No. _____

In the Supreme Court of the United States

HECLOUIS NIEVES-DÍAZ, PETITIONER,

v.

UNITED STATES OF AMERICA, RESPONDENT.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

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

PARTIES

Heclouis Nieves-Díaz, Petitioner, was the defendant-appellant below.

The United States of America, Respondent, was the plaintiff-appellee below.

RELATED PROCEEDINGS

United States Court of Appeals (1st Cir.):

> *United States v. Nieves-Díaz,* Nos. 21-1519, 21-1520, 99 F.4th 1 (1st Cir. 2024) (affirming judgments in part, vacating in part)

United States District Court (D.P.R.)

> *United States v. Nieves-Díaz*, No. 3:20-cr-00353-FAB (June 22, 2021) (judgment)
>
> *United States v. Nieves-Díaz*, No. 3:12-cr-00426-FAB-35 (June 22, 2021) (judgment)

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OPINIONS BELOW

Petitioner Heclouis Nieves-Díaz (Petitioner or Mr. Nieves) respectfully petitions for a writ of certiorari to review the judgment of the First Circuit. App. 26a. It's reported at 99 F.4th 1.

JURISDICTION

The First Circuit entered judgment on April 17, 2024. App. 1a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The relevant provisions of the United States Sentencing Guidelines are reproduced in the appendix to this petition. App. 35a-41a

INTRODUCTION

When imposing a criminal sentence, a district court starts its analysis by consulting the Sentencing Guidelines. When doing so, the court must often determine whether any prior conviction triggers an enhancement. To make this determination, sentencing courts employ the categorical approach: the court compares the elements of a defendant's prior conviction with the elements listed in the enhancement. If the elements of the prior conviction necessarily encompass those of the enhancement, the enhancement applies.

But when an offense—like conspiracy—is undefined in the Guidelines, the court looks at this Court's precedent in *Taylor*, to interpret the text. *Taylor v. United States*, 495 U.S. 575 (1990). The court does not ask what the person did, but rather the sentencing court identifies "a 'generic' version of a crime—that is, the elements of 'the offense as commonly understood.'" *Shular v. United States*, 589 U.S. 154, 158, (2020). The court then applies the categorical approach, comparing the elements of the prior conviction with that of the generic definition. *Id.*

This case deals with the crime of conspiracy, which remains undefined in the Sentencing Guidelines, and Petitioner's prior conviction under 21 U.S.C. § 846. The

question presented is whether a prior conviction for conspiracy to possess drugs with intent to distribute under § 846 falls within the Guidelines' definition of a "controlled substance offense" such that an enhancement under U.S.S.G. § 2K2.1(a)(3)(B) applies.

Importantly, there is a 6-2 circuit split over how to interpret the offense of conspiracy, whether it requires an overt act or not. The Fourth and Tenth Circuits define the offense of conspiracy to require both an agreement and overt act in furtherance of the conspiracy. *See, e.g.*, *United States v. Norman*, 935 F.3d 232, 237-238 (4th Cir. 2019); *United States v. Martínez-Cruz*, 836 F.3d 1305, 1310-14 (10th Cir. 2016). In contrast, the First, Second, Fifth, Sixth, Seventh, and Ninth Circuits have all held that the Guidelines only require proof of an agreement; no overt act is necessary. *See United States v. Tabb*, 949 F.3d 81, 87-89 (2d Cir. 2020); *United States v. Rodríguez-Escareno*, 700 F.3d 751, 753-754 (5th Cir. 2012); *United States v. Sanbria-Bueno*, 549 F. App'x 434, 438-439 (6th Cir. 2013); *United States v. Smith*, 989 F.3d 575, 586 (7th Cir. 2021); *United States v. Rivera-Constantino*, 798 F.3d 900, 903-905 (9th Cir. 2015).

There is further division between the circuits in how they came to their decisions. The First, Sixth, and Ninth Circuits do not apply a generic-crime analysis in deciding that conspiracy only requires an agreement. The Second and Seventh Circuit purportedly used a generic-crime definition, but they reached a different conclusion than the Fourth and Tenth Circuits. The Fifth Circuit has issued decisions that take both approaches.

This Court should step in to resolve this important question. The Court's intervention is necessary to ensure uniformity in federal sentencing and minimize the growth of sentencing disparities based on these drastically different approaches and conclusions reached by the courts of appeals. The issue is both relevant and important because, although the Guidelines were amended in November 2023, the definition of Guidelines conspiracy remains undefined.

This Court should grant this petition and reverse.

STATEMENT

A. Legal Background

1. The United States Sentencing Commission was established to "provide certainty and fairness" and avoid "unwarranted sentencing disparities." 28 U.S.C. § 991(b)(1)(B). The Commission promulgates the federal Sentencing Guidelines, policy statements, and official commentary.

When a district court sentences a defendant, the Guidelines and its commentary guide the court in making its determination. *Molina-Martinez v. United States*, 578 U.S. 189, 193 (2016). The Guidelines' aim is to ensure uniformity and proportionality in sentencing. *Id.* at 193. A court must "begin all sentencing proceedings by correctly calculating the applicable Guidelines range," which serves as the "starting point and the initial benchmark." *Gall v. United States*, 552 U.S. 38, 49 (2007). Throughout sentencing, the "Guidelines

inform and instruct the district court's determination." *Molina-Martínez*, 578 U.S. at 200.

2. In addition to providing guidance on the offenses themselves, the Guidelines contain sentencing enhancements for defendants who have previously committed "controlled substance offenses" or "crimes of violence." *See, e.g.*, U.S.S.G. §§ 2K2.1(a)(1)-(4) (firearm offenses); 2K1.3(a)(1)-(2) (explosive offenses); 4B1.1 (career offenders).

At all times relevant here, "controlled substance offense" was defined in the Guidelines as:

> An offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or counterfeit substance) with intent to manufacture, import, export, distribute, or dispense; or is an offense described in 46 U.S.C. § 70503(a) or § 70506(b).

U.S.S.G. § 4B1.2.(b).

The Guidelines' commentary at the time provided that controlled substance offenses and crimes of violence "include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses." *Id.* § 4B1.2 cmt. n1. But the guidelines do not provide a definition for these inchoate offenses. *See id.*

Crimes of violence are those crimes with an element of "the use, attempted use, or threatened use of physical force," or

certain enumerated but undefined offenses, such as murder and arson. *Id*. at § 4B1.2.(a).

3. Title 21 criminalizes several federal drug offenses, such as manufacturing, distributing, and dispensing controlled substances. *See* 21 U.S.C. § 841(a). An offense committed in violation of 21 U.S.C. § 846 criminalizes conspiracy to commit such drug offenses. The statute states, "Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy." 21 U.S.C. § 846.

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

B. Proceedings Below

In October 2020, Puerto Rico police officers executed a search warrant at a house in San Juan, Puerto Rico. App. 4a. The search netted drugs, ammunition, and an auto-sear device—an attachment that renders Glock pistols capable of firing continuously with a single pull of the trigger. App. 4a. No firearms were found on the premises. App. 4a.

Petitioner Heclouis Nieves-Díaz, who at the time was on federal supervised release for a prior conviction under 21 U.S.C. § 846, accepted responsibility for the seized contraband. App. 4a.

Mr. Nieves was arrested and charged federally in a three-count indictment with possession of ammunition by a person with a prior felony conviction, 18 U.S.C. § 922(g)(1), unlawful possession of a machinegun, 18 U.S.C. § 922(o), and possession with intent to distribute cocaine, 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C). App. 4a. Based on this new criminal conduct, the Probation Office filed a petition to revoke Mr. Nieves's term of supervised release. App. 3a.

Mr. Nieves pled guilty to the three counts without the benefit of a government agreement. App. 4a. And he accepted responsibility for the parallel supervised-release violation.

When sentencing Mr. Nieves for the new criminal conduct, the district court imposed an enhancement that applies when a defendant possesses certain firearms and has one prior conviction for a controlled substance offense. U.S.S.G. § 2K2.1(a)(3)(B). [1] App. 5a. Petitioner had previously suffered a conviction under § 846. App. 8a. So, as relevant here, Mr. Nieves argued that § 846 did not qualify as conspiring to commit a controlled substance offense under the Guidelines. App. 8a.

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[1] Although no firearms were recovered from the searched premises, the seized auto-sear device, the district court found, qualifies as a "firearm that is described in 26 U.S.C. § 5845(a)," U.S.S.G. § 2K2.1(a)(3)(A)(ii). App. 5a.

Specifically, Mr. Nieves contended that conspiracy to commit a controlled substance offense means committing an offense that necessarily includes the elements of a generic conspiracy— meaning both an agreement and overt act. App. 8a. Yet, unlike generic conspiracy offenses, § 846 requires only proof of an agreement. App. 8a; *see also United States v. Shabani*, 513 U.S. 10, 15 (1994). For that reason, Mr. Nieves explained, § 846 falls outside the sweep of the Guidelines definition of conspiring to commit a controlled substance offense. App. 8a.

The district court disagreed and concluded that the prior § 846 conviction was covered under the Guidelines and that it therefore triggered an enhancement under § 2K2.1(a)(3)(B). App. 8a. In the end, Mr. Nieves received an 84-month prison term for each conviction, with the sentences to be served concurrently and consecutive to the 18-month sentence that was imposed upon revocation of supervised release. App. 3a.

Mr. Nieves appealed, challenging the sentence imposed in the new criminal matter as well as the sentence imposed upon revocation of his supervised release. App. 3a. Pertinent to this petition, he argued that agreement-only conspiracy offenses, like the one set out in § 846, are a categorical mismatch to the generic definition of conspiracy and therefore do not meet the Guidelines' definition of conspiracy to commit a controlled substance offense. [2] App. 8a.

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[2] Mr. Nieves's briefing recognized that this claim was foreclosed by circuit precedent in *United States v. Rodríguez-Rivera*, 989 F.3d 183 (1st

The First Circuit affirmed in part, vacated in part, and remanded on other grounds.[3] App. 26a. Importantly, the First Circuit disagreed with Mr. Nieves that his prior conviction under § 846 did not qualify as a controlled substance offense. To get there, the court of appeals relied on precedent in *Rodríguez-Rivera*, which held that a conviction under § 846 qualifies as a Guidelines controlled substance offense—even though § 846 does not require proof of an overt act. *Id.* at 185.

This petition follows.

Cir. 2021) (holding § 846 is a controlled substance offense within the meaning of U.S.S.G. § 4B1.2).

[3] The First Circuit vacated in part after agreeing with Mr. Nieves that certain items of contraband that were recovered from the San Juan house did not support application of a four-level enhancement for use or possession of a firearm or ammunition in connection with another felony offense, *see* U.S.S.G. § 2K2.1(b)(6)(B). App. 17a.

REASONS TO GRANT CERTIORARI

The Sentencing Guidelines provide the framework for the tens of thousands of federal sentencing proceedings that occur each year, including sentences for people with prior convictions under 21 U.S.C. § 846. *See Molina-Martínez v. United States*, 578 U.S. 189, 192 (2016). The Guidelines were established to ensure uniformity in federal courts. *Peugh v. United States*, 569 U.S. 530, 542 (2013). Yet the circuits are split over the definition of "controlled substance offense" in the Guidelines, *see* U.S.S.G. § 4B1.2. *United States v. Rodriguez-Rivera*, 989 F.3d 183, 185 (2021). Since this definition guides the application of numerous enhancements, if left unaddressed, the decision will result in severe consequences for thousands of convicted individuals based solely on the geographic location where they're sentenced.

This is not a trivial problem. Section 846 most commonly serves as the vehicle for charging conspiracy offenses in federal drug cases, and the offense lacks an overt act requirement. *United States v. Shabani*, 513 U.S. 10, 15 (1994). Because of this, cases like Petitioner's, where courts must decide whether to apply an enhancement, occur frequently.

Further, the decision below is wrong. The questions presented are constitutionally important and critical. And there is confusion in cases like Petitioner's because the Guidelines do not define conspiracy.

This Petition presents an opportunity for the Court to decide whether a "controlled substance offense" under the

Guidelines includes conspiracy offenses under § 846, even though no overt act is required.

I. There is a deep circuit split on the issue.

The question presented involves an entrenched split which was acknowledged by the court of appeals below and other circuits.

The First, Second, Fifth, Sixth, Seventh, and Ninth Circuits define Guidelines conspiracy to require only an agreement without an overt act.[4] *United States v. Rodriguez-Rivera*, 989 F.3d 183 (1st Cir. 2021); *see United States v. Tabb,* 949 F.3d 81 (2d Cir. 2020); *United States v. Rudolph*, 103 F.4th 356 (5th Cir. 2024); *United States v. Smith*, 989 F.3d 575, 586 (7th Cir. 2021); *United States v. Rivera-Constantino*, 798 F.3d 900, 903- 905 (9th Cir. 2015).

The Fourth and Tenth Circuits have held that the offense of conspiracy under the Guidelines, *see* U.S.S.G. § 4B1.2, means an offense that meets the generic definition of a con-

[4] This Court's decision in *Kisor* led to some circuits changing their position on whether a conspiracy-to-distribute offense was a controlled substance offense because the inchoate offense of conspiracy was listed in the commentary and not in the Guidelines text itself. *See e.g., United States v. Kisor,* 588 U.S. 558 (2019); *United States v. Havis*, 927 F.3d 382, 387 (6th Cir. 2019); *United States v. Castillo*, 69 F.4th 648 (9th Cir. 2023). However, on November 1, 2023, the Guidelines were amended, *inter alia*, to expand the definition of controlled substances to include "the offenses of aiding and abetting, conspiring, and attempting to commit such offenses." U.S.S.G. § 4B1.2(d). Since neither the Amendments nor *Kisor* further define whether conspiracy in the Guidelines includes an overt act or not, we address the Circuit split as it exists.

spiracy; namely, a state or federal offense requiring proof of an agreement and an overt act. *See United States v. McCollum*, 885 F.3d at 307-309 (4th Cir. 2018); *United States v. Norman*, 935 F.3d at 237-238 (4th Cir. 2019); *United States v. Martínez-Cruz*, 836 F.3d at 1310-14 (10th Cir. 2016).

Even though the First Circuit rejected the contention that conspiracy requires an overt act to qualify as a controlled substance offense, the court acknowledged that an answer to this question matters because the resulting classification often means longer recommended sentences by raising base offense levels and levels. *Rodriguez-Rivera*, 989 F.3d at 185.

A. The circuits that concluded conspiracy does not require an overt act used different approaches to reach that incorrect conclusion, further deepening the division on the issue.

The circuits that have held that generic conspiracy does not require an overt act used different approaches to reach that incorrect conclusion. For example, the Second Circuit and the Seventh Circuit defined a generic crime and concluded that conspiracy does not require an overt act. *Tabb*, 949 F.3d at 88; *see also Smith*, 989 F.3d at 586. The Second Circuit rejected the notion that the generic definition of conspiracy requires an overt act and stated that controlled substance offense conspiracies under the Guidelines included § 846 conspiracies. *Tabb*, 949 F.3d at 88. The court defined conspiracy as an agreement between two or more persons to commit an unlawful act. *Id.*

The Seventh Circuit cited to *Tabb* in its decision affirming the holding that a conviction under § 846 for conspiracy to traffic cocaine came within the term "controlled substance offense" in the guidelines. *Smith*, 989 F.3d at 575. The Seventh Circuit looked to the generic version of the offense and found no reason to construe the word conspiring as excluding § 846 conspiracy convictions. *Id.* at 586.

On the other hand, the First, Sixth and Ninth Circuits interpret the Guidelines without reference to a generic definition of a conspiracy. For example, the Ninth Circuit surveyed "state conspiracy statutes" and concluded that "forty of fifty-four jurisdictions," along with the generic federal conspiracy statute, require an overt act; it concluded that both the Model Penal Code and Professor LaFave's treatise "confirm the results of [its] survey;" and it explained that, while the common law had not required proof of an overt act, the modern requirement "developed to guard against the punishment of evil intent alone, and to assure that a criminal agreement actually existed." *United States v. García-Santana*, 774 F.3d 528 (9th Cir. 2014) at 534-537.[5]

The Fifth Circuit has taken conflicting approaches. For instance, in *Rodriguez*, the court initially issued an opinion

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[5] After *Kisor*, the Ninth Circuit did not consider inchoate offenses, overt act or not, to be included since they were only listed in the commentary. *Castillo*, 69 F.4th at 664. However, the Ninth Circuit has not issued a new position after the latest Guideline amendments which expressly included inchoate offenses. *See* U.S.S.G. § 4B1.2(d); U.S. Sent'g Comm'n, Amendments to the Sentencing Guidelines, 88 Fed. Reg. 28,254, 28,275 (effective Nov. 1, 2023).

holding that the generic meaning of conspiracy requires an overt act. *United States v. Rodriguez*, 711 F.3d 541 (5th Cir. 2013). The court then sua sponte withdrew its opinion and issued a second opinion, reaching the opposite result. In its later decision, *Pascacio-Rodriguez*, the Fifth Circuit held that conspiracy to commit murder does not require an overt act as an element of the offense even though the generic, contemporary meaning of conspiracy requires an overt act. *United States v. Pascacio-Rodriguez*, 749 F.3d 353, 354 (5th Cir. 2014). To reach this conclusion, the court discussed two possible approaches—the categorical approach and the interpretive approach, which attempted to discern whether the Commission intended for an overt act to be an element of every conspiracy conviction. *Id.* at 358. The court concluded that under either approach, conspiracy did not require an overt act. While the abovementioned case does not directly involve § 846, the court's conflicting definitions of conspiracy serve to highlight the deep division and confusion among the circuits.

B. The Fourth and Tenth Circuit provide clarity on the appropriate approach.

Breaking up this confusion, the Fourth Circuit provides for more clarity supporting Mr. Nieves's assertion that Guidelines conspiracy requires an overt act. Initially, the Fourth Circuit addressed the meaning of "conspiring" to determine if conspiracy to commit murder under 18 U.S.C. § 1959 qualified as a conspiracy to commit a crime of violence under the Guidelines. *See McCollum*, 885 F.3d at 308-309. In

subsequent decisions, the Fourth Circuit applied its prior decision to specifically hold that, "because [18 U.S.C.] § 846 does not require an overt act, 'it criminalizes a broader range of conduct than that covered by generic conspiracy,'" and does not qualify as an offense of conspiring under the Guidelines. *United States v. Whitley*, 737 F. App'x 147, 149 (4th Cir. 2018).

In *Norman*, the court found that comparison of predicate offenses to generic definitions of specified offenses is necessary because the plain language of the Guidelines which used a generic, undefined term is not sufficient. *Norman*, 935 F.3d at 239. The court acknowledged that the Fourth Circuit had previously assumed, but never held, that § 846 conspiracy convictions qualified as controlled substance offenses. *Id.* at 241. The court stated that unchallenged and uncontested assumptions are not binding on future courts. *Id.* Finally, following the categorical approach, the court found that the contemporary definition of conspiracy requires an overt act. *Id.* at 237. The court pointed out that 36 states, the District of Columbia, Guam, Puerto Rico, the Virgin Islands, and the general federal conspiracy statute all define conspiracy as requiring an overt act. *Id.* The court thus held that a conspiracy conviction under § 846 is a categorical mismatch to the generic crime of conspiracy. *Id.* at 239.

The Tenth Circuit, too, interpreted "conspiring" to "commit such offenses" by looking to the generic definition of conspiracy. *See Martínez-Cruz*, 836 F.3d at 1308. The court recognized that its decision went against the majority of the other circuits but found their decisions unpersuasive. *Id.* at 1313. Like the Fourth Circuit, the Tenth began its analysis

with "the categorical approach adopted by the Supreme Court in *Taylor v. United States*." *Id.* at 1309 (internal quotation marks omitted). Under that approach, "the court assume[d] that an enumerated offense in the Guidelines refers to the generic, contemporary meaning of the offense." *Id.* (internal quotation marks omitted).

In its analysis, the Tenth Circuit rejected two counter arguments. First, the Tenth Circuit rejected the position adopted by the Fifth Circuit; namely, that the generic definition of conspiracy does not require an overt act because sixteen states and many federal statutes did not. *Id.* at 1311-12 (citing *Pascacio-Rodríguez*, 749 F.3d at 363-366). The Tenth Circuit found this analysis unpersuasive because it failed to give "[w]eight to the primary federal general conspiracy statute" which does require an overt act, and "the more than 2:1 ratio of states that require an overt act for conspiracy." *Id.* at 1312. A "simple balancing of federal conspiracy statutes is not very helpful," because "many of the statutes reach narrow behavior," such as "'conspiracy to furnish facilities or privileges to ships or persons contrary to a presidential proclamation.'" *Id.* at 1311.

Second, the Tenth Circuit rejected the Fifth, Ninth and Sixth Circuit's approach based on their assumption that the Commission clearly intended to encompass § 846 conspiracy convictions. *Id.* at 1312. The Tenth Circuit concluded that those circuits had erroneously assumed an intent without providing any such evidence of that supposed intent. *Id.* at 1314.

Granting this petition is of paramount importance. Doing so, would help ensure uniformity in sentencing by providing much needed clarity to its precedent. As demonstrated above, lower courts are not clear on when and how to apply the generic definition to interpret a Guidelines offense. Given the prevalence of § 846 convictions, the issue is bound to keep coming up. The Court should resolve it now.

II. The First Circuit decided the issue incorrectly: conspiracy to possess with intent to distribute controlled substances does not constitute a controlled is a categorical mismatch with the Guidelines.

The First Circuit erred in holding that Mr. Nieves's prior conviction for conspiracy to possess with intent to distribute controlled substances, in violation of 21 U.S.C. § 846, constituted a controlled substance offense such that the U.S.S.G. § 2K2.1(a)(3)(B) enhancement applied. App. 9a. The First Circuit made this mistake in *Rodríguez-Rivera* as well, where the court reasoned incorrectly that conspiring refers to conduct, rather than the offense of conspiracy and so stated that the key test was whether the aim of conspiracy is certain prohibited conduct. *Rodríguez-Rivera*, 989 F.3d at 189. Despite reaching the wrong conclusion in *Rodríguez-Rivera*, the court correctly used *Shular* to find that the definition of conspiracy veered close to those "formulation[s]" in which this Court has applied a generic definition to interpret a criminal-law term of art. *Id*. 989 F.3d at 189. However, despite this recognition, the court ultimately took a different turn based

on its "strong sense" that the Commission had § 846 in mind when it wrote the definition of a controlled-substance offense. *Id*. The court rejected the notion that the key test was whether the prior offense in question necessarily requires the elements of a generic conspiracy. *Id*. This approach is wrong and inevitably led to the wrong conclusion.

Indeed, *Shular* does not require rejecting the generic definition of conspiring, as the First Circuit incorrectly held in *Rodríguez-Rivera*. *Id.* at 188. *Shular* provides a clear framework for when a criminal code refers to an offense without specifying the elements. This is discussed above, but worth summarizing here. In these situations, the court must come up with the generic version and inquire whether the elements of conviction match that generic version. *Shular*, 589 U.S. at 158. Here, every relevant tool of interpretation points to a conspiracy as requiring both an agreement and an overt act. Since conspiracy to possess with intent to distribute controlled substances does not, that is where the categorical mismatch exists.

There is no dispute that the generic crime of conspiracy requires both an agreement and an overt act. Indeed, there is a commonly used definition of conspiracy, with a "common-law history and widespread usage." *Shular,* 589 U.S. at 161. Black's Law Dictionary states that most states require proof of an overt act in the form of an action or conduct to further the conspiracy. *Conspiracy*, Black Law's Dictionary (2nd ed.). The Model Penal Code, too, defines conspiracy to require an overt act as well. Model Penal Code § 5.03(2). Specifically, the code states that, "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." *Id.*

The generic crime of conspiracy is also evident in the Guidelines. The Sentencing Guidelines use a definite article—the *offenses* of aiding and abetting, conspiring, and attempting—which also strongly suggests a generic term. Notably, when this Court declined to apply a generic definition in *Shular*, the statute at issue used an indefinite article. *Shular,* 589 U.S. at 164 (interpreting 18 U.S.C. § 924(e)(2)(A)(ii), which defines "serious drug offense" to mean "*an* offense under State law, involving []") (emphasis added). By contrast, here, the phrase, "*the* offenses of aiding and abetting, conspiring, and attempting" indicates that the listed offenses are "definite" and "settled"—because they refer to generic definitions of well-known forms of criminal liability. *See Nielsen v. Preap*, 586 U.S. 392, (2019).

This Court has directed courts to look at the generic definition of crimes when interpreting numerous terms in the Armed Career Criminal Act and the Immigration and Nationality Act. *See Mathis, v. United States,* 579 U.S. 500, 504 (2016); *Moncrieffe v. Holder,* 569 U.S. 184, 190 (2013). Following these past approaches, the categorical approach tells courts to look at the generic definition of the offense of conspiracy and see whether the offense of conviction satisfies the Guidelines' standard. *United States v. Ramirez, 708* F.3d 295, 300 (1st Cir. 2013). However, the First Circuit below still concluded erroneously that Petitioner's conviction, only

requiring proof of an agreement, qualifies as a controlled substance offense.

CONCLUSION

The question presented here involves a recurring issue that not only involves the specific part of the Guidelines discussed, but also implicates how federal courts interpret texts that reference enumerated but undefined crimes. Petitioner is one of thousands impacted by this ongoing issue, which has real effects on the length of the federal sentences imposed.

Well-established law surrounding the categorical approach reveals that agreement-only conspiracy convictions, like Petitioner's, do not qualify as conspiring to commit a controlled substance offense under the Guidelines because the generic contemporary meaning of conspiracy requires an overt act. The result of such an incorrect interpretation is devastating. Defendants like Petitioner end up paying harsher consequences for those mistakes. The Court should address the question presented in this case to resolve the First Circuit's mistake. This issue has been fully preserved and is outcome determinative. Without this Court's review, Petitioner, and others like him, will continue facing longer sentences than are justified.

Based on the reasons above, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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