No. _____

In the Supreme Court of the United States

TONY LAM,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the U.S. Sentencing Commission's use of the Sentencing Guideline commentary in U.S.S.G. § 4B1.2 to capture drug conspiracy offenses within the meaning of "controlled substance offense" exceed the scope of its constitutionally permissible authority, rending that commentary invalid and unenforceable?

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IN THE
SUPREME COURT OF THE UNITED STATES

TONY LAM,
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On Petition for Writ of Certiorari
to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner Tony Lam respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

JUDGMENT AT ISSUE

Mr. Lam challenged his 327-month sentence based on the district court's plainly erroneous application of the career offender enhancement. On May 6, 2020, a panel of the Fifth Circuit Court of Appeals affirmed Mr. Lam's judgment. A copy of the order is attached to this petition as an appendix.

JURISDICTION

The judgment of the Fifth Circuit Court of Appeals was entered on May 6, 2020. No petition for rehearing was filed. Mr. Lam's petition is timely filed pursuant to Supreme Court Rule 13 because this petition is filed within 90 days after the entry of the Fifth Circuit's judgment. This Court has jurisdiction under 28 U.S.C. § 1254(1).

FEDERAL STATUTES INVOLVED

28 U.S.C. § 994(h) provides:

> The [U.S. Sentencing] Commission shall assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants in which the defendant is eighteen years old or older and—
>
> (1) has been convicted of a felony that is—
>
> (A) a crime of violence; or
>
> (B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and chapter 705 of title 46; and
>
> (2) has previously been convicted of two or more prior felonies, each of which is—
>
> (A) a crime of violence; or
>
> (B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and chapter 705 of title 46.

Section 401 of the Controlled Substances Act (21 U.S.C. § 841) provides:

> (a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally —
>
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or
>
> (2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

SENTENCING GUIDELINES INVOLVED

U.S.S.G. § 4B1.1(a) provides:

> A defendant is a career offender if
>
> > (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction;
> >
> > (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and
> >
> > (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

U.S.S.G. § 4B1.2(b) provides:

> 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 Note 1 of the commentary to U.S.S.G. § 4B1.2 provides:

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

STATEMENT OF THE CASE

On August 22, 2018, Mr. Lam pleaded guilty to a single count of distributing 40 grams or more of a mixture or substance containing a detectable amount of fentanyl, in violation of 21 U.S.C. § 841(a)(1) and § 841(b)(1)(B). Due to a prior conviction for a felony drug offense, Mr. Lam faced a statutory penalty range of ten years to life imprisonment. In preparing his Presentence Investigation Report, the U.S. Probation Office determined that the drug quantity involved in Mr. Lam's offense generated a base offense level of 26, pursuant to U.S.S.G. § 2D1.1, from which 3 points were deducted based on Mr. Lam's timely acceptance of responsibility. Combined with his criminal history category of IV, his total offense level of 23 generated a Sentencing Guidelines range of 70 to 87 months of imprisonment, restricted to 120 months due to the statutory minimum.

However, U.S. Probation also determined that Mr. Lam qualified as a career offender under U.S.S.G. § 4B1.1(a), based on two prior convictions for conspiracy to possess with intent to distribute controlled substances. As a result of that designation, his offense level skyrocketed to 37 due to the statutory maximum of life imprisonment for his conviction, and his criminal history category became VI. *See* U.S.S.G. § 4B1.1(b)(1). Even with the 3-point offense level reduction for acceptance of responsibility, the career offender enhancement more than tripled Mr. Lam's Guidelines calculation, increasing his final range to 262 to 327 months. Defense counsel did not object to the application of the enhancement, and the district court sentenced Mr. Lam to the top of that range—327 months.

Mr. Lam challenged his sentence on appeal, arguing that the district court plainly erred in applying the career offender enhancement to his Guidelines calculation based on two prior drug conspiracy convictions. In particular, he argued that the career offender directive in § 994(h) is plainly limited to substantive drug offenses—not conspiracies or other inchoate offenses—and the U.S. Sentencing Commission's use of the commentary to expand the Guideline and capture those offenses clearly exceeds the scope of its authority and is plainly unconstitutional under this Court's precedent. Mr. Lam further argued that the error affected his substantial rights and warranted the Fifth Circuit's correction because it drastically increased his Sentencing Guidelines range, resulting in a sentence that is more than 17 years longer than he likely would have received absent the error. Finally, Mr. Lam argued that his trial counsel was ineffective for failing to object to this error in the district court, particularly in light of the fact that the D.C. Circuit recognized this as an "obvious legal argument" six months prior to Mr. Lam's sentencing.

Although acknowledging that the Fifth Circuit had not been confronted with Mr. Lam's argument before, the government did not attempt to refute the merits of the claim, nor did it argue that the Sentencing Commission *does* have the authority to expand the scope of § 4B1.2(b) through the Guideline commentary. Instead, it relied on previous Fifth Circuit decisions affirming the application of the career offender enhancement to conspiracy offenses (in the absence of Mr. Lam's specific argument), as well as the existence of a circuit split, to argue that the district court did not commit "clear or obvious" error in applying the enhancement. The Fifth

Circuit agreed, holding that Mr. Lam failed to show "that the district court clearly and obviously erred in basing application of the career offender guideline on his drug conspiracy convictions." *See United States v. Lam*, 803 F. App'x 796, 797 (5th Cir. 2020).

REASONS FOR GRANTING THE PETITION

Tony Lam's current, 327-month sentence was imposed based on an enhanced sentencing range that Congress never intended to apply to him. Through 28 U.S.C. § 994(h), Congress directed the Sentencing Commission to provide enhanced sentencing ranges for certain categories of "career offenders"—specifically, individuals who are convicted of a substantive drug offense or crime of violence and who have two prior convictions for such offenses. The Sentencing Commission implemented this directive by promulgating U.S.S.G. § 4B1.1, which similarly limits the "career offender" enhancement, in relevant part, to individuals whose convictions are for substantive drug offenses. However, the Commission used the Guideline commentary to reach beyond Congress's narrowly-defined "career offender" category to capture defendants convicted of *conspiring* to commit a substantive drug offense or other inchoate crimes—offenses that fall outside the plain language of both the statutory directive and Guideline itself.

As discussed below, that commentary—which more than tripled Mr. Lam's Guidelines range and likely increased his ultimate sentence by more than 17 years—violates this Court's clear precedent and exceeds the scope of the Commission's constitutionally permissible authority. Moreover, it has created a complex circuit split, inevitably resulting in dramatic, unwarranted sentencing disparities across jurisdictions. It also has led to internal conflict, inconsistency, and confusion among judges within individual circuits. Accordingly, this Court's intervention and guidance is necessary to restore fairness and uniformity to the federal court system.

I. The Fifth Circuit's decision clearly conflicts with this Court's prior decisions defining the scope of the Sentencing Commission's constitutionally permissible authority.

The plain language of § 994(h) identifies a category of "career offenders" who Congress determined warrant harsher penalties than other federal offenders, defining that category as people who have been convicted of—and have two prior convictions for—"crimes of violence" or certain felony drug offenses. With respect to drug offenders, the statute explicitly reaches only those convicted of "an offense *described in*" 21 U.S.C. § 841, which makes it unlawful "to manufacture, distribute, or dispense" any controlled substance or counterfeit substance, or "possess with intent to manufacture, distribute, or dispense" a controlled or counterfeit substance.[1] *See* § 994(h)(1)(B), § 994(h)(2)(B) (emphasis added). Section 994(h) does not include people convicted of conspiring to violate § 841—*i.e.*, "an offense described in" 21 U.S.C. § 846, which criminalizes the mere act of *agreeing* to commit a substantive drug offense. *See United States v. Davis*, 903 F.3d 483, 485 (5th Cir. 2018), *aff'd in part, vacated in part*, 139 S. Ct. 2319 (2019) (reiterating that "conspiracy to commit an offense is merely an agreement to commit an offense"); *see also United States v. Moody*, 664 F. App'x 367, 369 (5th Cir. 2016) (explaining that "the crime of conspiracy is complete upon the formation of the illegal agreement" (internal quotation marks and citations omitted)).

[1] Section 994(h) also applies to people convicted of certain importation-related drug offenses, which are not relevant to this petition. *See* § 994(h)(1)(B), § 994(h)(2)(B).

U.S.S.G. § 4B1.1 implements § 994(h)'s directive by providing significantly enhanced penalty ranges for a defined category of "career offenders." In identifying the scope of drug offenses that make someone a career offender, U.S.S.G. § 4B1.2(b) tracks the express language of § 994(h) by defining the term "controlled substance offense" as a felony offense "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." (emphasis added). However, the Sentencing Commission has broadened that definition—and thereby extended the reach of the career offender Guideline—by stating in the commentary that "controlled substance offense . . . include[s] the offenses of aiding and abetting, conspiring, and attempting to commit such offenses." U.S. SENTENCING GUIDELINES MANUAL § 4B1.2 cmt. n.1 (2018) ("Application Note 1"). As discussed below, that use of the commentary to expand the career offender Guideline beyond Congress's unambiguous directive clearly conflicts with this Court's precedent defining the scope of the Sentencing Commission's constitutionally permissible authority and precluding the enforcement of commentary that is "at odds with § 994(h)'s plain language." *See United States v. LaBonte*, 520 U.S. 751, 757 (1997).

Congress established the U.S. Sentencing Commission in 1984, delegating to it substantial authority to promulgate a set of Sentencing Guidelines that would govern all federal sentencing proceedings. Unsurprisingly, the creation of the Commission and Guidelines quickly gave rise to serious constitutional questions

regarding the nature and scope of the Commission's authority—questions that ultimately were brought before this Court in *Mistretta v. United States*, 488 U.S. 361 (1989). Indeed, as this Court recognized in *Mistretta*, the Commission "unquestionably is a peculiar institution within the framework of our Government" and "an unusual hybrid in structure and authority." *Id.* at 384, 412. While it was created as an "independent commission in the judicial branch," the Commission was vested with the "quasi-legislative power" of promulgating the Sentencing Guidelines. *Id.* at 368–69, 393. The petitioner in *Mistretta* argued that Congress had granted "excessive legislative discretion" to this new independent Commission in violation of the nondelegation doctrine, by endowing it with the power to promulgate the Sentencing Guidelines. *See id.* at 371.

This Court affirmed the constitutionality of the Commission and its Guidelines, but only because "Congress' delegation of authority to the Sentencing Commission is sufficiently specific and detailed to meet constitutional requirements." *Mistretta*, 488 U.S. at 374. The Court explained that while "Congress generally cannot delegate its legislative power to another Branch" of government, "the separation-of-powers principle, and the nondelegation doctrine in particular, do not prevent Congress from obtaining the *assistance* of its coordinate Branches." *Id.* at 372 (citations omitted) (emphasis added). Thus, "[s]o long as Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to exercise the delegated authority is directed to conform, such legislative action is not a forbidden delegation of legislative power." *Id.* (internal quotation marks,

alterations, and citations omitted). Noting the practical considerations that drove the "intelligible principle" test, the Court explained that it "has deemed it constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *Id*. at 372–73 (internal quotation marks and citations omitted).

In concluding that the Commission's promulgation of the Sentencing Guidelines did not violate the nondelegation doctrine, the Court focused on the specific statutory directives and framework that Congress included in its legislation. *See Mistretta*, 488 U.S. at 374–79. Among them was Congress's directive to the Commission "to develop a system of 'sentencing ranges' applicable 'for each category of offense involving each category of defendant.'" *Id.* at 374–75 (quoting 28 U.S.C. § 994(b)). After discussing this and other "overarching constraints" imposed by the statute, the Court highlighted Congress's "even more detailed guidance to the Commission about categories of offenses and offender characteristics." *Id.* at 376. Addressing the career offender directive specifically, the Court stated: "Congress directed that guidelines require a term of confinement at or near the statutory maximum for certain crimes of violence and for drug offenses, particularly when committed by recidivists." *Id.* at 376 (citing § 994(h)). The Court relied on the career offender directive and other targeted, specifically-defined directives to conclude:

> In other words, although Congress granted the Commission substantial discretion in formulating guidelines, in actuality *it legislated a full hierarchy of punishment . . . and stipulated the most important offense and offender characteristics to place defendants within these categories*.

Id. at 377 (emphasis added).

Thus, Congress's explicit instructions on how to define and punish different categories of offenders was central to the Court's finding that the Guidelines were constitutionally permissible. *See Mistretta*, 488 U.S. at 379 ("We have no doubt that in the hands of the Commission the criteria which Congress has supplied are wholly adequate for carrying out the general policy and purpose of the Act." (internal quotation marks and citations omitted)); *id.* at 379 ("The statute outlines the policies which prompted establishment of the Commission, explains what the Commission should do and how it should do it, and sets out specific directives to govern particular situations."); *id.* at 380 ("Congress has set forth sufficient standards for the exercise of the Commission's delegated authority[.]"). As the Court explained: "The Constitution's structural protections do not prohibit Congress from delegating to an expert body located within the Judicial Branch the intricate task of formulating sentencing guidelines *consistent with such significant statutory direction as is present here*." *Id.* at 412 (emphasis added).

Notably, Justice Scalia dissented from the ruling, calling the creation of the Sentencing Commission "a pure delegation of legislative power" and stating that "[i]t is irrelevant whether the standards are adequate, because they are not standards related to the exercise of executive or judicial powers; they are, plainly and simply, standards for further legislation." *Mistretta*, 488 U.S. at 420 (Scalia, J., dissenting). He also warned that the Court "must be particularly rigorous in preserving the Constitution's structural restrictions that deter excessive delegation"—the "major one" being "that the power to make law cannot be exercised by anyone other than

Congress, except in conjunction with the lawful exercise of executive or judicial power." *Id.* at 416–17.

In the decades since *Mistretta*, this Court has actively policed the Commission's exercise of authority, reinforcing the principle that its constitutionality depends on its adherence to Congress's specific statutory directives. This policing has included overseeing the Commission's drafting of "commentary" to the Sentencing Guidelines—a practice that Congress did not mention, much less direct, in its enacting legislation. *See Stinson v. United States*, 508 U.S. 36, 41 (1993) ("[T]he Sentencing Reform Act does not in express terms authorize the issuance of commentary."). While this Court has permitted the Commission's use of commentary to *interpret* the Guidelines, it has drawn a line between permissible interpretation and impermissible modification, strictly prohibiting the enforcement of commentary that crosses that line.

The Court first weighed in on "the authoritative weight to be accorded to the commentary to the Sentencing Guidelines" in *Stinson*, recognizing that the question had created conflict among the various Courts of Appeals. *Stinson*, 508 U.S. at 40. There, the Court ultimately held that "commentary in the Guidelines Manual that *interprets or explains* a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline." *Id.* at 38 (emphasis added). In reaching that conclusion, the Court noted a critical distinction between amendments to the actual Guidelines themselves versus the addition or modification of the commentary—namely, that amendments to

the Guidelines "must be submitted to Congress," who has the power to modify or disapprove them, whereas the commentary is solely the product of the Commission. *Id.* at 41. As indicated in the Guidelines themselves, the commentary is expressly intended to interpret or explain how to apply a given Guideline, suggest circumstances that may warrant departure, or provide background information regarding the promulgation of the Guidelines. *See id.* at 41 (citing U.S.S.G. § 1B1.7).

In its opinion, the Court grappled with the proper characterization for the "legal force of the commentary," considering and rejecting various analogies. *Stinson*, 508 U.S. at 44. The Court ultimately determined that, while not precise, the commentary is akin to "an agency's interpretation of its own legislative rule" due to the Commission's role in promulgating the Guidelines. *Id.* at 44–45. The Court thus concluded that while "amendments to guidelines provisions are one method of incorporating revisions, another method open to the Commission is amendment of the commentary, *if the guideline which the commentary interprets will bear the construction*." *Id.* at 46 (emphasis added). However, in the event of inconsistency between the commentary and the Guideline it interprets, "the Sentencing Reform Act itself commands compliance with the guideline." *Id.* at 43 (citing 18 U.S.C. § 3553(a)(4), (b)).

In *United States v. LaBonte*, 520 U.S. 751 (1997), this Court confronted (and rejected) the Commission's attempt to use the commentary to reinterpret the very Guideline at issue here—U.S.S.G. § 4B1.1. In that case, the Court addressed § 994(h)'s requirement that the Guidelines specify a sentence for career offenders "at

or near the maximum term authorized." *Id.* at 753. In promulgating § 4B1.1, the Commission coined the term "offense statutory maximum" and used it to determine the offense level for a given defendant. *See id.* at 753–54. The Commission defined "offense statutory maximum" as "the maximum term of imprisonment authorized for the offense of conviction," but it did not address whether that "maximum term" should be the "basic" statutory maximum provided in the statute of conviction or, if applicable, the *enhanced* maximum penalty that may apply to a recidivist offender.[2] When Courts of Appeals began concluding that it meant the enhanced maximum term, the Commission amended the Guideline commentary "to *preclude* consideration of statutory enhancements in calculating the 'offense statutory maximum.'" *Id.* at 754–55.

This Court rejected that commentary, concluding that "the Commission's interpretation [was] inconsistent with § 994(h)'s plain language" and holding that "'maximum term authorized' must be read to include all applicable statutory enhancements." *LaBonte*, 420 U.S. at 753. The Court explained that while Congress delegated "significant discretion" to the Commission to formulate the Guidelines, "it [still] must bow to the specific directives of Congress." *Id.* at 757. Accordingly, in determining whether the commentary "accurately reflects Congress' intent," the

[2] For example, "the maximum term" for a conviction under § 841(b)(1)(B) ordinarily is 40 years of imprisonment, corresponding to an offense level of 34 under U.S.S.G. § 4B1.1, but it can be enhanced to life imprisonment—corresponding to an offense level of 37—if the defendant was previously convicted of a qualifying offense.

Court turns "to the statutory language." *Id.* And, if the commentary "is at odds with § 994(h)'s pain language, it must give way." *Id.*

Turning to the language of § 994(h), the Court stated that it does "not start from the premise that [Congress's] language is imprecise[,]" but instead "assume[s] that in drafting this legislation, Congress said what it meant." *LaBonte*, 420 U.S. at 757. The Court thus looked to the "ordinary meaning" of the word "maximum" to determine whether the Commission's commentary ran afoul of Congress's directive. The Court concluded that it did, holding "that the phrase 'at or near the maximum term authorized' is unambiguous" and requires the use of the enhanced statutory maximum for qualifying repeat offenders, not the base term that is generally applicable to the offense. *Id.* at 758–59, 762.

Here, the Commission's commentary similarly alters—and unquestionably broadens—Congress's clear directive in § 994(h) and the plain meaning of U.S.S.G. § 4B1.2(b). By adding conspiracies and other inchoate crimes to the definition of "controlled substance offense," the Commission has unilaterally expanded the reach of the career offender Guideline to capture scores of offenders and conduct that Congress never intended. Thus, it is not a mere interpretation of the career offender Guideline, but an improper and unconstitutional modification of it. As a result, it is invalid and unenforceable.

Notably, this Court recently found it necessary to "reinforce the limits" on *Auer* deference—*i.e.*, the deference afforded to an agency's "reasonable readings of [its own] genuinely ambiguous regulations"—and "emphasize the critical role courts retain in

interpreting rules." *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2408, 2423 (2019) (citing *Auer v. Robinson*, 519 U.S. 452 (1997)). The Court explained that "the possibility of deference can arise only if a regulation is *genuinely ambiguous* . . . even after a court has resorted to all the standard tools of interpretation." *Id.* at 2414 (emphasis added). "If uncertainty does not exist, there is no plausible reason for deference. The regulation then just means what it means—and the court must give it effect, as the court would any law." *Id.* at 2415. The Court warned of the consequences of permitting deference in such unambiguous situations, stating:

> [T]he core theory of *Auer* deference is that sometimes the law runs out, and policy-laden choice is what is left over. But if the law gives an answer—if there is only one reasonable construction of a regulation—then a court has no business deferring to any other reading, no matter how much the agency insists it would make more sense. Deference in that circumstance would "permit the agency, under the guise of interpreting a regulation, to create de facto a new regulation." *Auer* does not, and indeed could not, go that far.

Id. (quoting *Christensen v. Harris Cnty.*, 529 U.S. 576, 588 (2000)).

The career offender Guideline's definition of "controlled substance offense" is not "genuinely ambiguous"—indeed, it is not ambiguous at all. The plain language states that the term "means" an offense that "prohibits" specific, enumerated acts involving controlled substances—*e.g.*, manufacturing, distributing, or dispensing—as well as the possession of a controlled substance with the intent to commit one of those enumerated acts. *See Burgess v. United States*, 553 U.S. 124, 130 (2008) ("As a rule, a definition which declares what a term 'means' excludes any meaning that is not stated." (internal quotation marks, alterations, and citations omitted)); *see also Christopher v. Smith-Kline Beecham Corp.*, 567 U.S. 142, 162 (2012) (explaining that

the use of the verb "includes" in a statutory definition "makes clear that the examples enumerated in the text are intended to be illustrative, not exhaustive," in contrast with other statutory provisions in which "Congress used the narrower word 'means'. . . when it wanted to cabin a definition to a specific list of enumerated items"). Moreover, the history and purpose of the regulation—to implement Congress's narrowly-tailored career offender directive—establishes that it is not "genuinely ambiguous" because § 994(h) explicitly limits the directive to offenses described in § 841(a) and the importation statutes, *i.e.*, substantive drug offenses.[3]

Thus, both the career offender Sentencing Guideline and the underlying statutory directive provide "only one reasonable construction," and courts have "no business deferring to any other reading, not matter how much the [Sentencing Commission] insists it would make more sense." *See Kisor*, 139 S. Ct at 2415. Enforcement of the Guideline commentary in this circumstance effectively permits the Commission "to create de facto a new regulation," which clearly is constitutionally impermissible. Accordingly, Mr. Lam's Guidelines calculation was clearly erroneous—an error that resulted in him being sentenced to a prison term that is more than 17 years longer than his correct Guidelines range.

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[3] As the Court explained in *Kisor*, courts "must exhaust all the 'traditional tools' of construction" before concluding that a rule is "genuinely ambiguous." *Id.* at 2415. "To make that effort, a court must carefully consider the text, structure, history, and purpose of a regulation, in all the ways it would if it had no agency to fall back on." *Id.* (internal quotation marks and citations omitted).

II. A circuit split has developed over this important federal issue, causing dramatic sentencing disparities among defendants.

The Sentencing Commission's use of the commentary to unconstitutionally expand the career offender Guideline not only violates this Court's clear precedent. It also has created a deeply problematic split among the Courts of Appeals, with some circuits properly invalidating the commentary in light of this clear precedent while others affirm its enforcement. This disparate enforcement necessarily has resulted in unwarranted (and extreme) sentencing disparities across the country, with a defendant's geographic location potentially dictating whether he or she will face decades longer in prison. What's more, this issue has created significant intra-circuit conflict. Indeed, at least one panel has explicitly stated that it believes the commentary is invalid but felt bound by prior circuit precedent to affirm its continued enforcement. This further highlights the necessity of this Court's intervention and guidance to resolve the conflict.

At its inception, the background commentary for the career offender Guideline identified § 994(h) as the sole basis for its promulgation, stating:

> 28 U.S.C. § 944(h) mandates that the Commission assure that certain "career" offenders, as defined in the statute, receive a sentence of imprisonment "at or near the maximum term authorized." Section 4B1.1 implements this mandate.

U.S. SENTENCING GUIDELINES MANUAL § 4B1.1 cmt. background (1987). As some Courts of Appeals recognized, however, the commentary's inclusion of "aiding and abetting, conspiring, and attempting to commit" controlled substance offenses made the Guideline definition broader than Congress's statutory definition in § 994(h). *See, e.g.*, *United States v. Bellazerius*, 24 F.3d 698, 701 (5th Cir. 1994); *United States v.*

Price, 990 F.2d 1367, 1369 (D.C. Cir. 1993); *United States v. Mendoza-Figueroa*, 28 F.3d 766, 766 (8th Cir. 1994), *rev'd*, *United States v. Mendoza-Figueroa*, 65 F.3d 691 (8th Cir. 1995) (en banc). While some Courts of Appeals believed that rendered the commentary invalid, others held that it was within the scope of the Commission's authority, resulting in the emergence of a circuit split. *See Bellazerius*, 24 F.3d at 701.

This debate also became a source of intra-circuit conflict. For example, after a panel of the Eighth Circuit reversed a district court's application of the career offender enhancement to a defendant convicted of a drug conspiracy, the *en banc* court reversed, holding that the commentary was "a reasonable interpretation of the career offender guidelines that is well within the Sentencing Commission's statutory authority." *See Mendoza-Figueroa*, 65 F.3d at 692, 694. However, the majority opinion elicited a powerful dissent from three judges, who determined:

> Section 994(h) enumerates three statutes which define substantive offenses, and makes no reference to a conspiracy. The Sentencing Commission exceeded its mandate by including conspiracy as a predicate offense for career offender purposes.

Id. at 694–95 (Gibson, J., dissenting, joined by McMillian, J., and Arnold, J.); *see also id.* at 698 ("I conclude that the Sentencing Commission exceeded its statutory authority by including a drug conspiracy offense in the definition of a career offender, and I would reverse the sentence.").

In response to this conflict, the Sentencing Commission revised the background commentary to the career offender Guideline—not to remove the impermissible expansion, but to change the purported basis for the Guideline. *See*

U.S. SENTENCING GUIDELINES MANUAL § 4B1.1 cmt. background (1995). In the revised version of the background commentary, which is the same version that exists today, the Commission explained that it "modified" the definition of a career offender "in several respects to focus more precisely on the class of recidivist offenders for whom a lengthy term of imprisonment is appropriate[.]" *Id.* The Commission asserted that the modifications were "in accord with [the Commission's] general guideline promulgation authority under 28 U.S.C. § 994(a)–(f), and its amendment authority under 28 U.S.C. § 994(o) and (p)[.]" *Id.*

While the Commission's amendment seemingly quieted the conversation surrounding the validity of this commentary for a time, the issue recently has resurged—and created a new circuit split. The D.C. Circuit appears to be the first Court of Appeals to have addressed this issue anew, and interestingly enough, it vacated the appellant's sentence based on a finding that his attorney provided ineffective assistance of counsel by failing to challenge the validity of the commentary. *See United States v. Winstead*, 890 F.3d 1082, 1089–92 (D.C. Cir. 2018). In *Winstead*, the D.C. Circuit determined that counsel performed deficiently by failing to "raise this obvious legal argument"—specifically, the argument that his client's career offender designation based on "attempt" offenses was erroneous. *See id.* at 1089–90. Rather than remand for a prejudice finding, the court reached the merits of this "purely legal question" and agreed with the appellant that the commentary is inconsistent with the Guideline. *Id.* at 1090–91. The court also noted that the Government had failed "to even address Winstead's textual arguments" and

almost exclusively relied on other, out-of-circuit cases that generally did the same—commenting that in other cases where the government had taken that approach, the court found its "reluctance to come to grips with the language quite revealing." *See Winstead*, 890 F.3d at 1092 (internal quotation marks, alterations, and citations omitted).[4]

The Sixth Circuit, sitting *en banc*, joined the D.C. Circuit in holding the commentary to be invalid in *United States v. Havis*, 927 F.3d 382 (2019) (en banc). In a unanimous opinion, the court agreed with the appellant that the Sentencing Commission stepped beyond the "careful limits" that Congress placed on its power by using the commentary "to *add* an offense not listed in the [career offender] guideline." *Id.* at 383, 386 (emphasis in original). The court explained that Application Note 1 "did not interpret a term in the guideline itself—no term in § 4B1.2(b) would bear that construction." *Id.* at 386. Thus, permitting the Commission to use the commentary in this manner, the court explained, would render meaningless "the institutional constraints that make the Guidelines constitutional in the first place—congressional review and notice and comment[.]" *Id.*at 386–87. In short, the Commission's use of the commentary to add crimes to the definition of "controlled substance offense" "deserves no deference," as the text of the Guideline makes it clear that those added offenses do not so qualify. *See id.* at 387.

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[4] The Government similarly failed to address the underlying merits of Mr. Lam's textual arguments in this appeal, even though—as the Government acknowledged—the Fifth Circuit had not been confronted with this specific challenge in previous cases where the application of the commentary was affirmed.

Following those decisions, several other Courts of Appeals diverged from the D.C. and Sixth Circuits, often relying solely on binding circuit precedent that, in many cases, pre-dated this Court's instruction and guidance in *LaBonte*. *See, e.g.*, *United States v. Crum,* 934 F.3d 963, 966–67 (9th Cir. 2019) (agreeing with *Winstead* and *Havis* but finding itself compelled to reject their view based on a prior circuit decision from 1993); *United States v. Adams*, 934 F.3d 720, 728–29 (7th Cir. 2019) (noting the circuit split and determining that the court's holding was governed by a prior decision in which the Seventh Circuit "rejected the textual arguments that the D.C. Circuit later found persuasive in *Winstead*"); *United States v. Tabb*, 949 F.3d 81, 87 (2d Cir. 2020) (finding that circuit precedent from 1995 "precludes [the] argument that Application Note 1 is invalid"). Moreover, while the Fourth Circuit does not appear to have directly addressed this issue yet, several district court judges within that circuit have joined the D.C. and Sixth Circuit's in holding that Application Note 1 is inconsistent with the text of § 4B1.2 and therefore unenforceable. *See, e.g.*, *United States v. Bond*, 418 F. Supp. 3d 121, 123 (S.D. W. Va. 2019) (adopting the reasoning of *Winstead* and *Havis*); *United States v. Faison*, No.: GJH-19-27, 2020 WL 815699, at *9 (D. Md. Feb. 18, 2020) (same); *see also United States v. Cooper*, 410 F. Supp. 3d 769, 773 (S.D. W. Va. 2019) (holding that "the commentary listing 'conspiring' as a 'crime of violence' improperly expands the text of the Guidelines and is not authoritative").

Notably, this issue also appears to be driving internal conflict and inconsistency *within* individual circuits. *Compare, e.g.*, *United States v. Piper*, 35 F.3d

611, 619 (1st Cir. 1994) (holding that "§ 994(h) neither comprises a ceiling nor an exclusive compendium of the crimes that are eligible to serve as triggering or predicate offenses," and "Application Note 1 is nothing more than an interpretive aid") *with United States v. Soto-Rivera*, 811 F.3d 53, 59-62 (1st Cir. 2016) (concluding that, because § 4B1.2(a) "sets forth a limited universe of specific offenses that qualify as a 'crime of violence,' . . . [t]here is simply no mechanism or textual hook in the Guideline that allows us to import offenses not specifically listed therein," and "reject[ing] the government's attempt to make use of U.S.S.G. § 4B1.2(a)'s Application Note 1 to expand upon the list of offenses that qualify for Career Offender status"); *also compare United States v. Raupp*, 677 F.3d 756, 759 (7th Cir. 2012) (holding that Application Note 1's inclusion of conspiracy does not conflict with the text of the career offender Guideline) *with Raupp*, 677 F.3d at 766 (Wood, J., dissenting) ("When an agency like the Sentencing Commission uses a regulation as a springboard for an 'interpretation' that goes beyond the boundaries of the original regulation, *Auer* and *Stinson* tell us that it has gone too far.").

Accordingly, the error in Mr. Lam's case not only violates this Court's clear precedent regarding the constitutionality of the Sentencing Commission and Guidelines, and the scope of the Commission's authority to interpret the Guidelines through commentary—it also has created growing division both among and within the various Courts of Appeals. As the legal landscape currently stands, identically situated defendants sentenced in different circuits will be subjected to drastically different Guidelines ranges, resulting in dramatic sentencing disparities. Indeed, had

Mr. Lam been sentenced in the Sixth Circuit, D.C. Circuit, or districts within the Fourth Circuit, he almost certainly would be serving a 10-year sentence rather than a 327-month (*i.e.*, over 27-year) sentence. Accordingly, this Court's guidance and intervention is desperately needed to resolve this conflict and restore fairness and uniformity to the federal court system.

CONCLUSION

For the foregoing reasons, Mr. Lam respectfully requests that his petition for a writ of certiorari be granted.

Respectfully submitted July 31, 2020,

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