No. 21-____

IN THE
Supreme Court of the United States

RAYMOND RODRÍGUEZ-RIVERA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

ERIC ALEXANDER VOS
Federal Public Defender
FRANCO L. PÉREZ-REDONDO
Supervisor, Appeals Division
KEVIN E. LERMAN
FEDERAL PUBLIC DEFENDER,
DISTRICT OF PUERTO RICO
241 F.D. Roosevelt Ave.
San Juan, PR 00918
(787) 281-4922
franco_perez@fd.org

NEAL KUMAR KATYAL
Counsel of Record
NATHANIEL A.G. ZELINSKY
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600
neal.katyal@hoganlovells.com

Counsel for Petitioner

QUESTION PRESENTED

The United States Sentencing Guidelines define a "controlled substance offense" as one that includes "the offense[] of * * * conspiring * * * to commit such offenses." The question presented is whether this provision is limited to only those state and federal crimes that categorically overlap the generic definition of a conspiracy, requiring proof of both an overt act and an agreement, as two circuits have held, or whether it does not, as six circuits have held?

PARTIES TO THE PROCEEDING

Raymond Rodríguez-Rivera, petitioner on review, was the defendant-appellant below.

The United States of America, respondent on review, was the plaintiff-appellant below.

RELATED PROCEEDINGS

The following proceedings are directly related to this case:

- *United States* v. *Raymond Rodríguez-Rivera*, No. 19-1529 (1st Cir. Mar. 4, 2021) (reported at 989 F.3d 183).
- *United States* v. *Raymond Rodríguez-Rivera*, No. 3:18-cr-00402-CCC-1 (D.P.R. Apr. 30, 2019).

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

RELATED PROCEEDINGS iii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY AND SENTENCING GUIDELINES PROVISIONS INVOLVED 2

INTRODUCTION 2

STATEMENT 5

A. Legal Background 5

B. Proceedings Below 6

REASONS FOR GRANTING THE PETITION 10

I. THE DECISION BELOW ACKNOWLEDGED A CLEAR AND DEEP CIRCUIT SPLIT 12

A. Two Circuits Interpret Conspiring To Commit Controlled Substance Offenses To Require An Overt Act 13

B. Six Circuits Hold That An Overt Act Is Not Required 17

C. This Split Cannot Develop Much Further 22

II. THE DECISION BELOW IS WRONG 23

TABLE OF CONTENTS—Continued

Page

III. THIS PETITION IS AN IDEAL VEHICLE TO ADDRESS THIS IMPORTANT QUESTION PRESENTED 31

CONCLUSION 36

APPENDIX

APPENDIX A—First Circuit's Opinion (March 4, 2021) 1a

APPENDIX B—District Court's Order (April 30, 2019) 15a

APPENDIX C— Statutory and Sentencing Guidelines Provisions Involved 20a

APPENDIX D—*United States* v. *Rodríguez-Escareno*, No. 11-41063 (5th Cir. Oct. 23, 2012) (opinion withdrawn and superseded) 29a

APPENDIX E—Order, *United States* v. *Rodríguez-Escareno*, No. 11-41063 (5th Cir. Oct. 29, 2012) 37a

TABLE OF AUTHORITIES

Page(s)

CASES:

Braxton v. *United States*,
500 U.S. 344 (1991)..32, 34

Early v. *United States*,
502 U.S. 920 (1991)..32, 33

Esquivel-Quintana v. *Sessions*,
137 S. Ct. 1562 (2017)....................................23, 27

Gall v. *United States*,
552 U.S. 38 (2007)...5

Gonzales v. *Dueñas-Álvarez*,
549 U.S. 183 (2007)..25, 27

Johnson v. *United States*,
559 U.S. 133 (2010)..............................9, 22, 28, 30

Mathis v. *United States*,
136 S. Ct. 2243 (2016)................................2, 20, 23

Molina-Martínez v. *United States*,
136 S. Ct. 1338 (2016)...5

Nielsen v. *Preap*,
139 S. Ct. 954 (2019)......................................25, 26

Shular v. *United States*,
140 S. Ct. 779 (2020)....................................*passim*

Stinson v. *United States*,
508 U.S. 36 (1993)...5

Taylor v. *United States*,
495 U.S. 575 (1990)......................................*passim*

United States v. *Benítez-Beltrán*,
892 F.3d 462 (1st Cir. 2018) 29, 30

TABLE OF AUTHORITIES—Continued

Page(s)

United States v. *Crooks*,
997 F.3d 1273 (10th Cir. 2021)............................15

United States v. *Dunnigan*,
507 U.S. 87 (1993)..33

United States v. *García-Santana*,
774 F.3d 528 (9th Cir. 2014)........................*passim*

United States v. *Havis*,
927 F.3d 382 (6th Cir. 2019) (en banc)................23

United States v. *Martínez-Cruz*,
836 F.3d 1305 (10th Cir. 2016)....................*passim*

United States v. *McCollum*,
885 F.3d 300 (4th Cir. 2018)........................*passim*

United States v. *Merritt*,
934 F.3d 809 (8th Cir. 2019)................................13

United States v. *Nasir*,
982 F.3d 144 (3d Cir. 2020) (en banc) 23

United States v. *Norman*,
935 F.3d 232 (4th Cir. 2019)................3, 12, 13, 35

United States v. *Pascacio-Rodríguez*,
749 F.3d 353 (5th Cir. 2014)........................*passim*

United States v. *Reséndiz-Ponce*,
549 U.S. 102 (2007)..25

United States v. *Rivera-Constantino*,
798 F.3d 900 (9th Cir. 2015)................3, 12, 20, 21

United States v. *Rodríguez-Escareno*,
700 F.3d 751 (5th Cir. 2012)........................*passim*

United States v. *Sanbria-Bueno*,
549 F. App’x 434 (6th Cir. 2013) 3, 12, 21

TABLE OF AUTHORITIES—Continued

Page(s)

United States v. *Shabani*,
513 U.S. 10 (1994) 6, 28

United States v. *Smith*,
989 F.3d 575 (7th Cir. 2021) 3, 12, 20

United States v. *Tabb*,
949 F.3d 81 (2d Cir. 2020) 3, 12, 19, 20

United States v. *Whitley*,
737 F. App'x 147 (4th Cir. 2018) 7, 13

United States v. *Winstead*,
890 F.3d 1082 (D.C. Cir. 2018) 23

Witte v. *United States*,
515 U.S. 389 (1995) 33

Zuni Pub. Sch. Dist. No. 89 v. *Dep't of Educ.*,
550 U.S. 81 (2007) 31

STATUTES:

8 U.S.C. § 1101(a)(43)(B) 8

15 U.S.C. § 77 16

18 U.S.C. § 371 .... 14, 27

18 U.S.C. § 922(g)(1) 7

18 U.S.C. § 922(o) 7

18 U.S.C. § 924(e) 8

18 U.S.C. § 924(e)(2)(A)(ii) 26, 28

18 U.S.C. § 1959 13

18 U.S.C. § 3231 7

21 U.S.C. § 841 21

21 U.S.C. § 841(a) 6

TABLE OF AUTHORITIES—Continued

Page(s)

21 U.S.C. § 841(a)(1) 21
21 U.S.C. § 841(c)(1) 30
21 U.S.C. § 846 .... *passim*
28 U.S.C. § 991(a) 34
28 U.S.C. § 991(b)(1)(B) 5
28 U.S.C. § 1254(1) 2
U.S.S.G. § 2K1.3(a)(1) 5
U.S.S.G. § 2K1.3(a)(2) 5
U.S.S.G. § 2K2.1(a)(1) 5
U.S.S.G. § 2K2.1(a)(2) 5
U.S.S.G. § 2K2.1(a)(3) 5, 7
U.S.S.G. § 2K2.1(a)(4) 5
U.S.S.G. § 2L1.2 15
U.S.S.G. § 4B1.1 .... 5, 34
U.S.S.G. § 4B1.2 15
U.S.S.G. § 4B1.2(a) 6
U.S.S.G. § 4B1.2(a)(2) 29
U.S.S.G. § 4B1.2(b) 3, 5, 10, 29
U.S.S.G. § 4B1.2 cmt. n.1 .... *passim*
Model Penal Code § 5.03(2) 24
Model Penal Code § 5.03(5) 27
18 Pa. Stat. and Cons. Stat. Ann. § 903 25
720 Ill. Comp. Stat. 5/33G-4 24
Alaska Stat. § 11.31.120 25
Ariz. Rev. Stat. Ann. § 13-1003(B) 24

TABLE OF AUTHORITIES—Continued

Page(s)

Colo. Rev. Stat. § 18-2-201 25

Ky. Rev. Stat. Ann. § 506.050 25

Mo. Rev. Stat. § 562.014(1)-(2) 24

Neb. Rev. Stat. § 28-202 25

Tex. Penal Code Ann. § 71.01(b) 25

Tex. Penal Code Ann. § 71.02(c) 25

RULE:

Sup. Ct. R. 10(a) 33

OTHER AUTHORITIES:

A (indefinite article), Merriam-Webster's Collegiate Dictionary (11th ed. 2004) 26

Aid and abet, Black's Law Dictionary (11th ed. 2019) 25

Conspiracy, Black's Law Dictionary (11th ed. 2019) 27

Former Commissioner Information, U.S. Sentencing Comm'n, *available at* https://tinyurl.com/3eaf5dcv (last visited July 30, 2021) 32

Include, Merriam-Webster's Collegiate Dictionary (11th ed. 2004) 26

Wayne R. LaFave, *Substantive Criminal Law* § 12.2(b) (3d ed. Oct. 2020 update) 6, 27

Merriam-Webster's Collegiate Dictionary (11th ed. 2005) 26

Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (2012) 25

TABLE OF AUTHORITIES—Continued

Page(s)

U.S. Sentencing Comm'n, *Amendments to the Sentencing Guidelines* § 2L1.2, at 32-39 (eff. Nov. 1, 2016) 15

U.S. Sentencing Comm'n, *Proposed Amendments to the Sentencing Guidelines* (Dec. 20, 2018), https://tinyurl.com/vpen82y9 34

IN THE

Supreme Court of the United States

No. 21-____

RAYMOND RODRÍGUEZ-RIVERA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

Raymond Rodríguez-Rivera respectfully petitions for a writ of certiorari to review the judgment of the First Circuit in this case.

OPINIONS BELOW

The First Circuit's opinion is reported at 989 F.3d 183. Pet. App. 1a-14a. The District Court's opinion is not reported. *Id.* at 15a-19a.

JURISDICTION

The First Circuit entered judgment on March 4, 2021. On March 19, 2020, and July 19, 2021, this Court by general order extended the deadline to petition for a writ of certiorari to 150 days from the date

of the lower court judgment. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND SENTENCING GUIDELINES PROVISIONS INVOLVED

Relevant statutory and United States Sentencing Guidelines provisions are reproduced in the appendix to this petition. *See* Pet. App. 20a-28a.

INTRODUCTION

One of the most serious issues in imposing a criminal sentence is determining whether a defendant's criminal history triggers an enhancement. To conduct that inquiry, federal courts often apply a categorical approach: A court compares the statutory elements of a defendant's prior conviction with the elements listed in the enhancement. If the former necessarily includes the latter, an enhancement applies.

But criminal codes sometimes enhance sentences based on undefined crimes—such as "burglary" or "arson." In those circumstances, this Court's precedent—dating back to *Taylor* v. *United States*, 495 U.S. 575 (1990)—provides a clear method to interpret the text. The sentencing court identifies "a 'generic' version of a crime—that is, the elements of 'the offense as commonly understood.' " *Shular* v. *United States*, 140 S. Ct. 779, 783 (2020) (quoting *Mathis* v. *United States*, 136 S. Ct. 2243, 2247 (2016)). The court then compares that generic definition with the elements of the prior conviction.

This case concerns how federal courts should interpret one of the most frequently applied provisions in the entire federal Sentencing Guidelines: conspiring to commit a "controlled substance offense." According to the Guidelines, a "controlled substance offense" is a

state or federal crime prohibiting manufacturing, importing, distributing, or exporting drugs. U.S.S.G. § 4B1.2(b). The commentary to the Guidelines defines "controlled substance offense[s]" to "include" three classic, inchoate offenses: "the offenses of aiding and abetting, conspiring, and attempting to commit" controlled substance offenses. *Id.* § 4B1.2 cmt. n.1.

The Circuits have split 6-2 over how to interpret "the offense[] of * * * conspiring." As first year law students learn—and as is true in the vast majority of states—a criminal conspiracy typically requires proving both the agreement to commit a crime and some overt act in furtherance of the conspiracy.

Applying *Taylor* and its progeny, the Fourth and Tenth Circuits have interpreted "the offense of conspiring" to mean just that: a conspiracy offense that requires an agreement and an overt act. *See, e.g.*, *United States* v. *Norman*, 935 F.3d 232, 237-238 (4th Cir. 2019); *United States* v. *Martínez-Cruz*, 836 F.3d 1305, 1310-14 (10th Cir. 2016).

In contrast, the First, Second, Fifth, Sixth, Seventh, and Ninth Circuits have all held that the Guidelines only require proof of an agreement. No overt act is necessary. *See* Pet. App. 4a (1st Cir.); *United States* v. *Tabb*, 949 F.3d 81, 87-89 (2d Cir. 2020); *United States* v. *Rodríguez-Escareno*, 700 F.3d 751, 753-754 (5th Cir. 2012); *United States* v. *Sanbria-Bueno*, 549 F. App'x 434, 438-439 (6th Cir. 2013); *United States* v. *Smith*, 989 F.3d 575, 586 (7th Cir. 2021); *United States* v. *Rivera-Constantino*, 798 F.3d 900, 903-905 (9th Cir. 2015).

Making matters worse, beneath that surface uniformity in those six circuits, lies deeper fragmentation and disagreement. In the First Circuit decision below,

and in the Sixth and Ninth Circuits, the court declined to apply a generic-crime analysis altogether. But the Second and Seventh purport to define a generic crime—and reach the opposite result from the Fourth and Tenth. Meanwhile, the Fifth Circuit has issued decisions that take both approaches.

This Court should intervene to resolve this critical question of textual interpretation. The core purpose of the Sentencing Guidelines is to provide uniformity in federal sentencing, and a core purpose of this Court's review is to ensure uniformity in the federal courts. But today, defendants in New York or Los Angeles receive different sentences from those in Denver or Richmond—for no good reason. Because the Sentencing Commission lacks six out of seven members, there is little chance it will solve this unjust dis-uniformity any time soon. Unless and until this Court intervenes, this problem will only fester.

This petition is an ideal vehicle to address this compelling split. Petitioner received a 38-month sentence for firearms charges, based on an enhancement for a prior drug conspiracy conviction that did not require an overt act. In a decision upholding the enhancement, the First Circuit acknowledged the circuit split on the meaning of "the offense of conspiring," and declined to apply a generic-crime analysis. Instead, the First Circuit claimed to follow this Court's recent decision in *Shular*. But the First Circuit was wrong. *Shular* directs courts to define a generic crime to interpret terms of art with "common-law history and widespread usage." 140 S. Ct. at 785. "The offense of conspiring" to commit another crime is just that kind of hornbook term with a long-established legal pedigree and a generic meaning.

This Court should grant this petition and reverse.

STATEMENT

A. Legal Background.

1. Congress established the United States Sentencing Commission to "provide certainty and fairness" and avoid "unwarranted sentencing disparities." 28 U.S.C. § 991(b)(1)(B). The Commission promulgates the federal Sentencing Guidelines, policy statements, and official commentary. Commentary "that interprets or explains a guideline is authoritative." *Stinson* v. *United States*, 508 U.S. 36, 38 (1993).

When a district court sentences a defendant, the Guidelines and commentary provide the "lodestar." *Molina-Martínez* v. *United States*, 136 S. Ct. 1338, 1346 (2016). A court must "begin all sentencing proceedings by correctly calculating the applicable Guidelines range," which serves as the "starting point and the initial benchmark." *Gall* v. *United States*, 552 U.S. 38, 49 (2007). Throughout the sentencing, the "Guidelines inform and instruct the district court's determination." *Molina-Martínez*, 136 S. Ct. at 1346.

2. The Guidelines impose several sentencing enhancements for defendants who have previously committed "controlled substance offenses" or "crimes of violence." *See, e.g.*, U.S.S.G. §§ 2K2.1(a)(1)-(4) (firearm offenses); 2K1.3(a)(1)-(2) (explosive offenses); 4B1.1 (career offenders).

A controlled substance offense is a state or federal felony that "prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance" and possession with intent to do the same. *Id.* § 4B1.2(b). Crimes of violence are those crimes with an element of "the use, attempted use, or threatened

use of physical force," or certain enumerated but undefined offenses, such as murder and arson. *Id.* § 4B1.2(a).

The Guidelines' commentary states that controlled substance offenses and crimes of violence "include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses." *Id.* § 4B1.2 cmt. n.1. The Guidelines do not further define these three inchoate offenses.

3. Title 21 criminalizes a number of federal drug offenses, such as manufacturing, distributing, and dispensing controlled substances. *See* 21 U.S.C. § 841(a). Section 846 criminalizes conspiracy to commit such drug offenses: "Any person who attempts or conspires to commit any [such] offense * * * 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." *Id.* § 846.

"In order to establish a violation of" Section 846, "the Government need not prove the commission of any overt acts in furtherance of the conspiracy." *United States* v. *Shabani*, 513 U.S. 10, 15 (1994). Instead, the government need only prove the existence of a "criminal agreement." *Id.* at 16. In most states, by contrast, conspiracy requires proving both an agreement and "an overt act in furtherance of the plan." *See* Wayne R. LaFave, *Substantive Criminal Law* § 12.2(b) (3d ed. Oct. 2020 update).

B. Proceedings Below.

On June 14, 2018, police searched an apartment in San Juan and found a pistol modified to shoot automatically. Pet. App. 4a-5a. Petitioner Raymond Rodríguez-Rivera claimed responsibility for the gun and pleaded guilty to being a felon in possession of a

firearm, *see* 18 U.S.C. § 922(g)(1), and possessing a machine gun, *see id*. § 922(o). Pet. App. 5a.[1]

When it calculated the Guidelines range, the District Court imposed an enhancement that applies when a defendant possesses certain firearms and has one prior conviction for a controlled substance offense. U.S.S.G. § 2K2.1(a)(3). Petitioner had previously been convicted under Section 846. Pet. App. 16a. Petitioner agreed that he possessed the kind of firearm necessary to trigger that enhancement. But petitioner argued that his prior Section 846 conviction did not qualify as conspiring to commit a controlled substance offense under the Guidelines. *Id*. at 17a.

Citing Fourth Circuit precedent, petitioner argued that "conspiring" "to commit" a controlled substance offense means committing an offense that necessarily includes the elements of a generic conspiracy, including both an agreement and an overt act. *See id*. (citing *United States* v. *Whitley*, 737 F. App'x 147 (4th Cir. 2018) (per curiam)). But Section 846 is unusual; it does not require proof of an overt act. According to petitioner, the "elements" of a Section 846 offense therefore "do not track the generic definition of conspiracy," and so his Section 846 conviction did not qualify as a controlled substance offense. *Id*. (internal quotation marks omitted).

The District Court disagreed and "applied the enhancement, which added six and eight months of imprisonment, respectively, to the bottom and top of the Guidelines sentencing range." *Id*. at 5a. Petitioner received a 38-month sentence. *Id*. at 5a-6a.

---

[1] The District Court had jurisdiction under 18 U.S.C. § 3231.

On appeal, petitioner argued that the Guidelines' definition of conspiring to commit a controlled substance offense means only those state and federal offenses that necessarily include the elements of the generic definition of a conspiracy. The First Circuit disagreed, and held that conspiracy offenses qualify as controlled substance offenses so long as the predicate offense of the conspiracy "prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance or the possession of the same." *Id*. at 8a (cleaned up).

The First Circuit acknowledged that, at the time of its opinion, "the six circuits that have addressed this issue have split four to two." *Id*. at 3a. "Two circuits"—the Fourth and Tenth—"have more or less accepted [petitioner's] argument." *Id*. at 7a-8a. In contrast, the Second, Fifth, Sixth, and Ninth Circuits had reached the opposite conclusion. *See id*. at 3a n.1.

The court below acknowledged that *Taylor* v. *United States*, 495 U.S. 575 (1990), and "its progeny" have often looked to "generic definition[s]" of crimes to interpret criminal statutes, including the terms "burglary," "arson," and "extortion" in the Armed Career Criminal Act, 18 U.S.C. § 924(e) and the term "illicit trafficking in a controlled substance" in the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(B). *See* Pet. App. 9a-10a. But the First Circuit rejected a generic-crime analysis when it came to interpreting the meaning of a conspiracy offense: According to that court, "it would be odd indeed if the definition of a controlled substance offense excluded the only form of conspiracy prohibited by the [federal] Controlled Substances Act itself." *Id*. at 8a.

The court below acknowledged that it uses a generic definition to define the offense of attempting in the very same sentence, *see id*. at 13a n.3. But the court below concluded that two of this Court's decisions meant that it should interpret the meaning of the offense of "conspiring" without reference to the generic definition of a conspiracy offense. In *Johnson* v. *United States*, 559 U.S. 133 (2010), this Court "determined what the term 'physical force' meant as used in [the Armed Career Criminal Act], without needing to search for any generic meaning." Pet. App. 10a. And in *Shular* v. *United States*, 140 S. Ct. 779 (2020), this Court held that the terms "involving manufacturing, distributing, or possessing" a controlled substance "described conduct rather than [generic] offenses with elements." Pet. App. 11a (internal quotation marks omitted).

According to the First Circuit, two aspects of *Shular* were particularly instructive: The terms at issue in *Shular* were "unlikely names for generic offenses" and were "more readily viewed as descriptions of conduct." *Id*. (quoting *Shular*, 140 S. Ct. at 785). Additionally, the statute at issue in *Shular* did not use "the formulation X is Y, (*e.g.*, a crime that 'is burglary, arson, or extortion')," but instead used "the formulation X involves Y (*i.e.*, 'an offense involving manufacturing, distributing or possessing a controlled substance')." *Id*. (ellipses omitted). The "X involves Y" formula "reinforce[d] the understanding that the descriptive terms immediately following the word 'involving' identify conduct," not generic offenses. *Id*. at 11a-12a (internal quotation marks omitted).

The court below applied *Shular* to interpret the meaning of the offense of conspiring to commit a controlled substance offense. The First Circuit concluded that the Guidelines' definition of a controlled substance offense as an offense that "prohibits" "manufacture, import, export, distribution, or dispensing," U.S.S.G. § 4B1.2(b), indicated that a court should not "define or identify any generic offense." Pet. App. 12a. Instead, a court should "ask whether the predicate offense [of the conspiracy] 'prohibits' the specified conduct." *Id*.

When it came to "the offense of conspiring," the First Circuit admitted that the definition "veers closer to the 'X is Y' formulation" because the text defines a controlled substance offense *to include* inchoate offenses. *Id*. But the First Circuit argued that the definition's use of "the gerund 'conspiring,' * * * naturally refers to conduct, rather than the [generic] offense of 'conspiracy.' " *Id*. at 12a-13a. The First Circuit likewise noted that the word "include[]" "is not so far from" the word "involve[]" used in *Shular*, meaning the court need not look to the generic definition of a conspiracy when interpreting the definition. *Id*. at 13a.

In its summation, the First Circuit again noted its "strong sense that conspiring under section 846 of the Controlled Substances Act was one of many offenses the Sentencing Commission had in mind." *Id*.

This petition follows.

REASONS FOR GRANTING THE PETITION

This petition presents an unusually clear 6-2 split: The First Circuit's decision openly departs from the Fourth and the Tenth Circuits, and joins the Second, Fifth, Sixth and Ninth Circuits. Additionally, on the

day before the First Circuit released the decision below, the Seventh Circuit similarly held that a controlled substance offense includes conspiracy offenses that lack an overt act requirement.

This Court should intervene to resolve this compelling and straightforward legal question. The core purpose of the Sentencing Guidelines is to ensure national uniformity in federal sentences, and a core purpose of this Court's review is to ensure uniformity in federal courts. Yet right now, the circuit in which a defendant is convicted can drastically impact whether a sentencing enhancement applies. Nor is this a trivial problem: Because Section 846 is a commonly prosecuted federal crime and lacks an overt act requirement, cases just like petitioner's occur frequently. And while this case involves controlled substance offenses, the same problem arises with respect to the Guidelines' identical definition of a conspiracy to commit a "crime of violence." *See, e.g.*, *United States* v. *McCollum*, 885 F.3d 300, 309 (4th Cir. 2018).

In addition to preserving the uniformity of federal law, this petition implicates a second core purpose of this Court's review: the need for this Court to clarify its precedent. As the decision below demonstrates, lower courts are confused about when and how to apply a generic definition to interpret a criminal provision. That methodological debate reverberates beyond the meaning of any one statute or guideline, is sure to arise time and again, and can only be clarified by this Court.

The decision below is also wrong: *Shular* does not require ignoring the generic definition of conspiring. The First Circuit acknowledged that this Court has directed courts to look to the generic definition of

crimes when interpreting numerous terms in the Armed Career Criminal Act and the Immigration and Nationality Act. The court below even recognized that the definition in this case "veers close[]" to those "formulation[s]" in which this Court has applied a generic definition to interpret a criminal-law term of art. Pet. App. 12a. But that court ultimately took a different path based on pure purposivism—its "strong sense" that the Commission "had" Section 846 offenses "in mind" when it wrote the definition of a controlled substance offense. *Id*. at 13a. That results-oriented approach elevates a hunch over text and is incorrect.

I. THE DECISION BELOW ACKNOWLEDGED A CLEAR AND DEEP CIRCUIT SPLIT.

This petition presents a deep split which was acknowledged by the court below and multiple other circuits.

Two circuits—the Fourth and the Tenth—apply the generic meaning of an offense of conspiring, and conclude that the generic offense includes an overt act. *See McCollum*, 885 F.3d at 307-309 (4th Cir.); *Norman*, 935 F.3d at 237-238 (4th Cir.); *Martínez-Cruz*, 836 F.3d at 1310-14 (10th Cir.). In contrast, six circuits—the First, Second, Fifth, Sixth, Seventh, and Ninth—have held that offenses qualify as conspiracies under the Guidelines' definition even if they lack an overt act requirement. *See* Pet. App. 4a (1st Cir.); *Tabb*, 949 F.3d at 87-89 (2nd Cir.); *Rodríguez-Escareno*, 700 F.3d at 753-754 (5th Cir.); *Sanbria-Bueno*, 549 F. App'x at 438-439 (6th Cir.); *Smith*, 989 F.3d at 586 (7th Cir.); *Rivera-Constantino*, 798 F.3d at 903-905 (9th Cir.). But beneath that surface uniformity lies a deeper confusion: Three circuits (the First,

Sixth, and Ninth) do not apply a generic crime analysis, at least for Section 846 convictions; two circuits do (the Second and Seventh); and one (the Fifth) has adopted conflicting approaches.

This split cannot percolate much further: At most, two more courts of appeals could weigh in. The Eighth Circuit has acknowledged that its "sister circuits appear split." *United States* v. *Merritt*, 934 F.3d 809, 811 (8th Cir. 2019). But neither the Eighth nor Eleventh Circuits has yet taken a position. Meanwhile, the Third and D.C. Circuits cannot decide the question because of unrelated circuit precedent.

A. Two Circuits Interpret Conspiring To Commit Controlled Substance Offenses To Require An Overt Act.

The Fourth and Tenth Circuits have held that the Guidelines' phrase "the offense[] of * * * conspiring" means an offense that meets the generic definition of a conspiracy, namely a state or federal offense requiring proof of an agreement and an overt act.

1. The Fourth Circuit initially addressed the meaning of "conspiring" to determine if conspiracy to commit murder under 18 U.S.C. § 1959 qualifies as a conspiracy to commit a crime of violence under the Guidelines. *See McCollum*, 885 F.3d at 308-309. In subsequent decisions, the Fourth Circuit then applied its prior decision to specifically hold that, "because [18 U.S.C.] § 846 does not require an overt act, 'it criminalizes a broader range of conduct than that covered by generic conspiracy,' " and does not qualify as an offense of conspiring under the Guidelines. *Whitley*, 737 F. App'x at 149 (quoting *McCollum*, 885 F.3d at 309); *see Norman*, 935 F.3d at 237-238 (same).

To define an offense of "conspiring," the Fourth Circuit looked to this Court's decision in *Taylor* as establishing the relevant interpretative framework. Under *Taylor*, to define an enumerated crime, "courts must look to the 'generic, contemporary meaning' of the crime, which will typically correspond to the 'sense in which the term is now used in the criminal code of most states,' rather than the term's common law meaning." *McCollum*, 885 F.3d at 304 (internal citation omitted) (quoting *Taylor*, 495 U.S. at 594, 598). Then, courts "ensure that the elements of the crime of conviction are no broader than those of the generic enumerated offense." *Id*.

The Fourth Circuit first held that because "the Guidelines do not define conspiracy, it should be understood to refer to the generic, contemporary meaning of the crime." *Id*. at 307 (internal quotation marks omitted). Citing a Ninth Circuit case that had exhaustively surveyed the law, the Fourth Circuit determined that "thirty-six states, the District of Columbia, Guam, Puerto Rico, and the Virgin Islands define conspiracy to require an overt act," as does "the general federal conspiracy statute." *Id*. at 308 (citing *United States* v. *García-Santana*, 774 F.3d 528, 534-535 (9th Cir. 2014) and 18 U.S.C. § 371). This survey was "sufficient to establish the contemporary definition of conspiracy" as requiring an overt act. *Id*. The Fourth Circuit then held that where a state or federal conspiracy offense "does not require an overt act, it criminalizes a broader range of conduct than that covered by generic conspiracy," and therefore does not qualify under the Guidelines as conspiring. *Id*. at 309.

2. The Tenth Circuit has likewise interpreted "conspiring" "to commit such offenses" by looking to the

generic definition of a conspiracy. *See Martínez-Cruz*, 836 F.3d at 1308.[2] The court recognized that its conclusion pitted it "against" its "sister circuits." *Id*. at 1314. But the court found those contrary decisions "unpersuasive." *Id*. at 1313.

Like the Fourth Circuit, the Tenth began its analysis with "the categorical approach adopted by the Supreme Court in *Taylor* v. *United States*." *Id*. at 1309 (internal quotation marks omitted). Under that approach, "the court assume[d] that an enumerated offense in the Guidelines refers to the generic, contemporary meaning of the offense." *Id*. (internal quotation marks omitted). A sentencing enhancement based on a prior offense could apply only if "the elements of that generic enumerated offense are congruent with the elements of the defendant's prior offense." *Id*. (internal quotation marks omitted).

The Tenth Circuit held that multiple sources provide evidence of the generic definition of a crime, including the particular federal statute that provided the basis of the prior conviction, states' criminal codes, and "prominent secondary sources, such as criminal law treatises and the Model Penal Code." *Id*. (internal quotation marks omitted). Looking to the same Ninth Circuit case as the Fourth Circuit, the Tenth Circuit noted that, to prove a conspiracy in "forty of fifty-four

---

[2] *Martínez-Cruz* interpreted language in U.S.S.G. § 2L1.2 nearly identical to the definition in § 4B1.2 which was subsequently removed. *Compare* U.S.S.G. § 2L1.2 cmt. n.5 (2015), *with* U.S. Sentencing Comm'n, *Amendments to the Sentencing Guidelines* § 2L1.2, at 32-39 (eff. Nov. 1, 2016). The Tenth Circuit has applied *Martinez-Cruz* to similarly interpret U.S.S.G. § 4B1.2. *See United States* v. *Crooks*, 997 F.3d 1273, 1279-80 (10th Cir. 2021). The Fifth, Sixth and Ninth Circuit opinions discussed below likewise interpreted U.S.S.G. § 2L1.2.

jurisdictions," prosecutors must prove the existence of an overt act. *Id*. at 1311 (quoting *García-Santana*, 774 F.3d at 534-535).

The Tenth Circuit rejected two counter arguments. *First*, the Tenth Circuit rejected the argument—accepted in the Fifth Circuit—that "the generic definition of conspiracy does not require an overt act" because "sixteen" states "and many federal" conspiracy statutes do not. *Id*. at 1311-12 (citing *United States* v. *Pascacio-Rodríguez*, 749 F.3d 353, 363-366 (5th Cir. 2014)). The Tenth Circuit found this analysis unpersuasive because it failed to give "weight to the primary federal general conspiracy statute" which *does* require an overt act, and "the more than 2:1 ratio of states that require an overt act for conspiracy." *Id*. at 1312. A "simple balancing of federal conspiracy statutes is not very helpful," because "many of the statutes reach narrow behavior," such as " 'conspiracy to furnish facilities or privileges to ships or persons contrary to a presidential proclamation.' " *Id*. at 1311 n.5 (quoting 15 U.S.C. § 77). "And while the common law of conspiracy did not require an overt act, * * * most jurisdictions have jettisoned that doctrine." *Id*. at 1314. Defining a generic definition of a crime requires "look[ing] to the law's current state." *Id*.

The Tenth Circuit likewise rejected the Fifth, Ninth and Sixth Circuit's purposivism, based on their "assumption[]" that "the clear intent of the Sentencing Commission" "was to encompass a prior federal drug conspiracy conviction under" Section 846. *Id*. at 1312 (internal quotation marks omitted). Those circuits supposedly "divined the intent of the Sentencing Commission without offering any evidence of that intent."

Id. at 1314. But if the drafters truly sought to encompass Section 846, they "could have stated so expressly." *Id*. at 1313. Instead, the drafters used "a generic, undefined word ripe for" a generic definition. *Id*.

B. Six Circuits Hold That An Overt Act Is Not Required.

In contrast to the Fourth and Tenth, the First, Second, Fifth, Sixth, Seventh, and Ninth Circuits have held that the phrase "offense[] of * * * conspiring" in the Guidelines does not have an overt act requirement. And even this agreement within these six circuits belies a deeper confusion over whether and how to apply *Taylor* and its progeny. The First, Sixth, and Ninth Circuits do not apply the generic crime analysis at all, while the Second and Seventh do, and the Fifth has adopted internally conflicting approaches.

1. The clearest example of confusion is the Fifth Circuit, which initially released an opinion holding that "conspiring" meant the generic definition of conspiring, including proof of an overt act. But the Fifth Circuit panel *sua sponte* withdrew its first opinion and issued a second opinion—devoid of almost any reasoning—that reached the opposite result. *See United States* v. *Rodríguez-Escareno*, No. 11-41063 (5th Cir. Oct. 23, 2012) (reprinted at Pet. App. 29a-36a), *opinion withdrawn and superseded*, 700 F.3d 751 (5th Cir. 2012).

In its first opinion, the Fifth Circuit initially held that, to interpret the meaning of the word "conspiring," it must look to "definitions contained within the Guidelines itself and the word's generic, contemporary meaning." Pet. App. 32a (internal quotation marks omitted). But "the Guidelines do not define

'conspiracy,' " so the Fifth Circuit sought "the term's generic, contemporary meaning," *id.*, by looking to Black's Law Dictionary, Professor LaFave's treatise, and precedent—all of which indicated that a conspiracy requires an overt act, *id.* at 32a-33a. According to that now-withdrawn opinion, "Section 846 does not require that an overt act occur" and so does not qualify as "conspiring" under the Guidelines. *Id.* at 33a.

The Fifth Circuit *sua sponte* withdrew that opinion and reversed course. *See id.* at 37a. Instead, the same panel held that the "Guidelines themselves tell us that a conviction for a conspiracy to commit a federal drug trafficking offense will justify application of the enhancement." *Rodríguez-Escareno*, 700 F.3d at 753-754. Contrary to its prior decision, that court refused "to search for a generic meaning of 'conspiracy,' " claiming it "would only becloud what is clear from the Guideline itself." *Id.* at 754. The Fifth Circuit provided no other meaningful analysis for its reading of the text—except to state that it did not decide whether the same definition applied "for conspiracies to commit state-law offenses." *Id.* at 754 n.2.

In a subsequent decision involving a conspiracy to commit a crime of violence, the Fifth Circuit again concluded that the Guidelines' use of the term "conspiring" does not denote a crime requiring an overt act. That opinion largely tracked *Taylor*'s generic-crime analysis. *See Pascacio-Rodríguez*, 749 F.3d at 358-366. The Fifth Circuit decided that, to determine the generic definition for the purposes of that case, it "should focus on the particular offense that [was] at issue in [that] appeal, which [was] conspiracy to commit murder." *Id.* at 364. The Court admitted that "a majority of the states' laws" required "proving an

overt act in furtherance of a conspiracy to commit murder," which indicated that "the generic, contemporary definition of conspiracy to commit murder includes the requirement of an overt act." *Id*. at 366. But the Fifth Circuit decided it could not "ignore [conspiracy] laws of 16 states, a number of federal laws, and the Model Penal Code, none of which contains an overt-act requirement for conspiracy to commit murder." *Id*. Even though it deemed this "weight of authority" "slight," the Fifth Circuit nonetheless held "that the generic, contemporary meaning" "does not require an overt act." *Id*. at 366, 368.

The Fifth Circuit also rejected its earlier suggestion that the term "the offense of conspiring" could bear different meanings depending on whether a prior conviction was under a federal or state statute. "The text * * * does not draw a distinction between federal and state crimes and does not reasonably permit courts to draw such a distinction." *Id*. at 367.

2. The Second and Seventh Circuits resort to a blend of purposivism and *Taylor*'s generic-crime analysis to conclude that a conspiracy does not require an overt act.

The Second Circuit rejected the notion that a generic definition of a conspiracy requires an overt act. That court conceded that conspiracy often requires "an overt act, however trivial, be taken in furtherance of the conspiracy," but then noted that "several federal crimes, most notably narcotics conspiracy," do not contain an overt act requirement. *Tabb*, 949 F.3d at 88. The court also declared that a Section 846 conviction simply must count as a controlled substance offense: "To hold otherwise would be to conclude that the Sentencing Commission intended to exclude federal drug

conspiracy offenses when it used the word 'conspiring.'" *Id*. (cleaned up). But the Second Circuit deemed it "patently evident" that the Guidelines' definition "was intended to and does encompass Section 846 narcotics conspiracy." *Id*. at 89.

Citing the Second Circuit's analysis of the generic meaning of a conspiracy, the Seventh Circuit reached the same result. *See Smith*, 989 F.3d at 586. That court looked to the "'generic' version of an offense," meaning "'the offense as commonly understood.'" *Id*. at 585 (quoting *Mathis*, 136 S. Ct. at 2247). It then found "no reason to construe the word 'conspiring' * * * to exclude § 846 conspiracy, especially given that an overt act is not always a required element in the narcotics conspiracy context." *Id*. at 586.

3. Meanwhile, the First, Sixth and Ninth Circuits interpret the Guidelines without reference to a generic definition of a conspiracy.

In its controlling opinion, the Ninth Circuit acknowledged that it had previously "defined the generic offense of conspiracy" "as requiring an overt act" in order to interpret the meaning of a "conspiracy" in the Immigration and Nationality Act. *Rivera-Constantino*, 798 F.3d at 903 (citing *García-Santana*, 774 F.3d at 534). That prior Ninth Circuit opinion was exhaustive. The court surveyed "state conspiracy statutes" and concluded that "forty of fifty-four jurisdictions," along with the generic federal conspiracy statute, require an overt act; it concluded that both the Model Penal Code and Professor LaFave's treatise "confirm the results of [its] survey;" and it explained that, while the common law had not required proof of an overt act, the modern requirement "developed to guard against the punishment of evil intent alone, and

to assure that a criminal agreement actually existed." *García-Santana*, 774 F.3d at 534-537.

But *García-Santana* was cast aside when the Ninth Circuit determined whether Section 846 conspiracies qualify under the Guidelines. That court then held that it need not look to the generic definition of conspiracy because "the plain meaning" was "readily apparent from the text, context, and structure of the relevant Guidelines provision and commentary." *Rivera-Constantino*, 798 F.3d at 904. According to that court, it would have been "downright absurd" to believe the Sentencing Commission excluded "a federal conviction for a drug trafficking offense under federal law." *Id*. at 904-905. The Ninth Circuit, however, reserved any consideration of "the meaning of the phrase 'conspiring to commit a drug trafficking offense' as it relates to conspiracy convictions under state law." *Id*. at 906 n.4 (cleaned up).

Judge Paez dissented. He noted that while *Taylor*'s "approach at times is underinclusive," the court was "obligated to follow" it and apply the generic definition of a conspiracy to interpret the text. *Id*. at 909 (Paez, J., dissenting).

The Sixth Circuit has similarly concluded that it need not look to the generic definition of a conspiracy because the drafters' intent was "clear." *Sanbria-Bueno*, 549 F. App'x at 438. According to the Sixth Circuit, "no one disputes" that Section 841(a)(1) was a qualifying offense, a conspiracy to commit a qualifying offense in turn qualifies, and therefore the drafters "expressly intended that a conviction under 21 U.S.C. § 846 for conspiracy to commit a federal drug offense proscribed by § 841" would qualify. *Id*. at 439.

Finally, in the decision below, the First Circuit likewise declined to identify a generic offense and concluded that a conspiracy offense qualifies even if it lacks an overt act requirement.

Like other courts on this side of the split, the First Circuit began its analysis with a heavy dose of purposivism, declaring it "odd indeed if the definition of a controlled substance offense excluded the only form of conspiracy prohibited by the Controlled Substances Act itself." Pet. App. 8a. Applying a generic definition to interpret the Guidelines leads to "nonsense." *Id*. (quoting *Johnson*, 559 U.S. at 139-140).

The court below then relied on this Court's decision in *Shular* to "confirm[ ]" it was "on the right track in rejecting a generic version of conspiracy as the benchmark." *Id*. at 11a. It admitted that the text in the case differed from what was at issue in *Shular*, and "veers closer to the 'X is Y' formulation" in which this Court has looked to the generic definition of a crime. *Id*. at 12a. But the court below concluded that "the gerund 'conspiring,' * * * naturally refers to conduct, rather than the offense of ' conspiracy.' " *Id*. at 12a-13a. Therefore, the Court concluded, "the key test is whether the aim of the 'conspiring' is certain prohibited conduct," and not whether the prior offense in question necessarily requires the elements of a generic conspiracy. *Id*. at 13a.

C. This Split Cannot Develop Much Further.

Of the remaining four geographic circuits, only two—the Eighth and the Eleventh—could possibly weigh in. Third and D.C. Circuit precedent prevents those courts from ever addressing this question. Those latter circuits have held that the Guidelines'

commentary, which authoritatively interprets a controlled substance offense to include inchoate offenses, improperly expanded the scope of the Guidelines themselves. *See United States* v. *Nasir*, 982 F.3d 144, 157-160 (3d Cir. 2020) (en banc); *United States* v. *Winstead*, 890 F.3d 1082, 1090-1092 (D.C. Cir. 2018); *see also United States* v. *Havis*, 927 F.3d 382, 386-387 (6th Cir. 2019) (en banc) (per curiam) (same). That administrative-law question is not presented by this petition, and this Court need not address it. But the question this petition does present cannot arise in those two circuits.

II. THE DECISION BELOW IS WRONG.

This Court has recently affirmed that when a criminal code "refers generally to an offense without specifying its elements," this Court's decisions provide a clear framework. *Shular*, 140 S. Ct. at 783. A court must "come up with a 'generic' version of a crime—that is, the elements of 'the offense as commonly understood.' " *Id*. (quoting *Mathis*, 136 S. Ct. at 2247). The court then inquires "whether the elements of the offense of conviction matched those of the generic crime." *Id*. (citing *Taylor*, 495 U.S. at 602). At bottom, this inquiry requires applying "the normal tools of" "interpretation." *Esquivel-Quintana* v. *Sessions*, 137 S. Ct. 1562, 1569 (2017). In this case, every relevant tool indicates that "the offense[ ] of * * * conspiring" means a generic offense of conspiracy, which in turn requires proof of both an agreement and an overt act. But because Section 846 does not require proof of an

overt act, petitioner's Section 846 conviction does not match the elements of the generic crime.

1. Five important textual and contextual indicators suggest that the Sentencing Guidelines employ a "generic, undefined word ripe for" *Taylor*'s interpretative approach. *Martínez-Cruz*, 836 F.3d at 1313.

First, as every first-year criminal law student learns, there is a commonly understood generic definition of conspiracy, with a "common-law history and widespread usage." *Shular*, 140 S. Ct. at 785. That a generic definition is so readily available is a strong indication that the text meant to invoke it.

Second, in common usage, the gerund "conspiring" is often synonymous with the noun "conspiracy." Both words can refer to a legal offense with multiple elements. Consider examples from criminal codes. In the same paragraph, the Model Penal Code refers to a "person" being "guilty of conspiracy" and being "guilty of conspiring." Model Penal Code § 5.03(2). In its adoption of that Code, Arizona's general conspiracy statute similarly refers to the same "person" as being "guilty of conspiracy" and being "guilty of conspiring to commit the offense." Ariz. Rev. Stat. Ann. § 13-1003(B). Likewise, Missouri's general conspiracy statute refers both to "the offense of conspiracy to commit" and "a prosecution for conspiring to commit." Mo. Rev. Stat. § 562.014(1)-(2). An Illinois statute also refers to "the offense of conspiring to violate this Article" and a "prosecution for a conspiracy to violate this Article." 720 Ill. Comp. Stat. 5/33G-4. In any of these

examples, and more, "conspiracy" could replace "conspiring"—and vice versa—without changing any meaning.[3]

Third, the Sentencing Guidelines embed the word "conspiring" alongside two other terms of art which likewise reference generic offenses: "aiding and abetting" and "attempting." The former phrase in particular refers to a distinct theory of accomplice liability. *See, e.g.*, *Gonzales* v. *Dueñas-Álvarez*, 549 U.S. 183, 185-190 (2007) (using *Taylor*'s approach to analyze the generic offense of aiding and abetting); *Aid and abet*, Black's Law Dictionary (11th ed. 2019) ("Aiding and abetting is a crime in most jurisdictions."); *see also United States* v. *Reséndiz-Ponce*, 549 U.S. 102, 107 (2007) ("[T]he word 'attempt' * * * as used in the law for centuries * * * encompasses both the overt act and intent elements."). Because "words grouped in a list should be given related meanings," Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 195 (2012) (internal quotation marks omitted), the offense of "conspiring" is likewise best understood as also meaning a generic inchoate offense.

Fourth, the Sentencing Guidelines use a definite article—*the offenses* of aiding and abetting, conspiring, and attempting—which also strongly suggests a generic term. The "rules of grammar govern [textual] interpretation." *Nielsen* v. *Preap*, 139 S. Ct. 954, 965 (2019) (internal quotation marks omitted). When a

---

[3] *See also, e.g.*, Alaska Stat. § 11.31.120; Colo. Rev. Stat. § 18-2-201; Ky. Rev. Stat. Ann. § 506.050; Neb. Rev. Stat. § 28-202; 18 Pa. Stat. and Cons. Stat. Ann. § 903; Tex. Penal Code Ann. §§ 71.01(b), 71.02(c).

text uses a definite article, it indicates that "a following noun or noun equivalent is definite or has been previously specified by context." *Id.* (quoting Merriam-Webster's Collegiate Dictionary 1294 (11th ed. 2005)). By contrast, indefinite articles indicate "the referent is unspecified." *A (indefinite article)*, Merriam-Webster's Collegiate Dictionary (11th ed. 2004). Notably, when this Court recently declined to apply a generic definition in *Shular*, the statute at issue used an indefinite article. *See Shular,* 140 S. Ct. at 783-784 (interpreting 18 U.S.C. § 924(e)(2)(A)(ii), which defines "serious drug offense" to mean "*an* offense under State law, involving * * * " (emphasis added)). By contrast, here, the phrase "*the* offenses of aiding and abetting, conspiring, and attempting" indicates that the listed offenses are "definite" and "settled"—because they refer to generic definitions of well-known forms of criminal liability. *See Preap*, 139 S. Ct. at 965.

Fifth, according to the text, " '[c]rime of violence' and 'controlled substance offense' *include* the offenses of aiding and abetting, conspiring, and attempting to commit such offenses." U.S.S.G. § 4B1.2 cmt. n.1 (emphasis added). "Include" means to "comprise as a part of a whole or group." *Include*, Merriam-Webster's Collegiate Dictionary (11th ed. 2004). This definition "indicates a congruence" between the larger whole and the subordinate part. *Shular*, 140 S. Ct. at 785. In this case, the phrases "crime of violence" and "controlled substance offense"—on one side of the verb "include"—refer to defined "crimes." *See id.* So too, the subordinate parts on the other side of include—the *offenses* of aiding and abetting, conspiring, and attempting to commit such offenses—refer to distinct "crimes." *See id.*

2. The court below did not dispute that there is a clear contemporary definition of the generic crime of conspiring. The elements of the generic offense include both (1) an agreement and (2) an overt act. Because petitioner's Section 846 conviction only required proof of an agreement, it lacks one of the two elements of a generic conspiracy, and so cannot qualify as a controlled substance offense.

The conclusion that the generic offense of conspiring requires an overt act flows from every relevant source.

Start with a basic survey of American "state criminal codes." *Esquivel-Quintana*, 137 S. Ct. at 1571 (citing *Taylor*, 495 U.S. at 598, and *Dueñas–Álvarez*, 549 U.S. at 190). The "vast majority" of "states"—thirty-six—require "an overt act to sustain" a conspiracy "conviction." *Martínez-Cruz*, 836 F.3d at 1311 (quoting *García-Santana*, 774 F.3d at 535). If "the District of Columbia, Guam, Puerto Rico, and the Virgin Islands are included, then the tally rises to forty of fifty-four jurisdictions." *Id*. (quoting *García-Santana*, 774 F.3d at 534-535). Meanwhile, while some specialized federal statues do not require an overt act, the generic federal conspiracy statute does. *See* 18 U.S.C. § 371.

Black's Law Dictionary confirms that "most states" require proof of "action or conduct that furthers the agreement." *Conspiracy*, Black's Law Dictionary, *supra*. So does the leading criminal law treatise by which this Court has defined generic crimes. *See* LaFave, *supra*, § 12.2(b); *see also, e.g.*, *Dueñas-Álvarez*, 549 U.S. at 189-190; *Taylor*, 495 U.S. at 598-599. Likewise, for all but the most serious crimes, the Model Penal Code's definition of conspiracy requires an overt act. *See* Model Penal Code § 5.03(5).

Because Section 846 does not require "any overt acts in furtherance of the conspiracy," *Shabani*, 513 U.S. at 15, its elements do not "match[] those of the generic crime." *Shular*, 140 S. Ct. at 783 (citing *Taylor*, 495 U.S. at 602). Petitioner's prior conviction therefore does not qualify under the definition of a controlled substance offense, and so cannot support a sentencing enhancement.

3. The First Circuit's decision misreads this Court's precedent and displaces plain text in favor of a results-oriented decision based on little more than its "strong sense." Pet. App. 13a.

a. The First Circuit interpreted *Shular* and *Johnson* as requiring it to eschew any need to define a generic crime. *Id*. at 10a-12a. But both *Shular* and *Johnson* confirm that the generic crime analysis is the proper approach here.

Start with *Shular*. There, this Court interpreted the meaning of "an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance." 18 U.S.C. § 924(e)(2)(A)(ii). The Court decided that it should not identify a generic crime but should instead determine whether "the state offense's elements necessarily entail one of the types of conduct." *Shular*, 140 S. Ct. at 784-785 (cleaned up).

As the First Circuit noted, *Shular* deemed the terms "manufacturing," "distributing," or "possessing with intent" " 'unlikely names for generic offenses.' " Pet. App. 11a (quoting *Shular*, 140 S. Ct. at 785). But that logic only supports identifying a generic offense of "conspiring" in this case. In contrast to the drug offenses in *Shular*, "conspiring" *does* invoke a criminal-

law term of art with a "common-law history and widespread usage"—just like the "terms 'burglary,' 'arson,' and 'extortion,' " all of which require identifying a generic offense. *Shular*, 140 S. Ct. at 785. Nor was the First Circuit correct that "the gerund 'conspiring' * * * naturally refers to conduct, rather than the offense of 'conspiracy.' " Pet. App. 12a-13a. Legal codes use both the gerund and the noun interchangeably to refer to the generic offense. *See supra* pp. 24-25.

The First Circuit likewise noted—but failed to appreciate fully—*Shular*'s reliance on the use of the word "involve[]." Pet. App. 12a. By contrast, in this case, the Guidelines refer to crimes of violence and controlled substance offenses as *including* the offenses of conspiring. "Include" creates a congruence between the whole category of crimes and the subordinate part, requiring a generic crime analysis. *See supra* p. 26.

Nor does it matter that the Guidelines define a controlled substance offense as prohibiting "the manufacture, import, export, distribution, or dispensing," or possession with intent—all of which invoke conduct. U.S.S.G. § 4B1.2(b); *see* Pet. App. 8a. The offense of "conspiring" appears in a different portion of the text. U.S.S.G. § 4B1.2 cmt. n.1. And the term "conspiring" applies to both controlled substance offenses and crimes of violence, the latter of which are defined with reference to generic offenses, *e.g.* "murder," "voluntary manslaughter," and "arson." *Id*. § 4B1.2(a)(2). Indeed, the opinion below acknowledged that the First Circuit employs a generic definition of "attempting" to determine whether attempting to commit murder constitutes a crime of violence. Pet. App. 13a n.3 (citing *United States* v. *Benítez-Beltrán*, 892 F.3d 462, 465

(1st Cir. 2018)). The meaning of these inchoate terms should remain consistent, regardless of the object of the inchoate offense.

Finally, the First Circuit's throw-away citation to *Johnson* fares no better. Pet. App. 10a-11a. *Johnson* interpreted the phrase "physical force" as used to define a "violent felony." 559 U.S. at 138-140. This Court declined to apply a generic definition of force based on the generic crime of battery because context made that "term of art" a poor "fit." *Id*. at 139-140. The generic definition of force meant the most-minimal unlawful touch. But the phrase "violent felony" indicated that force meant "violent force." *Id*. at 140. Moreover, the generic definition was "a meaning derived from a common-law *misdemeanor*," whereas the statute at issue defined violent felonies. *Id*. at 141.

Unlike *Johnson*, the context here *supports* applying a generic definition. The term "conspiring" appears alongside two other inchoate offenses, and the words "the" and "include" strongly indicate the statute invokes a generic offense. *See supra* pp. 25-26.

b. Stripped of its thin textualism, the First Circuit's decision boils down to one thing: The court's "strong sense" that "conspiring" simply must include Section 846. Pet. App. 13a. But context again suggests otherwise. "When the Commission wants to single out federal laws, it can—and does—do so explicitly." *McCollum*, 885 F.3d at 306. Here, the same commentary specifically notes that some enumerated federal offenses qualify, such as "possessing a listed chemical with intent to manufacture a controlled substance" under 21 U.S.C. § 841(c)(1). U.S.S.G. § 4B1.2 cmt. n.1. Section 846 is pointedly missing from this list.

This Court has repeatedly warned courts applying the categorical approach to compare the statutory "elements" of offenses, not the "labels" a legislature "assigns" to a crime. *Shular*, 140 S. Ct. at 783 (internal quotation marks omitted). And yet the reason that the First Circuit thought the Guidelines encompass a Section 846 conviction is because Section 846 shares a similar label to language in the Guidelines. *See* Pet. App. 8a.

At the end of the day, the best indication of the Commission's goal is the text it wrote. And "once one departs from strict interpretation of the text," "fidelity to the intent of [the Commission] is a chancy thing." *Zuni Pub. Sch. Dist. No. 89* v. *Dep't of Educ.*, 550 U.S. 81, 116-117 (2007) (Scalia, J., dissenting) (internal quotation marks omitted).

III. THIS PETITION IS AN IDEAL VEHICLE TO ADDRESS THIS IMPORTANT QUESTION PRESENTED.

The stakes in this case are high. Whether a prior conviction qualifies as a controlled substance offense can drastically increase a sentence. Meanwhile, the courts of appeals' confusion is broader than just a debate over how to interpret an (important) Guidelines provision. The lower courts fundamentally disagree on trans-substantive principles of interpretation: When and how does *Taylor*'s generic crime approach apply? That confusion will arise any time a federal court must interpret text referencing undefined crimes. These issues deserve this Court's attention.

1. For three reasons, this Court should grant this petition to resolve the Guidelines' meaning.

First, the Commission is powerless to resolve the confusion regarding this key Guidelines provision. Although this Court has stated that the Commission should have an initial opportunity to clarify the Guidelines, *see Braxton* v. *United States*, 500 U.S. 344, 348 (1991), the Commission is completely unable to act—for the first time in its history. It has lacked a four-member quorum for more than two years running, since January 2019, and presently has just a single voting member.[4] The current administration has not announced any nominees, and there is every reason to think partisan gridlock could stymie confirmations.

The Commission's current state contrasts sharply with the Commission's history, in which it has possessed unbroken authority to respond to lower courts' confusion. That unbroken authority is necessary to understand this Court's statement in *Braxton* that the Court would be "restrained and circumspect in using [its] certiorari power as the *primary* means of resolving [circuit] conflicts" over the meaning of the Guidelines. 500 U.S. at 348 (emphasis added). In *Braxton*, a fully empowered Commission had "already undertaken a proceeding" to "eliminate" the precise "circuit conflict" at issue, and "the specific controversy before [this Court] [could] be decided on other grounds." *Id.* at 348-349. By contrast, today, this Court is the *only* means of resolving this conflict. If the Court doesn't, no one else will. *See Early* v. *United States*, 502 U.S.

---

[4] *See Former Commissioner Information*, U.S. Sentencing Comm'n, *available at* https://tinyurl.com/3eaf5dcv (last visited July 30, 2021).

920 (1991) (White, J., dissenting from denial of certiorari) (advocating review where Commission had "not addressed" "recurring issue").

This Court has also clarified the Guidelines' text on more than one occasion. For instance, in *United States* v. *Dunnigan*, 507 U.S. 87, 92 (1993), neither party contested that a Guidelines enhancement for obstruction of justice included perjury. But the Court interpreted the Guidelines, and defined perjury with reference to contemporary meaning. *See id*. at 92-96. Likewise, *Witte* v. *United States*, 515 U.S. 389, 404 (1995), interpreted "pertinent" Guidelines to refute a defendant's "contention that he should not [have] receive[d] a second sentence under the Guidelines" for conduct taken into account at a prior sentencing.

The Guidelines are federal law, and this Court has a fundamental duty to declare what the law is. *See* Sup. Ct. R. 10(a). This Court should not abandon that duty in the name of circumspection and a faint hope that a quorum-less institution might, maybe, one day act.

Second, there is also little indication that a revitalized Commission would choose to resolve the split. In 2018, the Commission proposed multiple amendments to clarify the meaning of "conspiring." Some proposals include an overt act requirement, while others do not. (Tellingly, one proposal *required* an overt act for controlled substance conspiracies but *not* for

crimes of violence—excluding Section 846 convictions.)[5] There is no guarantee the Commission's members—only four of whom may come from the same political party, *see* 28 U.S.C. § 991(a)—will agree on a solution.

Third, the current circuit split badly undermines the very sentencing scheme Congress created. *See Braxton*, 500 U.S. at 348 (looking to "congressional expectation" in deciding whether to interpret the Guidelines). Congress established the Sentencing Commission to ensure uniformity in federal sentences. But the deep circuit split over the meaning of "the offense of conspiring" has created the kind of dis-uniformity the Guidelines are supposed to avoid. Just take this case: Had petitioner been sentenced in Denver or Richmond instead of San Juan, he would likely have received a sentence that was 6 to 8 months shorter. Because the definition of "the offense of conspiring" can also dictate career offender status, the discrepancy between circuits will be much larger in many cases. *See* U.S.S.G. § 4B1.1. In short, this is a pervasive issue, which infects swaths of the federal criminal justice system.

2. The question presented does not only involve a particular part of the Guidelines. It also implicates *how* federal courts interpret a class of texts that reference undefined but enumerated crimes. That issue is trans-substantive, and turns on the meaning of this Court's precedents, from *Taylor* through *Shular*. It will arise time and again—including whenever the

---

[5] *See* U.S. Sentencing Comm'n, *Proposed Amendments to the Sentencing Guidelines* 43-49 (Dec. 20, 2018), https://tinyurl.com/vpen82y9.

Commission drafts a Guideline using a legal term of art. But only this Court can clarify its own opinions.

Consider the conflicting approaches to the same text. The First, Sixth, and Ninth Circuits did not apply a generic-crime analysis and instead concluded that Section 846 convictions *must* apply. *See supra* pp. 20-22. By contrast, the Second, Fourth, Seventh, and Tenth looked to a generic crime—but reached conflicting results about the meaning of the generic offense. *Compare supra* pp. 13-17, *with supra* pp. 19-20.

Meanwhile, the Fifth Circuit has issued *three* conflicting decisions: the *Rodríguez-Escareno* withdrawn opinion holding that a generic crime analysis applies and that conspiracy requires an overt act, *see* Pet. App. 29a-36a; a superseding opinion holding that no generic-analysis is necessary, *see Rodríguez-Escareno*, 700 F.3d at 753-754; and a later decision applying a generic definition to conclude that conspiracy to commit murder does not require an overt act, *see Pascacio-Rodríguez*, 749 F.3d at 366.

This confusion reflects fundamental methodological disagreement, at every level. What type of text triggers a generic crime approach? Should a court focus on the most generic statute (*e.g.*, conspiracy to commit any offense)? Or should the Court look to the most "narrow" generic version of "the particular offense that is at issue"? *Id*. at 364. Do two-thirds of the States reflect a consensus? *Martínez-Cruz*, 836 F.3d at 1311; *Norman*, 935 F.3d at 237. Or can the combination of some federal statute, a model code, and "16 states" reflect "the weight of authority"? *Pascacio-Rodríguez*, 749 F.3d at 366. Only this Court can resolve those questions.

2. Last, this case is an ideal vehicle. The question presented has been fully preserved, is outcome determinative, and was the exclusive issue addressed below, in an opinion that openly recognized the circuit split.[6]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ERIC ALEXANDER VOS
Federal Public Defender
FRANCO L. PÉREZ-REDONDO
Supervisor, Appeals Division
KEVIN E. LERMAN
FEDERAL PUBLIC DEFENDER,
DISTRICT OF PUERTO RICO
241 F.D. Roosevelt Ave.
San Juan, PR 00918
(787) 281-4922
franco_perez@fd.org

NEAL KUMAR KATYAL
Counsel of Record
NATHANIEL A.G. ZELINSKY
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600
neal.katyal@hoganlovells.com

Counsel for Petitioner

JULY 2021

---

[6] Petitioner remains on supervised release, and this case presents a live controversy. *See United States* v. *Ketter*, 908 F.3d 61, 66 (4th Cir. 2018) (collecting cases).