No. 21-6121

IN THE SUPREME COURT OF THE UNITED STATES

LUIS ENRIQUE LARIO-RIOS, PETITIONER

v.

UNITED STATES OF AMERICA

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

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends (Pet. 6-12) that the district court erred in treating two of his prior convictions as "crime[s] of violence" when assessing criminal-history points for purposes of calculating his advisory Sentencing Guidelines range. See Sentencing Guidelines §§ 4A1.1(e), 4A1.2(p), 4B1.2(a) (2018). In particular, petitioner contends (Pet. 6-12) that that the definition of "crime of violence" in Section 4B1.2(a) of the Guidelines unambiguously excludes his two prior state convictions for attempted kidnapping, and that Application Note 1 to that guideline is invalid insofar as it interprets the definition to include attempt offenses. See Sentencing Guidelines § 4B1.2, comment. (n.1) (2018) (stating that

the terms "'[c]rime of violence' and 'controlled substance offense' include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses") (emphases omitted).

This Court has recently and repeatedly declined to review similar challenges to the validity of Application Note 1. See Roberts v. United States, 141 S. Ct. 2822 (2021) (No. 20-7069); Sorenson v. United States, 141 S. Ct. 2822 (2021) (No. 20-7099); Clinton v. United States, 141 S. Ct. 2820 (2021) (No. 20-6807); Jefferson v. United States, 141 S. Ct. 2820 (2021) (No. 20-6745); Tabb v. United States, 141 S. Ct. 2793 (2021) (No. 20-579); Broadway v. United States, 141 S. Ct. 2792 (2021) (No. 20-836).

For the reasons stated at pages 9 to 27 of the government's brief in opposition in Tabb v. United States, supra, the same course is warranted here.[1] Petitioner's argument is inconsistent with the text, context, and design of the guideline and its commentary, see Br. in Opp. at 9-13, Tabb, supra (No. 20-579); is not supported by this Court's precedent, see id. at 13-17; and is based on an incorrect understanding of Application Note 1 and its history, see id. at 18-23. In any event, the United States Sentencing Commission has already begun the process of amending the Guidelines to address the recent disagreement in the courts of appeals (see Pet. 8-11) over the validity of Application Note 1. Br. in Opp. at 23-25, Tabb, supra. No sound basis exists for this

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

Court to depart from its usual practice of leaving to the Commission the task of resolving Guidelines issues. Cf. Longoria v. United States, 141 S. Ct. 978, 979 (2021) (Sotomayor, J., respecting the denial of certiorari) (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 v. United States, 500 U.S. 344, 348 (1991)).

This case would also be an unsuitable vehicle in which to address petitioner's contention because petitioner "failed to raise [this] claim before the district court," so the issue is subject only to plain-error review. Pet. App. 2; see Pet. 4 (acknowledging that petitioner "did not object to the [district court's] guideline calculations" at sentencing). And the unpublished decision below did not directly address, let alone resolve, the question presented, nor has petitioner identified any Fifth Circuit decision that does.

The petition for a writ of certiorari should be denied.[2]

Respectfully submitted.

ELIZABETH B. PRELOGAR
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NOVEMBER 2021

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[2] The government waives any further response to the petition unless this Court requests otherwise.