No. _____

In the Supreme Court of the United States

Daniel Lovato,
Petitioner,

v.

United States of America, Respondent

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

Petition for Writ of Certiorari

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Questions Presented

In *Stinson v. United States*, 508 U.S. 36 (1993), this Court explained that the U.S. Sentencing Commission's commentary interpreting the Sentencing Guidelines should be "treated as an agency's interpretation of its own legislative rule," quoting the *Seminole Rock* standard that such an interpretation "is authoritative unless it . . . is inconsistent with, or a plainly erroneous reading of, that guideline." *Id.* at 38.

In *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), this Court noted that it had sent "mixed messages" about *Seminole Rock* deference in the past and clarified that a court errs when it defers to an agency's construction of its regulation without determining that the regulation is "genuinely ambiguous," and that the agency has made a "reasonable" interpretation that "come[s] within the zone of ambiguity." *Id.* at 2408, 2415.

The courts of appeals are openly divided over a question that necessarily follows—namely, whether courts may continue to defer to Commission commentary without first deciding that the underlying Guideline is genuinely ambiguous as to the matter expounded upon in the commentary. At least two circuits say no. At least six (including the Tenth Circuit) say yes.

The questions presented are:

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

2. Whether Commission commentary impermissibly expands the unambiguous definitions of crime of violence in U.S.S.G. § 4B1.2 to include attempts and conspiracies to commit crimes of violence.

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Opinions Below

The opinion of the court of appeals (Pet. App. at 2a–30a) is reported at *United States v. Lovato*, 950 F.3d 1337 (10th Cir. 2020). The judgment of the district court (Pet. App. at 31a–37a) is unreported.

Basis for Jurisdiction

The court of appeals entered judgment on February 27, 2020 (Pet. App. at 2a). It denied a timely petition for rehearing en banc on June 23, 2020 (Pet. App. at 1a). This Court's general order of March 19, 2020, extends the deadline in 28 U.S.C. § 2101(c) to file a petition for writ of certiorari by 60 days, creating a deadline of November 20, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Guidelines Provision Involved

Section 4B1.2 of the 2018 U.S. Sentencing Guidelines provides in relevant part:

> (a) The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—
>
> > (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
> >
> > (2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).
>
> (b) 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 to § 4B1.2 provides in relevant part:

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

Additional provisions of the U.S. Code, the 2018 U.S. Sentencing Guidelines, and the Colorado Revised Statutes are reproduced in Appendices D, E, and F.

Introduction

This case raises important administrative law questions regarding separation of powers, the role of the independent judiciary, and historic due process principals, all in the context of federal criminal sentencing. Over 70,000 men and women were sentenced to federal prison last year, and in each case, the district court calculated an advisory sentencing range using the U.S. Sentencing Commission's guideline manual. While the U.S. Sentencing Guidelines itself is subject to the constraints of notice and comment rulemaking and congressional approval, the Commission's commentary on those guidelines is not. Nonetheless, the Commission directs federal courts to defer to that commentary. At least six circuits almost always do. But two others carefully follow this Court's admonitions limiting deference to an agency's interpretation of its own rules and regulations, leading to different results.

This circuit split is most apparent with regard to U.S.S.G. § 4B1.2's definitions of crimes of violence and controlled substance offenses. Even though these definitions unambiguously do not include attempts and conspiracies to commit crimes of violence and controlled substance offenses, the Commission purports to use commentary to require courts to so interpret them.

The recently-filed petition in *Tabb v. United States*, Case No. 20-579, asks this Court to consider the Commission's effort to use commentary to expand U.S.S.G. § 4B1.2's unambiguous definition of controlled substance offenses. This companion case asks the Court to consider the same questions as they relate to U.S.S.G. § 4B1.2's unambiguous definitions of crimes of violence.

Statement of the Case

I. Legal background.

1. In *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), this Court addressed the meaning of a regulation issued by the Office of Price Administration. The Court explained that since the case "involve[d] an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt." *Id.* at 413-414. While the Court deemed the regulation "clear," it also stated that "the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Id.* at 414. *Seminole Rock*'s "plainly erroneous or inconsistent" formulation soon became the definitive standard governing agencies' interpretations of their own rules, and later became known as *Auer* deference after this Court's leading decision applying *Seminole Rock* to an agency amicus brief, *see Auer v. Robbins*, 519 U.S. 452 (1997).

In the years that followed, courts applied *Seminole Rock* and *Auer* to uphold "agency interpretations sometimes without significant textual analysis of the underlying regulation." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2414 (2019). Although for a time this Court sent "mixed messages," *id.*, by 2000 the Court was emphatic that "*Auer* deference is warranted only when the language of the regulation is ambiguous." *Christensen v. Harris Cty.*, 529 U.S. 576, 588 (2000). Otherwise, deferring "to the agency's position would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation." *Ibid.*

2. Following a series of opinions by members of this Court questioning *Auer*, the Court granted certiorari in *Kisor* to decide whether to overrule it. The Court declined to do so. But all nine Justices agreed that at minimum the Court needed to "reinforc[e] some of the limits inherent in the *Auer* doctrine." 139 S. Ct. at 2415; *id.* at 2424 (Roberts, C.J., concurring); *id.* at 2448 (Gorsuch, J., concurring); *id.* at 2448–2449 (Kavanaugh, J., concurring). Central among those limits was that "a court should not afford *Auer* deference unless the regulation is genuinely ambiguous." *Id.* at 2415 (citing *Christensen*, 529 U.S. at 588). "[B]efore concluding that a rule is genuinely ambiguous, a court must exhaust all the 'traditional tools' of construction." *Id.* (*quoting Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984)). And deference is only proper if the agency gave a "reasonable interpretation" that "come[s] within the zone of ambiguity the court has identified after employing all its interpretive tools." *Id.* at 2415–16.

The Court explained that this limitation was necessary because *Seminole Rock*—which contained the "most classic formulation of the test"—"may suggest a caricature of the doctrine, in which deference is reflexive," and at times the Court "ha[d] applied *Auer* deference without significant analysis of the underlying regulation." *Id.* at 2414–2415 (quotation marks omitted).

3. The U.S. Sentencing Commission is a federal agency in the judicial branch charged with promulgating "guidelines . . . for use of a sentencing court in determin-

ing the sentence to be imposed in a criminal case." 28 U.S.C. § 994(a). Congress directed the Commission to "periodically . . . review and revise, in consideration of comments and data coming to its attention, [its] guidelines." 28 U.S.C. § 994(o).

The Commission must submit all proposed amendments to Congress, which then has six months to review amendments before they take effect. 28 U.S.C. § 994(p). The Commission must comply with the Administrative Procedure Act (APA), 5 U.S.C. § 553, by publishing notice of proposed amendments in the Federal Register and giving the public an opportunity to comment. 28 U.S.C. § 994(x); *see, e.g.*, 83 Fed. Reg. 65,400 (Dec. 20, 2018). The Commission's promulgation of Guidelines thus closely resembles rulemaking conducted by other federal agencies like the EPA and the Department of Labor, which are similarly governed by the APA's notice-and-comment requirements and whose major rules are subject to a 60-day congressional review period pursuant to the Congressional Review Act of 1996, 5 U.S.C. § 801; *see Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress.").[1]

Though the Commission's primary work product is the Sentencing Guidelines, it also produces official commentary on those Guidelines. Unlike with the Guidelines

[1] In *Mistretta v. United States*, 488 U.S. 361, 363–369 (1989), this Court held that despite the Commission's "unusual hybrid" nature, the body permissibly operated as an "independent agency" in promulgating and amending Guidelines subject to notice-and-comment procedures and congressional review. *Id.* at 393–94.

themselves, the Commission can issue commentary without seeking congressional review and need not comply with the APA's notice-and-comment requirements.

4. This Court addressed the relationship between Guidelines and commentary in *Stinson v. United States*. *Stinson* recognized that the Sentencing Commission uses the commentary on the Guidelines to "explain[] the guidelines and provide[] concrete guidance as to how even unambiguous guidelines are to be applied in practice." 508 U.S. at 44. It went on to explain that "the guidelines are the equivalent of legislative rules adopted by federal agencies," because "[t]he Sentencing Commission promulgates the guidelines by virtue of an express congressional delegation of authority for rulemaking, and through the informal rulemaking procedures in 5 U.S.C. § 553." 508 U.S. at 44–45 (citations omitted). And because the Guidelines were equivalent to other agency rules, *Stinson* applied *Seminole Rock* and held that so long as the Commission'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.[2]

5. *Stinson* involved a regular occurrence—the U.S. Sentencing Guidelines calling upon courts to consider whether the person being sentenced has any prior conviction for a "crime of violence" or a "controlled substance offense." This question arises

[2] *Stinson* upheld the Commission's use of commentary to exempt a specific type of offense from an ambiguous Guidelines definition of crime of violence that has since been removed. *See* 508 U.S. at 38, 47 (upholding exemption of felon-in-possession offenses from residual clause); U.S.S.G. Supp. to App'x C, Amendment 798 (2018) (removing residual clause).

under numerous guideline provisions. *See, e.g.,* U.S.S.G. §§ 2K1.3, 2K2.1, 2L1.2, 2S2.1, 2X6.1, 3B1.5, 4A1.1, 4A1.2, 4B1.1, 4B1.4 (2018). But the text of the Guidelines defines the terms themselves in only one place, U.S.S.G. § 4B1.2 (2018).

Section 4B1.2 defines crime of violence in two ways. The first definition relates to the use of force. Crime of violence "means" any felony offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another." U.S.S.G. § 4B1.2(a)(1) (2018). The second enumerates specific offenses. Crime of violence also "means" any felony offense that "is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c)." U.S.S.G. § 4B1.2(a)(2) (2018).

Section 4B1.2 also defines controlled substance offense, which "means" 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." U.S.S.G. § 4B1.2(b) (2018).

In Application Note 1, the Commission's commentary states that "'crime of violence' and 'controlled substance offense' include the offenses of . . . conspiring, and attempting to commit such offenses." U.S.S.G. § 4B1.2, comment. (2018).[3]

[3] The Commission added this commentary in 1989. *See* U.S.S.G. App. C, amend. 268 (2018).

II. Proceedings below.

Petitioner Daniel Lovato was convicted at jury trial and sentenced by the district court for being a felon in possession of a firearm and ammunition. Pet. App. at 31a. Sua sponte, the district court proposed that Mr. Lovato's prior attempted assault conviction was a crime of violence under U.S.S.G. § 4B1.2. D. Ct. Doc. No. 88. Mr. Lovato objected, arguing that the attempted assault conviction was not a crime of violence because Colorado Attempted Second Degree Assault unambiguously does not meet the definition of crime of violence in the Guidelines. ROA Vol. 1 at 318–19, 321–22. Nor, he argued, could the district court defer to the commentary purporting to expand the Guidelines definitions of crime of violence to include attempts and conspiracies to commit those crimes. *Id.* at 321–22. He acknowledged, however, that this objection was foreclosed by clear circuit precedent. *Id.* at 321.

The district court overruled Mr. Lovato's objection. ROA Vol. 2 at 600–01. It did so based on *United States v. Martinez*, 602 F.3d 1166 (10th Cir. 2010), in which the circuit held that it was required to defer to Application Note 1 under *Stinson* not because the language of the Guidelines was ambiguous, but rather because the text of the Guidelines could be "reconciled" with the commentary. *Id.* at 1174.

Counting this attempted assault as a crime of violence, the district court calculated Mr. Lovato's advisory guideline range to be 100–120 months, rather than the 70–87 month range that would have applied without it. It sentenced Mr. Lovato to 100 months.

Exercising jurisdiction pursuant to 28 U.S.C. § 1291, the Tenth Circuit affirmed. Pet. App. 3a. It agreed it was bound by its prior ruling in *Martinez*. 19a–20a.

Mr. Lovato sought rehearing en banc, arguing that *Martinez* cannot be reconciled with the limitations on agency deference reinforced in *Kisor*. Specifically, he explained that the Guidelines definition of crime of violence in U.S.S.G. § 4B1.2 unambiguously excludes inchoate offenses that do not—independently—fall within the definitions. The court, therefore, should not have deferred to Commission commentary expanding those unambiguous definitions. The court of appeals denied rehearing en banc. Pet. App. 1a.

Reasons for Granting the Petition.

I. Courts of appeals are intractably split over whether courts must make a threshold determination of ambiguity before deferring to Sentencing Commission commentary on the Guidelines.

In the past several years, the question of whether sentencing courts must make a threshold finding of ambiguity in the U.S. Sentencing Guidelines before deferring to the Sentencing Commission's commentary has arisen in nearly every circuit. These cases have all involved the Guidelines definitions of crime of violence and controlled substance offense in U.S.S.G. § 4B1.2. But the question—and the conflicting rulings—transcend any one guideline. Even after *Kisor*, the courts of appeals fundamentally disagree about whether limitations on administrative deference apply to the Sentencing Commission as they do to every other rulemaking agency. This Court should grant review to resolve the intractable split between the circuits.

1. Two circuits consistently refuse to defer to commentary when the underlying Guideline is unambiguous. *United States v. Havis*, 927 F.3d 382, 386-387 (6th Cir.)

(en banc) (per curiam); *United States v. Winstead*, 890 F.3d 1082, 1091 (D.C. Cir. 2018).

In *Winstead*, the D.C. Circuit acknowledged "the decisions of several of [its] sister circuits . . . defer[ring] to Application Note 1." 890 F.3d at 1091. But the court consciously broke from the pack, holding that "the commentary adds a crime, 'attempted [drug] distribution,' that is not included in the guideline." *Id.* at 1090. The court explained that "Section 4B1.2(b) presents a very detailed 'definition' of controlled substance offense that clearly excludes inchoate offenses. *Expressio unius est exclusio alterius*." *Id.* at 1091. "[S]urely," it concluded "*Seminole Rock* deference does not extend so far as to allow [the Commission] to invoke its general interpretive authority via commentary . . . to impose such a massive impact on a defendant with no grounding in the guidelines themselves." *Id.* at 1092.

In *Havis*, the en banc Sixth Circuit followed suit. The court unanimously refused the government's request to defer to Application Note 1, holding that reflexive deference "sidesteps [the] threshold question" of whether there is any ambiguity requiring explanation. 927 F.3d at 386. The court found no ambiguity: "The guideline expressly names the crimes that qualify as controlled substance offenses . . . ; none are attempt crimes." *Id.* "To make attempt crimes a part of § 4B1.2(b)," the court explained, "the Commission did not interpret a term in the guideline itself—no term in § 4B1.2(b) would bear that construction." *Id.* Rather, the Commission "used Application Note 1 to ***add*** an offense not listed in the Guideline." *Id.* (emphasis original). If that addition could be sustained, then "the institutional constraints that make the

Guidelines constitutional in the first place—congressional review and notice and comment—would lose their meaning." *Id.* at 386-387 (citing *Winstead*, 890 F.3d at 1092).

2. Two different panels of the Seventh Circuit have reached different conclusions. Interpreting U.S.S.G. § 4B1.2's crime of violence definitions, the court concluded that conspiracy to kill a government witness was not an enumerated offense, and that no element "required the government to prove 'the use, attempted use, or threatened use of physical force.'" *D'Antoni v. United States*, 916 F.3d 658, 665 (7th Cir. 2019). Thus, like the D.C. and Sixth Circuits, it held that deference to Application Note 1 was not permitted under *Stinson*. *Id.* at 662–63.

But in *United States v. Adams*, 934 F.3d 720 (7th Cir. 2019), decided several months after *Kisor*, the Seventh Circuit skipped over the preliminary ambiguity analysis altogether. The court ruled that it was bound by prior precedent holding that there is no "textual conflict" between the Guideline definition of controlled substance offense in U.S.S.G. § 4B1.2 and the commentary incorporating conspiracies into that definition. *Id.* at 729.

3. The First, Second, Eighth, Ninth, Tenth, and Eleventh Circuits have taken note of the issue, and most have even concluded that the relevant commentary ***expands*** the definition included in the text of the Guidelines. But—like the Seventh Circuit in *Adams*—they consider the deference question to be controlled by pre-*Kisor* precedent and have refused to reconsider the issue in light of this Court's clear holding in *Kisor*.

The Eighth Circuit, for example, recently reaffirmed circuit precedent that "deferred to the commentary [on U.S.S.G. § 4B1.2], not out of its fidelity to the Guidelines text, but rather because it is not a 'plainly erroneous reading' of it." *United States v. Broadway*, 815 F. App'x 95, 96 (8th Cir. 2020) (unpublished) (per curiam) (quoting *United States v. Mendoza-Figueroa*, 65 F.3d 691, 693 (8th Cir. 1995) (en banc)). The court acknowledged that "[t]he commentary ***extends the reach*** of section 4B1.2(b) to attempted distribution, even though the provision itself lists only completed acts." *Id.* (emphasis added). The panel recognized that "there have been some major developments since 1995," including *Kisor*, which holds that "*Auer*/*Seminole Rock* deference is triggered only by 'genuine[] ambigu[ity].'" *Id.* at 96 n.2. And yet the panel bemoaned that it was bound by its outdated circuit precedent. *Id.*; *see also United States v. Jefferson*, 975 F.3d 700, 707–08 (8th Cir. 2020) (declining to follow *Winstead* and *Havis* for attempted controlled substance offenses since commentary is "within the Commission's full statutory authority"), *rehearing denied*, Order, Case No. 19-3159 (Oct. 28, 2020).

The Ninth Circuit did likewise in *United States v. Crum*, 934 F.3d 963 (9th Cir. 2019) (per curiam), where it agreed that the Commission used Application Note 1 to "expand the definition of 'controlled substance offense' . . . without any grounding in the text . . . and without affording any opportunity for congressional review." *Id.* at 966. Yet—because the Guidelines do not "explicitly exclude[]" inchoate offenses—precedent required deference to Application Note 1. *Id.* at 964, 966. Notably, two members of the *Crum* panel "would [have] follow[ed] the Sixth and D.C. Circuits'

lead" if "free to do so." *Id.* And another member of the court has since made a similar statement. *United States v. Sorenson*, 818 F. App'x 668 (9th Cir. 2020) (Paez, J., concurring) ("I believe the commentary in Application Note 1 to § 4B1.2 impermissibly expands the scope of the Guideline's text."). But—even put on notice that prior case law was irreconcilable with *Kisor v. Wilkie*—the full court refused an overture to reconsider the precedent standing in the panel's way. *See* Pet'n for Rehearing, *United States v. Crum*, Case No. 17-30261 (9th Cir. Sept. 30, 2019); Order Denying Petition for Rehearing, *United States v. Crum*, Case No. 17-30261 (9th Cir. Oct. 29, 2019).

A similar thing happened in the First Circuit, where two judges wrote in support of the Sixth and D.C. Circuit opinions, but still ruled the other way based on pre-*Kisor* precedent that the en banc court refused to reconsider. *See United States v. Lewis*, 963 F.3d 16 (1st Cir. 2020), *rehearing denied*, Order Denying Petition for Rehearing, *United States v. Lewis*, Case No. 18-1916 (1st Cir. Oct. 2, 2020). In a concurrence, they argued that the Sentencing Commission "***added*** a substantive offense . . . to the relevant career-offender guideline through its commentary as opposed to the statutorily prescribed channel for doing so." *Id.* at 27 (Torruella and Thompson, JJ., concurring) (emphasis added). They noted "troubling implications for due process, checks and balances, and the rule of law," and explained that "[t]he Sentencing Guidelines are no place for a shortcut around the due process guaranteed to criminal defendants." *Id.* at 28. Yet they signed onto a majority opinion holding the Commission commentary on inchoate drug offenses to be "authoritative." *Id.* at 23–25.

So too the Second Circuit has acknowledged that the commentary "expand[ed] the definition of a controlled substance offense." *United States v. Tabb*, 949 F.3d 81, 87 (2d Cir. 2020). But pre-*Kisor* case law held that the Commission had the authority to expand the Guidelines definition of controlled substance offense. *Id.* And so, the Second Circuit held, the Commission was authorized to expand the Guideline definition via interpretive commentary. *Id.* The full court refused to reconsider that position en banc. Order, Case No. 18-338 (June 1, 2020).[4]

The Eleventh Circuit has granted even stronger deference to the Commission's commentary. In holding that Application Note 1 controls, the court viewed the commentary as shaping the meaning of the terms in the Guidelines text: "Application Note 1 informs how we should interpret [U.S.S.G. § 4B1.2's] definition. . . . Because Application Note 1 tells us that an offense prohibits the manufacture of a controlled substance when it prohibits . . . conspiring, and attempting that manufacture, . . . we must not construe 'prohibit' too narrowly." *United States v. Lange*, 862 F.3d 1290, 1295 (11th Cir. 2017) (emphasis added). The court has expressly reaffirmed this conclusion and analytical approach after *Kisor*, even while acknowledging the circuit split. *United States v. Bass*, No. 19-15148, 2020 WL 6065979, *2 (11th Cir. Oct. 15, 2020) (unpublished); *United States v. Cingari*, 952 F.3d 1301, 1308 (11th Cir. 2020).

[4] Distinguishing *Tabb,* a district court within the circuit has refused to defer to Application Note 1's attempt to expand the Guidelines definitions of crime of violence to include conspiracies because it "goes beyond interpretation to purport to expand the scope of the guideline." *United States v. Chappelle*, Case No. 13-CR-986-LTS, 2020 WL 5441541, *1 (S.D.N.Y. Sept. 9, 2020).

And the Tenth Circuit continues to adhere to similar pre-*Kisor* caselaw that looks only to whether commentary "can be reconciled with the language of" the Guidelines, *e.g. United States v. Martinez*, 602 F.3d 1166, 1174 (10th Cir. 2010). For example, it did so in this case, involving the question of whether an attempted assault is a crime of violence—where it also denied rehearing en banc. Pet. App. 1a, 19a–20a; *see also United States v. Chavez*, 660 F.3d 1215, 1226 (10th Cir. 2011) (recognizing that the Commission "expanded" the definition of "controlled substance offenses" to include inchoate offenses, but deferring nonetheless).[5]

II. Continued deference to Sentencing Commission commentary without making a threshold determination of ambiguity contravenes *Kisor*.

Review is also necessary because the analytical approach underlying the Tenth Circuit's decision here fundamentally conflicts with this Court's precedent limiting

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[5] The en banc Third Circuit is currently considering "whether, in light of *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), it remains appropriate to defer to the U.S. Sentencing Commission's commentary to U.S.S.G. § 4B1.2." Order Sua Sponte Rehearing En Banc, *United States v. Nasir*, Case No. 18-2888 (March 4, 2020).

This question has not arisen in the Fourth Circuit, but district courts there have followed the lead of the Sixth and D.C. Circuits in cases involving both inchoate controlled substance offenses and inchoate crimes of violence. *See, e.g., United States v. Faison*, Case No. GJH-19-27, 2020 WL 915699, *7–*9 (D. Md. Feb. 18, 2020) (federal drug conspiracy conviction falls outside of Guidelines definition); *United States v. Bond*, 418 F. Supp. 3d 121, 122–24 (S.D.W.V. 2019) (attempted delivery of a controlled substance falls outside of Guidelines definition); *United States v. Cooper*, 410 F. Supp. 3d 769, 771–72 (S.D.W.V. 2019) (state conspiracy to commit robbery offense falls outside of Guidelines definition because it "does not require 'violent force'" and therefore "does not have an element which includes the 'use, attempted use, or threatened use of physical force'").

The Fifth Circuit has not addressed the question.

the deference owed to an agency's interpretation of its own rules. Under a proper application of this Court's precedents, the court below could not have treated the Sentencing Commission's commentary as binding. Absent this Court's intervention, it and like decisions will evade *Kisor*'s limits indefinitely.

A. Reflexive deference to Sentencing Commission commentary ignores *Kisor*'s three-step framework.

The decision below—and the circuit precedent on which it relies—fundamentally disregard this Court's clear directive in *Kisor*.

In *Kisor*, this Court made clear that *Seminole Rock*/*Auer* deference to an agency's interpretation of its own rule has long been subject to three key constraints. First, deference is only required where the rule or regulation being interpreted is "genuinely ambiguous" after "exhaust[ion of] all the traditional tools of construction." *Id.* at 2415 (internal quotation marks omitted). "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.* Second, where a rule or regulation is genuinely ambiguous, courts only defer to "reasonable interpretation[s]" that "come within the zone of ambiguity the court has identified after employing all its interpretive tools." *Id.* at 2415–16. This means that the "agency construction" of a rule or regulation receives no "greater deference than agency constructions of statutes" under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *Kisor*, 139 S. Ct. at 2416. And third, before deferring, "a court must make an independent inquiry into whether the character and context of the agency interpretation entitles it to controlling weight." *Id.*

Stinson's focus was the third constraint, and it held that the Commission's commentary on the Sentencing Guidelines is the type of agency interpretation of its own rules or regulations that is entitled to deference. 508 U.S. at 45. The commentary is not a legislative rule or regulation in its own right, subject to *Chevron* deference, because it "is not the product of delegated authority for rulemaking." *Id.* at 44. Rather, "commentary explains the guidelines." 508 U.S. at 44. After examining what *Kisor* would call the "character and context" of the commentary, 139 S. Ct. at 2416, the Court determined that "commentary is binding on the federal courts even though it is not reviewed by Congress," *Stinson*, 508 U.S. at 46. The Court then determined that a particular application note was binding in the case, *id.* at 47—but by then this was a foregone conclusion. *Stinson* did not displace *Seminole Rock* deference, provide a new formulation for it, or otherwise add anything to the mechanics of the test.

The questions that *Stinson* does not answer, because they must be asked anew for each and every agency interpretation, are whether a particular commentary is interpreting a genuinely ambiguous rule; and if so, whether the interpretation is a reasonable one that falls within the zone of ambiguity.

The fundamental error that the Tenth Circuit made here when it relied on and refused to reconsider its pre-*Kisor* holding in *Martinez* is that *Martinez* failed to ask whether Section 4B1.2 is genuinely ambiguous, or whether the Commission's interpretation of it in Application Note 1 falls within that zone of ambiguity. Instead, it simply asked whether the commentary could "be reconciled" with the language of the Guidelines. *Martinez*, 602 F.3d at 1174. That is, it skipped over the constraints of

Seminole deference that were reaffirmed in *Kisor*. In doing so, it apparently fell victim to this Court's prior "mixed message[]" of "reflexive" deference to any agency construction that is not "plainly erroneous or inconsistent with the regulation." *Kisor*, 139 S. Ct. at 2414–15 (quotation marks omitted).

B. This Court's precedent compels a different result.

Proper application of *Kisor*'s three-step framework compels a conclusion that Mr. Lovato's conviction was not for a crime of violence.

Mr. Lovato was convicted of Colorado attempted second degree assault with a deadly weapon under Colo. Rev. Stat. § 18-3-203(1)(b). This conviction was not for a crime of violence as defined by the text of U.S.S.G. § 4B1.2(a). The first Guidelines definition unambiguously requires that an ***element*** of the offense be for the "use, attempted use, or threatened use of force"—and Colorado attempted second degree assault with a deadly weapon does not have any such element. And the second Guidelines definition unambiguously requires that a prior conviction "is" for one of the offenses enumerated. A similar offense will not do.

The elements of the ***completed*** offense of Colorado second degree assault with a deadly weapon are (1) with intent to cause bodily injury to another person; (2) he or she caused such injury; (3) by means of a deadly weapon. *People v. Rivas*, 77 P.3d 882, 888 (Colo. App. 2003). But Mr. Lovato was convicted under Colorado's attempt statute, which requires intent to cause injury, but no actual causation of injury. Colo. Rev. Stat. § 18-2-101(1). Rather, it requires only a "substantial step" towards the commission of the offense that is "strongly corroborative" of intent. *People v. Lehnert*,

163 P.3d 1111, 1113 (Colo. 2007). Such substantial steps can include, for example, "searching out a contemplated victim, reconnoitering the place contemplated for commission of a crime, and possessing materials specially designed for unlawful use and without lawful purpose." *Id.* at 1115.

This means that a person can be convicted of Colorado attempted second degree assault with a deadly weapon by preparatory activities to the intended assault or by weapons possession, so long as such activities are strongly corroborative of the firmness of the defendant's purpose to commit the crime he is charged with attempting. And such preparatory activities or weapons possession, while strongly corroborative, do not necessarily involve any "use, attempted use, or threatened use of physical force." And so—unambiguously—Mr. Lovato's conviction does not come within the Guideline's first, force-based definition of crime of violence. *See United States v. Rucker*, Case No. 09-cr-00262-PAB, 2017 WL 1246465 (D. Colo. April 5, 2017) (so concluding regarding same Colorado conviction and identical Armed Career Criminal Act definition).

Nor does it come within the second definition, which enumerates certain offenses, including aggravated assault. Even assuming that Colorado second degree assault "is . . . aggravated assault," *see* U.S.S.G. § 4B1.2(a)(2), ***attempted*** Colorado

second degree assault is not, because it involves different elements.[6] As this Court explained in *James v. United States*, attempted burglary "is not 'burglary' because it does not meet the [generic] definition of burglary." 550 U.S. 192, 197 (2007), *overruled on other grounds*, *Johnson v. United States*, 135 S. Ct. 2551 (2015).

Martinez skipped this analysis entirely, thereby reaching the wrong conclusion. Rather than asking whether the Guidelines definition was unambiguous, the Tenth Circuit simply announced that the commentary could be "reconciled with the language of" U.S.S.G. § 4B1.2(a)(2)'s definition enumerating certain offenses. 602 F.3d at 1173.

This led to an anomalous result in *Martinez*. The case held that conspiracy to commit burglary ***was not*** a violent felony under the Armed Career Criminal Act, notwithstanding the fact that the statute enumerated "burglary" in its definition of violent felony. *Id.* But conspiracy to commit burglary ***was*** a crime of violence under U.S.S.G. § 4B1.2(a)(2), despite the fact that the Guidelines defined "crime of violence"

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[6] The Guidelines inclusion of crimes having "as an element the . . . attempted use, or threatened use of physical force" reaches certain ***completed*** crimes such as aggravated assault and robbery that can be committed by means of attempting or threatening to use of physical force. *See, e.g.,* Model Penal Code § 211.1(2) ("A person is guilty of aggravated assault if he . . . attempts to cause . . . serious bodily injury to another"); § 222.1(1) ("A person is guilty of robbery if, in the course of committing a theft, he . . . threatens another with . . . immediate serious bodily injury"). In this way, the force-based definition of crime of violence is comparable to the Guidelines definition of controlled substance offense to include offenses "that prohibit[] . . . possession of a controlled substance . . . with intent to . . . distribute," U.S.S.G. § 4B1.2(b)—another completed crime.

using the exact same language that the Armed Career Criminal Act uses to define violent felony. *Id.* at 1174. This was not due to any tool of statutory interpretation or ambiguity in the Guidelines definition. Rather, according to the circuit, it was because Application Note 1 "tells us that when the guideline uses the word for a specific offense that word is referring to not just the completed offense but also . . . 'conspiring' to commit the offense, and 'attempting' to commit the offense.'" 602 F.3d at 1174.[7]

That was error. "As a rule, a definition which declares what a term means excludes any meaning that is not stated." *Burgess v. United States*, 553 U.S. 124, 130 (2008) (alteration marks omitted). And declaring what "'crime of violence' ***means***" and what "'controlled substance offense' ***means***," U.S.S.G. § 4B1.2(a) & (b) (emphasis added), is just what the Guidelines do. This Court's clarification of the scope of *Seminole Rock* deference in *Kisor* makes clear, if it was not clear before, that the Tenth Circuit's decision in *Martinez*—which deferred to the Commission's Commentary despite the unambiguous text of Section 4B1.2, and which controlled the outcome of Mr. Lovato's case—was wrongly decided.

[7] The Tenth Circuit has never addressed whether the first, force-based definition in U.S.S.G. § 4B1.2(a)(1) requires deference to the Commission's commentary in Application Note 1—though it does not. *Cf. United States v. Wartson*, 772 F. App'x 751, 755-57 (10th Cir. 2019) (unpublished) (holding that Oklahoma conspiracy to shoot with intent to kill does not categorically meet identical force-based definition of violent felony in Armed Career Criminal Act).

III. The questions presented are of exceptional importance.

The failure of courts of appeals to follow the limitations that this Court found necessary to reinforce in *Kisor* is extremely important, both constitutionally and practically. The fine constitutional balance that this Court reinforced in *Kisor* is all the more important in the criminal context, where—in a large part of the country—federal judges are abdicating the judicial function by deferring to the Sentencing Commission's unchecked interpretations of unambiguous sentencing rules.

A. Circuits' overly broad deference to Commission Commentary raises serious constitutional concerns.

The U.S. Sentencing Commission is an independent agency with rulemaking authority. It makes rules (the Sentencing Guidelines) and interprets its own rules (e.g., through committee commentary). The Guidelines are constitutional, in part, because of constraints on the Commission's rulemaking authority, including those set out in the Administrative Procedure Act ["APA"]. Deference to commentary must be circumscribed as discussed in *Kisor* in order for this constitutional balance to be maintained. In this case it was not, raising serious constitutional concerns regarding separation of powers, the role of the independent judiciary, and historic due process principals.

In *Mistretta v. United States*, this Court upheld the constitutionality of the Sentencing Commission as an "independent agency" that "wields rulemaking power" in the form of promulgating the Sentencing Guidelines. 488 U.S. 361, 393–95 (1989). The Commission is "fully accountable to Congress, which can revoke or amend any or

all of the Guidelines as it sees fit." *Id.* at 393–94. And its "rulemaking is subject to the notice and comment requirements of the Administrative Procedure Act." *Id.*

Like other agencies that engage in APA rulemaking, the Sentencing Commission provides guidance regarding the interpretation of its own rules. One of the main ways that it does this is through commentary. But unlike with the Guidelines, Congress does not review and approve of Commission commentary. *Stinson*, 508 U.S. at 40 & 46.5. And while the commentary can be authoritative under *Seminole Rock*, *id.* at 43–45, deference is subject to the threshold constraints reiterated in *Kisor*.

Indeed, without the limitations on *Seminole Rock* deference described in *Kisor*, it would violate the APA and the Constitution to defer to Commission commentary. As *Kisor* notes, an agency is permitted to interpret rules under the APA without notice and comment, because interpretive rules are not "binding of anyone . . . merely by the agency's say-so." 139 S. Ct. at 2420. Deference to such an interpretation does not "circumvent[] the APA's rulemaking requirements," because *Kisor*'s three-step inquiry ensures that "courts retain the final authority to approve—or not—the agency's reading of a notice-and-comment rule." *Id.* And such deference does not violate separation of powers principles when "[p]roperly understood and applied," because "courts retain a firm grip on the interpretive function." *Id.* at 2421.

It has long been recognized that these constitutional concerns are heightened in criminal cases. For example, deference to agency definitions of crimes (even in the face of ambiguous statutes) is highly problematic, as it "threatens a complete undermining of the Constitution's separation of powers, while the application of the rule of

lenity preserves them by maintaining the legislature as the creator of crimes." *Esquivel-Quintana v. Lynch*, 810 F.3d 1019, 1030 (6th Cir. 2016) (Sutton, J., concurring in part), *reversed on other grounds*, 137 S.Ct. 1562 (2017); *see also Guedes v. Bureau of Alcohol, Tobacco, Firearms and Explosives*, 140 S. Ct. 789, 790 (2020) (Gorsuch, J., statement regarding denial of certiorari) (explaining that agency deference "has no role to play when liberty is at stake"); *Whitman v. United States*, 135 S. Ct. 352, 353 (2014) (Scalia, J., statement regarding denial of certiorari, joined by Thomas, J.) (explaining that deference to agency's interpretation of criminal statute would "upend ordinary principles of interpretation" and allow "federal administrators [to] in effect create (and uncreate) new crimes at will, so long as they do not roam beyond ambiguities that the laws contain").

These concerns exist also in the case of *Seminole Rock* deference at the sentencing stage. As Judge Thapar wrote in in his panel concurrence in *Havis*, "applying *Auer*" in a criminal case to "extend" a person's "time in prison" should cause "alarm bells" to go off. *United States v. Havis*, 907 F.3d 439, 450 (6th Cir. 2018), *vacated by rehearing en banc*. "The whole point of separating the federal government's powers in the first place was to protect individual liberty." *Id.* (citing The Federalist No. 47, at 324 (James Madison) (J. Cooke ed., 1961), Baron de Montesquieu, Spirit of the Laws 199 (T. Evans ed., 1777) (1978)). "It is one thing to let the Commission . . . promulgate Guidelines that influence how long defendants remain in prison." *Id.* But "[i]t is entirely another to let the Commission interpret the Guidelines on the fly and without notice and comment—one of the limits that the Supreme Court relied on in finding

the Commission constitutional in the first place." *Id.* (citing *Mistretta*, 488 U.S. at 412; *id.* at 413–27 (Scalia, J., dissenting)).

There must be a limit, and indeed there is: it's the limit this Court restated in *Kisor*. "[S]urely *Seminole Rock* deference does not extend so far as to allow [the Sentencing Commission] to invoke its general interpretive authority via commentary . . . to impose such a massive impact on a defendant with no grounding in the guidelines themselves." *Winstead*, 890 F.3d at 1092. If application notes could add to the guidelines, rather than merely interpret them, "the institutional constraints that make the Guidelines constitutional in the first place—congressional review and notice and comment—would lose their meaning." *Havis*, 927 F.3d at 386–87.

B. This issue arises with frequency across the country.

This petition also raises an issue that is of exceptional importance given the frequency with which federal courts are called upon to calculate advisory sentencing ranges—and in particular to interpret U.S.S.G. § 4B1.2—at sentencing.

As discussed above, the intractable circuit split here relates to the Guidelines definitions of both "crime of violence" and "controlled substance offense" contained in U.S.S.G. § 4B1.2, which in turn control the meaning of those terms in many other guidelines. This includes offense conduct guidelines relating to explosives, firearms, and money laundering. *See* U.S.S.G. §§ 2K1.3(a)(1) & (2), 2K2.1(a)(1)–(4), 2K2.4(c), 2S1.1(b)(1). It includes criminal history and criminal livelihood guidelines, including the career offender guideline. *See* U.S.S.G. §§ 4A1.1(e), 4B1.1(a), 4B1.4(b)(3) & (c)(2).

And it includes policy statements relating to departures, and violations of probation and supervised release. *See* U.S.S.G. §§ 5K2.17, 7B1.1(a)(1).

Statistics are not available for how often sentences are increased under Application Note 1 based on attempt or conspiracy convictions. However, it would include a portion of the nearly 4,000 people who, like Mr. Lovato, had their base offense level raised between six and ten offense levels last year under U.S.S.G. § 2K2.1(a) based on one or more prior convictions for crimes of violence or controlled substance offenses. *See* U.S. Sentencing Comm'n, *Use of Guidelines and Specific Offense Characteristics: Guideline Calculation Based* 1, 53 (Fiscal Year 2019), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/guideline-application-frequencies/2019/Use_of_SOC_Guideline_Based.pdf. It would also include a percentage of the thousands of individuals—1,597 in 2018 alone—receiving the career offender enhancement, which can sometimes enhance a sentence by decades. U.S. Sentencing Comm'n, *2018 Annual Report and Sourcebook of Federal Sentencing Statistics* 77, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2018/2018-Annual-Report-and-Sourcebook.pdf.

The difference that this mistake can make in a person's life is hard to overestimate. For Mr. Lovato, it meant a guideline range that was thirty months higher, 100–120 months instead of 70–87. Mr. Lovato was sentenced within that higher guideline range—making him like 75 percent of defendants in the last decade who were sentenced under the U.S. Sentencing Guidelines. U.S. Sentencing Comm'n,

2019 Annual Report and Sourcebook of Federal Sentencing Statistics 85 Fig. 8, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2019/2019-Annual-Report-and-Sourcebook.pdf. This Court should grant Mr. Lovato's petition to make sure that he—and the men and women like him—are not sentenced in violation of the APA and U.S. Constitution.

Conclusion

For the foregoing reasons, this petition should be granted.

Respectfully submitted,

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