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

SUPPLEMENTAL BRIEF FOR THE PETITIONER

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SUPPLEMENTAL BRIEF FOR THE PETITIONER

Petitioner submits this supplemental brief to bring to the Court's attention a Second Circuit decision, *United States* v. *Wynn*, 845 Fed. Appx. 63 (2021), issued after the filing of petitioner's reply brief and first supplemental brief.

1. *Wynn*, applying the decision below in this case, rejected the argument "that the definition of a 'controlled substance offense' under Section 4B1.2(b) does not include inchoate offenses such as conspiracy." 845 Fed. Appx. at 65. *Wynn* affirmed the Second Circuit's holding that the Sentencing Commission had "authority to expand the definition of 'controlled substance offense' to include aiding and abetting, conspiring, and attempting to commit such offenses." *Id.* at 66. (quoting *United States* v. *Jackson*, 60 F.3d 128, 133 (2d Cir. 1995)).

In doing so, the court confirmed that the Second Circuit has "addressed th[e] methodological question" regarding the effect of *Kisor* on reflexively deferential precedent. Opp. 18; see Reply 4. The court explained:

> Wynn argues that the reasoning in *Jackson* has been undermined by the Supreme Court's decision in *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019). As a threshold matter, although our decisions in *Tabb* and *Richardson* do not explicitly address whether *Kisor* unsettles *Jackson*, *Kisor* was decided well before *Tabb* and *Richardson*, and the *Kisor* argument advanced here was briefed and discussed at length during oral argument in *Tabb*. Moreover, both *Tabb* and *Richardson* made clear that *Jackson* is still binding precedent in this Circuit. *See Tabb*, 949 F.3d at 87 ("[W]e find that *Jackson* precludes Tabb's argument that Application Note 1 is invalid."); *see also Richardson*, 958 F.3d at 155 (rejecting the same because it "contradicts our holdings in *Tabb* and *Jackson*.").

> Accordingly, based upon binding precedent, Wynn's procedural challenge to the Guidelines calculation fails.

845 Fed. Appx. at 66.

Wynn thus confirms that this case presents methodological questions that the Sentencing Commission is unable to resolve.[1] *Wynn* also confirms that the questions presented are frequently recurring. Just since petitioner filed a supplemental brief on March 3, there have been at least six decisions from six different circuits reaffirming their circuit precedent on the application of Section 4B1.2 to inchoate offenses—and whether Guidelines commentary is entitled to deference. Those decisions demonstrate that the circuit split at issue here is entrenched and will not be resolved without this Court's intervention. Compare *United States* v. *Reaves*, __ Fed. Appx. __, 2021 WL 1884884, at *2 (3d Cir. May 11, 2021) (holding that *Kisor* "put guardrails around the deference that should be given to agency interpretations"; thus "[d]eference should not be reflexive," and must not be afforded unless a Guideline is "genuinely ambiguous" (cleaned up)); *United States* v. *Jackson*, 995 F.3d 476, 482 (6th Cir. 2021) (holding that "in light of [*United States* v.] *Havis*, [973 F.3d 603 (6th Cir. 2020) (en banc)], conspiracy to distribute controlled substances is not a 'controlled substance offense' under §4B1.2(b)"), with *United States* v. *Webster*, 844 Fed. Appx. 937, 939 (8th Cir. 2021) (per curiam) (rejecting *United States* v. *Winstead*, 890 F.3d 1082, 1090-1092 (D.C. Cir. 2018), because "[*United States* v.] *Mendoza-Figueroa*[, 65 F.3d 691 (8th Cir. 1995) (en banc)] remains binding on us"); *United States* v. *Crosby*, 838 Fed. Appx. 891, 893 (5th Cir. 2021) (per curiam) (disagreeing with

[1] Even if the Commission in theory could resolve these questions, which it cannot (Pet. 17-19), the Commission still lacks a quorum and there still have been no nominations. The sole current Commissioner was confirmed in 2017 and his term expires this October.

"case law from the D.C. Circuit, which held that the commentary to §4B1.2 impermissibly expanded the definition of 'crime of violence'" (citing *Winstead*)); *United States* v. *Smith*, 989 F.3d 575, 585-586 (7th Cir. 2021) (noting "different approach[es]" taken by courts in circuit split, but agreeing with Second Circuit's *Tabb* decision); *Wynn*, 845 Fed. Appx. 63 (following *Tabb*).

2. This case is the best vehicle for resolving these frequently recurring methodological questions. The government has identified no impediments to this Court's review. Compare *Lovato* v. *United States*, No. 20-6436; *Jefferson* v. *United States*, No. 20-6745; *Clinton* v. *United States*, No. 20-6807. Both questions presented were squarely raised below, see *Wynn*, 845 Fed. Appx. at 66, and resolved in a published opinion. Compare *Davis* v. *United States*, No. 20-6242; *Roberts* v. *United States*, No. 20-7069; *O'Neil* v. *United States*, No. 20-7277; *James* v. *United States*, No. 20-7533. And resolution of the questions presented will have a dispositive and dramatic effect for Mr. Tabb, whose current 10-year sentence is triple his non–career offender Guidelines range. Compare *Sorenson* v. *United States*, No. 20-7099 (33-month sentence within non–career offender range).

CONCLUSION

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

Respectfully submitted.

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