

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

---

No. 20-71372  
Agency File No. A043 439 804

---

**RAMON GONZALEZ DOMINGUEZ<sup>1</sup>**  
Petitioner  
v.

**MERRICK GARLAND, U.S. ATTORNEY GENERAL**  
Respondent

---

On Petition for Review from the Board of Immigration Appeals

---

**BRIEF OF AMICI CURIAE CALIFORNIA COLLABORATIVE FOR  
IMMIGRANT JUSTICE ET AL. IN SUPPORT OF PETITIONER'S  
REQUEST FOR REHEARING EN BANC**

---

Merle D. Kahn  
LAW OFFICE OF MERLE D. KAHN  
P.O. Box 353  
21300 Almaden Road  
San Jose, CA 95120  
T: (408) 666-9096  
E: merle.kahn@gmail.com

*Counsel for Amici Curiae*

---

<sup>1</sup>**DETAINED**

**I. TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... iii  
CORPORATE DISCLOSURE STATEMENT ..... 1  
FRAP RULE 29 STATEMENT OF CONSENT ..... 1  
STATEMENT OF INTEREST OF AMICUS CURIAE ..... 1  
INTRODUCTION ..... 2  
I. A MENS REA REQUIREMENT THAT USES A NEGLIGENCE  
STANDARD IS CATEGORICALLY NOT A CRIME OF  
VIOLENCE AS DEFINED UNDER 18 USC § 16(a).....6  
    A. The Federal Generic Definition of a Crime of Violence under 18  
    U.S.C. § 16(a) Requires the Prosecutor to Establish that Defendant  
    Acted with Knowledge or Purposefully in Committing a Crime of  
    Violence ..... 6  
    B. Section 245(a) of the California Penal Code Requires Only a Mens  
    Rea Similar to the Federal Mens Rea of Negligence for A Conviction  
    for Assault Under Each of its Subsections..... 8  
II. THIS COURT’S DECISION DETERMINING WHETHER  
CALIFORNIA PENAL CODE SECTION 245(A) IS A CRIME OF  
VIOLENCE WILL HAVE IMMENSE CONSEQUENCES FOR  
LONG-TERM LAWFUL PERMANENT RESIDENTS, ASYLEES,  
DACA RECIPIENTS, AND THEIR FAMILY MEMBERS..... 13  
CONCLUSION..... 17  
CERTIFICATE OF COMPLIANCE..... 18  
CERTIFICATE OF SERVICE ..... 20  
APPENDIX.....a

## II. TABLE OF AUTHORITIES

### Federal Cases

<i>Borden v. United States</i> , 141 S. Ct. 1817 (2021).....	4, 7, 8, 10, 11, 13, 17
<i>Castillo-Cruz v. Holder</i> , 581 F.3d 1154 (9th Cir. 2009) .....	5
<i>Ceron v. Holder</i> , 747 F.3d 773 (9th Cir. 2014) (en banc) .....	10
<i>Flores-Vega v. Barr</i> , 932 F.3d 878 (9th Cir. 2019).....	6
<i>Gonzales v. Duenas-Alvarez</i> , 549 U.S. 183 (2007).....	11
<i>Guerra v. Barr</i> , 974 F.3d 909 (9th Cir. 2020) .....	15
<i>Miller v. Gammie</i> , 335 F.3d 889 (9th Cir. 2003) (en banc).....	4
<i>Taylor v. United States</i> , 495 U.S. 575 (1990).....	6
<i>United States v. Begay</i> , 33 F.4th 1081 (9th Cir. 2022) (en banc).....	8
<i>United States v. Grajeda</i> , 581 F.3d 1186 (9th Cir 2009) .....	3
<i>United States v. Jimenez-Arzate</i> , 781 F.3d 1062 (9th Cir. 2015) .....	3
<i>United States v. Heron-Salinas</i> , 566 F.3d 898 (9th Cir. 2009) .....	3
<i>United States v. Man</i> , 553 F. Supp. 3d 718 (N.D. Cal. 2021) .....	2
<i>United States v. Park</i> , 649 F.3d 1175 (9th Cir. 2011). .....	4
<i>United States v. Perez</i> , 932 F.3d 782 (9th Cir. 2019).....	7
<i>United States v. Vasquez-Gonzalez</i> , 901 F.3d 1060 (9th Cir. 2018) .....	3

### State Cases

<i>In re Armanda G</i> , 2005 WL 2671505 (Cal. Ct. App. 2005) (unpublished) .	12
<i>People v. Aznavoleh</i> , 210 Cal. App 4th 1181 (2012) .....	4, 9, 10, 12
<i>People v. Hayes</i> , 142 Cal. App. 4th 175 (2006) .....	12
<i>People v. Lopez</i> , 2010 WL 780369 (Cal. Ct. App. 2010) (unpublished) .....	12
<i>People v. Patzer</i> , 2008 WL 4958659 (Cal. Ct. App. 2008) (unpublished) ..	12
<i>People v. Rainville</i> , 2017 WL 712603 (Cal. Ct. App. 2017) (unpublished) .	4,
12	
<i>People v. Vasquez</i> , 85 Cal. App. 575 (1927).....	12
<i>People v. Williams</i> , 29 P.3d 197 (Cal. 2001).....	3, 9, 10
<i>People v. Wright</i> , 100 Cal. App. 4th 703 (2002) .....	4, 12

### Statutes

18 USC § 16(a) .....	7
8 U.S.C. § 1101(a)(43)(F).....	2, 4, 5, 13
8 U.S.C. § 1101(f)(8) .....	13
8 U.S.C. § 1158(b)(2)(B) .....	13
8 U.S.C. § 1182(a)(9)(A)(i) .....	13
8 U.S.C. § 1227(a)(2)(A)(iii).....	5

8 U.S.C. § 1229b(a)(3).....	13
8 U.S.C. § 1229b(b)(1)(C).....	13
8 U.S.C. § 1427(a)(3).....	13
California Penal Code § 245.....	passim

**Other Authorities**

Judicial Council of California Criminal Jury Instruction (CALCRIM) 875 ....	9
.....	
Model Penal Code § 2.02(2)(c) .....	10
U.S. Department of State, <i>2021 Country Reports on Human Rights Practices Mexico</i> (Apr. 12, 2022) .....	15

## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rules of Appellate Procedure 26.1, 29(a)(4)(A) and 29(b)(4), Amici Curiae California, California Collaborative for Immigrant Justice, et al. state that no subsidiaries or any corporation, and no publicly held corporation owns 10% or more of their stock.

## **FRAP RULE 29 STATEMENT OF CONSENT**

Pursuant to FRAP 29, both parties consent to the filing of this amicus brief. No counsel for either party authored this brief in whole or in part, and no party, party's counsel, or person or entity other than Amici Curiae and their counsel contributed money that was intended to fund the preparing or submitting of the brief.

## **STATEMENT OF INTEREST OF AMICI CURIAE**

*Amici* are nonprofit immigrant rights and civil rights organizations, public defenders, and law school clinics that provide support and legal representation to immigrants in removal proceedings. They share the belief that noncitizens who have been convicted of California Penal Code section 245(a) (assault upon the person of another) should not be permanently exiled and separated from their families based on a misunderstanding of California law. The *amici* are moving this Court to take a fresh look at California Penal

Code section 245(a) and this Court’s determination that this statute is a crime of violence as defined under 8 U.S.C. § 1101(a)(43)(F).

Amici are the following organizations: California Collaborative for Immigrant Justice; African Advocacy Network; the Alameda County Public Defender’s Office; the American Civil Liberties Union (“ACLU”) of Northern California; Asian Americans Advancing Justice – Asian Law Caucus; Community Legal Services in East Palo Alto; Contra Costa County Office of the Public Defender; Dolores Street Community Services; Florence Immigrant & Refugee Rights Project; Immigrant Defenders Law Center; Immigrant Legal Defense; Immigrant Legal Resource Center; Innovation Law Lab; the National Immigration Project of the National Lawyers Guild; Pangea Legal Services; San Francisco Office of the Public Defender; and UC Davis Immigration Law Clinic. More detailed descriptions of amici are included in the appendix to this brief.

## **INTRODUCTION**

This amicus brief in support of the petition for rehearing en banc urges this Court to heed Judge Charles Breyer’s plea in *United States v. Man* and overturn its prior decisions finding that California Penal Code section 245(a) is categorically a crime of violence. 553 F.Supp.3d 718, 723 (N.D. Cal. 2021) (suggesting that "the Ninth Circuit take a hard look at its

precedent" regarding crimes of violence). These prior decisions include *inter alia* *United States v. Heron-Salinas*, 566 F.3d 898 (9th Cir. 2009) (finding assault with a firearm under California Penal Code section 245(a)(2) is categorically an aggravated felony “crime of violence” for immigration purposes); *United States v. Grajeda*, 581 F.3d 1186 (9th Cir. 2009) (finding assault with a deadly weapon other than a firearm is a crime of violence); *United States v. Jimenez-Arzate*, 781 F.3d 1062 (9th Cir. 2015) (finding assault with a deadly weapon is a violent felony); and *United States v. Vasquez-Gonzalez*, 901 F.3d 1060 (9th Cir. 2018) (finding assault with a deadly weapon other than a firearm is a crime of violence).

These prior decisions have misconstrued the mens rea requirement for an assault under section 245(a). This Court relied on the California Supreme Court’s decision in *People v. Williams*, which found that mere recklessness is not enough to satisfy the mens rea requirement for section 245(a). 29 P.3d 197, 203 (Cal. 2001). But the *Williams* Court defined the term “recklessness” in its historical sense as a synonym for negligence. *Williams*, 29 P.3d at 203 n.4. Moreover, as this Court has acknowledged, the *Williams* definition of assault criminalizes even negligent conduct. *Grajeda*, 581 F.3d at 1194. Because these panel decisions all hold that a conviction for section 245(a) is categorically a crime of violence as defined under 8 U.S.C. §

1101(a)(43)(F), only the Ninth Circuit sitting en banc can rectify this misinterpretation of the law. *See Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (en banc) (finding federal courts in the Ninth Circuit must follow precedent unless that precedent is “clearly irreconcilable with the reasoning or theory” of an intervening higher court).

Section 245(a) is categorically neither a crime of violence nor a violent felony.<sup>2</sup> This statute has always only required a mens rea of negligence. A mens rea of recklessness or negligence is not enough to constitute a crime of violence; a crime of violence requires a mens rea of knowledge or purposefulness. *See Borden v. United States*, 141 S. Ct. 1817, 1821-22 (2021). California courts have repeatedly acknowledged that the “more than mere recklessness” standard set out by the California Supreme Court in *Williams* is actually a negligence standard. *People v. Wright*, 100 Cal. App. 4th 703, 712 (2002) (stating that *Williams* “define[d] the mental state by a negligence standard”); *People v. Aznavoleh*, 210 Cal. App. 4th 1181, 1189 (2012) (“[A] defendant need not intend to commit a battery ... [h]e need only be aware of what he is doing. The foreseeability of the consequences is judged by the objective “reasonable person” standard.”)

---

<sup>2</sup> The Ninth Circuit uses the terms crime of violence and violent felony interchangeably. *United States v. Park*. 649 F.3d 1175, 1177 (9th Cir. 2011).

(internal citations omitted); *People v. Rainville*, 2017 WL 712603 at \*3 (Cal. Ct. App. Feb. 23, 2017) (unpublished)<sup>3</sup> (finding, under *Williams*, the mens rea required for assault is merely “a species of negligent conduct”). Therefore, section 245(a) categorically cannot be a match for the mens rea element for the generic federal definition of a crime of violence.

This erroneous interpretation of the law affects not only the Petitioner, but also many individuals who have been removed from the United States or are facing removal for a conviction of section 245(a). Under this Court’s misinterpretation of California law, convictions for this offense have triggered removal orders as an aggravated felony crime of violence. *See* 8 U.S.C. § 1101(a)(43)(F) (defining a crime of violence); 8 U.S.C. § 1227(a)(2)(A)(iii) (establishing that a person who has been convicted of an aggravated felony is removable). Amici represent or have represented some of these individuals in proceedings before this Court, before the Board of Immigration Appeals, and before the Executive Office of Immigration Review. These individuals, many of whom came to the United States as children, have been exiled or are at risk of exile from their homes in this country. Their families are experiencing or are at risk of permanent family

---

<sup>3</sup> When determining the scope of conduct criminalized by a California statute under the categorical approach, the federal courts consider unpublished California court decisions. *See e.g., Castillo-Cruz v. Holder*, 581 F.3d 1154, 1161 n.9 (9th Cir. 2009).

separation due to this misinterpretation of California law. Additionally, there are untold numbers of people facing harsh, unjustified and unjustifiable federal sentences under the Armed Career Criminal Act due to this Court's misinterpretation of section 245(a) as a categorically violent felony. We ask this Court to rehear this case en banc and correct this error in interpretation.

## ARGUMENT

### **I. A MENS REA REQUIREMENT THAT USES A NEGLIGENCE STANDARD IS CATEGORICALLY NOT A CRIME OF VIOLENCE AS DEFINED UNDER 18 USC § 16(a)**

#### **A. The Federal Generic Definition of a Crime of Violence under 18 U.S.C. § 16(a) Requires the Prosecutor to Establish that Defendant Acted with Knowledge or Purposefully in Committing a Crime of Violence**

In determining whether a state conviction is a federal crime of violence, this Court applies the categorical approach. *Flores-Vega v. Barr*, 932 F.3d 878, 882–83 (9th Cir. 2019). Under this approach, the Court looks “only to the fact of conviction and the statutory definition of the ... offense.” *Taylor v. United States*, 495 U.S. 575, 602 (1990). This Court must consider whether the state statute at issue describes “an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another.” 18 U.S.C. § 16(a). “[T]he use of force must be intentional, requiring ‘active employment’ and a ‘higher degree of intent than negligent or merely accidental conduct.’” *United States v. Perez*, 932

F.3d 782, 785-86 (9th Cir. 2019) (quoting *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004)). “[F]or a state crime of conviction to constitute a ‘crime of violence’ . . . it must have as an element the intentional ‘use, attempted use, or threatened use’ of violent physical force against another person.” *Perez*, 932 F.3d at 786.

The generic federal definition of a crime of violence requires that the defendant acted purposefully or knowingly – a mens rea of recklessness or of negligence is not enough. *Borden*, 141 S. Ct. at 1821-22. The *Borden* Court set forth the four mental states of mind that may give rise to criminal liability:

*Table 1: Identifying the Four States of Mind, or Mens Rea, Definitions*

<b>State of Mind</b>	<b>Behavior Required for Criminal Liability</b>
Purposeful Action	“A person acts purposefully when he ‘consciously desire[s]’ a particular result.” <i>Borden</i> , 141 S. Ct. at 1823.
Knowing Behavior	The person “acts knowingly when ‘he is aware that [a] result is practically certain to follow from his conduct’ whatever the affirmative desire.” <i>Borden</i> , 141 S. Ct. at 1823.
Reckless Behavior <sup>4</sup>	“A person acts recklessly...when he consciously disregards a substantial

<sup>4</sup> The Supreme Court did not address whether a mens rea of depraved heart recklessness or extreme reckless is a crime of violence. See *Borden*, 141 S. Ct. at 1825 &n. 4. But this

	and unjustifiable risk attached to his conduct, in gross deviation from accepted standards.” <i>Borden</i> , 141 S. Ct. at 1824.
Negligent Behavior	“[A] person acts negligently if he is not but ‘should be aware’ of such a ‘substantial and unjustifiable risk.... There, the fault lies in the person’s simple ‘failure to perceive’ the possible consequences of his behavior.” <i>Borden</i> , 141 S. Ct. at 1824.

The California mens rea requirement for a conviction under section 245(a) is similar to the negligence standard set forth by the Supreme Court in *Borden* – it is a “reasonable person” standard.

**B. Section 245(a) of the California Penal Code Requires Only a Mens Rea Similar to the Federal Mens Rea of Negligence for A Conviction for Assault Under Each of its Subsections**

Section 245(a) is categorically not a crime of violence. First, the statute does not require the use, attempted use, or threatened use of *violent* force. “The terms application of force and apply force mean to touch in a harmful or offensive manner. The slightest touching can be enough if it is

---

Court has held that a conviction for second degree murder “qualifies as a crime of violence because a defendant who acts with the requisite mens rea to commit second-degree murder necessarily employs force “against the person or property of another,” and rather than acting with ordinary recklessness, the defendant acts with recklessness that rises to the level of extreme disregard for human life. *United States v. Begay*, 33 F.4th 1081, 1093 (9th Cir. 2022) (en banc). This standard is much higher than the recklessness standard set forth by the California Supreme Court in *Williams*.

done in a rude or angry way.\*.\* \* The touching does not have to cause pain or injury of any kind.” Judicial Council of California Criminal Jury Instruction (CALCRIM) 875. The jury instructions make clear that section 245(a) encompasses “slight” and “rude” touching, which need not be violent in nature. *Id.*

Second, the California Supreme Court has held that section 245(a):

does not require a specific intent to cause injury or a subjective awareness of the risk that an injury might occur. Rather, [section 245(a)] only requires an intentional act and *actual knowledge* of those facts sufficient to establish that the act by its nature will probably and directly result in the application of physical force against another.

*Williams*, 29 P.3d at 204 (emphasis added). However, “actual knowledge” for a section 245 conviction does not require a person’s subjective awareness of any risk of force. *People v. Aznavoleh*, 210 Cal. App. 4th 1181, 1189.

“[A] defendant guilty of assault must be aware of the facts that would lead a *reasonable person* to realize that a battery would directly, naturally and probably result from his conduct.” *Williams*, 29 P.3d at 203 (emphasis added); *see also Aznavoleh*, 210 Cal. App. 4th at 1190; *Ceron v. Holder*, 747 F.3d 773, 784 (9th Cir. 2014) (en banc).

The recklessness mens rea articulated in *Williams* does not satisfy the elements clause for a crime of violence based on the standard set forth by the Supreme Court in *Borden*. *Borden* defines “recklessness” in terms of the

Model Penal Code, i.e., when a person “‘consciously disregards a substantial and unjustifiable risk’ attached to his conduct, in ‘gross deviation’ from accepted standards.” *Borden*, 141 S. Ct. 1824 (quoting Model Penal Code section 2.02(2)(c)). Here, the California courts have repeatedly held that section 245(a) does not require any subjective awareness of risk by the defendant, let alone the “conscious disregard” of such risk as required by *Borden*. See *Williams*, 29 P.3d at 203-04; *Aznavoleh*, 210 Cal. App. 4th at 1190. Moreover, a mens rea of recklessness does not rise to the mens rea required for a crime of violence. *Borden*, 141 S. Ct. at 1821-22.

Section 245(a)’s mens rea actually qualifies as negligence under *Borden*’s Model Penal Code framework because a defendant need not be consciously aware of any risk. California applies a reasonable person standard as to whether the defendant should be aware of the risk created by his conduct. *Williams*, 29 P.3d at 203. “[A] person acts negligently if he is not but ‘should be aware’ of such a ‘substantial and unjustifiable risk,’ again in ‘gross deviation’ from the norm.” *Borden*, 141 S. Ct. at 1824 (quoting Model Penal Code section 2.02(2)(d)).

The State of California has applied section 245(a) to conduct that falls far short of the generic federal definition of a crime of violence. To establish that a state statute creates a crime outside the generic definition of a federal

crime of violence, the petitioner must establish that there is a realistic possibility that the state would apply its statute to conduct that falls outside of the federal generic definition of the crime. *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193-94 (2007). This Court’s application of *Williams* confirms that section 245(a) entails negligent or reckless use or attempted use of force against the victim, contrary to *Borden*’s requirement of knowing or purposeful action to meet the mens rea required for a crime of violence. *Borden*, 141 S. Ct. at 1821-22.

California courts have found that the following conduct is enough to violate section 245(a). The fact patterns in these cases reflect that none of the defendants acted purposefully or knowingly. Rather they acted without awareness that they could harm anyone. These convictions for section 245(a) only required a mens rea of negligence as defined by the Supreme Court in *Borden* to convict under California law. *Borden*, 141 S. Ct. at 1824 (finding negligence is defined as acting without awareness of a substantial risk in gross deviation from the norm).

*Table 2: Examples of Minimum Conduct for Section 245(a) in California State Caselaw*

<b>Conviction Under California Penal Code Section 245(a)</b>	<b>Minimum Conduct</b>
<i>People v. Aznavoleh</i> , 210 Cal. App. 4 <sup>th</sup> 1181,	Defendant drove their car through a red light through an intersection.

1183, 1189-90 (Cal. Ct. App. 2012)	
<i>People v. Rainville</i> , 2017 WL 712603 (Cal. Ct. App. 2017) (unpublished)	Defendant, who was severely intoxicated, drove her car through her neighbor's backyard. No one was injured.
<i>People v. Patzer</i> , 2008 WL 4958659 (Cal. Ct. App. 2008) (unpublished)	Defendant, while driving slowly during a holiday parade, turned in the opposite direction indicated by a police officer, almost hitting the officer.
<i>People v. Wright</i> , 100 Cal. App.4 <sup>th</sup> 703, 706 (Cal. Ct. App. 2002)	Defendant drove a pickup truck close to other drivers.
<i>People v. Lopez</i> , 2010 WL 780369 (Cal. Ct. App. 2010) (unpublished)	Defendant weaved to avoid hitting a tire deflation device and did not intend to frighten or hurt anyone.
<i>People v. Hayes</i> , 142 Cal. App. 4th 175 (2006)	Defendant kicked a large ashtray that fell on an arresting officer.
<i>In re Armanda G</i> , 2005 WL 2671505 (Cal. Ct. App. 2005) (unpublished)	Defendant minor shot a BB gun at a tree in the dark knowing that others were nearby.
<i>People v. Vasquez</i> , 85 Cal. App. 575 (1927)	Defendant drove on a dark highway without headlights.

This offense fails to match the federal mens rea requirement of knowing or purposeful use of force against another person as required by the Supreme Court. *Borden*, 141 S. Ct. at 1822-25. Accordingly, it is categorically not a crime of violence.

**II. THIS COURT’S DECISION DETERMINING WHETHER CALIFORNIA PENAL CODE SECTION 245(A) IS A CRIME OF VIOLENCE WILL HAVE IMMENSE CONSEQUENCES FOR LONG-TERM LAWFUL PERMANENT RESIDENTS, ASYLEES, DACA RECIPIENTS, AND THEIR FAMILY MEMBERS**

This misinterpretation of section 245(a) as a crime of violence has had devastating repercussions in immigrant communities. A conviction for an aggravated felony has the following immigration consequences:

*Table 3: Identifying the Immigration Consequences of an Aggravated Felony Conviction as Defined under 8 U.S.C. § 1101(a)(43)*

<b>Statute</b>	<b>Immigration Consequences of An Aggravated Felony Conviction</b>
8 U.S.C. § 1158(b)(2)(B)	Ineligibility for asylum
8 U.S.C. § 1182(a)(9)(A)(i)	Permanent inadmissibility to the United States
8 U.S.C. § 1226(c)(1)	Mandatory detention during the pendency of removal proceedings
8 U.S.C. § 1229b(a)(3)	Ineligibility for cancellation of removal for lawful permanent residents
8 U.S.C. § 1229b(b)(1)(C)	Ineligibility for cancellation of removal for non-lawful permanent residents
8 U.S.C. § 1229c(a)(1) and (b)(1)(C)	Ineligibility for voluntary departure
8 U.S.C. § 1427(a)(3)	Ineligibility for naturalization for lack of good moral character as defined under 8 U.S.C. § 1101(f)(8)

There are real-life consequences due to this erroneous interpretation of the law. Families have been torn apart and permanently severed, with

lifelong permanent residents exiled from often the only home they have ever known. A few examples of people who have been exiled or are facing exile as a result of this erroneous interpretation of section 245(a) follow:

**J-B-R-** J-B-R- fled Mexico as a teenager because family members were targeted and murdered by a drug cartel working in concert with Mexican law enforcement. He fled his home country after witnessing the murder of ten people by men wearing military uniforms. J-B-R- made a life for himself in the United States, married a lawful permanent resident, and had six U.S. citizen children. His father became a naturalized U.S. citizen. In 2013, he adjusted status to permanent resident but was convicted for violating section 245(a)(4) in 2016. In 2018, he was removed to Mexico while his petition for review was pending before this Court. J-B-R- died in Mexico before this Court was able to adjudicate his case, leaving his permanent resident wife a widow with six children. The youngest child, born in 2015, never knew her father, as he was incarcerated, removed, and died before she could form any memories of him.

**M-A-** M-A- is a developmentally delayed adult who has been living in the United States since the age of eight. He was raised by his father, who is a lawful permanent resident. M-A- cannot live independently, hold a job, drive a car, or ride a bike. He has no family or friends in Mexico and there is

no one who can care for him in his home country. The U.S. government granted M-A- asylum. In 2019, he was ordered removed because of a 2018 conviction under section 245(a)(4). This case is currently on appeal before the Board of Immigration Appeals. M-A- is now facing removal to a country where he will be without a caregiver and likely experience homelessness. Even worse, because of his disability, M-A- may be placed in a Mexican mental institution, where he would be at high risk of suffering harm rising to the level of persecution and torture.<sup>5</sup>

**“Juan”.** Juan, a lawful permanent resident for over forty years, immigrated to the United States at the age of ten. He was appointed deacon of his local church and was a leader in Celebrate Recovery, helping those struggling with alcoholism. Juan’s entire family are U.S. citizens and permanent residents, including his son, his two grandchildren, siblings, and life partner. Juan was convicted of section 245(a)(4) and now faces removal.

**C-K-.** C-K- was born in 1975 in a refugee camp in Thailand, after his family fled the Khmer Rouge in Cambodia. In 1981 C.K. was admitted to the United States as a refugee, and in 1999 was convicted under section

---

<sup>5</sup> U.S. Department of State, *2021 Country Reports on Human Rights Practices Mexico* (Apr. 12, 2022) (reports of involvement by police, military, and illegal armed groups targeting people with disabilities and reports of institutionalized persons with disabilities lacking adequate medical care, privacy, clothing, hygiene, and rehabilitation services). *See also Guerra v. Barr*, 974 F.3d 909 (9th Cir. 2020) (detailing widespread systemic discrimination and abuse in Mexico on the basis of disability.)

245(a)(1). C-K- is married and has six U.S. citizen children. C-K- is the sole provider in his household and his family depends on his job for health insurance. He also takes care of his elderly mother. In 2018, Governor Brown pardoned C-K-. Had C-K not been pardoned he would have been deported to Cambodia, a country where he does not speak the language and has no surviving family.

While Amici's clients' stories are all different, they reflect a common theme: The U.S. government is removing long-term residents from the United States because they have been convicted of an offense (section 245(a)) that this Court has incorrectly deemed to be an aggravated felony crime of violence. The "more than recklessness" mental state utilized in the California Supreme Court's definition of the mens rea standard necessary for a conviction under section 245(a) does not match the federal definition of the mental state of "recklessness" and in fact matches the federal definition of the mental state of "negligence." The California courts do not actually require the prosecution to establish that the defendant acted with more than "recklessness" as it is defined federally, despite the language in *Williams*. California prosecutors need only prove, and the juries need only find, that a reasonable person would realize that a battery would likely occur as a result of their actions. This standard is the same as the federal definition of

negligence. *Borden*, 141 S. Ct. at 1824. Accordingly, California Penal Code section 245 categorically is not an aggravated felony crime of violence.

**CONCLUSION**

This Court should grant the petition for rehearing en banc.

July 18, 2022,

Respectfully submitted,

s/ Merle D. Kahn  
Counsel for Amici

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

**Form 8. Certificate of Compliance for Briefs**

*Instructions for this form:* <http://www.ca9.uscourts.gov/forms/form08instructions.pdf>

**9th Cir. Case Number(s)** 20-71372

I am the attorney or self-represented party.

**This brief contains 3996 words**, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief (*select only one*):

complies with the word limit of Cir. R. 32-1.

is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.

is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).

is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.

complies with the longer length limit permitted by Cir. R. 32-2(b) because (*select only one*):

it is a joint brief submitted by separately represented parties;

a party or parties are filing a single brief in response to multiple briefs; or

a party or parties are filing a single brief in response to a longer joint brief.

complies with the length limit designated by court order dated \_\_\_\_\_.

is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

**Signature:** s/ Merle D. Kahn

**Date:** July 18, 2022

(use "s/[typed name]" to sign electronically-filed documents)

**CERTIFICATE OF SERVICE**

I, Merle D. Kahn, the undersigned say:

I am over the age of eighteen years and not a party to the within action or proceedings; my business address is Law Office of Merle D. Kahn, P.O. Box 253, 21300 Almaden Road, San Jose, CA 95120.

On July 18, 2022, I caused to be served within:

**BRIEF OF AMICI CURIAE CALIFORNIA COLLABORATIVE FOR  
IMMIGRANT JUSTICE ET AL. IN SUPPORT OF PETITIONER'S  
REQUEST FOR REHEARING EN BANC**

With the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users, and that service will be accomplished by the appellate CM/ECF system.

/s Merle D. Kahn

**APPENDIX**  
**List and Description of Amici**  
*Dominguez v. Garland, No. 20-71372*

**California Collaborative for Immigrant Justice (CCIJ)** is a statewide organization that focuses on serving the most vulnerable in our community, including immigrants facing deportation due to prior contact with the criminal legal system. CCIJ conducts in person or remote legal intake clinics at four California detention centers, serving hundreds of detained immigrants each year. Through our services, we empower detained immigrants and their communities through technical assistance, education, and participatory defense strategies, while also advancing advocacy, policy, and litigation initiatives consistent with the goals of abolition and freedom for immigrants in detention.

**African Advocacy Network** is a San Francisco-based nonprofit founded in 2009 to serve the growing Diaspora of African and Afro-Caribbean immigrants. AAN provides immigration legal services, case management, and social integration services based on a unique Cultural Brokering model.

The **Alameda County Public Defender's Office (ACPD)** zealously represents approximately 26,000 people annually who are charged with crimes in Alameda County and cannot afford an attorney. In 2014, ACPD became the first public defender office in California to establish a deportation defense unit to provide Padilla advisals and critical immigration legal services to noncitizen clients in need before the immigration courts, the BIA, the U.S. District Court, and the Ninth Circuit.

The **American Civil Liberties Union (ACLU)** is a nationwide, non-partisan, non-profit organization with approximately two million members and supporters dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The **ACLU of Northern California** is a regional affiliate of the national ACLU. The ACLU and its affiliates share a longstanding commitment to immigrants' rights. The ACLU of Northern California has a strong interest in the guidance this court would bring in the interpretation of section 245(a)(2).

**Asian Americans Advancing Justice – Asian Law Caucus (Advancing Justice – ALC)**, founded in 1972, is the nation's first legal and civil rights organization serving low-income Asian Pacific Islander communities.

Advancing Justice – ALC provides legal services to and engages in advocacy on behalf of immigrants facing detention and deportation due to criminal convictions. The immigration consequences of criminal convictions are of particular concern to Southeast Asian and Pacific Islander communities who are disproportionately impacted by policing and incarceration.

**Community Legal Services in East Palo Alto (CLSEPA)** is a nonprofit organization that offers legal services that improve the lives of low-income families throughout the Bay Area region. CLSEPA is committed to pursuing multiple, innovative strategies, including community education, individual legal advice and representation, legal assistance to community groups, policy advocacy, and impact litigation.

The **Contra Costa County Office of the Public Defender** represents people who are charged with crimes and who cannot afford an attorney. Stand Together Contra Costa, an immigration removal defense collaborative run out of the office, represents dozens of noncitizen community members facing deportation. They have an interest in seeing that their clients do not unfairly risk deportation, detention, or denial of immigration relief on the basis of California convictions which should not qualify as aggravated felonies.

**Dolores Street Community Services** nurtures individual wellness and cultivates collective power among low-income and immigrant communities to create a more just society.

**Florence Immigrant & Refugee Rights Project** is a 501(c)(3) nonprofit legal service organization providing free legal and social services to adults and unaccompanied children in immigration custody in Arizona. The Florence Project redresses the lack of counsel in immigration proceedings, both locally and nationally through direct service, partnerships with the community, and advocacy and outreach efforts.

**Immigrant Defenders Law Center (ImmDef)** is a next-generation social justice law firm that defends our immigrant communities against injustices in the immigration system. We envision a future where no immigrant is forced to face an unjust immigration system alone.

**Immigrant Legal Defense (ILD)** is a nonprofit organization based in Oakland, California, dedicated to providing legal services to marginalized immigrant communities in California and throughout the United States. ILD strives to pursue robust due process protections for these communities, including a meaningful right to be heard in the courts. Among those that ILD represents and advocates for are individuals in the U.S. who suffer the inhumane and harsh immigration consequences of criminal convictions. ILD has a strong interest in an interpretation and application of the law that observes fairness and avoids unjust outcomes for the communities it serves.

The **Immigrant Legal Resource Center (ILRC)** is a national non-profit organization that provides legal trainings, educational materials, and advocacy to advance immigrant rights. As part of ILRC's mission, we provide critical support at the intersection of criminal and immigration law through legal analysis, policy work, trainings, technical assistance, and developing and disseminating best practices. Through our extensive networks with service providers, immigration practitioners, and public defenders, we have developed a profound understanding of the barriers faced by low-income individuals seeking to obtain immigration benefits and defend against removal.

**Innovation Law Lab (Law Lab)** is a nonprofit organization established to promote and improve due process in immigration proceedings. Law Lab uses empirical analysis, technology, and litigation to ensure the fair and just administration of our immigration laws. Law Lab has represented many immigrants with criminal charges in immigration court proceedings, and has a direct interest in correcting misinterpretations of immigration consequences of criminal charges to avoid wrongful deportation of their clients.

The **National Immigration Project of the National Lawyers Guild (NIPNLG)** is a national membership organization of lawyers, law students, legal workers, advocates, and jailhouse lawyers working to defend and extend the rights of all noncitizens in the United States, regardless of immigration status. NIPNLG pursues all forms of legal advocacy on behalf of immigrants and provides technical assistance, training, and support to legal practitioners, community-based immigrant organizations, and advocates working to advance the rights of noncitizens.

**Pangea Legal Services (Pangea)** is a non-profit organization that provides low-cost and free legal services to immigrants in removal proceedings. In addition to direct legal services, Pangea also advocates on behalf of the immigrant community through policy advocacy, education, and legal empowerment efforts. Pangea frequently represents immigrants who face deportation due to contact with the criminal system, including asylum seekers, victims of crimes, and individuals with deep and long-standing community ties in the United States.

**San Francisco Office of the Public Defender** represents people who are charged with crimes and who cannot afford an attorney. Their Immigration Defense Unit represents hundreds of noncitizen community members facing deportation. They have an interest in seeing that their clients do not unfairly risk deportation, detention, or denial of immigration relief on the basis of California convictions which should not qualify as aggravated felonies.

**UC Davis Immigration Law Clinic** seeks justice for all noncitizens interacting with the criminal justice system.