No. 21-5714

IN THE

Supreme Court of the United States

JAYREN JAKAR WYNN,

Petitioner,

v.

UNITED STATES,

Respondent.

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

REPLY BRIEF FOR PETITIONER

James P. Maguire
OFFICE OF THE FEDERAL DEFENDER
265 Church St., Ste. 702
New Haven, CT 06510

Eric A. Shumsky
Thomas M. Bondy
Lauren A. Weber
Emily Villano
ORRICK, HERRINGTON & SUTCLIFFE LLP
1152 15th Street N.W.
Washington, D.C. 20005

E. Joshua Rosenkranz
Counsel of Record
ORRICK, HERRINGTON & SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019
(212) 506-5000
jrosenkranz@orrick.com

Counsel for Petitioner

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INTRODUCTION

Jayren Wynn is serving a 78-month sentence in prison. But had he been sentenced in New Jersey, Ohio, or D.C. instead of in Connecticut, his Guidelines range would have been at most 57 months. This intolerable discrepancy arises from an intractable, 9-3 circuit split over whether an "application note" to Guideline § 4B1.2(b) can permissibly expand the definition of "controlled substance offense" in that guideline to include inchoate offenses. In resolving that question, the circuits have further divided concerning whether courts should defer to the Sentencing Commission's commentary when interpreting unambiguous guidelines.

Reading the government's abbreviated response, one never would know that the government has repeatedly admitted (including in the brief in opposition the government filed in *Tabb v. United States*, which it incorporates by reference) that the circuits are deeply divided. The government responds (at 6) that the Commission has "begun the process" of addressing the issue. But that process "began" and almost simultaneously stalled more than three years ago, and there is no indication that the Commission will act anytime soon.

The government also minimizes the circuit split, claiming it does not implicate any larger "methodological" disagreement about *Kisor v. Wilkie*. On the contrary, numerous circuits on both sides of the conflict have addressed the meaning of § 4B1.2(b) in light of *Kisor*, and they continue to come out different ways. And while the government does not dispute that *Kisor*

governs whether courts must defer to the Commission's commentary, it contends that pre-*Kisor* cases necessarily remain valid. It is little wonder why the government takes this illogical position: Its argument about the meaning of § 4B1.2(b) requires a reading so strained that the government cannot prevail without an outmoded form of deference.

Fidelity to the separation-of-powers principles underlying *Kisor* is especially critical here. After all, "[t]he whole point of separating the federal government's powers in the first place was to protect individual liberty." *United States v. Havis*, 907 F.3d 439, 450 (6th Cir. 2018) (Thapar, J., concurring), on rehearing, 927 F.3d 382. Nowhere is individual liberty more at risk than in the criminal context, where tens of thousands of defendants are sentenced under the Guidelines each year. Reflexive deference to Guidelines commentary gives the Commission undue power over individual liberty without congressional, judicial, or executive checks. This Court's intervention is urgently needed to restore balance and to resolve persistent divisions of authority.

ARGUMENT

I. The Circuits Are Deeply Split On A Question This Court Alone Can Answer.

A. There is an entrenched split over whether the term "controlled substance offense" in Guideline § 4B1.2(b) includes inchoate offenses such as

attempted crimes. Opp.18-19.[1] The government admits that all 12 regional circuits have weighed in on this question and that they are divided 9-3. *Id.*; Pet.7-8. Three courts of appeals—the Third, Sixth, and D.C. Circuits—agree with Mr. Wynn's argument that there is no basis to defer to Note 1's addition of inchoate crimes because § 4B1.2(b)'s "plain language" unambiguously "does not include inchoate crimes." *United States v. Nasir*, 17 F.4th 459, 468, 470-71 (3d Cir. 2021) (en banc); *see Havis*, 927 F.3d 382, 386-87 (6th Cir. 2019) (en banc); *United States v. Winstead*, 890 F.3d 1082, 1091-92 (D.C. Cir. 2018). Two of these decisions reflect the views of unanimous en banc courts, and some *36* circuit judges see things our way. By contrast, the Second Circuit and eight others defer to Note 1's expansion of "controlled substance offense," holding that it "is not 'inconsistent with, or a plainly erroneous reading of' § 4B1.2[(b)]." Pet.App.4 (quoting *Stinson v. United States*, 508 U.S. 36, 38 (1993)); *see* Opp.18.

In short, this is a classic case for the Court's intervention.

B. These same decisions further implicate a fundamental division of authority over whether *Kisor* constrains the application of *Auer* deference to Guidelines commentary. The government is mistaken to contend otherwise. Opp.18.

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[1] Because the government relies entirely on the brief in opposition it filed in *Tabb*, No. 20-579, "Opp." cites refer to the *Tabb* brief.

Consistent with Mr. Wynn's argument here, the Third Circuit holds that *Kisor* fatally undercut the reasoning of cases that gave "uncritical and broad deference" to the commentary. *Nasir*, 17 F.4th at 470-71. As Judge Bibas put it, *Kisor* "awoke us from our slumber of reflexive deference." *Id.* at 472. Likewise, the Sixth Circuit holds that unquestioningly deferential pre-*Kisor* cases cannot stand, because *Kisor* "applies just as much to *Stinson* (and the Commission's guidelines) as it does to *Auer* (and an agency's regulations)." *United States v. Riccardi*, 989 F.3d 476, 484-86 (6th Cir. 2021).

Conversely, the Second Circuit rejected Mr. Wynn's argument that *Kisor* undermined precedent reflexively deferring to Note 1. Pet.App.4-5. The court followed its prior decision in *United States v. Jackson*, which bowed to Note 1 despite recognizing that the commentary "broadens the definition" of "controlled substance offense" and that the commentary's "broadened definition … does not appear in an actual guideline." 60 F.3d 128, 131 (2d Cir. 1995); *see United States v. Richardson*, 958 F.3d 151, 154-55 (2d Cir.) (following *Jackson*), *cert. denied*, 141 S. Ct. 423 (2020). That "caricature" of deference flouts "the limits inherent" in *Auer*. *Kisor*, 139 S. Ct. 2400, 2415 (2019).

Other circuits have also refused to revisit this question after *Kisor*, contending, for instance, that "*Kisor* reaffirmed existing law on the legal force of guideline commentary." *United States v. Miller*, 857 F. App'x 877, 878 (8th Cir. 2021) (per curiam); *see United States v. Smith*, 989 F.3d 575, 585 (7th Cir.) (deferring because Note 1 does not "conflict" with

§ 4B1.2(b)), *cert. denied*, 142 S. Ct. 488 (2021). Some circuits acknowledge that their prior authority stands on shaky ground, but still treat it as binding. *See United States v. Goodin*, 835 F. App'x 771, 782 n.1 (5th Cir. 2021); *United States v. Lewis*, 963 F.3d 16, 25 (1st Cir. 2020), *cert. denied*, 141 S. Ct. 2826 (2021); *United States v. Crum*, 934 F.3d 963, 966-67 (9th Cir. 2019). And some courts have concluded that their old cases remain binding because this Court "has [not] overruled" prior *Stinson* cases. *E.g.*, *United States v. Bass*, 838 F. App'x 477, 481 (11th Cir. 2020) (per curiam). So the conflict will persist unless and until the Court intervenes.

The question of whether and when to defer to Guidelines commentary has broad importance beyond § 4B1.2(b). Indeed, it previously has arisen with respect to multiple other Guidelines provisions. *Compare, e.g.*, *Riccardi*, 989 F.3d at 480 (rejecting, under *Kisor*, the commentary's interpretation of "loss" in § 2B1.1(b)(1)), *with United States v. Cruz-Flores*, 799 F. App'x 245, 246 (5th Cir. 2020) (per curiam) (finding no plain error in deferring to the commentary to § 2L1.2 about unlawful reentries because "*Kisor* did not discuss" the Guidelines).

C. The government is wrong that the Commission can resolve this disagreement. Opp.23-25. The Commission cannot decide how and when to defer to commentary. Only this Court can "clear up some mixed messages" that remain after *Kisor*, 139 S. Ct. at 2414, regarding whether *Stinson* "established a free-standing deference standard" that "continue[s] to apply" to commentary cases, *Riccardi*, 989 F.3d at 490 (Nalbandian, J., concurring in the judgment).

Nor should the Court expect the Commission to resolve whether § 4B1.2(b) includes inchoate crimes. As the government acknowledges, that issue was teed up for the Commission as early as 2018, but nothing has happened in the intervening 3+ years. Opp.24-25; 83 Fed. Reg. 65,400, 65,412-65,415 (Dec. 20, 2018). Indeed, because the Commission lacks a quorum, it has been powerless to act on *anything* since January 2019. 28 U.S.C. § 994(a); U.S. Sent'g Comm'n, *2020 Annual Report* 2, https://tinyurl.com/2t2a3fkz. The term of the Commission's lone remaining member expired months ago,[2] but the President has not made a single nomination. And even once the Commission regains a quorum, its "amendment cycle" for promulgating Guidelines amendments takes a full year. U.S. Sent'g Comm'n, *Federal Sentencing: The Basics* 34-35 (2020), https://tinyurl.com/mr3hdewk.

There is also no indication that a reconstituted Commission would pursue an amendment to move Note 1 into the text of the Guidelines. Since the 2018 proposal was shelved, the Commission has accumulated new priorities. For example, Congress directed the Commission to implement the First Step Act, a monumental criminal justice reform bill, Pub. L. No. 115-391, 132 Stat. 5194 (2018)—which the Commission has failed to do. *United States v. Long*, 997 F.3d 342, 348 (D.C. Cir. 2021). Moreover, President Biden campaigned on the goal of "[t]ask[ing]" the Commission with "reduc[ing] unreasonably long sentences."

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[2] Nate Raymond, *U.S. Sentencing Panel's Last Member Breyer Urges Biden To Revive Commission*, Reuters (Nov. 11, 2021), https://tinyurl.com/mryj749s.

Joe Biden, *Unity Task Force Recommendations* 60 (2020), https://tinyurl.com/mr67y24b.

The Commission is unlikely to address the inchoate-offenses issue anytime soon, if ever.

II. The Decision Below Is Wrong.

The government makes two arguments in support of the decision below. Neither has merit.

A. In the government's view, *Kisor* both redefined *Auer* deference and at the same time preserved in amber every existing *Seminole Rock* or *Auer* decision. Opp.14-15. Surely if *Kisor* intended to depart from the bedrock rule that "judicial decisions operate retrospectively," *United States v. Sec. Indus. Bank*, 459 U.S. 70, 79 (1982), it would have said so. It did not. For while *Kisor* did not overrule *Auer*, it admonished the lower courts to afford *Auer* deference only in limited circumstances. *Kisor* thus undermines "the continuing validity" of decisions that "afforded *Auer* deference mechanically" without finding genuine ambiguity. 139 S. Ct. at 2447 (Gorsuch, J., concurring in the judgment). Simply put: The fact that the decision below relied on pre-*Kisor* circuit authority does not shield it from the effect of this Court's decision.

B. The government also argues that the Second Circuit would have reached the same result even if it had "reconsidered its precedent in light of *Kisor*." Opp.15-17.

First, the government contends that, although § 4B1.2(b) explicitly forbids only certain conduct, it

effectively sweeps in much more by using the verb "prohibits." According to the government, an "alternative meaning" of "prohibit" encompasses *any* offense that would even just "hinder" one of the controlled-substance offenses enumerated in § 4B1.2(b). Opp.15-16. This interpretation "would take any modern English speaker (not to mention any criminal lawyer) by surprise." *Lewis*, 963 F.3d at 28 (Torruella & Thompson, JJ., concurring). "In ordinary speech, criminal laws do not 'prohibit' what they do not ban or forbid." *Id.*

And the government's theory proves too much. Almost any criminal law conceivably "hinders" an offense described in § 4B1.2(b). Outlawing money laundering hinders the distribution of drugs by making it harder to manage unlawful profits. And banning drug *possession* hinders drug *manufacturing* by making it riskier to use drugs, thereby dampening demand. But the Court has already held that simple possession is not a "controlled substance offense" under the Guidelines. *Salinas v. United States*, 547 U.S. 188 (2006) (per curiam).

Moreover, the "venerable canon" of *expressio unius* confirms that § 4B1.2(b)'s "detailed 'definition' of controlled substance offense … clearly excludes inchoate offenses." *Winstead*, 890 F.3d at 1091; *see Havis*, 907 F.3d at 450 (Thapar, J., concurring) ("Interpreting a menu of 'hot dogs, hamburgers, and bratwursts' to include pizza is nonsense."). Unlike the neighboring definition of "crime of violence," § 4B1.2(b) "does not even mention inchoate offenses," so "it does not include them." *Nasir*, 17 F.4th at 471.

Second, the government relies on the "context, purpose, and history" of § 4B1.2(b) to "support the Commission's longstanding interpretation." Opp.16. But the government's "purposive argument simply cannot overcome the force of the plain text." *Mohamad v. Palestinian Auth.*, 566 U.S. 449, 460 (2012). And its argument about history is just a purposive argument in disguise: The government does not contend, for example, that "historical sources" show that "prohibits" had a different "ordinary meaning at the time of [§ 4B1.2(b)'s] enactment." *Bostock v. Clayton County*, 140 S. Ct. 1731, 1750 (2020). "If uncertainty does not exist, there is no plausible reason for deference." *Kisor*, 139 S. Ct. at 2415.

In any event, § 4B1.2(b)'s history favors Mr. Wynn. The government suggests that inchoate crimes fell within the phrase "and similar offenses" in the 1987 Guidelines' definition of "controlled substance offense." Opp.12-13. But in the government's own telling, the Commission deleted that catchall phrase just two years later. *Id.*

III. The Question Presented Is Of Great Importance To The Separation Of Powers And To Numerous Defendants.

The questions in this case go to the heart of our constitutional structure and affect the liberty of thousands of criminal defendants.

A. There is no dispute that *Kisor* governs the application of the Commission's commentary. *See* Pet.6; Opp.15. And the separation-of-powers principles underlying that decision apply here with force.

Immunizing the Commission from *Kisor*'s requirements would "transfer the judiciary's power to say what the law is to the Commission and deprive the judiciary of its ability to check the Commission's exercise of power." *Havis*, 907 F.3d at 451 (Thapar, J., concurring).

Still, the government claims that the principles underlying *Kisor* have no bearing here because the Commission is not an executive agency. Opp.25-26. But courts owe the Commission no special solicitude. On the contrary, the Commission presents *heightened* separation-of-powers concerns. *Stinson* expanded *Auer* deference beyond its "traditional" application to administrative agencies and "into the realm of criminal sentencing." *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 114 (2015) (Thomas, J., concurring). In that realm, *Kisor*'s "cabin[ing]" of *Auer* deference, 139 S. Ct. at 2408, takes on added importance.

1. Because the Commission is relatively "insulated from the political process," judicial checks are critical to its constitutionality. *Mistretta v. United States*, 488 U.S. 361, 422 (1989) (Scalia, J., dissenting). Whereas traditional agencies are under direct Presidential supervision and thus "accountab[le] … to the public," *Kisor*, 139 S. Ct. at 2413, the Commission exercises policymaking power with oversight only from Congress. This oversight takes the form of two key constraints: Guidelines cannot take effect unless they follow the APA's notice-and-comment requirements and survive congressional review. *Mistretta*, 488 U.S. at 393-94. Yet if courts allow the Commission to expand the Guidelines through commentary—which the Commission may promulgate at will—

those constraints become meaningless. The Commission will exercise "significantly political" power with no accountability. *Id*. at 393.

The government says the Court should be unconcerned because the Commission put Note 1 through notice and comment and submitted it to Congress. Opp.19-22. In other cases, however, the government has told this Court to deny review for precisely the opposite reason—that the Commission can put new or revised commentary "into effect at any time" *without* congressional review. *E.g.*, Brief in Opposition at 16, *Bryant v. United States*, No. 20-1732 (internal quotation marks omitted).

True, the Commission may "endeavor" to submit its commentary to Congress along with Guidelines amendments. U.S. Sent'g Comm'n R. 4.1. But because this is mere commentary, "[no] statutory provision requires" or even "alerts" Congress to review it. *United States v. Havis*, 929 F.3d 317, 320 (6th Cir. 2019) (Sutton, J., concurring in denial of reconsideration). Notably, the government implicitly accepts the point by conceding that *Kisor* applies. Opp.15.

2. Because personal liberty is at stake, deference to the Commission's commentary should trigger "alarm bells"—particularly when, as here, deference *increases* a defendant's sentence. *Havis*, 907 F.3d at 450 (Thapar, J., concurring). The Guidelines involve the exercise of the "ultimate governmental power, short of capital punishment": the power to deprive citizens of their liberty. *Winstead*, 890 F.3d at 1092 (quoting *Mistretta*, 488 U.S. at 413 (Scalia, J., dissenting)). Allowing the Commission to "impose such a

massive impact on a defendant" through commentary, in the absence of judicial or legislative checks, is at odds with our constitutional system. *Id.*; *see also Abramski v. United States*, 573 U.S. 169, 191 (2014) (courts have an independent "obligation" to determine the reach of criminal laws).

It also is out of step with the textual analysis mandated by *Kisor*. If a court examined the Guidelines' text "in all the ways it would if it had no [Commission] to fall back on," *Kisor*, 139 S. Ct. at 2415, ambiguous Guidelines would be "construe[d] in the criminal defendant's favor," *Havis*, 907 F.3d at 451 (Thapar, J., concurring). Given the liberty and fair-notice interests at stake in this domain, the rule of lenity is critical in interpreting the Guidelines—as six judges on the Third Circuit and the amici in this case have emphasized. *Nasir*, 17 F.4th at 472-74 (Bibas, J., concurring); NCLA Br.5-12 (discussing the history, purpose, and application of the rule of lenity); PLF Br.10-13 (same).

B. That this case implicates "our nation's strong preference for liberty" heightens the need for review. *Nasir*, 17 F.4th at 473 (Bibas, J., concurring). By expanding the career-offender enhancement, which "dwarfs all other Guidelines calculations," Note 1 imposes "severe, even Draconian, penalties" on criminal defendants. *United States v. Tabb*, 949 F.3d 81, 83 n.2 (2d Cir. 2020), *cert. denied*, 141 S. Ct. 2793 (2021). The enhancement can quadruple the relevant sentencing range and add more than a decade to a defendant's sentence. *Id.* at 83. And courts frequently consult Note 1 in sentencing: Last year, 1,216 defendants were deemed "career offenders" under § 4B1.1; more

than 3,000 others, like Mr. Wynn, received felon-in-possession enhancements under provisions of § 2K2.1 that implicate Note 1. U.S. Sent'g Comm'n, *Fiscal Year 2020 Overview* 7, https://tinyurl.com/2p8emc7y; U.S. Sent'g Comm'n, *Use of Guidelines and Specific Offense Characteristics FY2020 (Offender Based)* 51, https://tinyurl.com/223xphah.

The advisory nature of the Guidelines does not negate the magnitude of this issue. *Contra* Opp.26-27. "[I]n a real sense," the Guidelines are "the basis" for every sentence imposed in federal district courts. *Peugh v. United States*, 569 U.S. 530, 542 (2013) (emphasis omitted). Whether varying from or following the Guidelines, courts must answer to them. *Id.* at 541-42. Because the Commission's commentary interprets the Guidelines, it is immensely significant. With 64,565 individuals having been sentenced under the Guidelines last year, U.S. Sent'g Comm'n, *Fiscal Year 2020 Overview* 1, this case's importance can scarcely be overstated.

CONCLUSION

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

Respectfully submitted,

James P. Maguire
OFFICE OF THE FEDERAL DEFENDER
265 Church Street
Suite 702
New Haven, CT 06510

Eric A. Shumsky
Thomas M. Bondy
Lauren A. Weber
Emily Villano
ORRICK, HERRINGTON & SUTCLIFFE LLP
1152 15th Street N.W.
Washington, D.C.20005

E. Joshua Rosenkranz
Counsel of Record
ORRICK, HERRINGTON & SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019
(212) 506-5000
jrosenkranz@orrick.com

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