No. 20-6745

IN THE SUPREME COURT OF THE UNITED STATES

Demetrius Elishakim Jefferson,

Petitioner,

-vs.-

United States of America,

Respondent.

On Petition for Writ of Certiorari to the Eighth Circuit Court of Appeals

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

The Government provides only two and a half pages in opposition to the Petition for writ of certiorari. Instead of addressing the specific challenge Mr. Jefferson brings here, the Government is content to rely on its briefing in *Tabb v. United States*, No. 20-579. The Opposition is unpersuasive.

To start, the entire Opposition is a thinly-veiled merits brief. At this stage, however, the considerations for accepting certiorari are adequately explained by Supreme Court Rule 10 (noting two reasons for granting certiorari include (a) a split among the Circuits; or (c) a Circuit Court of Appeals "has decided an important question of federal law that has not been, but should be settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court"). But the Government offers no response to either of these points. Indeed, the Government merely contends that the position taken by the Eighth Circuit in *Jefferson* was substantively correct. While that may be the Government's position on the merits, it does not make an issue of consequence more or less persuasive as to whether this Court ought to grant certiorari.

Further, since the Petitioner filed his Petition for Writ of Certiorari, and 51 days before the Government's Brief in Opposition was due, the Fifth Circuit spoke on the particular issue Mr. Jefferson brings:

> The Third Circuit changed its position on § 4B1.2 after the recent Supreme Court decision, *Kisor v. Wilkie*, in which the Court "cut back on what had been understood to be uncritical and broad deference to agency interpretations of regulations and explained that *Auer*, or *Seminole Rock*, deference should only be applied when a regulation is genuinely ambiguous." [*United States v. Nasir*, 982 F.3d 144, 158 (3d

> Cir. 2020)]. The court found that "in light of *Kisor*'s limitations on deference to administrative agencies" it is no longer proper to give the commentary "independent legal force" and that "separation-of-powers concerns advise against any interpretation of the commentary that expands the substantive law set forth in the guidelines themselves." *Id.* at 159–60. If Goodin did not have the other two qualifying offenses and we were not constrained by *Lightbourn*, our panel would be inclined to agree with the Third Circuit.

United States v. Goodin, 835 Fed. App'x 771, 782 n.1 (5th Cir. 2021). The Government fails to mention this recent decision, which, like *United States v. Crum*, 934 F.3d 963 (9th Cir. 2019), is a panel that agrees with the argument Petitioner brings here, but is bound by *en banc* Circuit precedent to the contrary.

Lastly, the Government makes no argument as to the important question of law here presented—that a determination the sentencing court is required to make can result in significant sentencing disparities. And the Eighth Circuit's recalcitrance in denying rehearing en banc at every opportunity leaves only this Court for remedy. The Government makes no mention of broad sentencing disparities on this issue. Nor does it suggest when, if ever, this split will be resolved if the Court declines certiorari here.

The Government's Opposition Brief, albeit a gilded merits brief, is unavailing because (I) the Court should grant certiorari in this attempt case; and (II) the Government's merits arguments are unavailing and premature.

I. The Court should grant certiorari in this attempt case.

The Government elects only to broadly refer to its February briefing in *Tabb v. United States*, No. 20-579. *See* Opp. 2. But the short Opposition is unavailing because (A) attempt offenses differ from conspiracy offenses; (B) *Kisor* should apply

to *Stinson*'s framework as it does *Auer*'s identical framework; (C) the Government's position creates further Circuit division; and (D) *Longoria* is a red herring.

A. Attempt offenses differ from conspiracy offenses.

In *Tabb*, the Second Circuit was confronted with a challenge to the same application note, but on very different facts. Specifically, Mr. Tabb's challenge relates to a prior *conspiracy* offense. *See United States v. Tabb*, 949 F.3d 81, 86–87 (2d Cir. 2020), *petition for certiorari docketed* No. 20-579. Mr. Jefferson's prior offense is one of *attempt*. Petition, at 8. The Government fails to appreciate the significance between an "attempt" offense and a "conspiracy" offense in light of *Kisor*.

In determining whether language is genuinely ambiguous, *Kisor* requires the "[C]ourt must exhaust all 'traditional tools' of construction." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019). One of those is *expressio unius est exclusio alterius*, 'the expression of one thing excludes others.' *See United States v. Winstead*, 890 F.3d 1082, 1091 (D.C. Cir. 2018). *Kisor* directs the sentencing court to apply this statutory canon, as a traditional tool of construction. The District Court, the Eighth Circuit, and now the Government have failed to do so. This Court need not look further than section 4B1.2 itself to see the plain application of this statutory canon.

Section 4B1.2 does not only relate to "controlled substance offenses"; it also defines "crimes of violence":

> (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….

U.S.S.G. § 4B1.2(a)(1) (emphasis added). Of course, the definition for controlled substance offenses does not include the reference to "attempt[]":

> 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.

U.S.S.G. § 4B1.2(b).

The language of the Guideline itself has import in two key ways. *First*, Application note 1, purporting to add the inchoate offenses to both definitions, may have a firmer interpretive basis for "crimes of violence" than "controlled substance offenses."[1]

Second, under the statutory canon *expressio unius est exclusio alterius*, section 4B1.2(a) references "attempt," but section 4B1.2(b) does not. *See* U.S.S.G. § 4B1.2. Neither make reference to "conspiracy." This statutory canon may bear different weight for "conspiracy" offenses—like that in *Tabb*—than it would for "attempt" offenses here. In other words, it may also be inappropriate to consider *Tabb* dispositive of *Jefferson*. In a case such as *Tabb*, the *expressio* canon may bear

[1] To the extent the Government contends that "crimes of violence" cases, such as *Lovato v. United States*, No. 20-6436, argue the same issue, the Government ignores significant differences in the text of the applicable Guideline subsections. *See United States v. Lovato*, 950 F.3d 1337, 1347 (10th Cir. 2020). Although the Application note at issue is the same, the Application note does not control whether the Guideline's language is ambiguous. That must be done independent of the Application note. *Cf. Kisor*, 139 S. Ct. at 2415–16. Because section 4B1.2(a) contains different text than 4B1.2(b) it would be inappropriate to consider one dispositive of the other.

different weight because section 4B1.2(a) does not also include 'the *conspired* use of force,' like it does include "the *attempted* use of force." U.S.S.G. § 4B1.2(b). While in the end this may or may not make a difference, this Court is the only one positioned to resolve this dispute and cannot fully do so without considering the specific challenge at issue here.

B. *Kisor* should apply to *Stinson*'s framework as it does to *Auer*'s identical framework.

Petitioner respectfully submits that the arguments contained within his Petition for Writ of Certiorari are distinct.

Specifically, in the Government's Opposition to the Cert Petition in *Broadway v. United States*, No. 20-836, the Government notes a number of cases with similar arguments that Application note 1 to U.S.S.G. § 4B1.2 is not entitled to deference. *See* Opp., No. 20-836, at 8 n.2 (collecting eight pending cases for certiorari); *see also Davis v. United States*, No. 20-6242 (not included in the eight collected cases).

But the arguments presented by each petitioner are not congruent. For one, some involve crimes of violence. *See, e.g.*, *Lovato*, No. 20-6436. Some involve conspiracy. *See, e.g.*, *Tabb*, No. 20-579; *Lewis v. United States*, No. 20-7387. Then, even among the "attempt" offenses, there is divergence.

For example, the petitioner in *Broadway* seeks certiorari, at least in part, to overturn *Stinson v. United States*, 508 U.S. 36 (1993). *See* Petition, *Broadway v. United States*, No. 20-836, at 28–34. But Petitioner here alleges that such measures are not necessary. Indeed, *Stinson* does not *mandate* deference. *Stinson*, 508 U.S. at 38 ("We decide that commentary in the Guidelines Manual that *interprets* or

explains a Guidelines is authoritative unless it violates the Constitution or a federal statute, or is *inconsistent with, or a plainly erroneous* readings of that Guideline." (emphases added)). *Cf. Auer v. Robbins*, 519 U.S. 452, 461 (1997) ("Because the salary-basis test is a creature of the Secretary's own regulations, his *interpretation* of it is, under our jurisprudence, controlling unless *plainly erroneous or inconsistent with the regulation*." (internal quotations omitted, emphases added)). To be sure, the Government correctly notes that the *Kisor* Court declined to overrule *Auer*, citing the "long line of precedents" it has spawned. Opp., *Tabb*, No. 20-579, at 14 (quoting *Kisor*, 139 S. Ct. at 2422). As such, the *analytical framework* enshrined in *Stinson* and *Auer* was preserved. But the application of that *analytical framework* is regulated by *Kisor*'s three-step process in order to confirm both that the purported interpretation is in fact an *interpretation*, and that it is not *inconsistent* or *plainly erroneous* with the text it purports to interpret. *Kisor*, 139 S. Ct. at 2415–16. *Kisor* is an explanation of how to apply those two identical frameworks, and is a logical consequence of *Stinson* and *Auer*.

Similarly, Mr. Jefferson's argument here provides the Court the opportunity to address the logical consequences of *Kisor*. Although *Kisor* does not cite *Stinson*, the identical analytical framework contained therein should be treated in accordance with *Kisor*'s explanation of *Auer*. In fact, it would perhaps make more sense that the *Government* seek *Stinson* overturned or broadened. But the Government's terse Opposition makes no such ask. The analytical framework in

Stinson, identical to that in *Auer*, survives *Kisor* and must correspondingly be treated as such. The Eight Circuit has declined to do so.

The litigants' various positions on *Stinson* and the Government's disparate treatment of identical analytical frameworks underscore the reason this Court ought to grant certiorari to Mr. Jefferson's Petition. Courts and litigants lack the guidance needed to address this issue. And the Government's position is that such division and such disparity is tolerable. It is not.

C. The Government's position creates further Circuit division.

This issue is not going away. The Circuit Split is growing, as demonstrated by the Third Circuit's recent en banc decision and the Fifth Circuit panel's dicta. *United States v. Nasir*, 982 F.3d 144 (3d Cir. 2020); *Goodin*, 835 Fed. App'x at 782 n.1. The disparity in sentences can be significant. *Cf.* U.S.S.G. § 4B1.1. Petitioner submits this Court should intervene and provide guidance to the Circuits, and to criminal defendants. *Cf. United States v. Santos*, 553 U.S. 507, 514 (2008) (Scalia, J., majority) (recognizing "no citizen should be…subjected to punishment that is not clearly prescribed" and that the courts should avoid "making criminal law in Congress's stead").

Another recent development in this area came on March 3, 2021, which the Government again declines to acknowledge. The Sixth Circuit, following the position it took in *United States v. Havis*, 927 F.3d 382 (6th Cir. 2019) (en banc), determined that commentary to U.S.S.G. § 2B1.1 could not receive deference. *See*

United States v. Riccardi, 989 F.3d 476, 488–89 (6th Cir. 2021). Denying certiorari threatens significant growth of the current Circuit split beyond just section 4B1.2.

D. *Longoria* is a red herring.

The only authority the Government provides this Court—other than a blanket reference to its prior briefing in a separate case—is its recent denial of a writ of certiorari in *Longoria v. United States*, No. 20-5715 (Mar. 22, 2021). But *Longoria* is inapplicable.

Petitioner Longoria sought certiorari on a narrow issue as to whether the Government could properly withhold a third level reduction for acceptance of responsibility for demanding a suppression hearing. *See* Petition, *Longoria*, No. 20-5715, at *i*; U.S.S.G. § 3E1.1. The plain language of the Guideline reveals its inapplicability:

> If the defendant qualifies for a decrease under subsection (a), the offense level determined prior to the operation of subsection (a) is level 16 or greater, *and upon motion of the government* stating that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently, decrease the offense level by 1 additional level.

U.S.S.G. § 3E1.1(b) (emphasis added).

First, the Guideline at issue in *Longoria* contemplates discretion. In order to qualify under section 3E1.1(b), the defendant must first obtain a motion from the Government. Without such motion, the Court has no opportunity to apply the Guideline provision. By contrast, section 4B1.2 contains no such discretion. Rather, it is a mandatory definition of "controlled substance offense." U.S.S.G. § 4B1.2(b).

The consequence of whether, under that definition, a defendant constitutes a career offender directly impacts the Guidelines computation—which the sentencing court is required to correctly calculate. *See Gall v. United States*, 552 U.S. 38, 49 (2007).

Second, *Longoria* does not deal with the interpretation of Guideline commentary as it relates to Guideline text. By contrast, the issue Petitioner presently brings is one squarely within the province of this Court. *See Stinson*, 508 U.S. at 44–45. *Stinson* did not hold, however, that every application note is entitled to *deference* under *Auer*; *Stinson* only held that application notes are entitled to *analysis* under *Auer*. *Id.*; *Auer*, 519 U.S. at 461.[2] The Eighth Circuit's holding below thereby conflicts with *Auer* and *Kisor*, by its failure to consider the narrow circumstances under which an application note can interpret Guideline text.

Third, the Government ignores the acting party in each distinct Guideline. In section 4B1.2, the actor is the sentencing court making a career offender determination, over which this Court does exert direct controlling authority. By contrast, in section 3E1.1, the actor is the prosecutor, over which the Court holds indirect authority, limited to the text of the statute and the Constitution. As such, declining certiorari until a body can create text by which to assess this Court's control of the enforcement of the Guidelines may be sound judicial discretion.

Despite the significant differences, the Government argues that certiorari need not be granted because the "Sentencing Commission has already begun the

[2] Petitioner acknowledges that *Stinson* precedes *Auer*. *Stinson*'s holding was in relation to *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). Since then, however, such deference is often termed *Auer* deference, without substantive difference. *See, e.g.*, *Kisor*, 139 S. Ct. at 2408.

process of amending the Guidelines to address the recent disagreement in the courts of appeals over the validity of Application Note 1." Opp. 2 (citation omitted). The Government ignores a number of problems with this argument.

First, a sentencing court must correctly calculate the Guideline. *Gall*, 552 U.S. at 49.

Second, as Justice Sotomayor's footnote in *Longoria* mentions, the Sentencing Commission currently has only one of seven seats filled. *Longoria*, No. 20-5715, at 2 n. (Sotomayor, J., respecting the denial of certiorari). There is no end date for the current lack of quorum. This Court should not defer to a Commission—whose resolution of a widespread and growing issue is best characterized as indefinite—when the Court is competent and necessary to resolve this *interpretive* issue. This issue needs prompt resolution, and the Commission's indefinite lack of quorum is not compatible with criminal defendants' rights. *Cf. Santos*, 553 U.S. at 514.

Third, whenever, if ever, the Commission rewrites the Guidelines and commentary—either 4B1.2, or any other provision—it must comply with this Court's guidance. That opinions are split on this matter underscores that this Court stands in the only position to remedy the issue presently before it, and provide the guidance necessary for the Commission to avoid similar delegation issues.

II. The Government's merits arguments are unavailing and premature.

The Government maintains a number of puzzling arguments as to the merits of the case. These arguments do not control the Court at this stage.

First, in its Opposition, the Government finally identifies what word or phrase it views as ambiguous—the word "prohibits." Such an argument is entirely unavailing:

> The government's late-breaking suggestion at oral argument that the offense of conspiracy to commit a controlled substance offense (which forbids only the *agreement* to commit such an offense plus, sometimes, an overt act in furtherance) "prohibits" the acts listed in § 4B1.2(b), *see United States v. Richardson*, 958 F.3d 151, 155 (2d Cir. 2020); *United States v. Lange*, 862 F.3d 1290, 1295 (11th Cir. 2017), would take any modern English speaker (not to mention any criminal lawyer) by surprise. In ordinary speech, criminal laws do not "prohibit" what they do not ban or forbid. And if conspiracy laws "prohibit" the acts listed in § 4B1.2(b) because they "hinder" those acts (as the Second and Eleventh Circuit have reasoned), then 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. But we know that § 4B1.2(b) does not cover simple possession offenses. *See Salinas v. United States*, 547 U.S. 188, 188 (2006).

United States v. Lewis, 963 F.3d 16, 27–28 (1st Cir. 2020) (Torruella and Thompson, JJ., concurring). Nevertheless, were the Court to engage in this debate, it would be analyzing the case on the merits, not whether certiorari should be granted.[3]

Second, whether the Application note had been presented to Congress at any time does not impact the widening Circuit split, and the important sentencing issues currently presented to the Court. *Cf.* Opp., *Tabb*, No. 20-579, at 19–23. Ironically, the Government essentially argues that because Congress had visibility of the application note it should be entitled to deference. *Id.* But such an argument

[3] In fact, the Government engages in all three steps of *Kisor* in its *Tabb* Opposition. *See* Opp., *Tabb*, No. 20-579, at 15–17. None of these merits arguments are persuasive either.

again requires the Government's position to ask this Court to overturn *Stinson*, not the other way around. *Stinson* controls the analytical framework. If the Government wants to subvert this framework, it would seemingly need *Stinson* to be overturned. Additionally, longstanding precedent demonstrates that Congressional inaction should not be interpreted as acquiescence. *See, e.g.*, *Star Athletica, LLC v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1015 (2017) ("As an initial matter, 'congressional inaction lacks persuasive significance' in most circumstances." (quoting *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990))). Surely, the parties will be able to elucidate this further on a merits brief. In fact, that much of the Government's argument is a merits brief underscores the ripeness of this issue for review.

Third, the Government argues that "[a]lthough the court of appeals declined to address [a third conviction], the district court found it to be a 'a crime of violence' for purposes of the career-offender guideline." Opp., at 3. But the Government can cite this Court to no authority that the District Court's determination is the end of the road for a criminal defendant. In fact, the opposite is true.[4] Petitioner correctly maintains that both convictions reviewed by the Eighth Circuit panel (and declined to rehear en banc) implicate Application Note 1.

[4] The Courts of Appeals are required to review a criminal defendant's arguments, even those not raised below, for plain error. *Davis v. United States*, 140 S. Ct. 1060, 1061–62 (2020). To the extent the Eighth Circuit declined to do so on any issue Petitioner raised, even more reason to grant certiorari and reverse.

Fourth, whether Congress is to legislate, as it clearly limited in 28 U.S.C. § 994, the Sentencing Commission has no ability to offer a contradictory, inconsistent "interpretation." Further, this Court should not decline to engage in this dispute, for which it is properly positioned to resolve important issues of federal law—another role of government the Commission is incompetent to remedy:

> There is no doubt that the Sentencing Commission has established significant, legally binding prescriptions governing application of governmental power against private individuals—indeed, application of the ultimate governmental power, short of capital punishment.
>
> …
>
> The lawmaking function of the Sentencing Commission is completely divorced from any responsibility for execution of the law or adjudication of private rights under the law. It is divorced from responsibility for execution of the law not only because the Commission is not said to be "located in the Executive Branch"…but, more importantly, because the Commission neither exercises any executive power on its own, nor is subject to the control of the President who does….And the Commission's lawmaking is completely divorced from the exercise of judicial powers since, not being a court, it has no judicial powers itself, nor is it subject to the control of any other body with judicial powers. The power to make law at issue here, in other words, is not ancillary but quite naked.
> …
> To disregard structural legitimacy is wrong in itself—but since structure has purpose, the disregard has adverse practical consequences.

Mistretta v. United States, 488 U.S. 361, 413, 420–21 (1989) (Scalia, J., dissenting).

CONCLUSION

For the reasons contained herein, Mr. Jefferson's Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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