No. 20-579

IN THE

Supreme Court of the United States

ZIMMIAN TABB,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether courts may defer to Sentencing Guidelines commentary without first determining that the underlying guideline is genuinely ambiguous.

2. Whether the Sentencing Commission can use commentary to rewrite a guideline that applies to "prohibit[ions]" on the "distribution" of drugs, U.S.C.S. Appx. § 4B1.2, to apply to conspiracies and attempts to distribute drugs.

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established to restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences and forums, and produces the annual *Cato Supreme Court Review*.

This case is of central concern to Cato because it involves an extra-legislative power to make law-like interpretations that can cost people years of freedom.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), this Court preserved some form of judicial deference to administrative agencies' interpretations of their own regulations, as previously recognized in *Auer v. Robbins*, 519 U.S. 452 (1997), and *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945). Simultaneously, the Court placed restraints on so-called *Auer* deference, making clear the limited circumstances in which deference is warranted, and the steps courts must take before applying it. *Kisor*, 139 S. Ct. at 2420.

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[1] Rule 37 statement: All parties were timely notified and consented to the filing of this brief. No part of this brief was authored by any party's counsel, and no person or entity other than *amicus* funded its preparation or submission.

After the decision came out, the question became: How would lower courts apply this newly adapted *Kisor* deference? The lower courts' reactions would show whether the *Kisor* majority was right that the doctrine just needed tightening, or it was beyond repair, as the dissent would have had it.

This case presents one of the first tests of the new regulatory deference, asking the important question of whether deference to the Sentencing Commission's interpretation of sentencing guidelines should survive despite its clear incompatibility with *Kisor*.

Petitioner was convicted of aiding and abetting the distribution of crack cocaine and received a harsher sentence than he would have received for this crime alone based on his designation as a career offender due to prior convictions for *attempted* second-degree assault and federal narcotics conspiracy. Pet. App. at 3a. Under their definition of prior "crimes of violence" for the purpose of sentencing determinations, the Sentencing Commission's guidelines do not include all attempt crimes, nor even all violent attempt crimes. 18 U.S.C.S. Appx. § 4B1.2. Neither do the guidelines include conspiracy in the definition of prior controlled-substance offences. *Id*. The commentaries, however, specify that all attempt and conspiracy crimes, if the underlying offence has an element of violence or is drug related, are relevant to career-offender designation. *Id*.

Even before *Kisor* reinvigorated judicial review of agency self-interpretation, both the D.C. and Sixth Circuits ruled the guidelines text to be unambiguous and exclude attempt crimes. *United States v.*

Winstead, 890 F.3d 1082 (D.C. Cir. 2018); *States v. Havis*, 927 F.3d 382 (6th Cir. 2019) (per curiam).

More recently, the Third Circuit held that *Kisor* made "clear" that giving the commentaries binding effect was "not warranted." *United States v. Nasir*, No. 18-2888, *23 (3d Cir. Dec. 1, 2020) (en banc). Instead, looking at the "plain text and policy" of the statute, the en banc court concluded "that inchoate crimes are not included in the definition of "controlled substance offenses"' *Id*. at *26.

The court below, however, following *United States v. Jackson*, 60 F.3d 128 (2d Cir. 1995), and *Stinson v. United States*, 508 U.S. 36 (1993), upheld Petitioner's sentence and the deference extended to the commentaries. Both cases affirm a form of deference that gives controlling force to the commentaries unless they are clearly inconsistent with the guidelines or federal statutory law.

A fair reading of *Kisor* shows this new ruling to be incompatible with and thus having implicitly overturned—or at least obviated—*Stinson*, which required no preconditions for the application of deference. The Second Circuit's decision, therefore, gives a level of deference to the guidelines beyond that allowed by this Court in *Kisor*.

ARGUMENT

I. *KISOR* RESTRICTED THE APPLICATION OF *AUER* DEFERENCE AND OVERTURNED OR OBVIATED *STINSON*

Stinson, which established the rule on which the Second Circuit relied, made clear that it was applying *Seminole Rock*, later *Auer*, deference. 508 U.S. at 45.

After considering several alternatives—including analogizing the commentaries to statements of intent and the agency interpretation of statutes—Justice Kennedy's unanimous opinion concluded that the deference the Court would give to the sentencing-guideline commentaries was the same that it customarily gave to administrative agency interpretations of regulations. *Id*.

Justice Kennedy's opinion acknowledges that the analogy between the commentaries and agency regulations is imperfect, and the government might point to that language to argue that *Stinson*'s fate is unconnected to *Auer*'s reworking. *Id.* at 44. Even if accepted, however, that argument does not affect the outcome of this case. The *Stinson* Court noted that sentencing guidelines are different from agency regulations because Congress is involved in the enactment of the guidelines. *Id*. While the *Stinson* Court explicitly declined to follow this logic to the point of making the commentaries subject to *Chevron* deference, *Chevron U.S.A., Inc. v. NRDC, Inc.,* 467 U.S. 837 (1984), it can still be said that to whatever extent *Stinson* deference is distinguishable from S*eminole Rock* deference, it is analogous to *Chevron* deference.

The result of *Kisor*'s version of *Auer* deference, as Justice Gorsuch described it, is to make *Auer* subject to the same two-step structure—beginning with the discernment of ambiguity—as *Chevron,* and refusing to allow deference to agencies' regulatory interpretations where it would not be granted to their statutory interpretation. *Kisor*, 139 S. Ct. at 2448 (Gorsuch, J., dissenting). Accordingly, if there is some aspect of *Stinson* deference that is not subject to

Kisor's requirements, it is only because it was already subject to those same requirements by analogy to *Chevron*. But it would make no sense for a hybrid *Auer*/*Chevron* doctrine, if indeed that is what *Stinson* was, to give a far more powerful form of deference than either of those doctrines independently do.

In any event, the commentaries are agency interpretations subject to a level of deference that needs to be reevaluated in light of *Kisor*. While this Court explicitly did not jettison *Auer* deference in *Kisor*, as the dissent would have done, neither did it leave the doctrine entirely intact, at least not as the Court has employed it in prior cases. 139 S. Ct. at 2425 (Gorsuch, J., dissenting).

Moreover, as the chief justice pointed out in concurrence, the gulf between the majority and dissent is not great. *Kisor*, 139 S. Ct. at 2424 (Roberts, C.J., concurring). *Kisor* restricted *Auer* by laying out several preconditions that courts must find before deference may be applied. *Id.* at 2414–18. Even Justice Kagan's majority opinion, which places itself in the *Auer*/*Seminole Rock* tradition, acknowledged that the Court has given confusing guidance and that some cases have not observed these preconditions. *Id.* at 2414. Given that "the Court has given *Auer* deference without careful attention to the nature and context of the interpretation," some *Auer*-based rulings must have been set aside by *Kisor*. *Id.* *Stinson* is one of them.

In establishing preconditions for *Auer* deference, *Kisor* effectively prescribed the order in which courts must consider sources of legal authority and interpretative tools when a question of regulatory

interpretation arises. *Id*. at 2414. A court must first consider the text of the regulation in question. Next come the canons of interpretation and other normal interpretive aids, then consideration of the relevance of the interpreting agency's expertise to the question at hand. Finally, there is a potential inquiry into whether the agency has offered a reasonable and authoritative interpretation. *Id.* at 2414–19. If these conditions are met, *Auer* deference can be applied to the interpretation of the agency.

A court may not move beyond the text unless it can find a genuine material ambiguity therein. Nor is it enough for the regulation not to be unambiguous upon initial inspection. A court must employ the full range of normal interpretative tools, including dictionaries and all the relevant traditional canons, before declaring a bona fide ambiguity. *Id*. at 2415. If, at this stage, a court does not find any such ambiguity, it need not look to any other material, nor should other materials color its discernment of ambiguity. The modified *Auer* analysis is thus similar to the deference given to agency statutory interpretations under *Chevron*, with *Kisor* having removed any exceptional deference given to regulatory interpretations. *Id.* at 2416.

Contrary to all the above, *Stinson* looked first to the agency interpretation: the commentaries. The Sentencing Commission's commentary can govern, the Court said, unless it "is inconsistent with, or a plainly erroneous reading of" the guidelines themselves. *Stinson*, 508 U.S. at 38. More than a useful interpretation, *Stinson* seemed to regard the commentaries as a binding expression of law. "Failure to follow such commentary could constitute an

incorrect application of the guidelines, subjecting the sentence to possible reversal." *Id.* at 43 (quoting 18 U.S.C.S. Appx. § 1B1.7).

This Court in *Kisor* held that a court shouldn't find a regulation to be ambiguous merely because it can't be deciphered on first reading. But *Stinson* doesn't even require a first regulatory reading, at least not before bringing in the commentaries. *Id.* Framed in *Auer* and *Kisor's* terms, *Stinson* treats statutes as presumptively ambiguous unless they can be shown to be materially clear in a way that disfavors the interpretation made by the Sentencing Commission's guidelines. *Id.* at 43–44.

Any way you read it, *Stinson* is incompatible with *Kisor*, reversing the order of consideration of authorities. As the Third Circuit just held on essentially the same issue, the court "may have gone too far in affording deference to the guidelines' commentary under the standard set forth in *Stinson*" because "after the Supreme Court's decision last year in *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), it is clear that such an interpretation is not warranted." *Nasir*, No. 18-2888, at 23. Under *Stinson*, there will be fewer cases where an agency interpretation will be found to be plainly inconsistent with a regulation than under *Kisor*. Even unambiguous guidelines could be supplemented in various ways by agency interpretations under the *Stinson* approach. That type of super-deference is simply unwarranted and should be remedied by this Court.

II. THIS COURT'S NORMAL INTERPRETIVE TOOLS ARE SUFFICIENT TO PROVIDE GUIDANCE FOR LOWER COURTS

Side-stepping the outdated *Stinson*, the application of *Kisor* here is relatively straightforward and is in line with the language of this Court: any seeming ambiguities in the sentencing guidelines can be resolved without recourse to further interpretive tools, the commentaries included.

Guideline 4B1.2.(a)(1) says that a crime of violence that includes an element of an "attempt" to use violence requires something more than an attempt to commit a statutory offence, an element of which, itself, is the use of violence. 18 U.S.C.S. Appx. § 4B1.2. Furthermore, via the canon of *expressio unius est exclusio alterius*, and the related anti-surplusage canon, attempt is excluded from the other provisions of Guideline 4B1.2 because it's referenced in Guideline 4B1.2(a)(1). If the guidelines were written to include attempted violent crimes broadly, the narrower language targeting crimes that require actual attempts of violent acts—not violent crimes—would be unnecessary. *Id.*

Further, a close reading of the text of Guideline 4B1.1.(a)(1) reveals that, in order for an attempted crime to be considered a crime of violence, it must only punish attempts that have progressed to a point at which the violent element of the crime was *per se* attempted, not merely a broader offence of which it is a part. For example, pulling the trigger of a firearm that happens to jam is an attempted shooting and therefore a crime of violence, assuming the offence is narrowly defined. But attempting a burglary by

purchasing a lockpick, black gloves, and some binoculars would not be an attempted crime of violence. *Cf. James v. United States*, 550 U.S. 192, 206 (2007) (holding that Florida's attempted burglary statute created a crime of violence but leaving open the question of whether "more attenuated conduct . . . presents a potential risk of serious injury").

Nor does that reading hamstring legislators. Those wishing to punish all forms of attempted crimes while still maximizing sentences under the guidelines would only need to define separate degrees or kinds of attempt. For instance, a first-degree attempt might require an actual attempted violent act, ensuring that those who pull triggers are maximally punished. A second-degree attempt might include any attempt at an ultimately violent crime so that no attempted criminals are left uncovered by the law.

As for controlled-substance offences, Guideline 4B1.2.(b) states that they must include "an element of 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," but says nothing of conspiracy. 18 U.S.C.S. Appx. § 4B1.2 And the canons likewise suggest that if inchoate offenses were meant to be included, they would have been specified.

What is certain, however, is that the deference to the sentencing guidelines here was given unconstitutionally, and not in line with *Kisor*.

CONCLUSION

We urge the Court to use this case to provide clarity, for both the lower courts and the executive branch, on the extent of judicial deference to agency self-interpretation in a post-*Kisor* world. As the Third Circuit recently concluded, the case on which the Second Circuit's decision rests, *Stinson,* is no longer consistent with this Court's jurisprudence. A straightforward interpretation of the sentencing guidelines provides a simple solution to resolve the circuit split. For these reasons, and those stated by the petitioner, the Court should grant the petition.

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