No. ___ – _____

In the Supreme Court of the United States

FRANCIS SCHAEFFER COX,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The decisions below sustained against a sufficiency challenge Petitioner's conviction under 18 U.S.C. §§ 1117 & 1114 for conspiring to murder federal officers or employees, even though, under the operative government theory, the alleged conspirators did not contemplate killing anyone unless "Stalinesque" martial law, consisting of mass arrests and purges of citizens, were imposed in the United States, and the conspirators could specifically identify the individuals (whether state or federal employees) carrying out those arrests or purges. AER 266–68. The Ninth Circuit Court of Appeals upheld the conviction, holding that there was sufficient evidence where the conspirators' plans were contingent upon "certain conditions that they subjectively thought were likely to occur." Pet. App. 3a. This petition presents the following questions regarding the breadth of conspiracy liability and federal jurisdiction:

1. Whether a contingent conspiracy may be based on a condition outside the conspirators' control that they subjectively believed was likely to occur, even if the condition was not just unlikely but highly unlikely to ever occur?

2. Whether federal jurisdiction exists for a conspiracy to murder federal employees where "the object of the intended attack [was] not identified with sufficient specificity so as to give rise to the conclusion that had the attack been carried out the victim would have been a federal [employee]," thereby falling short of the jurisdictional test articulated in *Feola v. United States*, 420 U.S. 671, 695–96 (1975)?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Francis Schaeffer Cox respectfully petitions this Court for a writ of certiorari to review the judgments of the United States Court of Appeals for the Ninth Circuit.

OPINIONS AND ORDERS BELOW

The original opinion of the court of appeals (Pet. App. 1a) is unreported but is available at 705 Fed. Appx. 573. The order denying the petition for rehearing with suggestion for rehearing *en banc* (Pet. App. 7a) is unreported. The opinion of the court of appeals pursuant to a second direct appeal after resentencing (Pet. App. 8a) is not reported but available at 2021 WL 4705233.

JURISDICTION

The second judgment of the court of appeals was entered October 8, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 1114 provides in relevant part:

> Whoever kills or attempts to kill any officer or employee of the United States or of any agency in any branch of the United States Government (including any member of the uniformed services) while such officer or employee is engaged in or on account of the performance of official duties, or any person assisting such an officer or employee in the performance of such duties or on account of that assistance, shall be punished—
>
> (1) in the case of murder, as provided under section 1111; . . . .

18 U.S.C. § 1117 provides:

> If two or more persons conspire to violate section 1111, 1114, 1116, or 1119 of this title, and one or more of such persons do any overt

> act to effect the object of the conspiracy, each shall be punished by imprisonment for any term of years or for life.

INTRODUCTION

This case concerns the outer limits of liability for conspiracy in the federal courts, and in particular the extent to which federal courts maintain jurisdiction over plots to attack generic (not specifically federal) government actors under the relevant statutes. The facts are extraordinary, but they also represent the ideal vehicle for this Court to resolve the precise issues about outlier liability that divided the First, Seventh, and Ninth Circuits and bewildered the district court below.

This Court last addressed the minimum requirements for a conspiracy to attack federal officers or employees in *Feola v. United States*, 420 U.S. 671 (1975). There, the Court established that the actual federal identity of the specific person the conspirators conspired to attack is dispositive in establishing jurisdiction, whether or not the conspirators knew about the person's federal identity. *Id.* at 694–95. In prosecuting Francis Schaeffer Cox for first-degree conspiracy to murder federal officers or employees, however, the government premised liability on a highly unlikely contingency which, even if triggered, did not necessarily involve federal targets. If events played out as any reasonable observer would expect, the conspiracy would result in no killings whatsoever; if the highly unlikely contingency somehow came to pass, meanwhile, the conspirators might have attacked either state employees or federal employees, depending on who was bringing about the contingency.

The Ninth Circuit erred by rejecting the combined objective and subjective limitation for conspiracies applied by the First Circuit, which holds that "[l]iability should attach if the defendant *reasonably* believed that the conditions would obtain." *United States v. Palmer*, 203 F.3d 55, 64 (1st Cir. 2000) (emphasis added) (citing *United States v. Dworken*, 855 F.2d 12, 19 (1st Cir. 1988)). It also squarely presents a question that deeply concerned the Seventh Circuit even as it was rejecting the positions of both the First and Ninth Circuits: "[W]e need not decide in this case how to deal with the situation where an agreement is conditioned on an event that is highly unlikely ever to occur." *United States v. Podolsky*, 798 F.2d 177, 179 (7th Cir. 1986). This Court's intervention is necessary to resolve this three-way circuit split regarding the reach of conspiracy liability under federal law.

The Court should also grant certiorari to answer the question whether federal jurisdiction exists over a conspiracy where it is unclear that any attack, if carried out, would be on a federal employee. The Ninth Circuit ignored the test suggested by this Court on that precise question:

> Where the object of the intended attack is not identified with sufficient specificity so as to give rise to the conclusion that had the attack been carried out the victim would have been a federal officer, it is impossible to assert that the mere act of agreement to [murder] poses a sufficient threat to federal personnel and functions so as to give rise to federal jurisdiction.

Feola, 420 U.S. at 695–96. Instead, it skipped to *Feola*'s legal conclusion and held that "[a] rational trier of fact could also conclude that 'the agreement, standing alone, constituted a sufficient threat to the safety of a federal officer so as to give rise to federal jurisdiction.'" Pet. App. 3a (citing *Feola*, 420 U.S. at 695–96). The

Court should grant certiorari to answer whether *Feola*'s test deprives the federal court of jurisdiction where, as here, the ultimate targets of a murder conspiracy would not necessarily be federal employees.

STATEMENT OF THE CASE

I. Background Facts

The government premised its prosecution of Francis Schaeffer Cox for first-degree murder conspiracy of federal employees on three separate theories of liability.

The first theory, which the Ninth Circuit relied on to uphold the conviction, involved a discussion between government witness Mike Anderson and Cox during the summer of 2009 about the possibility of government collapse and the ensuing imposition of "Stalinesque" martial law, by which they meant the use of "mass arrests [and] purges" by the government. AER 266–67.[1] Anderson testified under immunity that he and Cox discussed creating a database of government employees, which they could use to help "identify who was [carrying out the mass arrests and purges]." AER 268. Alluding to "a quote out of Ale[ksandr] Solzhenitsyn"'s *Gulag Archipelago*, Anderson explained that in the event of such mass arrests, "we would want to be able to protect ourselves rather than just lay down and let it happen." AER 267. Whether the database would be used at all depended on two separate developments: first, government collapse and the imposition of martial law, and

[1] "AER" refers to Appellee's Excerpts of Record filed by Respondent in the Ninth Circuit Court of Appeals in Case Number 13-3000. "ER" refers to Petitioner's Excerpts of Record from the same case, and "FER" refers to Petitioner's Further Excerpts of Record. "2nd Appeal ER" refers to Petitioner's Excerpts of Record filed in the Ninth Circuit Court of Appeals in Case Number 19-30254.

second, the identification of persons responsible for mass arrests or purges. Only if the database contained the name of someone who had a hand in the enforcement of martial law did Anderson and Cox contemplate "kill[ing] them before they could come for us," as Solzhenitsyn wished his countrymen had done. AER 268. The database Anderson created consisted entirely of 15–20 state employees, and although Cox had given Anderson the names of three other federal employees to add to the list, Anderson did not add them, and he did no research on them. AER 323–36, FER 10.

The Ninth Circuit did not rely on the government's second theory of liability, although it played a central role in Cox's trial on the conspiracy count, because it was premised on Cox's efforts to defend himself against a team of federal "assassins" that the government admitted did not exist and were instead a product of paranoid fantasy. In overturning Cox's conviction for solicitation to murder federal officers or employees, the Ninth Circuit held that "because the federal 'hit team' that the security team was supposed to guard against did not exist, the solicitation to murder a member of that hit team" did not give rise to federal jurisdiction under *Feola*. Pet. App. 4a (citing 420 U.S. at 695–96).

The final theory of conspiracy liability involved discussions between Cox and others (not including Anderson) about a hypothetical "deterrence" policy the group was considering, but ultimately rejected. *See* ER 378–416. The Ninth Circuit did not explicitly rely on this theory. During the period in which the discussions took place, Cox was planning on refusing to appear for a separate state court proceeding.

ER 356, 411. At the suggestion of a confidential informant for the FBI, Cox relayed to his group the concept of a "2-4-1" policy, in which two government employees would be arrested for every one member of Cox's group that was arrested, or two government employees would be killed for every one of Cox's group that was killed. FER 26–29; ER 378–79, 390–91. No one suggested targeting federal officials, though they did mention state "trooper[s]" and "judge[s]" more generally. ER 394–95. In the transcripts, Cox repeatedly emphasized that this was not yet a plan to be implemented, but rather a point of discussion for the group. *See, e.g.*, ER 382 (Cox "want[ed] to get you guys' thoughts" on the subject); ER 384 (asking, "anyway, what are your guys' thoughts on 241? I really wanted your feedback"); ER 394 (reminding the confidential informant, "Now keep in mind we are all just speculating now"); ER 391–92 (distinguishing between acts that are "morally allowable" versus "tactically advantageous"). When queried, he declined to provide details of how the policy might work. *See, e.g.*, ER 390 (when one alleged coconspirator asked him for clarification on what would trigger 2-4-1, Cox answered, "I don't know. That's what we've got to talk about"). Immediately before the court date for which Cox planned to fail to appear, Cox overruled the confidential informant's pronouncement of "support" for 2-4-1, and announced a substitute "definitive plan for Monday," the court date: "try[ing] to lay low Monday and avoid—if they do—if they're coming out with bench warrant, avoid it and try to hit them with paperwork every way I can." ER 409–12. In the event Cox were arrested or killed, he suggested, "[j]ust raise hell . . . by having—picketing and just like—well, not quite a riot, but almost, you know?

And on the radio and on TV and—and sit-ins and just every kind of, you know, peaceful protest and just get everybody's panties in a wad." ER 412–13.

No one was killed as a result of any of these discussions. The alleged conspirators did not resolve to kill any particular person or group of persons, much less anyone who was a federal employee.

II. Proceedings Below

A. Trial Court

Counsel for Cox and for other alleged coconspirators, Lonnie Vernon and Coleman Barney, moved for a judgment of acquittal on the murder conspiracy count at the close of the government's evidence. *See* ER 275–79; Tr. 15:3–7; 2nd Appeal ER 71–77; AER 93–96. Counsel for Cox specifically argued that liability for a conditional conspiracy "should focus on the likelihood that the condition precedent will be fulfilled," citing *United States v. Anello*, 765 F.2d 253 (1st Cir. 1985), and *Dworken*, 855 F.2d 12, and argued that the government had made no such showing with respect to the condition precedent of "the collapse of the government." AER 63–64; *see also* AER 95 (referring to "martial law" as the condition precedent). He also argued that the 2-4-1 "was not an actuality" but rather "an idea that was discussed" and was ultimately "renounced." AER 66.

In a discussion with the prosecutor, the court expressed concern regarding the reliance on "condition precedent" for the conspiracy count. AER 75. Focusing on the government's second theory of liability, in which Cox allegedly conspired to murder a team of fictitious federal "assassins," the court worried,

> Well, here's the thing, that I guess is a little troubling to me. There were no federal agents that we know of. There might as well have been little green men from Mars. And so if it's—is the existence of federal agents or the likelihood of federal agents coming to arrest Mr. Cox—is that a condition precedent that has to be met here with some evidence in order to get to a conspiracy . . . that's realistic—you know, realistic conspiracy?

AER 77–78.

The court ultimately denied the motion, finding these are "arguments that can properly be made to the jury," and allowing the government to proceed on all three theories of liability for the conspiracy count. AER 102.

At the close of evidence, counsel for Mr. Vernon and Mr. Barney renewed their motions for acquittal, relying on their earlier arguments. The court summarily denied the motions, expressing the desire to bring the jury back into the courtroom quickly. 2nd Appeal ER 87–88. Cox did not formally renew his motion to acquit.

B. Court of Appeals

On appeal, Cox argued the evidence of a conspiracy to murder federal officers or employees was insufficient because conspiracy liability does not extend to an agreement conditioned on independent events of historical proportion whose objective likelihood was so remote as to be fantastical. Pet. C.A. Subst. Opening Br. at 63–68; Pet. C.A. Reply Br. at 30. He urged the court to adopt the standard applicable to conditional conspiracies in the First Circuit, where liability attaches only if "the defendant reasonably believed that the conditions would obtain." Pet. C.A. Subst. Opening Br. at 68 (citing *Palmer*, 203 F.3d at 64 (citing *Dworken*, 855 F.2d at 19)). He further argued federal jurisdiction for such a conspiracy did not exist where there was no showing that an attack, if carried out, would have been on

a federal employee. Pet. C.A. Subst. Opening Br. at 66; Pet. C.A. Reply Br. at 21. Regarding the fictitious-federal-assassin theory of conspiracy liability, which also was the sole theory offered to support the conviction for solicitation to murder a federal officer or employee, Cox argued that federal jurisdiction does not exist where the alleged targets of the conspiracy did not exist and lacked an actual as opposed to imagined federal identity. Pet. C.A. Reply Br. at 43–44.

Although Cox had failed to renew his Rule 29 motion at the close of evidence at trial, he argued on appeal that under Ninth Circuit precedent his renewal of the motion would have been an "empty ritual," and his claim was thus subject to de novo review. Pet. C.A. Subst. Opening Br. at 62 (citing *United States v. Esquivel-Ortega*, 484 F.3d 1221, 1225 (9th Cir. 2007)).

The Ninth Circuit Court of Appeals overturned the solicitation conviction, agreeing with Cox that *Feola* deprived the federal courts of jurisdiction over an alleged request to murder fictional federal entities: "[B]ecause the federal 'hit team' that the security team was supposed to guard against did not exist, the solicitation to murder a member of that hit team did not 'constitute[ ] a sufficient threat to the safety of a federal officer so as to give rise to federal jurisdiction.'" Pet. App. 4a (quoting *Feola*, 420 U.S. at 695–96). In response to Cox's self-defense arguments, the Ninth Circuit also agreed for the purposes of solicitation liability that none of the circumstances surrounding the security detail "'strongly confirm[ed] that [D]efendant actually intended' for anyone to commit first-degree murder." *Id.* (quoting *United States v. Stewart*, 420 F.3d 1007, 1020–21 (9th Cir. 2005)).

Although the fictitious federal assassins also played a primary role in the evidence the jury was asked to consider for the conspiracy count, the Ninth Circuit nonetheless upheld the conspiracy conviction. Pet. App. 3a. Assuming without deciding that Cox was entitled to de novo review, the Ninth Circuit held that the evidence was sufficient where "[d]efendant and his co-conspirators agreed to attack government officials—including federal officers—in the event of certain conditions that they subjectively thought were likely to occur." *Id*. Ignoring *Feola*'s proposed test for conspiracy liability where the target could not be identified as a federal officer, the court skipped to *Feola*'s legal conclusion and held that "[a] rational trier of fact could also conclude that 'the agreement, standing alone, constituted a sufficient threat to the safety of a federal officer so as to give rise to federal jurisdiction.'" *Id.* (quoting *Feola*, 420 U.S. at 695).

Cox then filed a petition for rehearing with suggestion for rehearing *en banc*, which was denied. Pet. App. 7a. He then filed his first petition for certiorari, *see* Supreme Ct. Case No. 17-8074, which was denied.

Upon remand, the district court resentenced Cox, reducing his sentence from 310 months to 188 months. ER 4; 2nd Appeal ER 6.

Cox filed a second direct appeal from this judgment, arguing a post-remand, pre-sentencing writ of *audita querela* should have been granted and reiterating the argument challenging the sufficiency of the evidence for the conspiracy conviction. *United States v. Cox*, Case No. 19-30254 (9th Cir. filed Nov. 8, 2019). The Court of Appeals affirmed the judgment denying the writ and affirmed the conspiracy

conviction by incorporating its holding from the first appeal. *United States v. Cox*, Case No. 19-30254, 2021 WL 4705233, at *1 (9th Cir. 2021).

Because the Solicitor General's Brief in Opposition to Cox's first cert petition argued that the petition should be denied in part because it was "in an interlocutory posture," BIO at 10, this petition, arguing the same substance, is being filed after the resentencing and second direct appeal.

REASONS FOR GRANTING THE PETITION

I. The Decision Below Deepens a Conflict Between the Circuits.

This Court should step in to resolve a three-way circuit split affecting multiple federal conspiracy statutes with this case, which touches upon all aspects of the split. While the Ninth Circuit held below that subjective belief in the likelihood of a conspiracy was enough to establish liability, Pet. App. 3a, the First Circuit holds that both subjective and objective likelihood is required, *Palmer*, 203 F.3d at 64 (citing *Dworken*, 855 F.2d at 19), and the Seventh Circuit rejects subjective and objective tests but has reserved the particularly vexing question presented here of "highly unlikely" contingencies. *Podolsky*, 798 F.2d at 179. This split has created an uneven patchwork of conspiracy liability across the nation: Had Cox—and his plans for what to do in the extremely unlikely case of mass arrests and mass purges being carried out in the United States—been tried in the First Circuit, he never would have been convicted.

At trial, Cox had advocated the standard embraced by the First Circuit, which holds that "[l]iability should attach if the defendant *reasonably* believed that the conditions would obtain," *Palmer*, 203 F.3d at 64 (emphasis added) (citing

Dworken, 855 F.2d at 19)—requiring both objective likelihood and subjective belief in that likelihood. There would be no murder-conspiracy liability under this standard. Even if the conspirators judged the collapse of government and martial law characterized by "Stalinesque" mass arrests and purges to be likely, this belief was simply not "reasonable." *Id.* (There was no evidence introduced of *how* likely they believed such a development to be, only that they had "a general concern" about it and viewed it as a "possibility." AER 266.) The Fourth, Fifth, and Fourteenth Amendments of the Constitution prohibit "mass" arrests not based on individualized probable cause.

The Seventh Circuit rejects a test based on "subjective or objective likelihood," a holding that represents a split with both the First Circuit and the decision of the Ninth Circuit below. *Podolsky*, 798 F.2d at 179. But Judge Posner's opinion noted that such rules were probably motivated by a concern "that without some attention to the likelihood of the condition's being fulfilled, all sorts of fantastic hyperbole might become punishable ('I agree to horsewhip Idi Amin if he ever shows his face on Rush Street')." *Id.* Agreeing that "the more fantastic the condition, the lower the probability that the defendant actually agreed to commit an offense," *id.*, the court then reserved the precise question presented here: "[W]e need not decide in this case how to deal with the situation where an agreement is conditioned on an event that is highly unlikely ever to occur." *Id.* In the Seventh Circuit, Cox would be able to argue the open question of whether liability extends to "the situation where an agreement is conditioned on an event that is highly unlikely

ever to occur." *Id.* "Stalinesque" martial law characterized by mass arrests and purges, as described by Aleksandr Solzhenitsyn in *Gulag Archipelago*, was highly unlikely to occur in the United States in the 2009–10 timeframe. While the United States was experiencing economic distress in that period, the rule of law had not been undermined and showed no signs of eroding. This case presents the ideal vehicle to address Judge Posner's worry over liability for agreements that have little bearing in reality.

In contrast, the Ninth Circuit held that Cox was liable for conspiracy where the conspirators purportedly "subjectively thought [the conditions] were likely to occur," Pet. App. 3a, rejecting the First Circuit rule that Cox had urged and inviting the real-life liability for dystopian fantasies that worried Judge Posner. The Ninth Circuit rule is not only untethered to actual risk, but is also unjust, punishing mentally ill conspirators more harshly than their clear-headed brethren.

Outside the federal courts of appeal, this issue has also interested state courts: A state high court held there was sufficient evidence for a conspiracy where "[d]efendant reasonably believed the condition to the execution of the planned murder—his release from prison—would occur," *People v. Washington*, 869 N.E.2d 641, 645 (N.Y. 2007), but did not resolve the question whether reasonable belief was also necessary for such a conviction. *Id.*

Several other circuit courts have held that conditions to a conspiracy are legally irrelevant, while not directly answering the improbable-condition question presented here. *See United States v. Grassi*, 616 F.2d 1295, 1302 (5th Cir. 1980)

("That the agreement was subject to a condition does not make it any less an agreement."); *United States v. Prince*, 883 F.2d 953, 958 (11th Cir. 1989). In a case that presents a slightly different issue but is sometimes discussed alongside these cases, the Eighth Circuit quoted approvingly a 1985 holding of the First Circuit indicating subjective belief in the likelihood of a condition being fulfilled was sufficient, though the relevant condition in both cases was not an independent event, but a belief that the drugs to be purchased "were of satisfactory quality." *See United States v. Brown*, 946 F.2d 58, 61 (8th Cir. 1991) (quoting *United States v. Anello*, 765 F.2d 253, 262 (1st Cir. 1985)).

II. Intervention by This Court Is Necessary to Clarify an Area of Law the District Court Called "a Mass of Confusion" and a Theory of Liability Scholars Have Called "Radical."

In an age in which misinformation and paranoid thinking spread more easily than ever before, consistent guidance is urgently needed by the lower courts and prosecutors about when plans for contingencies that the conspirators subjectively fear but which are not objectively likely give rise to liability under the federal conspiracy statutes. Uncertainty about whether the government was straying too far from what the district court called a "realistic conspiracy" was pervasive throughout Cox's trial. Tr. 15:22–23. Cox's attorney pointed out that "we haven't had martial law," AER 95, but no one knew how to interpret this fact. The confusion was shared by the key prosecution witnesses: Immediately after testifying under immunity about the database of state employees he and Cox had assembled to help identify "potential" perpetrators of mass arrests and purges, Mike Anderson denied

that he had ever agreed with Cox to commit a crime, much less murder of a federal employee. Tr. 6:172–73.

When faced with Cox's argument about objectively unlikely conspiracies, the district court characterized conspiracy law as "just a mass of confusion," AER 76, and stated that "conspiracy law . . . can be cloudy." AER 100. With no relevant precedent to guide it, the court made no explicit ruling on the contingent conspiracy question—and no factual finding as to the conspirators' subjective estimates of the contingency's probability—but merely held that the same arguments could properly be made to the jury. ER 273.

The problem of contingent conspiracy liability has alarmed legal scholars. In the parallel (though not identical) context of conditional purpose, two observers noted that the Model Penal Code's indifference to conditional purpose seemed "radical." Larry Alexander & Kimberly D. Kessler, *Mens Rea and Inchoate Crimes*, 87 J. Crim. L. & Criminology 1138, 1142 (1997). As a thought experiment, they asked readers to "[c]onsider John and Jack, who agree after buying a ticket in the lottery that if they should win the jackpot, they will murder their wives and spend their millions on high living. [This rule] would label this agreement a conspiracy to murder, despite the fact that John and Jack's chance of winning is infinitesimal." *Id.* Cox and Anderson's agreement was even more attenuated: they only contemplated killing if the yet-to-be-determined target was carrying out mass arrests and purges in violation of the Constitution and the rule of law; there was no

agreement that an external event would automatically trigger the murder of a particular person.

Similarly, Neil Katyal has argued for limitations to the MPC's conditional purpose doctrine: "The criminal law should punish activity where people genuinely intend to fulfill their illegal aims and where the chances of their doing so are high. But neither deterrence nor retribution is served by criminalizing threats with remote conditional triggers." Neil Katyal, *Probable Failure of Conditional Purpose*, 32 Crim. L. Bull. 25, 35 (1996). There was no evidence that Cox and Anderson genuinely intended or desired that their discussions about killing the perpetrators of Stalinist mass arrests would come to fruition, even if they overestimated the chances of martial law being imposed.

III. This Case Directly Presents the Important Federal Jurisdictional Question Discussed Only in Dicta in *Feola v. United States*.

Regardless of whether there was sufficient evidence to convict Cox of a first-degree murder conspiracy in state court, the government prosecuted him in federal court for a conspiracy to murder federal officers or employees. The database of government employees compiled by Anderson and used by the Ninth Circuit to uphold Cox's conviction contained the names of 15–20 state employees and no federal employees. Later, Cox asked Anderson to add the names of certain federal employees, but Anderson did not add them and did no research on them. Cox and Anderson did not pretend to know which, if any, individuals in or outside the database would be the perpetrators of mass arrests without due process, because martial law was never imposed. While this Court has never directly held what

evidence establishes jurisdiction where the target of the agreement to murder cannot be identified with specificity, *Feola* did propose a test that directly speaks to this situation:

> Where the object of the intended attack is not identified with sufficient specificity so as to give rise to the conclusion that had the attack been carried out the victim would have been a federal officer, it is impossible to assert that the mere act of agreement to [murder] poses a sufficient threat to federal personnel and functions so as to give rise to federal jurisdiction.

Feola, 420 U.S. at 695–96. Absent binding precedent from this Court, the Ninth Circuit disregarded this test entirely, jumping to the conclusory statement that "[a] rational trier of fact could also conclude that 'the agreement, standing alone, constituted a sufficient threat to the safety of a federal officer so as to give rise to federal jurisdiction.'" Pet. App. 3a. (The jury was not asked to decide this question.)

There was no question that the conspirators did not *specifically* agree to murder a federal employee or group of federal employees, nor a person whose actual federal status was unknown to the conspirators. Under *Feola*'s proposed test, there was no federal jurisdiction. No federal court besides the Ninth Circuit has held federal jurisdiction was established in a case as attenuated and conditional as this one.

This Court has revisited a federal nexus requirement for a criminal statute once in recent years, considering whether, where "a defendant killed a person with an intent to prevent that person from communicating with law enforcement officers in general but where the defendant did not have federal law enforcement officers (or any specific individuals) particularly in mind," the evidence was sufficient for a

federal witness-tampering conviction. *Fowler v. United States*, 563 U.S. 668, 670 (2011). Even in this circumstance—where the government had to prove beyond a reasonable doubt that the defendant had killed someone, and the purpose of the killing was to prevent reporting—this Court recognized the proof of intent regarding reporting to law enforcement *generally* was not enough to justify the application of federal law. *Id.* at 675. Further, the Court rejected a test based on "possible" communication to a federal law enforcement officer: "[T]o allow the Government to show only a mere possibility that a communication would have been with federal officials is to permit the Government to show little more than the possible commission of a federal offense." *Id.* at 676. Emphasizing the statutory text referring to "a law enforcement officer or judge *of the United States*," *id.* (emphasis in opinion) (quoting 18 U.S.C. § 1512(a)(1)(C)), and the background principle that "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance in the prosecution of crimes," *id.* at 677 (alteration omitted) (quoting *Jones v. United States*, 529 U.S. 848, 858 (2000)), the Court concluded that the government must show "a reasonable likelihood" that the victim's communication (had the murder not occurred) would have been to a federal officer, and that "the likelihood of communication to a federal officer was more than remote, outlandish, or simply hypothetical." *Id.* at 678–79. *Fowler* shows that federal courts are already in the business of estimating the reasonable likelihood of the occurrence of an event relating to federal jurisdiction, though *Feola*'s test is even easier to administer.

As in *Fowler*, the statutes under which Cox was convicted require the target to be "any officer or employee *of the United States* or of any agency in any branch *of the United States Government* (including any member of the uniformed services). . . ." 18 U.S.C. § 1114 (emphasis added). The crime of murder, like the crime of arson discussed in *Jones*, "is a paradigmatic common-law state crime." *Jones*, 529 U.S. at 858. For these and similar concerns, this Court has been vigilant about policing the boundaries of federal jurisdiction in the criminal context. *See United States v. Lopez*, 514 U.S. 549, 561 n.3 (1995) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993), and *Screws v. United States*, 325 U.S. 91, 109 (1945) (plurality opinion)) ("States possess primary authority for defining and enforcing the criminal law," and "[o]ur national government is one of delegated powers alone."). Cox's case warrants similar scrutiny.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted this 6th day of January 2022.

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