No. 21-_____

In The
Supreme Court of the United States

MARTEZ L. SMITH,

Petitioner,

v.

UNITED STATES OF AMERICA

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the categorical approach for generic offenses applies to the offense of conspiring under U.S.S.G. § 4B1.2 Application Note 1 and requires an overt act element.

2. Whether U.S.S.G. § 4B1.2 Application Note 1 is a valid and controlling interpretation of that guideline.

STATEMENT OF RELATED PROCEEDINGS

Smith v. United States, No. 18-cr-20037-MMM-EIL-1, United States District Court for the Central District of Illinois. Judgment entered January 15, 2020.

Smith v. United States, No. 20-1117, U.S. Court of Appeals for the Seventh Circuit. Judgment entered March 3, 2021.

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The Seventh Circuit's opinion (Pet. App. 1a-20a) is reported and available at 989 F.3d 575. The district court's judgment imposing sentence (Pet. App. 21a-32a) is unreported.

JURISDICTION

The court of appeals entered judgment on March 3, 2021. By order dated March 19, 2020, this Court extended the deadline to file any petition for a writ of certiorari to 150 days from the date of the lower court judgment. This Court has jurisdiction under 28 U.S.C. § 1254(1).

GUIDELINES PROVISIONS

Section 4B1.2 of the 2018 U.S. Sentencing Guidelines provides in part:

> (a) The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—
>
> (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
>
> (2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or

unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).

(b) The term "controlled substance offense" means 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 a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

* * *

Application Notes:

1. *Definitions.*—For purposes of this guideline—

"Crime of violence" and "controlled substance offense" include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.

Additional provisions of the U.S. Code and the 2015 and 2018 U.S. Sentencing Guidelines are reproduced in Appendix D. Pet. App. 72a-105a.

INTRODUCTION

This petition asks whether the U.S. Sentencing Guidelines are uniquely immune from the interpretive principles that govern other sources of federal law. At Congress's direction, the U.S. Sentencing Commission, a federal agency, promulgates guidelines that specify sentencing ranges for federal defendants. Like other agencies, the Commission promulgates text (the guidelines) that is subject to mandatory congressional review and notice-and-comment procedures, and commentaries on the text (Application Notes) that are not. And like other federal provisions, the guidelines impose collateral consequences on individuals for their prior convictions for certain generic criminal offenses.

Yet despite the guidelines' similarity to other federal law, circuits are deeply split on whether the interpretative methodologies that generally apply to federal law likewise govern the guidelines. It is undisputed, for instance, that this Court uses a "categorical approach" that "requires the court to come up with a 'generic' version of a crime—that is, the elements of 'the offense as commonly understood'" "when the statute refers generally to an offense without specifying its elements." *Shular v. United States*, 140 S. Ct. 779, 783 (2020). Yet the circuits are split on whether that categorical approach applies to undefined generic offenses in the guidelines. It is likewise settled that a court may not defer to an agency's interpretation of a regulation "unless the regulation is genuinely ambiguous," and that "before concluding that a rule is genuinely ambiguous, a court must exhaust all the 'traditional tools' of

construction." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019). Yet the circuits are also split on whether they should defer to the Commission's commentary interpreting the guidelines without such a finding of genuine ambiguity in the guideline text.

The questions presented are important and warrant this Court's review. Not only do they involve fundamental questions about how courts should interpret the guidelines, but (in this case) they also implicate one of the harshest guidelines in U.S. sentencing: the career offender guideline. Here, application of that guideline tripled Petitioner Martez Smith's sentencing range. Given the guideline's consequences, it is all the more important that it be applied accurately and consistently. But, for years now, the cross-cutting circuit splits raised here have made uniform application of the career offender guideline impossible. The petition for a writ of certiorari should be granted.

STATEMENT OF THE CASE

A. Legal Background

1. The Categorical Approach

In *Taylor v. United States*, this Court adopted a categorical approach to determine whether a defendant's prior conviction qualified as "burglary" under the Armed Career Criminal Act ("ACCA"), which increases the sentence of certain federal defendants with three prior convictions for specified offenses. 495 U.S. 575, 598-02 (1990). The Court observed that ACCA uses language indicating a "categorical approach, extending

the range of predicate offenses to all crimes having certain common characteristics * * * regardless of how they were labeled by state law." *Id.* at 589. The Court thus rejected as "implausible" the notion that Congress meant a defendant's sentence enhancement to hinge on whether "his prior conviction happened to call that conduct 'burglary.'" *Id.* at 590-91. Nor did the Court believe that Congress could have silently given "burglary" its "common-law meaning," since "the contemporary understanding of 'burglary' has diverged a long way from its commonlaw roots." *Id.* at 592-93. The Court thus concluded that Congress meant to adopt "the generally accepted contemporary meaning" of burglary, which it found to be "the generic sense in which the term is now used in the criminal codes of most States." *Id.* at 596, 598. And to determine whether prior convictions qualify as generic burglary, the Court continued, courts must "look[] only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions." *Id.* at 600.

Since *Taylor*, this Court has applied the categorical approach to other federal statutes that assign consequences to predicate convictions, including the Immigration and Nationality Act ("INA"). *See, e.g.*, *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562 (2017). In applying the approach to generic offenses, this Court surveys the traditional sources for ascertaining a generic offense's contemporary meaning—legal dictionaries, state, federal, and model codes, and well-respected treatises. *See, e.g.*, *id.* at 1569-72; *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 189-90 (2007).

In *Shular v. United States*, this Court elaborated on the categorical approach, explaining that "[u]nder some statutes, using a categorical approach requires the court to come up with a 'generic' version of a crime—that is, the elements of 'the offense as commonly understood.'" 140 S. Ct. at 783. Specifically, this Court has "required that step when the statute refers generally to an offense without specifying its elements." *Ibid.* "In that situation," this Court instructed, "the court must define the offense so that it can compare elements, not labels." *Ibid.*

2. The Sentencing Guidelines

The United States Sentencing Commission is a federal agency that issues "guidelines * * * for use of a sentencing court in determining the sentence to be imposed in a criminal case." 28 U.S.C. § 994(a)(1). The Commission must submit proposed guideline amendments to Congress, which has six months to review them before they take effect. *Id.* § 994(p). The proposed amendments must comply with the notice-and-comment requirements of the Administrative Procedure Act. *Id.* § 994(x). The Commission also produces commentary to its guidelines, but the commentary is not subject to the mandatory Congressional review and notice-and-comment procedures applying to the guidelines themselves.

Under that framework, the Commission promulgated U.S.S.G. § 4B1.1 and § 4B1.2. Section 4B1.1, the career offender guideline, specifies enhanced sentences for certain defendants with "at least two prior felony

convictions of either a crime of violence or a controlled substance offense." § 4B1.1(a). Section 4B1.2 defines a "crime of violence" and "controlled substance offense." § 4B1.2(a)-(b). It defines a "controlled substance offense" 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 a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

§ 4B1.2(b).

In 1989, the Commission amended the guideline commentary to provide that its definitions of "'crime of violence' and 'controlled substance offense' include *the offenses of aiding and abetting, conspiring, or attempting to commit such offenses*.'" U.S. Sentencing Comm'n, *Guidelines Manual* § 4B1.2(2) n.1 (1989), http://bit.ly/2WpUhVn (emphasis added). The Commission made no corresponding change to the guideline itself.

Designation as a "career offender" under § 4B1.1 has severe consequences for sentencing. Under the guidelines, a defendant's sentencing range is a product of his offense level and criminal history category. The career offender guideline catapults these figures. It pegs the defendant's offense level to the statutory maximum for his crime. § 4B1.1(b). And it automatically

places the defendant in the highest criminal history category regardless of his actual criminal history. *Ibid.*

Besides § 4B1.1, numerous guidelines cross-reference § 4B1.2's or Application Note 1's definitions of "crime of violence" and "controlled substance offense." *See, e.g.*, §§ 2K1.3 cmt. n.2 (explosive materials); 2K2.1 cmt. n.1 (firearms); 2S1.1 cmt. n.1 (money laundering); 4A1.1 cmt. n.5 (criminal history category); 4B1.4(b)(3) (armed career criminal).

3. Administrative Deference

In *Bowles v. Seminole Rock & Sand Co.*, this Court held that when the "meaning of [a regulation] is in doubt," "the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." 325 U.S. 410, 413-14 (1945). That holding, known at first as *Seminole Rock* deference and later as *Auer* deference (after *Auer v. Robbins*, 519 U.S. 452 (1997)) became the "most classic formulation" of the test for when courts must defer to agency interpretations of their own regulations. *Kisor*, 139 S. Ct. at 2415.

In *Stinson v. United States*, this Court applied that principle of agency deference to the Sentencing Commission's commentary on its guidelines. The Court held that "the commentary [should] be treated as an agency's interpretation of its own legislative rule." 508 U.S. 36, 44 (1993). It thus held that if the Commission's commentary "does not violate the Constitution or a federal statute, it must be given 'controlling weight unless

it is plainly erroneous or inconsistent with'" the guidelines. *Id.* at 45 (quoting *Seminole Rock & Sand Co.*, 325 U.S. at 414).

In 2019, this Court in *Kisor* narrowly declined to overrule *Auer*. 139 S. Ct. at 2418-23; *id.* at 2424 (Roberts, C.J., concurring). The Court acknowledged that its "most classic formulation" of its agency deference test—the one developed in *Seminole Rock* and applied in *Stinson*—"may suggest a caricature of the doctrine, in which deference is 'reflexive.'" *Id.* at 2415. But the Court held, properly applied, *Auer* does not "'bestow[] on agencies expansive, unreviewable' authority," but rather obligates "courts to perform their reviewing and restraining functions." *Ibid.*

To ensure such proper application, the Court "reinforc[ed] some of the limits inherent in the *Auer* doctrine." *Ibid.* "First and foremost" among these limits is that "a court should not afford *Auer* deference unless the regulation is genuinely ambiguous." *Ibid.* Deference without genuine ambiguity "would 'permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation.'" *Ibid.* (quoting *Christensen v. Harris County*, 529 U.S. 576, 588 (2000)). And "before concluding that a rule is genuinely ambiguous, a court must exhaust all the 'traditional tools' of construction." *Ibid.*

B. Procedural History

Petitioner Martez Smith was convicted after pleading guilty to one count of distribution of methamphetamine in violation of 21 U.S.C. § 841(a)(1), (b)(1)(B), and one count of possession of a firearm by a felon in violation of 18 U.S.C. § 922(g). Pet. App. 3a-4a. The presentence investigation report recommended a career offender enhancement under § 4B1.1 based on Smith's prior convictions for conspiring to possess with intent to distribute cocaine in violation of 21 U.S.C. § 846 and attempted armed robbery in violation of Indiana law. Pet. App. 5a. Smith objected that his conspiracy conviction under § 846 did not constitute a predicate "controlled substance offense" as required by that guideline. Pet. App. 5a.

The District Court rejected Smith's objection and applied the career offender enhancement. Pet. App. 5a. That decision had a dramatic effect on Smith's guidelines range. The designation increased his offense level by seven points and rewrote his criminal history from a Category III to a Category VI. Pet. App. 47a, 55a, 59a. The court thus calculated Smith's sentencing guidelines range as 262 to 327 months. Pet. App. 55a. Without the enhancement, Smith's range would have been 87 to 108 months. Pet. App. 47a; United States Br. 26 n.8, No. 20-1117 (7th Cir. July 15, 2020).[1] With the enhancement, however, the court sentenced Smith to 214

[1] Smith was subject to a 120-month mandatory minimum on Count 2, 21 U.S.C. § 841(b), but no mandatory minimum on Count 1.

months' imprisonment on Count 1 and 120 months' imprisonment on Count 2 to be served concurrently. Pet. App. 5a, 23a, 68a.

The Seventh Circuit affirmed. Smith argued that his § 846 conviction did not qualify as a controlled substance offense for two reasons. First, he contended that Application Note 1's addition of conspiracy to the definition of "controlled substance offense" in § 4B1.2 deserves no deference because it impermissibly expanded the text of the guideline, which requires actual distribution. Pet. App. 14a. And second, he argued that, even if the application note applied, his conviction under 18 U.S.C. § 846 does not qualify as conspiracy because generic conspiracy requires an overt act, and § 846 does not. Pet. App. 17a. While recognizing circuit splits on both issues, the Seventh Circuit rejected Smith's positions, and affirmed his sentence. Pet. App. 13a-20a.

On the issue of deference, the court acknowledged that "[a] split of authority exists among many of the circuits as to whether courts are to defer to Application Note 1 when applying § 4B1.2." Pet. App. 14a-17a (citing cases from D.C., 1st, 3rd, 6th, 8th, 10th, and 11th Circuits). But it reaffirmed its own prior precedent holding that the Commission's commentary on the guidelines is entitled to "controlling weight." Pet. App. 14a. Quoting the familiar language that *Stinson* borrowed from *Seminole Rock*, the Court said that "[a] corresponding application note is binding authority 'unless it violates the Constitution or a federal statute,

or is inconsistent with, or a plainly erroneous reading of, that guideline.'" *Ibid.*

The court also recognized a circuit split on whether § 4B1.2's Application Note 1 encompasses § 846 conspiracy since a conviction under § 846 requires no overt act. Pet. App. 17a-19a. The court cited decisions from the Fourth and Tenth Circuits that have "found generic conspiracy to require an overt act in furtherance of the conspiracy" under the categorical approach and thus have "concluded [that] Application Note 1 does not include § 846 conspiracy." Pet. App. 18a. On the other hand, the court noted, "[t]he Second Circuit recently took a different approach" to conclude that Application Note 1 includes § 846 conspiracies, and "other circuits have drawn similar conclusions." Pet. App. 18a-19a (citing cases from 2d, 9th, and 5th Circuits).

Siding with the latter circuits, the court concluded that "Application Note 1 encompasses § 846 conspiracy." Pet. App. 19a. The court acknowledged that the categorical approach would require a court to compare "the elements of the crime of conviction" to "the elements of the generic version of the offense." Pet. App. 17a. But the court declined to identify the elements of "generic" conspiracy under the categorical approach. Instead, the court reasoned that "Application Note 1 unambiguously includes conspiracy as a 'controlled substance offense,'" and it saw "no reason to construe the word 'conspiring' in Application Note 1 to exclude § 846 conspiracy, especially given that an overt act is not always a required element in the narcotics

conspiracy context." Pet. App. 19a. It further reasoned that the Commission could not have intended to "exclude *federal* conspiracy from the *federal* Sentencing Guidelines." Pet. App. 19a.

The court of appeals subsequently denied Petitioner's motion to recall the mandate and for leave to file an untimely rehearing petition. Order, *United States v. Smith*, No. 20-1117 (7th Cir. Mar. 31, 2021), ECF No. 39.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW ENTRENCHES TWO CIRCUIT CONFLICTS

The decision below cements two sets of acknowledged circuit conflicts over foundational questions about how courts should apply the sentencing guidelines. The first involves whether this Court's categorical approach applies to the federal sentencing guidelines in the same way it does to other federal provisions. And the second involves whether the limits on agency deference apply to the Sentencing Commission as they do to other agencies. Both circuit conflicts warrant this Court's review.

A. The Circuits Are Divided On Whether And How The Categorical Approach Applies To The Guidelines

The Circuits are split two to six on whether a conspiracy conviction that requires no proof of an overt act

qualifies as an "offense of conspiring" under the guidelines. That split arises from a methodological divide—courts that apply the categorical approach for generic offenses require an overt-act element; those that reject the categorical approach do not.

1. Two circuits apply the categorical approach for generic offenses to require an overt-act element for conspiracy convictions under the guidelines

The Tenth and Fourth Circuits both apply this Court's categorical approach for generic offenses to the guidelines and thus conclude that conspiracy convictions lacking an overt-act element do not qualify as an "offense of conspiring" under the guidelines.

The Tenth Circuit adopted this approach in *United States v. Martinez-Cruz*, 836 F.3d 1305 (2016). There the court held that a § 846 conviction does not qualify as an offense of conspiring under Application Note 5 to U.S.S.G. § 2L1.2—an Application Note to the illegal reentry guideline, which used language identical to § 4B1.2 Application Note 1. The court reasoned that "the generic definition of conspiracy requires an overt act" while § 846 does not. *Id.* at 1307. The court acknowledged that the "other circuits to decide this issue held the opposite, *that the categorical approach should not apply*." *Id.* at 1314 (emphasis added) (citing decisions of the 5th, 6th, and 9th Circuits). But the Tenth Circuit disagreed with those courts, explaining that the Application Note had not defined conspiracy

or cross-referenced any federal statutes, but had instead "provided a generic, undefined word ripe for the categorical approach." *Id.* at 1313-14 ("Although it pits us against our sister circuits, we must follow binding Tenth Circuit precedent and apply the categorical approach"). Applying that approach, the court determined that the contemporary meaning of the offense of conspiring requires an overt act. *Id.* at 1311. The court noted that "thirty-six states," "the District of Columbia, Guam, Puerto Rico, and the Virgin Islands," as well as the federal "general conspiracy statute" all require "an overt act." *Ibid.* And "major treatises support an overt act requirement for conspiracy convictions." *Ibid.*

The Tenth Circuit recently reaffirmed its position in *United States v. Crooks*, 997 F.3d 1273, 1279 (2021). There, it held that § 846 convictions also do not qualify as an offense of conspiring under Application Note 1 to § 4B1.2, which is "identical" to § 2L1.2's Application Note addressed in *Martinez-Cruz*. *Ibid.* "Just as 'conspiring' in § 2L1.2 application note 5 refers to the generic definition of conspiracy, which requires an overt act, so too does 'conspiring' in § 4B1.2 application note 1." *Id.* at 1280. And because the defendant's § 846 conspiracy conviction did "not require an overt act," he did "not satisfy the career offender requirements of § 4B1.1." *Ibid.*

The Fourth Circuit joined the Tenth Circuit in applying the categorical approach in *United States v. McCollum*, 885 F.3d 300 (4th Cir. 2018). While recognizing the "circuit split" on this question, the court there applied *Taylor*'s categorical approach for generic

crimes to determine that the defendant's prior conviction for conspiracy to commit murder in aid of racketeering under 18 U.S.C. § 1959(a)(5) did not qualify as an offense of conspiring under U.S.S.G. § 4B1.2(a) because it lacks an overt-act requirement. *Id.* at 307 n.6, 308-09. The court explained that "the Guidelines text supports the application of *Taylor*'s categorical approach to predicate crimes under both state and federal law." *Id.* at 306. And it agreed that surveys of "the 'generic, contemporary meaning' of the crime" showed that conspiracy requires an overt act. *Id.* at 304. Judge Traxler concurred, hoping that "Congress or the Supreme Court would help" clarify the law. *Id.* at 309 (Traxler, J., concurring). In dissent, Judge Wilkinson insisted that "there is no need to rely on the *Taylor* framework" "when a guideline's meaning is already patently clear." *Id.* at 311 (Wilkinson, J., dissenting). Pointing to the decisions of "three other circuits" with which "the majority is in conflict," Judge Wilkinson contended that "use of the generic-definition framework in plain-meaning cases" "would only becloud what is clear from the Guideline itself." *Ibid.*

In *United States v. Norman*, the Fourth Circuit reached the same conclusion for § 846 conspiracy, holding that because it lacks an overt-act requirement it "is a categorical mismatch to the generic crime of conspiracy enumerated in § 4B1.2(b)." 935 F.3d 232, 239 (2019). The court rejected the government's argument that it "should diverge from" the "categorical approach" because the Commission's intent to include § 846 conspiracy was "somehow" clear. *Id.* at 238. The court

explained that where, as in § 4B1.2, "the Guidelines simply name a type of offense without specifically defining it, nomenclature alone does not control; rather, we use the categorical approach." *Ibid.* And the Court found "no evidence of the intent of the Sentencing Commission regarding whether a conspiracy conviction requires an overt act—except for the plain language of the guideline, which uses a generic, undefined term, ripe for the categorical approach." *Id.* at 239 (quotation marks omitted).

2. Six circuits do not apply the categorical approach for generic crimes

The Seventh Circuit's decision below makes it one of six circuits that do not apply the categorical approach for generic crimes in this context. The court acknowledged that the categorical approach entails comparing "the elements of the crime of conviction" to "the elements of the generic version of the offense," Pet. App. 17a, but declined to identify the elements of generic conspiracy. Instead, it found that inquiry unnecessary based on the offense label used in the commentary. It thus saw "no reason to construe the word 'conspiring' in Application Note 1 to exclude § 846 conspiracy." Pet. App. 19a. The court recognized that its decision conflicted with those of the Fourth and Tenth Circuits "that have concluded Application Note 1 does not include § 846 conspiracy." Pet. App. 18a.

The Fifth Circuit pioneered the rejection of the categorical approach in *United States v. Rodriguez-Escareno*, 700 F.3d 751 (2012). The court there declined to "search outside the Guidelines for a definition of 'conspiracy' applicable to [the § 2L1.2] enhancement," instead discerning it was clear that the guideline encompasses § 846 convictions. *Id.* at 754. The court rejected application of the categorical approach as "one that generally applies to deciding whether a defendant's prior *state conviction* was for an offense enumerated in the Guidelines." *Id.* at 753 (emphasis added).[2]

The Ninth Circuit followed suit in *United States v. Rivera Constantino*, 798 F.3d 900 (2015). That court had previously held, in interpreting the INA, that the generic offense of conspiracy under the categorical approach includes an overt-act element. *See United States v. Garcia-Santana*, 774 F.3d 528, 532 (9th Cir. 2014). But in *Rivera-Constantino*, the court explained that while *Taylor*'s approach can "represent[] a useful tool for divining legislative intent," "when the plain meaning of a term is readily apparent from the text, context, and structure of the relevant Guidelines

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[2] In *United States v. Pascacio-Rodriguez*, 749 F.3d 353 (2014), the Fifth Circuit waffled on its prior rejection of the categorical approach. The court applied the approach there while expressing doubt about doing so. *Id.* at 366. And the court limited its search for the generic offense to contemporary definitions of "conspiracy to commit murder," the predicate offense there, and did not consider conspiracy more broadly. *Id.* at 364. Surveying that narrower body of law, it found that "the weight of authority indicates that conspiracy to commit murder does not require an overt act as an element." *Id.* at 366.

provision and commentary, that meaning is dispositive and there is no need to rely on the 'generic definition' framework." 798 F.3d at 904. And it concluded that it was "the clear intent of the Sentencing Commission" to include § 846 convictions as offenses of conspiring in the Application Note to § 2L1.2. *Id.* at 903. Judge Paez dissented on the ground that the majority's approach "sidestep[s] the *Taylor* categorical approach" and contradicted the court's treatment of state predicate offenses under the same guideline, where the categorical approach is faithfully applied. *Id.* at 906-08 (Paez, J., dissenting) (citing *United States v. Gonzalez-Monterroso*, 745 F.3d 1237, 1240, 1243 (9th Cir. 2014)).

The Second Circuit also agrees that sentencing courts can disregard the categorical approach when the Commission's intent is "clear"—and that the Commission's intent to include certain non-overt-act conspiracy offenses meets that standard. In *United States v. Tabb*, that court declined to apply the categorical approach because "[t]o us, it is patently evident that Application Note 1 was intended to and does encompass Section 846 narcotics conspiracy." 949 F.3d 81, 89 (2d Cir. 2020). The court recognized that the Fourth and Tenth Circuits had held that "Application Note 1 encompasses only 'generic' conspiracy," but it "disagree[d]" with those decisions. *Id.* at 88 & n.7. The court reasoned that Application Note 1's "offense[] of * * * conspiring" "on its face encompasses federal narcotics conspiracy." *Id.* at 88.

The Sixth Circuit has similarly concluded that the categorical approach for generic crimes "only applie[s]

to interpret the underlying offense where it is unclear in what sense the term was used by Congress." *United States v. Sanbria-Bueno*, 549 F. App'x 434, 438 (2013). Because it concluded that the "Commission's intent" to include § 846 conspiracy under Application Note 5 to § 2L1.2 was "clear," it held that the "analytical framework" that "look[s] at a crime's 'generic' meaning" did not apply. *Ibid.*

The First Circuit is the latest circuit to buck the categorical approach. In *United States v. Rodriguez-Rivera*, the court recognized that "[t]o date, the six circuits that have addressed the issue" of whether Application Note 1 "includes only a so-called generic form of conspiracy that has as an element an overt act in furtherance of the conspiracy" "have split four to two." 989 F.3d 183, 184-85 (1st Cir. 2021).[3] It joined the "majority" because it saw "little sense in identifying and adopting a generic version of the conspiracy offense as the benchmark against which to compare a violation of section 846." *Id.* at 187. It instead followed its "strong sense that conspiring under section 846 * * * was one of many offenses the Sentencing Commission had in mind" for Application Note 1 of § 4B1.2. *Id.* at 189.

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[3] The Seventh Circuit's decision here issued just one day before *Rodriguez-Rivera* and was thus excluded from its count. With those decisions, the split is now six to two.

B. The Circuits Are Divided On When To Defer To The Sentencing Commission's Commentary On The Guidelines

The Circuits are also intractably divided on whether Application Note 1's addition of inchoate offenses to the definition of "controlled substance offense" in § 4B1.2 is a valid and binding interpretation of the guideline. Here again the split turns on conflicting answers to a recurring methodological question—may a court defer to the Sentencing Commission's Application Notes without determining that the guidelines text is genuinely ambiguous?

1. Three circuits deny deference to the Commission's commentary on unambiguous guidelines

Three Circuits apply ordinary administrative law principles to deny deference to Application Note 1 of § 4B1.2 because the guideline's text is unambiguous.

In *United States v. Winstead*, the D.C. Circuit concluded that the guideline's text unambiguously excludes inchoate crimes. 890 F.3d 1082, 1091 (2018). That text provides that:

> [t]he term "controlled substance offense" *means* 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 a counterfeit substance) with intent

> to manufacture, import, export, distribute, or dispense.

§ 4B1.2(b) (emphasis added). The court held that § 4B1.2(b)'s "very detailed 'definition' of controlled substance offense" "clearly excludes inchoate offenses'" under the canon of *"[e]xpressio unius est exclusio alterius."* *Winstead*, 890 F.3d at 1091. The court thus declined to defer to Application Note 1's purported extension of the provision to inchoate offenses. "[S]urely *Seminole Rock* deference does not extend so far as to allow [the Commission] to invoke its general interpretive authority via commentary * * * to impose such a massive impact on a defendant with no grounding in the guidelines themselves." *Id.* at 1092.

In *United States v. Havis*, the en banc Sixth Circuit unanimously reached the same conclusion. 927 F.3d 382, 387 (2019) (en banc). The court explained that "application notes are to be '*interpretations of*, not *additions to*, the Guidelines themselves.'" *Id.* at 386 (emphasis in original). Examining the guideline language, the court found that Application Note 1 does "not interpret a term in the guideline itself," but "*add[s]* an offense not listed in the guideline." *Ibid.* (emphasis in original). The court thus held that "[t]he Commission's use of commentary to add attempt crimes to the definition of 'controlled substance offense' deserves no deference." *Id.* at 387.

Most recently, the Third Circuit sua sponte granted rehearing en banc to reconsider in light of *Kisor* its prior precedent deferring to Application Note

1. Before *Kisor*, that circuit had held that because the "commentary's expansion of the definition of a controlled substance offense to include inchoate offenses is not 'inconsistent with, or a plainly erroneous reading of' § 4B1.2(2) of the Sentencing Guidelines," it was "binding." *United States v. Hightower*, 25 F.3d 182, 187 (3d Cir. 1994).

But the en banc Third Circuit overruled that precedent, holding—unanimously—that "in light of *Kisor*'s limitations on deference to administrative agencies," "inchoate crimes are not included in the definition of 'controlled substance offenses' given in section 4B1.2(b) of the sentencing guidelines." *United States v. Nasir*, 982 F.3d 144, 160 (3th Cir. 2020) (en banc). The court explained that it could not defer to Application Note 1 because "the plain language of the guidelines does not include inchoate crimes." *Id.* at 156. And the court emphasized that "the plain-text approach" "protects the separation of powers." *Id.* at 159. "If we accept that the commentary can do more than interpret the guidelines, that it can add to their scope," the court warned, "we allow circumvention of the checks Congress put on the Sentencing Commission, a body that exercises considerable authority in setting rules that can deprive citizens of their liberty." *Ibid.*

2. Seven circuits reflexively defer regardless of ambiguity

On the other hand, seven circuits defer reflexively to Application Note 1 to § 4B1.2 without making the threshold determination that the guideline is ambiguous. Absent this Court's intervention, that reflexive deference will remain—all of these circuits have reaffirmed their positions in post-*Kisor* decisions.

The Seventh Circuit here did just that. It saw "no reason * * * to diverge from" its prior precedent deferring to the Application Note, notwithstanding another circuit's recent reconsideration of that issue in light of *Kisor*. Pet. App. 15a-16a (citing *Nasir*); *see also United States v. Adams*, 934 F.3d 720, 729 (7th Cir. 2019) (reaffirming earlier precedent that "rejected the textual arguments that the D.C. Circuit later found persuasive in *Winstead*").

Like the Seventh Circuit, the Eighth Circuit has "deferred to the commentary, not out of its fidelity to the Guidelines text, but rather because it is not a 'plainly erroneous reading' of it." *United States v. Broadway*, 815 F. App'x 95, 96 (8th Cir. 2020) (citing *United States v. Mendoza-Figueroa*, 65 F.3d 691, 693 (8th Cir. 1995) (en banc)). And it has retained this approach notwithstanding "some major developments" since its adoption, including *Kisor*. *Id.* at 96 n.2.

Other circuits have done the same. In *Tabb*, the Second Circuit followed circuit precedent to reject the defendant's argument that "Application Note 1 is invalid." 949 F.3d at 87. The First Circuit followed suit. *See*

United States v. Lewis, 963 F.3d 16, 22 (1st Cir. 2020) ("This circuit precedent forecloses Lewis's * * * contention that Application Note 1 is inconsistent with the text of the career-offender guideline"). Two judges concurred, highlighting the circuit precedent's inconsistency with *Kisor*'s direction to "bring all [its] interpretive tools to bear" to the text of a rule before deferring to the agency's interpretation of it. *Id.* at 28 (Torruella & Thompson, JJ., concurring). The Ninth Circuit similarly concluded that it was "compelled by" prior circuit precedent to uphold the validity of Application Note 1, though, "[i]f [it] were free to do so," it would have followed "the Sixth and D.C. Circuits' lead." *United States v. Crum*, 934 F.3d 963, 966 (2019). And the Tenth Circuit recently reaffirmed circuit precedent holding "that the application note properly extends the reach of crimes of violence to attempt crimes." *See United States v. Lovelace*, 794 F. App'x 793, 795 (2020) (citing *United States v. Martinez*, 602 F.3d 1166, 1173--75 (10th Cir. 2010)).

The Eleventh Circuit grants even greater weight to the Commission's commentary–shunning interpretations of guidelines text that might undermine the commentary. *See United States v. Lange*, 862 F.3d 1290, 1295 (2017) ("Because Application Note 1 tells us that an offense prohibits the manufacture of a controlled substance when it prohibits aiding and abetting, conspiring, and attempting that manufacture, * * * we must not construe 'prohibit' too narrowly."). And it has reaffirmed that position post-*Kisor*. *See, e.g.*, *United States v. Bass*, 838 F. App'x 477, 480 (11th Cir. 2020).

II. THE DECISION BELOW IS WRONG

The decision below got both questions wrong. Under this Court's precedents, the guidelines' use of an undefined generic offense commands the categorical approach. *See Shular*, 140 S. Ct. at 783. And under that approach, Smith's § 846 conviction is not an offense of conspiring to commit a controlled substance offense under Application Note 1 to § 4B1.2. The court also erred in even turning to the Application Note in the first place. It should not have deferred to the Commission's commentary adding inchoate crimes to § 4B1.2 because the text of the guideline is unambiguous. *See Kisor*, 139 S. Ct. at 2415. Properly applied, the career offender guideline does not deem Smith a career offender—and he should not have received the enhanced sentence that followed.

A. The Categorical Approach Applies To The Sentencing Guidelines Just As It Does Elsewhere

Application Note 1 of § 4B1.2 requires a categorical approach for its generic offenses. Application Note 1 refers to several generic offenses—namely the "*offenses of* aiding and abetting, conspiring, and attempting" other offenses. § 4B1.2 cmt. n.1 (emphasis added). These correspond to well-known, "deeply rooted" offenses. *Shular*, 140 S. Ct. at 786. By referring "generally to an offense without specifying its elements," the commentary triggers a "categorical approach [that] requires the court to come up with a 'generic' version of a crime—that is, the elements of 'the offense as commonly understood.'" *Id.* at 783.

This Court has consistently applied that methodology to federal statutes, and nothing suggests deviation from it when applying the guidelines. Like ACCA, the sentencing guidelines assign collateral consequences to prior state and federal convictions. *See, e.g.*, § 4B1.2(b) (controlled substance offenses include offenses under "federal or state law"). As in ACCA, no history or text indicates that Congress intended the Commission to adopt sentencing enhancements that hinge on how a defendant's prior conviction is "labeled." *Taylor*, 495 U.S. at 588-89. And like ACCA, the guidelines use language that train the sentencing court's view on offense characteristics, not the "vagaries" of different jurisdictions' laws. *Compare* 18 U.S.C. § 924(e) *with* § 4B1.2; *see Taylor*, 495 U.S. at 588-89. Application of the categorical approach to the guidelines' generic offenses accords with that focus by ensuring that courts can then "compare elements, not labels." *Shular*, 140 S. Ct. at 783.

Nor is it likely that the Sentencing Commission meant to incorporate the common-law definition of conspiracy. Like "burglary" in *Taylor*, conspiracy offenses have "diverged a long way from [their] commonlaw roots." *Taylor*, 495 U.S. at 593. The common law required no proof of an overt act for a conspiracy conviction, instead punishing the "agreement" as an evil of its own. *See Whitfield v. United States*, 543 U.S. 209, 213 (2005). But jurisdictions grew concerned that "the minimum of proof required to establish conspiracy is extremely low," *Krulewitch v. United States*, 336 U.S. 440, 452 (1949) (Jackson, J., concurring), and that "the

procedural rules attached to conspiracy allegations make convictions easier to obtain than for substantive crimes." *United States v. Garcia-Santana*, 774 F.3d 528, 537 (9th Cir. 2014). "To guard against the punishment of evil intent alone, and to assure that a criminal agreement actually existed," jurisdictions adopted "[t]he contemporary overt act requirement." *Ibid.* Today, the vast majority of jurisdictions require an overt act for a conspiracy conviction. *Ibid.*; *see generally* Peter Buscemi, Note, *Conspiracy: Statutory Reform Since the Model Penal Code*, 75 COLUM. L. REV. 1122, 1153-59 (1975) (tracking legislative revision of the common law of conspiracy to include an overt-act requirement and outlining the motivations for reform).

Had the Commission wanted a non-generic meaning of conspiracy, it would have said so. Throughout the guidelines, and in § 4B1.2 specifically, the commission said when it wanted federal statutory definitions to control. In § 4B1.2, for example, the Commission singled out federal laws, specifically including as crimes of violence "unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c)." § 4B1.2(a)(2). Had the Commission intended § 846 conspiracy convictions to qualify, it would have said "'[t]he term 'conspiring' includes, but is not limited to, conspiracy convictions under 21 U.S.C. § 846'" or something similar. *Martinez-Cruz*, 836 F.3d at 1313. Instead, it provided "a generic, undefined word ripe for the categorical approach." *Ibid.*

The reasons that some circuits have given for rejecting the categorical approach do not hold up. The courts reason that the categorical approach is unnecessary when—as they believe to be the case here—the Commission's intent to include a specific conviction is clear. But these decisions never "point[] to anything beyond assumptions about the Sentencing Commission's intent." *Martinez-Cruz*, 836 F.3d at 1312. And in fact, the Commission's intent is far from clear. Federal law contains multiple definitions of conspiracy—none of which the Commission expressly adopted despite incorporating federal definitions elsewhere. *Id.* at 1313.

Treating the categorical approach as a "back up" plan for interpreting generic offenses in the guidelines also creates illogical differences between state and federal predicate offenses. The circuits that reject the categorical approach for inchoate offenses under the guidelines do so only for *federal* predicate offenses. *Supra* pp. 16-19. For state predicate offenses, they hold that *Taylor*'s categorical approach still controls. *See, e.g.*, *United States v. Hernandez-Montes*, 831 F.3d 284, 287-89, 292-94 (5th Cir. 2016) (applying generic-offense categorical approach to conclude that the defendant's Florida conviction for attempted second degree murder did not constitute an offense of attempt under the Application Notes to § 2L1.2.); *United States v. Capelton*, 966 F.3d 1, 6 (1st Cir. 2020) (applying generic-offense categorical approach to conclude that Massachusetts convictions qualified as "offense[s] of aiding and abetting" under 4B1.2 cmt. n.1.); *Gonzalez-Monterroso*, 745 F.3d at 1243 (comparing "federal

generic definition of 'attempt' to the Delaware definition of 'attempt' for purposes of its state attempt crimes" when applying 2L1.2 cmt. n.5). Yet § 4B1.2 applies to offenses "under federal *or* state law," without distinguishing between the two. § 4B1.2(a)-(b) (emphasis added). The majority approach thus creates an atextual dichotomy between state and federal predicate offenses: state convictions are judged against generic definitions of inchoate offenses, while federal offenses are not. *See, e.g.*, *Martinez-Cruz*, 836 F.3d at 1312 (highlighting this contradiction).

The court below also rejected the categorical approach because it found it improbable that the Commission "intended to exclude *federal* conspiracy from the *federal* Sentencing Guidelines." Pet. App. 19a. But *federal* conspiracy is not excluded. The general federal conspiracy statute, which covers "drug crimes as well as and non-drug federal crimes," does require an overt act. *Martinez-Cruz*, 836 F.3d at 1313 (citing 18 U.S.C. § 371). And so do many other federal conspiracy statutes. *Ibid.* They would thus be covered under the categorical approach. And while other federal conspiracy offenses, including § 846, do not require an overt act, nothing in the guideline or its commentary indicates which federal definition of conspiracy (if any) the Commission supposedly intended to adopt. *Martinez-Cruz*, 836 F.3d at 1312 ("Congress never provided a clear definition of conspiracy—different federal crimes have different elements."); *McCollum*, 885 F.3d at 306 ("There is no single federal definition of conspiracy that we can assume the Commission intended to adopt

when it included conspiracy in the commentary to § 4B1.2").

The court below also emphasized that an overt act is not always required for conspiracies to commit drug trafficking. Pet. App. 19a. But the categorical approach adopts the general, contemporary meaning of the offense, whether or not every statute defines it that way. *See, e.g.*, *Esquivel-Quintana*, 137 S. Ct. at 1571 (adopting age of consent used by "[a] significant majority of jurisdictions" for generic undefined offense of sexual abuse of a minor). And the majority of jurisdictions require an overt act for *all* conspiracies—drug conspiracies or otherwise. *Martinez-Cruz*, 836 F.3d at 1311. The court's focus on drug trafficking conspiracies was also too narrow because Application Note 1's "offense of conspiring" applies to a wide array of conspiracies, not just drug trafficking ones, and the meaning of a single provision cannot change from case to case. § 4B1.2 cmt. n.1; *see Clark v. Martinez*, 543 U.S. 371, 378 (2005) ("To give these same words [in 8 U.S.C. § 1231(a)(6)] a different meaning for each category [of aliens] would be to invent a statute rather than interpret one.").

Had this Court's categorical approach for generic offenses been applied here, Smith's prior conviction would not have qualified. Smith's prior conviction under § 846 did not require an overt act. *See United States v. Shabani*, 513 U.S. 10, 13-15 (1994). And the traditional sources for ascertaining the contemporary meaning for a generic offense—legal dictionaries, model, federal, and state codes, and well-known treatises—all support an overt-act requirement for generic

conspiracy. Black's Law Dictionary, for example, defines conspiracy as "[a]n agreement by two or more persons to commit an unlawful act, coupled with an intent to achieve the agreement's objective, and (in most states) *action or conduct that furthers the agreement*; a combination for an unlawful purpose." *Conspiracy*, *Black's Law Dictionary* (11th ed. 2019) (emphasis added). LaFave's classic treatise says the same. Wayne R. LaFave, *2 Subst. Crim. L.* § 12.2 (3d ed. 2020). The Model Penal Code also requires an overt act for most conspiracies. *See* MODEL PENAL CODE § 5.03(5). And the general federal conspiracy statute too requires an overt act. 18 U.S.C. § 371. While other federal statutes (including § 846) do not, many of those cover extremely narrow circumstances and convictions under them are thus unlikely to fall within § 4B1.2 in any event. *Martinez-Cruz*, 836 F.3d at 1311 n.5.[4] And meanwhile, 36 states, the District of Columbia, Puerto Rico, and the Virgin Islands all require an "overt act" for conspiracy convictions. *Garcia-Santana*, 774 F.3d at 534-35.

[4] *See, e.g.*, 18 U.S.C. § 1037(a)(5) ("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"); 15 U.S.C. § 77 ("conspiracy to furnish facilities or privileges to ships or persons contrary to a presidential proclamation").

B. Limits On Agency Deference Apply To The Sentencing Commission Just As They Do To Other Agencies

In *Kisor*, this Court "reinforc[ed] some of the limits inherent in the *Auer* doctrine." 139 S. Ct. at 2415. The Court recognized that some language in its prior cases—like its statement that an "agency's interpretation 'becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation'"—"may suggest a caricature of the doctrine, in which deference is 'reflexive.'" *Id.* at 2412, 2415. *Kisor* made clear, however, that agency deference must not be accorded in that fashion. *Id.* at 2415.

"First and foremost," the Court explained, "a court should not afford *Auer* deference unless the regulation is genuinely ambiguous." *Ibid.* "And before concluding that a rule is genuinely ambiguous, a court must exhaust all the 'traditional tools' of construction." *Ibid.* That means "'carefully consider[ing]' the text, structure, history, and purpose of a regulation, in all the ways [the court] would if it had no agency to fall back on." *Ibid.* "[O]nly when that legal toolkit is empty and the interpretive question still has no single right answer can a judge conclude that it is 'more [one] of policy than of law.'" *Ibid.*

The Seventh Circuit's approach contradicts *Kisor*. The court never asked (or answered) whether § 4B1.2 is genuinely ambiguous. Pet. App. 13a-17a. Neither did the prior Seventh Circuit cases on which it relied. *See Adams*, 934 F.3d at 72; *United States v. Raupp*, 677

F.3d 756, 759 (7th Cir. 2012). None engaged in a textual analysis of the guideline, let alone one that "exhaust[ed] all the 'traditional tools' of construction." *Kisor*, 139 S. Ct. at 2415. Instead, the court invoked the very language that *Kisor* found suggestive of erroneously reflexive deference—noting that "[a] corresponding application note is binding authority 'unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline.'" Pet. App. 14a; *cf. Kisor*, 139 S. Ct. at 2415. Without finding any ambiguity in § 4B1.2(b), the court has deferred to Application Note 1's interpretation of it simply because the two do not "conflict[]." *Raupp*, 677 F.3d at 759.

Had the Seventh Circuit followed *Kisor*'s approach, it never could have deferred to Application Note 1. Smith was convicted under 21 U.S.C. § 846, which prohibits conspiring to distribute drugs. Under *Kisor*, the court should have looked to the guideline itself first, asking whether § 846 is an offense "that prohibits the manufacture, import, export, distribution, [] dispensing," or "possession * * * with intent to * * * distribute" drugs. § 4B1.2. Applying the ordinary rules of statutory interpretation, it is not. To "prohibit" something is to "forbid" it. *Prohibit*, *Black's Law Dictionary* (11th ed. 2019). Section 846 does not prohibit the distribution of drugs; it prohibits an agreement to do so. An argument that the two prohibitions are the same "would take any modern English speaker (not to mention any criminal lawyer) by surprise." *Lewis*, 963 F.3d at 27-28 (Torruella & Thompson, JJ., concurring).

What's more, § 4B1.2's function as a definition section necessarily excludes offenses—like conspiracy—that are not listed: "As a rule, [a] definition which declares what a term 'means' * * * excludes any meaning that is not stated." *Burgess v. United States*, 553 U.S. 124, 130 (2008) (alterations in original).

Even if § 4B1.2(b)'s plain language were not enough, *Kisor* would then instruct a court to first "empty" its "toolkit" of statutory interpretation before turning to commentary. 139 S. Ct. at 2415. One such tool is examination of other subsections of the same guideline for clues. And here the Commission "showed within § 4B1.2 itself that it knows how to include [inchoate] offenses when it intends to do so." *Winstead*, 890 F.3d at 1091. Section 4B1.2(a), just before the definition here, defines a "crime of violence" as an offense that "has as an element the use, *attempted* use, or threatened use of physical force." § 4B1.2(a)(1) (emphasis added). Had the Commission intended § 4B1.2(b) to also include any inchoate offenses, it would have followed the approach of § 4B1.2(a) and expressly included them. *See Russello v. United States*, 464 U.S. 16, 23 (1983).

III. THE QUESTIONS PRESENTED ARE IMPORTANT AND THIS CASE IS AN EXCELLENT VEHICLE

The career offender guideline applied in this case is one of the harshest guidelines in U.S. sentencing. In over 90% of cases where it applies, it dictates a higher sentencing range than the defendant's history

and offense characteristics would otherwise warrant. United States Sentencing Commission, *Quick Facts: Career Offenders* 1 (2021). It pegs a defendant's offense level to the statutory *maximum* for his crime and automatically assigns him the highest criminal history category in the books. In the majority of cases, sentencing judges vary down from the guideline range—reflecting their assessment that the recommended sentence is too high. *Id.* at 2. But even with these variances, the resulting sentences—anchored by the high guidelines range—are long. In recent years, the average sentence for defendants has been twelve and a half years. *Ibid.*

Given the guideline's consequences, it is all the more important that it be applied accurately and consistently. Yet given the crisscrossing circuit splits plaguing the guideline, uniform application is impossible. Had Smith been sentenced in the D.C., Third, or Sixth Circuits, he could not have received the enhancement because the Application Note is invalid there. *Supra* pp. 20-22. And had he been sentenced in the Fourth or Tenth Circuits, his prior conviction would not have qualified him as a career offender because it is a categorical mismatch with generic conspiracy. *Supra* pp. 13-15. Yet because he faced sentencing in the Seventh Circuit, his sentencing range was triple what it otherwise would have been.

The questions presented also extend beyond the Application Note applied here. The majority's rule that the categorical approach is a mere backup tool for defining undefined generic offenses has implications for

the guidelines as a whole—which frequently refer to undefined generic offenses. *E.g.*, § 2L1.2 cmt. n.2 ("murder," "voluntary manslaughter," "kidnapping," "arson," "aggravated assault," "robbery"); § 4B1.2(a)(2) (same). So it is little surprise that circuits also disagree on whether the categorical approach applies to other generic offenses outside of Application Note 1. *Compare United States v. Smith*, 775 F.3d 1262, 1267 (11th Cir. 2014) ("[W]e need not search for the elements of 'generic' definitions of * * * 'controlled substance offense'" under § 4B1.2(b)) *with United States v. Maldonado*, 864 F.3d 893, 899-01 (8th Cir. 2017) (applying generic offense categorical approach to § 4B1.2(b)). The same is true of the deference question. The guidelines are replete with Application Notes that purport to engraft meaning on guidelines' text. *Compare United States v. Riccardi*, 989 F.3d 476, 486 (6th Cir. 2021) (holding that "*Kisor* affect[s] our approach to the commentary" and thus denying deference to Application Note 3(F)(i) to § 2B1.1 because it "does not fall 'within the zone of [any] ambiguity' in this guideline") *with United States v. Moore*, 788 F.3d 693, 695 (7th Cir. 2015) ("Application Note 3(F)(i) to U.S.S.G. § 2B1.1" "is an authoritative interpretive aid for how the guideline should be applied."). Each one raises the question whether it is entitled to controlling weight absent a finding of ambiguity in the guideline's text.

And the Sentencing Commission is unlikely to resolve either split. The Commission has long known of the generic-offense categorical-approach split concerning 4B1.2 Application Note 1 and has not resolved it.

And even if the Commission somehow resolved it in Application Note 1, the broader question whether the categorical approach applies to generic offenses in the guidelines would remain. Absent an overhaul of the guidelines in which *all* currently undefined generic offenses are expressly defined, courts will still need to decide whether *Taylor*'s analytical method controls.

The Commission *cannot* resolve the methodological conflict underlying the second question presented. The Commission lacks power to tell courts when they must accord deference to the Commission's commentary. Even if the Commission were to move inchoate offenses into the text of § 4B1.2, that would not resolve the broader question of when deference to the Commission's commentary is appropriate.[5]

This case is an excellent vehicle to resolve either split. Petitioner's case squarely implicates both circuit splits, as the decision below forthrightly acknowledges. Pet. App. 13a-20a.[6] Resolution of either question in

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[5] In 2018, the Commission proposed various amendments to § 4B1.2 and Application Note 1, one of which would move inchoate offenses into the guideline, and some of which would address the overt-act requirement for conspiracy offenses. *See* Sentencing Guidelines for U.S. Courts, 83 Fed. Reg. 65,400, 65,413 (Dec. 20, 2018). But it has not acted on them for the past two and a half years, and currently lacks a quorum to do so. And even so, the proposals would not resolve the broader, methodological questions of whether *Taylor*'s generic-offense framework applies to the generic offenses in the guidelines, or whether deference is permissible absent a finding of ambiguity.

[6] That distinguishes this petition from other petitions this Court has denied that raised only the split over whether Application Note 1 is entitled to deference. *See, e.g.*, *Tabb v. United*

Smith's favor would render the career offender enhancement inapplicable. And that enhancement unquestionably affected Smith's sentence. It increased his offense level by seven points, and it doubled his criminal history category, resulting in a recommended range of 262 to 327 months. Pet. App. 47a, 55a, 57a, 59a. Anchored by that range, the district court sentenced Smith to 214 months' imprisonment. But had the career offender enhancement not been applied, his recommended sentencing range would have been 87-108 months, and thus his ultimate sentence would certainly have been far lower. *See Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1907 (2018) ("[A]n error resulting in a higher range than the Guidelines provide usually establishes a reasonable probability that a defendant will serve a prison sentence that is more than 'necessary' to fulfill the purposes of incarceration. (quoting 18 U.S.C. § 3553(a)")).

States, No. 20-579, ___ S. Ct. ___, 2021 WL 2519097 (U.S. June 21, 2021). Even if the Commission were to resolve one of the two splits here, it would be unlikely to resolve both.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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