NO. 21-143

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

BRIEF OF *AMICUS CURIAE* MASSACHUSETTS ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae the Massachusetts Association of Criminal Defense Lawyers ("**MACDL**") is an association of more than 1,000 experienced trial and appellate lawyers who are members of the bar of the Commonwealth of Massachusetts and who devote a substantial part of their practices to criminal defense. MACDL is dedicated to protecting the rights of Massachusetts citizens guaranteed by the Massachusetts Declaration of Rights and the United States Constitution. MACDL seeks to improve the criminal justice system by supporting policies and procedures ensuring fairness and justice in criminal matters. MACDL devotes much of its energy to identifying and attempting to avoid or correct problems in the criminal justice system. It files *amicus curiae* briefs in cases raising questions of importance to the administration of justice.

This case raises just such an important issue: whether "conspiring" to commit a "controlled substance offense" as defined in the United States Sentencing Guidelines ("Guidelines") is limited to only those state and federal crimes that categorically overlap with the generic definition of a conspiracy, which requires proof of *both* an agreement *and* an overt act. *See* Petition at 27–28. Resolution of the recognized circuit split on this issue will directly and profoundly impact criminal defendants

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* states that no counsel for a party authored this brief in whole or in part, and that no person other than *amicus*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. Further, pursuant to Rules 37.2(a) and 37.3(a), counsel of record for the parties received notice of *amicus*'s intent to file this brief at least 10 days prior to its due date and both parties consented to its filing.

in Massachusetts. Like the federal conspiracy statute under which the defendant in this case was previously convicted, 21 U.S.C. § 846, the crime of conspiracy in Massachusetts does not include an overt act requirement. *See* Mass. Gen. Laws ch. 274, § 7; *Commonwealth v. Nee*, 458 Mass. 174, 181 (2010) ("Proof of an overt act in furtherance of the conspiracy is not necessary."). Therefore, defendants with a prior Massachusetts state conviction for conspiracy who are facing sentencing in the First Circuit (or any other circuit that has adopted a similar methodology) will suffer the same fate as the defendant in this case, receiving a substantial sentencing enhancement based solely on jurisdictional happenstance rather than the crime for which they were previously convicted. MACDL has a particular interest in this Court's resolution of the issue presented in the Petition because the First Circuit's error will arbitrarily and erroneously extend the sentences of our clients in federal court.

INTRODUCTION

If any law should be consistent, it is that governing criminal sentencing. Like offenses should be treated alike. Sentencing statutes, the United States Sentencing Commission, and the Guidelines all strive for uniformity in federal sentencing. *See Dorsey v. United States*, 567 U.S. 260, 268 (2012) (Sentencing Reform Act has "uniformity" goal of treating like offenders alike); U.S.S.G., Ch. 1, Pt. A at 3 (main objectives of Sentencing Commission include creating "reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders."). Correct and consistent interpretation of the Guidelines is critical because all "sentencing decisions are anchored by the Guidelines." *Peugh v. United States*, 569 U.S. 530, 541 (2013). The conflict among federal

courts at issue in the Petition undermines the uniformity objective of federal sentencing by conditioning an individual's liberty on the jurisdiction in which that individual happens to be convicted. Nothing could be more arbitrary.

Federal courts regularly must determine whether a particular defendant's criminal history triggers a sentencing enhancement. In most cases, courts use a categorical approach, comparing the statutory elements of a defendant's prior conviction with the elements of the offense specified in the Guidelines triggering the enhancement. If the statutory elements necessarily include the elements of the offense triggering the enhancement, then the enhancement applies. The approach focuses solely on the elements of the prior crime rather than its facts because "the only facts the court can be sure the jury so found are those constituting elements of the offense—as distinct from amplifying but legally extraneous circumstances." *Descamps v. United States*, 570 U.S. 254, 269–270 (2013).[2]

To use the categorical approach, a court must start with a definition of the offense that triggers the enhancement. In general, where a predicate crime is undefined in the Guidelines, this Court's precedent dictates that the court follow the "generic crime" approach. *Taylor v. United States*, 495 U.S. 575, 598 (1990). Under *Taylor*,

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[2] Courts generally default to the categorical approach because of "the Sixth Amendment concerns that would arise from sentencing courts[] making findings of fact that properly belong to juries." *Descamps*, 570 U.S. at 267. Given these concerns, courts only abandon the categorical approach and focus on the underlying facts when the statutory or guideline description of the predicate offense "refers to specific circumstances" that "cannot possibly refer to a generic crime." *Nijhawan v. Holder*, 557 U.S. 29, 30 (2009).

courts evaluate such predicate crimes, like burglary, in comparison to a single, nationwide definition of the predicate crime, i.e., the crime's "generic" definition. The "generic" definition of a crime is that "used in the criminal codes of most States." *Id.* Courts then match the elements of the predicate conviction against the elements of the generic crime. That approach makes sense: even as state and federal laws vary, the Guidelines should have one consistent meaning. Any other approach, the Court recognized in *Taylor*, would result in the varying application of a sentencing enhancement to the exact same conduct depending on what the jurisdiction of conviction labeled that conduct. *See id.* at 590–91 (without applying generic crime approach, a federal defendant's sentence enhancement would be "based on exactly the same conduct, depending on whether the State of his prior conviction happened to call that conduct 'burglary.'"). In other words, it would make the content of federal law dependent on (and variable with) state law. This Court declined to permit the "odd results" triggered by state-by-state inconsistency in the labeling of a predicate crime. *Id.* at 591–92. Instead, in the interest of consistency and fairness in sentencing, this Court adopted the generic crime approach to defining predicate offenses.

Despite the existing guidance from this Court in *Taylor* and its progeny, federal courts are confused about how to determine when a prior conspiracy conviction triggers a sentencing enhancement. Some courts—the First, Second, Fifth, Sixth, Seventh, and Ninth Circuits—have looked only to the label of the crime of conviction, imposing the sentencing enhancement for convictions called "conspiracy" regardless of whether the elements of the

predicate "conspiracy" conviction match its generic definition and include an overt act.[3] The Fourth and Tenth Circuit, in contrast, have applied the generic crime approach set forth by this Court in *Taylor*, imposing a sentence enhancement only where the elements of the predicate "conspiracy" conviction align with the elements of the generic definition. Additionally, there is inconsistency among approaches within each side of the circuit split. For example, the Fifth Circuit has issued decisions that take both approaches. *See generally* Petition at 12–23 (describing entrenched split).

Consequently, the concerns about inconsistency recognized by this Court in *Taylor* apply equally here: the First Circuit's approach could apply sentencing enhancements based on whether state or federal law happens to label a crime "conspiracy" regardless of its elements. The First Circuit's decision in this case contributes to the uncertainty and division among federal courts regarding the imposition of sentencing enhancements for prior convictions for controlled substance offenses. These different approaches result in criminal defendants convicted of the very same predicate crime based upon the very same conduct receiving different sentences depending on the jurisdiction of sentencing. Such arbitrariness and inconsistency in sentencing undermines the principal purpose of the Guidelines—to provide uniformity in federal sentencing—and that of Section 846.

Additionally, the divergent logic of these inconsistent decisions among the circuits will readily extend

[3] While reaching the same result, these Circuits utilized varying methodologies and justifications, raising further inconsistencies and questions over how each circuit would treat state law, as opposed to Section 846. *See* Petition at 20–22.

beyond controlled substance offenses to other provisions of the Guidelines. The lower court's inconsistency in imposing sentencing enhancements is not just a matter of interpreting a single provision; it reflects a lack of clarity as to the *methodology* used when determining whether a criminal defendant's prior conviction supports imposing a sentencing enhancement under the Guidelines. This split therefore runs directly contrary to "the increased uniformity of sentencing that Congress intended its Sentencing Guidelines system to achieve." *United States v. Booker*, 543 U.S. 220, 246 (2005).

Further, due to systemic inequalities in the criminal justice system, sentencing enhancements for past drug conspiracy convictions have a disproportionate impact on defendants and communities of color. The First Circuit's interpretation of the Guidelines therefore unjustifiably perpetuates those inequalities, exacerbating the problem rather than fixing it.

This Court must intervene to eliminate this inconsistency and its wide-ranging effects. Granting the Petition in this case will allow this Court to clarify its directions to federal courts regarding how to determine when a sentencing enhancement should be imposed based on a prior conviction for "conspiring," provide insight to federal courts as to the correct methodology to use for this and other similar determinations, and ensure uniformity of sentencing in federal courts. Resolving this split also will have a broad impact on criminal defendants and their counsel's ability to properly advise them. This case involves one of the most frequently applied provisions in the entire Guidelines: "conspiring" to commit a "controlled substance offense." U.S.S.G. § 4B1.2(b). In recent terms, this Court has granted certiorari to decide even "exceedingly narrow" questions that create disparity in

federal sentencing. *See, e.g.*, *Quarles v. United States*, 139 S. Ct. 1872, 1875 (2019). But the issue in this case has expansive implications.

If Congress's intended goal of national uniformity in federal sentencing is to be achieved, the Petition must be granted.

ARGUMENT

I. THIS CIRCUIT SPLIT HERE RESULTS IN ARBITRARY GEOGRAPHIC DIFFERENCES IN FEDERAL SENTENCING, UNDERMINING THE ESSENTIAL PURPOSE FOR WHICH THE GUIDELINES AND COMMISSION WERE CREATED

The split among the federal courts as to the question presented, combined with the diversity of state and federal conspiracy statutes, means that some jurisdictions, including the First Circuit, now impose enhanced sentences that would not be imposed for the same prior conviction in other jurisdictions. The split thus causes especially unfair and significant dissimilarity because it layers needlessly disparate federal treatment atop already existing disparity in state-law definitions of conspiracy crimes whereby a defendant can receive a sentencing enhancement for prior conduct that would not even be a crime in most states—reaching an agreement with no overt act.

Two factors impact whether a sentencing enhancement should be imposed when a defendant has a prior conviction for "conspiring" to commit a "controlled substance offense": (1) the predicate jurisdiction's definition of "conspiracy"; and (2) what methodology the sentencing

jurisdiction then uses to determine whether that conviction triggers the enhancement.

In most states, conspiracy requires proof of both an agreement to commit a crime and "an overt act in furtherance of the plan." *See, e.g.*, Wayne R. LaFave, *Substantive Criminal Law*, § 12.2(b) (3d ed. Oct. 2020 update). "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 [18 U.S.C. § 371]." *United States v. McCollum*, 885 F.3d 300, 308 (4th Cir. 2018) (citing *United States* v. *Garcia-Santana*, 774 F.3d 528, 534–535 (9th Cir. 2014) and 18 U.S.C. § 371). Consequently, a court would impose the Guidelines' enhancement on defendants convicted in those states (or under § 371) regardless of the approach used in the sentencing court. That makes sense: defendants convicted of conspiracy *with* an overt act requirement have committed the generic crime of conspiracy, which (as the most serious version of a conspiracy) logically warrants enhancement. U.S.S.G., Ch. 1, Pt. A at 3 (one purpose of the Guidelines is to impose "appropriately different sentences for criminal conduct of differing severity").

But for a defendant convicted in those jurisdictions, including Massachusetts, where the crime of conspiracy does not require an overt act for conviction, imposition of the enhancement depends *not* on the seriousness of his conduct, but instead only on the methodology employed to evaluate the prior conviction in the sentencing court. Indeed, even the very same predicate can be treated differently: the same defendant with a Massachusetts conspiracy conviction receives the enhancement

if later sentenced in the First Circuit, but not in the Fourth.

The circuit split not only treats the same defendant differently; it treats differently situated defendants the same. Those involved in a conspiracy where no overt act is proven would be sentenced like those involved in a conspiracy that includes an overt act. The First Circuit is illustrative. Jurisdictions within the First Circuit are split as to whether a conviction for conspiracy requires proof of both an agreement and an overt act. Maine, New Hampshire, and Puerto Rico all require an overt act.[4] Massachusetts and Rhode Island, however, do not.[5] Under the First Circuit's label-based approach to imposing sentencing enhancements, a sentencing enhancement would be imposed for a prior conspiracy conviction under

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[4] *See* Me. Rev. Stat. tit. 17-A, § 151 (actor must have taken "a substantial step toward commission of the crime" to be convicted of a conspiracy); N.H. Rev. Stat. Ann. § 629:3 (requiring that "an overt act is committed by one of the conspirators in furtherance of the conspiracy" for conspiracy conviction); P.R. Laws Ann. tit. 33, § 4878 ("No agreement, except to commit a first degree or second degree felony, shall constitute conspiracy, except that ulterior or optional act is carried out to execute the agreement by one or more of the conspirators.").

[5] *See* Mass. Gen. Laws ch. 274, §7; *Commonwealth v. Cerveny*, 387 Mass. 280, 288, (1982) ("The essence of a conspiracy is the agreement. No overt act is necessary to complete the crime; the making of the agreement itself is enough."); R.I. Gen. Laws Section 11-1-6 Notes of Decision (General) ("The common law crime of conspiracy involves a combination of two or more persons to commit some unlawful act or do some lawful act for an unlawful purpose; it does not require that any overt acts have been committed in execution of the unlawful agreement.").

all five state statutes, as well as under Section 846, despite the fact that defendants in Massachusetts and Rhode Island had not been convicted of the more culpable conduct involving an overt act in furtherance of the conspiracy. In contrast, if the First Circuit followed the generic crime approach set forth in *Taylor*, the sentencing enhancement would be applied only to those defendants with prior conspiracy convictions in the three jurisdictions where an overt act is required for a conspiracy conviction: New Hampshire, Maine, and Puerto Rico. Nothing could be more arbitrary than a sentencing scheme that results in a defendant in Massachusetts, who has already acquired a conspiracy conviction he never would have acquired just over the state line in New Hampshire, also receiving a federal sentencing enhancement simply because the First Circuit declined to adopt the generic crime approach. That the same conduct can constitute no crime, just a crime, or both a crime and the basis of a federal enhancement, based solely upon where the person happens to be charged shows the importance of the Petition and need for this Court to resolve the circuit split at issue in this case.

Because this Court cannot address the inconsistent state definitions of conspiracy, it must ensure that those differences do not get compounded by federal sentencing. The First Circuit, and courts that have adopted a similar methodology, bake the inconsistency in state laws into federal sentencing. Without guidance from this Court, criminal defendants, including those in Massachusetts, will continue to be impacted by unfair impositions of sentencing enhancements based on the dual geographic happenstance of where they were convicted of

conspiracy and in which circuit they committed their subsequent federal crime.

Massachusetts criminal defendants would directly benefit from the Court's correction of the First Circuit's error in refusing to apply the generic crime approach. As described above, Massachusetts defendants sentenced in federal court currently receive a sentencing enhancement for less culpable conduct. This impacts both defendants who are convicted at trial as well as those who plead guilty to a conspiracy charge in state court. When counsel, including many members of the *amicus* organization here, advise their clients to accept a plea agreement for a Massachusetts conspiracy charge, their client risks a later federal enhancement for that conspiracy conviction even though no overt act was proven. Counsel cannot provide clear advice about the impact of the conviction on any future sentence for a federal crime given the current circuit split. Right now, the only guidance counsel can provide is the most stereotypical lawyer adage: "it depends."

To serve its purposes, the criminal law should be clear. People cannot follow the law, or be deterred by it, if it is inconsistent at multiple levels. If this Court holds that the generic crime methodology should be used, Massachusetts defendants convicted of "conspiracy" will not receive a sentencing enhancement for their less culpable conduct. Moreover, counsel like the members of *amicus* will be able to provide clear, consistent advice to their clients about the impact of a state conspiracy conviction on any future federal sentence without uncertainty. The

Court should grant the Petition to provide that much-needed clarity.

II. THE COURT SHOULD GRANT THE PETITION BECAUSE THE CIRCUIT SPLIT HINDERS THE PURPOSE OF BOTH SECTION 846 AND THE GUIDELINES

A. The Circuit Split Creates Inconsistency in Sentencing Contrary to the Purpose of the Comprehensive Drug Abuse Prevention and Control Act of 1970 and the Sentencing Reform Act of 1984

Section 846 was enacted as part of the Comprehensive Drug Abuse Prevention and Control Act of 1970 ("CDAPCA"). 91 P.L. 513. Coming after a period of reorganization for federal drug agencies, the CDAPCA was "prompted by a perceived need to consolidate the growing number of piecemeal drug laws . . . ." *Gonzales v. Raich*, 545 U.S. 1, 12 (2005); *see also* H.R. Rep. No. 91-1444, pt. 1, 6 (1970) ("this bill collects and conforms these diverse [drug control] laws in one piece of legislation…."). It was designed in part to "provid[e] for an overall balanced scheme of criminal penalties for offenses involving drugs." H.R. Rep. No. 91-1444, pt. 1, at 1. With respect to criminal penalties in particular, the CDAPCA sought to provide "a consistent method of treatment of all persons accused of violations." *Id*. at 4.

The Sentencing Commission is an independent commission of the Judicial Branch that publishes the Guidelines. The Sentencing Commission was established by the Sentencing Reform Act of 1984 and charged with establishing sentencing policies and practices for the Federal criminal justice system that, *inter alia*, "provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities

among defendants with similar records who have been found guilty of similar criminal conduct." 28 U.S.C. § 991(b)(1)(B). The Guidelines themselves make clear that one of the main objectives of the Sentencing Reform Act was creating "reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders." USSG, Ch. 1, Pt. A at 3. *See also Mistretta v. United States*, 488 U.S. 361, 365 (1989) (describing the "[s]erious disparities in sentences" that existed before the Sentencing Reform Act).

As explained above, the current circuit split treats identical offenders differently depending on the circuit in which they were charged. Currently, a First Circuit defendant previously convicted of conspiracy under either Section 846 or Massachusetts state law would face a harsher sentence than a defendant in the Fourth or Tenth Circuits convicted of a predicate crime with identical elements. That inconsistency runs contrary to the CDAPCA's intended consistency and uniformity. Moreover, it contradicts the Sentencing Reform Act and the Guidelines themselves, as it creates the exact sort of "disparit[y] among defendants with similar records who have been found guilty of similar conduct" the Guidelines are supposed to prevent. 28 U.S.C. § 991(b)(1)(B). Resolution of the circuit split would thus not only resolve a disagreement among the courts of appeals, but also would ensure that federal drug laws and sentencing achieve their intended purposes.

B. The First Circuit's Holding Is Contrary to the Sentencing Reform Act's Goal of Proportionality

In addition to seeking consistent treatment of like offenders, with the Sentencing Reform Act of 1984 "Con-

gress sought proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity." U.S.S.G., Ch. 1, Pt. A at 3. However, the approach of the First Circuit and circuits employing a similar methodology treats a "conspiracy" to commit a "controlled substance offense" the same regardless of whether the charge in question requires an overt act. Those courts trigger the enhancement based solely on the label applied to the conviction ("conspiracy") rather than the elements required for conviction ("agreement plus overt act"). As this Court has long recognized, and the law of the vast majority of states confirms, the generic definition of conspiracy requires an overt act because that is the point at which "[c]riminal intent has crystallized, and the likelihood of actual fulfilled commission warrants preventive action." *United States v. Feola*, 420 U.S. 671, 694 (1975). Put differently, it is the "point in the continuum between preparation and consummation" when "the likelihood of a commission of an act is sufficiently great and the criminal intent sufficiently well formed to justify the intervention of the criminal law." *Id*. The further along that continuum, the more culpable the conduct.

It follows, therefore, that crimes called "conspiracy" but not requiring an overt act are inherently further from consummation on that continuum and thus *less* deserving of a substantial sentence enhancement. *See Yates v. United States*, 354 U.S. 298, 334 (1957) ("The function of the overt act in a conspiracy prosecution is simply to manifest 'that the conspiracy is at work,' . . . and is neither a project still resting solely in the minds of the conspirators nor a fully completed operation no longer in existence."), *overruled on other grounds by Burks v. United States*, 437 U.S. 1 (1978). Yet the First Circuit's interpretation of the Guidelines treats any drug

conviction labelled "conspiracy" the same despite that differing culpability. This Court should grant the Petition and reverse the First Circuit's decision to ensure that courts apply the Guidelines in a manner furthering Congress's goal of proportionality.

Moreover, although the First Circuit opined that "it would be odd indeed if the definition of a controlled substance offense excluded the only form of conspiracy prohibited by the Controlled Substances Act itself," *United States v. Rodríguez-Rivera*, 989 F.3d 183, 187 (1st Cir. 2021), that reasoning reflects "a heavy dose of purposivism" as the Petition correctly explains. Petition at 22. But, even taking the First Circuit's purposivism by its terms, that court's attempt to divine the Sentencing Commission's intent completely ignores the history of both Section 846 and the Guidelines. The Sentencing Commission included conspiracy offenses in the notes to the definition of a "controlled substance offense" in its original 1987 Guidelines.[6] But this Court did not make clear that Section 846 lacked any overt act requirement until seven years later. *See United States v. Shabani*, 513 U.S. 10, 17 (1994). A purposivist might reasonably surmise that the Commission writing the Guidelines in 1987 would have intended "conspiring" to include only those crimes fitting the generic definition, as that was the law in the vast majority of jurisdictions at the time and under Section 371, and there was considerable contemporary criticism of the minority position.[7] Indeed,

[6] U.S.S.G. § 4B1.2, n. 2 (1987), *available at* https://www.ussc.gov/ 1987 sites/default/files/pdf/guidelines-manual/1987/manual-pdf/ 1987_Guidelines_Manual_Full.pdf).

[7] *See, e.g.*, John Lord O'Brian, *Loyalty Tests and Guilt by Association*, 61 Harv. L. Rev. 592, 599 (1948) ("[S]pecial attention should be given

that criticism regularly issued from this Court.[8] It was against this backdrop of warnings that Congress enacted Section 846 and the Commission adopted the Guidelines. Thus, a purposivist might say that the 1987 Commission likely believed that the elements of Section 846 aligned with the majority view of the crime it codified and against the minority position subject to repeated criticism. Given this history, it would not be at all "odd" for the term "conspiring" in the Guidelines to mean the generic definition of conspiracy.

III. THE DISPARATE SENTENCING OF DEFENDANTS RESULTING FROM THE CIRCUIT SPLIT HAS BROAD SOCIAL AND PRACTICAL IMPLICATIONS

A. The First Circuit's Interpretation of the Guidelines Disproportionately Affects People and Communities of Color

This Court should also grant the Petition because the First Circuit's expansive interpretation of the Guidelines—which essentially ensures that any drug crime labeled a "conspiracy" qualifies as a predicate crime regard-

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to the sinister developments which have been taking place in broadening the scope of our criminal conspiracy statutes.").

[8] *See Von Moltke v. Gillies*, 332 U.S. 708, 727 (1948) (Frankfurter, J., concurring) (citing the "too easy abuses to which a charge of conspiracy may be put"); *Krulewitch v. United States*, 336 U.S. 440, 445–48 (1949) (Jackson, J., concurring) (describing the "vague but unpleasant connotations" of a definition of conspiracy without an overt act requirement); *Grunewald v. United States*, 353 U.S. 391, 404 (1956) ("Prior cases in this Court have repeatedly warned that we will view with disfavor attempts to broaden the already pervasive and widesweeping nets of conspiracy prosecutions.").

less of its elements—has and will continue to have a disproportionate impact on defendants and communities of color.

Drug crimes are disproportionately charged against people of color. In 2020, 26.9% of federal drug trafficking offenders[9] were black, and 43.9% were Hispanic, while only 14.2% of the general population is black and 18.7% Hispanic/latinx. United States Sentencing Commission, *2020 Annual Report and Sourcebook of Federal Sentencing Statistics* (2020) at 48, *available at* https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks /2020/2020-Annual-Report-and-Sourcebook.pdf.; United States Census Bureau, *Supplementary Tables on Race and Hispanic Origin: 2020 Census Redistricting Data* (2020), *available at* https:// www2.census.gov/programs-surveys/decennial/2020/data/redistricting-supplementary-tables/redistricting-supplementary-table-package.pdf. The disparity is not unique to federal drug convictions. A 2020 Study by the Criminal Justice Policy Program at Harvard Law School, at the request of the late Chief Justice Ralph Gants of the Massachusetts Supreme Judicial Court, found that a disproportionate percentage of defendants charged with drug offenses particularly in Massachusetts were black and Latinx. Harvard Law School Criminal Justice Policy Program, Racial Disparities in the Massachusetts Criminal System (2020),

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[9] When collecting data, the Sentencing Commission does not separately report data on conspiracy charges under Section 846, but rather includes them as "Drug Trafficking" crimes. United States Sentencing Commission, *2020 Annual Report and Sourcebook of Federal Sentencing Statistics* (2020) at 212, *available at* https:// www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2020/2020-Annual-Report-and-Sourcebook.pdf.

available at https://hls.harvard.edu/content/uploads/2020/11/Massachusetts-Racial-Disparity-Report-FINAL.pdf.

These statistics are part of a historic trend of over-policing communities of color. In 2010, Black people were arrested for drug crimes at three times the rate of whites, and in the late 1980s the rate was six times as high. National Research Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences*. Washington, DC: The National Academies Press at 60 (2014), *available at* https://doi.org/10.17226/18613 ("NRC"). This disproportionality cannot be attributed to differences in conduct, as studies indicate Black people do not use drugs at a significantly higher rate, nor is there evidence they sell drugs more often than whites. *Id*. Similarly, evidence does not show higher drug use among Hispanics. National Institutes for Health, *Drug Use Among Racial/Ethnic Minorities* (2003), *available at* https://archives.drugabuse.gov/sites/default/files/minorities03_1.pdf. This disproportionate treatment also carries over into sentencing length. United States Sentencing Commission, Demographic Differences in Sentencing: An Update to the 2012 Booker Report (2017) at 8, *available at* https:// www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171114_Demographics.pdf. The Sentencing Commission has reported that, on average from 2012 to 2016, Black male offenders received sentences that are 19.1% longer than sentences for similarly situated white male offenders, and Hispanic male offenders 5.3% longer. When it comes to drug crimes, people of color are disproportionately charged and, already, disproportionately sentenced.

The First Circuit's interpretation of the Guidelines adds an unprincipled uniformity to federal sentencing

law: the Guidelines' definition of a "conspiracy" is elastic enough to encompass *all* state drug conspiracy offenses. This variable definition, sweeping in every drug conspiracy for enhancement regardless of its elements, will have a predictably disparate impact. Because of the past and present inequities described above, that definition will both perpetuate and exacerbate systemic inequality against people of color. Even beyond the effect on individual defendants, inequality in incarceration has a broader negative impact on families and communities. It is no surprise, for example, that incarceration of a spouse or parent has negative economic impacts on family members and increases reliance on government assistance. NRC at 267. And the incarceration of a parent devastates children. *See* Eric Martin, *Hidden Consequences: The Impact of Incarceration on Dependent Children*, March 1, 2017, *available at* https://nij.ojp.gov/topics/articles/hidden-consequences-impact-incarceration-dependent-children.

Balanced against the obvious negative consequences of enhanced sentences, there is little public safety benefit. Studies have relentlessly documented the fact that the *severity* of punishment—i.e., sentence length—has a much lower association with deterrence than the *certainty* of punishment. *See, e.g.*, NRC at 288. Broad construction of an enhancement will not deter for much the same reason that the Guidelines are not susceptible to void-for-vagueness challenge: though the Guidelines are a critical lodestar, the courts retain full discretion over the sentence regardless of whether the enhancement actually applies. *See Beckles v. United States*, 137 S. Ct. 886, 894 (2017). Thus, once a person is caught and facing a (likely considerable) sentence for a federal crime, the marginal deterrent effect of an enhancement—particularly when it is applied inconsistently between the

circuits—falls somewhere between *de minimis* and nil.[10] In fact, some studies suggest that longer sentences actually *increase* crime. *See* Andrew Leipold, *Is Mass Incarceration Inevitable?*, 56 Am. Crim. L. Rev. 1579, 1586 (2019) (collecting sources).

B. Disparate Sentencing Based on the Defendant's Geographic Location Will Not be Limited to Defendants with Prior Convictions for Controlled Substance Offenses

Granting the Petition in this case and resolving the existing methodological inconsistency also will impact sentencing beyond defendants facing potential enhancement based on conspiring to commit a controlled substance offense, or other conspiracy offenses referenced in the Guidelines.[11] As explained, the disagreement in the lower courts over the imposition of this enhancement reflects a deeper divide on a question of methodology: When and how does *Taylor*'s generic crime approach apply? Such a methodological debate will not be limited to one provision of the Guidelines or one particular type of predicate conviction. Rather, the potential for

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[10] From both a deterrence and retributive perspective, sentences for drug crimes are also irrationally disproportionate when compared to other crimes. For example, "the average sentence for federal drug traffickers is 6 years, roughly double the average state sentence for rape, which is less than 3 years for first-time offenders." Rachel Barkow, *Prisoners of Politics: Breaking the Cycle of Mass Incarceration* 39 (Harvard University Press/Belknap, 2019).

[11] Of course, even if the question presented exclusively implicated the meaning of a controlled substance offense and crime of violence under U.S.S.G. § 4B1.2, those definitions are themselves directly incorporated by reference in numerous other provisions of the Guidelines. *See* U.S.S.G § 2K1.3; § 2K2.1; § 2S1.1; § 4A1.1; § 4A1.2; § 4B1.1; § 4B1.4; § 5K2.17; § 7B1.2.

inconsistencies in sentencing inevitably will arise any time a federal court must interpret Guidelines text referencing undefined crimes or when imposing sentencing enhancements to conspiracies to commit other commonly charged crimes.

For example, in addition to the specific sentence enhancement applied to Petitioner under the Guidelines for firearms offenses, there are enhancements for a prior "controlled substance offense," and therefore, by definition, "conspiring" to commit such an offense, throughout the Guidelines, including establishing a defendant as a "career offender" under U.S.S.G. §§ 4B1.1. Career Offender status can dramatically increase the sentencing range for numerous types of convictions, the most common being drug trafficking, firearms, and robbery. *See* United States Sentencing Commission, *Fiscal Year 2020 Quick Facts-Career Offenders* ("Career Offenders 2020 Quick Facts"), *available at* https:// www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Career_Offenders_FY20.pdf.

The same problem present in this case has already surfaced in some circuits with respect to the Sentencing Guidelines' identical definition of a "conspiring" to commit a "crime of violence," another set of commonly prosecuted federal crimes. In *McCollum*, 885 F.3d at 303, the defendant had a prior conviction under a federal statute for conspiracy to commit murder in aid of racketeering, where the conspiracy did not require an overt act. The Fourth Circuit, applying *Taylor*'s generic crime approach to sentencing enhancements, concluded that conspiring to commit murder did not qualify as a crime of violence triggering a sentence enhancement under the Guidelines because the conspiracy offense did not require an overt act, and therefore "criminalizes a broader range

of conduct than that covered by generic conspiracy." *Id.* at 309.

Conversely, in *United States v. Pascacio-Rodriguez*, 749 F.3d 353, 354 (5th Cir. 2014), the Fifth Circuit analyzed the exact same predicate criminal conduct for enhancement and reached the exact opposite result. The defendant had pleaded guilty to a Nevada state law crime of conspiracy to commit murder, which did not require proof of an overt act. *Id.* at 355. The Fifth Circuit affirmed the defendant's sentencing enhancement nonetheless, concluding that the Sentencing Guidelines did not require an overt act to trigger an enhancement, even after acknowledging that thirty four states required an overt act for a conspiracy conviction. *Id.* at 367–68.

The defendant in *Pascacio-Rodriguez* was sentenced to 70 months of imprisonment, nearly double the sentence he would have received without the enhancement. *See id.* at 354 (the advisory Sentencing Guidelines range for defendant's sentence would have been 33 to 41 months without the enhancement for conspiracy to commit a crime of violence). *Id.* at 354. In *McCollum*, because the court did not impose the enhancement for his prior conspiracy conviction, the defendant avoided an increase in his base sentencing level from a fourteen to twenty, protecting him from a significantly longer sentence. *See McCollum*, 885 F.3d at 303. These two decisions alone reveal that a defendant facing sentencing based on a prior conviction for conspiracy to commit a crime of violence in Texas faces a much longer sentence than a defendant in the same situation in North Carolina based solely on the circuit court's methodology in approaching sentencing enhancement under the Sentencing Guidelines.

Moreover, like a controlled substance offense, a conviction for conspiring to commit a "crime of violence" can result in a career offender designation, significantly increasing the length of a defendant's sentence. *See* Career Offenders 2020 Quick Facts. The Sentencing Guidelines broadly define a "crime of violence" as 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, including conspiring to commit such an offense. U.S.S.G § 4B1.2(a). Thus, especially in light of the Sentencing Commission's lack of quorum, without this Court's intervention the circuit split at issue here will continue to fester, and defendants convicted of "conspiring" to commit any one of the myriad of crimes defined as "crimes of violence" will face varying sentences depending on the jurisdiction in which they are convicted. Such a result undermines the core purpose that animated the Sentencing Guidelines and cannot be tolerated.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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