No. 21-8129

IN THE SUPREME COURT OF THE UNITED STATES

RADU MICLAUS, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court committed reversible plain error in calculating petitioner's advisory Sentencing Guidelines range, on the theory that an application note prohibiting an enhancement "for the transfer * * * of a means of identification," Sentencing Guidelines § 2B1.6, comment. (n.2), precluded a two-level enhancement for offense conduct involving the "trafficking" of an "unauthorized access device," id. § 2B1.1(b)(11)(B)(i).

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OPINIONS BELOW

The amended opinion of the court of appeals (Pet. App. 1a-30a) is reported at 17 F.4th 706. The original opinion of the court of appeals that was subsequently withdrawn (Pet. App. 31a-59a) is reported at 15 F.4th 689.

JURISDICTION

The judgment of the court of appeals was entered on November 9, 2021. A petition for rehearing was denied on January 11, 2022 (Pet. App. 67a). On March 22, 2022, Justice Kavanaugh extended the time within which to file a petition for a writ of certiorari to and including May 11, 2022. On May 4, 2022, Justice Kavanaugh

further extended the time to and including June 10, 2022, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Ohio, petitioner was convicted on one count of conspiring to commit wire fraud, in violation of 18 U.S.C. 1343 and 1349; 12 counts of wire fraud, in violation of 18 U.S.C. 1343; one count of conspiring to commit computer fraud, in violation of 18 U.S.C. 371 and 1030; one count of conspiring to traffic in counterfeit service marks, in violation of 18 U.S.C. 2320(a)(1); five counts of aggravated identity theft, in violation of 18 U.S.C. 1028A(a)(1); and one count of conspiring to commit money laundering, in violation of 18 U.S.C. 1956(a) and (h). Pet. App. 3a-4a, 60a. He was sentenced to 216 months of imprisonment followed by three years of supervised release. Id. at 61a-62a. The court of appeals affirmed his conviction, vacated his sentence, and remanded for resentencing. Id. at 1a-30a.

1. Petitioner, along with his co-defendant Bogdan Nicolescu, was a founding member of a Romanian criminal group dubbed "Bayrob" (a combination of "eBay" and "robbery") by the FBI. Pet. App. 2a, 20a. For nine years, Bayrob engaged in several Internet-based fraud schemes targeting victims in the United States. Pet. App. 2a.

First, beginning around 2007, Bayrob began listing fake vehicles for auction sale on eBay. Pet. App. 2a. The group posted advertisements purporting to be from U.S.-based sellers, using various technologies to conceal their real IP addresses. Ibid. Bayrob employed U.S.-based "money mules" (described to unwitting buyers as "eBay Escrow Agents") to collect payment from the victims via wire transfer; the money mules, some of whom resided in the Northern District of Ohio, were then tasked with wiring the payments to various locations in Europe, where they were transferred to petitioner. Id. at 2a, 21a. With petitioner as its most frequent eBay poster, Bayrob carried out more than 1,000 fraudulent transactions pursuant to that scheme, garnering between $3.5-$4.5 million. Ibid.

In 2014, Bayrob began a new money-making scheme using a trojan horse computer virus. Pet. App. 2a. Nicolescu created the virus and embedded it in links in the group's eBay auctions and spam e-mails. Ibid. Once a victim clicked on the link and downloaded the virus onto her computer, it would run in the background until the victim tried to visit certain popular websites, such as eBay, Facebook, PayPal, Gmail, Yahoo, and Walmart. Id. at 2a-3a. The virus would then redirect the victim to a dummy website created by Bayrob, which collected the victim's account credentials, identities, and credit-card information. Id. at 3a. Bayrob collected more than 70,000 account credentials, including 25,000 stolen credit-card numbers, that way. Ibid. Bayrob then sold

some of the stolen credit cards on AlphaBay, a website on the dark web. Ibid.

Around this same time, Bayrob devised a third scheme that involved commandeering its network of 33,000 virus-infected computers to generate cryptocurrency. Pet. App. 3a. Bayrob's virus would force an infected computer's processor to solve mathematical equations that generate bitcoin, a process known as "cryptomining"; this caused victims' computers to slow dramatically. Ibid. Bayrob then exchanged the bitcoins for cash, generating approximately $10,000–$20,000 per month in 2014 and $30,000–$40,000 per month in 2015 and 2016. Ibid. As with the profits from the eBay scheme, petitioner was responsible for collecting the cryptomining proceeds as they came in from the United States. Id. at 21a.

In 2015, law enforcement agents executed a search warrant on the cell phone of a Bayrob member, Tiberiu Danet, as he traveled through the Miami airport. Pet. App. 3a. Using information obtained from Danet's phone, the FBI and Romanian police executed a search warrant at the Romanian residences of Danet, Nicolescu, and petitioner. Ibid. The searches turned up the group's servers, hard drives, and other computing equipment; the seized files included spreadsheets that Bayrob used to keep track of its victims and the funds moving through its money-mule network. Ibid.

2. A grand jury indicted petitioner and Nicolescu on one count of conspiring to commit wire fraud, in violation of 18 U.S.C.

1343 and 1349; 12 counts of wire fraud, in violation of 18 U.S.C. 1343; one count of conspiring to commit computer fraud, in violation of 18 U.S.C. 371 and 1030; one count of conspiring to traffic in counterfeit service marks, in violation of 18 U.S.C. 2320(a)(1); five counts of aggravated identity theft, in violation of 18 U.S.C. 1028A(a)(1); and one count of conspiring to commit money laundering, in violation of 18 U.S.C. 1956(a) and (h). Pet. App. 3a-4a. Following a two-and-a-half-week trial, a jury found both defendants guilty on all counts. Id. at 4a, 60a.

The Probation Office's presentence report grouped petitioner's convictions on the conspiracy and wire fraud counts together, Presentence Investigation Report (PSR) ¶ 48, and calculated an adjusted offense level of 47 for those convictions, PSR ¶ 55, which was automatically lowered to a total offense level of 43, PSR ¶ 58. The adjusted offense level reflected several enhancements, including a two-level enhancement under Sentencing Guidelines § 2B1.1(b)(11)(B)(i) for an offense that "involved * * * trafficking of any * * * unauthorized access device" -- here, the stolen credit-card information. PSR ¶ 49; see ibid. (citing 18 U.S.C. 1029(e)(1) and (e)(3)). Petitioner's co-defendant Nicolescu, whose Guidelines calculations were similar to petitioner's, see Pet. App. 4a, objected to the same trafficking enhancement on the theory that it was precluded by Application Note 2 to Sentencing Guidelines § 2B1.6, the guideline applicable

to aggravated identity theft offenses under 18 U.S.C. 1028A. Pet. App. 69a-70a.

The aggravated identity theft statute requires an additional two-year sentence if, during the commission of certain enumerated felonies, a defendant "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person." 18 U.S.C. 1028A(a)(1). That sentence must be served consecutively to any other sentence imposed (except for another Section 1028A sentence). 18 U.S.C. 1028A(b)(2) and (b)(4). Application Note 2 to Section 2B1.6, in turn, instructs that "[i]f a sentence [for aggravated identity theft] is imposed in conjunction with a sentence for an underlying offense, do not apply any specific offense characteristic for the transfer, possession, or use of a means of identification when determining the sentence for the underlying offense." Sentencing Guidelines § 2B1.6, comment. (n.2). "A sentence [for aggravated identity theft]," the note continues, "accounts for this factor for the underlying offense of conviction, including any such enhancement that would apply based on conduct for which the defendant is accountable under § 1B1.3 (Relevant Conduct)." Ibid. The phrase "means of identification" in Application Note 2 includes an unauthorized access device. See ibid.; see also 18 U.S.C. 1028(d)(7)(D).

The district court rejected Nicolescu's objection to the Section 2B1.1(b)(11)(B)(i) trafficking enhancement, reasoning that "trafficking" an unauthorized access device involves conduct

distinct from the "transfer" of that device. Pet. App. 72a-73a. The court otherwise largely adopted the Probation Office's calculations, with modifications that reduced petitioner's adjusted offense level by four. Sent. Tr. 90-91. The district court thus calculated a total offense level of 43 for petitioner, which produced an advisory Guidelines range of life imprisonment. Pet. App. 4a. Because that Guidelines sentence exceeded the statutory maximum sentence for petitioner's crimes (20 years), the court further reduced the offense level to 38, which produced an advisory range of 235 to 293 months. Ibid. The court then sentenced petitioner to a total of 216 months of imprisonment: 192 months on the counts of conspiring to commit wire fraud, wire fraud, and conspiring to commit money laundering; a concurrent sentence of 60 months on the count of conspiring to commit computer fraud; a concurrent sentence of 120 months on the count of conspiring to traffic in counterfeit service marks; and mandatory 24-month sentences on the five aggravated identity theft counts, to run concurrently with each other and consecutively to all other sentences. Id. at 4a-5a.

3. The court of appeals affirmed petitioner's conviction but vacated his sentence and remanded for resentencing. Pet. App. 2a.

On appeal, petitioner joined Nicolescu in arguing that Application Note 2 to Section 2B1.6 precluded the Section 2B1.1(b)(11)(B)(i) trafficking enhancement. Pet. App. 21a. The court of appeals noted that petitioner did not object to the

enhancement at sentencing. Id. at 26a; see Fed. R. Crim. P. 52(b) (providing for plain-error review of forfeited objections). But the court found no error regardless. Pet. App. 21a-26a.

The court of appeals acknowledged that if the terms "trafficking" and "transfer" were wholly synonymous, then Application Note 2 would preclude the trafficking enhancement. Pet. App. 22a. But the court observed that "if the culpable conduct involved in 'trafficking' is 'different than or in addition to' the 'transfer, possession, or use,' then the enhancement can apply." Ibid. (citation omitted) (emphasis added).

The court of appeals noted that "traffic" and "transfer" are not defined in Section 2B1.1(b)(11) or Section 2B1.6 of the Guidelines. Pet. App. 23a. And when the court looked to those terms' "ordinary meaning," using dictionary definitions, it found that the word "traffic" usually "carries a commercial aspect, which the word 'transfer' does not." Ibid. The court accordingly recognized that "although all 'trafficking' involves 'transfer,' the converse is not true." Ibid. The court also pointed out that other enhancements in Section 2B1.1(b)(11) specifically use the words "transfer," "possession," and "use," suggesting that the word "traffic" was used in that same Guidelines provision to mean something distinct. Id. at 23a-24a; see Sentencing Guidelines § 2B1.1(b)(11)(C)(i) and (C)(ii) (providing enhancements for "the unauthorized transfer or use" of a means of identification and "the possession" of certain means of identification).

Applying that interpretation of Application Note 2 and the trafficking enhancement to the case at hand, the court of appeals emphasized that Bayrob did not merely provide stolen credit-card numbers to others, but also marketed them on AlphaBay and accepted payment for their sale. Pet. App. 23a. The court therefore determined that "[t]he commercial aspect of 'trafficking' is not captured" by petitioner's aggravated identity theft convictions, and concluded that the Section 2B1.1(b)(11)(B)(i) enhancement could properly apply. Ibid.

The court of appeals acknowledged that its resolution of the issue "chart[ed] a new course among [its] sister circuits," but disagreed with those courts' conclusion that "trafficking" should be treated as "transferring" under the application note. Pet. App. 24a-25a. The court pointed out, inter alia, that those other circuits "apply a different rule entirely to another component of the disputed Guideline," namely, the part of Section 2B1.1(b)(11)(B)(i) providing an enhancement for the "production" of an unauthorized access device. Id. at 25a. Even though the "production" of an unauthorized access device (or a means of identification) will in most instances involve its "possession" or "use" -- for which Application Note 2 likewise prohibits any enhancement -- those circuits do not preclude the "production" enhancement. See ibid. (citing decisions from the Seventh, Eighth, and Eleventh Circuits); see also United States v. Jones, 551 F.3d 19, 25 (1st Cir. 2008), cert. denied 556 U.S. 1141 (2009). The

court explained that those other circuits' approach to production, in contrast to their approach to trafficking, reflects the "the proper rule": that if the disputed enhancement is based on the defendant's transfer, possession, or use "plus something more," then Application Note 2 does not apply. Pet. App. 25a-26a.

The court of appeals, however, vacated petitioner's sentence based on its separate determination that the district court had improperly applied two different enhancements that increased petitioner's offense level. Pet. App. 27a-28a. The court of appeals remanded the case to the district court for petitioner's resentencing, id. at 28a, which has not yet occurred.

Judge White dissented from the court of appeals' affirmance of the Section 2B1.1(b)(11)(B)(i) trafficking enhancement. Pet. App. 29a-30a (White, J., concurring in part and dissenting in part). Judge White agreed with petitioner that the enhancement cannot apply in these circumstances. Id. at 29a.

4. Petitioner sought rehearing and rehearing en banc, renewing his argument that Application Note 2 bars the trafficking enhancement, and additionally arguing that the court of appeals failed to address his alternative contention that there was insufficient evidence supporting the enhancement in his case. The court issued an amended opinion rejecting that alternative argument, see Pet. App. 26a-27a, and denied rehearing, id. at 67a.[1]

[1] Petitioner does not renew that alternative argument in this Court.

ARGUMENT

Petitioner contends (Pet. 8-18) that the Court should grant certiorari to resolve a conflict in the courts of appeals about whether Application Note 2 to Section 2B1.6 of the Sentencing Guidelines bars application of the enhancement in Section 2B1.1(b)(11)(B)(i) for "trafficking" an unauthorized access device. The interlocutory posture of the petition, however, makes this case an inappropriate vehicle for reviewing that question. In any event, the court of appeals correctly determined that the district court could apply the trafficking enhancement in petitioner's case, and any disagreement in the lower courts regarding the interpretation of the advisory Guidelines can be addressed by the Sentencing Commission, which now has a quorum of voting members. This Court recently denied a petition for a writ of certiorari filed by petitioner's co-defendant, which presented the same question. See Nicolescu v. United States, 142 S. Ct. 1458 (2022) (No. 21-7301). The Court should follow the same course here.

1. As a threshold matter, this case is in an interlocutory posture because the court of appeals vacated petitioner's sentence and remanded for resentencing. Pet. App. 28a. The interlocutory posture of a case ordinarily "alone furnishe[s] sufficient ground for the denial" of a petition for a writ of certiorari. Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 258 (1916); see Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook

R.R., 389 U.S. 327, 328 (1967) (per curiam) (observing that a case remanded to the district court "is not yet ripe for review by this Court"); Abbott v. Veasey, 137 S. Ct. 612, 613 (2017) (statement of Roberts, C.J., respecting the denial of certiorari). Consistent with that general rule, this Court routinely denies interlocutory petitions in criminal cases. See Stephen M. Shapiro et al., Supreme Court Practice 4-55 n.72 (11th ed. 2019).

This practice promotes judicial efficiency, because the proceedings on remand may affect the consideration of the issues presented in a petition. It also enables issues raised at different stages of lower-court proceedings to be consolidated into a single petition. See Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504, 508 n.1 (2001) (per curiam) ("[W]e have authority to consider questions determined in earlier stages of the litigation where certiorari is sought from the most recent of the judgments of the Court of Appeals."). Petitioner offers no reason why this case warrants a departure from the Court's usual practice. Indeed, the practice is especially sound here, where petitioner presents a sentencing question, and the district court is set to impose a fresh sentence.

2. a. The Court's review would be unwarranted in any event. The court of appeals correctly determined that the Section 2B1.1(b)(11)(B)(i) trafficking enhancement could apply under these circumstances. The text of Application Note 2 to the aggravated identity theft guideline prohibits the application of "any

specific offense characteristic for the transfer, possession, or use of a means of identification." Sentencing Guidelines § 2B1.6, comment. (n.2) (emphasis added). As the court of appeals recognized, if an enhancement is imposed for "culpable conduct" that is "different than or in addition to" the transfer, possession, or use of a means of identification, then Application Note 2 by its terms does not apply. Pet. App. 22a (citation omitted). The text thus reflects the application note's stated purpose of preventing double-counting; if the defendant's wrongful conduct involves the transfer of a means of identification "plus something more," id. at 26a, then no unfairness results from imposing the mandatory two-year sentence for aggravated identity theft and applying an enhancement for additional wrongful conduct beyond simple transfer, use, or possession.

The court of appeals also correctly determined that "trafficking" a means of identification involves culpable conduct in addition to the item's mere transfer. Because the words "transfer" and "traffic" are not defined in the Sentencing Guidelines, the court reasonably looked to the terms' "ordinary meaning," as shown in dictionary definitions. Pet. App. 23a. "Traffic" is typically defined to carry a commercial component -- i.e., the transfer for sale, trade, or other financial gain. See ibid. (citing two dictionary definitions); Webster's Ninth New Collegiate Dictionary 1250 (1989) (defining the verb "traffic" with reference to the noun, and the noun as "the business of

bartering or buying and selling" or "illegal or disreputable usu[ally] commercial activity"); Black's Law Dictionary (11th ed. 2019) ("[t]o trade or deal in (goods, esp[ecially] illicit drugs or other contraband)"). That financial component is not necessarily present in transfer simpliciter, which need not involve, for example, a sale of identity credentials like the dark-web sales of credit-card information that Bayrob undertook here.

As the court of appeals also recognized (Pet. App. 23a-24a), the surrounding text of Section 2B1.1(b)(11) reinforces that "traffic" must mean something different from "transfer." Were that not the case, the use of the two distinct words in subclauses (B) and (C) of the same subsection would make little sense. See Sentencing Guidelines § 2B1.1(b)(11)(B) and (11)(C); cf. Wisconsin Central Ltd. v. United States, 138 S. Ct. 2067, 2071 (2018) (observing that courts "usually presume differences in language * * * convey differences in meaning") (citation and internal quotation marks omitted). Indeed, Application Note 2's employment of the same terms ("transfer," "possession," and "use") that are employed in Section 2B1.1(b)(11) enhancements other than the "trafficking" enhancement strongly indicates that the application note's drafters had those other enhancements -- not a "trafficking" enhancement -- in mind. See Pet. App. 23a-24a; cf. United States v. Gonzales, 844 F.3d 929, 933 (10th Cir. 2016) (observing that Section 2B1.1(b)(11)(C) would provide "[a] proper occasion for using application note 2 to § 2B1.6").

The upshot is that the Section 2B1.1(b)(11)(B)(i) trafficking enhancement properly applies where a defendant is guilty not merely of transferring a means of identification from one person to another, but also culpable of "marketing or sales activity" -- for example, receiving payment in exchange. Pet. App. 26a. And as the court of appeals found, petitioner was properly held responsible here for such "marketing and sales of stolen credit cards" as part of the Bayrob scheme. Id. at 26a-27a.

b. Petitioner's contrary arguments lack merit. He first argues (Pet. 13-14) that Application Note 2 should bar any enhancement punishing conduct that "includes" or "involv[es]" a transfer, even if the enhancement targets additional culpable conduct. Id. at 14 (emphasis omitted). But Application Note 2 does not preclude an enhancement that "includes" or "involves" transferring; it precludes an enhancement "for" transferring. Sentencing Guidelines § 2B1.6, comment. (n.2) (emphasis added).

Petitioner does not explain how his textual substitution would serve the note's express anti-double-counting role. See Sentencing Guidelines § 2B1.6, comment. (n.2). And as the court of appeals recognized, there appears to be general consensus in the lower courts that the Section 2B1.1(b)(11)(B) enhancement at issue here can be applied to conduct that is more culpable in some respect than the type of conduct that the aggravated identity theft statute's mandatory two-year sentence accounts for by default. Specifically, in considering the part of the Section

2B1.1(b)(11)(B) enhancement applicable to the "production" of an unauthorized access device, courts have not found it barred by Application Note 2. See Pet. App. 25a; see also, e.g., United States v. Taylor, 818 F.3d 671, 676 (11th Cir.), cert. denied 137 S. Ct. 387 (2016) (reasoning that the "production" of a device is "separate and distinguishable from the mere transfer, possession, or use of such device"). Petitioner's observation (Pet. 16-17) that the word "production" is defined in the Guidelines is a non sequitur; "production" under that definition includes activities that would often involve the defendant's possession or use of the device. See Sentencing Guidelines § 2B1.1, comment. (n.10A) ("'Production' includes manufacture, design, alteration, authentication, duplication, or assembly.") (emphasis omitted); see also Pet. App. 25a n.7.

Petitioner also argues (Pet. 15) that the ordinary meaning of "traffic" does not encompass "a commercial aspect." But he offers no competing dictionary definitions, instead asserting that "in criminal law" specifically, the word carries a unique "transfer"-only meaning. Ibid. But the criminal law in fact contains many counterexamples. See, e.g., 18 U.S.C. 1028(d)(12) (identity fraud statute defining "traffic" to mean "to transport, transfer, or otherwise dispose of, to another, as consideration for anything of value"); 18 U.S.C. 1591(a)(1) ("[s]ex trafficking" statute requiring "a commercial sex act"); 18 U.S.C. 2320(f)(5) ("[t]rafficking in counterfeit goods or services" statute defining

"traffic" to mean to transport "for purposes of commercial advantage or private financial gain"); 18 U.S.C. 1170(a) ("[i]llegal trafficking in Native American human remains" statute criminalizing one who "knowingly sells, purchases, uses for profit, or transports for sale or profit, the human remains of a Native American"); Sentencing Guidelines § 2G1.3 (Guidelines section applicable to 18 U.S.C. 1591 offenses involving minors titled, inter alia, "[s]ex [t]rafficking of [c]hildren").

3. Petitioner notes (Pet. 8-9) that four other circuits "have held that the trafficking enhancement cannot apply to a defendant convicted of aggravated identity theft." Pet. App. 24a-25a; see United States v. Charles, 757 F.3d 1222, 1226-1227 (11th Cir. 2014); United States v. Doss, 741 F.3d 763, 766-768 (7th Cir. 2013); United States v. Lyons, 556 F.3d 703, 708 (8th Cir. 2009); Jones, 551 F.3d at 25. Another circuit has reached the same result in an unpublished opinion. Pet. 8; see United States v. Giannone, 360 Fed. Appx. 473, 477-478 (4th Cir. 2010) (per curiam).[2] This Court's review is not warranted, however, because the disagreement concerns the interpretation of the advisory Sentencing Guidelines.

[2] In two of those cases, the respective U.S. Attorney's Office stated in appellate briefing that Application Note 2 does bar application of the Section 2B1.1(b)(11)(B)(i) trafficking enhancement, and conceded plain error on that basis. See Gov't Br. at 7-11, Doss, supra (No. 13-1001); Gov't Br. at 49-52, Giannone, supra (No. 07-4844). As explained above, see pp. 12-17, supra, the government's position is that those concessions were not required by the Guidelines' language. In any event, the Sentencing Commission can clarify the issue in the future. See pp. 18-19, infra.

This Court ordinarily does not review decisions applying the Guidelines because the Sentencing Commission can amend the Guidelines or their commentary to correct any error. See Braxton v. United States, 500 U.S. 344, 347-349 (1991) ("[I]n charging the Commission 'periodically [to] review and revise' the Guidelines, Congress necessarily contemplated that the Commission would periodically review the work of the courts, and would make whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest.") (brackets in original); see also United States v. Booker, 543 U.S. 220, 263 (2005) (similar); Longoria v. United States, 141 S. Ct. 978, 979 (2021) (statement of Sotomayor, J., respecting the denial of certiorari) (stating that the Sentencing Commission "should have the opportunity to address" a split of authority among the courts of appeals regarding a Guidelines issue "in the first instance").

The petition states (Pet. 12 n.5) that the Commission is "currently unable to act" due to an absence of a quorum. But since the petition was filed, the Senate has confirmed seven new Commission members, and the Commission now has a voting quorum. See U.S. Sentencing Comm'n, Acting Chair Charles Breyer, Incoming Chair Judge Carlton W. Reeves Applaud Senate Confirmation of New Commissioners (Aug. 5, 2022), https://perma.cc/CS5E-BWE3; U.S. Sentencing Comm'n, Organization, https://perma.cc/DG3P-J2E7 (last visited Nov. 4, 2022). The Commission is therefore able to fulfill its "responsibility * * * to address this division [of judicial

authority] to ensure fair and uniform application of the Guidelines." Guerrant v. United States, 142 S. Ct. 640, 640-641 (2022) (statement of Sotomayor, J., respecting the denial of certiorari).

Reviewing the court of appeals' Guidelines interpretation is also unwarranted because the Guidelines are advisory. See Booker, 543 U.S. at 245. Thus, if petitioner were correct that Application Note 2 bars a sentencing court from applying the Section 2B1.1(b)(11)(B)(i) enhancement under these circumstances, the court could nonetheless consider the same facts, if reliable, when fashioning the ultimate sentence pursuant to 18 U.S.C. 3553(a). See 18 U.S.C. 3661 ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."); see also Booker, 543 U.S. at 251-252 (similar). Conversely, under the Sixth Circuit's approach, a sentencing court can still exercise the discretion afforded by Section 3553(a) and discount the effect of the Section 2B1.1(b)(11)(B)(i) enhancement in appropriate cases. Either way, the court of appeals' resolution of the question presented need not constrain district courts in their choice of sentence in any particular case.

4. Finally, even beyond its interlocutory posture, see pp. 11-12, supra, this case would be a poor vehicle for considering the question presented. Petitioner acknowledges that he "did not

raise an objection to the application of the trafficking enhancement at the time of sentencing," Pet. 5, and the court of appeals accordingly reviewed his challenge "for plain error," Pet. 6; see Pet. App. 26a.

As a consequence of his forfeiture, petitioner bore the burden of proving not only that (1) an error occurred, but that the error (2) was "plain," (3) affected his substantial rights, and (4) seriously affected the fairness, integrity or public reputation of the proceedings. Greer v. United States, 141 S. Ct. 2090, 2096-2097 (2021). Even if an error occurred in this case, petitioner cannot show that it was plain. A plain error must be "clear or obvious, rather than subject to reasonable dispute." United States v. Marcus, 560 U.S. 258, 262 (2010) (citation omitted). Here, although other circuits had adopted the position petitioner advanced on appeal, the Sixth Circuit had "not yet opined on" the issue, Pet. App. 22a, and the court found that the "ordinary meaning" of "trafficking" permitted the disputed enhancement to apply, id. at 23a, 25a-26a. Under these circumstances, the district court's error (if any) was not so clear or obvious that it justifies relief on plain-error review. See Henderson v. United States, 568 U.S. 266, 278 (2013) (explaining that "lower court decisions that are questionable but not plainly wrong (at time of trial or at time of appeal) fall outside the * * * scope" of the plain-error rule).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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