**No. _____**

In the Supreme Court of the United States

_____

**Edward Sanchez**,
*Petitioner,*

v.

**United States of America**,
*Respondent*

_____

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

_____

# PETITION FOR A WRIT OF CERTIORARI

_____

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## QUESTIONS PRESENTED

I. The Fifth Circuit Court of Appeals relies exclusively on the Model Penal Code to define generic "aggravated assault" for purposes of the categorical approach. Three other Circuit Courts of Appeals rely on the MPC only when its definition corresponds to the one recognized by a majority of the States' criminal codes.

The question presented is:

Whether the Fifth Circuit's exclusive reliance on the MPC misapplies the categorical approach announced by this Court in *Taylor v. United States*, 495 U.S. 575 (1990).

## LIST OF PARTIES

Edward Sanchez, petitioner on review, was the Defendant-Appellant below. The United States of America, respondent on review, was Plaintiff-Appellee. No party is a corporation.

## RELATED PROCEEDINGS

- *United States v. Sanchez*, No. 3:20-CR-245-N, U.S. District Court for the Northern District of Texas. Judgment entered on December 17, 2021.

- *United States v. Sanchez*, No. 21-11281, U.S. Court of Appeals for the Fifth Circuit. Judgment entered on September 28, 2022.

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## PETITION FOR A WRIT OF CERTIORARI

Edward Sanchez respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

## OPINIONS BELOW

The Fifth Circuit's unreported opinion is available on Westlaw's electronic database at 2022 WL 4533988 and reprinted at Pet.App.a1-a2.

## JURISDICTION

The Court of Appeals issued its panel opinion on September 28, 2022. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## RELEVANT PROVISIONS

Section 2K2.1 of the United States Sentencing Guidelines Manual applied below and set the base offense level after the district court found that Mr. Sanchez had "committed any part of the instant offense subsequent to sustaining one felony conviction [for] a crime of violence." U.S. SENTENCING COMM'N, GUIDELINES MANUAL § 4B1.1(a)(3) (Nov. 1, 2021). Section 4B1.2 defines the term "crime of violence" to include "any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that . . . is . . . aggravated assault" USSG § 4B1.2(a)(2).

## STATEMENT OF THE CASE

### A. Introduction

The Fifth Circuit has staked out a minority position on the process of defining generic offenses. It relies solely on the Model Penal Code to define generic

"aggravated assault," and given that analysis, has repeatedly held that aggravated-assault predicates defined to include the reckless causation of bodily injury qualify as generic. This approach has resulted in two circuit splits. As to methodology, three other Circuit Courts of Appeals—the Third, Sixth, and Ninth—eschew an MPC-only approach and have instead consulted the MPC only in those cases where its definition matches the one found in a majority of state codes. The Fifth Circuit, by contrast, has never compared the two. Its methodological error has led to a second split. After conducting a multijurisdictional analysis, the Ninth Circuit concluded that an aggravated-assault offense defined to include the reckless causation of bodily injury falls outside the generic version of the crime. So too in the Fourth and Eighth Circuits. The Fifth Circuit's MPC-only approach has so far allowed it to shield its contrary authority from multijurisdictional scrutiny. That authority foreclosed Mr. Sanchez's sole claim advanced on appeal.

### B. Legal Framework

#### 1. Generic Offenses and the Categorical Approach

This case turns on the application of the "formal categorical approach" announced by this Court in *Taylor v. United States*. 18 U.S.C. § 924(e) set an enhanced punishment range for any felon-in-possession defendant "who ha[d] three prior convictions for specified types of offenses, including 'burglary.'" 495 U.S. 575, 577-78 (1990). Congress left the term "burglary" undefined, and this Court crafted a "generic, contemporary" definition by looking to the "sense in which the term is now used in the criminal codes of most States." *Id.* at 598 (citing *Perrin v. United*

*States*, 444 U.S. 37, 45 (1979); *Nardello v. United States*, 393 U.S. 286, 289 (1969)). A footnote explained that the definition drawn from those codes—"an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime"— "approximate[d]" the one "adopted by the drafters of the Model Penal Code." *Id*. at 598 n.8 (quoting MODEL PENAL CODE § 221.1 (AM. LAW INST. 1980)). Aside from that reference, the MPC played no role in this Court's analysis.

The *Taylor* Court did not write on a blank slate. Before *Taylor*, this Court had twice interpreted an offense enumerated in a federal statute but left undefined by Congress, and in both cases, cited the MPC for additional support after consulting a series of statutes. *Perrin v. United States* addressed the meaning of the term "bribery." 18 U.S.C. § 1952, passed by Congress in 1961, criminalized various acts related to "bribery" but did not define the term. 444 U.S. at 38-39. Mr. Perrin "argued that Congress intended 'bribery' . . . to be confined to its common-law definition, *i.e.*, bribery of a public official." *Id*. at 41. This Court rejected his argument after construing the term with reference to its "ordinary, contemporary, common meaning." *Id*. at 42 (citing *Burns v. Alcala*, 420 U.S. 575, 580-81 (1975)). It looked first to federal law. By 1961, Congress "had extended the term bribery well beyond its common-law meaning," and in two contemporary statutes, used the term "in the sense of payments to private persons to influence their actions." *Id*. at 43 (citing 47 U.S.C. § 509(a)(2); 49 U.S.C. § 1(17)(b)). The Court then noted "[a] similar enlargement of the term beyond its common-law definition . . . in the states." *Id*. at 44. 14 "had statutes which outlawed commercial bribery generally,"

and "[a]n additional 28 had adopted more narrow statutes outlawing corrupt payments to influence private duties in particular fields." *Id*. In a footnote, the Court cited the Model Penal Code for additional support, *id*. at 45 n.11 (citing MODEL PENAL CODE § 224.8 (AM. LAW INST. Prop. Off. Draft 1962)), but its analysis ultimately depended on legislative definitions. "42 states" and Congress "had extended" bribery "beyond its early common-law definitions," and this consensus contributed to "the common understanding and meaning" of the term as it appeared in § 1952. *Id*. at 45.

In *United States v. Nardello*, this Court interpreted "extortion," another crime listed in § 1952 but left undefined by Congress. Mr. Nardello, like Mr. Perrin before him, argued that Congress intended to retain the "common-law meaning of extortion—corrupt acts by public officials." 393 U.S. at 292. In the alternative, he argued that state-law labels should control, which meant that only offenses classified as "extortion" in a criminal code would qualify as "extortion" for purposes of § 1952. *Id*. at 290. This Court rejected both claims and held instead that § 1952's use of the term "extortion" referred to "acts prohibited by state law which would be generically classified as extortionate, *i.e.*, obtaining something of value from another with his consent induced by the wrongful use of force, fear, or threat." *See id*. at 290, 296. This interpretation tracked prevailing legislative trends. "[M]any States" had "statutorily expanded" extortion-style offenses "to include private acts by individuals under which property is obtained by means of force, fear or threats." *Id*. at 289. Others prohibited the same activity but called the crime something else.

*Id*. at 289-90. The Court's generic interpretation would apply to both based on the underlying elements, not the specific label applied. *Id*. at 292-93. For additional support, this Court again referenced the Model Penal Code in a footnote. The generically extortionate conduct recognized by federal law and many state statutes—obtaining property "by means of force, fear or threats"—again approximated the conduct defined as "Theft by Extortion" in the MPC. *Id*. at 290 n.6 (citing MODEL PENAL CODE § 223.4 (AM. LAW INST. Prop. Off. Draft 1962)).

Since *Taylor*, this Court has repeatedly applied the same analysis to interpret enumerated offenses listed in but not defined by a federal statute. In *Scheidler v. National Organization for Women, Inc.*, it interpreted the term "extortion" as it appears in 18 U.S.C. § 1951 and again adopted the definition used by "the Model Penal Code and a majority of States." 537 U.S. 393, 410 (2003). Both sources "recognize[d] the crime of extortion as requiring a party to obtain or to seek to obtain property." *Id*.

*Esquivel-Quintana v. Sessions* took the same approach. There, the Court looked to define generic "sexual abuse of a minor" as the term appeared in 8 U.S.C. § 1101(a)(43)(A). 137 S. Ct. 1562, 1567 (2017). It first considered 18 U.S.C. § 2243, a federal statute criminalizing "sexual abuse of a minor or ward." *Id*. at 1570. That statute "contain[ed] the only definition of th[e] phrase ['sexual abuse of a minor'] in the United States Code" and "proscribed engaging in a 'sexual act'" with "anyone under the age of 16." *Id*. (citing 18 U.S.C. §§ 2241(c), 2243(a)). § 2243 thereby provided some "evidence of the meaning of sexual abuse of a minor," but since

Congress had not incorporated § 2243's definition into § 1101(a)(43)(A), this Court's resort to federal law could not provide a "complete or exclusive definition." *Id.* at 1571. It accordingly "look[ed] to state criminal codes for additional evidence about the generic meaning of sexual abuse of a minor." *Id.* When Congress added the term to § 1101, 31 "States and the District of Columbia set the age of consent at 16 for statutory rape offenses that hinged solely on the age of the participants" and three others set the limit at an even younger age. *Id.* "A significant majority of jurisdictions," this Court concluded, "thus set the age of consent at 16 for statutory rape offenses predicated exclusively on the age of the participants." *Id.* This legislative trend resolved the undefined term's meaning, as "the general consensus from state criminal codes points to the same generic definition" established by Congress in § 2243. *Id.* at 1572. The Model Penal Code likewise "set[] the default age of consent at 16" for a similar offense, and this Court noted the point with a single citation. *See id.* at 1571 (citing MODEL PENAL CODE § 213.3(1)(a) (AM. LAW INST. 1980).

More of the same in *United States v. Stitt*. In that opinion, this Court considered "whether the statutory term 'burglary,'" as used in 18 U.S.C. § 924(e), "includes burglary of a structure or vehicle that has been adapted or is customarily used for overnight accommodation." 139 S. Ct. 399, 403-04 (2018). Per *Taylor*, the answer turned on "the generic sense in which the term [was] used in the criminal codes of most States at the time [§ 924(e)] was passed." *Id.* at 406 (quoting 495 U.S. at 598). At that time, "a majority of state burglary statutes covered vehicles

adapted or customarily used for lodging—either explicitly or by defining 'building' or 'structure' to include those vehicles." *Id.* The Court proved the point with an appendix citing contemporary burglary statutes from 31 States. *Id.* at 408. It also cited the Model Penal Code, which took the same approach. *Id.* at 406 (citing MODEL PENAL CODE §§ 220.0(1), 221.1(1) (AM. LAW INST. 1980)).

### C. Factual and Procedural History

Mr. Sanchez, a convicted felon, received a 78-month term of imprisonment after pleading guilty to possessing a handgun. Pet.App.a4. His presentence report identified a prior aggravated-assault conviction as a "crime of violence" under Section 4B1.2 of the Guidelines Manual and set the base-offense level accordingly. Pet.App.a1-a2. Mr. Sanchez objected but conceded that the issue was foreclosed by Fifth Circuit authority. Pet.App.a11. That authority held that aggravated assault, as defined in the Texas Penal Code, qualified as generic "aggravated assault," an enumerated "crime of violence" listed in § 4B1.2(b). Pet.App.a11 (citing *United States v. Cruz*, 691 F. App'x 204, 205 (5th Cir. 2017)). The district court overruled the objection at sentencing, Pet.App.a25, and imposed a sentence within the range suggested by the PSR, Pet.App.a24.

But for this authority, the prior aggravated-assault conviction would not qualify as a "crime of violence." The Guidelines Manual also defines the term to include "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." USSG §

4B1.2(a)(1). This Court held in *Borden v. United States* that offenses defined to include the reckless causation of bodily injury do not require the "use of physical force against the person of another." 141 S. Ct. 1817, 1825 (Kagan, J., writing for four justices); *id*. at 1835 (Thomas, J., concurring only in the judgment). The disputed predicate in this case, aggravated assault as defined in the Texas Penal Code, includes the reckless causation of bodily injury. TEX. PENAL CODE §§ 22.01(a)(1), 22.02(a)(1)-(2). The Texas Penal Code also defines aggravated assault to include knowing and intentional threats of serious bodily injury. TEX. PENAL CODE §§ 22.01(a)(2), 22.02(a)(2). The Fifth Circuit has declared this statute divisible, *United States v. Bowman*, 2022 WL 613466, at *1 (5th Cir. Mar. 2, 2022) (citing *United States v. Torres*, 923 F.3d 420, 425 (5th Cir. 2019)), and applying *Borden*, has held that the assault-by-injury alternative does not have as an element the use of force against another, *United States v. Gomez Gomez*, 23 F.4th 575, 577 (5th Cir. 2022). Assault-by-threat, however, still has as an element the threatened use of force. *See United States v. Garrett*, 24 F.4th 485, 491 (5th Cir. 2022). In this case, neither the government nor probation presented the district court with documents that would have allowed it to pare down the elements underlying Mr. Sanchez's aggravated-assault conviction. That evidentiary dearth precluded the district court from relying on the PSR's description of the offense to do the same, *see United States v. Gonzalez-Chacon*, 432 F.3d 334, 338 (5th Cir. 2005) (citing *United States v. Bonilla-Mungia*, 422 F.3d 316, 321 (5th Cir. 2005)), and required the Fifth

Circuit to assume conviction under the least culpable alternative, *Gomez-Perez v. Lynch*, 829 F.3d 323, 328 (5th Cir. 2016).

The Fifth Circuit's authority on generic "aggravated assault" nevertheless foreclosed Mr. Sanchez's arguments at sentencing and on appeal. It has issued two relevant opinions. The first—*United States v. Mungia-Portillo*—considered a Tennessee aggravated-assault statute defined to include reckless causation of bodily injury. 484 F.3d 813, 815 (5th Cir. 2007) (citing TENN. CODE ANN. § 39-13-102(a)(1)(A)). The defendant drew a contrast between mere recklessness, which would support an aggravated-assault conviction in Tennessee, and recklessness "under circumstances manifesting extreme indifference to the value of human life." *Id.* at 816-17 (quoting MODEL PENAL CODE § 211.2 (AM. LAW INST. 1985)). The second standard came from the Model Penal Code, which the defendant held up as an example of generic "aggravated assault." *Id.* at 816. The Fifth Circuit dismissed the difference between the two forms of recklessness as "sufficiently minor" and held "that a defendant's mental state in committing an aggravated assault, whether exhibiting 'depraved heart' recklessness or 'mere' recklessness, is not dispositive of whether the aggravated assault falls within or outside the plain, ordinary meaning of the enumerated offense of aggravated assault." *Id.* at 817. Based on that holding, the Fifth Circuit "decline[d] to exhaustively survey all state codes." *Id.* at 817, n.3.

In *United States v. Guillen-Alvarez*, the Fifth Circuit applied the holding from *Mungia-Portillo* to the statute at issue here. 489 F.3d 197, 200-01 (5th Cir. 2007).

Like Mr. Sanchez, the defendant in that case had a conviction for aggravated assault as defined in the Texas Penal Code. *Id.* at 199 (citing TEX. PENAL CODE § 22.02). He argued that the Texas version of the crime was "broader" than the enumerated offense "contemplated in the Guidelines." *Id.* at 199. The Fifth Circuit disagreed after noting "the essential similarity" between the Tennessee and Texas aggravated-assault statutes. *Id.* at 199-200 (citing TENN. CODE ANN. §§ 39-11-101(a)(1), 102(a)(1)(A); TEX. PENAL CODE §§ 22.01(a)(1), 22.02(a)(1)). That similarity "compel[led]" the same result reached in *Mungia-Portillo*. *Id.* at 200-01. Again, the Fifth Circuit failed to test the MPC's definition against the definition found in a majority of state codes.

*Guillen-Alvarez* thus resolved the sole issue advanced on appeal. Mr. Sanchez pressed the same argument preserved before the district court at the Fifth Circuit. Pet.App.a1-a2. In doing so, he attacked (1) the Fifth Circuit's focus on the MPC as out of line with this Court's authority and (2) *Mungia-Portillo* and *Guillen-Alvarez* as wrongly decided. *Appellant's Initial Brief* at 4-13, *United States v. Edward Sanchez*, Case No. 21-11281 (5th Cir. July 20, 2022). To support the second point, he conducted the multijurisdictional analysis from *Taylor* and defined the term "aggravated assault" as the term is used in a majority of state criminal codes. *Id.* at 10-13. Texas, Mr. Sanchez demonstrated, is one of only 15 jurisdictions—14 States and the District of Columbia—that define aggravated assault to include the merely reckless causation of bodily injury. *Id.* at 11. By contrast, 20 define aggravated assault to include only the intentional or knowing causation of bodily

injury, and 14 others define the offense to include the reckless causation of serious bodily injury but only under circumstances manifesting extreme indifference to the value of human life. *Id*. at 11-13. This analysis has led three Circuit Courts of Appeals to hold that aggravated-assault offenses like Mr. Sanchez's do not qualify as ones for generic "aggravated assault." *Id*. at 13-16. Mr. Sanchez pointed the Fifth Circuit to this authority but ultimately conceded that his claim was foreclosed in the government's favor for the time being. *Id*. at 3-4, 20. The government moved for summary affirmance, and a three-judge panel granted the motion on September 28, 2022. Pet.App.a2.

## REASONS FOR GRANTING THIS PETITION

### I. The Circuits are split on the question presented—what role, if any, should the MPC play in defining generic crimes?

#### a. Three Circuits have correctly limited the MPC's relevance to only those cases where its definition matches the one found in a majority of state Codes.

The Sixth Circuit recognized the Model Penal Code's secondary role in defining generic crimes in *United States v. Soto-Sanchez*. There, it interpreted the term "kidnapping" as it appeared in the Guidelines Manual, and Mr. Soto urged the Sixth Circuit to adopt as generic the definition found in the MPC. 623 F.3d 317, 322 (6th Cir. 2010). It declined the invitation based on its reading of this Court's opinion in *Taylor*. That opinion, the Sixth Circuit explained, "stated that the generic, contemporary meaning of an offense is the way the offense is defined by the criminal codes of most states." *Id* (citing *Taylor*, 495 U.S. at 598). It went on to

define generic "kidnapping" after collecting definitions from the 50 States and District of Columbia. *Id.* at 322-23.

The Ninth Circuit recognized the same limitation in *United States v. Garcia-Jimenez*. Like this one, that appeal concerned generic "aggravated assault," and the Ninth Circuit defined the term with reference to the definition adopted by "a substantial majority of U.S. jurisdictions." 807 F.3d 1079, 1086 (9th Cir. 2015). The Ninth Circuit recognized that the MPC "point[ed] in the opposite direction" but appropriately rejected its guidance in light of prevailing state-law definitions. *Id.* The MPC, "while a helpful tool in the categorical analysis, does not dictate the federal generic definition of a crime." *Id.* That is necessarily true, the Ninth Circuit determined, where the MPC's definition aligned with the approach taken in only "one-third of the states." *Id.*

The Third Circuit recognized the same limitations in *United States v. Graves*. There, it considered the generic definition of "robbery," and for the first time, confronted "a situation where the MPC's definition of a crime differs in an important respect from the approach taken by the significant majority of states." 877 F.3d 494, 503 (3d Cir. 2017). For guidance, the Third Circuit looked to this Court's opinion in *Taylor*, which "demonstrate[d] the primacy of state statutes in defining the generic version of an offense." *Id.* It then held "that the most important factor in defining the generic version of an offense is the approach of the majority of state statutes defining the crime." *Id.* The Third Circuit recognized the

MPC as a "useful starting point" but noted that its definition could not "supersede the way in which the majority of states have defined [an] offense." *Id*.

### b. The Fifth Circuit applies an MPC-only analysis for generic "aggravated assault."

The Fifth Circuit has not yet addressed the MPC's limitations. In 2006, it first identified the MPC as its "primary source for the generic contemporary meaning of aggravated assault." *United States v. Torres-Diaz*, 438 F.3d 529, 536 (5th Cir. 2006). The Fifth Circuit neither justified nor explained that initial decision but has continued to apply it ever since. *See, e.g.*, *United States v. Torres-Jaime*, 821 F.3d 577, 582 (5th Cir. 2016) (quoting *United States v. Hernandez-Rodriguez*, 788 F.3d 193, 197 (5th Cir. 2015)). That approach has allowed the Fifth Circuit to avoid testing its authority on the definition of generic "aggravated assault" against an "exhaustive[] survey" of "all state codes." *See Mungia-Portillo*, 484 F.3d at 817 n.3

## II. The Fifth Circuit's MPC-only analysis is wrong.

The Fifth Circuit's MPC-only approach cannot be squared with this Court's authority. The rule from *Taylor* is simple—an undefined offense should be interpreted with reference to "the generic sense in which the term is used in the criminal codes of most States." *Taylor*, 495 U.S. at 598. This Court recently reaffirmed that approach in *Stitt*, 139 S. Ct. at 403-04 (quoting *Taylor*, 495 U.S. at 598), and where the MPC's definition mirrors the approach taken by a majority of States, the resulting consensus provides strong evidence of the relevant term's generic meaning, *see, e.g.*, *Scheidler* 537 U.S. at 410.

That will not always be the case. The MPC is a prescriptive document. The American Law Institute drafted it in an effort to "stimulate" and "assist" legislative efforts to "appraise the content of the penal law by a contemporary reasoned judgment." Herbert Wechsler, *Foreword* to MODEL PENAL CODE at xi (AM. LAW INST. 1985)). Its purpose is therefore "critical and reformist," rather than descriptive. Sanford H. Kadish, *Fifty Years of Criminal Law: An Opinionated Review*, 87 CAL. L. REV. 943, 950 (1999). Without reference to state codes, whether the MPC's definition corresponds to the ordinary, contemporary meaning of "aggravated assault" or any other crime remains a mystery.

The Fifth Circuit's MPC-only approach creates other problems. For one, it aggrandizes the power of the federal judiciary at the expense of elected policymakers. The individual "States possess primary authority for defining and enforcing the criminal law." *Engle v. Isaac*, 456 U.S. 107, 128 (1982). A survey of state laws validates this principle by tying the definition of an enumerated offense to legislative choice. *See United States v. Rodriguez*, 711 F.3d 541, 556 (5th Cir. 2013) (en banc) (citing *Taylor*, 495 U.S. at 593-94; *Perrin*, 444 U.S. at 43-45; *Nardello*, 393 U.S. at 296), *abrogated on other grounds by Esquivel-Quintana*, 137 S. Ct. at 1569. The Fifth Circuit's approach, by contrast, ties that definition to judicial fiat aided only by an unelected group of scholars with no interest in accurately characterizing the current state of criminal law.

The Fifth Circuit's approach also resulted in a demonstrably false holding. In addition to Texas, only 11 States and the District of Columbia statutorily define

felony assault to include the reckless causation of serious bodily injury.[1] Three other States—Maryland, Massachusetts, and South Carolina—criminalize and punish certain assaults as felonies but have not defined the offenses by statute.[2] Courts in those States have interpreted the offense to include the reckless causation of bodily injury.[3]

By contrast, a significant majority of States—34 in total—exclude from their aggravated-assault definitions the reckless causation of serious bodily injury. 16 define aggravated assault to include only the intentional or knowing causation of serious bodily injury.[4] Three others—Georgia, Nevada, and Oklahoma—use different language to achieve the same result. The State of Georgia punishes certain crimes committed "maliciously" as aggravated assaults, GA. CODE ANN. § 16-5-24(a), and courts there have interpreted the term to require intent, *Hillsman v. State*, 802 S.E.2d 7, 10 (Ga. Ct. App. 2017). Nevada uses the term "willful," NEV. REV. STAT. § 200.481(1)(a), (2)(b), and its courts have likewise interpreted the term

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[1] ALASKA STAT. § 11.41.210(a)(2), (b); ARIZ. REV. STAT. § 13-1204(A)(1), (E); DEL. CODE ANN. tit. 11, § 612(a)(1)-(2), (d); D.C. CODE § 22-404(2); HAW. REV. STAT. § 707-711(a)-(b); KAN. STAT. ANN. § 21-5413(b)(2)(A); ME. STAT. tit. 17-a, § 208(A)-(B); MO. REV. STAT. § 565.052(1)(3); N.H. REV. STAT. § 631:2(I)(a); N.D. CENT. CODE § 12.1-02-02(1)(c), (e), 12.1-17-02(1)(a); TENN. CODE ANN. § 39-13-102(a)(1)(B)(i); UTAH CODE ANN. § 76-5-103(2)(a)(iii), (b)(iii).

[2] MD. CODE ANN., CRIM. LAW §§ 3-201(b), -203(a); MASS. GEN. LAWS ch. 265, § 13A(b)(1); S.C. CODE ANN. § 16-3-600(B)(1)(a).

[3] *United States v. Chisolm*, 579 F. App'x 187, 193 n.6 (4th Cir. 2014) (citing *State v. Sussewell*, 146 S.E. 697, 698 (S.C. 1929)); *Com. V. Welch*, 450 N.E.2d 1100, 1102 (Mass. App. Ct. 1983); *Nicolas v. State*, 44 A.3d 396, 403-04 (Md. 2012).

[4] FLA. STAT. §§ 784.041(1)(a)-(b), 784.045(1)(a)(1)-(2); IDAHO CODE §§ 18-903(c), -907(1)(a), -908; 720 ILL. COMP. STAT. 5/12-3(a), 5/12-3.05(a)(1); IND. CODE § 35-42-2-1(c)(1)-(2), (e)(1), (g)(1); IOWA CODE §§ 708.1(2)(a), 708.2(4), 708.4, 903.1(2); LA. REV. STAT. §§ 14:33, :34, :34.1; MINN. STAT. §§ 609.02(10), .221(1)., .223(1); MONT. CODE ANN. § 45-5-202(1); NEB. REV. STAT. § 28-308; N.M. STAT. ANN. § 30-3-2(A), (C); OHIO REV. CODE ANN. § 2903.11(A)(1); OR. REV. STAT. ANN. § 163.175(1)(a); VA. CODE ANN. §§ 18.2-51, -51.2(A); WASH. REV. CODE §§ 9A.36.011(1)(d), .36.021(1)(a); W. VA. CODE § 61-2-9(a); WIS. STAT. § 940.19(6).

as a synonym for intentional conduct, *Chatman v. State*, 2017 WL 2591451, at *2 (Nev. Ct. App. June 9, 2017) (citing *Byars v. State*, 336 P.3d 939, 949 (Nev. 2014)). Oklahoma likewise punishes as aggravated assault those committed willfully, OKLA. STAT. REV. tit. 21, §§ 642, 646(A)(1), 647, and by statute, defines willful to require intentional conduct, OKLA. STAT. REV. tit. 21, § 92. North Carolina has judicially adopted the same approach as Georgia, Nevada, and Oklahoma. Its aggravated-assault statute does not define "assault," N.C. GEN STAT. § 14-32.4, but its Court of Appeals has interpreted the offense to require intentional conduct, *State v. Griffin*, 826 S.E.2d 253, 256 (N.C. Ct. App. 2019).

14 other States define aggravated assault to include the reckless causation of serious bodily injury but only under circumstances manifesting extreme indifference to the value of human life. 13 do so by statute.[5] California's aggravated-assault statute does not define the offense, CAL. PENAL CODE §§ 242, 243(d), but courts there have interpreted it to include "an act 'inherently dangerous to others'" and "done 'with a conscious disregard of human life and safety.'" *People v. Lara*, 44 Cal. App.4th 102, 107-08 (Cal. Ct. App. 1996) (quoting *People v. Lathus*, 35 Cal. App.3d 466, 470 (Ct. App. Cal. 1973)).

The Fifth Circuit's MPC-only approach has thus far allowed it to avoid this analysis, and that error has resulted in a second circuit split. Three Circuit Courts

[5] ALA. CODE § 13A-6-20(a)(3); ARK. CODE ANN. § 5-13-201(a)(3); COLO. REV. STAT. § 18-3-202(1)(c); CONN. GEN. STAT. § 53a-59(1)(c); KY. REV. STAT. ANN. § 508.010(1)(b); MISS. CODE ANN. § 97-3-7(2)(a)(i); N.J. STAT. ANN. § 2C:12-1(b)(1), (7); N.Y. PENAL LAW § 120.10(3) 18 PA. CONS. STAT. § 2702(a)(1); 11 R.I. GEN. LAWS § 11-5-2.2(a); S.D. CODIFIED LAWS § 22-18-1.1(1); VT. STAT. ANN. tit. 13, § 1024(a)(1); WYO. STAT. ANN. § 6-2-502(a)(i).

of Appeals—the Fourth, Eighth, and Ninth—have faithfully applied *Taylor* and accounted for the prevailing aggravated-assault definition applied by a significant majority of the States. Each has held that aggravated-assault offenses defined to include the reckless causation of bodily injury do not constitute generic "aggravated assault." *See United States v. Schneider*, 905 F.3d 1088, 1095 (8th Cir. 2018); *United States v. Barcenas-Yanez*, 826 F.3d 752, 756 (4th Cir. 2016); *Garcia-Jimenez*, 807 F.3d at 1085. In fact, the Fourth Circuit addressed the same statute at issue here—aggravated assault as defined in the Texas Penal Code—and held that the "inclusion of a mere reckless state of mind renders the statute broader than the generic offense." *Barcenas-Yanez*, 826 F.3d at 756.

The Ninth Circuit reached the same result after surveying state codes in a case involving Arizona's aggravated-assault statute. *United States v. Esparza-Herrera*, 557 F.3d 1019, 1021 (9th Cir. 2009) (citing ARIZ. REV. STAT. § 13-1204(A)(11) (Supp. 2000)). Like Texas, Arizona defined aggravated assault to include the reckless causation of serious bodily injury. *Compare* TEX. PENAL CODE §§ 22.01(a)(1), .02(a), *with* ARIZ. REV. STAT. §§ 13-1203(A)(1), -1204(A)(11) (Supp. 2000). The Ninth Circuit began by addressing the MPC and found that its own commentary established an important distinction between "ordinary recklessness" and recklessness under circumstances manifesting extreme indifference to the value of human life. *Id*. at 1024 (citing MODEL PENAL CODE § 211.1 cmt.4, at 189 (AM. LAW INST. 1980)). It then conducted a survey of state criminal codes and held "that a majority of states"—at least 33—"define aggravated assault as requiring . . . a

heightened, 'extreme indifference' form of recklessness." *Id.* at 1025. A conviction under the Arizona statute thus "encompasse[d] conduct beyond" generic "aggravated assault." *Id.*

The Eighth Circuit applied the same analysis and reached the same conclusion in *United States v. Schneider*. By its count, 31 States and the District of Columbia defined "aggravated assault or an equivalent crime [to] require[] a person to cause serious bodily injury with at least an extreme indifference to human life." *Schneider*, 905 F.3d at 1094-95. North Dakota, by contrast, defined aggravated assault to include the willful causation of bodily injury, and the term "willful" included reckless conduct. *Schneider*, 905 F.3d at 1091-92 (citing N.D. CENT. CODE § 12.1-02-02(1)(c), (e), 12.1-17-02(1)(a) (Supp. 2003)). The disputed predicate thus failed to qualify as a conviction for generic "aggravated assault." *Id.* at 1094-95.

## III. The Fifth Circuit's MPC-only error misapplies *Taylor* and presents an important question of federal law.

The MPC's proper role in defining generic crimes is a recurring and "important question" of federal law that warrants this Court's review. *See* Rule 10(c), RULES OF THE SUPREME COURT OF THE UNITED STATES. District courts are routinely called upon to construct generic versions of undefined offenses listed in the Guidelines Manual, USSG § 4B1.2(a)(2), substantive sentencing laws, *see, e.g.*, 18 U.S.C. §§ 924(e)(2)(B)(ii), 3559(c)(2)(F)(i), and immigration statutes, *see* 8 U.S.C. § 1101(a)(43)(A). The Fifth Circuit's MPC-only approach has thus far shielded from a multijurisdictional analysis its erroneous definition of generic "aggravated assault," and it has compounded the error by using an MPC-only approach to the

define the term "forgery" as it appears in Title 8 of the United States Code. *United States v. Villafana*, 577 F. App'x 248, 249-50 (5th Cir. 2014); *United States v. Martinez-Valdez*, 419 F. App'x 523, 524 (5th Cir. 2011). There, Congress defined the term "aggravated felony" to include a prior conviction for any "offense relating to . . . forgery." 8 U.S.C. § 1101(a)(43)(R). An aggravated-felony conviction may subject an alien to expedited removal, 8 U.S.C. § 1228(a)(3)(A), and increased criminal penalties upon reentry, 8 U.S.C. § 1326(b)(2). The stakes raised by the question presented are accordingly high and extend beyond the Guidelines Manual. On top of that, the Fifth Circuit's MPC-only approach "conflict[s]" with the method applied by this Court in *Taylor* and *Stitt*. *See* Rule 10(c), RULES OF THE SUPREME COURT OF THE UNITED STATES.

## CONCLUSION

Petitioner respectfully submits that this Court should grant *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit

Respectfully submitted December 27, 2022.

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