No.

In the Supreme Court of the United States

NICHOLAS NEWMAN, PETITIONER,

v.

UNITED STATES OF AMERICA

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This petition seeks an order granting a certificate of appealability or, in the alternative, plenary review of the following questions:

1. Whether reasonable jurists could debate whether assault on a federal officer under 18 U.S.C. § 111 can be committed by reckless contact with another person (or, instead, requires the government to prove intentionality) when the statute criminalizes mere "simple assault," numerous other federal assault crimes require mere recklessness, and no controlling Tenth Circuit precedent forecloses that construction of the statute.

2. Whether reasonable jurists could debate whether a collateral attack waiver in a plea agreement is unenforceable when it would prevent a petitioner from obtaining habeas relief from a crime of which he is actually innocent, when the Fourth Circuit has held that collateral attack waivers are unenforceable in such cases, and no controlling Tenth Circuit precedent forecloses such a holding.

RELATED PROCEEDINGS

United States v. Newman,
No. 2:20-cr-20014-JAR-1 (D. Kan. Apr. 28, 2023)

United States v. Newman,
No. 23-3120 (10th Cir. Dec. 8, 2023),
rehearing denied (Mar. 8, 2024)

United States v. Newman,
No. 23A866 (U.S. Apr. 25, 2024)

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-7a) is unreported but available at 2023 WL 8520092. The order of the court of appeals denying rehearing (App. 29a) is unreported. The decision of the United States District Court for the District of Kansas (App. 8a-28a) is unreported but available at 2023 WL 3159615.

JURISDICTION

The judgment of the court of appeals was entered on December 8, 2023. The court of appeals denied a timely petition for rehearing en banc on March 8, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. § 2253(c)(1), which authorizes each justice of this Court to issue a certificate of appealability, and 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reproduced at App. 30a-31a.

STATEMENT OF THE CASE

Petitioner seeks a certificate of appealability ("COA") or, in the alternative, plenary review on two questions: (1) whether the statute criminalizing assault on a federal officer, 18 U.S.C. § 111, is violated only when a person knowingly or intentionally uses force against another person, or alternatively can be violated as a result of reckless contact; and (2) whether a collateral attack waiver in a plea agreement is unenforceable when it would prevent habeas relief in a case where the petitioner is actually innocent of the underlying crime.

Both are questions that reasonable jurists could debate—indeed, the United States *appears to agree* with

petitioner's position on the first question,[1] and the Fourth Circuit has adopted petitioner's position on the second question. These questions not only are subject to debate; they are being debated *right now*. A COA should thus issue to permit the Tenth Circuit to consider in the first instance these issues of broad importance. Alternatively, the Court should take up these questions on plenary review.

Both questions presented are indisputably important. The assault on a federal officer statute, 18 U.S.C. § 111, as the name suggests, criminalizes assaults on federal officers. For decades it has protected the lives and physical safety of law enforcement officers. Congress enacted § 111 to provide "uniformly vigorous protection of federal personnel" to the "maximum" extent while engaged in their duties. *United States v. Feola*, 420 U.S. 671, 684 (1975). The ongoing relevance of that congressional goal is reflected in the data: in the last five years, 9,163 federal officers have been assaulted or killed. FBI, *Federal Topic Page*, in Law Enforcement Officers Killed and Assaulted, 2022, at 4 (2023) (hereinafter

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[1] In response to petitioner's application for a COA submitted to Circuit Justice Gorsuch, No. 23A866, the United States stated that its "current position," "informed by the unanimous view of the courts of appeals, is that conviction under [18 U.S.C.] Section 111(a) and (b) *requires the knowing use of force*." Opposition to Application for a Certificate of Appealability, *Newman v. United States*, No. 23A866 (U.S.) (hereinafter "COA Opp.") at 25 (emphasis added). But that formulation artfully evades the relevant question, which is whether conviction requires the knowing use of force *against the person of another*. The United States appears to take the position that, so long as there has been a "knowing use of force," that use of force need not be intentionally or knowingly directed against anyone. *See id.* 21-22 (endorsing *United States v. Gagnon*, 553 F.3d 1021, 1027 (6th Cir. 2009), *cert. denied*, 558 U.S. 822 (2009) (holding that the statute is violated even in cases where a defendant does not direct force against anyone)).

"Federal LEOKA"). And the circumstances under which collateral attack waivers may be enforced has vexed the lower courts, sometimes to the detriment of the actually innocent.

The standard for the issuance of a COA is modest. A COA may issue if "reasonable jurists could debate whether (or, for that matter, agree that) the [habeas] petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000) (internal quotation marks omitted); *see Autry v. Estelle*, 464 U.S. 1301, 1302 (1983) (White, J., in chambers) (concluding that a habeas petitioner had raised a "substantial question" that did not "lack[] substance," and thus "I am compelled to issue a certificate of probable cause to appeal, as I am authorized to do under § 2253"); *Davis v. Jacobs*, 454 U.S. 911, 918 (1981) (Rehnquist, J., dissenting) (certificate should issue if "any Member of this Court believes [the petition] to be deserving of a certificate of probable cause").

Yet the Tenth Circuit summarily denied petitioner a COA. It did so *sua sponte* without soliciting or receiving appellee United States' position. And the Tenth Circuit's position appears to contradict the position the United States later took, *see supra* note 1.

The Tenth Circuit gave two reasons for its holding. First, it believed that it had already decided the question in *United States v. Kendall*, 876 F.3d 1264 (10th Cir. 2017). *See* App. 5a-6a. But no party in that case briefed the question of the necessary *mens rea* to violate 18 U.S.C. § 111(b), meaning, under Circuit precedent governing precedent, *Kendall* should not have been treated as controlling on this question. *See United States v. Wolfname*, 835 F.3d 1214, 1219 (10th Cir. 2016) (explaining prior case was not precedential where party "[n]ever argued that assault was an element of his

conviction"); *see also United States v. Taylor*, 514 F.3d 1092, 1099 (10th Cir. 2008) (Gorsuch, J.) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.").

Second, it suggested that two other circuits recently held that § 111(b) "requires an intentional assault," App. 6a. Those cases are inapposite, as petitioner would have explained if given the opportunity. One addressed a pre-1994 version of the statute, which has since been amended in a manner that leaves no doubt it reaches reckless assaults. *See United States v. McDaniel*, 85 F.4th 176, 183-84 (4th Cir. 2023) (evaluating § 111 "as it existed" at the time of conviction in 1993). The other relied on precedent interpreting the pre-1994 version without accounting for the amendment in the statutory language. *See United States v. Medearis*, 65 F.4th 981, 987 (8th Cir. 2023) (relying on *United States v. Hanson*, 618 F.2d 1261 (8th Cir. 1980) for the proposition that "[a] defendant must intentionally assault someone under § 111").

Finally, the Tenth Circuit declined to decide whether a COA should issue on the question whether petitioners' collateral attack waiver is unenforceable. App. 3a-4a. But a COA should obviously issue on that question. Numerous courts outside the Tenth Circuit have refused to enforce waivers in circumstances, just like those here, where an appellant raised a challenge to a conviction following a change in law that rendered him actually innocent. *See United States v. McKinney*, 60 F.4th 188, 192-93, (4th Cir. 2023) (holding that a waiver does not bar a claim for relief where later law invalidates a prior conviction); *United States v. Cornette*, 932 F.3d 204, 208-10 (4th Cir. 2019) (similar); *United States v. Adams*, 814 F.3d 178, 182 (4th Cir. 2016); *Williams v. United States*, 568 F. Supp. 3d 1115, 1126 (W.D. Wash. 2021) (similar); *Thompson v.*

United States, No. 14-0340, 2020 WL 1905817, at *3 (N.D. Tex. Apr. 17, 2020) (similar); *see also United States v. Torres*, 828 F.3d 1113 (9th Cir. 2016) (vacating the lower court decision and allowing the defendant to challenge his sentence despite an appeal waiver based on the Supreme Court's ruling in *Johnson v. United States*, 576 U.S. 591 (2015)). The Tenth Circuit has no precedent to the contrary, and as the multitude of courts holding waivers unenforceable in these circumstances show, the question is at least debatable.

A COA should be issued to allow a full airing of these issues on the merits in the Tenth Circuit. Alternatively, given the broad importance of the questions presented, the Court may wish to set this case for plenary review to resolve these purely legal questions on two recurrent, exceptionally important issues of federal law.

1. Petitioner Nicholas Newman was involved in several small-scale drug and firearms transactions with undercover agents from the Bureau of Alcohol, Tobacco, and Firearms. AA47-48, 66-69, 105-06.[2] In the last of those transactions, while seated in a parked car with an undercover agent, petitioner reached for a firearm to show an agent how to load it. AA103. The agent, fearful that petitioner was reaching for the firearm to use it, suddenly grabbed for it as well. AA95.

A struggle ensued. AA95-96; *see also* AA139-140. For twenty-three seconds, the agent and petitioner fought to get the firearm away from one another. AA96. Fearing for his own life, petitioner eventually wrestled the firearm from the agent's hands, injuring her thumb in the process. AA57, 99. Moments later, federal agents waiting nearby swarmed the scene and arrested petitioner. AA99.

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[2] "AA" citations are to the Appellant's Appendix filed on October 23, 2023 and available on the Court of Appeals docket.

On May 19, 2021, petitioner pleaded guilty to one count of forcible assault of a federal officer using a dangerous weapon in violation of 18 U.S.C. §§ 111(a)(1) and (b), and one count of using, carrying, possessing, or brandishing a firearm in furtherance of a crime of violence in violation of 18 U.S.C. §§ 924(c)(1)(A), 924(c)(3)(A), and 2. App. 2a. The plea agreement included a stock collateral attack waiver. On September 27, 2021, the district court sentenced petitioner to 120 months on the § 111 count and 60 months on the § 924(c) count, totaling 180 months of imprisonment. App. 3a.[3]

One year later, petitioner moved under 28 U.S.C. § 2255 to vacate his 18 U.S.C. § 924(c) conviction and remand for an evidentiary hearing on his sentence. App. 3a. Specifically, petitioner asserted that he is innocent of his § 924(c) conviction after *Borden v. United States*, 593 U.S. 420 (2021), which held that crimes that can be committed without knowingly or intentionally using force against another person are categorically *not* crimes of violence. App. 2a, 3a. (citing *Borden*, 593 U.S. at 423-24). Petitioner argued that 18 U.S.C. § 111(a)(1) and (b) are not crimes of violence because they can be committed without knowingly or intentionally directing force against another person and thus cannot support an 18 U.S.C. § 924(c) conviction. App. 3a.

On April 28, 2023, the district court dismissed petitioner's motion and denied a COA. App. 27a. The district court held that the collateral attack waiver in his guilty plea is enforceable and that 18 U.S.C. § 111(b) qualifies as a predicate crime of violence. App. 13a, 24a.

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[3] The district court recently reduced petitioner's sentence on the 18 U.S.C. § 111 count from 120 months to 109 months in accordance with a change to the sentencing guidelines. *See* Dist. Ct. Dkt. 85. Petitioner's 60-month consecutive sentence on the 18 U.S.C. § 924(c) count—the sentence he attacks—remains intact. *See id.*

Petitioner requested a COA from the Tenth Circuit to challenge the district court's denial of his 28 U.S.C. § 2255 motion. *See* 28 U.S.C. § 2253(c)(1)(B). He sought to raise two arguments on appeal: (1) the collateral attack waiver provision in his plea agreement is unenforceable; and (2) he is actually innocent of his 18 U.S.C. § 924(c) conviction because 18 U.S.C. § 111 is not a crime of violence under *Borden*. App. 3a-4a.

The Tenth Circuit reached only petitioner's argument that § 111 does not qualify as a crime of violence under *Borden*. App. 4a. The Circuit determined that, in *Kendall*, 876 F.3d at 1270, it already had held that a conviction under 18 U.S.C. § 111(b) "requires a more culpable *mens rea* than mere recklessness." App. 5a-6a. It "further note[d] that at least two post-*Borden* decisions from . . . sister circuits have held that 18 U.S.C. § 111(b) requires an intentional assault and, thus, qualifies as a predicate crime of violence to sustain a conviction under 18 U.S.C. § 924(c)." App. 6a. It concluded that "[g]iven this authority, no reasonable jurist would debate" that 18 U.S.C. § 111(b) cannot be committed with a *mens rea* of recklessness. App. 6a. It issued a *per curiam* order before the United States filed any responsive brief in the appeal. Petitioner timely filed a petition for rehearing en banc, which the Circuit denied on March 8, 2024. App. 29a.

2. Petitioner submitted an application for a COA to Justice Gorsuch pursuant to 28 U.S.C. § 2253(c)(1) on March 28, 2024. Justice Gorsuch called for a response to the application. *See Newman v. United States*, No. 23A866 (U.S. Apr. 25, 2024).

a. The United States opposed the application. It first leveled a procedural attack on petitioner's application, taking the position that individual justices should grant COA applications only in "rare and unusual circumstances," and that otherwise COA applications should be channeled to the whole Court via petitions for

writs of certiorari. COA Opp. 9-11. The United States contended that the Court's decision in *Hohn v. United States*, 524 U.S. 236 (1998), recognizing the Court's statutory certiorari jurisdiction under 28 U.S.C. § 1254(1) to review a court of appeals' denial of a COA, effectively eliminated any warrant for the exercise of justices' COA authority under 28 U.S.C. § 2253(c)(1) except in "extraordinary" cases. COA Opp. 9-10.

b. On the merits, the United States disputed petitioner's entitlement to a COA on either question presented. COA Opp. 12-25.

First addressing petitioner's collateral attack waiver, the United States argued that the waiver is valid and enforceable and that the Fourth Circuit's many decisions holding that such waivers are unenforceable in cases like this one—involving claims of actual innocence—are "different[]" from this case. COA Opp. 16. It further argued that the principle recognized in *Bousley v. United States*, 523 U.S. 614, 622-623 (1998), should apply in cases where a habeas petitioner seeks to set aside a collateral attack waiver, and thus that petitioner should be required first to make a showing that he is innocent of the charges the government dismissed before he may be permitted to overcome the collateral attack waiver. COA Opp. 16. The United States argued that petitioner could not make that showing in this case, and that the waiver should be enforced for that reason. COA Opp. 16-17.

Turning to the *mens rea* necessary to violate 18 U.S.C. § 111, the United States argued the statute establishes a "general-intent" crime and that a defendant must "knowingly take a forcible act" to violate it. COA Opp. 18-19. The United States emphasized that "[t]he courts of appeals are … all in agreement that defendants convicted under Section 111(a)(1) and (b) must knowingly or intentionally take forcible acts." COA Opp. 19. Accordingly, the United States argued, the

Tenth Circuit correctly denied a COA because those cases establish that 18 U.S.C. § 111 remains a crime of violence after *Borden*. COA Opp. 19.

Rejecting petitioner's argument that the inclusion of "simple assault" in the statute shows that it can be violated in cases involving reckless contact, the United States argued that the commission of a "simple assault" under the statute still requires the knowing use of force. COA Opp. 17. The United States explained:

> The phrase ["simple assault"] functions "as a term of art," calling on courts to read the six types of conduct in Section 111(a)'s misdemeanor offense "through the common-law lens of 'simple assault' as excluding cases involving forcible physical contact or the intent to commit a serious felony." *United States v. Gagnon*, 553 F.3d 1021, 1027 (6th Cir.), *cert. denied*, 558 U.S. 822 (2009).

COA Opp. 21. (Candidly, petitioner cannot follow the logic in the United States' explanation).

The United States did not dispute petitioner's contention that most other federal assault crimes are not crimes of violence after *Borden* because they can be committed by reckless contact. COA Opp. 22-23. Responding to petitioner's contention that it would be anomalous for assault on a federal officer to require a higher *mens rea* (and correspondingly higher burden of proof) than other forms of assault, the United States argued that "[w]hatever might be said about those other statutes, statutory context—such as Section 111's unique 'forcibly' element—matters for mens rea purposes." COA Opp. 22.

Finally, the United States disputed petitioner's claim that it had previously taken the position that assault on a federal officer can be committed without the knowing or intentional use of force against another. COA Opp. 23-25.

The United States argued that petitioner had misinterpreted its earlier arguments and charging decisions, while admitting that in one instance it had made arguments that were "wrong." COA Opp. 24. The United States further explained that "the current position of the United States, informed by the unanimous view of the courts of appeals, is that conviction under Section 111(a) and (b) requires the knowing use of force." COA Opp. 25.

c. On April 25, 2024, Justice Gorsuch denied the application "without prejudice to the filing of a petition for a writ of certiorari seeking review of the December 8, 2023 decision of the United States Court of Appeals for the Tenth Circuit, case No. 23-3120." *United States v. Newman*, No. 23A866 (U.S. Apr. 25, 2024).

REASONS FOR GRANTING THE PETITION

The Court should grant the petition. Petitioner has far exceeded the showing required for issuance of a COA. The standard is whether reasonable jurists could debate the questions presented. Both questions in the petition are clearly debatable. They also implicate recurrent, critically important, and unresolved issues of federal law that affect the physical safety of federal officers and access to collateral review for federal prisoners nationwide. The Court therefore may wish to grant plenary review to resolve these questions on the merits.

I. THE COURT SHOULD GRANT A CERTIFICATE OF APPEALABILITY

A COA should issue. The Tenth Circuit erred in its analysis of the statutory question in this case. The text of the post-1994 federal assault statute, as explained *infra*, shows the statute reaches cases where force is not intentionally or knowingly directed against a federal officer. The Tenth Circuit panel below held that it had already resolved this question in a controlling case—*Kendall*. But the requisite *mens rea* of the statute was not

at issue in *Kendall*. The Tenth Circuit panel below also looked to two other circuits as persuasive authority suggesting that the statute requires intentionality. But the decisions that the Circuit looked to for persuasive authority either applied the pre-1994 statute or relied on precedent construing the pre-1994 statute.

The Tenth Circuit did not reach the question of the enforceability of petitioner's collateral attack waiver, but reasonable jurists could debate it. Numerous reasonable jurists have already held that collateral attack waivers are unenforceable in precisely the circumstances of this case—where enforcing the waiver would prevent a habeas petitioner from raising an actual innocence claim. *See, e.g.*, *Adams*, 814 F.3d at 182-83; *McKinney*, 60 F.4th at 192-93.

A. Reasonable Jurists Could Debate Whether Assault on a Federal Officer under 18 U.S.C. § 111(b) Can Be Committed Without Intentionally or Knowingly Using Force Against Another

1. This Court held in *Borden* that a criminal offense with a *mens rea* of recklessness does not qualify as a valid predicate for Armed Career Criminal Act (ACCA) sentencing enhancement as a crime of violence. 593 U.S. at 423. Crimes of violence require "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). "The term crime of violence in § 16(a) cannot be said naturally to include … crimes of recklessness or negligence." *Borden*, 593 U.S. at 438 (internal quotation marks omitted). The use of physical force applies "'only to intentional acts designed to cause harm.'" *Id.* at 446 (Thomas, J., concurring).

This Court has yet to address whether 18 U.S.C. § 111 can constitute a valid predicate for "crime of violence" enhancement under *Borden*, 593 U.S. at 421. But it plainly cannot. That is clear for two independent reasons. *First*,

assault on a federal officer can be committed by means of "simple assault." While petitioner and the United States dispute exactly why "simple assault" can be committed without the intentional or knowing use of force against another, *the parties appear to agree* that it can be committed in that manner. As a consequence § 111(b), which can be violated by committing "simple assault" with a deadly weapon, is not a crime of violence.

Second, assault on a federal officer is a "general intent" crime. As numerous federal courts have held, and as the United States has even argued to this Court previously, general intent assaults can be committed without intentionally or knowingly using force against another person.

a. Because assault on a federal officer can be committed by means of "simple assault," it follows that the statute can be violated without the intentional or knowing use of force against another person. Section 111 of Title 18 provides:

> **(a) In General.** Whoever—
>
> > **(1)** forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of official duties; or
> >
> > **(2)** forcibly assaults or intimidates any person who formerly served as a person designated in section 1114 on account of the performance of official duties during such person's term of service,
>
> shall, where the acts in violation of this section constitute only simple assault, be fined under this title or imprisoned not more than one year, or both, and where such acts involve physical contact with the victim of that assault or the intent to commit another

> felony, be fined under this title or imprisoned not more than 8 years, or both.
>
> **(b) Enhanced Penalty.**
>
> Whoever, in the commission of any acts described in subsection (a), uses a deadly or dangerous weapon (including a weapon intended to cause death or danger but that fails to do so by reason of a defective component) or inflicts bodily injury, shall be fined under this title or imprisoned not more than 20 years, or both.

18 U.S.C. § 111(a)-(b) (emphases added).

Since it was amended in 1994, the statute has expressly criminalized "simple assault," § 111(a), a term of art distinct from the unadorned word "assault" that Congress otherwise uses in the federal criminal code. *See, e.g.*, 18 U.S.C. §§ 113(a)(1)-(8). "Simple assault" appears in the Model Penal Code ("MPC"), the *Final Report of The National Commission on Reform of Federal Criminal Laws* (1971), and in 18 U.S.C. § 113(a)(5). In all those places, "simple assault" can be committed without the intentional or knowing use of force against another person. *See* MPC, § 211.1(1); *Final Report*, at 176; *United States v. Delis*, 558 F.3d 177, 180-82 (2d Cir. 2009). State criminal codes which employ the same phrase give it the same meaning,[4] and the Tenth Circuit itself has employed

[4] For example, Pennsylvania's "simple assault" statute expressly incorporates reckless infliction of battery and negligent infliction of injury with a deadly weapon. *See* 18 Pa. Stat. and Cons. Stat. Ann. § 2701 (West 2014) ("[A] person is guilty of assault if he[] attempts to cause or intentionally, knowingly or recklessly causes bodily injury to another."); *Vicky M. v. Ne. Educ. Intermediate Unit 19*, 486 F. Supp. 2d 437, 457-58 (M.D. Pa. 2007) ("In Pennsylvania the common law torts of assault and battery are consolidated under the term 'assault.'" (citing 18 Pa. Stat. and Cons. Stat. Ann. § 2701)). "Section 2701 was derived from Section 211.1 of the Model Penal Code," "eliminat[ing] … the distinction between 'assault' and

the MPC definition of "simple assault" for statutory interpretation purposes in at least one case, albeit pre-*Borden*. *See United States v. Winder*, 926 F.3d 1251, 1255 (10th Cir. 2019) (interpreting a Wyoming officer assault statute).

The most straightforward reading of § 111 is that "simple assault," like "simple assault" in 18 U.S.C. § 113(a)(5), "includes completed common-law battery." *Delis*, 558 F.3d at 181 (Livingston, J.) (explaining how to interpret "simple assault" in 18 U.S.C. § 113(a)(5)). Thus, where the "simple assault" involves recklessly inflicted offensive touching, it is a misdemeanor punishable by up to 1 year in prison. *See* 18 U.S.C. § 111(a). Where "that assault" involves "physical contact" (meaning more than mere offensive touching) the maximum term is eight years. *See id.*; *cf. Johnson v. United States*, 559 U.S. 133, 140 (2010) ("the phrase 'physical force' means *violent* force"). And where the acts involve use of a "deadly weapon" the maximum term is 20 years. *See* 18 U.S.C. § 111(b).

That reading is bolstered by the longstanding rule that "[w]hen interpreting federal criminal statutes that are silent on the required mental state," courts "read into the statute only that *mens rea* which is necessary to separate wrongful conduct from otherwise innocent conduct." *Elonis v. United States*, 575 U.S. 723, 736 (2015) (internal quotation marks omitted). Section 111 does not enumerate a requisite mens rea; in its absence, the

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'battery.'" *Morency v. City of Allentown*, No. 19-5304, 2020 WL 1935640, at *7 n.21 (E.D. Pa. Apr. 22, 2020). New Jersey's assault statute also defines "simple assault" as a reckless infliction of injury or negligent infliction of injury with a deadly weapon. N.J. Stat. Ann. § 2C:12-1 (West 2022). Same with New Hampshire, South Dakota, Vermont, and Mississippi. N.H. Rev. Stat. § 631:2-a (West 1979); S.D. Codified Laws § 22-18-1 (West 2021); Vt. Stat. Ann. tit. 13, § 1023 (West 1981); Miss. Code Ann. § 97-3-7 (West 2019).

ordinary presumption is, therefore, that each element of the crime can be committed recklessly. *See, e.g.*, *id.* at 745 (Alito, J., concurring in part and dissenting in part).

Finally, imposing a mens rea of recklessness adheres to the legislative purpose of § 111 to broadly protect federal officers. Through § 111, Congress sought to provide "uniformly vigorous protection of federal personnel" to the "maximum" degree. *Feola*, 420 U.S.at 684. Courts construing § 111 must "effectuate the congressional purpose of according maximum protection to federal officers by making prosecution for assaults upon them cognizable in the federal courts." *Id.*

It would be counterintuitive to conclude that assault on a federal officer requires a more demanding mens rea than virtually all other federal assault statutes. Other federal statutes criminalizing assault can be violated recklessly. For example, assault causing serious bodily injury, 18 U.S.C. § 113(a)(6), can be committed recklessly. *See United States v. Devereaux*, 91 F.4th 1361, 1362 (10th Cir. 2024). Assault by wounding, 18 U.S.C. § 113(a)(4), can be committed recklessly. *See United States v. Pettigrew*, 468 F.3d 626, 639 & n.5 (10th Cir. 2006). Simple assault, 18 U.S.C. § 113(a)(5), can be committed recklessly. *See Delis*, 558 F.3d at 180-81. Domestic assault by a habitual offender, 18 U.S.C. § 117, can be committed recklessly. *See Silk v. United States*, 955 F.3d 681, 684 (8th Cir. 2020). One would expect § 111 to reach at least as broadly as these other federal assault statutes given its purpose of protecting federal officials from harm.

b. The United States disagrees with petitioner's interpretation of the statute, but its bottom line position appears to be *the exact same* as petitioner's: simple assault under the statute can be committed without intentionally or knowingly using force against a federal officer. *See* COA Opp. 21-22 (citing *Gagnon*, 553 F.3d at 1027). In cases in the lower courts, and in its opposition to

petitioner's COA application, the United States has taken the position (and four courts of appeals have agreed with it) that "simple assault" can be committed without committing an "assault" at all. Under that interpretation, petitioner must win because an assault crime that can be committed without committing "assault" plainly does not involve the use of force against another that *Borden* requires.

The United States' position is well articulated in *Gagnon*, the leading case it relied on in its opposition to petitioner's COA application. In *Gagnon*, the United States brought an assault prosecution under § 111 against a defendant who had "forcibly resisted, impeded, and interfered with" federal officers but had not assaulted anyone. 553 F.3d at 1022; *see also id.* at 1027. Specifically, "agents tried to force Gagnon to sit down, he resisted, and they handcuffed him." *Id.* at 1022; *see also id.* at 1027 & n.7 (simple assault charge was supported because "Gagnon acted defiantly while being detained and taken away"; court did not need to resolve whether his spitting at the officers was assault).

The Sixth Circuit held that these acts, *e.g.* "imped[ing]" an officer, are "simple assaults" under the statute. *Id.* at 1027. The Sixth Circuit stated in *Gagnon* that, when a "defendant unlawfully resist[s] a federal agent where 'the physical conduct is initiated by the arresting officer rather than the arrestee,'" that constitutes misdemeanor simple assault on the officer *by the defendant*. *Id.* (explaining that it would be merely simple assault because "in those cases, the arrestee would not have 'forcibly' initiated the physical contact"). The court of appeals went on to explain that if the resistance involved "pushing, punching, or headbutting," that would be felony assault on a federal officer. *Id.* Under the *Gagnon* interpretation of simple assault—endorsed by the United States (COA Opp. at 21-22)—not even a

reckless *mens rea* is needed to commit a "simple assault" because a fleeing arrestee tackled by a federal agent is guilty of "simple assault" under *Gagnon* by "forcibly resist[ing]" by using his feet to propel himself away.[5]

The interpretation adopted by the Sixth Circuit in *Gagnon* is also used in the Fourth, Fifth, and Seventh Circuits. *See United States v. Stands Alone*, 11 F.4th 532, 535 (7th Cir. 2021) (agreeing with *Gagnon*); *see also United States v. Williams*, 602 F.3d 313, 317-18 (5th Cir. 2010) (same); *United States v. Briley*, 770 F.3d 267, 274-75 (4th Cir. 2014) (same).

In *Williams*, the Fifth Circuit joined *Gagnon* in holding that "non-assaultive conduct" comes within the statute. 602 F.3d at 317. The court thus upheld a § 111(a) conviction because the defendant "swung her arms for the specific purpose of resisting the officers' attempts to handcuff her." *Id.* at 318. And in *Briley*, the Sixth Circuit adopted *Gagnon*'s analysis in an effort to situate into the statute "[f]acts of the more passive" and "nonforcible" kind. 770 F.3d at 275.

In *Stands Alone*, after a federal officer sprayed pepper spray at the defendant, the defendant discharged a fire extinguisher causing the pepper spray to fly back

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[5] *See* Brief for the United States at 10, *United States v. Wolfname*, 835 F.3d 1214 (10th Cir. 2016) (No. 15-8025), 2016 WL 279133, at *10 ("The issue of whether a defendant can be convicted of violating 18 U.S.C. § 111 for forcibly committing one of the five prohibited acts other than assault, without having also committed an underlying assault, involves questions some appellate courts have described as 'surprisingly vexing' …. Of the courts that have acknowledged the complexity of § 111, many have ultimately concluded that the statute plainly prohibits more forms of forcible conduct than merely assault."); *see id.* at *12 ("Although all six actions require the defendant to act 'forcibly,' only one constitutes assault. The other five prohibited actions involve forcible behavior that threatens federal officers or obstructs their official activities but do not necessarily constitute a formal assault.").

into the federal officer's face. 11 F.4th at 533. The indictment for violation of §§ 111(a) and (b) did not charge the defendant with assault; instead it specified that he "knowingly and forcibly resisted, intimidated, and interfered with" an officer "while she was engaged in her official duties, and in doing so, inflicted bodily injury to [her]." *Id.* The defendant argued that by failing to charge him with assault the indictment was defective. *Id.* The Seventh Circuit disagreed, holding that "[a] proper reading of the text militates against defining resist, oppose, impede, intimidate, and interfere merely as synonyms of 'assault.'" *Id.* at 535. "[R]equiring assault as an essential element of *every* § 111 offense" the Seventh Circuit held "would render the remaining five verbs superfluous." *Id.* The Seventh Circuit thus joined the Sixth Circuit's position (at the United States' urging) and affirmed the defendant's conviction. *Id.* at 535, 537.

To be sure, other Circuits have parted with the Fourth, Fifth, Sixth, and Seventh Circuits on this question. The Second, Ninth, and Tenth Circuits have squarely rejected the *Gagnon* interpretation. *See United States v. Chapman*, 528 F.3d 1215, 1219 (9th Cir. 2008); *United States v. Davis,* 690 F.3d 127, 135 (2d Cir. 2012); *Wolfname*, 835 F.3d at 1218-19, 1221 n.3 (10th Cir. 2016).

c. Whether the United States is right, that "simple assault" can be committed via "non-assaultive conduct," or petitioner is right, that "simple assault" includes reckless batteries, the outcome is the same. Because every type of assault under § 111 can be committed by "simple assault," *see supra*, no form of assault on a federal officer is a categorical crime of violence. As relevant here, for example, assault on a federal officer with a deadly weapon, criminalized in § 111(b), can be committed by "simple assault" with a deadly weapon.

The list of acts that clearly do not meet the test of *Borden* but that it appears petitioner and the United

States[6] would both agree constitute simple assault under § 111 include:

- Slamming a door to impede a federal officer, inadvertently catching the officer's hand in the door
- Driving a car recklessly through a group of federal officers in an effort to escape, accidentally striking one
- Being tackled while fleeing from a federal officer, injuring the officer
- Driving a car drunkenly and striking a federal officer with it
- Firing a gun straight into the air in an effort to scare off pursuing federal officers, injuring an officer
- Resisting an officer's efforts to apply handcuffs, making contact with the officer in the process
- Laying down road spikes to prevent pursuit which are then driven over by a federal officer
- Jockeying with an undercover agent for possession of an unloaded firearm

All of these cases would involve a "simple assault" whether because the statute criminalizes reckless battery (petitioner's view) or because the statute reaches any conduct that forcibly "assaults, resists, opposes, impedes, intimidates, or interferes with" a federal officer (the United States' view).

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[6] The United States' position would apparently go even further than petitioner's and also include damaging property to "interfere" with federal officers, such as using a gun to destroy the security cameras used to secure a federal building or using a gun to destroy a drone being used as part of a pursuit.

2.a. The Court need not even reach the "simple assault" issue to conclude that 18 U.S.C. § 111 can be violated without intentionally or knowingly using force against another. Numerous courts, and the United States, have taken the position that § 111 is a "general intent" crime, and have taken the position that "general intent" assaults can be committed without intentionally or knowingly using force against another. Thus, even putting aside whether "simple assault" can be committed without intentional or knowing use of force against another, the fact that courts nationwide agree that § 111 is a general intent crime, and that general intent assaults can be committed by merely making reckless contact with another person, conclusively establishes that § 111 is not a crime of violence under *Borden*.

The United States has consistently argued that § 111 is a general intent crime, both to this Court and to the circuit courts. The United States has already taken that position in this very case. COA Opp. 18-19. And the United States has taken that position in other briefs in this Court as well. Reply In Support of Application for a Certificate of Appealability at 13, *Newman v. United States*, No. 23A866 (U.S.) (hereinafter "COA Reply") (collecting briefs). The United States has also consistently taken this position in briefs in the circuit courts. *See* COA Reply 13-14 & n.5 (collecting briefs).

Consistent with the government's position, several courts of appeals have held that § 111 is a general intent crime. *See United States v. Jim*, 865 F.2d 211, 215 (9th Cir. 1989), *cert. denied*, 493 U.S. 827 (1989) ("We hold that § 111 is a general intent crime."); *see also* COA Reply 14 (collecting cases).

Contrary to the position it took in opposition to petitioner's COA application, COA Opp. 19, the United States has also represented to this Court that general intent crimes can be committed with a *mens rea* of

recklessness. As the United States told the Court in *Voisine v. United States*, 579 U.S. 686 (2016):

> While there is some historic ambiguity to the term, compare *United States v. Bailey,* 444 U.S. 394, 403[-04] (1980), with *Carter v. United States,* 530 U.S. 255, 268 (2000), "general intent" traditionally encompassed not only purposeful, but also knowing and reckless conduct.

Brief for the United States at 18, *Voisine v. United States*, 579 U.S. 686 (2016) (No. 14-10154), 2016 WL 1238840, at *18. And as it stated in *Borden*:

> This Court has accordingly "described reckless conduct as morally culpable" in "a wide variety of contexts." *Elonis v. United States,* 135 S. Ct. 2001, 2015 (2015) (Alito, J., concurring in part and dissenting in part) (citing *Farmer,* 511 U.S. at 835-836; *Garrison v. Louisiana,* 379 U.S. 64, 75 (1964); *New York Times Co. v. Sullivan,* 376 U.S. 254, 279-280 (1964); *Tison v. Arizona,* 481 U.S. 137, 157 (1987)). The recklessness default is also expressly codified in many state criminal codes. And even as to jurisdictions that use common-law terminology to describe mens rea, the Model Penal Code has observed - contrary to petitioner's description (U.S. Br. 4) - a "rough correspondence" between its own default of recklessness "and the common law requirement of 'general intent.'" Model Penal Code § 2.02 (sub-sec. (3) note) (1985).

Brief for the United States at 16, *Borden v. United States*, 593 U.S. 420 (2021) (No. 19-5410), 2020 WL 4455245, at *16 (footnote omitted). The United States has also told circuit courts that general intent crimes correspond to a *mens rea* of recklessness. *See* Brief for the United States at 18 n.3, *United States v. Mann*, 899 F.3d 898 (10th Cir. 2018) (No. 17-2117), 2017 WL 4510952, at *18 n.3.

Several courts of appeals have thus held that "general intent" crimes correspond to a *mens rea* of recklessness. *See United States v. Zunie*, 444 F.3d 1230, 1234-35 (10th Cir. 2006); *see also United States v. Ashley*, 255 F.3d 907, 912 (8th Cir. 2001); *see also United States v. Loera*, 923 F.2d 725, 730 (9th Cir. 1991) , *cert. denied*, 502 U.S. 854 (1991); *Watson v. Dugger*, 945 F.2d 367, 370 (11th Cir. 1991).

The Tenth Circuit itself has held that "[w]hat the common law would traditionally consider a 'general intent' crime, such as assault resulting in serious bodily injury, encompasses crimes committed with purpose, knowledge, or recklessness." *Zunie*, 444 F.3d at 1234. In *Zunie* the Tenth Circuit considered the *mens rea* necessary to commit assault resulting in serious bodily injury in § 113(a)(6). The case involved a reckless assault (a serious car accident as a result of drunken speeding) committed against a Zuni Indian family on the Zuni Reservation. *Id.* at 1232-33. After his conviction under § 113(a)(6), the defendant argued that insufficient evidence supported the jury's verdict because the government failed to prove that he acted with knowledge or purpose, which he argued were necessary to convict him of assault under § 113(a)(6). *Id.* at 1233-36. The Tenth Circuit rejected this argument. *See id.* at 1233. It noted that it had already held that § 113(a)(6) "is a general intent crime." *Id.* After extensively discussing the relationship between the common-law *mens reas* of "specific" and "general" intent and the MPC *mens reas* of purpose, knowledge, recklessness, and negligence, the Tenth Circuit laid down a rule for determining the MPC *mens rea* for common-law "general intent" crimes: in the Tenth Circuit, "[w]hat the common law would traditionally consider a 'general intent' crime, such as assault resulting in serious bodily injury, encompasses crimes committed with purpose, knowledge, or recklessness." *Id.* at 1234.

The Tenth Circuit therefore held that "a finding of … recklessness supports a conviction for assault resulting in serious bodily injury" and "sufficient evidence" supported a finding that the defendant acted recklessly. *Id.* at 1235.

b. In its opposition to petitioner's COA application in this Court, the United States took the position that § 111 "requires a defendant to knowingly take a forcible act." COA Opp. 19. That formulation appears to have been an artful way of evading the relevant question, which is whether § 111 requires the knowing use of force *against another*, which *Borden* held is required to establish that a crime is in fact a crime of violence. *See Borden*, 593 U.S. at 429 ("The phrase 'against another,' when modifying the 'use of force,' demands that the perpetrator direct his action at, or target, another individual."); *id.* at 432 (if a knowing act—running a red light—results in "contact with another person," "the reckless driver has not directed force at another").

It *appears* that slamming a door to impede a federal officer, inadvertently catching the officer's hand in the door, would constitute assault on a federal officer under § 111. So too would holding an unloaded gun where an undercover agent tried to wrestle it away. It is thus unclear how the United States can maintain the position that petitioner is not entitled to a COA (and, more than that, relief on the merits) in this case.

3. The Tenth Circuit denied a COA *sua sponte* without awaiting a response from the United States (and without calling for one). That decision—which was predicated on the holding that reasonable jurists could not even *debate* this question—was wrong.

The Tenth Circuit denied a COA on the basis of three cases, but none of them are controlling. It cited *Kendall*, 876 F.3d at 1270, as having held that 18 U.S.C. § 111(b) requires a more culpable *mens rea* than mere recklessness, and thus that the statute satisfies *Borden*'s

definition of a crime of violence. *See* App. 5a-6a. But no party in that case briefed or argued the question of the necessary *mens rea* to violate 18 U.S.C. § 111(b). As the Court explained in *Kendall*, "Kendall claims one can violate [§ 111(b)] … without the use, attempted use, or threatened use of violent physical force—the degree of force required to commit a crime of violence." 876 F.3d at 1267. In other words, the dispute in *Kendall* centered on the requisite *actus reus*. The question of the necessary intent to violate the statute was not briefed or argued. To be sure, the *Kendall* panel quoted a Fifth Circuit case that was about intent, but only for the proposition that § 111 necessarily requires force, not that it requires intent. *See id.* at 1270. And the Fifth Circuit case applied an idiosyncratic Fifth Circuit rule under which § 111(a) can be committed recklessly but § 111(b) cannot be, even though § 111(b) assault is defined as § 111(a) assault with a deadly weapon. *See United States v. Hernandez-Hernandez*, 817 F.3d 207, 217 (5th Cir. 2016) (quoted in *Kendall*, 876 F.3d at 1270, and then quoted from *Kendall* in App. 6a.).

Kendall is therefore not controlling precedent on this question. *See Belnap* v. *Iasis Healthcare*, 844 F.3d 1272, 1288-89 (10th Cir. 2017) (cases are not precedent for unargued propositions); *accord Wolfname*, 835 F.3d at 1219-20 (so holding in a § 111 case). Outside of this case, the Tenth Circuit has never treated *Kendall* as precedential on the question of the *mens rea* necessary to violate § 111(b). *See McDaniel*, 85 F.4th at 186 (omitting *Kendall* from a list of "sister courts of appeals [that] have addressed the mens rea element of § 111(b)" while citing *Kendall* elsewhere in the opinion). Instead, *Kendall* has always been described as having addressed the distinct question of whether § 111(b) requires the use of violent physical force. *See, e.g.*, *United States v. Montoya*, 770 F. App'x 436, 438 (10th Cir. 2019). If the scope of *Kendall*'s

precedential effect is unclear, at a minimum a COA should issue to permit the Tenth Circuit to determine on the merits whether it is in fact controlling precedent rather than summarily declare that *Kendall* forecloses a potentially meritorious appeal.

The Tenth Circuit also erred when it pointed to two recent out-of-circuit cases that held § 111 cannot be committed recklessly. The first, *United States v. McDaniel*, was construing a pre-1994 version of § 111, which this Court had held in *Feola* required proof of "an intent to assault." 85 F.4th at 186 (quoting *Feola*, 420 U.S. at 684). In the second case, *United States v. Medearis*, the Eighth Circuit applied its precedent governing the pre-1994 version of § 111—which did not include a prohibition on "simple assault"—as if it applied the same way to the post-1994 version of the statute. 65 F.4th at 987 (quoting *Hanson*, 618 F.2d at 1265). No party raised in *Medearis* that an intervening change in the text of the statute precluded the application of the Eighth Circuit's pre-1994 precedent. Accordingly, the Eighth Circuit's holding is not persuasive on the question before the Court in this case, which is whether the *post*-1994 version of § 111—which can be committed by means of "simple assault"—can be violated through mere recklessness.

These are complex legal arguments that deserve to be addressed on the merits with the benefit of adversarial briefing.

4. The question of the appropriate *mens rea* to violate § 111 is important. Tellingly, the United States did not dispute importance in response to petitioner's COA application.

The federal officer assault statute was enacted, and later expanded, to protect federal personnel. This Court recognized in *Feola* that "to effectuate the congressional purpose," courts should construe § 111 to "accord[] maximum protection to federal officers." 420 U.S. at 684.

Congress enacted the statute to ratchet up protections for federal officers—to ensure that the federal government would "not be compelled to rely upon the courts of the States, however respectable and well disposed, for the protection of its investigative and law-enforcement personnel." S. Rep. No. 73-535, at 2 (1934); *see also* H. Rep. No. 73-1455, at 2 (1934).

The statute's protections remain critical. Since 1972, the FBI has published annual reports detailing assaults against federal officers in the line of duty. FBI, *About Law Enforcement Officers Killed and Assaulted*, in Federal LEOKA, 2022 at 1. Between 2018 and 2022, 9,163 federal officers were assaulted. FBI, *Federal Topic Page*, in Federal LEOKA, 2022, at 4. Over 42% of these assaults were carried out with "personal weapons," such as "hands, fists, or feet." *See* FBI, *Table 74-Extent of Injury of Victim Officer by Type of Weapon, 2018–2022*, in Federal LEOKA, 2022. Of the 9,136 assaults, over 25% resulted in injury or death. *Id.* To the extent that dispositional information was reported, about 89% of known assailants were criminally charged in 2022; about 72% in 2021; and about 76% in 2020. FBI, *Table 79-Department, Agency, and Office by Disposition of Known Offender, 2022*, in Federal LEOKA, 2022; FBI, *Table 79-Department, Agency, and Office by Disposition of Known Offender, 2021*, in Federal LEOKA, 2021; FBI, *Table 79-Department, Agency, and Office by Disposition of Known Offender, 2020*, in Federal LEOKA, 2020.

B. Reasonable Jurists Could Debate Whether Collateral Attack Waivers Are Unenforceable When They Would Bar Actual Innocence Claims

1.a. A COA also should have issued on the question of whether petitioner's collateral attack waiver is unenforceable because it would unconstitutionally bar review in a case in which a defendant makes a cognizable claim of actual innocence. Reasonable jurists could debate

whether petitioner's collateral attack waiver is unenforceable. That is why the Tenth Circuit *did not reach this question below*: Petitioner made multiple, colorable constitutional arguments that would preclude enforcement of his collateral attack waiver.

This case is on all fours with multiple Fourth Circuit decisions holding that a collateral attack waiver is unenforceable when the underlying claim is that the prisoner is actually innocent of a crime for which he was convicted. *See, e.g.*, *Adams*, 814 F.3d at 182 ("A proper showing of 'actual innocence' is sufficient to satisfy the 'miscarriage of justice' requirement."). In *Adams*, for example, a prisoner argued that an intervening change in law invalidated the prisoner's 18 U.S.C. § 922(g) conviction because an underlying crime was no longer a valid predicate for the § 922(g) conviction. *Id.* at 185. The Fourth Circuit held that the prisoner's claim of actual innocence was cognizable, and thus it would be a miscarriage of justice to enforce the waiver to bar the it. *Id.* at 182-83 (holding that an actual innocence claim is outside the scope of appeal waiver to prevent a miscarriage of justice). Other Fourth Circuit cases are similar. *See McKinney*, 60 F.4th at 192 (a cognizable claim of actual innocence is enough for miscarriage-of-justice); *Cornette*, 932 F.3d at 208-10 (waiver does not bar an actual innocence claim based on subsequent change in law). This case is materially indistinguishable from those cases.

Courts have adopted an "actual innocence" rule for good reason: no greater miscarriage of justice could occur than imprisoning a person for a crime of which they are innocent. The government also has absolutely *no interest* in preventing a person who is actually innocent from obtaining release. To be sure, collateral attack waivers have been defended as advancing twin interests in conservation of prosecutorial resources and finality of criminal convictions. But neither of those interests

justifies enforcing a collateral attack waiver in circumstances where the person against whom the waiver is asserted is actually innocent of the crime for which they are incarcerated.

Even if the Tenth Circuit ultimately disagrees with Mr. Newman's position on the enforceability of his collateral attack waiver, at minimum reasonable jurists could debate—and have debated—the question. A COA thus should issue.

b. The United States' main argument against the grant of a COA on this question in briefing before Justice Gorsuch was that, because this case involved dismissed criminal charges that *could* have supported a hypothetical § 924(c) conviction—though not *this* § 924(c) conviction—that "differentiates applicant's case from the Fourth Circuit cases." COA Opp. 16. That is incorrect: the government made the exact same argument in *Adams* and the Fourth Circuit rejected it, so it does not "differentiate[]" this case from *Adams* at all. *See Adams*, 814 F.3d at 183-84 (rejecting argument that *Bousley* requires a showing of innocence of dismissed counts relating to distinct criminal conduct). Even if it did differentiate this case from the Fourth Circuit's cases, the United States' *Bousley* argument is misplaced for numerous other reasons. *See* COA Reply 6 n.1.

Regardless, the United States can point to no controlling precedent that would foreclose petitioner's miscarriage of justice argument under *Bousley*. The Fourth Circuit has said petitioner's position is correct; other jurists disagree. A COA should issue on petitioner's challenge to his collateral attack waiver.

2. The enforceable scope of collateral attack waivers is a question of exceptional importance. Confidence in the fairness of outcomes achieved through the plea process is central to the administration of criminal law in this country. Nearly all criminal charges in the United States

are resolved through plea agreements. And even as guilty pleas are now virtually universal, collateral attack waivers are now an exceedingly common feature of those guilty pleas. A practice that is this widespread, and that results in the waiver of such significant rights, often resulting in prolonged deprivations of liberty that would otherwise be subject to challenge, should be reviewed by this Court. The sheer number of cases implicating the miscarriage of justice exception shows that this issue warrants guidance from this Court, especially because the disparate treatment of this issue across the circuits continues to result in unequal outcomes based solely on where cases happen to arise.

II. ALTERNATIVELY, THE COURT SHOULD GRANT PLENARY REVIEW AND SET THIS CASE FOR ARGUMENT

Petitioner seeks only an order granting him a COA that will permit him to have his appeal heard in the Tenth Circuit. The Tenth Circuit erred in denying petitioner a COA in a case involving such important and clearly debatable questions. But given the posture of the case, and the nationwide importance of the questions presented, the Court may wish to grant plenary review and decide the questions presented on their merits. Such review would offer needed guidance to the lower courts on the proper scope of § 111, the appropriate method of addressing post-*Borden* claims, and on the circumstances in which collateral attack waivers may be rendered unenforceable.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 2024