No. _____

IN THE

Supreme Court of the United States

GARLAND GUILLORY,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Under what circumstances may a district court rely on commentary in the U.S. Sentencing Commission's Guidelines Manual to determine a defendant's Guidelines range for sentencing?

(2) Is Application Note 1 in the commentary to U.S.S.G. § 4B1.2 invalid insofar as it broadens the Guideline's definition of "controlled substance offense" to include conspiracies and other inchoate offenses?

RELATED PROCEEDINGS

The following proceedings are directly related to this case:

- *United States v. Guillory*, No. 17-cr-00242, U.S. District Court for the Eastern District of Louisiana. Judgment entered January 21, 2021.
- *United States v. Guillory*, No. 21-30050, U.S. Court of Appeals for the Fifth Circuit. Judgment entered June 21, 2021.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Garland Guillory respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The district court's sentencing determination was made orally at sentencing (1a–10a) and thus is not reported. Mr. Guillory moved for summary affirmance of his judgment because his sole challenge on appeal is currently foreclosed by circuit precedent. The Fifth Circuit's order granting his motion (11a) is not reported.

JURISDICTION

The Fifth Circuit entered summary judgment on June 21, 2021, and no petition for rehearing was filed. This petition for a writ of certiorari is thus timely filed pursuant to Supreme Court Rule 13, as modified by this Court's Order dated March 19, 2020, because it is being filed within 150 days of that Fifth Circuit's final judgment. This Court has jurisdiction under 28 U.S.C. § 1254(1).

FEDERAL STATUTES INVOLVED

28 U.S.C. § 994(h) provides:

> The [U.S. Sentencing] Commission shall assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants in which the defendant is eighteen years old or older and—
>
> (1) has been convicted of a felony that is—
>
> (A) a crime of violence; or
>
> (B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and chapter 705 of title 46; and
>
> (2) has previously been convicted of two or more prior felonies, each of which is—
>
> (A) a crime of violence; or
>
> (B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and chapter 705 of title 46.

Section 401 of the Controlled Substances Act (21 U.S.C. § 841) provides:

> (a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally —
>
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or
>
> (2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

SENTENCING GUIDELINES INVOLVED

U.S.S.G. § 4B1.1(a) provides:

> A defendant is a career offender if
>
> > (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction;
> >
> > (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and
> >
> > (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

U.S.S.G. § 4B1.2(b) 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.

Application Note 1 in the commentary to § 4B1.2 provides, in relevant part:

> **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.

INTRODUCTION

Congress's objective in enacting the Sentencing Reform Act of 1984 was to create an "effective, fair sentencing system" that would achieve "reasonable uniformity" and "proportionality in sentencing." U.S.S.G. Ch. 1 Pt. A.1(3). To that end, it created the U.S. Sentencing Commission and tasked it with promulgating a set of federal Sentencing Guidelines. In creating the Guidelines Manual, the Commission likewise aimed to achieve "a more honest, uniform, equitable, proportional, and therefore effective sentencing system." *Id.*

Shortly after the Commission was created, this Court determined that it is an "independent agency in every relevant sense," "fully accountable to Congress" and "subject to the notice and comment requirements of the Administrative Procedures Act[.]" *Mistretta v. United States*, 488 U.S. 361, 393–94 (1989). Accordingly, when the Commission generated informal commentary to the Guidelines, the Court properly determined that the normal rules of agency deference should apply. *See Stinson v. United States*, 508 U.S. 36, 38 (1993). The Court thus held that the commentary controlled unless it "violate[d] the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline." *Id.* And when the Commission introduced commentary that was inconsistent with unambiguous statutory language, this Court rejected it as invalid. *United States v. LaBonte*, 520 U.S. 751, 753 (1997).

Over the last decade, this practice of *Auer* deference (as it came to be known) has been the subject of intense criticism, including from members of this Court, past and present. Many suggested that it was time to reconsider the doctrine altogether,

and that opportunity presented itself in *Kisor v. Wilkie*, when a petitioner urged this Court to overrule *Auer* and its predecessor. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2408 (2019). A majority of the Court declined that invitation and upheld the doctrine, but also endeavored to "reinforce its limits" in light of the admittedly lax and "reflexive" manner in which the doctrine has been applied over the years. *Id.* at 2408, 2414–15. The Court outlined specific steps courts must take and factors they must consider before deferring to an agency's interpretation of its own rule, stressing the importance of knowing *when* to apply it. *Id.* at 2414–18. Relevant here, the Court explained that deference is not warranted unless a court determines that an agency's purported interpretation is a "reasonable reading" of a "genuinely ambiguous" regulation after employing all of the traditional tools of statutory construction. *Id.* at 2415–16. "If uncertainty does not exist, there is no plausible reason for deference," and the rule "just means what it means." *Id.* at 2415.

Shortly before *Kisor*, a circuit split emerged regarding whether Application Note 1 to the "career offender" Sentencing Guideline impermissibly expands the definition of a term used therein—namely, the term "controlled substance offense." The legal force of that commentary is critical to the proper and consistent application of the Guideline, which dramatically increases a defendant's sentencing range in most cases. *Kisor* deepened the split, prompting the Third Circuit to join the Sixth and D.C. Circuits in holding that Application Note 1 is invalid. In contrast, several other Courts of Appeals have continued to enforce Application Note 1, often affirming their pre-*Kisor* precedent endorsing reflexive deference to the commentary.

This split in authority has created inconsistency in the application of the Sentencing Guidelines across the country. But the impact is not limited to defendants classified as career offenders. Because the "controlled substance offense" definition is incorporated into other Guidelines—including the one that applies to common firearm offenses—the unwarranted sentencing discrepancies created by this conflict are significantly more widespread. Indeed, these conflicts "pose[] the same threat of sentencing disparities and arbitrariness that the Sentencing Reform Act was initially passed to remedy[.]" Jarrett Faber, *Kisor v. Wilkie as a Limit on Auer Deference in the Sentencing Context*, 70 Emory L. J. 905, 938 (2021) ("Faber") (citations omitted). And it is clear from the balance of authority, recent decisions, and continued uncertainty among appellate courts that these conflicts will only persist and grow unless this Court intervenes to provide much-needed guidance.

STATEMENT OF THE CASE

A. Legal Background

1. Constitutionality of the U.S. Sentencing Commission and Guidelines

Through the Sentencing Reform Act of 1984, Congress created the U.S. Sentencing Commission and charged it with the task of promulgating guidelines to govern all federal sentencings. *See* 28 U.S.C. § 991(b)(1), § 994(a). The Commission issued the first Sentencing Guidelines Manual in 1987, which immediately gave rise to constitutional challenges. Those challenges centered around concerns regarding nature and scope of the Sentencing Commission's unique role and authority, and they were ultimately brought before this Court in *Mistretta*. In that case, the petitioner

argued that Congress granted the Commission "excessive legislative discretion" in violation of the nondelegation doctrine by "delegating [to it] the power to promulgate sentencing guidelines for every federal criminal offense[.]" *Mistretta*, 488 U.S. at 371. The petitioner also argued that the legislation violated the constitutional principle of separation of powers because Congress delegated the rulemaking authority to an independent agency within the Judiciary. *Id.* at 383.

This Court rejected the petitioner's nondelegation doctrine challenge, relying on Congress's "sufficiently specific and detailed" delegation of authority to affirm the constitutionality of the Commission and Guidelines. *Id.* at 374–79. After discussing several "overarching constraints" that the Act imposes on the Commission, *see id.* at 374–77, the Court highlighted Congress's "even more detailed guidance to the Commission about categories of offenses and offender characteristics." *Id.* at 376. For example, the Court noted Congress's directive in 28 U.S.C. § 994(h) that the Guidelines "require a term of confinement at or near the statutory maximum for certain crimes of violence and for drug offenses, particularly when committed by recidivists." *Id.* at 376. Citing § 994(h) and other targeted directives, the Court explained:

> In other words, although Congress granted the Commission substantial discretion in formulating guidelines, in actuality it legislated a full hierarchy of punishment . . . *and stipulated the most important offense and offender characteristics to place defendants within these categories*.

Id. at 377 (emphasis added).

The *Mistretta* Court also rejected the petitioner's separation of powers challenge. *Id.* at 412. The Court recognized that the "degree of political judgment

integral to the Commission's formulation of sentencing guidelines" and the "scope of the substantive effects of its work does to some extent set its rulemaking powers apart from prior judicial rulemaking"—*e.g.*, the promulgation of the federal rules of civil procedure. *Id.* at 387–93. Nevertheless, it did not believe that "the significantly political nature of the Commission's work renders unconstitutional its placement within the Judicial Branch." *Id.* at 393. In reaching that conclusion, the Court explained that the Commission "is an independent agency in every relevant sense," "is fully accountable to Congress, which can revoke or amend any or all of the Guidelines as it sees fit," and engages in rulemaking that "is subject to the notice and comment requirements of the Administrative Procedure Act[.]" *Id.* at 393–94. Thus, "because Congress vested the power to promulgate sentencing guidelines in an independent agency, not a court, there can be no serious argument that Congress combined legislative and judicial power within the Judicial Branch." *Id.* at 394.

Notably, Justice Scalia dissented from the majority ruling in *Misretta*, calling the creation of the Sentencing Commission "a pure delegation of legislative power" and stating that "[i]t is irrelevant whether the standards are adequate, because they are not standards related to the exercise of executive or judicial powers; they are, plainly and simply, standards for further legislation." *Mistretta*, 488 U.S. at 420 (Scalia, J., dissenting). Referring to the Commission as a "sort of junior-varsity Congress," *id.* at 427, Justice Scalia explained that he could "find no place within our constitutional system for an agency created by Congress to exercise no governmental power other than the making of laws." *Id.* at 413. He also warned that this Court

must be especially vigilant in protecting the structural framework imposed by the Constitution, stating:

> Precisely because the scope of delegation is largely uncontrollable by the courts, we must be particularly rigorous in preserving the Constitution's structural restrictions that deter excessive delegation. The major one, it seems to me, is that the power to make law cannot be exercised by anyone other than Congress, except in conjunction with the lawful exercise of executive or judicial power.

Id. at 416–17.

2. The "Legal Force" of Guideline Commentary

In the years following *Misretta*, this Court actively policed the Commission's exercise of authority, including its promulgation of "commentary" to the Guidelines—a practice that Congress did not mention, much less direct, in the enabling legislation. *See Stinson*, 508 U.S. at 41. Indeed, while the Act explicitly instructs the Commission to promulgate the Guidelines and policy statements, *see id.* at 41 (citing 28 U.S.C. § 994(a)), it "does not in express terms authorize the issuance of commentary," *id.* As a result, the commentary is distinct from the Guidelines in a very important respect: "Amendments to the Guidelines must be submitted to Congress for a 6-month period of review, during which Congress can modify or disapprove them," while the commentary "is not reviewed by Congress" and may be amended at any time by the Commission. *Id.* at 41, 44–46 (citing 28 U.S.C. § 994(p)).

In *Stinson*, this Court grappled with the "legal force of the commentary," considering and rejecting various analogies. *Stinson*, 508 U.S. at 43–44. The Court ultimately agreed with the government's suggestion that the commentary should "be treated as an agency's interpretation of its own legislative rule," explaining:

> The Sentencing Commission promulgates the guidelines by virtue of an express congressional delegation of authority for rulemaking, and through the informal rulemaking procedures in 5 U.S.C. § 553. Thus, the guidelines are the equivalent of legislative rules adopted by federal agencies. The functional purpose of commentary (of the kind at issue here) is to assist in the interpretation and application of those rules, which are within the Commission's particular area of concern and expertise and which the Commission itself has the first responsibility to formulate and announce.

Id. at 44–45 (citations omitted). Accordingly, commentary "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; *see also id.* at 45–47 (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)). In the event of inconsistency between the Guideline and the commentary, "the Sentencing Reform Act itself commands compliance with the guideline." *Id.* at 43 (citing 18 U.S.C. § 3553(a)(4), (b)).

This Court was compelled to enforce its holding in *Stinson* four years later, when it confronted (and rejected) the Sentencing Commission's use of commentary to fundamentally change the Guideline at issue here: U.S.S.G. § 4B1.1 (the "career offender Guideline"). *See LaBonte*, 520 U.S. at 753. At issue in *LaBonte* was the meaning of the term "offense statutory maximum," which is used in § 4B1.1(b) to determine the degree of enhancement for "career offender" defendants. *See id.* at 753–54. That term implemented § 994(h)'s requirement that the Guidelines specify a sentence for career offenders "at or near the maximum term authorized." *Id.* at 753. However, the Guideline did not indicate whether "maximum" referred to the "basic" maximum provided by the statute of conviction or, if applicable, an *enhanced*

maximum penalty that may apply to a recidivist offender.[1] *Id.* at 754. After multiple Courts of Appeals held that the term must refer to the enhanced maximum, the Commission revised the commentary "to preclude consideration of statutory enhancements in calculating the 'offense statutory maximum.'" *Id.*

In *LaBonte*, a majority of this Court "conclude[d] that the Commission's interpretation [was] inconsistent with § 994(h)'s plain language" and held "that 'maximum term authorized' must be read to include all applicable statutory enhancements." 520 U.S. at 753. The Court explained that while Congress delegated "significant discretion" to the Commission to formulate the Guidelines, "it [still] must bow to the specific directives of Congress." *Id.* at 757 ("If the Commission's revised commentary is at odds with § 994(h)'s plain language, it must give way."). Because, in the majority's view, "the phrase 'at or near the maximum term authorized' is unambiguous," courts are required to take into account "all relevant statutory sentencing enhancements" in applying the Guideline. *Id.* at 762. Three Justices dissented, expressing their view that the statutory term *is* ambiguous, and therefore, applying traditional principles of agency deference, courts should defer to the Commission's "permissible" interpretation of the language. *Id.* at 763, 776–80 (Breyer, J., dissenting, joined by Stevens, J., and Ginsburg, J.).

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[1] For example, "the maximum term" for a conviction under § 841(b)(1)(B) ordinarily is 40 years of imprisonment, corresponding to an offense level of 34 under U.S.S.G. § 4B1.1(b)(2), but it can be enhanced to life imprisonment—corresponding to an offense level of 37 under § 4B1.1(b)(1)—if the government establishes that the defendant was previously convicted of a certain type of offense.

3. *"Reinforc[ing] the Limits" of Auer Deference in Kisor v. Wilkie*

The same year as *LaBonte*, this Court decided *Auer v. Robbins*, in which it employed decades-old precedent requiring judicial deference to an agency's interpretation of its own regulation so long as the interpretation is not "plainly erroneous or inconsistent with the regulation." 519 U.S. 452, 461 (1997); *see also Seminole Rock*, 325 U.S. at 414. Thereafter, the practice became known as "*Auer* deference." *See Kisor*, 139 S. Ct. at 2408.

Auer deference has long been criticized by courts and legal scholars alike. *See* Faber, at 923–26 (2021). Those criticisms gained more force in the last decade, as members of this Court began expressing their own views that the doctrine had gone too far and, perhaps, was a mistake in the first place. *See, e.g.*, *Decker v. Nw. Env't Def. Ctr.*, 568 U.S. 597, 616 (2013) (Scalia, J., concurring) ("For decades, and for no good reason, we have been giving agencies the authority to say what their rules mean, under the harmless-sounding banner of 'defer[ring] to an agency's interpretation of its own regulations.'" (citation omitted)); *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 112–13 (2015) (Thomas, J., concurring) (stating that the line of cases following *Seminole Rock* "call[s] into question the legitimacy of our precedents requiring deference to administrative interpretations of regulations," "undermines our obligation to provide a judicial check on the other branches," and "subjects regulated parties to precisely the abuses that the Framers sought to prevent"). Multiple members of the Court began calling for its reconsideration. *See Decker*, 568 U.S. at 616 (Roberts, C.J., concurring, joined by Alito, J.) ("It may be appropriate to

reconsider that principle in an appropriate case."); *id.* at 617 (Scalia, J., concurring) ("[R]espondent has asked us, if necessary, to 'reconsider *Auer*.' I believe that it is time to do so."); *Perez*, 575 U.S. at 133 (Thomas, J., concurring) ("[T]he entire line of precedent beginning with *Seminole Rock* raises serious constitutional questions and should be reconsidered in an appropriate case.").

This Court took that opportunity in *Kisor v. Wilkie*, confronting the question of whether it should overrule *Auer* and its *Seminole Rock* predecessor. 139 S. Ct. at 2408. A majority of the Court ultimately reaffirmed the continued validity of the doctrine but also "reinforce[d] its limits," recognizing that past decisions have sent "some mixed messages" about its proper application. *Id.* at 2408, 2414. In particular, the Court acknowledged that, "[a]t times, [it] has applied *Auer* deference without significant analysis of the underlying regulation" or "careful attention to the nature and context of the interpretation." *Id.* at 2414. The Court thus clarified that "*Auer* deference is not the answer to every question of interpreting an agency's rules." *Id.* To the contrary, it "is sometimes appropriate and sometimes not," and whether to apply it "depends on a range of considerations[.]" *Id.* at 2408. To that end, the Court "enumerated a new multi-step test for courts to use in determining whether *Auer* deference is warranted." Faber, at 928–29.

"First and foremost," the Court explained, "a court should not afford *Auer* deference unless the regulation is *genuinely ambiguous*." *Id.* at 2415 (emphasis added). "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." *Id.* "And before concluding that a rule is genuinely ambiguous, a court must exhaust all the 'traditional tools' of construction." *Id.* at 2415 (citation omitted). More specifically, it "must carefully consider the text, structure, history, and purpose of a regulation, in all the ways it would if it had no agency to fall back on," before resorting to deference. *Id.* (quotation marks, alterations, and citation omitted). Warning of the consequences of courts reflexively deferring to an agency's construction of an unambiguous rule, the Court explained:

> [T]he core theory of *Auer* deference is that sometimes the law runs out, and policy-laden choice is what is left over. But 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. Deference in that circumstance would "permit the agency, under the guise of interpreting a regulation, to create de facto a new regulation." *Auer* does not, and indeed could not, go that far.

Id. (quoting *Christensen v. Harris Cnty.*, 529 U.S. 576, 588 (2000)); *see also id.* at 2423 (emphasizing "the critical role courts retain in interpreting rules").

Even if an agency's rule is "genuinely ambiguous," that does not give the agency free reign to change it under the guise of "interpretation." An agency's reading "must still be 'reasonable.'" *Id.* at 2415 (citation omitted). "In other words, it must come within the zone of ambiguity the court has identified after employing all its interpretive tools." *Id.* at 2415–16 (explaining that the "text, structure, history, and so forth [can] at least establish the outer bounds of permissible interpretation"); *see also id.* at 2416 ("Under *Auer* . . . the agency's reading must fall within the bounds of reasonable interpretation." (quotation marks and citations omitted)).

Finally, the Court explained that "not every reasonable agency reading of a genuinely ambiguous rule should receive *Auer* deference." *Id.* at 2416. Instead, courts "must make an independent inquiry into whether the character and context of the agency interpretation entitles it to controlling weight." *Id.* That requires determining, among other things, that the agency's reading "implicate[s] its substantive expertise" and reflects "fair and considered judgment[.]" *Id.* at 2147. The Court instructed that judges "should decline to defer to a merely convenient litigation position or *post hoc* rationalization advanced to defend past agency action against attack." *Id.* (quotation marks, alterations, and citation omitted).

The Court concluded its guidance in *Kisor* by emphasizing the need for judges to carefully consider whether deference is appropriate before reflexively relying on an agency's interpretation. The Court explained: "When it applies, *Auer* deference gives an agency significant leeway to say what its own rules mean [and thereby] fill out the regulatory scheme Congress has placed under its supervision. But that phrase 'when it applies' is important—because it often doesn't." *Id.* at 2418. By "cabin[ing] *Auer*'s scope in varied and critical ways," as outlined in *Kisor*, the majority aimed to "maintain[] a strong judicial role in interpreting rules" and create balance in the doctrine. *Id.* Four members of the Court concurred only in the judgment, stating that *Kisor* was "more a stay of execution than a pardon" for *Auer* deference and discussing the fundamental flaws warranting its abandonment. *Id.* at 2425–48 (Gorsuch, J., concurring in the judgment, joined by Thomas, J., Kavanaugh, J., and Alito,).

4. Circuit Split Over the Commentary to U.S.S.G. § 4B1.2

In recent years, some U.S. Courts of Appeals have found that certain Sentencing Guideline commentary actually *modifies* Guidelines rather than reasonably *interpreting* them, contrary to this Court's holdings in *Stinson* and *Kisor*. The most prominent example has generated a circuit split and is the commentary at issue in this case: Application Note 1 to U.S.S.G. § 4B1.2.

The career offender Guideline imposes enhanced offense levels for adult offenders convicted of a "crime of violence" or "controlled substance offense" who have at least two prior convictions for such offenses. *See* U.S.S.G. § 4B1.1(a)–(b). U.S.S.G. § 4B1.2 defines specific terms used in the career offender Guideline, including "controlled substance offense." It states, in relevant part:

> 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 counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

U.S.S.G. § 4B1.2(b).

That language mirrors the statutory directive that the Guideline implements, in which Congress instructed the Commission to "specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of [adult] defendants" facing third convictions for crimes of violence or offenses "described in" substantive drug statutes in the federal criminal code. 28 U.S.C. § 994(h). However, in the commentary to § 4B1.2, the Commission added that the term "'controlled substance offense' include[s] the offenses of aiding and abetting, conspiring, and

attempting to commit such offenses." U.S.S.G. § 4B1.2 cmt. n.1 (2018) ("Application Note 1").

At least three U.S. Courts of Appeals—the Third, Sixth, and D.C. Circuits—have held that Application Note 1 improperly expands the Guideline's definition of "controlled substance offense" and thus warrants no deference by sentencing courts. *See United States v. Winstead*, 890 F.3d 1082, 1092 (D.C. Cir. 2018); *United States v. Havis*, 927 F.3d 382, 387 (6th Cir. 2019) (en banc); *United States v. Nasir*, __ F.4th __, 2021 WL 5173485, at *9 (3d Cir. Nov. 8, 2021) (en banc). As the D.C. Circuit explained, § 4B1.2(b) "presents a very detailed 'definition' of controlled substance offense that clearly excludes inchoate offenses." *Winstead*, 890 F.3d at 1091. The Sixth Circuit likewise found that "no term in § 4B1.2(b) would bear [the commentary's] construction," and if the Commission were permitted to use commentary to add to the Guidelines rather than merely interpret them, "the institutional constraints that make the Guidelines constitutional in the first place—congressional review and notice and comment—would lose their meaning." *Havis*, 927 F.3d at 386–87.

Notably, while the D.C. and Sixth Circuits relied on *Stinson* for their pre-*Kisor* holdings, it was *Kisor* that compelled the Third Circuit to reverse its own precedent. *See Nasir*, 2021 WL 5173485, at *8–9. In *Nasir*, the Third Circuit cited a past holding in which it "recognized that the commentary expanded and did not merely interpret the definition of 'controlled substance offense,' [but] nevertheless gave it binding effect" based on the court's "then-prevailing understanding of [agency] deference[.]"

Id. (citation omitted). Conceding that it "may have gone too far in affording deference to the guidelines' commentary under the standard set forth in *Stinson*," the en banc court found that *Kisor* made "clear that such an interpretation is not warranted." *Id.*

In contrast with these three circuits, several Courts of Appeals have continued to hold that Application Note 1 deserves deference—even after *Kisor*. *See, e.g.*, *United States v. Crum,* 934 F.3d 963, 966–67 (9th Cir. 2019); *United States v. Lewis*, 963 F.3d 16, 23–25 (1st Cir. 2020), *cert. denied*, 141 S. Ct. 2826 (No. 20-7387) (June 21, 2021); *United States v. Jefferson*, 975 F.3d 700, 708 (8th Cir. 2020), *cert. denied*, 141 S. Ct. 2820 (No. 20-6745) (June 21, 2021); *United States v. Wynn,* 845 F. App'x 63, 66 (2d Cir. 2021), *petition for cert. filed* (No. 21-5714) (Sept. 17, 2021); *United States v. Smith*, 989 F.3d 575, 584–85 (7th Cir. 2021), *cert. denied* (No. 21-496) (Nov. 15, 2021).

The Fifth Circuit is among the courts that are continuing to affirm the validity of Application Note 1, despite this Court's recent clarification of *Auer* deference rules. Like the Third Circuit, the Fifth Circuit has recognized in the past that Application Note 1 makes the "controlled substance offense" definition "broader than the statutory definition in section 994(h)" and, implicitly, § 4B1.2(b). *United States v. Bellazerius*, 24 F.3d 698, 701–02 (5th Cir. 1994). However, the Fifth Circuit nevertheless held that the Commission "lawfully included drug conspiracies in the category of crimes triggering classification as a career offender" when it relied on its "general promulgation authority" to add the commentary. *United States v. Lightbourn*, 115 F.3d 291, 293 (5th Cir. 1997). The Fifth Circuit has reaffirmed that precedent after *Kisor*, consistently rejecting challenges to the validity of Application

Note 1 as foreclosed. *See, e.g.*, *United States v. Kendrick*, 980 F.3d 432, 444 (5th Cir. 2020); *United States v. Goodin*, 835 F. App'x 771, 782 (5th Cir. 2021); *United States v. Mack*, 857 F. App'x 798, 803 (5th Cir. 2021); *United States v. Carviel*, No. 20-11238, 2021 WL 4987483, at *1 (5th Cir. Oct. 26, 2021), *petition for en banc reh'g filed*, (No. 20-11238) (Nov. 9, 2021); *United States v. Lario-Rios*, 855 F. App'x 956, 956 (5th Cir. 2021), *petition for cert. filed* (No. 21-6121) (Oct. 28, 2021).

B. Procedural Background

On January 9, 2020, Petitioner Garland Guillory pleaded guilty to conspiring to commit a federal drug offense, in violation of 21 U.S.C. § 846. The conviction generated an offense level of 26 under the Sentencing Guideline applicable to drug offenses, U.S.S.G. § 2D1.1, and Mr. Guillory's prior convictions generated a criminal history category of VI. After reducing his offense level by three points for timely acceptance of responsibility, his resulting Guidelines range should have been 92 to 115 months. *See* U.S.S.G. Ch. 5 Pt. A. However, in accordance with Fifth Circuit precedent, the U.S. Probation Office determined that he qualified as a "career offender" under U.S.S.G. § 4B1.1(a) because his drug *conspiracy* conviction qualified as a "controlled substance offense," and he had at least two prior convictions for controlled substance offenses. As a result, his sentencing range more than doubled, to 188 to 235 months. App. 4a.

Mr. Guillory's trial counsel did not object to the career offender enhancement, and the district court adopted the Probation Office's findings. App. 3a. Mr. Guillory moved for a downward variance at sentencing, specifically requesting a 100-month

sentence within his non-career offender Guidelines range, but the district court denied his request. App. 6a. The court ultimately sentenced him to the bottom of his career offender Guidelines range: 188 months. App. 7a.

Mr. Guillory timely appealed the district court's judgment. On appeal, he sought to challenge the validity of Application Note 1 to the extent it expands the definition of "controlled substance offense" to include conspiracies and other inchoate offenses. Recognizing that his argument was foreclosed by Fifth Circuit precedent, Mr. Guillory moved for summary affirmance of his judgment, preserving the issue for further review by this Court. The government did not oppose the request for summary affirmance, and the Fifth Circuit granted his motion on June 21, 2021.[2] App. 22a.

REASONS FOR GRANTING THE PETITION

I. Courts are divided over the validity of § 4B1.2's commentary, and this Court's intervention is necessary to resolve the dispute.

This Court should grant certiorari because there is a clear, deeply entrenched circuit split among the U.S. Courts of Appeals regarding whether Application Note 1 to the career offender Guideline is valid, particularly in light of this Court's holding in *Kisor*. The Third, Sixth, and D.C. Circuits have held that the commentary impermissibly expands the definition of "controlled substance offense" and therefore cannot be used to implement the Guideline. *See Winstead*, 890 F.3d at 1092; *Havis*,

[2] Although Mr. Guillory's plea agreement contained a broad and restrictive appeal waiver, waiving his right to appeal any sentence below the statutory maximum, the government did not invoke the waiver in the proceedings below. Accordingly, the appeal waiver has not been enforced. *See United States v. Story*, 439 F.3d 226, 231 (5th Cir. 2006) (holding that an appeal waiver "is enforceable to the extent that the government invokes the waiver provision").

927 F.3d at 387; and *Nasir*, 2021 WL 5173485, at *9. Meanwhile, the First, Second, Fifth, Seventh, Eighth, and Ninth Circuits maintain that Application Note 1 is valid and enforceable notwithstanding this Court's holding in *Kisor*. *See Lewis*, 963 F.3d at 23–25; *Wynn,* 845 F. App'x at 66; *Kendrick*, 980 F.3d at 444; *Smith*, 989 F.3d at 584–85; *Jefferson*, 975 F.3d at 708; and *Crum,* 934 F.3d at 966–67.

As a result of this conflict, identically situated defendants are being sentenced under vastly different Guideline ranges based solely on their location. These geographic disparities undermine the central purpose of the Guidelines to achieve "uniformity and proportionality in sentencing," and they are especially problematic given the severity of the career offender enhancement. *Rita v. United States*, 551 U.S. 338, 348–49 (2007). As this Court has explained, the Guidelines must "be the starting point and initial benchmark" for all sentencings, and it is critically important that courts begin each sentencing with a *correct* calculation of the Guidelines. *Gall v. United States*, 552 U.S. 38, 49 (2007); *see also Molina–Martinez v. United States*, 136 S. Ct. 1338, 1345–46 (2016); *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1908 (2018). That is impossible when courts fundamentally disagree about the proper application of the Guidelines.

Importantly, recent circuit decisions have proven that the conflict over Application Note 1's validity will not be resolved without this Court's intervention. With the exception of the Third Circuit, appellate courts that affirmed the validity of Application Note 1 before *Kisor* have been reinforcing that precedent in its aftermath. Not only that, but several have explicitly rejected *Kisor*-based challenges to their

precedent, all but guaranteeing that dramatic sentencing disparities will persist until this Court weighs in on whether Application Note 1 is entitled to deference.

For example, in *Lewis*, the First Circuit confronted the argument that *Kisor* presented an exception to the "law of the circuit doctrine," arguing that it "offers a sound reason for believing that our former panels [upholding Application Note 1's validity], in light of fresh developments, would change their collective minds." 963 F.3d at 23 (quotation marks, alterations, and citations omitted). The First Circuit rejected that argument and reaffirmed its precedent, stating that it found nothing in its previous opinions "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." *Id.* at 24.

The Second Circuit has similarly rejected *Kisor*-based challenges to its own precedent. In *United States v. Tabb*, the appellant argued that a prior circuit decision describing Application Note 1 as "binding authority" was "wholly irreconcilable" with *Kisor* because it was "not based on any of [the] legal principles" articulated in that decision "and would in any event be superseded by" *Kisor*. Brief, *United States v. Tabb*, 2019 WL 5592826, at *4–5 (2d Cir. Oct. 28, 2019) (discussing the precedential force of *United States v. Jackson*, 60 F.3d 128 (2d Cir. 1995)). Notwithstanding its previous recognition that Application Note 1 "broadened" the definition of "controlled substance offense," *see Jackson*, 60 F.3d at 131, the Second Circuit held that *Jackson* foreclosed the appellant's argument that Application Note 1 improperly expands the Guideline's text, *United States v. Tabb*, 949 F.3d 81, 87 (2d Cir. 2020). *See also Wynn*,

845 F. App'x at 66 (rejecting appellant's argument that *Jackson* was undermined by *Kisor* and noting that "the *Kisor* argument advanced here was briefed and discussed at length during oral argument in *Tabb*," which "made clear that *Jackson* is still binding precedent in this Circuit")).

The Eighth Circuit has also concluded that *Kisor* changes nothing about its precedential decisions affirming the validity of Application Note 1. *See United States v. Miller*, 857 F. App'x 877, 878 (8th Cir. 2021). In *Miller*, the appellant "suggest[ed] that *Kisor v. Wilkie* undermined [the court's] precedent" regarding the validity of Application Note 1. *Id.* The Eighth Circuit disagreed, stating that *Kisor* simply "reaffirmed existing law on the legal force of guideline commentary," and affirmed the appellant's sentence. *Id.*; *see also United States v. Broadway*, 815 F. App'x 95, 96 n.2 (8th Cir. 2020) ("We are not in a position to overrule *Mendoza-Figueroa*, as Broadway urges us to do, even if there have been some major developments since 1995." (citing *Kisor* and *United States v. Booker*, 543 U.S. 220, 259–61 (2005))).

The Fifth Circuit has proceeded in the same manner as the circuits above, finding no reason to diverge from earlier precedent in light of *Kisor*. In *Kendrick*, the court reaffirmed its holding in *Lightbourn* that conspiracies qualify as "controlled substance offenses" under U.S.S.G. § 4B1.1, stating that *Lightbourn* "has not been overturned" and thus "remains binding" on the court. 980 F.3d at 444. And in other, unpublished decisions, panels have found this commentary challenge to be foreclosed, even when appellants argued that deference is improper under *Kisor*, and even when

the panel agreed with the reasoning of the Third Circuit in *Nasir*. *See, e.g.*, *Mack*, 857 F. App'x at 803; *Goodin*, 835 F. App'x at 782 n.1.

Accordingly, this Court's guidance is needed to restore fairness and uniformity to federal sentencing. Unless several Courts of Appeals decide to address this issue en banc—and reach the same conclusion as the Third, Sixth, and D.C. Circuits—a ruling from this Court is the only way to resolve the split. That alternative scenario is unlikely, given that courts have reaffirmed their pre-*Kisor* precedent and expressly held that the commentary is a reasonable reading of the Guidelines. Thus, without this Court's intervention, people like Mr. Guillory will continue to receive significantly longer sentences than identically situated defendants in other circuits.

II. Fifth Circuit precedent is wrong and conflicts with this Court's decision in *Kisor v. Wilkie*.

As this Court recognized in *Mistretta*, the U.S. Sentencing Commission is an "independent agency in every relevant sense." 488 U.S. at 393; *see also Stinson*, 508 U.S. at 45 ("The Sentencing Commission promulgates the guidelines by virtue of an express congressional delegation of authority for rulemaking, and through the informal rulemaking procedures in 5 U.S.C. § 553." (citations omitted)). Thus, the commentary to the Guidelines—which the Commission generates alone—is "akin to an agency's interpretation of its own legislative rules." *Stinson*, 508 U.S. at 45. Consistent with agency deference rules, the commentary may only be used to "interpret[] or explain[] a guideline." *Id.* at 38. In the event of inconsistency between the commentary and Guideline, the Guideline controls. *See id.* at 43–47.

In *Kisor*, this Court restated and expanded upon agency deference principles, describing the factors that courts need to consider in determining whether deference to an agency's purported "interpretation" is appropriate. 139 S. Ct. at 2408, 2414. Before deferring to an agency's interpretation of its own regulation, courts must determine: (1) that the regulation "is genuinely ambiguous"; (2) that the agency's interpretation is a "reasonable reading" of the regulation; and (3) that "the character and context of the agency interpretation entitles it to controlling weight." *Id.* at 2415–16. If those requirements are not met, the court may not defer.

As the Third Circuit concluded in *Nasir*, Application Note 1 fails to satisfy the very first prong of *Kisor* because the Guideline definition of "controlled substance offense" is not "genuinely ambiguous." *Nasir*, 2021 WL 5173485, at *9. To the contrary, it exclusively identifies substantive drug crimes—*i.e.*, violations of statutes that criminalize certain drug-related acts—and "does not even mention inchoate offenses." *Id.* The Guideline states:

> 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.

U.S.S.G. § 4B1.2(b) (emphasis added); *see also* U.S.S.G. § 4B1.1, cmt. n.1 (stating that the term "controlled substance offense" is defined in § 4B1.2).

In contrast with the crimes identified in the Guideline, a drug *conspiracy* under 21 U.S.C. § 846 "is merely an agreement to commit" a drug offense—it does not "prohibit" any affirmative act. *See United States v. Davis*, 903 F.3d 483, 485 (5th Cir.

2018), *aff'd in part, vacated in part*, 139 S. Ct. 2319 (2019); *see also United States v. Moody*, 664 F. App'x 367, 369 (5th Cir. 2016) (explaining that "the crime of conspiracy is complete upon the formation of the illegal agreement"). Indeed, "proof of an overt act is not required to establish a violation of 21 U.S.C. § 846." *United States v. Shabani*, 513 U.S. 10, 11 (1994). Moreover, the Guideline's use of the word "means" indicates that the definition was intended as an exhaustive list of qualifying offenses, not merely illustrative examples. *See Burgess v. United States*, 553 U.S. 124, 130 (2008) ("As a rule, a definition which declares what a term 'means' excludes any meaning that is not stated."); *see also Christopher v. Smith-Kline Beecham Corp.*, 567 U.S. 142, 162 (2012) (explaining that "Congress used the narrower word 'means' [in statutes] when it wanted to cabin a definition to a specific list of enumerated items"). And this "plain-text reading of section 4B1.2(b) is strengthened when contrasted with the definition of 'crime of violence' in the previous subsection," which explicitly includes inchoate crimes. *Nasir*, 2021 WL 5173485, at *9 (citing § 4B1.2(a)(1)).

The history and purpose of the career offender Guideline further establish that the term "controlled substance offense" excludes inchoate offenses. The Guideline was created to implement Congress's directive in 28 U.S.C. § 994(h), which instructs the Commission to provide enhanced penalties "at or near the maximum term authorized" for certain recidivist offenders. *See* U.S.S.G. § 4B1.1 cmt. background (1994). In § 994(h), Congress identified two categories of offenses that should trigger the enhancement: (1) crimes of violence, and (2) offenses "*described in* section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of

the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and chapter 705 of title 46." *See* § 994(h)(1)(B), § 994(h)(2)(B) (emphasis added). The types of offenses listed in the Guideline thus mirror the offenses listed in § 994(h).[3] Tellingly, Congress did not include "offenses described in 21 U.S.C. § 846" in § 994(h), nor did it state that the offenses triggering the career offender enhancement should include conspiracies or attempts to commit the enumerated drug offenses. This background further supports the conclusion that the Guideline, which implements and mirrors § 994(h), unambiguously excludes inchoate offenses.

Importantly, the Commission has itself acknowledged that Application Note 1 *modifies* rather than interprets § 4B1.2's definition of "controlled substance offense." In its original form, the Guideline relied exclusively on § 994(h) for its authority to promulgate § 4B1.1. *See* U.S.S.G. § 4B1.1 cmt. background (1994). However, because § 994(h) does not include inchoate offenses, some Courts of Appeals determined that the commentary was invalid. *See, e.g.*, *United States v. Price*, 990 F.2d 1367 (D.C. Cir. 1993); *Bellazerius*, 24 F.3d at 701–02. In response, the Commission revised the background commentary to state that while the Guideline's "definition of a career offender track[s] in large part the criteria set forth in" § 994(h), the Commission "has *modified* this definition" pursuant to its "general guideline promulgation authority

[3] Section 401 of the Controlled Substances Act makes it unlawful to "manufacture, distribute, or dispense" any controlled substance or counterfeit substance, or "possess with intent to manufacture, distribute, or dispense" a controlled or counterfeit substance, while the Controlled Substances Import and Export Act prohibits conduct related to the importation and/or exportation of controlled substances.

under 28 U.S.C. § 994(a)–(f), and its amendment authority under 28 U.S.C. § 994(o) and (p)[.]" U.S. SENTENCING COMM'N, amend. 528 (Nov. 1, 1995) (emphasis added). In other words, the Commission itself admits that it used the commentary to substantively change—and not merely interpret—the career offender Guideline.

In sum, considering the plain text, history, and purpose of § 4B1.2(b), there is "only one reasonable construction" of the term "controlled substance offense," and "there is no plausible reason for deference" to Application Note 1. *See Kisor*, 139 S. Ct. at 2415. The Guideline "just means what it means—and the court must give it effect," regardless of whether the Commission insists that the commentary's expanded definition "would make more sense." *Id.* "Deference in [this] circumstance would permit the [Commission], under the guise of interpreting [the Guidelines], to create de facto a new [Guideline]" without Congress's input, review, or oversight. *Id.* (quotation marks and citations omitted). *Kisor* made clear that such deference is not permitted. Accordingly, the law of the Fifth Circuit and others upholding the validity of Application Note 1 is wrong and irreconcilable with this Court's decisions, and it must be reversed.

III. These are important issues that directly impact other Guidelines, including the Guideline applicable to common firearm offenses.

These questions are critically important for an obvious reason: the career offender enhancement—which, in most cases, dramatically increases a defendant's sentencing exposure—is being inconsistently applied by courts, creating severe, unwarranted sentencing disparities among similarly situated individuals. But the effects of the current circuit split go beyond that. As discussed below, several other

Guideline provisions incorporate by reference U.S.S.G. § 4B1.2's definition of "controlled substance offense." Most notably, the Guideline applicable to violations of 18 U.S.C. § 922(g)—one of the most commonly-charged federal crimes—incorporates that definition. As a result, this split in authority necessarily creates inconsistencies in the application of those other Guidelines as well, generating even more unfair disparities in criminal sentencing.

U.S.S.G. § 2K2.1 is the Guideline applicable to crimes involving unlawful receipt, possession, or transportation of firearms and prohibited firearm transactions. The Guideline imposes a default base offense level of 6 or 12, depending on the statute of conviction, but that level increases if certain, case-specific circumstances exist. *See* U.S.S.G. § 2K2.1(a). Relevant here, the base offense level will increase if the defendant has one or more prior felony convictions for "a crime of violence or a controlled substance offense." U.S.S.G. § 2K2.1(a)(1)–(4). The commentary to the Guideline defines "controlled substance offense" as having "the meaning given that term in § 4B1.2(b) and Application Note 1 of the Commentary to § 4B1.2." U.S.S.G. § 2K2.1 cmt. n.1. Accordingly, firearm offenders with prior convictions for inchoate drug offenses are currently subject to disparate treatment at sentencing in the same manner as drug offenders. *Compare Havis*, 927 F.3d at 383–84, *with United States v. Weber*, 844 F. App'x 937, 938–39 (8th Cir. 2021).

These sentencing disparities are significant. Assume that an individual is convicted of unlawfully possessing a firearm in violation of § 922(g)(1) and has a prior conviction for an inchoate drug offense (*e.g.*, attempting or conspiring to distribute a

controlled substance). If no other enhancements apply, that defendant will face a base offense level of 14 if he is in the Third, Sixth, or D.C. Circuit. His resulting Guidelines range will fall somewhere between 15–21 months and 37–46 months, depending on the severity and recency of his criminal history. *See* U.S.S.G. § 2K2.1(a)(6)(A); U.S.S.G. Ch. 5 Pt. A. However, if that same defendant is in a court that defers to the expansive definition of "controlled substance offense" provided by Application Note 1, his offense level will jump to 20, effectively doubling his Guidelines range to between 33–41 months and 70–87 months. *See* U.S.S.G. § 2K2.1(a)(4)(A); U.S.S.G. Ch. 5 Pt. A. And if he has *two* prior convictions for inchoate drug offenses, his range will triple, generating an offense level of 24 and a Guidelines range between 51–63 and 100–125 months. *See* U.S.S.G. § 2K2.1(a)(2); U.S.S.G. Ch. 5 Pt. A.

Further exacerbating this issue is the number of people affected. These disparities promise to impact hundreds, if not thousands, of firearm offenders every year until the circuit conflict is resolved. Per the U.S. Sentencing Commission, gun cases "represented the third most common federal offense in fiscal year 2020," accounting for 11.7% of all cases. *Fiscal Year 2020: Overview of Federal Criminal Cases*, at 5, U.S. SENTENCING COMM'N (Apr. 2021).[4] Among the 7,539 firearms cases reported to the Commission in 2020, almost all of them (nearly 95%) involved conduct covered by U.S.S.G. § 2K2.1. *See id.* at 18. For people in that class with prior inchoate

[4] This report is available on the U.S. Sentencing Commission's website at: https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2021/FY20_Overview_Federal_Criminal_Cases.pdf.

drug convictions, their Guidelines range was largely dictated by the location of their sentencing court. That will continue to be the case until this matter is settled.

Finally, the proper construction of "controlled substance offense" also impacts other provisions the Sentencing Guidelines, albeit less frequently and severely. For example, the same issues discussed above with respect to U.S.S.G. § 2K2.1 apply equally to U.S.S.G. § 2K1.3, which is the Guideline for unlawful receipt, possession, or transportation of explosive materials. The Guidelines Manual also includes a policy statement suggesting that an upward departure may be warranted if a defendant possesses a certain type of firearm "in connection with a . . . controlled substance offense," as defined in § 4B1.2. *See* U.S.S.G. § 5K2.17. Additionally, the severity of a probation or supervised release violation may turn on whether a crime is classified as a "controlled substance offense," directly affecting the recommended term of imprisonment upon revocation. *See* U.S.S.G. § 7B1.1(a)(1), cmt. n.3; U.S.S.G. § 7B1.4(a). These additional disparities generated by the conflict over § 4B1.2's commentary further underscore the need for this Court's review of the questions presented.

IV. This case is a good vehicle for addressing the questions presented.

Mr. Guillory's case presents a good vehicle for this Court to address the issues raised in this petition. As discussed above, his Guidelines range was significantly enhanced by the application of the career offender Guideline, and he was sentenced within that enhanced range. His sole conviction in this case was for a drug conspiracy, so there is no question that he should be resentenced if the Third, Sixth, and D.C. Circuits are correct that Application Note 1 is invalid. Accordingly, this case is an

appropriate conduit to resolve the issues presented in this petition, and the Court should thus grant certiorari on one or both of the questions presented.

CONCLUSION

For the foregoing reasons, this Court should grant Mr. Guillory's petition for writ of certiorari. Alternatively, if the Court believes another case presents a better vehicle to address these issues (*e.g.*, *Wynn v. United States,* No. 21-5714), it should grant certiorari in that case and hold Mr. Guillory's petition pending its resolution.

Respectfully submitted,

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