No. 20-579

In the Supreme Court of the United States

ZIMMIAN TABB, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly determined that petitioner's prior conviction for conspiring to distribute cocaine base (crack cocaine), in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C) and 846, is a "controlled substance offense" under Section 4B1.2(b) of the advisory Sentencing Guidelines.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 949 F.3d 81. The order of the district court (Pet. App. 15a-23a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 6, 2020. A petition for rehearing was denied on June 1, 2020 (Pet. App. 24a). The petition for a writ of certiorari was filed on October 28, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Southern District of New York, petitioner was convicted of distributing and possessing with intent to distribute cocaine base (crack cocaine), in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C). He was sentenced to

120 months of imprisonment, to be followed by three years of supervised release. The court of appeals affirmed. Pet. App. 1a-14a.

1. a. In the Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, Ch. II, 98 Stat. 1987, Congress established the United States Sentencing Commission (Commission) "as an independent commission in the judicial branch of the United States." 28 U.S.C. 991(a). Congress directed the Commission to promulgate "guidelines * * * for use of a sentencing court in determining the sentence to be imposed in a criminal case," as well as "general policy statements regarding application of the guidelines." 28 U.S.C. 994(a)(1) and (2). Congress also directed the Commission to "periodically * * * review and revise" the Sentencing Guidelines. 28 U.S.C. 994(*o*).

The Guidelines are structured as a series of numbered guidelines and policy statements followed by additional commentary. See Sentencing Guidelines § 1B1.6. The Commission has explained, in a guideline entitled "Significance of Commentary," that the commentary following each guideline "may serve a number of purposes," including to "interpret the guideline or explain how it is to be applied." *Id.* § 1B1.7. The Commission has further explained that "[s]uch commentary is to be treated as the legal equivalent of a policy statement." *Ibid.* And the Commission has instructed that, in order to correctly "apply[] the provisions of" the Guidelines, a sentencing court must consider any applicable "commentary in the guidelines." *Id.* § 1B1.1(a) and (b). Congress has similarly required district courts to consider "the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission" in imposing a sentence. 18 U.S.C. 3553(b)(1).

Under 28 U.S.C. 994(x), to promulgate or amend a guideline, the Commission must comply with the notice-and-comment procedures for rulemaking by executive agencies. See 5 U.S.C. 553(b) and (c). And under 28 U.S.C. 994(p), the Commission must "submit to Congress" any proposed amendment to the Guidelines, along with "a statement of the reasons therefor." Proposed amendments generally may not take effect until 180 days after the Commission submits them to Congress. *Ibid.* The guidelines cited above, regarding the salience of commentary, were themselves subject to both notice-and-comment and congressional-review procedures. See, *e.g.*, 52 Fed. Reg. 18,046, 18,053, 18,109-18,110 (May 13, 1987) (notice of submission to Congress of "Application Instructions" in Section 1B1.1 and "Significance of Commentary" in Section 1B1.7) (emphasis omitted).

Although Sections 994(p) and (x) do not apply to policy statements and commentary, the Commission's rules provide that "the Commission shall endeavor to include amendments to policy statements and commentary in any submission of guideline amendments to Congress." U.S. Sentencing Comm'n R. 4.1. The rules similarly provide that the Commission "will endeavor to provide, to the extent practicable, comparable opportunities for public input on proposed policy statements and commentary." U.S. Sentencing Comm'n R. 4.3. And like Guidelines amendments, an "affirmative vote of at least four members of the Commission" is required to promulgate or amend any policy statement or commentary. 28 U.S.C. 994(a); see U.S. Sentencing Comm'n R. 2.2(b).

b. Before this Court's decision in *United States* v. *Booker*, 543 U.S. 220 (2005), the Sentencing Guidelines

were "mandatory" and limited a district court's discretion to impose a non-Guidelines sentence, *id.* at 227, 233. In *Stinson* v. *United States*, 508 U.S. 36 (1993), this Court addressed the role of Guidelines commentary and determined 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.

In reaching that determination, the Court drew an "analogy" to the principles of deference applicable to an executive agency's interpretation of its own regulations. *Stinson*, 508 U.S. at 44. The Court stated that, under those principles, as long as the "agency's interpretation of its own regulations does not violate the Constitution or a federal statute, it must be given 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" *Id.* at 45 (quoting *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)). The Court acknowledged that the analogy was "not precise," but nonetheless viewed affording "this measure of controlling authority to the commentary" as the appropriate approach in the particular circumstances of the Guidelines. *Id.* at 44-45.

2. In 2016, petitioner was caught with 75 small bags of crack cocaine during a traffic stop in the Bronx. Presentence Investigation Report (PSR) ¶¶ 9, 11, 16. New York City police officers were in the area in response to a 911 call in which the caller had reported that two men had threatened a third party at gunpoint, that shots had been fired, and that the two men with the gun had fled in a white BMW. PSR ¶ 9. Officers found and stopped the car 45 minutes later. PSR ¶ 10. Petitioner,

who was in the driver's seat with one passenger, was arrested on an outstanding warrant. *Ibid.* During a later inventory search of the car, officers found the 75 small bags, containing a total of 3.75 grams of crack cocaine packaged for distribution. PSR ¶¶ 11, 14, 16.

At the time of his arrest, petitioner was serving a three-year term of federal supervised release for two prior offenses: conspiring to distribute crack cocaine and possessing a firearm after a felony conviction. PSR ¶¶ 12, 48. Ten days after the arrest, officers searched his apartment pursuant to the terms of his supervised release. PSR ¶ 13. Officers found numerous items of drug-trafficking paraphernalia in plain view, including scales with drug residue. *Ibid.*

3. In 2017, a grand jury in the Southern District of New York returned a superseding indictment charging petitioner with distributing and possessing with intent to distribute crack cocaine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C); distributing and possessing with intent to distribute detectable amounts of cocaine and heroin (at the apartment), in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C); and maintaining a place for the purpose of manufacturing, distributing, or using a controlled substance, in violation of 21 U.S.C. 856. Superseding Indictment 1-2.

Petitioner pleaded guilty to the first count of the superseding indictment in exchange for dismissal of the other counts. Plea Hr'g Tr. 6, 17; Plea Agreement 1. As part of the parties' written plea agreement, the government also agreed not to file an information under 21 U.S.C. 851, which would have made petitioner eligible for enhanced statutory penalties based on his prior drug-trafficking conspiracy conviction. Plea Agreement 1; see 21 U.S.C. 841(b)(1)(C).

The now-advisory Sentencing Guidelines generally prescribe significantly higher offense levels than would otherwise apply for an offense committed by a "career offender." Sentencing Guidelines § 4B1.1(b). A defendant is a "career offender" if the defendant was at least 18 years old at the time of the current offense, the current offense was "a felony that is either a crime of violence or a controlled substance offense," and the defendant previously committed two such felonies. *Id.* § 4B1.1(a). The Guidelines define a "controlled substance offense" for these purposes 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.

Id. § 4B1.2(b). Application Note 1 in the commentary to that guideline states that the term "'controlled substance offense' include[s] the offenses of aiding and abetting, conspiring, and attempting to commit such [an] offense[]." *Id.* § 4B1.2, comment. (n.1) (emphasis omitted).

Prior to sentencing, the Probation Office determined that petitioner is a career offender under the Guidelines. PSR ¶ 27; cf. PSR Sentencing Recommendation 21 (observing that "[t]he instant offense marks [petitioner's] 17th arrest and conviction"). The Probation Office determined, in particular, that petitioner's 2014 conviction for conspiring to distribute crack cocaine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C) and 846, qualifies as a "controlled substance offense." See PSR

¶¶ 27, 48; PSR Addendum 20. Based on the career-offender guideline, the Probation Office calculated petitioner's advisory guidelines range to be 151 to 188 months. PSR ¶ 84.

The district court adopted those calculations at petitioner's sentencing, overruling petitioner's objections to the application of the career-offender guideline. Sent. Tr. 27-28; see Plea Agreement 2 (noting parties' disagreement about application of career-offender guideline). The court then granted a downward variance and sentenced petitioner to 120 months of imprisonment, to be followed by three years of supervised release. Sent. Tr. 47-49; Judgment 2-3. The court later issued a written opinion to "explain and supplement" its oral ruling on the career-offender guideline, in which it observed that "binding Second Circuit precedent" required finding that petitioner's "conviction for conspiracy to distribute narcotics under 21 U.S.C. § 846 qualifies as a 'controlled substance offense' under Section 4B1.2(b)." Pet. App. 16a, 21a (citing *United States* v. *Jackson*, 60 F.3d 128, 133 (2d Cir.), cert. denied, 516 U.S. 980 (1995), 516 U.S. 1130, and 516 U.S. 1165 (1996)).

4. The court of appeals affirmed. Pet. App. 1a-14a. As relevant here, the court explained that the "plain text of [Section] 4B1.2 as interpreted by Application Note 1 * * * appears to include narcotics conspiracies such as 21 U.S.C. § 846." *Id.* at 10a. Petitioner argued that Application Note 1 "conflicts with the Guidelines text by improperly expanding" the definition of a controlled substance offense to encompass conspiracies. *Id.* at 11a. The court rejected that argument, observing that its prior decision in *Jackson* foreclosed such a challenge to the validity of Application Note 1. *Ibid.*; see

Jackson, 60 F.3d at 131 (treating Application Note 1 as "binding authority") (citing *Stinson*, 508 U.S. at 38). The court additionally explained that Section 846 itself "manifested congressional 'intent that drug conspiracies and underlying offenses should not be treated differently' by 'imposing the same penalty for a narcotics conspiracy conviction as for the substantive offense.'" Pet. App. 13a-14a (quoting *Jackson*, 60 F.3d at 133) (brackets omitted); see 21 U.S.C. 846 ("Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy."). The court observed that petitioner's interpretation of the career-offender guideline as excluding Section 846 drug-trafficking conspiracies "would place the Sentencing Commission at odds with Congress itself by attaching sentencing enhancements to substantive narcotics crimes but not to the very narcotics conspiracies that Congress wanted treated the same." Pet. App. 14a.

The court of appeals noted that the Sixth and D.C. Circuits had "recently agreed with [petitioner's] argument that Application Note 1 conflicts with the text of [Section] 4B1.2(b) by including crimes that the Guideline text excludes." Pet. App. 11a (citing *United States* v. *Havis*, 927 F.3d 382, 385-387 (6th Cir. 2019) (en banc; per curiam), and *United States* v. *Winstead*, 890 F.3d 1082, 1090-1092 (D.C. Cir. 2018)). But the panel explained that it was "not at liberty to revisit *Jackson*." *Id.* at 12a. The court later denied petitioner's request for rehearing en banc, without any noted dissent. *Id.* at 24a.

ARGUMENT

Petitioner contends (Pet. 20-24) that Application Note 1 to Sentencing Guidelines § 4B1.2 is invalid insofar as it interprets the career-offender guideline to include attempt and conspiracy offenses, and that applying the guideline to such offenses is inconsistent with this Court's decision in *Kisor* v. *Wilkie*, 139 S. Ct. 2400 (2019). That contention does not warrant certiorari in this case. The court of appeals correctly determined, in accord with the decisions of a large majority of the circuits, that petitioner's prior conviction for conspiring to distribute crack cocaine is a "controlled substance offense" under Section 4B1.2(b). Although several courts have recently declined to apply that guideline to attempt and conspiracy offenses, those decisions are unsound and reflect an incomplete understanding of the circumstances under which the career-offender guideline and Application Note 1 were adopted. In any event, the Commission has already begun the process of addressing the recent disagreement, obviating any need for review by this Court at this time. The petition for a writ of certiorari should be denied.

1. a. The court of appeals correctly rejected petitioner's challenge to the application of the career-offender guideline in calculating his advisory guidelines range. Petitioner's prior conviction for conspiring to distribute crack cocaine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C) and 846, qualifies as a "controlled substance offense" under Section 4B1.2(b). Section 4B1.2(b) defines such an offense as "an offense under federal or state law * * * that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the pos-

session of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense." Sentencing Guidelines § 4B1.2(b). Application Note 1 make clear that the term "'controlled substance offense' include[s] the offenses of aiding and abetting, conspiring, and attempting to commit such [an] offense[]." *Id.* § 4B1.2, comment. (n.1) (emphasis omitted). Petitioner's conspiracy conviction plainly qualifies. Section 841 proscribes the "distribut[ion]" of controlled substances such as crack cocaine, 21 U.S.C. 841(a)(1), and Section 846 forbids "conspir[ing]" to commit that offense, 21 U.S.C. 846.

Application Note 1's interpretation of the career-offender guideline as including drug conspiracies is firmly grounded in the guideline's text. The key term is "prohibits." Unlike an adjacent provision stating that a "crime of violence * * * *is* murder" or a list of other specified offenses, Sentencing Guidelines § 4B1.2(a)(2) (emphasis added), the definition of "controlled substance offense" extends to any felony offense that "*prohibits* the manufacture, import, export, distribution, or dispensing of a controlled substance," *id.* § 4B1.2(b) (emphasis added). Although the term "prohibit" can mean "forbid by authority or command," it can also mean "prevent from doing or accomplishing something." *Webster's Third New International Dictionary of the English Language Unabridged* 1813 (1986). In that sense, the term is synonymous with "hinder" or "preclude." See, *e.g.*, *Black's Law Dictionary* 1465 (11th ed. 2019) (defining "prohibit" to mean "forbid by law" or "prevent, preclude, or severely hinder").

Application Note 1 confirms that Section 4B1.2(b) uses the term "prohibit" in the latter sense. As the Eleventh Circuit recognized in *United States* v. *Lange*,

862 F.3d 1290, cert. denied, 138 S. Ct. 488 (2017), after reviewing the two accepted senses of "prohibit" noted above, see *id.* at 1295, Application Note 1 indicates that "'[c]ontrolled substance offense' cannot mean only offenses that forbid conduct outright, but must also include related inchoate offenses that aim toward that conduct." *Ibid.* The court observed that "a ban on conspiring to manufacture drugs hinders manufacture even though it will ban conduct that is not itself manufacturing." *Ibid.*; cf. *United States* v. *Vea-Gonzales*, 999 F.2d 1326, 1330 (9th Cir. 1993) ("The guideline refers to violations of laws prohibiting the manufacture, import, export, distribution, or dispensing of drugs. Aiding and abetting, conspiracy, and attempt are all violations of those laws.").

b. The context, purpose, and history of the Guidelines further confirm that the definition here is best understood to include attempts and conspiracies. In the Sentencing Reform Act, Congress directed the Commission to "assure" that the Guidelines "specify a sentence to a term of imprisonment at or near the" statutory maximum for a felony offense if: (1) the offense was "a crime of violence" or an offense "described in" specific sections of the U.S. Code proscribing drug trafficking, including 21 U.S.C. 841; and (2) the offender had two or more prior convictions for such offenses. Sentencing Reform Act § 217(a), 98 Stat. 2021; see 28 U.S.C. 994(h).

Congress thus sought to ensure that the new Guidelines would "impose substantial prison terms" on "repeat drug traffickers." *United States* v. *Jackson*, 60 F.3d 128, 133 (2d Cir.) (citation omitted), cert. denied, 516 U.S. 980 (1995), 516 U.S. 1130, and 516 U.S. 1165

(1996). Congress has also, both then and now, prescribed the same penalties for conspiring or attempting to violate any of the specific drug crimes listed in Section 994(h) as for the underlying crimes themselves. See 21 U.S.C. 846, 963; 46 U.S.C. 70506(b); Act of Sept. 15, 1980, Pub. L. No. 96-350, § 3, 94 Stat. 1160. In light of those provisions, the court of appeals correctly recognized that defining "controlled substance offense" to *exclude* conspiring to commit federal drug crimes "would place the Sentencing Commission at odds with Congress itself," by failing to provide comparable treatment "to the very narcotics conspiracies that Congress wanted treated the same." Pet. App. 14a.

Accordingly, in the first edition of the Guidelines, the Commission implemented Section 994(h) by promulgating the career-offender guideline—using the same operative terms, "crime of violence" and "controlled substance offense," now found in the current version. Sentencing Guidelines § 4B1.1 (1987); see *id.* § 4B1.1 comment. (backg'd). The Commission defined "controlled substance offense" to mean "an offense identified" in the list of drug crimes Congress had provided "and similar offenses," *id.* § 4B1.2(2), with an application note explaining that the term "also includes aiding and abetting, conspiring, or attempting to commit such offenses, and other offenses that are substantially equivalent to the offenses listed," *id.* § 4B1.2, comment. (n.2). Petitioner therefore errs in suggesting (Pet. 8) that the Commission only later "amended" the commentary to include such offenses; instead, it has always treated them as substantially equivalent to the substantive crimes.

In 1989, the Commission amended the definition of "controlled substance offense" to essentially its current

form. Sentencing Guidelines App. C, Amend. 268 (Nov. 1, 1989). In doing so, it remained committed to identical treatment for attempts, conspiracies, and the object crimes whose statutory penalties they adopt. Indeed, a conflict later developed on the specific issue of drug-trafficking conspiracies—namely, whether 28 U.S.C. 994(h), standing alone, authorized the Commission to include them in the definition of "controlled substance offense." See *Jackson*, 60 F.3d at 132 (collecting cases). The Commission resolved that conflict by amending the commentary to the career-offender guideline to invoke, as a source of authority, both Section 994(h) and Section 994(a)—*i.e.*, the Commission's general authority to promulgate guidelines. Sentencing Guidelines App. C, Amend. 528 (Nov. 1, 1995).

c. In affirming petitioner's sentence, the court of appeals adhered to a precedent in which it had applied this Court's decision in *Stinson* v. *United States*, 508 U.S. 36 (1993), to hold that Application Note 1 is "binding authority" because it is not "'inconsistent with, or a plainly erroneous reading of,'" Section 4B1.2(b). *Jackson*, 60 F.3d at 131 (quoting *Stinson*, 508 U.S. at 38); see Pet. App. 11a-12a (holding that "*Jackson* precludes [petitioner's] argument that Application Note 1 is invalid"). Petitioner asserts (Pet. 20) that the court of appeals erred by "reflexively deferr[ing] to the commentary's addition of inchoate offenses," effectively contending that the court was required to reconsider its precedent upholding Application Note 1 after this Court's clarification in *Kisor* v. *Wilkie*, *supra*, of the circumstances in which a federal court should defer to an agency's interpretation of its own rules, see Pet. 20-22. *Kisor* itself, however, does not require such reconsideration.

In *Kisor*, this Court considered whether to overrule *Auer* v. *Robbins*, 519 U.S. 452 (1997), and *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), and thus "discard[] the deference" afforded under those decisions to "agencies' reasonable readings of genuinely ambiguous regulations." *Kisor*, 139 S. Ct. at 2408; see *Auer*, 519 U.S. at 461 (stating that an agency's interpretation of its own regulation is "controlling unless 'plainly erroneous or inconsistent with the regulation'") (quoting, indirectly, *Seminole Rock*, 325 U.S. at 414). The Court took *Kisor* as an opportunity to "restate, and somewhat expand on," the limiting principles for deferring to agency's interpretation of its own regulation. 139 S. Ct. at 2414. Among other things, the Court emphasized that "a court should not afford *Auer* deference" to an agency's interpretation of a regulation "unless the regulation is genuinely ambiguous." *Id.* at 2415.

Notwithstanding those clarifications, the Court pointedly declined to overrule *Auer* or *Seminole Rock*—let alone the "legion" of other precedents applying those decisions, including *Stinson*. *Kisor*, 139 S. Ct. at 2411 n.3 (opinion of Kagan, J.) (identifying *Stinson*, 508 U.S. at 44-45, as one of numerous examples); see *id.* at 2422 (majority opinion) (citing this "long line of precedents" as a reason not to overrule *Auer*) (citation omitted); cf. *id.* at 2424-2425 (Roberts, C.J., concurring in part). The Court explained that it had "applied *Auer* or *Seminole Rock* in dozens of cases, and lower courts have done so thousands of times," and that "[d]eference to reasonable agency interpretations of ambiguous rules pervades the whole corpus of administrative law." *Id.* at 2422 (majority opinion). And the Court adhered to *Auer* on stare decisis grounds in part to avoid "allow[ing] reliti-

gation of any decision based on *Auer*," with the attendant "instability" that would result from overturning precedent in "so many areas of law, all in one blow." *Ibid.*

Kisor therefore cannot support the principle that petitioner effectively advocates here, under which a court of appeals must consider anew every one of its prior decisions deferring to the Commission's commentary under *Stinson*. To be sure, *Kisor* provides the governing standards for determining whether a court must defer to an executive agency's interpretation of a regulation, see 139 S. Ct. at 2414-2418, and *Stinson* reasoned that—by "analogy," albeit "not [a] precise" one—the Commission's commentary interpreting the Guidelines should be treated the same way, 508 U.S. at 44; see *id.* at 44-46. The government has accordingly taken the position, including in this case, that *Kisor* "sets forth the authoritative standards for determining whether particular commentary is entitled to deference." Gov't Corrected C.A. Br. in Opp. to Pet. for Reh'g 5. But it does not follow that a court of appeals is required to reopen settled law in order to apply those standards to matters previously decided in reliance on *Auer* or *Seminole Rock*—or, here, *Stinson*. Indeed, the Court in *Kisor* adhered to *Auer* and *Seminole Rock* in part to avoid such wasteful "relitigation." 139 S. Ct. at 2422.

d. In any event, the result below would not have been different had the court of appeals reconsidered its precedent in light of *Kisor*. Petitioner contends (Pet. 23-24) that Application Note 1 is invalid because Section 4B1.2 unambiguously does not encompass conspiracies and attempts. But petitioner's cursory textual analysis fails even to consider the established alternative meaning of the term "prohibit" as "hinder" or "prevent."

Compare Pet. 23, with pp. 10-11, *supra*. Nor does petitioner address the context, purpose, and history of the career-offender guideline, all of which support the Commission's longstanding interpretation. At a minimum, those considerations demonstrate that "the interpretive question" of whether Section 4B1.2(b) encompasses drug-trafficking conspiracies "has no single right answer," *Kisor*, 139 S. Ct. at 2415, leaving an ambiguity for the agency to resolve by interpretation.

Application Note 1 also has all the hallmarks of an agency interpretation warranting deference. First, it is the Commission's "authoritative" and "official" position, *Kisor*, 139 S. Ct. at 2416 (citation omitted), having been included in the official Guidelines Manual for decades. Second, Application Note 1 implicates the Commission's "substantive expertise." *Id.* at 2417. Congress specifically delegated to the Commission the task of assuring that the Guidelines impose substantial penalties for recidivist drug offenders, 28 U.S.C. 994(h), and the guidelines and commentary at issue here are the result of that mandate. And this Court itself subsequently recognized the Commission's substantive expertise in interpreting the Guidelines. See *Stinson*, 508 U.S. at 45 (explaining that the Commission's commentary "assist[s] in the interpretation and application of [the Guidelines], which are within the Commission's particular area of concern and expertise and which the Commission itself has the first responsibility to formulate and announce"); *Mistretta* v. *United States*, 488 U.S. 361, 379 (1989) ("Developing proportionate penalties for hundreds of different crimes by a virtually limitless array of offenders is precisely the sort of intricate, labor-intensive task for which delegation to an expert body is

especially appropriate."). Third, Application Note 1 reflects the Commission's "fair and considered judgment," not an ad hoc position of convenience adopted for litigation. *Kisor*, 139 S. Ct. 2417-2418 (citations omitted). The Commission has interpreted Section 4B1.2(b) to include attempts and conspiracies continuously since 1987. See Sentencing Guidelines § 4B1.2, comment. (n.2) (1987).

Petitioner observes (Pet. 24) that the Commission has addressed attempts and conspiracies explicitly in the text of other guidelines. But the inference petitioner would draw from that evidence—that such offenses are *excluded* unless expressly mentioned in the text of a guideline—is unsound. For example, the Commission has addressed the defendant's age in the text of the career-offender guideline, but doing so does not foreclose interpreting other provisions also to require that an offense have been committed after the defendant reached adulthood. See Sentencing Guidelines § 4B1.1(a) (providing that a current offense may trigger the career-offender guideline only if it was committed when defendant was "at least eighteen years old"); *id.* § 4B1.2, comment. (n.1) (interpreting the guideline to mean that a qualifying prior conviction also must have been "committed at age eighteen or older"). Analogously, while some federal statutes expressly permit agencies to engage in cost-benefit analysis, this Court has rejected the inference that, as a result, a statute that is merely "silent * * * with respect to cost-benefit analysis" necessarily "implies [a] prohibition." *Entergy Corp.* v. *Riverkeeper, Inc.*, 556 U.S. 208, 222 (2009); see *id.* at 223 (deferring to agency's interpretation of the statute). The inference that textual silence prohibits the agency's interpretation is equally unsound here.

2. Petitioner also contends that the courts of appeals are divided on a methodological question about whether a "threshold determination of ambiguity" is necessary before deferring to the Commission's commentary interpreting a guideline. Pet. 11 (capitalization and emphasis omitted). But the Second Circuit did not address that methodological question here; instead, as explained above, it simply—and permissibly—adhered to a pre-*Kisor* precedent upholding Application Note 1. Petitioner is correct (Pet. 12-17) that a recent disagreement has arisen in the courts of appeals specifically concerning the validity of Application Note 1's interpretation of Section 4B1.2. But that disagreement does not warrant this Court's review at this time. The minority position that petitioner advocates is mistaken, and in any event the Commission has already proposed an amendment to the text of Section 4B1.2 to resolve the disagreement.

a. The Second Circuit and eight other courts of appeals have accepted and applied the Commission's interpretation, in Application Note 1, that Section 4B1.2(b) encompasses inchoate offenses. Pet. App. 11a-12a; see *United States* v. *Crum*, 934 F.3d 963, 966-967 (9th Cir. 2019) (per curiam), cert. denied, 140 S. Ct. 2629 (2020); *United States* v. *Merritt*, 934 F.3d 809, 811 (8th Cir. 2019), cert. denied, 140 S. Ct. 981 (2020); *United States* v. *Adams*, 934 F.3d 720, 729 (7th Cir. 2019), cert. denied, 140 S. Ct. 824 (2020); *Lange*, 862 F.3d at 1295 (11th Cir.); *United States* v. *Nieves-Borrero*, 856 F.3d 5, 9 (1st Cir. 2017); *United States* v. *Dozier*, 848 F.3d 180, 183 & n.2 (4th Cir. 2017); *United States* v. *Martinez*, 602 F.3d 1166, 1174 (10th Cir. 2010); *United States* v. *Guerra*, 962 F.2d 484, 485-487 (5th Cir. 1992). Three courts have disagreed, including one in a decision post-dating the filing of the petition for a writ of certiorari in this case. See

United States v. *Nasir*, 982 F.3d 144, 156-160 (3d Cir. 2020) (en banc); *United States* v. *Havis*, 927 F.3d 382, 386-387 (6th Cir. 2019) (en banc; per curiam); *United States* v. *Winstead*, 890 F.3d 1082, 1090-1092 (D.C. Cir. 2018).

Those three decisions, however, not only fail to appreciate that Application Note 1 reflects the best reading of the guideline's text, but also rest on a mistaken premise concerning it. In each case, the court of appeals viewed the Application Note as an improper attempt by the Commission to "*add* an offense not listed in" the career-offender guideline without satisfying the procedural requirements for amending the text of the Guidelines, *Havis*, 927 F.3d at 386—*i.e.*, publication of a proposed amendment for notice and comment, 28 U.S.C. 994(x), and submission of the amendment to Congress for review, 28 U.S.C. 994(p). See *Nasir*, 982 F.3d at 159 (stating that giving effect to Application Note 1 would "allow circumvention of the checks Congress put on the" Commission); *Havis*, 927 F.3d at 386 (asserting that commentary "never passes through the gauntlets of congressional review or notice and comment"); *Winstead*, 890 F.3d at 1092 (observing that, "[i]f the Commission wishes to expand the definition of 'controlled substance offenses' to include attempts, it may * * * submit[] the change for congressional review"). In fact, the Commission has repeatedly published Application Note 1 for comment and has submitted it to Congress for review.

The Commission submitted the first version of the career-offender guideline to Congress in April 1987 as part of the initial proposed Guidelines. See 52 Fed. Reg. at 18,094-18,095. Although that version did not include any commentary addressing attempts and conspiracies,

the Commission added such commentary before the initial Guidelines took effect, as part of a broader effort to "revise[] the commentary" to "enhance understanding and clarity" without "mak[ing] substantive changes." 52 Fed. Reg. 44,674, 44,674 (Nov. 20, 1987); see *id.* at 44,729 (commentary stating that a controlled substance offense includes "aiding and abetting, conspiring, or attempting to commit" such an offense); see also Sentencing Guidelines § 4B1.2, comment. (n.2) (1987) (discussed at p. 12, *supra*). When the Commission added that commentary, it explained that, while revisions to commentary are not required by statute to go through notice-and-comment or congressional-review procedures, it nonetheless "intend[ed] to submit these revisions to Congress, after a comment period, in order to eliminate any questions as to their validity." 52 Fed. Reg. at 44,674; cf. U.S. Sentencing Comm'n R. 4.1, 4.3 (stating that the Commission "endeavor[s]" to use notice-and-comment and congressional-review procedures for amendments to commentary). After re-promulgating the October 1987 version of the Guidelines on an emergency basis in January 1988, see 53 Fed. Reg. 1286, 1286, 1291-1292 (Jan. 15, 1988), the Commission submitted the re-promulgated version of the Guidelines and commentary to Congress in April 1988. 53 Fed. Reg. 15,530, 15,530 (Apr. 29, 1988).

Any suggestion that the Commission sought to "add" inchoate offenses while circumventing "congressional review and notice and comment," *Havis*, 927 F.3d at 386-387 (emphasis omitted), is therefore incorrect. To the contrary, the Commission published the relevant commentary for comment and submitted it to Congress precisely to avoid any "questions as to [its] validity."

52 Fed. Reg. at 44,674. Moreover, in 1989 the Commission published for comment a proposed amendment to "clarify the coverage" of the career-offender guideline, in part by addressing inchoate offenses in Application Note 1 in essentially its current form. 54 Fed. Reg. 9122, 9162 (Mar. 3, 1989) ("The terms 'crime of violence' and 'controlled substance offense' include aiding and abetting, conspiring, and attempting to commit such offenses."). The Commission again submitted the proposed amendment to Congress for review before adopting it. 54 Fed. Reg. 21,348, 21,379 (May 17, 1989).

The Commission has since modified other aspects of Application Note 1, with each change published for comment and submitted to Congress:

Publication for Comment	Notice of Submission to Congress
60 Fed. Reg. 14,054, 14,055 (Mar. 15, 1995)	60 Fed. Reg. 25,074, 25,087 (May 10, 1995)
62 Fed. Reg. 152, 181 (Jan. 2, 1997)	62 Fed. Reg. 26,616, 26,632 (May 14, 1997)
65 Fed. Reg. 7080, 7089 (Feb. 11, 2000)	65 Fed. Reg. 26,880, 26,897 (May 9, 2000)
66 Fed. Reg. 59,330, 59,335 (Nov. 27, 2001)	67 Fed. Reg. 37,476, 37,490 (May 29, 2002)
68 Fed. Reg. 75,340, 75,373-75,374 (Dec. 30, 2003)	69 Fed. Reg. 28,994, 29,025 (May 19, 2004)
72 Fed. Reg. 4372, 4397-4398 (Jan. 30, 2007)	72 Fed. Reg. 28,558, 28,575 (May 21, 2007)
74 Fed. Reg. 4802, 4822 (Jan. 27, 2009)	74 Fed. Reg. 21,750, 21,760 (May 8, 2009)

Publication for Comment	Notice of Submission to Congress
80 Fed. Reg. 2570, 2572-2574 (Jan. 16, 2015)	80 Fed. Reg. 25,782, 25,794 (May 5, 2015)
80 Fed. Reg. 49,314, 49,315-49,316 (Aug. 17, 2015)	81 Fed. Reg. 4741, 4742 (Jan. 27, 2016)

Notably, in one of those instances, the Commission proposed to re-promulgate Application Note 1 "without change" while altering the "Background" discussion in Section 4B1.1 to resolve a conflict about whether the Commission had validly included "inchoate offenses" in the career-offender guideline. 60 Fed. Reg. at 25,087; see pp. 12-13, *supra*. Congress allowed that proposal to take effect while rejecting two other amendments—encompassing changes to the text of the Guidelines *and* the commentary—that the Commission had proposed at the same time. See Act of Oct. 30, 1995, Pub. L. No. 104-38, § 1, 109 Stat. 334; 60 Fed. Reg. at 25,075-25,077, 25,085-25,086. Had Congress disagreed with the Commission's view on inchoate offenses, it could have similarly disapproved of Application Note 1 or the change to the commentary clarifying the authority on which it rests. Congress did neither.

The history described above refutes petitioner's claim that the Commission acted "without notice and comment or congressional review" when it interpreted Section 4B1.2 to encompass drug-trafficking conspiracies. Pet. 3 (emphasis omitted). The regulatory history also weighs against addressing any broader methodological questions about *Stinson* or *Kisor* in this case. The loose analogy that this Court drew in *Stinson* between the Commission's commentary and an executive

agency's interpretation of its own regulations was predicated in part on the assumption that the commentary was not subject to the same procedures that apply to rulemaking. See 508 U.S. at 39-40, 45. That assumption appears to have been correct for the particular commentary at issue in *Stinson*, see Sentencing Guidelines App. C, Amend. 433 (Nov. 1, 1991) (discussed in *Stinson*, 508 U.S. at 39); 57 Fed. Reg. 20,148, 20,157 (May 11, 1992), but it would not be correct here.

More broadly, a central point of contention in *Kisor* was whether executive agencies might, under the guise of interpretation, use interpretive rules that do not go through notice and comment to make substantive changes to legislative rules, which are required to go through notice and comment. See 139 S. Ct. at 2420-2421 (opinion of Kagan, J.); *id.* at 2434-2435 (Gorsuch, J., concurring in the judgment). All of those concerns are absent here. The Commission published the relevant commentary, solicited public comment on it, and submitted it to Congress—on multiple occasions. In other words, the Commission has already repeatedly run through the same "gauntlets of congressional review [and] notice and comment," *Havis*, 927 F.3d at 386, that would have applied had the Commission instead chosen to alter the text of the guideline itself.

b. In any event, further review of the validity of Application Note 1 is unwarranted at this time. This Court typically leaves the resolution of such issues to the Commission. Cf. Pet. 17 & n.5 (acknowledging that practice, while questioning it). The Commission has a "statutory duty 'periodically to review and revise' the Guidelines." *Braxton* v. *United States*, 500 U.S. 344, 348 (1991) (quoting 28 U.S.C. 994(*o*)) (brackets omitted). Con-

gress thus "necessarily contemplated that the Commission would periodically review the work of the courts, and would make whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest." *Ibid.* Given that the Commission can and does amend the Guidelines to eliminate conflicts or correct errors, this Court ordinarily does not review decisions interpreting the Guidelines. See *ibid.*; see also *United States* v. *Booker*, 543 U.S. 220, 263 (2005) ("The Sentencing Commission will continue to collect and study appellate court decisionmaking. It will continue to modify its Guidelines in light of what it learns, thereby encouraging what it finds to be better sentencing practices.").

That prudential policy applies with special force here because the Commission has already begun the process of addressing the recent disagreement regarding Application Note 1. In December 2018, after the D.C. Circuit's decision in *United States* v. *Winstead*, *supra*, the Commission sought public comment on proposed revisions to Section 4B1.2 and Application Note 1. 83 Fed. Reg. 65,400, 65,412-64,415 (Dec. 20, 2018). The Commission explained that "[m]ost circuits have held that the definitions of 'crime of violence' and 'controlled substance offense' at § 4B1.2 include the offenses of aiding and abetting, conspiracy to commit, and attempt to commit such crimes, in accordance with the commentary to the guideline," but that the D.C. Circuit had "concluded otherwise" in *Winstead*. *Id.* at 65,413. In the Commission's view, "the commentary that accompanies the guidelines is authoritative and failure to follow the commentary would constitute an incorrect application of the guidelines." *Ibid.* Nonetheless, to resolve the disagreement, the Commission proposed to "move the inchoate offenses provision from the Commentary to § 4B1.2 to

the guideline itself as a new subsection (c) to alleviate any confusion and uncertainty resulting from the D.C. Circuit's decision." *Ibid.*

The Commission has not yet acted on that proposal. Since 2019, the Commission has lacked the necessary quorum of four voting members to amend any guideline or commentary. 28 U.S.C. 994(a); U.S. Sentencing Comm'n R. 2.2(b); see U.S. Sentencing Comm'n, *2019 Annual Report* 3 (2020) (noting lack of quorum). But the December 2018 proposal demonstrates that the question whether Application Note 1 in its current form is a binding and authoritative interpretation of Section 4B1.2 is likely to be resolved by the Commission itself. And although petitioner seeks to frame the question presented as implicating a broader methodological dispute that the Commission cannot itself resolve (see Pet. 17-19), all of the decisions he invokes in support of a putative conflict (Pet. 12-17) involved Application Note 1. Many also predated *Kisor*—including the two decisions whose approach he favors, see Pet. 12 (discussing *Havis*, *supra*, and *Winstead*, *supra*)—which underscores that the current dispute turns on the particulars of Section 4B1.2 and Application Note 1, not broader principles of administrative law.

3. Petitioner's remaining arguments for review lack merit. Petitioner contends (Pet. 27) that the "criminal context" of this case supports granting certiorari. See Pet. 27-29. But of course, every Guidelines dispute arises in the context of criminal sentencing. The Court has nonetheless typically declined to review questions that the Commission itself may resolve.

Petitioner also contends (Pet. 24-25) that certiorari is warranted to protect the separation of powers. But unlike the agencies whose interpretations were at issue

in *Seminole Rock*, *Auer*, and *Kisor*, the Commission does not exercise any "executive Power," U.S. Const. Art. II, § 1, Cl. 1. Instead, Congress established the Commission "as an independent commission in the judicial branch." 28 U.S.C. 991(a). At least three of its members must be federal judges. *Ibid.* And this Court has held that the Commission's functions are judicial in nature, akin to other "nonadjudicatory activities" that the Constitution permits Congress to assign to the Judicial Branch, such as adopting rules of procedures. *Mistretta*, 488 U.S. at 386; see *id.* at 386-391. A case concerning the Commission would thus be an unsuitable vehicle in which to address any broader questions about deference to executive agency interpretations.

Petitioner's separation-of-powers concerns are also misplaced because the Guidelines differ from the kind of legislative rules that have occasioned such concerns in other cases. The hallmark of a legislative rule, for which notice and comment is generally required, is that the rule has "the force and effect of law." *Kisor*, 139 S. Ct. at 2410 (opinion of Kagan, J.) (citation omitted). But the Guidelines, including the commentary, are "binding" only in a procedural sense after this Court's decision in *United States* v. *Booker*, *supra*. A sentencing court must apply them correctly when calculating a defendant's guidelines range, at step one of the three-step sentencing process, and when exercising traditional departure authority, at step two of that process. See, *e.g.*, *Gall* v. *United States*, 552 U.S. 38, 41 (2007); Sentencing Guidelines § 1B1.1(a) and (b). But once those steps are completed, the Guidelines' text, policy statements, and commentary all operate at the same nonbinding level: to "advise sentencing courts how to exercise their discretion within the bounds established

by Congress." *Beckles* v. *United States*, 137 S. Ct. 886, 895 (2017). Petitioner fails to explain how deferring to the Commission's interpretation of its own advice could offend the separation of powers.

Finally, the Guidelines present unique issues that would render them an unsuitable vehicle for a further examination of the issues addressed in *Kisor*. As previously noted, see pp. 2-3, *supra*, the role of commentary in interpreting the Guidelines is codified in guidelines that were *themselves* subject to notice and comment and congressional review. Sentencing Guidelines §§ 1B1.1, 1B1.7. *Stinson*'s holding primarily relies on those provisions, see 508 U.S. at 41, and their promulgation provides even further reason for applying Application Note 1's interpretation of Sentencing Guidelines § 4B1.2(b).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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