No. 21-0143

In the Supreme Court of the United States

RAYMOND RODRÍGUEZ-RIVERA,
Petitioner,

v.

UNITED STATES OF AMERICA.

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

BRIEF OF NATIONAL ASSOCIATION FOR PUBLIC DEFENSE AND THE FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICI CURIAE SUPPORTING PETITIONER

Emily Hughes
CO-CHAIR, NAPD AMICUS COMMITTEE
Boyd Law Building
Iowa City, IA 52242
Counsel for NAPD

Diana L. Johnson
407 N. Laura Street
Jacksonville, FL 32202
Counsel for FACDL

J. Carl Cecere
Counsel of Record
CECERE PC
6035 McCommas Blvd.
Dallas, TX 75206
(469) 600-9455
ccecere@cecerepc.com
Counsel for Amici Curiae

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INTEREST OF AMICI CURIAE[1]

The National Association for Public Defense (NAPD) is an association of professionals dedicated to securing the right to counsel and promoting equal access

[1] Counsel for all parties received notice of amici curiae's intent to file this brief 10 days before its due date, and both Petitioner and Respondent have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part, and no person or entity other than the amici, their members, or their counsel made a monetary contribution intended to fund the brief's preparation or submission.

to justice in America's criminal courts. NAPD brings together a wide range of professionals who play critical roles in representing the accused. NAPD's approximately 7,000 members include social workers, paralegals, legislative advocates, financial professionals, and administrative personnel, just to name a few categories.

The Florida Association of Criminal Defense Lawyers (FACDL) is a non-profit statewide organization of criminal defense practitioners with twenty-eight chapters and more than 2,000 members. FACDL strives to be the unified voice of an inclusive criminal defense community, to improve the criminal justice system at the judicial, legislative, and executive levels, and to promote the protection of the rights of individuals.

Amici have a deep interest in this case because resolution of the question presented will directly affect how long many of their members' clients will spend in prison. NAPD also cares about this case because addressing the question presented requires consideration of several larger issues about interpreting federal laws that reference criminal offenses that are vitally important to the proper development of federal criminal law more generally. And NAPD believes this Court must take them on because the United States Sentencing Commission is currently incapable of addressing them for itself because it lacks a quorum of members.

INTRODUCTION AND SUMMARY OF ARGUMENT

The concept of criminal "conspiracy" appears many times in criminal law, and it almost invariably requires two things: an agreement to commit a crime and "an overt act in furtherance of the plan." See Wayne R. LaFave, *Substantive Criminal Law* § 12.2(b) (3d ed.

2020). That two-element approach requiring an overt act in furtherance of the conspiracy is what the casebooks teach. *Ibid.* It is the definition recorded in Eleventh Edition of *Black's Law Dictionary* (11th ed. 2019). It is the conception that the Model Penal Code embraces for all but the most serious crimes.[2] It is the law in the "'vast majority of the States' criminal codes" plus those of "the District of Columbia, Guam, Puerto Rico, and the Virgin Islands"—40 of 54 jurisdictions by one count. *United States* v. *Martínez-Cruz*, 836 F.3d 1305, 1310-1311 (10th Cir. 2016) (quoting *United States* v. *García-Santana*, 774 F.3d 528, 534-535 (9th Cir. 2014)). And it is also the version adopted in the general conspiracy provision of the federal criminal code. 18 U.S.C. § 371. That two-element concept of conspiracy is the paradigm drilled into every first-year law student.

Yet that was not the version of conspiracy that the First Circuit adopted in interpreting the United States Sentencing Guidelines' definition of "controlled substance offense[s]." U.S.S.G. § 4B1.2(b). The United States Sentencing Commission's "authoritative" Commentary to the Guidelines, *Stinson* v. *United States*, 508 U.S. 36, 38 (1993), defines "controlled substance offense" to "include" three classic inchoate crimes: "the offenses of aiding and abetting, conspiring, and attempting to commit" controlled substance offenses. U.S.S.G. § 4B1.2 cmt. n.1.

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[2] Model Penal Code § 5.03(5) ("No person may be convicted of conspiracy to commit a crime, other than a felony of the first or second degree, unless an overt act in pursuance of such conspiracy is alleged and proved to have been done by him or by a person with whom he conspired.").

The Commentary did not define the term "conspiring." And when federal courts are faced with such a term in a federal law (or rule with the force of law) that "refers generally to an offense without specifying its elements," *Shular* v. *United States*, 140 S. Ct. 779, 783 (2020), this Court has directed them to apply a "categorical approach" to determine its elements by reference to the "generic, contemporary meaning" of the offense. *Taylor* v. *United States*, 495 U.S. 575, 598, 600 (1990).

But the court below opted against *Taylor*'s categorical approach in determining the definition of conspiracy referenced in § 4B1.2(b)'s controlled-substance offense provision. And it gave no weight to the obvious, generic, near-universal contemporary paradigm definition of the offense in determining the definition of the term. Instead, it concluded that "the offense" of "conspiring" referenced in § 4B1.2(b) did not reference an offense at all, but instead referred to "conduct." Pet. App. 13a. And based on that conclusion, it stripped an essential element from the concept of conspiracy.

The court of appeals held that a prior conspiracy conviction falls within § 4B1.2(b) even if it does not require the defendant to take any overt action in furtherance of the conspiracy. Taking part in its *planning* is enough. And it determined that Petitioner's prior conviction under the Controlled Substance Act's conspiracy provision, 21 U.S.C. § 846, satisfied § 4B1.2(b), and enhanced Petitioner's sentence under U.S.S.G. § 2K2.1, although § 846 contains no "overt act" requirement, *United States* v. *Shabani*, 513 U.S. 10, 15 (1994). Pet. App. 6a, 12a.

The court below concluded this result was dictated by two of this Court's decisions: *Johnson* v. *United States*, 559 U.S. 133 (2010) and *Shular* v. *United States*,

both of which found federal laws to reference "conduct" not "offenses," and therefore determined *Taylor*'s categorical approach to be unhelpful in interpreting them. Pet. App. 8a, 10a, 11a. But the court drew exactly the wrong lessons from these two cases. Both reinforce the same principle that the question whether federal law references "conduct" or an "offense" depends upon an examination of text. And the text of the Guidelines gave every indication that the Commission meant exactly what it said in referencing "the offense" of "conspiring" in § 4B1.2(b)—that it was referencing an *offense*.

The court below threw that text right out the window, resolving the case instead on suppositions about what the Sentencing Commission must have been *trying to accomplish* with the text. The court gave dispositive weight to the notion that "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" in § 846. Pet. App. at 8a. Disliking the lack of symmetry between the scope of the term "conspiring" in § 4B1.2(b)'s definition of controlled substances offense and the scope of conspiracy in § 846, the court assumed without evidence that the Commission would too. The court thus stretched a reference to "conspiring" in § 4B1.2(b) applicable to a broad range of conspiracy offenses to capture one particular conspiracy offense. And it joined a number of other circuits that have similarly followed purposive readings of § 4B1.2(b)'s Commentary to reach results at odds with its plain text.

It is vital for this Court to step in and correct this plainly erroneous result. Plenary review is essential to rectify the circuit conflict and ensure the uniformity the Guidelines intended. And the Court's intervention is

needed to reverse an interpretation of § 4B1.2(b) that subjects criminal defendants to much greater sentences, for far less culpable conduct, than the Commission intended.

But perhaps most fundamentally of all, the Court must intervene to halt the disturbing trend running through decisions interpreting § 4B1.2(b) of allowing naked suppositions about what the Sentencing Commission *meant* to overtake the text the Commission *wrote*. This Court cannot tolerate this perverse inversion of lenity, in which purpose expands the amount of time a person must spend in prison beyond what plain text permits. Plenary review is necessary to correct it. And it is even more necessary when the Commission currently lacks a quorum, has not had one in five years and is therefore incapable of doing the job itself. Only this Court can solve this problem.

The petition should be granted.

ARGUMENT

I. Resolving the meaning of "conspiring" in § 4B1.2(b) of the Sentencing Guidelines is an issue of utmost importance.

This case is suffused with important implications that make it deserving of this Court's review. First, of course, is the fact that the basis for the court of appeals' decision, which improperly tying the definition of "conspiring" referenced in § 4B1.2(b) to the scope of conspiracy prohibited under § 846 of the Controlled Substances Act, leads to results that are grossly unfair to federal defendants. And that unfairness ripples through all of federal criminal sentencing.

A. As a result of the First Circuit's decision, and those on its side of the split, far more federal defendants' sentences are subject to enhancement than the plain text of § 4B1.2(b)'s Commentary permits. The single-element concept of conspiracy the First Circuit adopted "'criminalizes a broader range of conduct than that covered by a generic conspiracy,'" and therefore brings a greater number of prior convictions within § 4B1.2(b)'s scope than if the court below had applied *Taylor*'s categorical approach and adopted the familiar two-element version of conspiracy instead. *United States* v. *Whitley*, 737 F. App'x 147, 149 (4th Cir. 2018) (per curiam) (quoting *United States* v. *McCollum*, 885 F.3d 300, 309 (4th Cir. 2018)); *United States* v. *Norman*, 935 F.3d 232, 237-238 (4th Cir. 2019) (same).

That expansion is not confined to prior controlled substance offenses either. The Commentary's reference to "the offense" of "conspiring" also applies to the Guidelines' definition of "crime[s] of violence." U.S.S.G. § 4B1.2 cmt. n.1. And both categories of prior offenses—"controlled substance offense" and "crime of violence"—trigger sentencing enhancements in numerous areas of the Guidelines, adding to sentences for firearm offenses (U.S.S.G. § 2K2.1(a)(1)-(4)) and explosives offenses (*id.* § 2K1.3(a)(1)-(2)), and counting towards "Career Offender" enhancements too (*id.* § 4B1.1). The lower court's erroneous interpretation of the Commentary therefore affects a broad swath of federal sentencing.

B. The resulting effects on individual sentences can be arbitrary and severe. Omitting the requirement that a defendant commit an overt act in furtherance of the conspiracy means that defendants can see their sentences increased based on prior offenses for low-level conduct that did not even require the defendant to get off

the couch and is not even considered illegal in the vast majority of jurisdictions.

Yet this low-culpability conduct can trigger massive increases in a defendant's sentence. Attaching hard numbers to the effect is difficult, owing to the many variables that drive a sentence's length under the Guidelines. But for Petitioner, it added six to eight months to the top and bottom of his guidelines sentencing range. Pet. App. 5a.

And the effects on other criminal defendants could be far worse, if the Sentencing Commission's recent statistical survey of sentences for "career offenders" is any guide. See U.S. Sentencing Comm'n, *Quick Facts—Career Offenders* (Fiscal Year 2020) (*USSC Quick Facts*), https://bit.ly/3gICl5u. As explained above, the Guidelines' "career offender" enhancement under § 4B1.1 is triggered by either a "controlled substance offense" or "crime of violence," both of which are subject to the First Circuit's impermissibly broad conspiracy definition.

On average, almost half of those subject to a "career criminal" enhancement see increases in both their final offense levels and criminal history categories. *U.S.S.C. Quick Facts* 1. Most defendants see their criminal offense categories increase from 23 to 31, *ibid.*, which more than doubles the top and bottom of the sentencing range across all criminal offense categories. See U.S.S.G., *Guidelines Sentencing Table* (2018 ed.), https://bit.ly/2Y86uVn. And most see their criminal offense category increase two levels. See *U.S.S.C. Quick Facts* 2. That can produce "staggering and mind-numbing" sentencing enhancements, which in one case increased both the top and bottom end of a defendant's sentencing range almost *four-fold*, "from 70–87 months"

to "262 to 327 months." *United States* v. *Newhouse*, 919 F. Supp. 2d 955, 958 (N.D. Iowa 2013). And that is just one example.

C. This risk of substantial sentencing increases based on low-level prior offenses created by the lower court's erroneous interpretation of § 4B1.2(b) cannot be tolerated. And these intolerable effects on criminal defendants' sentences are made worse by the geographic arbitrariness resulting from the circuit conflict. One defendant might receive an effective life sentence based on a prior conspiracy offense in one federal court when the same offense, based on the same conduct, would produce *no* enhancement in another. And defendants in the circuits that have not resolved the question—the Third and the Eleventh—face the uncertainty of not knowing the effect their prior offenses will have on their sentences at the time they enter a plea. These inconsistencies and imbalances undermine the "certainty and fairness" the Sentencing Guidelines were meant to promote and create the "unwarranted sentencing disparities" the Guidelines were meant to combat. 28 U.S.C. § 991(b)(1)(B). This Court's review is therefore necessary to resolve the split in the circuits and restore balance in federal sentencing.

II. This case also implicates important questions about the proper development of federal criminal law.

Beyond these immediate harmful effects of the First Circuit's erroneous interpretation of 4B1.2(b), which cry out for this Court's intervention, the Court needs to take this case to set the development of federal criminal law on the right course.

A. In recent years, this Court has devoted substantial time to the project of defining the ground rules for

applying *Taylor* and its categorical approach, taking on *seven* different cases over the past five terms in pursuit of that project. That includes the numerous times in which the Court has stepped to provide guidance on *how Taylor*'s categorical inquiry should be conducted.[3] But it also includes instances in which the Court has intervened to explain *whether Taylor*'s categorical approach should be applied, and how to discern the dividing line between an "offense" and "conduct" that controls the inquiry.[4]

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[3] See *Borden* v. *United States*, 141 S. Ct. 1817, 1821, 1822 (2021) (applying *Taylor*'s categorical approach in determining that a criminal offense that can be committed with a mens rea of recklessness cannot qualify under the mandatory minimum for a "violent felony" under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)); *Stokeling* v. *United States*, 139 S. Ct. 544, 549, 550 (2019) (applying the categorical approach in determining that "violent felony" in § 924(e) includes a state robbery offense that "requires the use of force sufficient to overcome a victim's resistance"); *Quarles* v. *United States*, 139 S. Ct. 1872, 1875 (2019) (applying *Taylor*'s categorical definition of "burglary," one form of "violent felony" satisfying § 924(e) and determining that it does not require the defendant to have intent to commit a crime at the time of unlawful entry); *United States* v. *Stitt*, 139 S. Ct. 399, 403-404, 405 (2018) (concluding that *Taylor*'s generic categorical definition of burglary includes burglary of a structure or vehicle that has been adapted to or is customarily used for overnight accommodation); *Esquivel-Quintana* v. *Sessions*, 137 S. Ct. 1562, 1567-1568 (2017) (applying *Taylor*'s categorical approach in determining that a state conviction did not constitute "sexual abuse of a minor," an "aggravated felony" making an alien removable under the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(43)(A); 1227(a)(2)(A)(iii)).

[4] *Shular*, 140 S. Ct. at 782, 783-784 (declining to apply *Taylor*'s categorical approach in determining the meaning of "serious drug offense" under the ACCA, 18 U.S.C. § 924(e)(2)(A)(ii)); *Sessions* v. *Dimaya*, 138 S. Ct. 1204, 1210-1211, 1216 (2018) (holding the "resid-

The Court needs to further clarify that line, although it should have been clear already. After all, *Shular* instructed lower courts that determining whether a federal law references an offense or conduct requires looking to "common-law history and widespread usage," 140 S. Ct. at 785, and *Esquivel-Quintana* reinforced the point by referencing the relevance of "the normal tools of interpretation" in the inquiry, 137 S. Ct. at 1569.

Shular applied those text-based rules to determine that ACCA's reference to "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), described conduct, not offenses, because the terms *manufacturing*, *distributing*, and *possessing* were "unlikely names for generic offenses." 140 S. Ct. at 785. *Shular* therefore left no doubt that the determination whether a federal law references an offense or conduct turns on whether the law actually names a long-understood offense, like *conspiracy*, or conduct, like *manufacturing*. See Pet. 24-25. That inquiry turns on text—the meaning of words and their surrounding context—not purposive supposition in conflict with the text. *Johnson* too drove that point

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ual clause" in 18 U.S.C. § 16(b), as incorporated into the Immigration and Nationality Act's provisions governing an alien's removal from the United States, 8 U.S.C. §§ 1227(a)(2)(A)(iii), 1229b(a)(3), (b)(1)(C), to be unconstitutionally vague, and rejecting the Government's argument that the statute could be saved by interpreting it to refer to "conduct" rather than an "offense" subject to the categorical approach); *United States* v. *Davis*, 139 S. Ct. 2319, 2323, 2326-2327 (2019) (applying *Dimaya*'s approach to hold that 18 U.S.C. § 924(c)'s residual clause, like the identical residual clause in § 16(b), is unconstitutionally vague because it requires an ordinary-case categorical approach to identifying a "crime of violence").

home. When the Court found the categorical definition of battery unhelpful in interpreting the phrase "physical force" in ACCA's definition of a "violent felony," 18 U.S.C. §§ 924(e)(1), (e)(2)(B), it did so because the inquiry was textually confined to *felonies* while the generic definition of battery is a *misdemeanor*. 559 U.S. at 138-140, 141. The text, not abstract theorizing, controlled the inquiry.

B. An appropriately text-focused inquiry should have also resolved this case because all the textual clues in § 4B1.2(b) point in the same direction: that the Commission intended to adopt the familiar, widely accepted, two-element conception of conspiracy when it referred to "the offense" of "conspiring" in § 4B1.2(b). These start, of course, with the fact that the comment uses the word "offense" to describe the term, and the fact that it appeared in a list with other offenses. There is also the Commentators' use of the definite article "the" to suggest reference to a defined, well-understood thing, which is further reinforced by the term "including," which appears in front of the whole sequence of offenses listed in the comment, suggesting that *each* referred to defined things. And of course, there is the fact that the term "conspiracy" enjoys as "widespread" a usage and as much depth in "common-law history" as any term in criminal law. *Shular*, 140 S. Ct. at 785. The familiar principles of textual interpretation required by *Shular*, *Johnson*, and *Esquival-Quintana* therefore permit only one inference: the Commission was referencing a defined thing, the offense of conspiracy, with its familiar dual elements.

But apparently these principles need further reinforcing because the First Circuit rejected each of these textual clues in concluding that § 4B1.2(b) referenced

conspiratorial conduct, not an offense. And it concluded that *Shular* provided it invitation to do so. That is because the court below read *Shular* as imposing a rule of proximity: It assumed that because *Shular* found ACCA's definition of "serious drug offense," 18 U.S.C. § 924(e)(2)(A)(ii), to reference conduct, anything *close* to that statute would reference conduct too. The court noted that the Commentary's use of "include[ ]" "is not so far from" the word "involve[ ]" used in ACCA. Pet. App. 13a. The court then assumed that the Commentary's use of a "formulation" of words with a rhythm similar to ACCA's somehow "reinforced" the idea that the Commentary referred to conduct. Pet. App. 11a-12a. And it noted that the Commentary describing "the offense" of conspiring in § 4B1.2(b) modified a definition of "controlled substance offense" that contained words like ACCA's—words like "manufacture" and distribution. Pet. App. 12a. And even though "conspiring" was not among those words, the court deemed its *physical proximity* to language like ACCA's close enough to suggest it referenced conduct.

That was a serious mistake. When it comes to the familiar tools of textual construction, close is not good enough. "Include" is not *close* to "involve." They mean completely different things. Pet. 29. And no matter how *physically* close on the page "conspiring" might appear to terms that *Shular* determined to reference conduct, that proximity cannot make "conspiring" any less an offense, or any more conduct. The Court therefore needs to clarify that *Shular* focuses on text—not as some obstacle to be blurred out of existence to create room for speculation, but as the exclusive tool for determining whether conduct qualifies as an offense and thereby becomes subject to *Taylor*'s categorical approach.

C. Yet perhaps even more importantly, the Court must intervene to halt a troublesome trend among the circuits on the First Circuit's side of the split. These circuits unite around the notion that speculation about the Commission's *aims* trumps the Guidelines' *text*. That notion presents a serious threat to the separation of powers and is especially pernicious when such speculation serves to deprive individuals of their liberty by adding substantially more time to a criminal sentence than the law allows.

Worse, the circuits' speculation about the Commission's aims is *bad* speculation. It assumes the Commission desired for § 4B1.2 definition of conspiracy to match the definition of conspiracy in § 846 of the Controlled Substance Act.[5] But the evidence suggests otherwise.

There is no reason to assume that the Commission was guided by *any* particular statutory definition in fashioning § 4B1.2, which adopts a definition of conspiracy designed to apply to a broad range of prior offenses. For such a generic and broadly applicable sentencing

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[5] Pet. App. 8a ("[I]t 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."); *United States* v. *Tabb*, 949 F.3d 81, 88 (2d Cir. 2020) (deeming it "patently evident" that that the Guidelines' definition "was intended to and does encompass Section 846 narcotics conspiracy"); *United States* v. *Rivera-Constantino*, 798 F.3d 900, 904-905 (9th Cir. 2015) (concluding it would have been "downright absurd" to believe the Sentencing Commission excluded "a federal conviction for a drug trafficking offense under federal law." *United States* v. *Sanbria-Bueno*, 549 F. App'x 434, 438-439 (6th Cir. 2013) (concluding that the Commission "expressly intended that a conviction under 21 U.S.C. § 846 for conspiracy to commit a federal drug offense proscribed by § 841" would qualify).

provision, it is far more natural to assume that Commission adopted the virtually universal generic version of conspiracy that every law student understands. That after all, is the wisdom behind *Taylor*'s categorical approach.

And even if the Commission sought in drafting § 4B1.2's Commentary to create symmetry between federal offenses and federal sentencing, there is no particular reason why it would latch onto federal *drug* offenses as the paradigm that the Guidelines should emulate. After all, the word "conspiring" in § 4B1.2 Commentary does not refer only to "controlled substance offenses," but applies to "crimes of violence" as well.

Nor is there any reason why the Commission would pick § 846 as the end-all-be-all guide for defining a federal conspiracy. After all, while Congress has occasionally directed the Commission to fashion sentencing guidelines for particular conspiracy offenses, it has never requested the Commission do so for § 846.[6] A Commission

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[6] In Section 961(m) of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183, 501, Congress directed the commission to promulgate guidelines, or amend existing guidelines, to provide for a substantial period of incarceration for a violation of, or a conspiracy to violate, § 215 [receipt of commissions or gifts for procuring loans], 656 [theft, embezzlement, or misapplication by bank officer or employee], 657 [embezzlement by employees and agents of lending, credit, and insurance institutions], 1005 [unauthorized bank entries, reports, and transactions], 1006 [fraudulent federal credit institution entries, reports and transactions], 1007 [improper influence of Federal Deposit Insurance Corporation transactions], 1014 [false statements in loan and credit applications and for crop insurance], 1341 [mail fraud], 1343 [wire fraud], or 1344 [bank fraud] of title 18, United States Code, that substantially jeopardizes the safety and soundness of a federally insured financial institution.

appropriately taking its cues from Congress would have never focused on § 846's definition of conspiracy to the exclusion of every conspiracy provision that Congress actually directed it to consider.

And even when it comes to federal drug conspiracy laws, there is no reason why the Commission would single out § 846, when 18 U.S.C. § 371, the general federal conspiracy statute, also includes drug crimes as well as non-drug federal crimes. And § 371 requires "proof of an overt act." *United States* v. *Martinez-Cruz*, 836 F.3d at 1313.

Finally, even if it was the Commission's goal to line up federal offenses and federal sentencing, it is doubtful that it would have modeled the Guidelines on *any* single-element definition of conspiracy adopted under *any* federal law, since most federal statutes employing a single-element definition criminalize only "very narrow behavior" that would prove little use in crafting a broadly applicable rule of conspiracy. *United States* v. *Martinez-Cruz*, 836 F.3d at 1311 n.5.

For instance, the single-element federal statutes that do not require an overt act for a conspiracy conviction include such crimes as "conspiracy to falsely represent oneself as the registrant of five or more Internet Protocol addresses and to initiate commercial electronic mail messages from those addresses" (18 U.S.C. § 1037(a)(5)), "conspiracy to furnish facilities or privileges to ships or persons contrary to a presidential proclamation," (15 U.S.C. § 77), "conspiracy to damage or interfere with the operations of an animal enterprise by property damage" (18 U.S.C. § 43(a)(2)(A)), "conspiracy to violate provisions regulating helium gas," (50 U.S.C. § 167k), and "conspiracy to violate statutory provisions or regulations related to Iran freedom and counterproliferation," (22

U.S.C. § 8809(b)). A Commission trying to develop a generally applicable definition of conspiracy would not have reached for a version applicable only to a statute criminalizing conspiracy to steal helium gas.

This evidence overwhelmingly demonstrates that the Commission had nothing like § 846's definition of conspiracy in mind when it referenced § 4B1.2's "offense" of "conspiring." And for the good of the criminal defendants subject to prior conspiracy offenses under § 4B1.2, and the good of the separation of powers, this Court needs to take this case to say so.

III. This Court must answer these questions when the Sentencing Commission cannot speak for itself.

It is vitally important that the Court intervene to answer these questions, because the Commission is currently incapable of answering them for itself. The Commission has lacked a quorum since 2018, and currently has only one active member.[7] And because only four Commission members may come from the same political party, 28 U.S.C. § 991(a), there are serious questions about when—or if—a closely divided and polarized Senate would confirm enough members to allow the Commission to reconvene. That same statutorily imposed gridlock will also make it hard for a reconvened Commission to reach a consensus on § 4B1.2's scope. Accordingly, for the first time in its history, the Commission is unable to act, and no one knows when it will be able to act.

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[7] See U.S. Sentencing Comm'n, *Former Commissioner Information*, https://tinyurl.com/3eaf5dcv.

The Court has always stated that the Commission should have an initial opportunity to clarify the Guidelines before federal courts step in to do so. See *Braxton* v. *United States*, 500 U.S. 344, 348 (1991). But that traditional deference has always presupposed a Commission that could act. Any principle favoring deference to the Commission breaks down when no Commission exists. The clients of amicus's members should not be made to wait for a resolution of § 4B1.2's scope that the Commission may never be able to provide. It is therefore up to this Court, and this Court alone, to address the question presented and resolve the split in the circuits. And the Court needs to grant the petition to do so.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

Emily Hughes
CO-CHAIR, NAPD AMICUS COMMITTEE
Boyd Law Building
Iowa City, IA 52242

Counsel for NAPD

Diana L. Johnson
407 N. Laura Street
Jacksonville, FL 32202

Counsel for FACDL

J. Carl Cecere
Counsel of Record
CECERE PC
6035 McCommas Blvd.
Dallas, TX 75206
(469) 600-9455
ccecere@cecerepc.com

Counsel for Amici Curiae

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