No. 20-836

In the Supreme Court of the United States

MARCUS BROADWAY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELIZABETH B. PRELOGAR
Acting Solicitor General
Counsel of Record
NICHOLAS L. MCQUAID
Acting Assistant Attorney General
DANIEL N. LERMAN
Attorney
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals correctly determined that petitioner's prior Arkansas conviction for attempted delivery of a controlled substance is a "controlled substance offense" under Section 4B1.2(b) of the advisory Sentencing Guidelines.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is not published in the Federal Reporter but is reprinted at 815 Fed. Appx. 95.

JURISDICTION

The judgment of the court of appeals was entered on August 5, 2020. The petition for a writ of certiorari was filed on December 16, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Western District of Arkansas, petitioner was convicted of distributing an unspecified amount of methamphetamine, in violation of 21 U.S.C. 841(a)(1). Judgment 1. He was sentenced to 100 months of impris-

onment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1a-3a.

1. a. In the Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, ch. II, 98 Stat. 1987, Congress established the United States Sentencing Commission (Commission) "as an independent commission in the judicial branch of the United States." 28 U.S.C. 991(a). Congress directed the Commission to promulgate "guidelines * * * for use of a sentencing court in determining the sentence to be imposed in a criminal case," as well as "general policy statements regarding application of the guidelines." 28 U.S.C. 994(a)(1) and (2). Congress also directed the Commission to "periodically * * * review and revise" the Sentencing Guidelines. 28 U.S.C. 994(*o*).

The Guidelines are structured as a series of numbered guidelines and policy statements followed by additional commentary. See Sentencing Guidelines § 1B1.6.[1] The Commission has explained, in a guideline entitled "Significance of Commentary," that the commentary following each guideline "may serve a number of purposes," including to "interpret the guideline or explain how it is to be applied." *Id.* § 1B1.7 (emphasis omitted). The Commission has further explained that "[s]uch commentary is to be treated as the legal equivalent of a policy statement." *Ibid.* And the Commission has instructed that, in order to correctly "apply[] the provisions of" the Guidelines, a sentencing court must consider any applicable "commentary in the guidelines." *Id.* § 1B1.1(a) and (b). Congress has similarly required district courts to consider "the sentencing

[1] Except as otherwise noted, all citations to the Guidelines refer to the 2018 edition used at petitioner's sentencing.

guidelines, policy statements, and official commentary of the Sentencing Commission" in imposing a sentence. 18 U.S.C. 3553(b)(1).

Under 28 U.S.C. 994(x), to promulgate or amend a guideline, the Commission must comply with the notice-and-comment procedures for rulemaking by executive agencies. See 5 U.S.C. 553(b) and (c). And under 28 U.S.C. 994(p), the Commission must "submit to Congress" any proposed amendment to the Guidelines, along with "a statement of the reasons therefor." Proposed amendments generally may not take effect until 180 days after the Commission submits them to Congress. *Ibid.* The guidelines cited above, regarding the salience of commentary, were themselves subject to both notice-and-comment and congressional-review procedures. See, *e.g.*, 52 Fed. Reg. 18,046, 18,053, 18,109-18,110 (May 13, 1987) (notice of submission to Congress of "Application Instructions" in Section 1B1.1 and "Significance of Commentary" in Section 1B1.7) (emphasis omitted).

Although Sections 994(p) and (x) do not apply to policy statements and commentary, the Commission's rules provide that "the Commission shall endeavor to include amendments to policy statements and commentary in any submission of guideline amendments to Congress." U.S. Sent. Comm'n R. 4.1. The rules similarly provide that the Commission "will endeavor to provide, to the extent practicable, comparable opportunities for public input on proposed policy statements and commentary." U.S. Sent. Comm'n R. 4.3. And like Guidelines amendments, an "affirmative vote of at least four members of the Commission" is required to promulgate or amend any policy statement or commentary. 28 U.S.C. 994(a); see U.S. Sent. Comm'n R. 2.2(b).

b. Before this Court's decision in *United States* v. *Booker*, 543 U.S. 220 (2005), the Sentencing Guidelines were "mandatory" and limited a district court's discretion to impose a non-Guidelines sentence, *id.* at 227, 233. In *Stinson* v. *United States*, 508 U.S. 36 (1993), this Court addressed the role of Guidelines commentary and determined 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.

In reaching that determination, the Court drew an "analogy" to the principles of deference applicable to an executive agency's interpretation of its own regulations. *Stinson*, 508 U.S. at 44. The Court stated that, under those principles, as long as the "agency'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 (quoting *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)). The Court acknowledged that the analogy was "not precise," but nonetheless viewed affording "this measure of controlling authority to the commentary" as the appropriate approach in the particular circumstances of the Guidelines. *Id.* at 44-45.

2. In January 2018, after a tip from a confidential informant, police officers in Fayetteville, Arkansas, began investigating petitioner for drug-trafficking. Gov't C.A. Br. 3-4; see Presentence Investigation Report (PSR) ¶¶ 13-14. On two separate occasions that month, petitioner sold hundreds of dollars of methamphetamine to a confidential informant wearing a record-

ing device. PSR ¶¶ 14-25. On a third occasion, an informant arranged to buy methamphetamine from petitioner, but the substance later proved to be a different chemical used in the manufacture of methamphetamine. PSR ¶¶ 26-31. Petitioner apparently learned of the investigation and left the area to avoid arrest. PSR ¶ 32. In September 2018, officers discovered that petitioner had returned to Fayetteville and was staying at his girlfriend's apartment, where officers arrested him. PSR ¶¶ 34-35. Inside the apartment, officers found a gun that petitioner identified as belonging to him and $2400 in cash. PSR ¶¶ 35-38.

A grand jury in the Western District of Arkansas charged petitioner with three counts of distributing methamphetamine, in violation of 21 U.S.C. 841(a)(1), and one count of possessing a firearm after a felony conviction, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2). Indictment 1-2. Petitioner pleaded guilty to one of the drug-distribution counts, involving 5.03 grams of methamphetamine, in exchange for dismissal of the remaining counts. Pet. App. 4a-5a; see Plea Agreement 1-3.

The now-advisory Sentencing Guidelines generally prescribe significantly higher offense levels than would otherwise apply for an offense committed by a "career offender." Sentencing Guidelines § 4B1.1(b). A defendant is a "career offender" if the defendant was at least 18 years old at the time of the current offense, the current offense was "a felony that is either a crime of violence or a controlled substance offense," and the defendant previously committed two such felonies. *Id.* § 4B1.1(a). The Guidelines define a "controlled substance offense" for these purposes as

> 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.

Id. § 4B1.2(b). Application Note 1 in the commentary to that guideline states that the term "'controlled substance offense' include[s] the offenses of aiding and abetting, conspiring, and attempting to commit such [an] offense[]." *Id.* § 4B1.2, comment. (n.1) (emphasis omitted).

Prior to sentencing, the Probation Office determined that petitioner is a career offender under the Guidelines because he has multiple prior Arkansas convictions that qualify as "controlled substance offense[s]" as defined above—namely, a 2012 conviction on one count of delivering cocaine and a 2007 conviction on three counts of attempting to deliver a controlled substance (crack cocaine). PSR ¶¶ 55, 63, 69. Based on the career-offender guideline, the Probation Office calculated petitioner's advisory guidelines range to be 151-188 months of imprisonment. PSR ¶¶ 55, 113.

The district court adopted those calculations at petitioner's sentencing, overruling his objections to the application of the career-offender guideline. Sent. Tr. 31-34, 40. The court explained that the Eighth Circuit's decision in *United States* v. *Mendoza-Figueroa*, 65 F.3d 691 (1995) (en banc), foreclosed petitioner's contention that his prior conviction for attempted drug delivery does not qualify as a "controlled substance offense" under the Guidelines. Sent. Tr. 33-34. The court then granted a downward variance and sentenced petitioner to 100 months of imprisonment, to be followed by three

years of supervised release. *Id.* at 47-49; see Pet. App. 6a-7a.

3. The court of appeals affirmed in a per curiam, unpublished decision. Pet. App. 1a-3a. As relevant here, the court rejected petitioner's challenge to the treatment of his attempted drug-delivery convictions as "controlled substance offenses" under the Guidelines. *Id.* at 2a (brackets and citation omitted). The court stated that Application Note 1 "extends the reach of section 4B1.2(b) to attempted distribution, even though the provision itself lists only completed acts." *Ibid.* The court also stated that, since its 1995 decision in *Mendoza-Figueroa*, *supra*, the court had "deferred to the commentary, not out of fidelity to the Guidelines text, but rather because" Application Note 1 is not a "'plainly erroneous reading'" of Section 4B1.2. *Ibid.* (quoting *Mendoza-Figueroa*, 65 F.3d at 693). The panel noted that it was "not in a position" to overrule the en banc decision in *Mendoza-Figueroa*, "even if there have been some major developments since 1995." *Id.* at 2a n.2 (citing *Kisor* v. *Wilkie*, 139 S. Ct. 2400, 2414 (2019), and *Booker*, 543 U.S. at 259-261). Accordingly, the court held that petitioner's prior drug "convictions count as 'controlled substance offenses.'" *Id.* at 3a (brackets omitted). Petitioner did not seek rehearing or rehearing en banc.

ARGUMENT

Petitioner contends (Pet. 11-17) that Application Note 1 to Sentencing Guidelines § 4B1.2 is invalid insofar as it interprets the career-offender guideline to include attempt offenses, and that applying the guideline to such offenses is inconsistent with this Court's decision in *Kisor* v. *Wilkie*, 139 S. Ct. 2400 (2019). That contention does not warrant certiorari in this case. The

court of appeals correctly determined, in accord with the decisions of a large majority of the circuits, that petitioner's prior conviction for the attempted delivery of crack cocaine is a "controlled substance offense" under Section 4B1.2(b). Although some courts have recently declined to apply that guideline to attempt and conspiracy offenses, those decisions are unsound and reflect an incomplete understanding of the circumstances under which the career-offender guideline and Application Note 1 were adopted. In any event, the Commission has already begun the process of addressing the recent disagreement, obviating any need for review by this Court at this time.[2]

Petitioner further contends (Pet. 17-34) that the rule of lenity should apply to resolve any ambiguity in the text of the Guidelines in a defendant's favor and that this Court's decision in *Stinson* v. *United States*, 508 U.S. 36 (1993), should be narrowed or overruled because, in his view, deferring to the Commission's interpretation of an ambiguous guideline deprives criminal defendants of due process. Those arguments were neither pressed nor passed upon below and, in any event, do not merit the Court's review. Accordingly, the petition for a writ of certiorari should be denied.

1. a. The court of appeals correctly rejected petitioner's challenge to the application of the career-

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[2] Similar questions are presented in *Tabb* v. *United States*, No. 20-579 (filed Oct. 28, 2020); *Lovato* v. *United States*, No. 20-6436 (filed Nov. 20, 2020); *Jefferson* v. *United States*, No. 20-6745 (filed Dec. 16, 2020); *Clinton* v. *United States*, No. 20-6807 (filed Dec. 30, 2020); *Sorenson* v. *United States*, No. 20-7099 (filed Feb. 1, 2021); *Roberts* v. *United States*, No. 20-7069 (filed Feb. 2, 2021); *O'Neil* v. *United States*, No. 20-7277 (filed Feb. 26, 2021); and *Lewis* v. *United States*, No. 20-7387 (filed Mar. 1, 2021).

offender guideline in calculating his advisory guidelines range. Petitioner's three prior Arkansas convictions for attempted delivery of a controlled substance are "controlled substance offense[s]" under Section 4B1.2(b). Section 4B1.2(b) defines such an offense as "an offense under federal or state law * * * 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." Sentencing Guidelines § 4B1.2(b). Application Note 1 makes clear that the term "'controlled substance offense' include[s] the offenses of aiding and abetting, conspiring, and attempting to commit such [an] offense[]." *Id.* § 4B1.2, comment. (n.1) (emphasis omitted). Petitioner's attempt convictions plainly qualify. Petitioner was convicted of attempting to "deliver * * * a controlled substance," Ark. Code Ann. § 5-64-401(a) (Supp. 2007), and "delivery" includes any "actual, constructive, or attempted transfer" of the controlled substance "in exchange for money or anything of value," *id.* § 5-64-101(7). See PSR ¶ 63; Pet. App. 2a.

For the reasons stated in the government's brief in opposition to the petition for a writ of certiorari in *Tabb* v. *United States*, No. 20-579 (Feb. 16, 2021), Application Note 1's interpretation of the career-offender guideline as including attempt and conspiracy offenses, including attempted drug distribution, is firmly grounded in the guideline's text. See Br. in Opp. at 9-10, *Tabb*, *supra* (No. 20-579) (*Tabb* Opp.).[3] Unlike an adjacent provision stating that a "crime of violence * * * *is* murder" or a

[3] We have served petitioner with a copy of the government's brief in opposition in *Tabb*.

list of other specified offenses, Sentencing Guidelines § 4B1.2(a)(2) (emphasis added), the definition of "controlled substance offense" extends to any felony offense that "*prohibits* the manufacture, import, export, distribution, or dispensing of a controlled substance," *id.* § 4B1.2(b) (emphasis added). The term "prohibit" can mean "prevent from doing or accomplishing something," *Webster's Third New International Dictionary of the English Language Unabridged* 1813 (1986), and in that sense is synonymous with "hinder" or "preclude," *Black's Law Dictionary* 1465 (11th ed. 2019). Application Note 1 confirms that Section 4B1.2(b) uses the term "prohibit" in that sense. See *United States* v. *Lange*, 862 F.3d 1290, 1295 (11th Cir.) (explaining that Application Note 1 indicates that "'[c]ontrolled substance offense' cannot mean only offenses that forbid conduct outright, but must also include related inchoate offenses that aim toward that conduct"), cert. denied, 138 S. Ct. 488 (2017). The context, purpose, and history of the Guidelines further confirm that the definition of "controlled substance offense" is best understood to include inchoate offenses. *Tabb* Opp. 11-13.

b. In affirming petitioner's sentence, the court of appeals adhered to a precedent in which it had applied this Court's decision in *Stinson* to determine that it must "enforce [Application] Note 1 in accordance with its terms" because the Application Note "is a reasonable interpretation of the career offender guidelines." *United States* v. *Mendoza-Figueroa*, 65 F.3d 691, 693-694 (8th Cir. 1995) (en banc); see Pet. App. 2a. Petitioner appears to argue (Pet. 3, 13-14) that the court of appeals erred in not reconsidering its precedent in light of this Court's decision in *Kisor* v. *Wilkie*, *supra*. The panel explained, however, that it was "not in a position

to overrule" the en banc decision in *Mendoza-Figueroa*, Pet. App. 2a n.2, and petitioner did seek rehearing en banc. Moreover, petitioner's apparent contention that *Kisor* required the panel to reconsider or overrule circuit precedent finds no support in *Kisor* itself.

In *Kisor*, this Court considered whether to overrule *Auer* v. *Robbins*, 519 U.S. 452 (1997), and *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), and thus "discard[] the deference" afforded under those decisions to "agencies' reasonable readings of genuinely ambiguous regulations." *Kisor*, 139 S. Ct. at 2408; see *Auer*, 519 U.S. at 461 (stating that an agency's interpretation of its own regulation is "controlling unless 'plainly erroneous or inconsistent with the regulation'") (quoting, indirectly, *Seminole Rock*, 325 U.S. at 414). The Court took *Kisor* as an opportunity to "restate, and somewhat expand on," the limiting principles for deferring to agency's interpretation of its own regulation. 139 S. Ct. at 2414. Among other things, the Court emphasized that "a court should not afford *Auer* deference" to an agency's interpretation of a regulation "unless the regulation is genuinely ambiguous." *Id.* at 2415.

Notwithstanding those clarifications, the Court pointedly declined to overrule *Auer* or *Seminole Rock*—let alone the "legion" of other precedents applying those decisions, including *Stinson*. *Kisor*, 139 S. Ct. at 2411 n.3 (opinion of Kagan, J.) (identifying *Stinson*, 508 U.S. at 44-45, as one of numerous examples); see *id.* at 2422 (majority opinion) (citing this "long line of precedents" as a reason not to overrule *Auer*) (citation omitted); cf. *id.* at 2424-2425 (Roberts, C.J., concurring in part). The Court explained that it had "applied *Auer* or *Seminole Rock* in dozens of cases, and lower courts have done so

thousands of times," and that "[d]eference to reasonable agency interpretations of ambiguous rules pervades the whole corpus of administrative law." *Id.* at 2422 (majority opinion). And the Court adhered to *Auer* on stare decisis grounds in part to avoid "allow[ing] relitigation of any decision based on *Auer*," with the attendant "instability" that would result from overturning precedent in "so many areas of law, all in one blow." *Ibid.*

Kisor therefore cannot support the principle that petitioner effectively advocates here, under which a court of appeals must consider anew every one of its prior decisions deferring to the Commission's commentary under *Stinson*. To be sure, *Kisor* provides the governing standards for determining whether a court must defer to an executive agency's interpretation of a regulation, see 139 S. Ct. at 2414-2418, and *Stinson* reasoned that—by "analogy," albeit "not [a] precise" one—the Commission's commentary interpreting the Guidelines should be treated the same way, 508 U.S. at 44; see *id.* at 44-46. The government has accordingly taken the position that *Kisor* sets forth the authoritative standards for determining whether particular commentary is entitled to deference. But it does not follow that a court of appeals is required to reopen settled law in order to apply those standards to matters previously decided in reliance on *Auer* or *Seminole Rock*—or, here, *Stinson*. Indeed, this Court adhered to *Auer* and *Seminole Rock* in part to avoid such wasteful "relitigation." *Kisor*, 139 S. Ct. at 2422.

c. In any event, the result below would not have been different had the court of appeals reconsidered its precedent in light of *Kisor*. Petitioner contends (Pet. 2) that Application Note 1 is invalid because "[t]he plain

text of Guideline § 4B1.2 lists only completed crimes in the definition of 'controlled substance offense.'" But petitioner fails even to consider the established meaning of the term "prohibit" as "hinder" or "prevent." Petitioner also fails address the context, purpose, and history of the career-offender guideline, all of which support the Commission's longstanding interpretation. See *Tabb* Opp. 9-12. At a minimum, those considerations demonstrate that "the interpretive question" of whether Section 4B1.2(b) encompasses inchoate drug-trafficking offenses "has no single right answer," *Kisor*, 139 S. Ct. at 2415, leaving an ambiguity for the agency to resolve by interpretation.

Application Note 1 also has all the hallmarks of an agency interpretation warranting deference. See *Tabb* Opp. 15-16. It is the Commission's "authoritative" and "official" position, *Kisor*, 139 S. Ct. at 2416 (citation omitted), having been included in the official Guidelines Manual for decades; it implicates the Commission's "substantive expertise," *id.* at 2417; and it reflects the Commission's "fair and considered judgment," not an ad hoc position of convenience adopted for litigation, *id.* at 2417-2418 (citations omitted).

2. Petitioner contends (Pet. 11) that the courts of appeals are divided "about whether *Kisor* limited *Stinson* and how rigorously judges must analyze the Guidelines' text before deferring to commentary." The Eighth Circuit did not address that question in its unpublished decision below, except insofar as the panel determined that it was "not in a position" to disregard a prior en banc decision in light of *Kisor*. Pet. App. 2a n.2. Petitioner is correct (Pet. 11-17) that a recent disagreement has arisen in the courts of appeals concerning the validity of Application Note 1's interpretation of Section

4B1.2. But that disagreement does not warrant this Court's review at this time. The minority position that petitioner advocates is mistaken, and in any event the Commission has already proposed an amendment to the text of Section 4B1.2 to resolve the disagreement.

a. The Eighth Circuit and eight other courts of appeals have accepted and applied the Commission's interpretation, in Application Note 1, that Section 4B1.2(b) encompasses attempt and conspiracy offenses. Pet. App. 2a-3a; see *United States* v. *Tabb*, 949 F.3d 81, 86-87 (2d Cir. 2020), petition for cert. pending, No. 20-579 (filed Oct. 28, 2020); *United States* v. *Crum*, 934 F.3d 963, 966-967 (9th Cir. 2019) (per curiam), cert. denied, 140 S. Ct. 2629 (2020); *United States* v. *Adams*, 934 F.3d 720, 729 (7th Cir. 2019), cert. denied, 140 S. Ct. 824 (2020); *Lange*, 862 F.3d at 1295 (11th Cir.); *United States* v. *Nieves-Borrero*, 856 F.3d 5, 9 (1st Cir. 2017); *United States* v. *Dozier*, 848 F.3d 180, 183 & n.2 (4th Cir. 2017); *United States* v. *Martinez*, 602 F.3d 1166, 1174 (10th Cir. 2010); *United States* v. *Guerra*, 962 F.2d 484, 485-487 (5th Cir. 1992).[4] Three courts have disagreed. See *United States* v. *Nasir*, 982 F.3d 144, 156-160 (3d Cir. 2020) (en banc); *United States* v. *Havis*, 927 F.3d 382, 386-387 (6th Cir. 2019) (per curiam) (en banc); *United States* v. *Winstead*, 890 F.3d 1082, 1090-1092 (D.C. Cir. 2018).

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[4] Petitioner asserts (Pet. 16-17) that the Eleventh Circuit adopted a uniquely different approach in *United States* v. *Cingari*, 952 F.3d 1301, cert. denied, 141 S. Ct. 835 (2020). But that immigration-fraud case did not involve Application Note 1; the court of appeals did not address any argument based on *Kisor*; and the court recited the same approach to the Commission's commentary that this Court adopted in *Stinson*. See *id.* at 1308 (citing *Stinson*, 508 U.S. at 47).

Those three decisions, however, not only fail to appreciate that Application Note 1 reflects the best reading of the guideline's text, but also rest on a mistaken premise concerning the guideline. In each case, the court of appeals viewed the Application Note as an improper attempt by the Commission to "add an offense not listed in" the career-offender guideline without satisfying the procedural requirements for amending the text of the Guidelines, *Havis*, 927 F.3d at 386 (emphasis omitted)—*i.e.*, publication of a proposed amendment for notice and comment, 28 U.S.C. 994(x), and submission of the amendment to Congress for review, 28 U.S.C. 994(p). See *Nasir*, 982 F.3d at 159 (stating that giving effect to Application Note 1 would "allow circumvention of the checks Congress put on the" Commission); *Havis*, 927 F.3d at 386 (asserting that commentary "never passes through the gauntlets of congressional review or notice and comment"); *Winstead*, 890 F.3d at 1092 (observing that, "[i]f the Commission wishes to expand the definition of 'controlled substance offenses' to include attempts, it may * * * submit[] the change for congressional review").

In fact, however, the Commission has repeatedly published Application Note 1 for comment and has submitted it to Congress for review. As set forth in detail at pages 18-21 of the government's brief in opposition in *Tabb*, *supra*, the Commission has included commentary interpreting the definition of "controlled substance offense" to include attempt and conspiracy offenses since the very first edition of the Guidelines, has repeatedly published that interpretation in the Federal Register for public comment, and has submitted it to Congress for review. Any suggestion that the Commission sought

to "add" inchoate offenses while circumventing "congressional review and notice and comment," *Havis*, 927 F.3d at 386-387 (emphasis omitted), is therefore incorrect. See *Tabb* Opp. 22. The regulatory history also weighs against addressing any broader methodological questions about *Stinson* or *Kisor* in this case. The loose analogy that this Court drew in *Stinson* between the Commission's commentary and an executive agency's interpretation of its own regulations was predicated in part on the assumption that the commentary was not subject to the same procedures that apply to rulemaking. See 508 U.S. at 39-40, 45. That assumption appears to have been correct for the particular commentary at issue in *Stinson*, see Sentencing Guidelines App. C, Amend. 433 (Nov. 1, 1991) (discussed in *Stinson*, 508 U.S. at 39); 57 Fed. Reg. 20,148, 20,157 (May 11, 1992), but it would not be correct here.

More broadly, a central point of contention in *Kisor* was whether executive agencies might, under the guise of interpretation, use interpretive rules that do not go through notice and comment to make substantive changes to legislative rules, which are required to go through notice and comment. See 139 S. Ct. at 2420-2421 (opinion of Kagan, J.); *id.* at 2434-2435 (Gorsuch, J., concurring in the judgment). Those concerns are not present here. The Commission published the relevant commentary, solicited public comment on it, and submitted it to Congress—on multiple occasions. See *Tabb* Opp. 18-21. In other words, the Commission has already repeatedly run through the same "gauntlets of congressional review [and] notice and comment," *Havis*, 927 F.3d at 386, that would have applied had the Commission instead chosen to alter the text of the career-offender guideline itself.

b. In any event, further review of the validity of Application Note 1 is unwarranted at this time. This Court typically leaves the resolution of Guidelines issues to the Commission. The Commission has a "statutory duty 'periodically to review and revise' the Guidelines." *Braxton* v. *United States*, 500 U.S. 344, 348 (1991) (quoting 28 U.S.C. 994(*o*) (1988)) (brackets omitted). Congress thus "necessarily contemplated that the Commission would periodically review the work of the courts, and would make whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest." *Ibid.* Given that the Commission can and does amend the Guidelines to eliminate conflicts or correct errors, this Court ordinarily does not review decisions interpreting the Guidelines. See *ibid.*; see also *United States* v. *Booker*, 543 U.S. 220, 263 (2005) ("The Sentencing Commission will continue to collect and study appellate court decisionmaking. It will continue to modify its Guidelines in light of what it learns, thereby encouraging what it finds to be better sentencing practices.").

That prudential policy applies with special force here because the Commission has already begun the process of addressing the recent disagreement regarding Application Note 1. In December 2018, after the D.C. Circuit's decision in *United States* v. *Winstead*, *supra*, the Commission sought public comment on proposed revisions to Section 4B1.2 and Application Note 1. 83 Fed. Reg. 65,400, 65,412-64,415 (Dec. 20, 2018). The Commission explained that "[m]ost circuits have held that the definitions of 'crime of violence' and 'controlled substance offense' at § 4B1.2 include the offenses of aiding and abetting, conspiracy to commit, and attempt to commit such crimes, in accordance with the commentary to

the guideline," but that the D.C. Circuit had "concluded otherwise" in *Winstead*. *Id.* at 65,413. In the Commission's view, "the commentary that accompanies the guidelines is authoritative and failure to follow the commentary would constitute an incorrect application of the guidelines." *Ibid.* Nonetheless, to resolve the disagreement, the Commission proposed to "move the inchoate offenses provision from the Commentary to § 4B1.2 to the guideline itself as a new subsection (c) to alleviate any confusion and uncertainty resulting from the D.C. Circuit's decision." *Ibid.*

The Commission has not yet acted on that proposal. As petitioner notes (Pet. 17), since 2019 the Commission has lacked the quorum of four voting members necessary to amend any guideline or commentary. 28 U.S.C. 994(a); U.S. Sent. Comm'n R. 2.2(b); see U.S. Sent. Comm'n, *2019 Annual Report* 3 (2020) (noting lack of quorum). But the December 2018 proposal demonstrates that the question whether Application Note 1 in its current form is a binding and authoritative interpretation of Section 4B1.2 is likely to be resolved by the Commission itself. Cf. *Longoria* v. *United States*, No. 20-5715 (Mar. 22, 2021) (Sotomayor, J., respecting the denial of certiorari), slip op. 2 (observing, with respect to another Guidelines dispute, that the "Commission should have the opportunity to address [the] issue in the first instance, once it regains a quorum of voting members") (citing *Braxton*, 500 U.S. at 348).

Petitioner contends (Pet. 17) that the Commission cannot resolve a methodological dispute concerning "*how* courts interpret the Guidelines," but the Guidelines already contain application instructions for applying the commentary, see Sentencing Guidelines § 1B1.7. In any event, the decisions petitioner invokes in support

of a putative conflict (Pet. 11-16) largely involve Application Note 1—the subject of the Commission's proposal. Many also predated *Kisor*—including two decisions whose approach he favors, see Pet. 11-12 (discussing *Havis*, *supra*, and *Winstead*, *supra*)—which underscores that the current dispute turns primarily on the particulars of Section 4B1.2 and Application Note 1, not on broader principles of administrative law.

3. Petitioner also seeks review of the question whether "the rule of lenity and the right to due process preclude *Stinson* deference when commentary to a Sentencing Guideline would increase a sentence." Pet. i; see Pet. 17-34. That question is not properly presented here. This Court's "traditional rule * * * precludes a grant of certiorari * * * when 'the question presented was not pressed or passed upon below.'" *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (citation omitted). Here, petitioner did not argue below that the rule of lenity or due process precludes deference to the Commission's commentary, and the court of appeals did not address any such arguments. Petitioner did invoke the rule of lenity, but only to argue that Section 4B1.2(b) should not be read to encompass his Arkansas attempted drug delivery convictions. Pet. C.A. Br. 26-27. Petitioner nowhere contended that the rule of lenity would generally supplant *Stinson* whenever deference to the Commission's commentary would increase a defendant's advisory guidelines range, and he did not raise any due process challenge at all. Petitioner offers no compelling reason for this Court to address those arguments in the first instance. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view.").

Even if it were properly presented here, petitioner's second question would not warrant review. Petitioner's reliance (Pet. 20-24) on the rule of lenity is misplaced. "[T]he rule of lenity only applies if, after considering text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the [provision]." *United States* v. *Castleman*, 572 U.S. 157, 172-173 (2014). No such "grievous ambiguity" exists here. As previously explained, see *Tabb* Opp. 9-12; pp. 9-10, *supra*, the text, context, purpose, and history of the Guidelines all confirm that the definition of "controlled substance offense" is best understood to include inchoate offenses, including attempts. In any event, this Court's decision that vagueness challenges cannot be made to the advisory Sentencing Guidelines, see *Beckles* v. *United States*, 137 S. Ct. 886, 895 (2017), casts serious doubt on whether the rule of lenity even applies to interpretations of the Guidelines. Like the due process vagueness doctrine, the rule of lenity derives from concerns of fair warning and avoiding arbitrary enforcement, see *id.* at 892; *United States* v. *Bass*, 404 U.S. 336, 348 (1971), that do not apply to the advisory Sentencing Guidelines, *Beckles*, 137 S. Ct. at 894; see, *e.g.*, *United States* v. *Gordon*, 852 F.3d 126, 130 n.4 (1st Cir.) ("[A]s is now clear from *Beckles* * * * , concerns about statutory vagueness, which underlie the rule of lenity, do not give rise to similar concerns regarding the Guidelines."), cert. denied, 138 S. Ct. 256 (2017).

Petitioner asserts (Pet. 24-27) that the courts of appeals are divided over whether the rule of lenity should be applied to an ambiguous guideline, rather than deferring to the Commission's interpretation of the guideline in commentary. But his claim (Pet. 25) that "[h]alf

the circuits" apply the approach he favors rests primarily on concurring opinions by individual judges in *Nasir* and *Havis*, which did not command a majority of either the Third or Sixth Circuit, respectively. The remaining decisions he identifies either did not apply the rule of lenity or did not involve the Guidelines. See *Winstead*, 890 F.3d at 1092 n.14 (stating that it was "not * * * necessary" to consider lenity); *United States* v. *Moss*, 872 F.3d 304, 308, 314 (5th Cir. 2018) (interpreting an executive agency's regulation, not the Guidelines); *United States* v. *McClain*, 23 Fed. Appx. 544, 548 (7th Cir. 2001) (finding that the defendant "waived his 'lenity' argument" and, alternatively, that the rule of lenity "is wholly inapplicable"); cf. *United States* v. *Lewis*, 963 F.3d 16, 27 (1st Cir. 2020) (Torruella & Thompson, JJ., concurring) (expressing "discomfort with the practical effect" of deferring to Application Note 1, but not invoking lenity), petition for cert. pending, No. 20-7387 (filed Mar. 1, 2021). The cases that petitioner describes as "the anti-lenity side of the ledger" (Pet. 26) also do not squarely address how, if at all, the rule of lenity applies when interpreting the Guidelines.

Petitioner states (Pet. 27-28) that this Court has previously declined to resolve whether the rule of lenity may take precedence over "deference." But the cases cited by petitioner involved arguments for deferring to an agency's interpretation of a statute, not to the agency's interpretation of its own regulations (let alone the Guidelines). See *Esquivel-Quintana* v. *Sessions*, 137 S. Ct. 1562, 1572 (2017); *Barber* v. *Thomas*, 560 U.S. 474, 488 (2010). Moreover, as explained at pages 25-27 of the government's brief in opposition in *Tabb*, *supra*, a Guidelines case would be a particularly unsuitable ve-

hicle in which to address any questions about administrative deference doctrines generally, given the Commission's distinct status as an entity established in the Judicial Branch, as well as its use of notice-and-comment procedures to promulgate the commentary at issue. The Commission has also promulgated, through notice-and-comment procedures, a guideline that itself directs courts to consider any applicable commentary when calculating a guidelines sentence. See Sentencing Guidelines § 1B1.1(a) and (b).

Finally, petitioner's contention (Pet. 28-34) that the approach adopted by this Court in *Stinson* was unconstitutional does not warrant certiorari. Applying a rule of law that calls for deference to the Commission's commentary in appropriate circumstances does not require Article III judges to surrender their "independent judgment" in sentencing (Pet. 31), particularly now that the Guidelines are merely advisory. Nor does *Stinson* necessitate or produce any "[j]udicial bias" (Pet. 32) against criminal defendants. As petitioner himself elsewhere recognizes (Pet. 18), giving effect to the Commission's commentary can sometimes result in *lower* guidelines ranges—as was true in *Stinson* itself, see 508 U.S. at 47-48. In any event, this Court recently considered similar constitutional challenges in *Kisor* and declined to overrule its precedent, including *Stinson*. See *Kisor*, 139 S. Ct. at 2421-2422 (opinion of Kagan, J.) (rejecting an argument that "*Auer* deference violates 'separation-of-powers principles'") (citation omitted). Petitioner offers no sound basis to revisit the same ground here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Acting Solicitor General
NICHOLAS L. MCQUAID
Acting Assistant Attorney General
DANIEL N. LERMAN
Attorney

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