No. _____

IN THE SUPREME COURT OF THE UNITED STATES

VAUGHN LEWIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITON FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The United States Sentencing Guideline Career Offender provision—which has been applied to eleven percent of the Bureau of Prisons inmate population—clearly and unambiguously defines the term "controlled substance offense" for the purpose of that guideline by identifying the substantive offenses that qualify. In commentary, the United States Sentencing Commission expands that definition by adding inchoate offenses, including conspiracy.

The courts of appeals are split: some defer to the commentary's expansion of the Guideline, others contend that the language of the Guideline specifies the offenses that qualify for career offender treatment, leaving no room for deference to the commentary.

In *Kisor v. Wilkie*, —— U. S. ——, 139 S. Ct. 2400 (2019), this Court held "the possibility of deference [to an agency interpretation of its rules] can arise only if a regulation is genuinely ambiguous . . . after a court has resorted to all the standard tools of interpretation." Most circuits have not applied this standard to assessments of whether deference is due to Guidelines commentary.

The Question Presented is:

When "controlled substance offense" is defined in the text of the Career Offender Guideline, U.S.S.G. § 4B1.2(b), whether the commentary can add conspiracy and other inchoate offenses not included in the guideline definition?

RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

- *United States v. Lewis*, No. 16-cr-10166, United States District Court for the District of Massachusetts. Judgment entered September 21, 2018.

- *United States v. Lewis,* No. 18-1916, United States Court of Appeals for the First Circuit. Judgment entered June 16, 2020; rehearing en banc denied October 2, 2020.

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PETITION FOR A WRIT OF CERTIORARI

Vaughn Lewis petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The First Circuit's opinion is reported at 963 F. 3d 16 and reproduced at App. 1a. The district court's decision on the applicability of the career offender provision is contained in the sentencing transcript, reproduced at App. 39a.

JURISDICTION

The judgment of the First Circuit was entered on June 16, 2020. A timely Petition for Rehearing En Banc was filed on June 30, 2020, and was denied on October 2, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

GUIDELINES PROVISIONS

Section 4B1.2 of the United States Sentencing Commission, Guidelines Manual, (Nov. 2016) provides, in relevant part:

> (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:

> 1. **Definitions.—**For purposes of this guideline—
>
> "***Crime of violence***" and "***controlled substance offense***" include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.

The full text of the guideline and commentary and additional provisions of the cited U.S. Code and Sentencing Guidelines are reproduced at App. 88a and 80a.

STATEMENT OF THE CASE

I. Legal Background

Federal sentencing starts with the Sentencing Guidelines, which are promulgated by the United States Sentencing Commission. *See* 28 U.S.C. §§ 991, 994; *United States v. Booker*, 543 U. S. 220, 264 (2005) ("The district courts . . . must consult those Guidelines and take them into account when sentencing.") (citing 28 U.S.C. §§ 3553(a)(4)-(5)).

The Sentencing Commission, and by extension the Guidelines, faced a constitutional challenge based on the delegation of power and separation of powers doctrines in its early years. *Mistretta v. United States*, 488 U. S. 361 (1989). This Court found that "although the unique composition and responsibilities of the Sentencing Commission give rise to serious concerns about a disruption of the appropriate balance of governmental power among the coordinate Branches," *id.* at 384, the Sentencing Commission, and the guidelines, survived this challenge. This finding was due in large part to the detailed prescriptions for how the Commission would exercise its grant of authority, including the directive that "it must report to Congress 'any amendments of the guidelines.'" *Id.* at 369 (citing 28 U.S.C. § 994(p)).

The Sentencing Commission issues guidelines, policy statements and commentary in a Guidelines Manual. U.S.S.G. § 1A3.1. Notably, issuing guidelines and policy statements are among the enumerated duties of the Commission, but providing commentary is not. 28 U.S.C. §§ 994(a)(1)-(2). This Court evaluated the role of commentary to the guidelines in *Stinson v. United States*, 508 U. S. 36 (1993),

finding that "the guidelines are the equivalent of legislative rules adopted by federal agencies," and that "commentary is akin to an agency's interpretation of its own legislative rules." *Id.* at 45. As such, the Court held that "commentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with or a plainly erroneous reading of, that guideline." *Id.* at 38 (citing *Bowles v. Seminole Rock*, 325 U. S. 410 (1945)).

In *Kisor*, this Court undertook a searching review of the appropriate scope of deference to an agency's interpretation of its own regulations, noting that "[w]e call that practice *Auer* deference, or sometimes, *Seminole Rock* deference, after two cases in which we employed it." 139 S. Ct. at 2408 (citing *Auer v. Robbins*, 519 U. S. 452 (1997) and *Seminole Rock*, 325 U. S. 410). The hallmark ruling from *Kisor* is that "a court should not afford *Auer* deference unless the regulation is genuinely ambiguous." *Id.* at 2415. Moreover, "before concluding that a rule is genuinely ambiguous, a court must exhaust all the 'traditional tools' of construction." *Id.* *Kisor* focused the inquiry on what is required before deference is allowed, leaving no room for deference to guideline commentary unless there is genuine ambiguity in the guideline.

At issue in this case is the Career Offender Guideline, which prescribes enhanced penalties for a defendant who (1) was at least eighteen at the time of the offense of conviction; (2) is convicted of a felony that is either a crime of violence or a controlled substance offense; and (3) has at least two prior felony convictions of either a crime of violence or a controlled substance offense. U.S.S.G. § 4B1.1(a). The Career

Offender provision is designed to "assure . . . a sentence to a term of imprisonment at or near the maximum term authorized." 28 U.S.C. § 994(h). The Career Offender Guideline provides a precise definition of the term "controlled substance offense," listing specific substantive offenses that qualify. U.S.S.G. § 4B1.2(b). The commentary *adds* "the offenses of aiding and abetting, conspiring, and attempting to commit such crimes." U.S.S.G. § 4B1.2, cmt.n.1.

II. Proceedings Below

In April 2018, Vaughn Lewis pleaded guilty to conspiracy to distribute cocaine in violation of 21 U.S.C. § 846. App. 31a. At sentencing, Mr. Lewis argued that his conspiracy offense does not trigger the career offender enhancement because neither the guideline definition of "controlled substance offense," nor the statute directing the creation of the career offender provision, 28 U.S.C. § 994(h), includes inchoate offenses. He contended that the commentary purporting to add such offenses to the guideline is "inconsistent with, or a plainly erroneous reading of, that guideline" under *Stinson*, 508 U. S. at 38, bolstered by the then-recently decided case *United States v. Winstead*, 890 F. 3d. 1082 (D.C. Cir. 2018), which held that the expansion of the guideline definition via the commentary was not entitled to deference. The district court, noting it was "bound by First Circuit law," App. 44a, deemed him a "career offender" based on his crime of conviction and two prior state drug trafficking offenses, *id.* 4a. With the enhancement, the district court determined that the Guidelines range was 151 to 188 months and, in September 2018, sentenced Mr. Lewis to nine years (108 months) of imprisonment. *Id.* 41a. The court varied down in

part because one of Mr. Lewis' two state predicates involved a $40 sale of cocaine when he was seventeen. *Id.* 72a-73a. Were he not subject to the career offender enhancement, Mr. Lewis' Guidelines range would have been 37 to 46 months. *See id.* 44a.

On appeal, Mr. Lewis continued to challenge the career offender enhancement, arguing that the guideline commentary that added inchoate crimes to the term "controlled substance offense" is invalid, citing *Kisor*, issued in June 2019, and *United States v. Havis*, 927 F. 3d 382 (6th Cir. 2018) (en banc).

The First Circuit affirmed Mr. Lewis' sentence, observing that his challenge to Application Note 1 "run[s] headfirst into our prior holdings that 'controlled substance offenses' under § 4B1.2 include so-called inchoate offenses such as conspiring to distribute controlled substances." App. 9a (citing *United States v. Fiore*, 983 F. 2d 1 (1st Cir. 1992), *abrogated on other grounds by United States v. Giggey*, 551 F. 3d. 27, 28 (1st Cir. 2008) (en banc); *United States v. Piper*, 35 F. 3d 611 (1st Cir. 1994); and *United States v. Nieves-Borrero*, 856 F. 3d 5 (1st Cir. 2017), all of which defer to the commentary).

The panel acknowledged that *Kisor* instructed that it "should not afford *Auer* deference unless the regulation is genuinely ambiguous,' after deploying the full interpretive 'legal toolkit' to 'resolve seeming ambiguities out of the box.'" App. 15a-16a (citing *Kisor*, 139 S. Ct. at 2415). And yet the panel leapfrogged over that critical step, failing to determine whether ambiguity existed and jumping directly to the question of whether the 'agency reading is reasonable, meaning it 'must come within

the zone of ambiguity the court has identified after employing all its interpretive tools.'" App. 16a (citing *Kisor*, 139 S. Ct. at 2415). Still failing to evaluate whether any ambiguity existed, the First Circuit charged ahead, concluding, "We see nothing in *Fiore*, *Piper* and *Nieves-Borrero* to indicate that the prior panels in those cases viewed themselves as deferring to an application note that strayed beyond the zone of ambiguity in the Sentencing Guidelines." App. 16a. The panel reiterated this conclusion, adding some gloss: "Simply put, we do not find anything in our prior opinions suggesting that those panels understood themselves as straying beyond the zone of ambiguity in deeming Application Note 1 *consistent with* § 4B1.2(b)." *Id.* 17a (emphasis added).

The panel considered and ultimately rejected the arguments about interpretation and separation of powers issues that had won the day in other cases, App. 17a-19a (reviewing *United States v. Soto-Rivera*, 811 F. 3d 53 (1st Cir. 2016),[1] *Winstead*, 890 F. 3d 1082, and *Havis*, 927 F. 3d 382). It observed, however:

> None of this is to say how we would rule today were the option of an uncircumscribed review available. That the circuits are split suggests that the underlying question is close. We hold only that the case for finding that the prior panels would have reached a different result today is not so obviously correct as to allow this panel to decree that the prior precedent is no longer good law in this circuit.

App. 19a.

[1] The First Circuit in *Soto-Rivera* held that without a "hook" in the text of the Guideline, there was no basis to allow the court to "import offenses not specifically listed" in the Guideline, and that commentary that would do that was "inconsistent with the text of the guideline" and, therefore, not entitled to deference. 811 F. 3d at 59-60.

The panel's two concurring judges also bowed to Circuit precedent but said that absent that precedent, they would hold that Application Note 1 "does not warrant deference." App. 25a. They explained, "we have already held [in another case] that 'there is simply no mechanism or textual hook in the Guideline that allows us to import offenses not specifically listed therein into § 4B1.2(b)'s definition of 'crime of violence.'" *Id.* (citing *Soto-Rivera*, 811 F. 3d at 60). They continued, "[i]n our view, the same is true of § 4B1.2(b)'s definition of 'controlled substance offense,'" *id.* 25a-26a (citing *Havis,* 927 F. 3d at 386-87, and *Winstead,* 890 F. 3d at 1091). They explained: the Sentencing Commission "can only promulgate binding guidelines, which influence criminal sentences, because they must pass two checks: congressional review and 'the notice and comment requirements of the Administrative Procedure Act,'" *id.* 28a (quoting *Havis*, 927 F. 3d at 385), and "commentary to the Guidelines is not required to pass through the gauntlets of congressional review or notice and comment," *id.* 30a. The concurrence continued, "the same principles that require courts to ensure that agencies do not amend unambiguous regulations in the guise of 'interpretation' ('without ever paying the procedural cost') apply with equal (if not more) force to the Sentencing Guidelines and their commentary." *Id.* 28a (quoting *Kisor*, 139 S. Ct. at 2420-21). They concluded: "If it were otherwise, the Sentencing Commission would be empowered to use its commentary as a Trojan horse for rulemaking. This it is surely not meant to do, especially when the consequence is the deprivation of individual liberty." *Id.* 28a (citing *Havis*, 927 F. 3d at 386-87, and *Winstead*, 890 F. 3d at 1092).

REASON FOR GRANTING THE PETITION

Multiple compelling reasons support the granting of this petition.

This Court should resolve the fully-developed circuit split regarding whether the Guidelines commentary can expand the clear and unambiguous definition of "controlled substance offense" provided by the text of the Career Offender Guideline. Three circuits have rejected the commentary that expands the definition of "controlled substance offense" to include conspiracy, attempt and other inchoate crimes based on *Kisor*, the plain language of the guideline and separation of powers principles, and "conclude[d] that inchoate crimes are not included in the definition of 'controlled substance offenses." *See*, *e. g.*, *United States v. Nasir*, 982 F. 3d 144, 160 (3d Cir. 2020) (en banc). Multiple other circuits have approved of deference to the commentary, including the First Circuit in this case. Still others, including the concurring judges below, have indicated that although they consider themselves bound by circuit precedent, "were [they] free to do so," they would find that "the commentary improperly expands the definition of 'controlled substance offense' to include other offenses not listed in the text of the guideline." *United States v. Crum*, 934 F. 3d 963, 966 (9th Cir. 2019). Despite issuing decisions post-*Kisor*, many circuits failed to even mention, much less follow, its central dictate—that unless a regulation is genuinely ambiguous, there is no place for agency interpretation of it—and instead simply fell back on circuit precedent. *See*, *e. g.*, *United States v. Tabb*, 949 F. 3d 81 (2d Cir. 2020), *petition for cert pending*, No. 20-579 (filed Oct. 28, 2020). Because all

the circuits have weighed in on this issue, it is unlikely that a development in the law at the circuit level will resolve the split.[2]

Granting this petition will enable this Court to correct the many circuits that are not currently utilizing the approach to evaluating whether deference is due to Guideline commentary that *Kisor* requires. Following *Kisor*, if a guideline is not "genuinely ambiguous," there is no place for guideline commentary. Because the Career Offender Guideline provides an unambiguous definition of "controlled substance offense," specifically identifying the substantive crimes that qualify, commentary that works to expand that definition by adding inchoate crimes to this definition deserves no deference and should be rejected.

Allowing continued deference (in some jurisdictions) to commentary that has not been subjected to notice and comment or congressional approval, as guidelines must be, would upset the carefully crafted system of checks and balances that *Mistretta* found saved the entire sentencing system from constitutional infirmity based on separation of powers concerns.

The Guidelines were put in place, at least in part, to provide a greater degree of consistency and uniformity across the country; the current split means that

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[2] Petitions seeking review on this question are pending in *United States v. Tabb*, 949 F. 3d 81 (2d Cir. 2020), *petition for cert. pending*, No. 20-579 (filed Oct. 28, 2020); *United States v. Broadway*, 815 F. App'x 95, 96 (8th Cir. 2020) (per curiam), *petition for cert. pending*, No. 19-2979 (filed Dec. 16, 2020); *United States v. Sorenson*, 818 F. App'x 668 (9th Cir. 2020) (citations omitted), *petition for cert. pending*, No. 20-7099 (filed Feb. 2, 2021); *United States v. Lovato*, 950 F. 3d 1337 (10th Cir. 2020), *petition for cert. pending*, No. 20-6436 (filed Nov. 20, 2020); and *United States v. Davis*, 801 F. App'x 457 (8th Cir. 2019), *petition for cert. pending*, No. 20-6042 (filed Nov. 2, 2020).

similarly situated defendants will be treated significantly differently, based solely on the jurisdiction in which they are prosecuted. Here, the career offender classification changed the Guidelines sentencing range from 37 to 46 months to 151 to 188 months. That is an enhancement that would not be applied in some other jurisdictions where there is no deference to the commentary. Such variation in the impact of the Guidelines undercuts "the evenhanded and effective operation of the criminal justice system." *Mistretta*, 488 U. S. at 366.

The Career Offender Guideline has an enormous impact on the length of sentences imposed and, thus, on the federal inmate population. It has also been identified as a source of significant and unwarranted adverse impact on Black defendants. Because many drug crimes are charged as conspiracies and other inchoate offenses, expanding the scope of the Career Offender Guideline by adding these crimes to the guideline definition has enormous consequences. These consequences should not be allowed to persist if they are based on an erroneous application of the law.

This case is an ideal vehicle for addressing whether deference is due to the commentary to the Career Offender Guideline because it squarely raises the essential questions and demonstrates the significant ramifications of being deemed a career offender. Without direct guidance from this Court, many circuits courts, including the First Circuit, continue to follow overly deferential precedent.

This Court needs to provide guidance to answer these important and compelling questions.

I. The Courts of Appeals are Deeply Divided Over Whether the Commentary Can Be Used to Expand the Definition of the Term "Controlled Substance Offense" in the Career Offender Guideline.

Every circuit court has weighed in on the question of whether to defer to the guideline commentary to § 4B1.2(b), reaching contrary conclusions. The existence of a circuit split has been widely noted. *See*, *e.g.*, *Lewis*, App. 19a (noting the circuit split); *Crum*, 934 F. 3d at 966 ("Our sister circuits are split on this issue."); *United States v. Goodin*, —— F. App'x ——, 2021 WL 506036, at *8 n.1 (5th Cir. 2021) ("We acknowledge the circuit split that this issue has presented."); *United States v. Adams*, 934 F. 3d 720, 728 (7th Cir. 2019), *cert. denied* 140 S. Ct. 824 (2020) (same).

The circuits have taken three different approaches. Some courts have rejected the commentary based on *Kisor*, the plain language of the guideline or concern about separation of powers issues. Other courts agree with this reasoning but defer to the commentary based on circuit precedent and a perceived inability to overcome circuit precedent without direct authority instructing that course of action. Still others accept the commentary based on precedent, or the reasoning set out in that precedent, frequently without reference to *Kisor*.

A. Three Circuits Have Held that the Commentary Adding Inchoate Offenses to the Career Offender Guideline Cannot Stand.

The Third, Sixth and D.C. Circuits have concluded that the commentary improperly attempts to add crimes to the guideline, reaching that result by reading the plain text of the guideline.

The Third Circuit, sitting en banc, unanimously held, "In light of *Kisor*'s limitations on deference to administrative agencies, . . . inchoate crimes are not

included in the definition of controlled substance offenses' given in section 4B1.2(b) of the sentencing guidelines." *Nasir*, 982 F. 3d at 160. The Court explained: "the guideline does not even mention inchoate offenses [and] that alone indicates it does not include them." *Id.* at 159. It noted that the Commission knew how to include inchoate offenses when it intended to and had done so in the "crime of violence" subsection of the career offender provision. The Third Circuit noted that constitutional concerns were in play, observing that "the plain-text approach . . . protects the separation of powers. If we accept that the commentary can do more than interpret the guidelines, that it can add to their scope, we allow circumvention of the checks Congress put on the Sentencing Commission[.]" *Id.* ("Unlike the guidelines, the commentary 'never passes through the gauntlets of congressional review of notice and comment.'" (quoting *Havis,* 927 F. 3d at 386)). The Third Circuit agreed with *Havis* "that separation-of-powers concerns advise against any interpretation of the commentary that expands the substantive law set forth in the guidelines themselves." *Id.*

Even before *Kisor*, the D.C. Circuit, applying *Stinson*, concluded that the Commission could not add to the guideline through commentary. *Winstead*, 890 F. 3d at 1091. The court noted that the Guideline "presents a very detailed 'definition' of controlled substance offense that clearly excludes inchoate offenses. *Expressio unius est exclusio alterius*." *Id.* (formatting in original). The court referenced this Court's guidance that, "as a rule, a definition which declares what a term 'means,' . . . excludes any meaning that is not stated,' and . . . the statute in this case

'defines the precise phrase used' in determining whether to apply a sentencing enhancement." *Id.* (citing *Burgess v. United States*, 553 U. S. 124, 128 (2008)). Noting that the Sentencing Commission "wields the authority to dispense 'significant, legally binding prescriptions governing application of governmental power against private individuals—indeed, application of the ultimate governmental power, short of capital punishment,'" *id.* at 1092 (citing *Mistretta*, 488 U. S. at 413 (Scalia, J., dissenting)), the D.C. Circuit concluded, "surely *Seminole Rock* deference does not extend so far as to allow it 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.*

Just weeks before *Kisor* was decided, the Sixth Circuit, sitting en banc, also rejected the commentary to § 4B1.2(b), drilling down on separation of powers concerns and ratifying the *Winstead* analysis. *See Havis*, 927 F. 3d at 385-87. The court noted, "The guideline expressly names the crimes that qualify as controlled substance offenses . . . [and] none are attempt crimes." Observing that the Commission could include attempt crimes in the definition, as it did elsewhere in the guidelines, the court explained:

> To make attempt crimes a part of § 4B1.2(b), the Commission did not interpret a term in the guideline itself—no term in § 4B1.2(b) would bear that construction. Rather, the Commission used Application Note 1 to *add* an offense not listed in the guideline. But application notes are to be "*interpretations of*, not *additions to*, the Guidelines themselves." If that were not so, the institutional constraints that make the Guidelines constitutional in the first place—congressional review and notice and comment—would lose their meaning. The Commission's use of commentary to add attempt crimes to the definition of "controlled substance offense" deserves no deference. The text of § 4B1.2(b) controls,

> and it makes clear that attempt crimes do not qualify as controlled substance offenses.

Id., 927 F. 3d at 386 (citations omitted).

B. Three Circuits Agreed that the Commentary to § 4B1.2 Does Not Deserve Deference Yet Indicated That, as a Panel, They Are Bound to Follow Contrary Circuit Law.

Panels and judges in the First, Fifth and Ninth Circuits would reject the commentary's addition of inchoate crimes to the definition of "controlled substance offense" in the Guideline but indicated an inability, as a panel, to break with circuit precedent.

As set forth above, the First Circuit considered itself bound by precedent to defer to the commentary. However, the two concurring judges wrote: "were we 'free to do so,' we would . . . hold that Application Note 1's expansion of § 4B1.2(b) to include conspiracies and other inchoate crimes does not warrant deference." App. 25a. They focused on the lack of a "'textual hook' in the guideline to anchor the addition of conspiracy offenses," *id.* 26a,[3] and expressed concern that "relying on commentary to expand the list of crimes that trigger career-offender status, which may well lead judges to sentence many people to prison for longer than they would otherwise deem necessary (as the district judge indicated was the case here), . . . raises troubling implications for due process, checks and balances, and the rule of law," *id.* 27a-28a. Recognizing that congressional review and notice and comment are "two checks" on

[3] The concurring judges noted that in *Soto-Rivera*, 811 F. 3d at 59-61, the First Circuit had held that the lack of a "textual hook" in the guidelines rendered the commentary inconsistent with the Guideline and not suitable for deference. App. 25a-26a.

Commission authority to create guidelines, these judges observed that "the same principles that require courts to ensure that agencies do not amend unambiguous regulations in the guise of 'interpretation' ('without ever paying the procedural cost'), apply with equal (if not more) force to the Sentencing Guidelines and their commentary." *Id.* 28a (quoting *Kisor*, 139 S. Ct. at 2420-21, and citing *Mistretta*, 488 U. S. at 393, and *Havis*, 927 F. 3d at 385).

The Fifth Circuit similarly considered itself "bound by" circuit precedent but "acknowledged the circuit split," specifically noting the Third Circuit's decision in *Nasir* and its recognition that *Kisor* "cut back on what had been understood to be uncritical and broad deference to agency interpretations of regulations." *Goodin*, 2021 WL 506036, at *7-8 & n.1. It recited the *Nasir* court's finding that "'in light of *Kisor*'s limitations on deference to administrative agencies' it is no longer proper to give 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 *8 n.1 (quoting *Nasir*, 982 F. 3d at 159-60). The Fifth Circuit concluded that were it not for circuit precedent, "our panel would be inclined to agree with the Third Circuit." *Id.* at *8 n.1.

The Ninth Circuit, after reviewing the circuit split and noting that both the D.C. and Sixth Circuits had held that the commentary conflicts with § 4B1.2(b), stated:

> Like the Sixth and D.C. Circuits, we are troubled that the Sentencing Commission has exercised its interpretive authority to expand the definition of "controlled substance offense" in this way, without any grounding in the text of § 4B1.2(b) and without affording any

> opportunity for congressional review. This is especially concerning given that the Commission's interpretation will likely increase the sentencing ranges for numerous defendants whose prior convictions qualify as controlled substance offenses due solely to Application Note 1.

Crum, 934 F. 3d at 966 (citations omitted). The court nevertheless upheld the commentary, understanding itself to be compelled to do so by an earlier Ninth Circuit decision, and writing, "If we were free to do so, we would follow the Sixth and D.C. Circuits' lead. In our view, the commentary improperly expands the definition of 'controlled substance offense' to include other offenses not listed in the text of the guideline." *Id.*[4] *see also United States v. Sorenson*, 818 F. App'x 668, 670 (9th Cir. 2020) (Paez, J., concurring) ("I agree with the *Crum* majority that Application Note 1 errs in sweeping in 'other offenses not listed in the text of that guideline.'"), *petition for cert. pending*, No. 20-7099 (filed Feb. 2, 2021).

C. One Circuit Has Conflicting Decisions.

Decisions of the Seventh Circuit are in tension with one another. One panel, dealing with a crime of violence case, flatly rejected the argument that the commentary could add crimes beyond those listed in the guideline, noting that "'application notes are *interpretations of*, not *additions to*, the Guidelines themselves' and 'an application note has no *independent* force.'" *D'Antoni v. United States*, 916 F. 3d 658, 663 (7th Cir. 2019) (emphasis in original) (citations omitted). "*[A]dding to*

[4] Although *Crum* was decided after *Kisor*, it was briefed and argued months before *Kisor* was decided, and *Kisor* was not mentioned in the *Crum* briefing or decision. 934 F. 3d 963. En banc review was denied. *United States v. Crum*, No. 17-30261 (9th Cir. Oct. 29, 2019).

the definition [is] *necessarily* inconsistent with the text of the guideline itself." *Id.* (emphasis in original).

A separate panel of the Seventh Circuit stood behind other circuit precedent that had "rejected the textual arguments that the D.C. Circuit later found persuasive in *Winstead*," *Adams*, 934 F. 3d at 729, explaining:

> [T]he application note's inclusion of conspiracy did not conflict with the text of the guideline itself. "There cannot be a conflict because the text of § 4B1.2(a) does not tell us, one [way] or another, whether inchoate offenses are included or excluded. The note says they are included. . . . Deciding how to handle conspiracy is a question about wise policy, not about textual conflict."

Id. (citations omitted). This analysis squarely collides with the dictates of *Kisor*.

D. Five Circuits Defer to the Commentary without Hesitation and Fail to Consider *Kisor*.

The Second, Fourth, Eighth, Tenth and Eleventh Circuits all rely on the commentary to expand the meaning of "controlled substance offense" to include inchoate offenses. The majority of these circuits have issued opinions on this point after *Kisor*; some have decided not to follow *Kisor*, while others have failed to consider it at all.

The Eighth Circuit is doggedly sticking with its circuit precedent, despite acknowledging the issuance of *Kisor*, writing: "Since 1995, we have deferred to the commentary, 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) (per curiam), *petition for cert. pending*, No. 19-2979 (filed Dec. 16, 2020). It concluded, "We are not in a position to overrule [this precedent] . . . even if

there have been some major developments since 1995. *See Kisor v. Wilkie,* . . . (emphasizing that *Auer*/*Seminole Rock* deference is triggered only by 'genuine ambiguity')." *Id.* at 96 n.2.

The Second Circuit, too, has opted to stand by its precedent. Although one panel, referencing *Havis* and *Winstead*, expressed concern about relying on commentary that does not undergo congressional review or notice and comment and acknowledged the argument that the commentary was an addition to rather than an interpretation of the Guideline, it remanded to allow the trial court to consider the question in the first instance. *United States v. Swinton*, 797 F. App'x 589, 602 (2d Cir. 2019), *cert. denied*, 140 S. Ct. 2791 (2020). In so doing, the court noted: "Whether the career offender Guideline applies in [this] case is a serious question with serious consequences, namely thirteen to sixteen years of incarceration." *Id.*

A separate Second Circuit panel had no such concerns and rejected a challenge to the commentary, writing, "In our view, there is no way to reconcile [our precedent's] holding that the Commission had the *'authority to expand* the definition of 'controlled substance offense' to include aiding and abetting, conspiring, and attempting to commit such offenses' through Application Note 1, with [appellant's] proposed holding that the Guideline text forbids expanding the definition of a controlled substance offense to include conspiracies." *Tabb*, 949 F. 3d at 87 (emphasis added). This analysis flies in the face of *Kisor*. Neither *Tabb* nor *Swinton* mention *Kisor*.

The Tenth Circuit, too, continues to follow its circuit precedent, not mentioning *Kisor* as it does so. Although appellants have challenged career offender

classifications based on inchoate offenses, no analysis has gone into rejecting those challenges. *See United States v. Lovato*, 950 F. 3d 1337, 1347 (10th Cir. 2020) (rejecting the challenges as foreclosed by precedent), *petition for cert. pending*, No. 20-6436 (filed Nov. 20, 2020); *see also United States v. Lovelace*, 794 F. App'x 793, 794 (10th Cir. 2020) (same).

In a pre-*Kisor* case, the Fourth Circuit summarily addressed the issue of this commentary in dicta, noting that *Stinson* allowed deference unless the commentary "violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline" and that the appellant in that case asserted none of those things. *United States v. Dozier*, 848 F. 3d 180, 183 n.2 (8th Cir. 2017) (citing *Stinson,* 508 U. S. at 38). A plethora of lower court decisions from the Fourth Circuit have embraced the reasoning set forth in *Winstead* and *Havis*, rejecting deference to the commentary and noting that the question was not reached by *Dozier*. *See*, *e. g.*, *United States v. Faison*, No. GJH-19-27, 2020 WL 815699, at *7-9 (D. Md. Feb. 18, 2020), *affirmed in part, reversed in part on other grounds,* —— F. App'x ——, 2021 WL 37450 (4th Cir. Jan. 5, 2021); *United States v. Bond*, 418 F. Supp. 3d 121, 122-23 (S.D. W. Va. 2019); *cf.*, *United States v. Vaughn*, No. 5:08-cr-00266, 2021 WL 136172, at *3 (S.D. W. Va. Jan. 13, 2021).

The Eleventh Circuit, also in a pre-*Kisor* case, ratified the inclusion of inchoate offenses via the commentary, writing: "This commentary constitutes 'a binding interpretation' of the term 'controlled substance offense.'" *United States v. Lange*, 862 F. 3d 1290, 1294 (11th Cir. 2017) (citation omitted). "We give an application note

'its most natural reading' even if 'it actually enlarges, rather than limits, the applicability of the enhancement." *Id.* (citation omitted). Such a standard runs afoul of the dictates of *Kisor*.

II. *Kisor* Compels the Conclusion that Because the Definition of "Controlled Substance Offense" is Unambiguous in U.S.S.G. § 4B1.2(b), the Commentary to the Guideline that Seeks to Expand that Definition to Additional Crimes Cannot Stand.

Deference "to agencies' reasonable readings of genuinely ambiguous regulations," is "cabined in its scope," *Kisor*, 139 S. Ct. at 2408 (citations omitted), and this Court "reinforc[ed] some of the limits inherent in the . . . [deference] doctrine[,]" *id.* at 2415. Before deference is allowed to commentary, it must overcome three hurdles.

"First and foremost, a court should not afford . . . deference unless the regulation is genuinely ambiguous . . . exhaust[ing] all the 'traditional tools of construction . . . [to] resolve . . . seeming ambiguities out of the box, without resorting to . . . deference." *Id.*

Second, "if genuine ambiguity remains, . . . the agency's reading must still be 'reasonable' . . . [and] come within the zone of ambiguity the court has identified after employing all its interpretive tools." *Id.* at 2415-16. Moreover, "agency constructions" of regulations receive no "greater deference than agency constructions of statutes" under *Chevron*. *Id.* at 2416 (citing *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)).

Third, even where there is genuine ambiguity, "not every reasonable agency reading of a genuinely ambiguous rule should receive . . . deference . . . [and] a court

must make an independent inquiry into whether the character and context of the agency interpretation entitles it to controlling weight." *Id.* at 2416.

Applying these rules, the commentary to the Career Offender Guideline that extends the reach of that provision to inchoate offenses including conspiracy is not entitled to deference.

Section 4B1.2(b) is not "genuinely ambiguous." It provides:

> 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.

This definition identifies six substantive offenses and does not include any inchoate offenses.[5]

The Guideline says what the term "controlled substance offense" "means," providing an exhaustive list. "As a rule, '[a] definition which declares what a term 'means,' . . . excludes any meaning that is not stated.'" *Colautti v. Franklin*, 439 U. S. 379, 392-93 n.10 (1979) (alterations in original) (citation omitted); *see also Burgess*, 553 U. S. at 130 (same). Similarly, as the D.C. Circuit explained, the "venerable canon" *expressio unius est exclusio alterius* "applies doubly here: the Commission showed within § 4B1.2 itself that it knows how to include [inchoate] offenses when it

[5] Although Mr. Lewis focuses here on the unambiguous nature of § 4B1.2(b), he also notes that the lack of alignment with the dictates of the statute – 28 U.S.C. § 994(h) – supports the argument that even if ambiguity is found, the commentary is inconsistent with the "text, structure, history, and so forth," *Kisor*, 139 S. Ct. at 2416, so as not to be entitled to deference.

intends to do so." *Winstead*, 890 F.3d at 1091 (citing § 4B1.2(a)(1), which defines a "crime of violence" as an offense that "has as an element the use, attempted use, or threatened use of physical force").

The guideline definition of "controlled substance offense" is not uncertain: it intends to include the specific substantive crimes listed, and all others are excluded. "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." *Kisor*, 139 S. Ct. at 2415. Because "if the law gives an answer—if there is only one reasonable construction of a regulation—then a court has no business deferring to any other reading, no matter how much the agency insists it would make more sense." *Id.* Otherwise, deference "would 'permit the agency, under the guise of interpreting a regulation, to create de facto a new regulation.'" *Id.* (citations omitted).

As the Third Circuit recognized in *Nasir*, *Kisor* refined both the degree of and approach to deference that courts should take towards guidelines commentary. As one judge put it: "In *Kisor*, the Supreme Court awoke us from our slumber of reflexive deference. . . . Before deferring, we must first exhaust our traditional tools of statutory construction. Anything less is too narrow a view of the judicial role." *Nasir*, 982 F. 3d. at 177 (Bibas, J., concurring). This Court should apply *Kisor* to the Guidelines commentary and hold that the commentary adding inchoate crimes to the career offender provision deserves no deference.

III. The Commission's Authority Must be Carefully Circumscribed to Avoid a Violation of the Separation of Powers Doctrine.

Although the Guidelines have withstood constitutional challenge, *see* discussion of *Mistretta, supra*, the commentary is not subject to the checks and balances that allowed the Guidelines to survive scrutiny on delegation and separation of powers grounds. By statute, the Commission must report annually to Congress on the operation of the guidelines with any suggested changes, 28 U.S.C. § 994(o), and must submit any proposed guidelines amendments to Congress for review, subject to a 180-day waiting period, 28 U.S.C. § 994(p), and all guidelines are subject to the notice and comment process set out in the Administrative Procedure Act, 28 U.S.C. § 994(x). Commentary undergoes none of this review.

As the concurring judges below noted, "The Sentencing Commission is an unelected body that exercises 'quasi-legislative power' and (unlike most other agencies) is located within the judicial branch. Thus, it can only promulgate binding guidelines, which influence criminal sentences, because they must pass two checks: congressional review and the 'notice and comment requirements of the Administrative Procedure Act.'" App. 28a. They continued:

> Unlike the Guidelines themselves, however, commentary to the Guidelines [is not required to] pass[] through the gauntlets of congressional review or notice and comment. . . . Thus, the same principles that require courts to ensure that agencies do not amend unambiguous regulations in the guise of "interpretation" ("without ever paying the procedural cost"), . . . apply with equal (if not more) force to the Sentencing Guidelines and their commentary.

Id. (quoting *Kisor*, 139 S. Ct. at 2420-21, and citing *Havis*, 927 F. 3d at 386); *see id.* 30a. "If it were otherwise, the Sentencing Commission would be empowered to use

its commentary as a Trojan horse for rulemaking. This it is surely not meant to do, especially when the consequence is the deprivation of individual liberty. The Sentencing Guidelines are no place for a shortcut around the due process guaranteed to criminal defendants." *Id.* (citations omitted).

The Third Circuit voiced the same concern: "If we accept that the commentary can do more than interpret the guidelines, that it can add to their scope, we allow circumvention of the checks Congress put on the Sentencing Commission." *Nasir*, 982 F.3d at 159. It concluded, "We too agree that separation-of-powers concerns advise against any interpretation of the commentary that expands the substantive law set forth in the guidelines themselves." *Id.*

To ensure the continued constitutionality of the Guidelines, this Court should ensure that courts hew to the unambiguous text of the career offender guideline that defines the term "controlled substance offense."

IV. The Career Offender Guideline is being Differentially Applied Across the Country, Undercutting the Fairness of the Criminal Justice System, Affecting Thousands of Defendants Annually, and Disproportionately Impacting Black Defendants.

Because of the circuit split, the Career Offender provision is being applied differently in jurisdictions across the country. One of the primary goals in the creation of the Sentencing Commission and Sentencing Guidelines was to create a greater degree of uniformity and consistency in sentencing. See *Mistretta*, 488 U. S. at 652 (noting that a key goal with enactment of the Sentencing Reform Act was to address "the great variation among sentences imposed by different judges upon

similarly situated offenders"). The current application of the Career Offender provision is anything but uniform.

It is hard to overstate the importance and impact of the Career Offender provision in federal sentencing. In this case, the Career Offender enhancement resulted in a Guidelines range of 151 to 188 months, App. 41a; were Mr. Lewis not subject to this enhancement, his Guidelines range would have been 37 to 46 months, *id.* 44a. These consequences are not anomalous. *See* U.S.S.C., REPORT TO CONGRESS: CAREER OFFENDER SENTENCING ENHANCEMENTS 18 (2016) ("CAREER OFFENDER REPORT") 21.[6]

Over 2,000 people per year are sentenced as career offenders, and they comprise 3.4% of all convicted defendants. CAREER OFFENDER REPORT 18.[7] Because "[c]areer offenders are sentenced to long terms of incarceration, receiving an average sentence of more than 12 years (147 months) . . . career offenders now account for over 11 percent of the total [Bureau of Prisons] population." *Id.*

A great majority of career offenders are deemed career offenders because of drug trafficking offenses (74.1%). *Id.* at 19. In Massachusetts, where Mr. Lewis (who is Black) grew up, Black people are significantly overrepresented as defendants in

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[6] The great majority of those sentenced as career offenders (91.3%) had an increase in their final Guidelines range resulting from that designation. CAREER OFFENDER REPORT 21. The Sentencing Commission found that "some of the most significant sentencing impacts apply to those offenders who had the least extensive criminal history scores" for certain of these offenders resulting in "an average guideline minimum . . . [of] 211 months, an increase of 84 months [or 7 years] over their average guideline minimum." *Id.*

[7] Over the ten-year period studied by the Sentencing Commission, 22,448 people were sentenced as career offenders. CAREER OFFENDER REPORT at 18.

drug-related cases. *See* ELIZABETH TSAI BISHOP ET AL., HARVARD LAW SCH., CRIMINAL JUSTICE POLICY PROGRAM, RACIAL DISPARITIES IN THE MASSACHUSETTS COURT SYSTEM 42 (2020). Moreover, studies conducted by the Sentencing Commission reviewing recidivism data have concluded that "recent sentencing data . . . supports a policy decision to reserve career offender penalties for those offenders who have committed at least one 'crime of violence.'" CAREER OFFENDER REPORT 43-44. Mr. Lewis was deemed a career offender exclusively based on drug-related crimes. App. 4a.

More than half—59.7%—of those deemed career offenders are Black. *Id.* at 19. This overrepresentation of Black people in the ranks of those deemed career offenders has long been noted in research done by the Sentencing Commission. U.S.S.C., FIFTEEN YEARS OF GUIDELINES SENTENCING: AS ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM 131, 133-34 (2004).

The differential application of the Career Offender Guideline across the country due to the circuit split, combined with the enormous impact of this guideline on the lives of those designated as career offenders, a significant majority of whom are Black, all militate for the granting of this petition.

V. This Case Presents the Ideal Vehicle to Address the Issue of the Appropriate Degree of Deference Courts Should Afford to Sentencing Guidelines Commentary.

Because this cases squarely raises the question of whether deference is due to commentary to the Career Offender provision in the Sentencing Guidelines, an issue that has generated a fully-developed circuit split, it is the ideal vehicle for this Court

to intervene and provide guidance. As noted above, it provides a vehicle for ensuring that courts follow the dictates of *Kisor* and preserve the integrity of the sentencing system from a separation-of-powers perspective.

In addition, this case provides an ideal vehicle for addressing the appropriate scope of who is deemed a career offender. For Mr. Lewis, the sentencing judge made a point of finding that were he not a career offender, he would have a Guidelines range of 37 to 46 months (as opposed to 151 to 188 months) and if the Career Offender provision were no longer applicable, he should return to the court for resentencing. App. 44a. Thousands of people convicted in the federal system each year are deemed career offenders, with a staggering impact both on each of their sentences individually and on the overall population of the Bureau of Prisons.

The uniformity and fairness of the sentencing system also stand in the balance.

CONCLUSION

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

Respectfully submitted,

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