No. 20-836

In the Supreme Court of the United States

MARCUS BROADWAY, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

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

REPLY BRIEF FOR THE PETITIONER

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INTRODUCTION

The brief in opposition reinforces just how confused *Stinson* deference has become—and will remain—without this Court's review. The government admits that *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), "sets forth the authoritative standards for determining whether particular commentary [to the U.S. Sentencing Guidelines] is entitled to deference." Opp. 12. And the government recognizes that several circuits, including the court below, continue to sentence defendants based on an outdated methodology. According to the government, however, requiring those courts to update their decisions to ensure that defendants receive just sentences consistent with this Court's precedent would be "wasteful." Opp. 12.

For all the minimization and obfuscation in the opposition brief, the government never explains *why* this Court should delay its review of the important issues presented in Mr. Broadway's petition. And how could it? Lower courts disagree on more than the interpretation of the Career-Offender Guideline at issue here. The courts are intractably split on what methodology courts must apply in *all* cases interpreting the Guidelines. Over 75,000 defendants per year receive a sentence based on the Guidelines—with around 2,000 of those receiving the severe career-offender enhancement (and countless more likely accepting plea deals to avoid risking a sentence that would trigger the enhancement). How courts apply the Guidelines has a drastic impact on each of these lives, and there is no hope that the lower courts will resolve the underlying split on their own.

Since Mr. Broadway filed his petition, the Sixth Circuit has reaffirmed that *Kisor*'s methodology applies in every Guidelines case, *United States v. Riccardi*, 989

F.3d 476 (6th Cir. 2021), while the Eighth Circuit has refused reconsideration of the issue yet again—its fifth such denial of reconsideration since *Kisor*.[1] The issue recurs so frequently that the government has lost track of how many petitions for *certiorari* are currently pending. See, *e.g.*, *United States v. Davis*, No. 20-6242 (filed Nov. 2, 2020) (omitted from Opp. n.2).

This Court's intervention is needed urgently.

I. ONLY THIS COURT CAN RESOLVE CIRCUIT SPLITS

A. The Government Takes the Wrong Side in the Split over What *Kisor* Requires

The government's opposition (Opp. 12) further confuses the ongoing disagreement over how *Kisor* impacted *Stinson*. For almost two decades, courts applied *Stinson* deference anytime the Commission's commentary was not a "plainly erroneous reading" of the Guideline. See Pet. App. 1a–3a. In *Kisor*, this Court rejected such "caricature[s]" of *Auer* deference. 139 S. Ct. at 2415. Before deferring to an agency's regulatory interpretation, courts now *must* (1) exhaust their interpretive tools and conclude the text is "genuinely ambiguous," (2) determine that the agency's

[1] The government tries to imply (Opp. 11) that review of Mr. Broadway's petition is somehow unnecessary because he did not seek rehearing *en banc*. But the Eighth Circuit has already denied five similar petitions since *Kisor*, including two after Mr. Broadway's case. See, *e.g.*, *United States v. Merritt*, 934 F.3d 809 (8th Cir. 2019), *reh'g denied* (Sept. 25, 2019); *United States v. James*, 790 Fed. App'x 837 (8th Cir. 2019), *reh'g denied* (Dec. 17, 2019); *United States v. Garcia*, 946 F.3d 413 (8th Cir. 2019), *reh'g denied* (Mar. 20, 2020); *United States v. Davis*, 801 Fed. App'x 457 (8th Cir. 2020), *reh'g denied* (June 5, 2020), *cert. pending*, No. 20-6242 (filed Nov. 2, 2020); *United States v. Jefferson*, 975 F.3d 900 (8th Cir. 2020), *reh'g denied* (Oct. 28, 2020), *cert. pending*, No. 20-6745 (filed Dec. 16, 2020).

interpretation is "reasonable," and (3) conduct an "independent inquiry" to confirm that "the character and context of the agency interpretation entitles it to controlling weight." *Id.* at 2415–16; DPI Br. 7.

The government does not dispute that the court below ignored *Kisor*'s methodology—even though the panel below acknowledged *Kisor* is a "major development[] since" the Eighth Circuit originally deferred to the career-offender commentary. Opp. 7 (quoting Pet. App. 1a–3a). That methodological failure led the court to defer reflexively to agency commentary that "extends the reach of section 4B1.2(b)." Pet. App. 2a.

The Eighth Circuit's refusal to accept *Kisor* is part of a methodological circuit split that requires this Court's immediate review. The split extends beyond whether the Career-Offender Guideline applies to inchoate drug crimes; it is instead a fundamental interpretative dispute about when to defer to *any* Guideline. Indeed, at least one *certiorari* petition currently raises similar methodological questions about commentary to the Crimes-of-Violence Guideline. See, *e.g.*, Pet., *Lovato v. United States* (No. 20-6436); see also *United States v. Cruz-Flores*, 799 F. App'x 245 (5th Cir. 2020) (rejecting *Kisor*-based arguments to Guideline § 2L1.2); *United States v. Faison*, 2020 WL 815699 (D. Md. Feb. 18, 2020) (considering commentary to Guideline § 2K2.1(a)(4)(A), which instructs courts to ignore a defendant's *mens rea*).

The Sixth Circuit's recent decision in *Riccardi* illustrates the interpretive quagmire prevailing in all Guidelines cases in the lower courts. The court refused to defer to § 2B1.1's commentary on gift-card theft, reasoning explicitly that "*Kisor*'s clarification of [*Auer*'s]

plain-error test applies just as much to *Stinson* (and the Commission's guidelines) as it does to *Auer* (and an agency's regulations)." 989 F.3d at 485. Rejecting the government's "attempts to distinguish" career-offender cases, the court noted that it was "not alone in this conclusion." *Id.* at 485, 488. The Third Circuit in *United States v. Nasir*, for instance, recognized that *Kisor* "cut back on what had been understood to be uncritical and broad deference to agency interpretations of regulations." 982 F.3d 144, 158 (3d Cir. 2020) (en banc); *id.* at 177 (Bibas, J., concurring) ("*Kisor* … awoke us from our slumber of reflexive deference[.]").

But the *Riccardi* panel also presented the view of those unwilling to heed *Kisor*'s command. Concurring in judgment, Judge Nalbandian opined that *Stinson* is "its own free-standing directive," under which courts should still defer to commentary "as long as the interpretation does not violate the Constitution or a federal statute and is not plainly erroneous or inconsistent with the provision's text." 989 F.3d at 491 & n.4 (disputing that *Kisor* was "a command … to apply such deference in [*Stinson*] cases"). In Judge Nalbandian's view, the old *Stinson* standard should prevail, unaltered by *Kisor*'s clarifications, until this Court "expand[s] its own precedent." *Id.* at 492.

Many courts have failed to receive *Kisor*'s message. And the government's own misunderstanding about what *Kisor* mandates only exacerbates the problem. In the government's view (Opp. 12), *Kisor* requires nothing of lower courts whenever those courts already have "settled law" on the Guideline at issue. This position makes little sense. The government relies on the fact that *Kisor* did not overturn *Auer*, in part, because thousands of cases have applied *Auer* deference and its derivative progenies like *Stinson* deference. But *Kisor*

made clear that "there is no plausible reason for deference" without genuine ambiguity. 139 S. Ct. at 2415. Likewise, there is no plausible reason for courts to uphold decisions that deferred to commentary to an unambiguous Guideline.

The methodological nature of the circuit split confirms that the Commission cannot resolve this dispute by amending a particular Guideline whenever the Commission eventually regains its quorum. Opp. 3, 18. The issue presented here is more fundamental. Only this Court can instruct the lower courts on how *Kisor* applies in Guidelines cases. Pet. 17. Any amendments would merely bandage *Stinson* deference's mortal wounds. This case provides a good vehicle to cure the issues underlying the circuit split.

B. This Case Provides a Good Vehicle to Clarify that Lenity Applies Before Deference

In addition to restoring uniformity to the lower courts' methodological approach, only this Court can resolve the split over *which* interpretive tools must apply before deference.

The government attempts to minimize (Opp. 20) the need for this Court to clarify that lenity and constitutional avoidance are two traditional tools that courts must use to resolve ambiguity before deferring to an agency's regulatory interpretation. While true that few judges have addressed the conflict between lenity and *Stinson* directly, that is only because many judges, like the court below, still view *Kisor* as inapplicable to the Guidelines. See, *e.g.*, *United States v. Lewis*, 963 F.3d 16, 24 (1st Cir. 2020) (Torruella & Thompson, JJ., concurring) (adhering to circuit precedent but noting "discomfort" with the "troubling implications for due

process, checks and balances, and the rule of law"); *United States v. Rodriguez-Arreola*, 313 F.3d 1064, 1067 (8th Cir. 2002) ("The rule of lenity applies when an ambiguous section of the Sentencing Guidelines may be given either of two plausible readings."); but see *United States v. Cingari*, 952 F.3d 1301, 1310 (11th Cir. 2020) ("cast[ing] doubt" on lenity's application to the Guidelines).

The government also seeks (Opp. 20) to equate the venerable rule of lenity with the vagueness doctrine to transpose this Court's decision in *Beckles v. United States*, 137 S. Ct. 866, 897 (2017). But the government ignores *Bifulco v. United States*, 447 U.S. 381, 387 (1980), which "made it clear that [lenity] applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose." Pet. 20. Besides, *Beckles* only carried five justices due to the "judicial discretion [] involved" in sentencing. 137 S. Ct. at 897 (Kennedy, J., concurring). Requiring deference to an agency interpretation without considering lenity deprives judges of that very discretion. Pet. 28–34.

Remarkably, the government falsely suggests (Opp. 19) that Mr. Broadway did not preserve the need for lenity. Mr. Broadway asserted below that lenity required that "the ambiguity as to whether attempt crimes are properly included in § 4B1.2's definition of a 'controlled substance offense' must be resolved in his favor." Pet. App. 27a & 24a. Faced with this argument, the panel adhered to *United States v. Mendoza-Figueroa*, 65 F.3d 691 (8th Cir. 1995) (en banc), which deferred reflexively to Commission commentary over a three-judge dissent that accused the majority of "willing[ly] disregard[ing] the rule of lenity in favor of a 'possible unstated statutory basis' for the Commission's

commentary" due to "the urgency of the recent drug problem." *Id.* at 696–98 (Gibson, McMillian, Arthur, JJ., dissenting).

Lenity's necessary application to the Guidelines is squarely before this Court and fundamental to ensuring just and uniform application of the Guidelines going forward. This case supplies a good vehicle to announce the proper application of *Stinson* deference.

C. The Government Admits that Lower Courts Are Split over the Meaning of the Career-Offender Guideline

In addition to the ongoing methodological dispute, the government acknowledges that a second split exists "in the courts of appeals concerning the validity of Application Note 1's interpretation of Section 4B1.2." Opp. 13–14. The D.C., Sixth, and Third Circuits have all ruled recently that § 4B1.2(b) unambiguously excludes inchoate crimes. Pet. 12. But, as the government points out (Opp. 10), the Eleventh Circuit adopted the government's position that "prohibit" in § 4B1.2(b) could mean "hinder" and states might "hinder" drug trafficking by criminalizing inchoate crimes. *United States v. Lange*, 862 F.3d 1290 (11th Cir. 2017); see also *United States v. Vea-Gonzales*, 999 F.2d 1326, 1330 (9th Cir. 1993) ("Aiding and abetting, conspiracy, and attempt are all violations of [laws prohibiting the manufacture, import, export, distribution, or dispensing of drugs].").

The Career-Offender Guideline *starts* at a presumptive 15-year prison term, adding thousands of years to the collective sentences of almost 2,000 defendants

annually.[2] This Court's review is desperately needed to announce that inchoate drug crimes do not trigger this serious and widespread sentence enhancement.

II. THIS CASE PRESENTS IMPORTANT CONSTITUTIONAL ISSUES

Despite acknowledging (Opp. 12) that *Kisor* set the definitive standard for interpreting the Guidelines, the government argues (Opp. 15–16) that independent judicial review of agency rules is somehow *less* vital in criminal cases. This outlandish position flouts both this Court's precedent and our constitutional system. Pet. 17–34.

A. Deferring to Commentary that *Increases* Criminal Penalties Is Unconstitutional

The constitutional problems with reflexive deference are more acute when "liberty is at stake." *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 140 S. Ct. 789, 790 (2020) (Gorsuch, J., statement regarding denial of *certiorari*); Pet. 18. Yet, the government thinks it's fine (Opp. 12) if lower courts continue to increase sentences based on Commission commentary—regardless of how the court might independently interpret the Guideline's text—so long as the commentary is not plainly erroneous. Given the government's position, it is no surprise that the lower courts continue to confuse the issue, at the expense of defendants' constitutional rights.

The government is also wrong (Opp. 22) that *Kisor* already considered Mr. Broadway's constitutional challenges to Article III judges' sentencing defendants based on an agency's legal interpretation. Pet. 28–34. Judicial

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[2] *Quick Facts: Career Offenders*, U.S. Sentencing Comm'n (FY 2019), *available at* https://bit.ly/2PSzYlX.

"bias against the criminally accused raises particularly grave due process concerns." DPI 22. Both lenity and constitutional avoidance are "traditional tools" of interpretation that permit courts to avoid Mr. Broadway's constitutional objections while applying *Kisor*'s methodology uniformly in Guidelines cases. Pet. 23; DPI 12.

B. Such Deference Offends the Constitutional Structure

The Commission's "unusual … structure and authority," *Mistretta v. United States*, 488 U.S. 361, 412 (1989), further compounds the constitutional issues in this case. The Commission structure is constitutional only because it issues Guidelines through notice-and-comment rulemaking *and* congressional review. *Id.* at 393–94; Pet. 7. Without these statutorily mandated safeguards, the Commission would impermissibly conjoin the legislative and judicial powers. *Mistretta*, 488 U.S. at 412; cf. *Guedes*, 140 S. Ct. at 790 (Gorsuch, J.) ("Under our Constitution, only the people's elected representatives in the legislature are authorized to make an act a crime.") (cleaned up). As the Sixth Circuit just recognized, "[t]he healthy judicial review that *Kisor* contemplates" constrains the Commission from sidestepping the statutory guardrails that prevent the Commission from assuming Congress' power. *Riccardi*, 989 F.3d at 485.

The government, however, tells us not to worry (Opp. 17) because the Commission submitted Application Note 1 to Congress and published it in the Federal Register. But the Commission's current voluntary "endeavor[s]" (Opp. 3) are no substitute for what Congress and the Constitution demand when the Commission amends its Guidelines. DPI 6. Without these formal requirements, the Commission can still amend commentary without "follow[ing] the same procedures that govern changes to

the substantive rules in the guidelines themselves[.]" *Riccardi*, 989 F.3d at 484 (citing *United States v. Havis*, 927 F.3d 382, 386 (6th Cir. 2019) (en banc)); DPI 3. Worse, it would do so while "insulated from legislative interference," *Peugh v. United States*, 569 U.S. 530, 545 (2013), undermining the political accountability that deference attempts to achieve. DPI 18–19.

These important constitutional concerns, unique to both the imposition of criminal penalties and the Commission's structure, demand this Court's immediate intervention.

III. THE DECISION BELOW WAS WRONG

A. The Career-Offender Guideline Does Not Include Inchoate Crimes

The Eighth Circuit mistakenly applied a "plainly erroneous" standard to defer to commentary that "expands" the Guidelines. Pet App. 2a. Neither that decision nor the circuit precedent on which it relied engaged in the textual analysis that *Kisor* requires. So, the government has attempted to do so on the court's behalf. Its analysis is unconvincing.

Stretching the plain meaning of ordinary language (Opp. 9–10), the government posits that "prohibit" has a secondary meaning that could include "preventing" or "hindering" and that punishing inchoate crimes could hinder the manufacturing or sale of controlled substances. Under the government's theory, career-offender status could also extend to common drug possession because it might "hinder" drug trafficking.

Aside from stretching the bounds of its thesaurus, the government relies (Opp. 9–10) on the Guideline's use of "is" rather than "prohibits" when defining crimes of violence. Conspicuously absent from the government's

comparative analysis is that the crime-of-violence definition explicitly enumerates inchoate crimes. § 4B1.2(a)(1). By contrast, the controlled-substance definition—which immediately precedes the subsection listing inchoate crimes of violence—enumerates only completed crimes. The Guideline's inclusion of inchoate crimes in the preceding subsection "further suggests that the omission of inchoate crimes from the very next subsection was intentional." *Nasir*, 982 F.3d at 159; see also *United States v. Winstead*, 890 F.3d 1082, 1091 (D.C. Cir. 2018) ("Section 4B1.2(b) presents a very detailed 'definition' of controlled substance offense that clearly excludes inchoate offenses.").

In a transparent attempt to manufacture ambiguity where none exists, the government directs the Court (Opp. 13) to context and history. But such "murky" considerations "can't overcome a statute's clear text and structure." See *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1815 (2019).

Seven of the eight lower-court decisions to conduct the requisite textual analysis have rejected the government's reading of § 4B1.2(b). Pet. 12–13. Half-heartedly, the government dismisses these decisions as "unsound." Opp. 8. Yet, conspicuously, the government has yet to appeal a single decision rejecting its proposed interpretation. Maybe the government hopes to hang onto its over-broad application of the Career-Offender Guideline for as long as possible. The threat of multiplying a potential sentence is undoubtedly a powerful cudgel during plea negotiations. But that leverage is no reason to delay justice for all the defendants whose petitions are pending before this Court and the thousands of others whose liberty is at stake.

B. The Eighth Circuit Failed to Apply *Kisor* Properly

Much like in *Kisor*, where "a redo [wa]s necessary," partly because the Federal Circuit "assumed too fast that *Auer* deference should apply in the event of genuine ambiguity," 139 S. Ct. at 2424, the court below (and the brief in opposition) completely skipped *Kisor*'s "independent inquiry into whether the character and context of the agency interpretation entitles it to controlling weight." *Id.* at 2416; DPI 4–5. That failure alone requires reversal.

In addition to the Commission's lack of political accountability, deference is inappropriate here because the Commission lacks "*comparative* expertise" over sentencing judges at textual interpretation. DPI 20 (quoting *Kisor*, 139 S. Ct. at 2417). And applying lenity rather than deference to genuinely ambiguous Guidelines would achieve the same uniformity. DPI 21.

CONCLUSION

This Court should grant review to clarify *Kisor*'s application to the Guidelines to protect fundamental liberty.

Respectfully submitted,

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