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

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

Although the government labors for nearly 30 pages, it either fails to dispute or affirmatively concedes facts demonstrating that review is necessary to determine whether courts may defer to Sentencing Guidelines commentary regardless of whether the underlying Guideline is ambiguous.

The government concedes that "[p]etitioner is correct" that "disagreement has arisen in the courts of appeals" about whether the Sentencing Commission's Application Note 1 warrants deference in extending the Career Offender Guideline's enhanced penalties to inchoate offenses. Opp. 18. And it does not dispute that disagreement is just one manifestation of how "the courts of appeals are divided" on the broader "methodological question about whether a 'threshold determination of ambiguity' is necessary before deferring to the Commission's commentary interpreting a guideline." *Ibid.*

It scarcely could. Since the filing of the petition, the unanimous en banc Third Circuit overruled circuit precedent to hold that "*Kisor*'s limitations on deference to administrative agencies" apply to the Sentencing Guidelines and foreclose deference unless the Guideline is "genuinely ambiguous." *United States* v. *Nasir*, 982 F.3d 144, 158, 160 (2020). That court consciously joined the unanimous en banc Sixth Circuit and the D.C. Circuit, which have held that the Commission's commentary is invalid if unmoored from the text of the Guideline. *Id.* at 159. Court after court has made clear that what is at stake is not just the validity of Application Note 1, but broader issues about "the application of the commentary to the interpretation of the guidelines, * * * informed by principles of administrative law." *Id.* at 157; *United States* v. *Paauwe*, 968 F.3d 614, 618 (6th Cir. 2020) (applying same "important

principle of administrative law" to sexual-offender enhancement). Just recently, the Fifth Circuit "acknowledge[d] the circuit split" that has developed and noted that the Third Circuit's recent decision implicated broader issues of "limitations on deference to administrative agencies," before concluding that it "would be inclined to agree with the Third Circuit" if "not constrained by" circuit precedent. *United States* v. *Goodin*, ___ Fed. Appx. ___, 2021 WL 506036, at *8 n.1 (Feb. 10, 2021).

Nor does the government dispute that the questions presented are important and recur frequently. It scarcely could. During 2016-2019, the career-offender enhancement was imposed on approximately 1,600-1,800 defendants *every year*. Section 4B1.2's definition of a "controlled substance offense" also is the basis for other significant sentencing enhancements, including under the felon-in-possession Guideline, U.S.S.G. §2K2.1(a)(2), making §4B1.2's scope independently important for the approximately 6,500 defendants sentenced annually for that offense. That two courts in recent years have reconsidered the validity of Application Note 1 en banc demonstrates how important the issue is, both practically and doctrinally: The career-offender enhancement carries "significantly higher offense levels," Opp. 6, yielding "severe, even Draconian, penalties." App. 3a n.2. It added more than *nine years* to petitioner's Guidelines range. The broader question of whether courts should defer to commentary regardless of Guidelines ambiguity potentially affects every one of the approximately 75,000 federal defendants sentenced each year. The structural importance of this broader question, which the Commission undisputedly cannot resolve, explains why not just civil-liberties groups but trade associations filed amicus briefs in *Nasir* and here. "[A] court that can deploy *Auer* deference to extend petitioner's incarceration by *nine years* can use the

same technique to destroy the settled expectations of American builders and farmers." Home Builders Br. 4.

Nor does the government identify any vehicle problem that would prevent this Court from resolving these issues. The government's opposition is essentially a merits brief—a lengthy defense of Application Note 1's validity. The government concedes that "*Kisor* 'sets forth the authoritative standards for determining whether commentary is entitled to deference.'" Opp. 15 (quoting Gov't Corrected Reh'g Opp. 5). It nonetheless maintains that the Guidelines commentary correctly interpreted § 4B1.2 to include inchoate crimes because while the Guideline never mentions them, its reference to offenses that "prohibit" drug distribution encompasses offenses whose prosecution "hinder" it—an absurd reading that would cause the Guideline to cover much of the federal criminal code. The government also argues that *Kisor* was not meant to disturb precedents reflexively deferring to Guidelines commentary, which it concedes are wrong on first principles. But see *Nasir*, 982 F.3d at 177 (Bibas, J., concurring) ("Old precedents that turned to the commentary rather than the text no longer hold.").

The government's insistence that courts may forever adhere to reflexively deferential precedent underscores the importance of immediate review to clarify *Kisor*'s implications for criminal sentencing.

A. Only This Court Can Resolve The Split

1. The government does not dispute that the circuits disagree about whether courts must find a Guideline ambiguous before deferring to commentary. The Third and Sixth Circuits have held that deference depends on whether the underling Guideline "is genuinely ambiguous." *Nasir*, 982 F.3d at 158; *id.* at 177 (Bibas, J., concurring) (*Kisor* "awoke us from our slumber of reflexive deference"); *United States* v. *Havis*, 927 F.3d 382, 386 (6th

Cir. 2019) (en banc) (government cannot "sidestep[] a threshold question" whether there is Guidelines ambiguity to "interpret[]"); *United States* v. *Havis*, 929 F.3d 317, 318 (6th Cir. 2019) (Sutton, J., concurring in denial of reconsideration) (*Havis* made "the broader point that the commentary * * * binds courts only to the extent it interprets a guidelines provision, not to the extent it adds to the text"); *Goodin*, 2021 WL 506036, at *8 & n.1 (acknowledging *Nasir*'s broader implications). The D.C. Circuit has written that "*Seminole Rock* deference does not extend so far" as permitting the Commission to impose enhancements "with no grounding in the guidelines themselves." *United States* v. *Winstead*, 890 F.3d 1082, 1092 (2018). Courts have applied this "important principle of administrative law" outside the career-offender context. *Pauuwe*, 968 F.3d at 618 (sexual-offender enhancement).[1] The government does not deny that this approach conflicts with the reflexive deference of the First, Second, Fifth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits. Pet. 14-17; *e.g.*, *United States* v. *Broadway*, 815 Fed. Appx. 95, 96 (8th Cir. 2020) ("defer[ing] to the commentary, not out of its fidelity to the Guidelines text, but rather because it is not a 'plainly erroneous reading' of it").

The government states that "the Second Circuit did not address that methodological question here," but simply "adhered to a pre-*Kisor* precedent." Opp. 18. But that pre-*Kisor* precedent deferred to commentary without analyzing the Guideline's text. Pet. 20. And the court below uncritically reaffirmed that precedent while acknowledging that Application Note 1 "expand[ed]" the Guideline's text, App. 11a-12a—an approach fundamentally inconsistent with the idea that the Commission can

[1] That *Havis* and *Winstead* predate *Kisor* does not suggest that they they "turn[] on the particulars" of the Career Offender Guideline. Opp. 25. *Kisor* did not plow entirely new ground but "reinforce[d]" existing limitations. 139 S. Ct. at 2408.

only act if the Guidelines are genuinely ambiguous. By reaffirming precedent after considering *Kisor*, the court *did* weigh in on the methodological question, "recogniz[ing] (albeit implicitly) that *Kisor* does not cast doubt on *Stinson* or *Jackson*." Gov't Corrected Reh'g Opp. 4. *United States* v. *Richardson* laid to rest doubts that the Second Circuit is "reflexively deferential," announcing that court defers to any commentary "not inconsistent with the guideline." 958 F.3d 151, 155 (2020). At minimum, there is methodological disagreement between courts that have reconsidered their deferential precedents "[i]n light of *Kisor*[]," *Nasir*, 982 F.3d at 160; see Pet. 19 (authorities overruling civil precedents in light of *Kisor*), and those like the Second Circuit that have concluded those flawed precedents stand.

The methodological nature of the dispute means that the Commission *cannot* resolve the questions presented. Pet. 17-19. The government does not argue that the Commission could resolve whether *Kisor* permits deference to commentary when the underlying Guideline is unambiguous. The dubious principle that this Court should leave sentencing splits to the Commission, Opp. 23-24; Pet. 17 & n.5, is thus irrelevant. Even if the Commission amended the Career Offender Guideline, some circuits would remain reflexively deferential to commentary, while others would "carefully consider the text, structure, history, and purpose of a regulation." *Nasir*, 982 F.3d at 158 (quoting *Kisor*, 139 S. Ct. at 2415).

2. Even were there no broader division over methodological issues, the government acknowledges an intractable split on the second question presented, "concerning the validity of Application Note 1's interpretation." Opp. 18. The Third, Sixth, and D.C. Circuits have held squarely that the Commission cannot use commentary to expand the scope of § 4B1.2's unambiguous language. Pet. 12-14. The First, Fifth, and Ninth Circuits would join

those courts but consider themselves constrained by circuit precedent. Pet. 15, 17. Other circuits, post-*Kisor*, have reaffirmed decisions following the commentary. Pet. 17.

This split is *not* "likely to be resolved by the Commission," Opp. 25, as the Commission currently has one voting member, it has lacked the necessary four-member quorum for over two years, *ibid.*, and there are not even any pending nominations. Even after nominations are made, hearings held, and confirmation votes taken, an amendment cycle typically takes a full year. It thwarts Congress's goal of promoting national "uniformity" in sentencing, Pet. 27 (quoting *Peugh* v. *United States*, 569 U.S. 530, 541 (2013)), to let one of the most frequent and most severe sentencing enhancements turn *indefinitely* on happenstance of geography—like whether a prosecution is brought in New Jersey or across the river in New York.

B. The Decision Below Is Wrong

This Court's precedent forbids granting reflexive deference to Guidelines commentary. Pet. 20-22; *Nasir*, 982 F.3d at 157-160. The government agrees: "*Kisor* 'sets forth the authoritative standards for determining whether particular commentary is entitled to deference.'" Opp. 15 (quoting Gov't Corrected Reh'g Opp. 5). The government nonetheless maintains the decision below correctly construed § 4B1.2 and correctly construed *Kisor*'s effect on inconsistent precedent. It is wrong about both.

1. *Text.* The ordinary meaning of "offenses that prohibit drug distribution," is not "offenses that hinder drug distribution." Opp. 10-11. "In ordinary speech, criminal laws do not 'prohibit' what they do not ban or forbid." *United States* v. *Lewis*, 963 F.3d 16, 28 (1st Cir. 2020) (Torruella and Thompson, J.J., concurring); accord *Havis*, 927 F.3d at 386 n.4.

The government's interpretation would turn § 4B1.2's circumscribed definition of a "controlled substance offense" into a wide-ranging three-strikes provision. For example, prohibiting money laundering also "hinders" drug distribution, in the sense that "a ban on [money laundering] hinders [distribution] even though it will ban conduct that is not itself [distribution]." Opp. 11 (quoting *United States* v. *Lange*, 862 F.3d 1290, 1295 (11th Cir. 2017)). And "it is hard to see why simple possession offenses would not also be 'controlled substance offense[s]' under § 4B1.2; certainly laws against possessing drugs hinder their distribution or manufacture." *Lewis*, 963 F.3d at 28 (Torruella and Thompson, J.J., concurring). But this Court has held that it is error to "treat[] [a] conviction for simple possession as a 'controlled substance offense.'" *Salinas* v. *United States*, 547 U.S. 188 (2006) (per curiam).

"[T]he plain text" of § 4B1.2 "does not even mention inchoate offenses," which "alone indicates it does not include them." *Nasir*, 982 F.3d at 159; Pet. 23-24.

Context and structure. Section 4B1.2 "affirmatively lists many other offenses that do qualify as controlled substance offenses"—none of which are inchoate. *Nasir*, 982 F.3d at 159. Another definition *in the very same Guideline* "does explicitly include inchoate crimes." *Ibid.* (citing U.S.S.G. § 4B1.2(a)). As do a host of other Guidelines. U.S.S.G. §§ 1B1.3(a)(1)(B), 2D1.1(d)(2), 2L2.2(c)(1)(A), 2X1.1.

These features overwhelmingly signal "[*e*]*xpressio unius*." *Winstead*, 890 F.3d at 1091; Pet. 24. The government's attenuated examples regarding age and cost-benefit analysis, Opp. 17, do not. The Commission permissibly interprets the Career Offender Guideline to cover only adult convictions because crimes "punishable by imprisonment for a term exceeding one year," U.S.S.G. § 4B1.2, generally are adult offenses, and reading Guidelines to

protect defendants accords with lenity, *Nasir*, 982 F.3d at 179 (Bibas, J., concurring); NCLA Br. 6-13. Statutes silent on the factors agencies may consider permit cost-benefit analysis, Opp. 17, because a contrary approach leads to a "logical impossibility"—that "the [agency] could not consider *any* factors in implementing" the statute. *Entergy Corp.* v. *Riverkeeper, Inc.*, 556 U.S. 208, 222 (2009). Section 4B1.2 poses no comparable issue.

History. The government notes that the original Guidelines Manual enumerated a list of covered offenses plus a catch-all ("and similar offenses")—implying that conspiracy fell in the catch-all. Opp.12. But the catch-all was *removed* in 1989. Opp. 12-13. Section 4B1.2(b) has since covered only offenses that "prohibit[]" a long list of specific actions—including *neither* conspiracy nor "similar offenses."

The government's extended historical discussion (Opp. 19-23), has no bearing on whether the Guideline is ambiguous. And it does not distinguish career-offender cases from *any* Guidelines case: The Commission *routinely submits all commentary amendments to Congress*. Opp. 3 (citing Commission rules); *e.g.*, 83 Fed. Reg. 20,145 (May 7, 2018); 81 Fed. Reg. 4,741 (Jan. 27, 2016). If that practice *actually* gave Guidelines commentary the same status as Guidelines text (Opp. 23), then *Kisor* would be inapplicable, as we would be dealing with regulatory text directly. The government admits *Kisor* applies, Opp. 15, confirming this history is mere theatre.

Courts have not been "mistaken" about the Commission's gratuitous submission of the commentary to Congress. Opp. 19. They have considered this history and concluded it "doesn't change matters." *Havis*, 929 F.3d at 320 (Sutton, J., concurring in denial of reconsideration); see also U.S. Supp. Br. 22-24, *Nasir*, *supra* (raising same argument). The Commission cannot elevate commentary to the status of a Guideline by submitting it to Congress. The

statutory safeguards of notice, comment, and congressional review "do not apply to * * * commentary." Opp. 3 (citing 18 U.S.C. 994(p), (x)). Because "[n]o * * * statutory provision requires" submission to Congress or sets a period for review, "nothing alerts Congress that it must (or even should) review proposed changes to the guidelines' commentary." *Havis*, 929 F.3d at 320 (Sutton, J., concurring in denial of reconsideration). Accordingly, commentary submitted to Congress has precisely the same status as agencies' interpretations of their rules, which Congress has an equal opportunity to review and overrule. Congress's failure to overrule imbues them with no special status. See *ibid.* If Congress's mere *ability* to weigh in on commentary were an adequate safeguard, Opp. 22, then *Kisor*'s standards are meaningless.

2. The government likewise errs in contending that reflexively deferential pre-*Kisor* precedents are sacrosanct. Opp. 13-15. *Kisor* declined to overrule *Auer* and *Seminole Rock* altogether, but it explicitly forbade applying a "caricature of the doctrine, in which deference is 'reflexive.'" 139 S. Ct. at 2415; *id.* at 2423 (reversing because court below "jumped the gun in declaring the regulation ambiguous"). *Kisor* did not create a special exception to the general rule that this Court's decisions overrule inconsistent circuit precedents. Rather, *Kisor*'s decision not to overrule *Auer* means only that *fewer* precedents were overruled, not that *none* were. The government touted that as a benefit of its position in *Kisor*: "narrowing *Seminole Rock* deference would not present the same degree of reliance concerns as overruling it altogether" because *Seminole Rock* would remain binding "in its core applications." U.S. Br. 38. Where an old case applying *Stinson* reaches the wrong result post-*Kisor*, that case is no longer good law. *See Nasir*, 982 F.3d at 179 (Bibas, J., concurring) ("our old precedents relying strictly on the commentary no longer bind"). That the government (and some

courts of appeals) insist that *Kisor* overruled nothing makes this Court's review *more* important, not less.

C. The Questions Presented Are Important

This case raises important separation-of-powers questions like those animating *Kisor*. Pet. 25-27.

1. The government implausibly insists that "[a]ll of [*Kisor*'s] concerns are absent here," Opp. 23, while conceding that *Kisor*'s "authoritative standards" govern the Commission's Guidelines interpretation, Opp. 15. "*Kisor*'s limitations on deference to administrative agencies" apply here *for a reason*: If "commentary can do more than interpret the guidelines, [and] it can add to their scope, we allow circumvention of the checks Congress put on the Sentencing Commission, a body that exercises considerable authority in setting rules that can deprive citizens of their liberty." *Nasir*, 982 F.3d at 159; see *Kisor*, 139 S. Ct. 2415 (when "there is only one reasonable construction," deference "permit[s] the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation").

2. The ways in which the Commission is "unlike" executive agencies, Opp. 25-26, *exacerbate* the separation-of-powers problems animating this Court's decisions reining in reflexive deference. Pet. 21-22, 25-27. The Commission's unusual structure—situated within the judiciary but exercising legislative judgments about punishment (Opp. 26)—survived constitutional challenge largely *because of* the statutory limitations on its power to promulgate Guidelines. *Mistretta* v. *United States*, 488 U.S. 361, 393-394 (1989). And the government does not dispute that judicial deference is on shaky ground in the criminal context. Pet. 21-22; NCLA Br. 22-23; *Guedes* v. *Bureau of Alcohol, Tobacco, Firearms & Explosives*, 140 S. Ct. 789, 790 (2020) (statement of Gorsuch, J., respecting denial of certiorari) ("[W]hatever else one thinks about [judicial

deference], it has no role to play when liberty is at stake.").

3. The government posits that "[a] case concerning the Commission would * * * be an unsuitable vehicle in which to address any broader questions about deference to executive agency interpretations." Opp. 26. But deference to agency interpretations in the criminal context is independently significant: The Guidelines are used to sentence some 75,000 individuals annually, Pet. 28-29, and the severe effect of the commentary here is hardly unusual. Correct Guidelines interpretation is crucially important. Though Guidelines are advisory, the fact that they are "procedural[ly]" "binding" on sentencing courts, Opp. 26, causes them to exert "a law-like gravitational pull," dictating 75% of all sentences. *Nasir*, 982 F.3d at 179 (Bibas, J., concurring); see Pet. 27-28.

The diverse array of *amici* supporting certiorari underscore the broader importance of this case. *Kisor* "reinvigorated judicial review of agency self-interpretation." Cato Br. 2. Farmers and homebuilders care about *Kisor*'s faithful application because if courts flout it in criminal sentencing, where individual liberty is at stake, they will surely flout it elsewhere. "Resolving this question will far transcend this petitioner's specific sentence and even sentencing law generally. It will instead convey—to the regulated public, administrative agencies, and judges alike—that courts must take *Kisor* seriously and apply it rigorously." Home Builders Br. 18.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted.

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