No. _____

IN THE
# Supreme Court of the United States

PATRICK MEDEARIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

## PETITION FOR A WRIT OF CERTIORARI

JASON J. TUPMAN
Federal Public Defender
MOLLY C. QUINN
Chief Appellate Attorney, *Counsel of Record*
Office of the Federal Public Defender
Districts of South Dakota and North Dakota
101 South Main Avenue, Suite 400
Sioux Falls, SD 57104
molly_quinn@fd.org
605-330-4489

Attorneys for Petitioner

## QUESTIONS PRESENTED

The Federal Sentencing Guidelines provide for an enhanced advisory guideline range for certain offenses if the defendant has a prior conviction for a "controlled substance offense" or a "crime of violence" as those phrases are defined in USSG § 4B1.2.

The questions presented are:

I. Does conspiracy to distribute a controlled substance in violation of 21 U.S.C. § 846 qualify as a "controlled substance offense" under USSG § 4B1.2(b) even though inchoate offenses are not expressly included in the text of the guideline and § 846 does not require an overt act?

II. Does assaulting, resisting, or impeding a federal officer with a deadly or dangerous weapon or by inflicting bodily injury in violation of 18 U.S.C. § 111(b) qualify as a "crime of violence" under USSG § 4B1.2(a)?

## LIST OF PARTIES

The only parties to the proceeding are those appearing in the caption to this petition.

## RELATED PROCEEDINGS

*United States v. Medearis*, No. 3:20-cr-30077-RAL, United States District Court for the District of South Dakota. Judgment entered April 11, 2022.

*United States v. Medearis*, No. 22-1841, United States Court of Appeals for the Eighth Circuit. Judgment entered April 24, 2023.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

Page(s)

**Cases**

**Statutes**



**Other Materials**

## PETITION FOR A WRIT OF CERTIORARI

Patrick Medearis respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

## OPINIONS BELOW

The opinion of the court of appeals (App. 1a-9a) is reported at 65 F.4th 981. The district court's relevant rulings are unreported.

## JURISDICTION

The court of appeals entered judgment on April 24, 2023. Medearis received an extension of time to file a petition for rehearing. The court of appeals denied his timely petition for rehearing *en banc* on June 20, 2023. This petition is timely filed under Rule 13.3. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## STATUTORY & SENTENCING GUIDELINE PROVISIONS INVOLVED

**18 U.S.C. § 111 provides:**

> **§ 111. Assaulting, resisting, or impeding certain officers or employees**
>
> **(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.
>
> **(c) Extraterritorial jurisdiction.**--There is extraterritorial jurisdiction over the conduct prohibited by this section.

**21 U.S.C. § 846 provides:**

> **§ 846. Attempt and conspiracy**
>
> Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

**USSG § 2K2.1(a) provides in relevant part:**

(a) Base Offense Level (Apply the Greatest):

. . .

(2) **24**, if the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense;

. . .

(6) **14**, if the defendant (A) was a prohibited person at the time the defendant committed the instant offense; (B) is convicted under 18 U.S.C. § 922(d); or (C) is convicted under 18 U.S.C. § 922(a)(6) or § 924(a)(1)(A) and committed the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person;

. . . .

**USSG § 4B1.2 provides in relevant part:**

(a) The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—

(1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or

(2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).

(b) The term "controlled substance offense" means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

. . .

**Application Notes:**

**1. Definitions**.—For purposes of this guideline—

"***Crime of violence***" and "***controlled substance offense***" include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.

. . .

## INTRODUCTION

This petition presents two important questions of federal law that affect potentially thousands of defendants a year. First, does conspiracy to distribute a controlled substance in violation of 21 U.S.C. § 846 qualify as a "controlled substance offense" under USSG § 4B1.2(b)? This question involves two related but distinct issues that have divided the courts of appeals—does the term "controlled substance offense" include inchoate offenses, and if so, what is the generic definition of "conspir[acy]"?

Second, does assaulting, resisting, or impeding a federal officer with a deadly or dangerous weapon or by inflicting bodily injury in violation of 18 U.S.C. § 111(b) qualify as a "crime of violence" under USSG § 4B1.2(a)? The text of the force clause in § 4B1.2(a) is nearly identical to force clauses found throughout the criminal code, so this question affects defendants facing enhanced guideline ranges for firearm and drug prosecutions, enhanced mandatory minimum penalties for a range of offenses including possession of a firearm by a prohibited person, prosecutions for using a firearm in connection with a crime of violence under 18 U.S.C. § 924(c), and more. *See, e.g.*, 18 U.S.C. § 16(a) (general definition of "crime of violence"); 18 U.S.C. § 924(c)(3)(A) (use of a firearm in connection with a "crime of violence"); 18 U.S.C. § 924(e)(2)(B)(i) (Armed Career Criminal Act); 18 U.S.C. § 3559(c)(2)(F)(ii) (definition of "serious violent felony" for mandatory life sentence). The question of whether assault on a federal officer under § 111(b) is a crime of violence is an important question of federal law that should be addressed by this Court.

The Court should grant certiorari to resolve the important questions of federal law raised by this case.

## STATEMENT OF THE CASE

Patrick Medearis was sentenced to 96 months in prison for being a prohibited person in possession of a firearm. Dist. Ct. Dkt. 117.[1] His guideline range was enhanced based on the district court's finding that his 2007 federal conviction for conspiracy to distribute and possess with intent to distribute a controlled substance in violation of 21 U.S.C. §§ 841(a)(1) and 846 was a "controlled substance offense" and that his 2017 federal conviction for assaulting, opposing, resisting, and impeding a federal officer in violation of 18 U.S.C. § 111(a) and (b) was a "crime of violence," all within the meaning of USSG § 2K2.1(a)(2). *See* PSR ¶ 14; Dist. Ct. Dkt. 112-1, at 4-5. This finding increased Medearis's advisory guideline range from 33 to 41 months to 92 to 115 months.[2]

---

[1] All citations to "Dist. Ct. Dkt." are to the docket in *United States v. Medearis*, No. 3:20-cr-30077-RAL (D.S.D.). All citations to the Sentencing Transcript are to the public transcript, available at Dist. Ct. Dkt. 123.

[2] Medearis's base offense level was 24 because the district court found that he had two prior convictions for a crime of violence or controlled substance offense. PSR ¶ 14 (citing USSG § 2K2.1(a)(2)). While the PSR applied a 4-level enhancement for possession of the firearm in connection with another felony offense, PSR ¶ 15, the district court sustained Medearis's objection to this enhancement. Sent. Tr. 28; Dist. Ct. Dkt. 117-1. Medearis did not receive any other enhancements or adjustments to his base offense level. *See* PSR ¶¶ 14-22. With a total offense level of 24 and a criminal history category of V, Medearis's advisory guideline range was 92 to 115 months. Dist. Ct. Dkt. 117-1, at 1. If Medearis did not have any qualifying prior convictions, his base offense level and total offense level would have been 14, and his advisory guideline range would have been 33 to 41 months. USSG § 2K2.1(a)(6); USSG Ch.5, Pt.A (sentencing table).

Medearis argued below that his federal drug conspiracy conviction did not qualify as a "controlled substance offense" because (1) federal drug conspiracy does not qualify as "conspir[acy]" within the meaning of the Sentencing Guidelines because it does not require an overt act, and (2) a conspiracy offense does not qualify as a "controlled substance offense" because inchoate offenses are not included in the text of § 4B1.2 and instead are only included in the commentary. Dist. Ct. Dkt. 110, at 1; App. 7a. He also argued that his assault on a federal officer conviction did not qualify as a "crime of violence" because § 111(b) could be violated by reckless conduct. Dist. Ct. Dkt. 110, at 2; App. 7a.

The court of appeals affirmed. App. 1a-9a. The panel found that Medearis's argument that his federal drug conspiracy conviction did not qualify as a "controlled substance offense" was foreclosed by circuit precedent. App. 7a (citing *United States v. Mendoza-Figueroa*, 65 F.3d 691, 694 (8th Cir. 1995) (en banc)). The panel also found, "Comparing the elements of a § 111(b) conviction to the Guidelines definition of crime of violence, we conclude, as our sister circuits have, that a § 111(b) conviction constitutes a categorical crime of violence." App. 8a (citing *United States v. Taylor*, 848 F.3d 476, 494 (1st Cir. 2017); *Gray v. United States*, 980 F.3d 264, 266-67 (2d Cir. 2020) (per curiam); *United States v. Bullock*, 970 F.3d 210, 217 (3d Cir. 2020)). The court of appeals exercised jurisdiction under 28 U.S.C. § 1291.

Medearis timely filed a petition for rehearing *en banc*. The court of appeals denied his petition in a summary order. App. 10a. This petition for a writ of certiorari follows.

## REASONS FOR GRANTING THE PETITION

The Sentencing Guidelines provide for an enhanced guideline range for several of the most common federal offenses where the defendant has a prior conviction for a "controlled substance offense" or a "crime of violence." *See, e.g.*, USSG § 2K2.1 (enhanced base offense level for unlawful receipt, possession, or transportation of firearms or ammunition offenses); USSG § 4B1.1 (enhanced base offense level and criminal history category if defendant qualifies as a career offender). This case raises important questions relating to the meaning of each phrase.

### I. Does conspiracy to distribute a controlled substance in violation of 21 U.S.C. § 846 qualify as a "controlled substance offense" under USSG § 4B1.2(b) even though inchoate offenses are not expressly included in the text of the guideline and § 846 does not require an overt act?

This case presents the ideal opportunity for the Court to address the status of federal drug conspiracy as a "controlled substance offense" under USSG § 4B1.2(b). The Sentencing Guidelines define "controlled substance offense" as:

> an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

USSG § 4B1.2(b). This definition does not include conspiracy offenses. Instead, such offenses are addressed only in an application note: "For purposes of this guideline—'Crime of violence' and 'controlled substance offense' include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses." USSG § 4B1.2,

comment. (n.1). Neither the guideline nor the commentary further define "conspiring" or "conspiracy."

### A. The circuits are divided on whether the term "controlled substance offense" includes inchoate offenses like conspiracy.

Under the current version of the Sentencing Guidelines, conspiracy offenses are included in the definition of "controlled substance offense" only in the commentary. This is an impermissible expansion of the text of the guideline. This Court has held that "commentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline." *Stinson v. United States*, 508 U.S. 36, 38 (1993). If the "commentary and the guideline it interprets are inconsistent in that following one will result in violating the dictates of the other, the Sentencing Reform Act itself commands compliance with the guideline." *Id.* at 43 (citing 18 U.S.C. § 3553(a)(4), (b)). Over 25 years after *Stinson*, this Court clarified that deference to an agency's interpretation of its rules is proper only if the regulation "is genuinely ambiguous." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2414 (2019). The text of § 4B1.2(b) is not ambiguous. It defines "controlled substance offense" as an offense that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or possession with intent to do so), not conspiracy to do the same.

In the wake of *Kisor*, the courts of appeals are divided on the question of whether the term "controlled substance offense" includes inchoate offenses even

though such offenses are not expressly included in the text of § 4B1.2(b). The Third, Fourth, Ninth, and Eleventh Circuits have held that inchoate offenses (like conspiracy) are not included in the definition of "controlled substance offense":

- ***United States v. Nasir*, 17 F.4th 459, 472 (3d Cir. 2021) (en banc)** ("Congress has delegated substantial responsibility to the Sentencing Commission, but, as the Supreme Court emphasized in *Kisor*, the interpretation of regulations ultimately remains in the hands of the courts. In light of *Kisor*'s limitations on deference to administrative agencies, and after our own careful consideration of the guidelines and accompanying commentary, we conclude that inchoate crimes are not included in the definition of 'controlled substance offenses' given in section 4B1.2(b) of the sentencing guidelines." (cleaned up));

- ***United States v. Campbell*, 22 F.4th 438, 447 (4th Cir. 2022)** ("In short, the plain text of U.S.S.G. § 4B1.2(b) is inconsistent with the Commission's Commentary to that Guideline, and this is the only reasonable construction of U.S.S.G. § 4B1.2(b). In such circumstances, a court has no business deferring to any other reading, no matter how much the [Government] insists it would make more sense. Rather, when commentary is inconsistent with an unambiguous guideline, the Sentencing Reform Act itself commands compliance with the guideline." (cleaned up));

- ***United States v. Castillo*, 69 F.4th 648, 653 (9th Cir. 2023)** ("The Sentencing Guidelines' definition of 'controlled substance offense' for career offender enhancements currently does not include inchoate crimes like conspiracies, although the commentary extends the definition to such crimes. U.S.S.G. § 4B1.2(b), application note 1. Because only the commentary includes inchoate crimes, and the text of the guideline unambiguously does not, applying the Supreme Court's *Kisor* analysis, we must conclude that Castillo's conspiracy conviction does not qualify as a 'controlled substance offense' under U.S.S.G. § 4B1.2(b).");

- ***United States v. Dupree*, 57 F.4th 1269, 1279 (11th Cir. 2023) (en banc)** ("We conclude that the text of § 4B1.2(b) unambiguously excludes inchoate crimes. Under *Kisor*, that concludes our analysis, and we have no need to consider, much less defer to, the commentary in Application Note 1.").

These courts join the Sixth and D.C. Circuits, which held that the term "controlled substance offense" did not include inchoate offenses even before *Kisor*:

- ***United States v. Havis*, 927 F.3d 382, 386-87 (6th Cir. 2019) (en banc) (per curiam)** ("To make attempt crimes a part of § 4B1.2(b), the Commission did not interpret a term in the guideline itself—no term in § 4B1.2(b) would bear that construction. Rather, the Commission used Application Note 1 to *add* an offense not listed in the guideline. But application notes are to be '*interpretations of*, not *additions to*, the Guidelines themselves.' If that were not so, the institutional constraints that make the Guidelines constitutional in the first place—congressional review and notice and comment—would lose their meaning. The Commission's use of commentary to add attempt crimes to the definition of 'controlled substance offense' deserves no deference. The text of § 4B1.2(b) controls, and it makes clear that attempt crimes do not qualify as controlled substance offenses." (internal citations omitted)).

- ***United States v. Winstead*, 890 F.3d 1082, 1091 (D.C. Cir. 2018)** ("Section 4B1.2(b) presents a very detailed 'definition' of controlled substance offense that clearly excludes inchoate offenses. *Expressio unius est exclusio alterius*. Indeed, that venerable canon applies doubly here: the Commission showed within § 4B1.2 itself that it knows how to include attempted offenses when it intends to do so. *See* USSG § 4B1.2(a)(1) (defining a 'crime of violence' as an offense that 'has as an element the use, attempted use, or threatened use of physical force . . . .')).").

Other circuits, like the court of appeals below, disagree. *See, e.g.*, *United States v. Vargas*, 74 F.4th 673, 684 (5th Cir. 2023) (en banc); *United States v. Maloid*, 71 F.4th 795, 814 (10th Cir. 2023); *United States v. Smith*, 989 F.3d 575, 583-85 (7th Cir. 2021), *cert. denied*, 142 S. Ct. 488 (2021); *United States v. Lewis*, 963 F.3d 16, 21-23 (1st Cir. 2020); *United States v. Richardson*, 958 F.3d 151, 154-55 (2d Cir. 2020); *United States v. Garcia*, 946 F.3d 413, 417 (8th Cir. 2019) (all holding that inchoate offenses qualify as "controlled substance offense[s]" or "crime[s] of violence"

under the commentary to § 4B1.2). The circuits are deeply divided on whether conspiracy offenses are included in the definition of "controlled substance offense."

### B. The circuits are divided on whether federal drug conspiracy under § 846 qualifies as generic conspiracy under § 4B1.2.

The courts of appeals are divided on a distinct but related question—if conspiracy offenses do qualify as "controlled substance offense[s]" under § 4B1.2(b), what does "conspiracy" mean and does the federal drug conspiracy statute qualify?

Under the categorical approach, courts look to the "generic, contemporary meaning," *Taylor v. United States*, 495 U.S. 575, 598 (1990), of a term. In other words, courts "distill a 'generic' definition of the predicate offense." *United States v. Norman*, 935 F.3d 232, 237 (4th Cir. 2019) (citing *Taylor*, 495 U.S. at 598). At least 36 states, the District of Columbia, Guam, Puerto Rico, and the Virgin Islands define "conspiracy" to require an overt act. *United States v. McCollum*, 885 F.3d 300, 308 (4th Cir. 2018) (citing *United States v. Garcia-Santana*, 774 F.3d 528, 534-35 (9th Cir. 2014)). The general federal conspiracy statute does as well. 18 U.S.C. § 371 (requiring that "one or more . . . persons do any act to effect the object of the conspiracy"). Thus, several courts of appeals have concluded, the generic meaning of "conspir[acy]" in § 4B1.2(b) requires an overt act. *See McCollum*, 885 F.3d at 308 ("The fact that more than thirty-two states require an overt act is sufficient to establish the contemporary definition of conspiracy as such."); *United States v. Martinez-Cruz*, 836 F.3d 1305, 1314 (10th Cir. 2016) ("[W]e conclude that the generic definition of 'conspiracy' requires an overt act.")

Federal drug conspiracy under § 846 does ***not*** require an overt act. *United States v. Shabani*, 513 U.S. 10, 11 (1994). For this reason, the courts of appeals are divided on whether federal drug conspiracy qualifies as a "controlled substance offense" under the Sentencing Guidelines. The Fourth and Tenth Circuits have held that it does not:

- ***United States v. Norman*, 935 F.3d 232, 237-38 (4th Cir. 2019)** ("Because the Guidelines do not define 'conspiracy' under § 4B1.2, the term is defined by reference to the generic, contemporary meaning of the crime. Relying on the fact that thirty-six states and the District of Columbia, Guam, Puerto Rico, and the Virgin Islands define conspiracy to require an overt act, we have expressly held that 'an overt act is an element of the generic definition of conspiracy' as incorporated into § 4B1.2. And it is undisputed that 'conspiracy' under § 846 does not require an overt act. Therefore, § 846 criminalizes a broader range of conduct than that covered by generic conspiracy, and Norman's conviction under § 846 cannot support the six-level enhancement he received." (cleaned up)).

- ***United States v. Martinez-Cruz*, 836 F.3d 1305, 1314 (10th Cir. 2016)** ("[W]e conclude that the generic definition of 'conspiracy' requires an overt act. Section 846 does not. Martinez-Cruz's conspiracy conviction under § 846 is a categorical mismatch for the generic definition of 'conspiracy' in U.S.S.G. § 2L1.2 Application Note 5." (applying old version of USSG § 2L1.2)).

Other circuits have held that federal drug conspiracy under § 846 does qualify as a "controlled substance offense" under § 4B1.2(b). *See, e.g.*, *Smith*, 989 F.3d at 586; *United States v. Rodríguez-Rivera*, 989 F.3d 183, 189 (1st Cir. 2021), *cert. denied*, 142 S. Ct. 235 (2021); *United States v. Tabb*, 949 F.3d 81, 88-89 (2d Cir. 2020); *see also United States v. Rivera-Constantino*, 798 F.3d 900, 906 (9th Cir. 2015) (holding that plain meaning of § 2L1.2(b)(1) encompasses federal drug conspiracy offenses). The courts of appeals are divided on this important question.

### C. The Court should act to resolve this important question of federal law.

The courts of appeals are divided on two distinct but related issues impacting whether federal drug conspiracy qualifies as a "controlled substance offense" under the Sentencing Guidelines. The Court should act to resolve this split of authority.

Admittedly, the Sentencing Commission recently adopted amendments to § 4B1.2 that will add inchoate offenses to the text of the guideline. Sentencing Guidelines for United States Courts, 88 Fed. Reg. 28,254, 28,275 (May 3, 2023). The amendment is intended to "address [the] circuit conflict regarding the authoritative weight afforded to certain commentary to § 4B1.2." *Id.* Under this amendment, the text of § 4B1.2 will state: "(d) Inchoate Offenses Included.—The terms 'crime of violence' and 'controlled substance offense' include the offenses of aiding and abetting, attempting to commit, or conspiring to commit any such offense." *Id.* Absent Congressional action, this amendment will go into effect on November 1, 2023. *Id.* at 28,254. Nevertheless, the question of whether an inchoate offense like conspiracy can qualify as a "controlled substance offense" under the version of § 4B1.2 in effect today remains an important question for defendants who commit their offenses or are sentenced before November 1, 2023. This is an important question worthy of this Court's review.

Moreover, the amendment to § 4B1.2 does *not* resolve the circuit split on what the terms "conspiring" and "conspiracy" mean. The amendment does not define "conspiring," "conspiracy," or any of the other inchoate offenses listed in new subsection (d). *See id.* at 28,275. Instead, it merely "mov[es], *without change*, the

commentary including certain inchoate and accessory offenses in the definitions of 'crime of violence' and 'controlled substance offense' to the text of the guideline. *Id.* at 28,276 (emphasis added). The Sentencing Commission did not identify this issue in its priorities for the next amendment cycle, so it is unlikely to resolve this issue any time soon. *See* Final Priorities for Amendment Cycle, 88 Fed. Reg. 60,536 (Sept. 1, 2023).

The generic definition of conspiracy and the status of federal drug conspiracy under § 4B1.2(b) remain unresolved. A prior conviction for a "controlled substance offense" within the meaning of § 4B1.2(b) can enhance a defendant's advisory guideline range in a number of ways. It can contribute to a finding of "career offender" status under USSG § 4B1.1. Such a designation "can have significant implications in setting the base guideline range." *United States v. Crocco*, 15 F.4th 20, 24 n.4 (1st Cir. 2021). In recent years, between 1,200 and 1,800 defendants were found to be career offenders each year. U.S. Sentencing Comm'n, *Quick Facts – Career Offenders*, *available at* https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Career_Offenders_FY22.pdf (last accessed Sept. 15, 2023). Without this designation, almost 93 percent of defendants would have had a lower guideline range. *Id.*

A prior conviction for a "controlled substance offense" can also increase the offense level under USSG § 2K2.1 (which applies to the unlawful receipt, possession, or transportation of firearms or ammunition, including 18 U.S.C. § 922(g) offenses), USSG § 2K1.3 (which applies to the unlawful receipt, possession,

or transportation of explosive materials), and USSG § 4B1.4 (which applies in Armed Career Criminal Act cases). Many federal defendants are sentenced under these guidelines. In fiscal year 2022, over 8,800 offenders (which amounts to 14.3 percent of all offenders) were sentenced under § 2K2.1 alone. U.S. Sentencing Comm'n, *2022 Sourcebook of Federal Sentencing Statistics*, at 71, *available at* https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2022/2022-Annual-Report-and-Sourcebook.pdf (last accessed Sept. 15, 2023). The definition of "controlled substance offense" impacts thousands of defendants a year.

The Court should act to resolve the split of authority among the courts of appeals and ensure that defendants do not face dramatically different guideline ranges for the same conduct and criminal history based only on the circuit they happen to have been prosecuted in.

## II. Does assaulting, resisting, or impeding a federal officer with a deadly or dangerous weapon or by inflicting bodily injury in violation of 18 U.S.C. § 111(b) qualify as a "crime of violence" under USSG § 4B1.2(a)?

This case raises a second important question of federal law that should be resolved by this Court—does assault on a federal officer under § 111(b) qualify as a "crime of violence" under the force clause?

The assault on a federal officer statute provides that whoever "forcibly assaults, resists, opposes, impedes, intimidates, or interferes with" a federal officer is guilty of a misdemeanor if the acts constitute simple assault and a felony if the acts involve physical contact or the intent to commit another felony. 18 U.S.C.

§ 111(a). Section 111(b) provides for an enhanced penalty if the defendant "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." 18 U.S.C. § 111(b). This Court has held "in order to incur criminal liability under [section] 111 an actor must entertain merely the criminal intent to do the acts therein specified." *United States v. Feola*, 420 U.S. 671, 686 (1975) (holding that § 111 does not require knowledge that victim was a federal officer). The courts of appeals disagree on whether § 111 is a general or specific intent crime. *Compare United States v. Gustus*, 926 F.3d 1037, 1040 (8th Cir. 2019); *see also id.* at 1041 (Kelly, J., concurring (noting conflicting opinions within the circuit)); *United States v. Brown*, 592 F. App'x 164, 166 (4th Cir. 2014) (per curiam) (unpublished); *United States v. Kimes*, 246 F.3d 800, 808 (6th Cir. 2001); *United States v. Ricketts*, 146 F.3d 492, 497 (7th Cir. 1998); *United States v. Kleinbart*, 27 F.3d 586, 592 (D.C. Cir. 1994); *United States v. Jim*, 865 F.2d 211, 214-15 (9th Cir. 1989) (general intent) *with United States v. Simmonds*, 931 F.2d 685, 687 (10th Cir. 1991); *United States v. Taylor*, 680 F.2d 378, 381 (5th Cir. 1982); *United States v. Caruana*, 652 F.2d 220, 222-23 (1st Cir. 1981) (per curiam) (specific intent). This petition raises the question of whether the aggravated form of assault on a federal officer under § 111(b) qualifies under the force clause.

### A. The Court should address this question in light of *Borden*.

Petitioner acknowledges that all the courts of appeals to address this issue have found that § 111(b) qualifies under the force clause, but most of these opinions

were issued before this Court's opinion in *Borden v. United States*, 141 S. Ct. 1817 (2021). *See United States v. Said*, 26 F.4th 653, 659 n.10 (4th Cir. 2022) (gathering cases).[3] Only the court below and the D.C. Circuit (in an unpublished judgment affirming an order of pretrial detention) have addressed § 111(b) since *Borden*. *United States v. Medearis*, 65 F.4th 981, 986-87 (8th Cir. 2023); *United States v. Quaglin*, 851 F. App'x 218, 219 (D.C. Cir. 2021) (per curiam) (unpublished). This Court should resolve the status of assault on a federal officer in violation of § 111(b) under the force clause after *Borden*.[4]

---

[3] Before *Borden*, eight circuits held that § 111(b) qualifies as a "crime of violence" under the force clause in § 4B1.2(a)(1) or as a "crime of violence" or "violent felony" under an identical or similarly-worded force clause in another federal statute. *Gray v. United States*, 980 F.3d 264, 266 (2d Cir. 2020) (per curiam) (18 U.S.C. § 924(c)); *United States v. Bullock*, 970 F.3d 210, 217 (3d Cir. 2020) (§ 4B1.2(a)(1)); *United States v. Bates*, 960 F.3d 1278, 1287 (11th Cir. 2020) (§ 924(c)); *United States v. Kendall*, 876 F.3d 1264, 1269 (10th Cir. 2017) (§ 4B1.2(a)(1)); *United States v. Taylor*, 848 F.3d 476, 492 (1st Cir. 2017) (§ 924(c)); *United States v. Rafidi*, 829 F.3d 437, 444 (6th Cir. 2016) (§ 924(c)); *United States v. Hernandez-Hernandez*, 817 F.3d 207, 210 (5th Cir. 2016) (USSG § 2L1.2); *United States v. Juv. Female*, 566 F.3d 943, 946 (9th Cir. 2009) (18 U.S.C. § 16(a)).

[4] While the opinion below and this petition focus on the force clause in § 4B1.2(a)(1), Petitioner submits that § 111(b) does not qualify as generic "aggravated assault" under § 4B1.2(a)(2) for the same reasons. The generic definition of "aggravated assault" requires more than recklessly causing serious bodily injury. *United States v. Schneider*, 905 F.3d 1088, 1097 (8th Cir. 2018); *United States v. Barcenas-Yanez*, 826 F.3d 752, 756 (4th Cir. 2016); *United States v. McFalls*, 592 F.3d 707, 716 (6th Cir. 2010), *abrogated on other grounds by Voisine v. United States*, 136 S. Ct. 2272 (2016); *United States v. Esparza-Herrera*, 557 F.3d 1019, 1025 (9th Cir. 2009) (per curiam). *But see United States v. Mungia-Portillo*, 484 F.3d 813, 817 (5th Cir. 2007) (finding ordinary recklessness sufficient for generic aggravated assault). Section 111(b) does not meet this standard.

The Sentencing Guidelines define "crime of violence" in part as a felony offense 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 has held that the force clause requires "*violent* force—that is, force capable of causing physical pain or injury to another person." *Johnson v. United States*, 559 U.S. 133, 140 (2010) (addressing Armed Career Criminal Act). Mere offensive touching is not enough. *See id.* at 139. For this reason, the basic felony offense under § 111(a) does not qualify under the force clause. The term "forcibly" in § 111(a) does not require "any particular level of force." *United States v. Dominguez-Maroyoqui*, 748 F.3d 918, 921 (9th Cir. 2014) (quoting *United States v. Sommerstedt*, 752 F.2d 1494, 1496 (9th Cir. 1985)). "In fact, a defendant may be convicted of violating section 111 if he or she uses *any force whatsoever*." *Id.* (cleaned up). Indeed, many convictions under § 111(a) have been based on mere spitting or other contact with bodily fluids. *See, e.g.*, *United States v. Frizzi*, 491 F.2d 1231, 1231-32 (1st Cir. 1974) (spitting in mail carrier's face); *United States v. Stoddard*, 407 F. App'x 231, 233-34 (9th Cir. 2011) (unpublished) (spitting in corrections officer's face); *United States v. Ramirez*, 233 F.3d 318, 322 (5th Cir. 2000) (throwing cup of urine/feces mixture at officer); *United States v. Taliaferro*, 211 F.3d 412, 413 (7th Cir. 2000) (throwing urine in guard's face). Because § 111(a) can be violated by merely offensive contact, it does not qualify under the force clause.

Turning to § 111(b), aggravated assault on a federal officer does not qualify under the force clause either. The additional element of this offense—the defendant

"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"—does not bring it within the force clause. *See* 18 U.S.C. § 111(b). The minimum mental state for this offense falls outside the force clause as interpreted by this Court in *Borden*. There, the Court held that the force clause in the Armed Career Criminal Act, which is identical to the force clause in § 4B1.2(a)(1),[5] requires a higher mental state than recklessness. *Borden*, 141 S. Ct. at 1821-22 (plurality opinion); *see also id.* at 1835 (Thomas, J., concurring). The *Borden* plurality held that the language "use of physical force against the person of another" excludes reckless conduct. *Id.* at 1825 (plurality opinion). The plurality explained, "[t]he phrase 'against another,' when modifying the 'use of force,' demands that the perpetrator direct his action at, or target, another individual." *Id.* "Reckless conduct is not aimed in that prescribed manner." *Id.* Justice Thomas supplied the fifth vote, basing his conclusion on the "use of force" language alone. *Id.* at 1834-37 (Thomas, J., concurring). According to Justice Thomas, "a crime that can be committed through mere recklessness does not have as an element the 'use of physical force' because that phrase 'has a well-understood meaning applying only to intentional acts designed to cause harm.' " *Id.* at 1835 (quoting *Voisine v. United States*, 579 U.S. 686, 713 (2016) (Thomas, J., dissenting)).

---

[5] *Compare* 18 U.S.C. § 924(e)(2)(B)(i) (defining "violent felony" as a felony offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another") *with* USSG § 4B1.2(a)(1) (defining "crime of violence" in part as a felony offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another").

Section 111(b) falls outside the force clause. Both prongs—using a weapon and inflicting bodily injury—can be committed with a subjective mens rea of recklessness. A person could violate the deadly or dangerous weapon prong of § 111(b) by volitionally using a weapon (like a vehicle) in a way that is reckless. "A car or truck may be used as a deadly or dangerous weapon" under this statute. *United States v. Yates*, 304 F.3d 818, 823 (8th Cir. 2002). The defendant must use the vehicle intentionally, not "purely by accident." *United States v. Arrington*, 309 F.3d 40, 45 (D.C. Cir. 2002). And he must use the vehicle "as a deadly weapon and not simply as a mode of transportation." *Id.* But the statute does not require that the defendant *intended* to use the vehicle as a weapon. Instead, he could intentionally use the vehicle in a way that was reckless. *See, e.g.*, *United States v. Wallace*, 852 F.3d 778, 781-83 (8th Cir. 2017) (upholding § 111(b) conviction where a person later identified as a federal officer ordered the defendant to stop the vehicle and jumped on the hood of the car when the car moved forward, later jumped back on the hood of defendant's car while she was backing out, and defendant continued backing out and abruptly stopped, causing the man to slide off the hood, and immediately sped away); *Arrington*, 309 F.3d at 49 (upholding § 111(b) conviction where Park Service officers reached into the defendant's car and grabbed him, at which point the defendant moved the gearshift into the drive position and took off).

This is the type of conduct the *Borden* plurality found falls outside the force clause. It is not the use of "force 'against' another person in the *targeted* way" the force clause requires. *See Borden*, 141 S. Ct. at 1827 (plurality opinion) (emphasis

added). It is much closer to the unsafe driving and drunk driving examples the *Borden* plurality found should not fall under the force clause—running a stop sign, veering onto the sidewalk, text messaging while driving, drunk driving, and speeding to a crime scene in a patrol car without the siren on. *Id.* at 1831. Just as in the examples in *Borden*, the defendants in these § 111(b) cases "acted recklessly, taking substantial and unjustified risks." *Id.* "And all the defendants hurt other people, some seriously, along the way." *Id.* "But few would say their convictions were for 'violent felonies,' " *id.*, or as relevant here, "crimes of violence."

Similarly, a person could violate the bodily injury prong of § 111(b) by acting recklessly or taking an intentional action that recklessly causes injury. *See United States v. Duran*, 96 F.3d 1495, 1509 (D.C. Cir. 1996) (approving, for the purposes of § 111, definition of "assault" from Model Penal Code that included recklessly causing bodily injury to another). Indeed, in *Duran*, the D.C. Circuit suggested that recklessly causing bodily injury to a federal officer could violate § 111(b). The court noted that the defendant's "act of firing twenty-nine bullets across the North Lawn certainly evinced a reckless state of mind with regard to anyone present on the North Lawn." *Id.* But because none of the Secret Service officers were actually injured, this conduct did not violate § 111(b). *Id. Duran* found sufficient evidence based on other conduct. *Id.* at 1509-10. *Cf. United States v. Ashley*, 255 F.3d 907, 908, 911-12 (8th Cir. 2001) (finding that the general intent required for assault resulting in serious bodily injury under 18 U.S.C. § 113(a)(6) was satisfied by the

"voluntary act [of] driving under the influence of alcohol in a vehicle with bad brakes, knowing that they were bad").[6]

The volitional, but reckless, conduct sufficient to violate § 111(b) does not amount to the "directed or targeted" conduct required by the force clause. *Borden*, 141 S. Ct. at 1833 (plurality opinion). And it is not an "intentional act[] designed to cause harm." *Id.* at 1835 (Thomas, J., concurring opinion). This offense does not qualify as a crime of violence under the force clause after *Borden*.

### B. The Court should act to resolve this important question of federal law.

The status of assault on a federal officer in violation of § 111(b) under the force clause after *Borden* is an important question of federal law. Section 111 is a common federal offense. The finding that § 111(b) is a crime of violence under the force clause in § 4B1.2(a)(1) affects the thousands of defendants facing guideline enhancements for having an instant offense and/or prior conviction that meets the definition of "crime of violence." *See* Section I(C), *supra*.

Moreover, because the text of the force clause in § 4B1.2(a) is identical or nearly identical to the force clauses found throughout the federal code, this question affects defendants and other individuals in a variety of other contexts:

---

[6] Consideration of the bodily injury prong of § 111(b) is only necessary if the statute is divisible. *See generally Mathis v. United States*, 579 U.S. 500 (2016). Section 111(b) appears to set out alternative means, rather than alternative elements, so it is not divisible. *See Arrington*, 309 F.3d at 44 n.7 ("[Section] 111(b) sets forth an alternative for this element: the defendant must either use a deadly or dangerous weapon or inflict bodily injury." (cleaned up)). In any event, because both prongs are overbroad, it is unnecessary to address the divisibility of the statute.

- Prosecutions for the use of a firearm in connection with a "crime of violence" (18 U.S.C. § 924(c)(3)(A));

- Mandatory minimum sentences for possession of firearms and ammunition under the Armed Career Criminal Act (18 U.S.C. § 924(e)(2)(B)(i));

- Mandatory life sentences for serious violent felonies (18 U.S.C. § 3559(c)(2)(F)(ii));

- Mandatory restitution under the Mandatory Victim Restitution Act (18 U.S.C. § 3663A(C)(1)(A)(i) (incorporating definition of "crime of violence" from 18 U.S.C. § 16));

- Pretrial detention under the Bail Reform Act (18 U.S.C. § 3142(f)(1)(A));

- Deportation under the Immigration and Nationality Act (8 U.S.C. § 1101(a)(43)(F) (incorporating § 16)).

The question of whether assault on a federal officer under § 111(b) is a crime of violence is an important question of federal law that should be addressed by this Court.

### III. This case is an ideal vehicle for the questions presented.

This case squarely presents the issues of whether federal drug conspiracy and assault on a federal officer in violation of § 111(b) qualify as a "controlled substance offense" and a "crime of violence" under § 4B1.2. Medearis challenged both prior convictions at sentencing and on appeal. The finding that each conviction qualified to increase his base offense level under § 2K2.1(a)(2) had a dramatic effect on his sentence. This finding increased his base offense level from 14 to 24 and nearly tripled his advisory guideline range, increasing it from 33 to 41 months to 92 to 115 months. *See* USSG § 2K2.1(a)(2), (6); PSR ¶ 14; Dist. Ct. Dkt. 117-1. The district

court elected to impose a guideline range sentence of 96 months in prison. Sent. Tr. 35. Without the enhanced base offense level, Medearis likely would have received a significantly shorter sentence. This case is an ideal vehicle for the questions presented.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Dated this 15th day of September, 2023.

Respectfully submitted,

JASON J. TUPMAN
Federal Public Defender
By:

*/s/ Molly C. Quinn*
Molly C. Quinn, Chief Appellate Attorney
Office of the Federal Public Defender
Districts of South Dakota and North Dakota
101 South Main Avenue, Suite 400
Sioux Falls, SD 57104
molly_quinn@fd.org
Phone: (605) 330-4489

*Counsel of Record for Petitioner*