No. _____

IN THE SUPREME COURT OF THE UNITED STATES

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JESUS RAMIRO GOMEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether a purely legal Sentencing Guidelines error is sufficient, by itself, to establish the plainness prong of plain-error review under *United States v. Olano*, 507 U.S. 725 (1993).

PARTIES TO THE PROCEEDING

The parties to the proceeding whose judgment is sought to be reviewed are Petitioner Jesus Ramiro Gomez and Respondent United States of America. There are no corporate parties or other interested entities.

STATEMENT OF RELATED PROCEEDINGS

The related proceedings are:

1. *United States v. Jesus Ramiro Gomez*, No. 8:20-cr-0171-JVS-FWS-5, United States District Court for the Central District of California. Judgment entered on March 13, 2023.

2. *United States v. Jesus Ramiro Gomez*, No. 23-435, United States Court of Appeals for the Ninth Circuit. Judgment entered on January 13, 2026, after *en banc* rehearing.

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INTRODUCTION

In an *en banc* decision, the Ninth Circuit applied plain-error review and acknowledged that the district court committed a purely legal error that doubled Petitioner Jesus Gomez's Sentencing Guidelines range – from 130-162 months to 262-327 months – based on the mistaken conclusion that California assault is a federal "crime of violence." There is no dispute that this error affected Gomez's substantial rights and undermined the fairness, integrity, and public reputation of the judicial proceedings, thus satisfying the third and fourth prongs of the plain-error test established in *United States v. Olano*, 507 U.S. 725 (1993).

Nevertheless, the Ninth Circuit declined to correct the error. It held the error was not "plain" under *Olano's* second prong, not because the law was unsettled, but because the court characterized the issue as a "close and difficult question." That reasoning conflicts with the approach to assessing whether Guidelines error is plain taken by the Second and Fifth Circuits, and directly conflicts with a Tenth Circuit opinion addressing the same issue. It also conflicts with this Court's decisions in *Molina-Martinez v. United States*, 578 U.S. 189 (2016), and *Rosales-Mireles v. United States*, 585 U.S. 129 (2018), which instruct that the plain-error standard should be applied less stringently in the Guidelines context.

The Ninth Circuit's rule is also troubling because it permits courts to deny relief for conceded legal errors that lengthen prison sentences – sometimes dramatically – simply by labeling an issue "difficult." That approach inverts plain-error review, elevating judicial hesitation over legal correctness and allowing prejudicial sentencing errors that undermine judicial integrity to go uncorrected. Moreover, the Ninth Circuit justified its conclusion by pointing to its own prior misreading of controlling law, effectively insulating error from correction because the court itself had erred before.

This case provides an ideal vehicle to resolve the conflicts identified above and to complete the trilogy of *Molina-Martinez* and *Rosales-Mireles* by addressing *Olano's* "plainness" prong in the context of purely legal Guidelines errors. The question presented is also exceptionally important because sentencing errors arise in the vast majority of federal criminal appeals and the rule adopted below will systematically deny relief even where defendants can show a purely legal Guidelines error that prejudiced them and undermined judicial integrity. Review is therefore warranted to ensure such sentences are not allowed to stand and to promote uniformity and fairness in federal sentencing. *See* S. Ct. R. 10(a) & (c).

OPINIONS BELOW

On September 4, 2024, the Ninth Circuit filed a published opinion remanding for resentencing because the district court erred in calculating Gomez's Sentencing Guidelines range. *See United States v. Gomez*, 115 F.4th 987 (9th Cir. 2024) (attached in appendix).

On April 14, 2025, the court vacated its prior opinion and ordered rehearing *en banc*. *See United States v. Gomez*, 133 F.4th 1083 (9th Cir. 2025).

On January 13, 2026, an *en banc* panel filed a published opinion holding that the district court erred but declining to grant relief under plain-error review because it concluded the error was not "plain." *See United States v. Gomez*, 165 F.4th 1199 (9th Cir. 2026) (*en banc*) (attached in appendix).

JURISDICTION

The judgment of the court of appeals was entered on January 13, 2026, following *en banc* review. The petition is timely under Supreme Court Rule 13 and this Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Federal Rule of Criminal Procedure 52(b) states, "[a] plain error that affects substantial rights may be considered even though it was not brought to the court's attention."

STATEMENT OF THE CASE

I. District Court Proceedings

In May 2022, Gomez pleaded guilty to distributing 109 grams of methamphetamine. *See Gomez*, 165 F.4th at 1204; *see also* 2-ER-46, 74.[1] During sentencing, the district court found that the Sentencing Guidelines' career-offender enhancement applied. *See* U.S.S.G. §4B1.1(a). That finding depended on the court's conclusion that Gomez's February 2013 conviction for assault under California Penal Code §245(a)(1) qualified as a federal "crime of violence" under the elements clause in U.S.S.G. §4B1.2(a)(1). *See Gomez*, 165 F.4th at 1204. The elements clause defines a crime of violence as "any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that . . . has as an element the use, attempted use, or threatened use of physical force against the person of another . . . ."

The career-offender enhancement doubled Gomez's Guidelines range, raising it from 130-162 months to 262-327 months. *See id.* The district court used that higher range as its starting point in imposing a 188-month sentence. *See id.*; *see also* 2-ER-112-20.

[1] ER denotes the excerpts of record filed at docket #10 in *United States v. Gomez*, Ninth Circuit No. 23-435.

II. Ninth Circuit Proceedings

A. Gomez's Argument On Appeal

For the first time on appeal, Gomez claimed that the career-offender enhancement didn't apply because assault under California Penal Code §245(a)(1) is not a federal crime of violence under the elements clause. Specifically, he argued that the threshold for the intent to apply force to another is higher under the elements clause than is required to convict for California assault, thus the latter doesn't qualify as a crime of violence.

To assess that claim, a court must apply the categorical approach. "Under that by-now familiar method . . . the facts of a given case are irrelevant. The focus is instead on whether the elements of the statute of conviction meet the federal standard. Here, that means asking whether" California assault "necessarily involves the defendant's 'use, attempted use, or threatened use of physical force against the person of another.'" *Borden v. United States*, 593 U.S. 420, 424 (2021) (interpreting elements clause *mens rea* in 18 U.S.C. §924(e)(2)(B)(i)).[2] "If any – even the least culpable – of the acts criminalized" by California Penal Code §245(a)(1) "do not entail [the] kind of force" necessary to qualify under the Guidelines' elements clause, then §245(a)(1) "does not categorically match the federal standard, and so cannot serve as" a career offender predicate. *Id.*

Beginning with the elements clause side of the categorical analysis, the key case is *Borden*, in which a four-justice plurality opinion concluded that the phrase "against the person of another" indicates that a person must "direct his action at, or target, another individual." 593 U.S. at 429.

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[2] The elements clause appears in several criminal statutes and the Guidelines in language that is identical, or nearly so. Consequently, case law across those contexts is mostly interchangeable. *See Borden*, 593 U.S. 426-27, 429; *see also United States v. Walker*, 953 F.3d 577, 579 (9th Cir. 2020).

Based on that reading, the plurality opinion concluded that to qualify as a crime of violence under the elements clause an offense must have a *mens rea* greater than recklessness, as defined in the Model Penal Code. That means an offense must have a *mens rea* greater than a "conscious[] disregard[of] a substantial and unjustifiable risk" that force will be applied to another. *Id.* at 427 (quoting Model Penal Code §2.02(2)(c)).

In a concurring opinion, Justice Thomas said he would go further and hold that the elements clause requires a *mens rea* commensurate with purpose, the highest of the four *mens rea* defined in the Model Penal Code. *See id.* at 446 (Thomas, J., concurring). Accordingly, five justices – the four who signed onto the plurality opinion and Justice Thomas – agreed that to qualify as a crime of violence under the elements clause an offense must have a *mens rea* greater than recklessness with respect to whether force will be applied to another.[3] *See Marks v. United States*, 430 U.S. 188, 193 (1977). The government agrees that the plurality opinion establishes the controlling holding. *See Gomez*, 165 F.4th at 1208.

Turning to California assault, the key case is *People v. Williams*, 26 Cal. 4th 779 (2001), in which the California Supreme Court interpreted a 150-year-old statute that defines assault as "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." Cal. Penal Code §240. That requires showing the defendant had "actual knowledge of the facts sufficient to establish that the defendant's act by its nature will probably and directly result in injury to another." *Williams*, 26 Cal. 4th at 784. "He, however, need not be subjectively aware of

[3] Arguably the *Borden* plurality went further and held the minimum *mens rea* required under the elements clause is knowledge as defined in the Model Penal Code, because it said "[t]he 'against' phrase indeed sets out a *mens rea* requirement – of purposeful or knowing conduct." 593 U.S. at 434. That conclusion is also encompassed in Justice Thomas's concurring opinion. But it was unnecessary to go that far to resolve this case and the Ninth Circuit panels did not do so.

the risk that a battery might occur." *Id.* at 787. Indeed, "a defendant who honestly believes that his act was not likely to result in a battery is still guilty of assault if a reasonable person, viewing the facts known to defendant, would find that the act would directly, naturally and probably result in a battery." *Id.* at 788 n.3. Thus, to convict for assault under §245(a)(1) the prosecution must show the defendant had knowledge of the surrounding facts but need not show the defendant had any intent to use force against another, or even that he knew there was a risk force would be applied.

As Gomez argued on appeal, it is obvious that assault under §245(a)(1) is not categorically a crime of violence under the elements clause because: (1) the California Supreme Court said in *Williams* that §245(a)(1) doesn't require showing the defendant was aware of *any* risk that force would be applied to another; but (2) this Court in *Borden* said an offense does not qualify as a crime of violence even if the defendant consciously disregarded a substantial risk that force would be applied.

B. Initial Ninth Circuit Panel Opinion

In its initial panel opinion, the Ninth Circuit agreed with Gomez, found the district court erred by applying the career-offender enhancement, and ordered the case remanded for resentencing. *See Gomez*, 115 F.4th at 992-996. There are two aspects of that opinion that bear highlighting.

First, the panel had to deal with the fact that in four pre-*Borden* published cases the Ninth Circuit had held that California assault *is* a crime of violence under the elements clause. The panel concluded that those cases were "clearly irreconcilable" with *Borden* and thus had been effectively overruled. *Gomez*, 115 F.4th at 996-98. As will be emphasized again below, the Ninth Circuit has held that a "clearly irreconcilable" holding also establishes that the error involved is plain under the

plain-error test set out in *Olano*. *See United States v. Garcia-Lopez*, 903 F.3d 887, 894 (9th Cir. 2018). That conclusion follows because the two standards are effectively identical.

Second, with respect to the standard of review, Gomez argued that the panel could rely on longstanding Ninth Circuit case law that allowed the court discretion to apply *de novo* review when the question presented is purely legal and the opposing party is not prejudiced by the failure to object in the district court. *See* Appellant's Op. Br. at 8-9, 37, *United States v. Gomez*, Ninth Circuit No. 23-435 (Docket #12). But Gomez also argued that even if the court applied plain-error review, relief should be granted because he satisfied all four prongs of *Olano's* test. *See id.* The panel chose the former course and applied *de novo* review. *See Gomez*, 115 F.4th at 990-92.

C. Ninth Circuit *En Banc* Proceedings

In a petition for rehearing *en banc*, the government asked the Ninth Circuit to overrule its longstanding pure-question-of-law exception to *Olano's* four-prong test, claiming that exception is inconsistent with this Court's case law. *See* Pet. for Rh'g at 6, 10, *United States v. Gomez*, Ninth Circuit No. 23-435 (Docket #45). The government didn't dispute that there was error, nor did it claim Gomez couldn't establish the third and fourth prongs of *Olano's* test, a claim it couldn't credibly make in light of this Court's opinions in *Molina-Martinez* and *Rosales-Mireles*. Instead, the government claimed Gomez couldn't establish *Olano's* second, plainness prong. Thus, the government said, this case was a good vehicle for overruling the Ninth Circuit's pure-question-of-law exception because doing so would be outcome-determinative on Gomez's claim for relief.

Gomez responded that this case was not a good vehicle for addressing the Ninth Circuit's pure-question-of-law exception because Gomez can meet *Olano's* second prong, thus the outcome

of his case would be the same regardless of whether the court overruled that exception. He made three arguments in that regard.

First, he noted that the original panel held that the Ninth Circuit's pre-*Borden* case law was "clearly irreconcilable" with *Borden*, and it necessarily followed that the error was "plain" under *Olano*, which is synonymous with "clear." *See Garcia-Lopez*, 903 F.3d at 894; *Olano*, 507 U.S. at 734; Gomez Resp. in Opp. to Pet. for R'hg (Gomez RIO to PFR) at 9-10, *United States v. Gomez*, Ninth Circuit No. 23-435 (Docket #49).

Second, Gomez pointed out that in *Molina-Martinez* and *Rosales-Mireles*, this Court had endorsed a relaxed application of *Olano's* plain-error test in the Guidelines error context, in light of the relative ease of correcting such errors and the important interests involved. And in those cases the Court cited approvingly to Second Circuit case law that relies on the same reasoning to apply the second prong of *Olano's* test less stringently in the Guidelines error context. Applying that approach here leads to the conclusion that the error is plain. *See* Gomez RIO to PFR at 1-2, 13-17.

Third, in *United States v. Sjodin*, 139 F.4th 1188, 1202-05 (10th Cir. 2025), the Tenth Circuit addressed the same issue presented here, applied the same reasoning as the panel in this case, concluded there was error that was plain, and granted relief. Thus, for the Ninth Circuit to conclude the error here was not plain would create a direct circuit split. *See* Gomez Rule 28(j) Letter, *United States v. Gomez*, Ninth Circuit No. 23-435 (Docket #63).

The Ninth Circuit granted *en banc* review and issued an opinion overruling its pure-question-of-law exception to *Olano's* plain-error test. *See Gomez*, 115 F.4th at 1204-07. The *en banc* panel then applied *Olano's* test and, replicating the original panel's reasoning, concluded there was error

because California assault is not a crime of violence under the elements clause. *See id.* at 1207-10. It therefore overruled its pre-*Borden* case law that concluded otherwise.[4] *See id.* at 1210.

The *en banc* panel next concluded the error was not plain under *Olano's* second prong because, even though it was purely legal error, the court viewed it as presenting "a close and difficult question." *Id.* at 1211. There are several points that bear making here with respect to the court's "close and difficult question" yardstick and analysis.

First, to support its conclusion that the question presented was "close and difficult," the *en banc* panel pointed to the fact that in four pre-*Borden* published cases, and in two post-*Borden* unpublished cases, the Ninth Circuit had held that California assault is a crime of violence. *See Gomez*, 165 F.4th at 1211-12. In this regard, the panel effectively reasoned that: (1) in its pre-*Borden* published cases the court had relied in part on language from the California Supreme Court in *Williams*, 26 Cal.4th at 788, stating that "mere recklessness or criminal negligence is . . . not enough" to convict for California assault; and (2) in its post-*Borden* unpublished opinions, two panels (comprised of the same three judges) concluded that the quoted language from *Williams* evidences a categorical match with *Borden's* holding that the elements clause requires that an offense have a *mens rea* of more-than-recklessness. *See id.*

But the quoted language from *Williams* comes with a footnote attached in which the California Supreme Court explained that it was using "the term 'recklessness' in its historical sense as a synonym for criminal negligence, rather than its more modern conception as a subjective

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[4] Like the original panel, the *en banc* panel relied on the same reasoning that drove its conclusion on the elements clause to conclude that California assault is also not a crime of violence under the enumerated offenses clause in U.S.S.G. §4B1.2(a)(2). *See Gomez*, 165 F.4th at 1210 n.7; *Gomez*, 115 F.4th at 998-99.

appreciation of the risk of harm to another." 26 Cal.4th at 788 n.4. Consistent with that, the opinion in *Williams* repeatedly makes clear that California assault does not require any *mens rea* with respect to application of force to another. Thus, in the words of the initial panel opinion in Gomez's case, the Ninth Circuit's unpublished post-*Borden* opinions and, to a degree, its pre-*Borden* published opinions, "conducted a labels-over-substance inquiry," consequently they "are not persuasive." *Gomez*, 115 F.4th at 998 n.7; *see id.* at 996.

Nonetheless, the *en banc* opinion reasoned that because prior Ninth Circuit panels "did not identify" the footnote in *Williams* stating that the California Supreme Court was using the term "recklessness [as] a synonym for criminal negligence," the categorical analysis in this case presents a "close and difficult question." *Gomez*, 165 F.4th at 1211. But invoking the prior panels' mistake with respect to reading *Williams* doesn't make the categorical mismatch here close. Indeed, the mismatch is so evident that the original panel held that the Ninth Circuit's pre-*Borden* case law is "clearly irreconcilable" with *Borden*, and thus *Borden* effectively overruled that prior case law. As mentioned, that finding equates to the error having been plain under *Olano's* second prong. *See Garcia-Lopez*, 903 F.3d at 894. While the *en banc* panel did not have to engage in that "clearly irreconcilable" analysis, because it could trump the prior Ninth Circuit three-judge decisions regardless, its 10-1 vote finding error is telling. Also telling is that the author of the *en banc* opinion joined the original panel opinion holding that the prior Ninth Circuit case law is "clearly irreconcilable" with *Borden*.

A final major weakness in the *en banc* panel's analysis is that, for its "close and difficult question" yardstick, it relied on *United States v. Irons*, 31 F.4th 702, 713 (9th Cir. 2022), which dealt with jury-instruction, not Guidelines, error. *See id.* at 710-13. As mentioned, and discussed further

below, this Court has made clear that the plain-error test should be applied less stringently in the Guidelines error context.

Furthermore, in *Irons* the Ninth Circuit found that even though the district court had relied on an unpublished opinion that explicitly approved the jury instruction it gave, it had plainly erred. 31 F.4th at 713. In that regard, the court in *Irons* said:

> To be sure, it seems quite unfair to conclude that the district court "plainly erred" when it followed an unpublished decision of this court, but the [Supreme] Court has made "clear that plain-error review is not a grading system for trial judges." [*Henderson v. United States*, 568 U.S. 266, 278 (2013).] "It has broader purposes, including in part allowing courts of appeals better to identify those instances in which the application of a new rule of law to cases on appeal will meet the demands of fairness and judicial integrity." *Id.*

The "demands of fairness and judicial integrity" are shorthand for the third and fourth prongs of the *Olano* test, which were undeniably met in this case and, as in *Irons*, support granting relief regardless of there having been previous erroneous unpublished opinions.

REASONS FOR GRANTING THE WRIT

I. Introduction

The Ninth Circuit's *en banc* opinion, and its "close and difficult question" test, conflicts with case law from this Court and other circuit courts in several ways.

First, it directly conflicts with the Tenth Circuit's opinion in *United States v. Sjodin*, 139 F.4th 1188, 1202-05 (10th Cir. 2025), which held that the same error involved in this case is plain in light of *Borden* and the California Supreme Court's opinion in *Williams*.

Second, it conflicts with this Court's opinions in *Molina-Martinez* and *Rosales-Mireles*, which indicate that *Olano's* plain-error test should be applied less stringently in the Guidelines error context because of the limited costs of correcting such error and the substantial interests involved.

Although those cases addressed *Olano's* third and fourth prongs, in cases in which a defendant satisfies those prongs – such as this one – it makes no sense to say he should be denied relief because the reviewing court found it "difficult" to resolve a purely legal issue.

Third, it conflicts with the Second Circuit's long line of cases holding that *Olano's* plain-error test should be applied less stringently in the sentencing context, an approach the Second Circuit has repeatedly applied to find Guidelines errors to be plain even though the Ninth Circuit would presumably conclude otherwise because the errors presented "close and difficult questions."

Fourth, it conflicts with Fifth Circuit case law holding a sentencing error is plain if it is dictated by a "straightforward application" of Supreme Court case law, even if there is contrary prior circuit case law. Here, the error is evident from a straightforward application of *Borden*, notwithstanding that the *en banc* panel acknowledged that prior Ninth Circuit panels misunderstood clear language in the California Supreme Court's *Williams* opinion.

Each of these points is addressed below, followed by an explanation of why this case is an ideal vehicle for resolving the question presented.

II. The Ninth Circuit's *En Banc* Opinion Directly Conflicts With The Tenth Circuit's Opinion In *Sjodin*

The Ninth Circuit's *en banc* opinion with respect to *Olano's* plainness prong directly conflicts with *Sjodin*, 139 F.4th at 1202-05, in which the Tenth Circuit held that California Penal Code §245(a) doesn't qualify as a crime of violence under U.S.S.G. §4B1.2(a) and granted relief under *Olano's* test. It is useful to quote that court's conclusion on the merits because it re-enforces how clear the error is:

> The *mens rea* criminalized by the California assault statute simply spans too wide on the "culpability spectrum" to constitute a crime of violence. . . . The least culpable

> conduct covered by the California assault statute, as interpreted in [*People v. Williams*, 29 P.3d 197, 204 (2001)], does not require an intent to apply force to another person, knowledge that that action will apply force on another, or subjective awareness of the risk of such force. *Id.* Instead, a "defendant who honestly believes that his act was not likely to result in a battery is still guilty of assault if a reasonable person, viewing the facts known to defendant, would find that the act would directly, naturally, and probably result in a battery." [*Id.* at 203 n.3.] *Borden*, on the other hand, requires an "awareness that a result is practically certain to follow from one's conduct." 593 U.S. at 426 . . . . The California assault statute's *mens rea* sweeps too broadly: mere volition does not prove the intent to apply force to another person.

Id. at 1203.

With respect to the second-prong of *Olano's* test, the court held that "because the California assault statute does not prohibit only the use of force with a *mens rea* greater than recklessness," and "in light of *Borden*" having held that an offense must have such a *mens rea*, "the district court's error is plain." *Id.* at 1204. This is consistent with the Fifth Circuit's holding – discussed in Section V below – that a sentencing error is plain if it involves a "straightforward application" of Supreme Court precedent. Furthermore, the court in *Sjodin* concluded the error at issue here is plain even though it was aware of the Ninth Circuit's initial opinion in *Gomez*, that court's *en banc* grant, and that court's prior published and unpublished case law on the issue. *See id.* at 1204 n.9. That is, the Tenth Circuit didn't find that the Ninth Circuit's grappling with the issue made the error any less plain. Finally, that the error is plain is supported by the fact that the government didn't petition for *certiorari* in *Sjodin*.

III. The Ninth Circuit's *En Banc* Opinion Conflicts With This Court's Approach To Plain-Error Review Set Out In *Molina-Martinez* And *Rosales-Mireles*

In *Molina-Martinez*, this Court addressed *Olano's* third prong in the Guidelines error context. There, the district court's error raised the defendant's Guidelines range from 70-87 to 77-96 months. *See* 578 U.S. at 195-97. The Fifth Circuit affirmed the 77-month sentence imposed because (a) it

was within the otherwise correct range, and (b) the defendant hadn't adduced evidence other than the error to support *Olano's* third-prong requirement that there be a reasonable probability that, but-for the error, the district court would have imposed a lower sentence. *See id.* at 197. This Court reversed, explaining that the Guidelines are central to the sentencing process, thus "[i]t follows . . . that in most cases" the district court's calculation of an erroneous range "will affect the sentence." *Id.* at 204. Accordingly, "the error itself can, and most often will, be sufficient" to satisfy *Olano's* third prong.[5] *Id.* at 198.

In response to the claim that this holding shifted the burden of establishing *Olano's* third-prong to the government, and would sap judicial resources, *see id.* at 202-04, this Court said application of the plain-error rule in the Guidelines context should be less-stringent because "a remand for resentencing, while not costless, does not invoke the same difficulties as a remand for retrial does." *Id.* at 204 (quoting *United States v. Wernick*, 691 F.3d 108, 117-118 (2d Cir. 2012)).

The Court returned to the plain-error rule in the Guidelines context in *Rosales-Mireles*, which addressed *Olano's* fourth prong. There, like in *Molina-Martrinez*, the district court's error raised the defendant's Guidelines range from 70-87 months to 77-96 months and it imposed a 77-month sentence. *See Rosales-Mireles*, 585 U.S. at 135. The Fifth Circuit affirmed the sentence because it concluded the error wasn't significant enough to trigger relief under *Olano's* fourth-prong, which asks whether the error affected "the fairness, integrity, and public reputation of the judicial proceedings." *See id.* at 136. This Court reversed and held that "[i]n the ordinary case, as here, the

[5] The court indicated that exceptions to this general rule may arise if the district court said it would have imposed the same sentence "irrespective of the Guidelines range," or made clear that it "selected" the sentence "based on factors independent of the Guidelines." 578 U.S. at 200.

failure to correct a plain Guidelines error that affects a defendant's substantial rights will" satisfy *Olano's* fourth prong. *Id.* at 145. The Court relied on three things to support that holding.

First, the Court again emphasized the "relative ease of correcting [Guidelines] error" because "[a] resentencing is a brief event, normally taking less than a day and requiring the attendance of only the defendant, counsel, and court personnel." *Id.* at 140 (quoting *United States v. Williams*, 399 F.3d 450, 456 (2d Cir. 2005)). For this reason, the Court said its case law stating that plain error relief should be granted "sparingly" to correct trial error is inapplicable in the Guidelines error context. *See id.* at 142-43. "As we have explained, a decision remanding a case to the district court for resentencing on the basis of a Guidelines miscalculation is far less burdensome than a retrial, or other jury proceedings, and thus does not demand such a high degree of caution." *Id.* at 143.

Second, the Court noted that apart from the effect on the parties, failing to correct a Guidelines error on appeal has institutional costs because: (1) to "determine whether revisions to the Guidelines are necessary," the Sentencing Commission gathers statistics on Guidelines calculations; and (2) "[s]imilarly, the work of the Federal Bureau of Prisons is hindered by uncorrected Guidelines errors, because the Bureau relies, in part, on aspects of the Guidelines calculation in designating and classifying prisoners based on security and program needs." *Id.* at 140-41 & n.2.

Finally, the district court's "role . . . in calculating the range" gives it "the ultimate responsibility to ensure that the Guidelines range it considers is correct." *Id.* at 134, 140. In this respect, Guidelines errors are "[u]nlike" trial error, for which *Olano's* test was crafted, *id.* at 140, because the relative blame for missing a Guidelines error lies more heavily on the district court.

There is no dispute that, under *Molina-Martinez* and *Rosales-Mireles*, Gomez meets the third and fourth prongs of the plain-error test. The Ninth Circuit's decision to nonetheless put substantial teeth into the second-prong of that test in the Guidelines context, and its reasoning for doing so, conflicts with those cases in several respects.

First, the Ninth Circuit's conclusion that Gomez should be denied relief because the purely-legal error involved here presents a "close and difficult question" conflicts with this Court's direction to apply *Olano's* test less stringently in the Guidelines error context.

Second, considering that failing to grant Gomez relief would adversely affect "the fairness, integrity, and public reputation of the judicial proceedings" (under *Rosales-Mireles*), the Ninth Circuit's refusal to do so because it concluded the purely-legal error involved presents a "close and difficult question" is indefensible from the standpoint of preserving fairness and judicial integrity.

Third, and relatedly, the Ninth Circuit's reliance on its past mistakes in construing the California Supreme Court's opinion in *Williams* to conclude that the question presented is "close and difficult" cuts against this Court's statement in *Rosales-Mireles* that one of the reasons the plain error rule should be applied less stringently in the Guidelines context is because the district court bears some responsibility for Guidelines error. Here, that reasoning has even more force because the Ninth Circuit relied on its *own* past mistake to deny Gomez relief.

Finally, the third and fourth prongs of *Olano's* test – not the second prong – are meant to be the gatekeepers against excessive grants of plain-error relief. *See Henderson*, 568 U.S. at 279 (holding that allowing courts to determine that an error is plain based on controlling law at the time of appeal provides flexibility so courts can "identify those instances in which the application of a new rule of law to cases on appeal will meet the demands of fairness and judicial integrity"). With

its "close and difficult question" test the Ninth Circuit has thus set up a barrier to relief that this Court deliberately sought to lower for Guidelines errors in *Molina-Martinez* and *Rosales-Mireles*.

IV. The Ninth Circuit's *En Banc* Opinion Conflicts With The Second Circuit's Relaxed Application Of *Olano's* Second Prong

As noted above, to support its holdings in *Molina-Martinez* and *Rosales-Mireles* this Court cited two Second Circuit cases that applied that court's longstanding rule that the plain-error test should be applied less stringently when dealing with sentencing error, including when assessing *Olano's* second prong.[6]

One of those cases is *Williams*, which this Court cited approvingly in *Rosales-Mireles*, 585 U.S. at 140. There, the Second Circuit considered the different circuits' approaches to appeals by defendants who were sentenced under then-mandatory Guidelines and, while they were on appeal, this Court rendered the Guidelines advisory in *United States v. Booker*, 543 U.S. 220 (2005). The Second Circuit noted that in dealing with this issue, the circuit courts "reckon with the plain-error doctrine, but apply it in different ways," which "prompt[ed]" the court in *Williams* "to analyze the application of the plain error doctrine in the context of a review of sentences." *Williams*, 399 F.3d at 454. In the portion of the opinion relied on by this Court in *Rosales-Mireles*, the Second Circuit contrasted the circumstances with respect to review of trial versus sentencing errors and explained why *Olano's* test should be applied less stringently in the latter context.

The Second Circuit began by noting that *Olano* dealt with trial error and relief in that context comes at the immense cost of holding a new trial. *See id.* at 455-56. Thus, the court explained,

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[6] Prior to *Molina-Martinez* and *Rosales-Mireles*, the D.C. Circuit took the same approach. *See, e.g., United States v. Saro*, 24 F.3d 283, 288 (D.C. Cir. 1994) ("[w]hen an error in sentencing is at issue, however, the problem of finality is lessened, for a resentencing is nowhere near as costly or as chancy an event as a trial").

when a court reviews forfeited trial error relief is granted only "sparingly." *Id.* at 456. "[T]he context of review of a sentencing error is fundamentally different. From the standpoint of the parties, the error might have great significance. An error yielding an unduly low sentence would deny the public its entitlement to a sentence sufficient to achieve the purposes of punishment. An error yielding an unduly high sentence would deny the defendant freedom for some length of time. More importantly, the cost of correcting a sentencing error is far less than the cost of a retrial." *Id.* In light of these considerations, and the relative ease of reliably correcting sentencing error, the court concluded that "there is no need to apply the plain error doctrine in the sentencing context with precisely the same procedure that has been used in the context of review of errors occurring at trial." *Id.* at 457.

Considering that the error addressed in *Williams* was abundantly clear following *Booker*, the court did not focus on *Olano's* second prong. But in a footnote it said:

> It might be argued that, in the sentencing context, where error can be easily corrected, the requirement that an error be "plain" is ill-advised. Although there is a sound reason not to require a new trial because of an unpreserved error that is not "plain," a sentence ought not to impose too few or too many years *just because the error took some thought for the appellate court to identify*. However, Rule 52(b) establishes the requirement that the error be "plain," and we have no occasion on this appeal . . . to consider whether the second *Olano* prong should be ameliorated in the context of sentencing errors.

Williams, 399 F.3d at 460 n.14 (emphasis added). Not correcting an error that satisfies *Olano's* third and fourth prongs solely "because the error took some thought for the appellate court to" resolve is "ill-advised," for obvious reasons. Even more so where, as here, the court declined to correct the error because previous Ninth Circuit opinions had made a fundamental mistake in reading the California Supreme Court's *Williams* opinion. "[W]ho wouldn't hold a rightly diminished view of

our courts if [they] allowed individuals to linger longer in prison than the law requires only because [the courts] [are] unwilling to correct [their] own obvious mistakes?" *Hicks v. United States*, 137 S. Ct. 2000, 2001 (2017) (Gorsuch, J., concurring) (citing *United States v. Sabillon-Umana*, 772 F.3d 1328, 1333-1334 (10th Cir. 2014)).

Presumably because of that common-sense conclusion, and despite the Second Circuit's reservation of the issue in *Williams*, in several cases that court has applied its less-stringent approach to find sentencing error was plain. For example, in *Wernick*, which this Court cited approvingly in *Molina-Martinez,* 578 U.S. at 204, the court began by cautioning that "the plain error doctrine should not be applied stringently in the sentencing context, where the cost of correcting an unpreserved error is not as great as in the trial context." *Wernick*, 691 F.3d at 113 (cleaned up). To find there was Guidelines error – *Olano's* first prong – the court then undertook a detailed analysis that covered five pages. *See id.* at 113-17. After finding error, the court said, "[a]lthough the Guidelines [involved] are intricate, we also find the error – a misreading of a frequently applied Guideline – sufficiently clear to satisfy the second prong." *Id.* at 117. Under the Ninth Circuit's approach, the error involved in *Wernick* would likely be found to present too "close and difficult" a "question" to be considered "plain."

The Second Circuit's opinion in *United States v. Orelien*, 119 F.4th 217 (2d Cir. 2024), is to the same effect. There the court addressed whether the district court erroneously increased the defendant's Guidelines offense level for obstruction of justice under U.S.S.G. §3C1.1. *See id.* at 220. At the outset, the court cited its longstanding case law holding that the plain-error test "should not be applied stringently in the sentencing context . . . ." *Id.* at 223. The court then undertook a complicated analysis, which spanned eight pages, and found there was error. *See id.* at 226-33. The

court remanded for the district court to address that error. On *Olano's* second prong, it stated only, "we emphasize the less-than-stringent plain-error standard that we apply to our review of sentencing determinations. . . . We in no way suggest that the district court made an elementary blunder." *Id.* at 234 n.17. Under the Ninth Circuit's test the error presumably would have been deemed too "close and difficult" to satisfy *Olano's* second prong.

The Second Circuit's opinion in *United States v. Matta*, 777 F.3d 116 (2d Cir. 2015), is similar. There the defendant challenged a condition of supervised release that delegated to the probation department whether he should undergo in-patient or out-patient drug treatment. *See id.* at 119. The government pointed out that plain-error review applied and claimed "Matta's argument fails because there was no clear precedent preventing the district court's delegation; in other words, the error was not 'plain.'" *Id.* at 121. The Second Circuit held that because Matta had not received adequate notice of the supervised release condition, *and* "because the alleged error relates only to sentencing," "we will entertain his challenge without insisting on strict compliance with the rigorous standards of plain error review." *Id.* at 122 (cleaned up). The court then undertook a lengthy analysis and granted relief, stating, "[a]pplying 'relaxed' plain error review, we conclude that the district court's delegation to the probation department of the discretion to require either inpatient or outpatient drug treatment was an impermissible delegation of judicial sentencing authority." *Id.* at 123. The court said nothing about *Olano's* second prong or the "plainness" of the error, presumably because it was applying a relaxed approach to the plain-error test in the sentencing context. Again, the outcome almost surely would have been different under the Ninth Circuit's "close and difficult" test. *See also United States v. Sofsky*, 287 F.3d 122, 125 (2d Cir. 2002) ("relax[ing] the otherwise rigorous standards of plain error review to correct sentencing error[]" and finding an error was plain

even though there was a circuit split on the issue presented, good arguments on both sides, and no controlling Second Circuit case).

In sum, there is a conflict between the Second and Ninth Circuits' approaches with respect to applying *Olano's* second prong in the sentencing error context, and, more specifically, in the Guidelines error context. That conflict is bound to create unjustifiably disparate outcomes, particularly because, as the discussion above shows, it is hard to know how much mental strain makes a purely-legal error a "close and difficult question." Furthermore, as discussed in *Rosales-Mireles*, 585 U.S. at 140-41 & n.2, refusing to correct legal errors that affect a defendant's substantial rights and impair judicial integrity will corrupt the data (a) the Sentencing Commission relies on to create Guidelines that foster uniformity in sentencing and (b) the Bureau of Prisons relies on to designate and classify inmates.

V. The Ninth Circuit's *En Banc* Opinion Conflicts With Fifth Circuit Case Law Holding That A Sentencing Error Is Plain If It Is Evident From A "Straightforward Application" Of Supreme Court Case Law

The Ninth Circuit's *en banc* opinion in *Gomez* also conflicts with Fifth Circuit case law holding that a sentencing error is plain if it is evident from a "straightforward application" of controlling Supreme Court case law.

In *United States v. Urbina-Fuentes*, 900 F.3d 687 (5th Cir. 2018), the defendant was convicted for illegal entry and he argued for the first time on appeal that the *ex post facto* clause required that he be sentenced under the 2015 version of the Guidelines, which produced a range of 15-21 months, rather than the 2016 version under which he was sentenced, which produced a range of 24-30 months. That issue turned on whether Urbina-Fuentes was subject to an upward adjustment under the 2015 Guidelines because he was previously convicted of a crime of violence. The district

court concluded the answer was yes based on Urbina-Fuentes's conviction for Florida burglary. *See id.* at 690-91. But Florida burglary includes within its ambit the burglary of a home's curtilage, which does not fall within the generic definition of burglary that would categorically qualify it as a federal crime of violence under the enumerated offenses clause in the crime of violence definition.[7] *See id.* at 694.

The key question, then, was whether Florida's burglary statute was divisible, such that the court could apply a modified categorical approach to conclude Urbina-Fuentes's burglary was of a home, not curtilage, and thus qualified as a crime of violence under the enumerated offenses clause. Addressing this question, the Fifth Circuit said that "[b]efore" *Mathis v. United States*, 579 U.S. 500 (2016), in published opinions it had "twice used the modified categorical approach to exclude from its consideration the portion of the Florida burglary statute pertaining to burglary of curtilages. Both of these decisions, however, moved from the premise that the modified categorical approach is available whenever adjudicative records disclose the precise factual basis of a defendant's conviction. That premise no longer holds [because *Mathis* rejected it]. The modified categorical approach is now only available when a court confronts alternative statutory elements tantamount to distinct offenses." *Urbina-Fuentes*, 900 F.3d at 694. The court then undertook the analysis required by *Mathis* and found the Florida burglary statute was not divisible, thus Urbina-Fuentes's burglary conviction does not qualify as a crime of violence and he was erroneously sentenced using the 2016 Guidelines manual.

[7] It was undisputed that Florida burglary is not a federal crime of violence under the elements clause definition.

With respect to whether the un-preserved error on this issue was plain, the government argued that it could not be in light of the prior Fifth Circuit case law holding the modified categorical approach applied to Florida burglary, and the lack of any post-*Mathis* opinion from that court to the contrary. The court rejected that argument, holding that the error was plain because a "straightforward application of *Mathis* produces the unmistakable conclusion that the Florida burglary statute is indivisible." *Id.* at 698.

The Fifth Circuit applied the same reasoning in *United States v. Rodriguez*, 25 F.4th 385, 390 (5th Cir. 2022). There the defendant argued that the district court plainly-erred when it concluded he had previously been convicted of an "aggravated felony" and consequently sentenced him for illegal entry under the enhanced penalty provisions in 8 U.S.C. §1326(b)(2). Specifically, he asserted that the district court should not have applied a modified categorical approach to assess whether the Texas sexual assault statute under which he was previously convicted was an aggravated felony because that statute is not divisible. The government countered that even if there was error, it could not be considered plain because there was no case law from the Fifth Circuit or the highest Texas criminal court holding that the Texas assault statute is not divisible. *See id.* The Fifth Circuit rejected that argument, concluding that the error was plain because a "straightforward application of" *Mathis* shows the Texas sexual assault statute is not divisible, and thus not subject to a modified categorical approach. *Id.*

Under the Fifth Circuit's approach, the error in Gomez's case is plain because it involves a "straightforward application" of *Borden* in light of the elements of assault set out by the California

Supreme Court in *Williams*.[8] The fact that previous Ninth Circuit panels misread *Williams* does not change that conclusion. And, as discussed above, to deny Gomez relief on that basis runs directly contrary to *Olano's* fourth prong and this Court's discussion of judicial integrity in *Rosales-Mireles*.

VI. This Case Is An Ideal Vehicle To Resolve An Important And Recurring Question

For several reasons, this case is an ideal vehicle to resolve an important and recurring question.

First, the question presented is purely legal, cleanly presented, and outcome-determinative. There is no dispute that Gomez satisfies *Olano's* first, third, and fourth prongs. The court of appeals denied relief solely because it concluded the error is not "plain." Resolving that question controls the outcome.

Second, as shown above, the Ninth Circuit's rule that a purely legal Guidelines error can never be plain if it presents a "close and difficult question" conflicts this Court's precedents and decisions from other circuits. The question presented therefore falls within Rule 10(a)'s core concern of ensuring uniformity in federal law, a concern that is especially important in the Guidelines context. *See Rita v. United States*, 551 U.S. 338, 349 (2007) (overarching purpose of the Guidelines is "uniformity" and "proportionality in sentencing").

Third, the question presented is exceptionally important. Sentencing issues arise in the overwhelming majority of federal criminal appeals. *See* U.S. Sentencing Commission, *Sourcebook of Federal Sentencing Statistics* at 150, Table A-1 (2024). In those appeals, application of the Guidelines will usually be critical – a staggering 96.6% of sentences fall within or below the

[8] As discussed above, this is effectively the same reasoning the Tenth Circuit applied to find the error involved in this case is plain. *See Sjodin*, 139 F.4th at 1204.

applicable range, thus when those ranges "move up or down, offenders' sentences move with" them. *Peugh v. United States*, 569 U.S. 530, 544 (2013); U.S. Sentencing Commission, *Sourcebook of Federal Sentencing Statistics* at 58, Table 29 (2024). The rule adopted below will systematically deny relief in many of those cases in which there is acknowledged Guidelines error, the defendant's substantial rights were affected, and concerns about judicial integrity are implicated. Thus, this case starkly presents the fairness and integrity concerns underlying *Molina-Martinez* and *Rosales-Mireles* and provides an ideal opportunity to complete the framework begun in those cases by clarifying how *Olano's* "plainness" prong applies in the context of purely legal Guidelines error.

Finally, the consequences for Gomez are substantial because the error doubled his Guidelines range from 130-162 months to 262-327 months, and the latter served as the district court's North Star when imposing a 188-month sentence. *See Glover v. United States*, 531 U.S. 198, 203 (2001) ("our jurisprudence suggests that" even a "minimal amount" of additional time in prison has constitutional "significance"); *United States v. Frady*, 456 U.S. 152, 163 (1982) (stating that Federal Rule of Criminal Procedure 52(b) is meant to ensure "our insistence that obvious injustice be promptly redressed").

CONCLUSION

Gomez respectfully requests that the Court grant the petition for a writ of *certiorari*.

Respectfully submitted,

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