No. 22-163

In the Supreme Court of the United States

LENAIR MOSES, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court correctly determined that, under the advisory Sentencing Guidelines, petitioner's 2013 conviction for possessing cocaine with intent to sell or deliver constituted a qualifying "prior felony conviction[] of * * * a controlled substance offense" for purposes of the career-offender enhancement, Sentencing Guidelines § 4B1.1(a).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 23 F.4th 347. The court's order denying rehearing en banc and opinions respecting that order (Pet. App. 47a-60a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 19, 2022. A petition for rehearing was denied on March 23, 2022 (Pet. App. 47a-60a). On May 11, 2022, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including August 20, 2022. The petition was filed on August 19, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Eastern District of North Carolina, petitioner was convicted on two counts of distributing cocaine base (crack cocaine), in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C). Judgment 1-2. The district court sentenced petitioner to 120 months of imprisonment, to be followed by three years of supervised release. Judgment 3-4. The court of appeals affirmed. Pet. App. 1a-26a.

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

The Guidelines are structured as a series of numbered guidelines and policy statements followed by additional commentary. See Sentencing Guidelines § 1B1.6 (2018).[1] The Commission has explained, in a guideline entitled "Significance of Commentary," that the commentary following each guideline "may serve a number of purposes," including to "interpret the guideline or explain how it is to be applied." *Id.* § 1B1.7 (emphasis omitted). The Commission has further explained

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

that "[s]uch commentary is to be treated as the legal equivalent of a policy statement." *Ibid.* And the Commission has instructed that, in order to correctly "apply[] the provisions of" the Guidelines, a sentencing court must consider any applicable "commentary in the guidelines." *Id.* § 1B1.1(a) and (b). Congress has similarly required district courts to consider "the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission" in imposing a sentence. 18 U.S.C. 3553(b)(1).

Under 28 U.S.C. 994(x), to promulgate or amend a guideline, the Commission must comply with the notice-and-comment procedures for rulemaking by executive agencies. See 5 U.S.C. 553(b) and (c). And under 28 U.S.C. 994(p), the Commission must "submit to Congress" any proposed amendment to the Guidelines, along with "a statement of the reasons therefor." Proposed amendments generally may not take effect until 180 days after the Commission submits them to Congress. *Ibid.* The guidelines cited above, regarding the salience of commentary, were themselves subject to both notice-and-comment and congressional-review procedures. See, *e.g.*, 52 Fed. Reg. 18,046, 18,053, 18,019-18,110 (May 13, 1987) (notice of submission to Congress of "Application Instructions" in Section 1B1.1 and "Significance of Commentary" in Section 1B1.7) (emphasis omitted).

Although Sections 994(p) and (x) do not apply to policy statements and commentary, the Commission's rules provide that "the Commission shall endeavor to include amendments to policy statements and commentary in any submission of guideline amendments to Congress." U.S. Sent. Comm'n R. 4.1. The rules similarly provide that the Commission "will endeavor to provide,

to the extent practicable, comparable opportunities for public input on proposed policy statements and commentary." U.S. Sent. Comm'n R. 4.3. And like amendments to the text of a guideline, an "affirmative vote of at least four members of the Commission" is required to promulgate or amend any policy statement or commentary. 28 U.S.C. 994(a); see U.S. Sent. Comm'n R. 2.2(b).

b. Before this Court's decision in *United States* v. *Booker*, 543 U.S. 220 (2005), the Sentencing Guidelines were "mandatory" and limited a district court's discretion to impose a non-Guidelines sentence, *id.* at 227, 233. In *Stinson* v. *United States*, 508 U.S. 36 (1993), this Court addressed the role of Guidelines commentary and determined that "commentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline." *Id.* at 38.

In making that determination, the Court drew an "analogy" to the principles of deference applicable to an executive agency's interpretation of its own regulations. *Stinson*, 508 U.S. at 44. The Court stated that, under those principles, as long as the "agency's interpretation of its own regulations does not violate the Constitution or a federal statute, it must be given 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" *Id.* at 45 (quoting *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)). The Court acknowledged that the analogy was "not precise," but nonetheless viewed affording "this measure of controlling authority to the commentary" as the appropriate approach in the particular circumstances of the Guidelines. *Id.* at 44-45.

2. In 2018, petitioner twice sold crack cocaine to confidential informants working with the police in Raleigh, North Carolina. Pet. App. 5a; see Presentence Investigation Report (PSR) ¶ 6. A grand jury in the Eastern District of North Carolina returned an indictment charging petitioner with two counts of distributing crack cocaine, in violation of 21 U.S.C. 841(a). Indictment 1. Petitioner pleaded guilty to the indictment, and the case proceeded to sentencing. Judgment 1; PSR ¶ 3.

The now-advisory Sentencing Guidelines generally prescribe significantly higher offense levels than would otherwise apply for an offense committed by a "career offender." Sentencing Guidelines § 4B1.1(b). A defendant is a "career offender" if the defendant was at least 18 years old at the time of the current offense, the current offense was "a felony that is either a crime of violence or a controlled substance offense," and the defendant "has at least two prior felony convictions" for such offenses. *Id.* § 4B1.1(a). The career-offender guideline specifies that the two prior felony convictions must have involved sentences that "are counted separately" under the guidelines for calculating the defendant's criminal-history category. *Id.* § 4B1.2(c). Those guidelines call for adding a certain number of criminal-history points "for each prior sentence," *id.* § 4A1.1(a)-(c), and define the term "'prior sentence'" to mean a sentence "previously imposed * * * for conduct not part of the instant offense," *id.* § 4A1.2(a)(1). The accompanying commentary states that "[c]onduct that is part of the instant offense means conduct that is relevant conduct to the instant offense under the provisions of § 1B1.3 (Relevant Conduct)." *Id.* § 4A1.2, comment. (n.1).

Before sentencing, the Probation Office determined that petitioner is a career offender under the Guidelines because he committed his 2018 federal controlled substance offenses after being convicted of at least two prior such offenses in state court, in 2009 and 2013, for possessing cocaine with intent to sell or deliver. PSR ¶¶ 23, 29, 65. Applying the career-offender enhancement, the Probation Office calculated petitioner's guidelines range as 151 to 188 months of imprisonment. PSR ¶ 70.

Petitioner objected to the career-offender designation, on the theory that his 2013 conviction rested on drug trafficking that should be considered "relevant conduct" to his 2018 offenses. Pet. App. 6a (citation omitted). He based that theory on Section 1B1.3(a)(2), which specifies that for certain drug offenses, relevant conduct includes other drug offenses "that were part of the same course of conduct or common scheme or plan as the offense of conviction." Sentencing Guidelines § 1B1.3(a)(2). In petitioner's view, his 2013 conviction and his 2018 federal offenses arose from the "same course of conduct," *ibid.*, because they all involved the sale of crack in the same general area. See D. Ct. Doc. 32, at 2-9 (Oct. 6, 2020). Petitioner also argued that the district court should "disregard" Application Note 5(C) in the commentary to the guideline that he invoked. Pet. App. 31a. Application Note 5(C) states that "offense conduct associated with a sentence that was imposed prior to the acts or omissions constituting the instant federal offense * * * is not considered as part of the same course of conduct." Sentencing Guidelines § 1B1.3, comment. (n.5(C)).

The district court overruled petitioner's objection. Pet. App. 37a. The court determined that the conduct

for which petitioner was convicted in 2013 was not "part of the instant offense"—which took place after conviction, sentencing, and incarceration for the 2013 crime—and that the 2013 conviction was therefore properly treated as a prior conviction for purposes of the career-offender guideline. *Ibid.* The court observed that "just because the offenses involve the sale of crack cocaine in the same neighborhood, that doesn't mean [petitioner] was engaging in a common scheme or single spree." *Ibid.* To the contrary, the court found that the similarities on which petitioner relied supported applying the career-offender enhancement because they "paint[ed] a picture of someone going back to the same community after a term of incarceration and doing the same thing, selling drugs." *Ibid.*

After considering the sentencing factors in 18 U.S.C. 3553(a), the district court determined that a downward variance from the guidelines range of 151 to 188 months was appropriate. Pet. App. 43a. The court sentenced petitioner to 120 months of imprisonment, to be followed by three years of supervised release. *Ibid.*; Judgment 3-4.

3. The court of appeals affirmed. Pet. App. 1a-27a. Petitioner contended on appeal that the district court had relied on Application Note 5(C) "in concluding that the career-offender enhancement was applicable," *id.* at 9a, and that Application Note 5(C) should be disregarded in light of this Court's decision in *Kisor* v. *Wilkie*, 139 S. Ct. 2400 (2019). The court of appeals rejected that contention. Pet. App. 9a-23a. The court reasoned that *Stinson* "continues to provide" the relevant standard and that Application Note 5(C) "is owed controlling deference" under *Stinson*. *Id.* at 22a-23a. And the court explained that "Application Note 5(C)

authoritatively excludes" petitioner's 2013 conviction as relevant conduct for his 2018 offenses because petitioner had been sentenced for that offense "prior to the acts and omissions constituting" the half-decade-later offenses. *Id.* at 23a. The court also rejected petitioner's separate challenge to the substantive reasonableness of his sentence. *Id.* at 24a-26a.

Judge King dissented in part and concurred in the judgment. Pet. App. 27a. Although he "agree[d] with the result reached by the panel majority," he viewed the majority's discussion of *Kisor* as inconsistent with a panel decision issued 12 days earlier in *United States* v. *Campbell*, 22 F.4th 438 (4th Cir. 2022). Pet. App. 27a.

4. Petitioner sought rehearing en banc, asserting a conflict between the panel decision in this case and the panel decision in *Campbell*. C.A. Pet. for Reh'g 8-10. In response, the government suggested that panel rehearing would be appropriate to "consider the implication of *Campbell*." Gov't C.A. Resp. to Pet. for Reh'g 1. The government also maintained that while "*Kisor* applies in the guidelines context and governs how much deference the commentary receives," Application Note 5(C) "readily survives review under *Kisor*." *Id.* at 11.

The court of appeals denied rehearing. Pet. App. 47a-48a. Judge Niemeyer, who had authored the panel opinion, authored an opinion supporting the denial of rehearing en banc in which he stated that any tension between the decision in this case and the earlier decision in *Campbell* "would be better addressed in a future case" where any difference between the standards prescribed in *Kisor* and *Stinson* would actually "alter the outcome[]." *Id.* at 52a. Judges Motz and Wynn both issued opinions dissenting from the denial of rehearing en banc, joined by each other and two colleagues. *Id.* at

53a-54a, 55a-60a. The dissenting judges would have granted rehearing to determine whether *Campbell* controls over the panel decision in this case to the extent that the two conflict. See *id.* at 53a, 55a.

ARGUMENT

Petitioner contends (Pet. 15-28) that the court of appeals erred in its consideration of how *Kisor* v. *Wilkie*, 139 S. Ct. 2400 (2019), affects the application in his case of Application Note 5(C) to Section 1B1.3 of the Sentencing Guidelines. That contention does not warrant this Court's review. The decision below correctly upheld petitioner's career-offender designation, and petitioner fails to show any conflict in the courts of appeals that would warrant further review in this case. This Court has repeatedly denied petitions for writs of certiorari seeking review of questions concerning the application of *Kisor* to the distinct context of the Guidelines, and the same course is warranted here.[2]

1. a. The district court correctly determined that petitioner's conviction in 2013 for the offense of

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[2] See, *e.g.*, *Carviel* v. *United States*, 142 S. Ct. 2788 (2022) (No. 21-7609); *Duke* v. *United States*, 142 S. Ct. 1242 (2022) (No. 21-7070); *Guillory* v. *United States*, 142 S. Ct. 1135 (2022) (No. 21-6403); *Wynn* v. *United States*, 142 S. Ct. 865 (2022) (No. 21-5714); *Lario-Rios* v. *United States*, 142 S. Ct. 798 (2022) (No. 21-6121); *Smith* v. *United States*, 142 S. Ct. 488 (2021) (No. 21-496); *Melkonyan* v. *United States*, 142 S. Ct. 275 (2021) (No. 21-5186); *Wiggins* v. *United States*, 142 S. Ct. 139 (2021) (No. 20-8020); *Kendrick* v. *United States*, 141 S. Ct. 2866 (2021) (No. 20-7667); *Lewis* v. *United States*, 141 S. Ct. 2826 (2021) (No. 20-7387); *O'Neil* v. *United States*, 141 S. Ct. 2825 (2021) (No. 20-7277); *Broadway* v. *United States*, 141 S. Ct. 2792 (2021) (No. 20-836); *Sorenson* v. *United States*, 141 S. Ct. 2822 (2021) (No. 20-7099); *Lovato* v. *United States*, 141 S. Ct. 2814 (2021) (No. 20-6436); *Tabb* v. *United States*, 141 S. Ct. 2793 (2021) (No. 20-579).

"Possession With Intent to Sell or Deliver Cocaine," PSR ¶ 29, constituted a qualifying prior felony conviction for purposes of the career-offender enhancement under the advisory Sentencing Guidelines.

Petitioner does not dispute that under the plain text of Section 4B1.1(a), the enhancement applies to him if he has "at least two prior felony convictions" for controlled substance offenses. Sentencing Guidelines § 4B1.1(a). The plain text of Section 4B1.2(c), in turn, defines the phrase "two prior felony convictions" to mean that "the defendant committed the instant offense of conviction subsequent to sustaining" the earlier convictions and the earlier convictions would be "counted separately" for purposes of calculating the defendant's criminal history. *Id.* § 4B1.2(c). A defendant "sustain[s]" a conviction on "the date that the guilt of the defendant [is] established, whether by guilty plea, trial, or plea of *nolo contendere*." *Ibid.*

Here, respondent pleaded guilty to the 2013 offense on October 1, 2013, and he committed his current offenses on October 17 and 23, 2018. PSR ¶¶ 1, 29. Thus, under the plain text of the Guidelines, petitioner's 2013 conviction constitutes a "prior felony conviction"—*i.e.*, a conviction for which his guilt was established before he committed his current offenses. Petitioner, however, does not address the text of the career-offender guideline. His challenge instead relies on commentary to the criminal-history guidelines. See Pet. 11, 34-35.

As noted above, the career-offender enhancement specifies that the prior convictions at issue must be of the sort that would be "counted separately" in calculating the defendant's criminal history. Sentencing Guidelines § 4B1.2(c). The plain text of the criminal-history guidelines generally assigns separate criminal-history

points for each of the defendant's "prior sentence[s]," *id.* § 4A1.1(a)-(c), defined as any sentence "previously imposed upon adjudication of guilt * * * for conduct not part of the instant offense," *id.* § 4A1.2(a)(1). The commentary to those provisions then states that conduct is "part of the instant offense," and therefore not a source of criminal-history points, if it is "relevant conduct to the instant offense under the provisions of § 1B1.3 (Relevant Conduct)." *Id.* § 4A1.2, comment. (n.1).

Based on that commentary, which incorporates the relevant-conduct guideline by reference, petitioner argues that his 2013 conviction cannot be considered a "prior felony conviction" for purposes of the career-offender guideline. See Pet. 11, 34-35. The relevant-conduct guideline states that, for certain drug offenses, relevant conduct includes "all acts" committed by the defendant "that were part of the same course of conduct or common scheme or plan as the offense of conviction." Sentencing Guidelines § 1B1.3(a)(2). Petitioner asserts that his 2013 conviction should not have been treated as a prior felony conviction because the conduct underlying that conviction was part of the "same course of conduct" as his instant offenses. *Ibid.*; see Pet. 35.

The district court correctly rejected that assertion. Pet. App. 37a. As the court explained, even if the 2013 and 2018 offenses "involve[d] the sale of crack cocaine in the same neighborhood," they did not form part of the same course of conduct. *Ibid.* Petitioner pleaded guilty to the prior offense in 2013 and served "a term of incarceration" ending in March 2018. *Ibid.*; see PSR ¶¶ 29, 33. Petitioner's course of conduct in 2013 was therefore terminated by his arrest, conviction, and imprisonment. As the court recognized (Pet. App. 37a), petitioner's return to the same general area to sell crack

again after his release from state custody makes application of the career-offender enhancement more appropriate, not less. It identifies him as precisely the sort of recidivist at whom the career-offender guideline is directed.

In overruling petitioner's objection to the application of the career-offender guidelines, the district court did not invoke any commentary. See Pet. App. 37a. But at an earlier point in the sentencing hearing, the court observed that petitioner's argument would require the court to "disregard" Application Note 5(C) to the relevant-conduct guideline. *Id.* at 31a. Application Note 5(C) states that "offense conduct associated with a sentence that was imposed prior to the acts or omissions constituting the instant federal offense * * * is not considered as part of the same course of conduct or common scheme or plan as the offense of conviction." Sentencing Guidelines § 1B1.3, comment. (n.5(C)). That provision makes unmistakably clear that petitioner's 2013 conviction was *not* part of the same course of conduct as his current offenses, which occurred five years later after he had served his prison term for the 2013 crime.

The relevant-conduct cases that petitioner cites (Pet. 34-35) do not suggest otherwise. None of those cases involved a prior offense for which the defendant was convicted and sentenced, let alone incarcerated, before committing the offense of conviction. Petitioner's oblique reference (Pet. 35) to examples in which courts "discount[ed] temporal gaps" resulting from the arrest of a "participant[]" disregards that the *defendant* was not the person arrested in those examples. See *United States* v. *Nunez*, 958 F.2d 196, 198 (7th Cir.) (treating the defendant's uncharged prior drug sales to the same customer as part of the same course of conduct despite

two-year gap resulting from the customer's imprisonment), cert. denied, 506 U.S. 857 (1992).

b. Petitioner argued on appeal that the district court's application of the career-offender enhancement rested "at least partially" on Application Note 5(C). Pet. C.A. Br. 24; see *id.* at 24-27. The court of appeals accepted petitioner's premise and viewed the case as turning on the validity of Application Note 5(C). See Pet. App. 3a-4a. The court then determined that Application Note 5(C) is authoritative and controlling under this Court's decision in *Stinson* v. *United States*, 508 U.S. 36 (1993), because Application Note 5(C) "'does not run afoul of the Constitution or a federal statute, and it is not plainly erroneous or inconsistent with' § 1B1.3." Pet. App. 23a (quoting *Stinson*, 508 U.S. at 47). The court of appeals also rejected petitioner's argument that this Court's recent decision in *Kisor* v. *Wilkie*, *supra*, requires applying a different standard before deferring to the commentary. See Pet. App. 11a-23a.

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

deference" to an agency's interpretation of a regulation "unless the regulation is genuinely ambiguous." *Id.* at 2415.

Notwithstanding those clarifications, the Court declined to overrule *Auer* or *Seminole Rock*—let alone the "legion" of other precedents applying those decisions, including *Stinson*. *Kisor*, 139 S. Ct. at 2411 n.3 (opinion of Kagan, J.) (identifying *Stinson*, 508 U.S. at 44-45, as one of numerous examples); see *id.* at 2422 (majority opinion) (citing this "long line of precedents" as a reason not to overrule *Auer*) (citation omitted); cf. *id.* at 2424-2425 (Roberts, C.J., concurring in part). The Court explained that it had "applied *Auer* or *Seminole Rock* in dozens of cases, and lower courts have done so thousands of times," and that "[d]eference to reasonable agency interpretations of ambiguous rules pervades the whole corpus of administrative law." *Id.* at 2422 (majority opinion). And the Court adhered to Auer on stare decisis grounds in part to avoid "allow[ing] relitigation of any decision based on *Auer*," with the attendant "instability" that would result from overturning precedent in "so many areas of law, all in one blow." *Ibid.*

This Court's decision in *Kisor* now provides the governing standard for determining whether a federal court must defer to an executive agency's interpretation of the agency's own regulation. 139 S. Ct. at 2414-2418. And the Court's earlier decision in *Stinson* reasoned that—by "analogy," albeit "not [a] precise" one—the Commission's commentary interpreting the Guidelines should be treated the same way as an executive agency's interpretation of its own regulation. 508 U.S. at 44; see *id.* at 44-46. The government has accordingly taken the position, including in this case, that *Kisor* sets forth the

authoritative standards for determining whether particular commentary is entitled to deference. See Gov't C.A. Resp. to Pet. for Reh'g 6 & n.2.

c. It is far from clear that the panel's opinion here will have prospective significance in the Fourth Circuit. Twelve days before the decision below, a different panel of the Fourth Circuit stated in *United States* v. *Campbell*, 22 F.4th 438 (2022), that *Kisor* applies "to judicial interpretations of the Sentencing Commission's commentary." *Id.* at 445 n.3. Petitioner sought rehearing below, asserting a conflict between *Campbell* and the panel decision here. See p. 8, *supra*. Although the court declined to rehear the case, four judges expressed the view that circuit precedent already requires treating *Campbell* as controlling on this point. See Pet. App. 53a-54a (Motz, J., dissenting from the denial of rehearing en banc); *id.* at 55a (Wynn, J., voting to grant rehearing en banc). Judge Niemeyer, who authored the panel opinion in this case, stated that whether *Campbell* is controlling on this point "is both an open and a debatable question," which he viewed as better addressed in a future case in which any distinction between *Kisor* and *Stinson* "becomes meaningful to that case's disposition." *Id.* at 52a (opinion supporting the denial of rehearing en banc). The other eight judges who voted to deny rehearing did not express any views.

Accordingly, it remains open to a future litigant in the Fourth Circuit, in a case in which it might matter, to argue that *Campbell* is controlling on this point. And resolving any "internal difficulties" between the two panel decisions is primarily a job for the court of appeals, not this Court. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). This, however, is not a case in which direct application of *Stinson*, rather

than *Kisor*, makes a difference to the outcome. Indeed, although petitioner now contends (Pet. 35) that his 2013 conviction qualifies as relevant conduct under the "plain meaning" of Section 1B1.3(a)(2), in the court of appeals, he described Section 1B1.3(a)(2) as "certainly ambiguous" and urged the court to consider other commentary that he viewed as supporting his position. Pet. C.A. Reply Br. 3.

Regardless, petitioner's current contention that the commentary to the relevant-conduct guideline should be disregarded is inconsistent with his own reliance on the commentary to the career-offender guideline, which is the only way that the relevant-conduct guideline even enters the picture. Sentencing Guidelines § 4A1.2, comment. (n.1) (discussed at pp. 10-11, *supra*). Under the plain text of the career-offender guideline itself, petitioner's 2013 conviction for possessing cocaine with intent to sell or deliver is clearly a "prior felony conviction[]," because petitioner sustained the conviction before he committed his current offense conduct. Sentencing Guidelines § 4B1.1(a); see *id.* § 4B1.2(c). Petitioner's contrary argument incoherently requires following the commentary to the definition of "prior sentence" that cross-references the relevant-conduct guideline, see *id.* § 4A1.2, comment. (n.1), but then disregarding the commentary to the relevant-conduct guideline itself.

The different weight that petitioner would give to each commentary application note cannot be squared unless one views the career-offender guideline and associated definitions as sufficiently ambiguous to warrant deference under *Kisor*, but the relevant-conduct guideline as sufficiently unambiguous—in his favor—as to foreclose similar deference. But, if anything, the

plain text of the relevant-conduct guideline is (like the plain text of the career-offender guideline itself) unambiguously against him. As the district court recognized, petitioner's 2013 offense was not part of the same course of conduct as his current offense conduct because he was arrested and imprisoned for the former before committing the latter. Pet. App. 37a. Application Note 5(C) makes that especially clear, but a reviewing court would reach the same result even in the absence of the commentary given the text, context, and purpose of Section 1B1.3. See Gov't C.A. Br. 15-18; Gov't C.A. Resp. to Pet. for Reh'g 11-13.

Moreover, even if a court were to view Section 1B1.3 as sufficiently ambiguous as applied to petitioner's discontinuous periods of drug trafficking, Application Note 5(C) would be owed deference under the principles set forth in *Kisor*. Application Note 5(C) is the Commission's "authoritative" and "official" position, *Kisor*, 139 S. Ct. at 2416 (citation omitted), having been included in the official Guidelines Manual for decades. See, *e.g.*, Sentencing Guidelines § 1B1.3, comment. (n.8) (1993) (same text as current Application Note 5(C)). Application Note 5(C) also implicates the Commission's "substantive expertise." *Kisor*, 139 S. Ct. at 2417. Congress charged the Commission with assuring substantial guidelines sentences for recidivist drug offenders, 28 U.S.C. 994(h), and the guidelines and commentary at issue here help to carry out that mandate. More broadly, this Court has recognized that the Commission's commentary "assist[s] in the interpretation and application of [the Guidelines], 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." *Stinson*, 508 U.S. at

45. And Application Note 5(C) reflects the Commission's "fair and considered judgment," not an ad hoc position of convenience. *Kisor*, 139 S. Ct. 2417-2418 (citations omitted).

2. a. Petitioner asserts (Pet. 15) that the courts of appeals are divided "over whether *Kisor* constrains the deference courts accord to the Guidelines commentary." This Court has repeatedly denied petitions for writs of certiorari asserting such a conflict, see p. 9 n.2, *supra*, and petitioner identifies no reason for a different course here. Petitioner also fails to identify any court of appeals that would treat his 2013 conviction as relevant conduct rather than as a qualifying prior conviction. Nor does he demonstrate any disagreement within the courts of appeals on the validity of Application Note 5(C). Petitioner thus fails to show that the outcome in his case would have been any different in any other circuit.

Even with respect to the abstract methodological question of whether *Kisor* "applies in the Guidelines context" (Pet. i), circuit decisions cited by petitioner (Pet. 18-20) do not demonstrate a conflict, because none definitively holds that *Kisor* is altogether inapplicable to Guidelines commentary. As explained above, a prior panel decision in the Fourth Circuit endorsed the position that he favors and might be viewed as controlling if the issue were outcome-determinative in a future case. See pp. 15-16, *supra*. The Fifth Circuit decision that petitioner invokes (Pet. 18-19) has been vacated pending rehearing en banc. See *United States* v. *Vargas*, 35 F.4th 936 (2022), vacated, 45 F.4th 1083 (2022) (oral argument tentatively scheduled for the week of Jan. 23, 2023). The Ninth Circuit has treated the question as an open one, including in the decision that petitioner cites

(Pet. 20). See *United States* v. *Kirilyuk*, 29 F.4th 1128, 1139 (9th Cir. 2022) (noting that another circuit had "appl[ied] the narrower deference set out in *Kisor*" in a recent Guidelines case and declining to "express a view on that analysis"). And, as petitioner acknowledges (Pet. 20), the Eleventh Circuit is considering the relevance of *Kisor* to the Guidelines in a pending en banc case. See *United States* v. *Dupree*, 849 Fed. Appx. 911 (2021) (per curiam), vacated, 25 F.4th 1341 (2022) (argued June 21, 2022).

Petitioner contends (Pet. 20) that four other circuits have continued to defer to the commentary under *Stinson* in decisions post-dating *Kisor*. But petitioner further states that those decisions did not "directly address[]" (*ibid.*) the relevance of *Kisor*, and this Court has already declined to review many of them. See *United States* v. *Tabb*, 949 F.3d 81 (2d Cir. 2020), cert. denied, 141 S. Ct. 2793 (2021); *United States* v. *Smith*, 989 F.3d 575 (7th Cir.), cert. denied, 142 S. Ct. 488 (2021); *United States* v. *Jett*, 982 F.3d 1072 (7th Cir. 2020), cert. denied, 142 S. Ct. 174 (2021); *United States* v. *Clayborn*, 951 F.3d 937 (8th Cir.), cert. denied, 141 S. Ct. 391 (2020); *United States* v. *Wynn*, 845 Fed. Appx. 63 (2d Cir. 2021), cert. denied, 142 S. Ct. 865 (2022); *United States* v. *Broadway*, 815 Fed. Appx. 95 (8th Cir. 2020) (per curiam), cert. denied, 141 S. Ct. 2792 (2021).

b. In any event, certiorari would not be warranted even if petitioner had demonstrated some disagreement in the courts of appeals because this Court typically leaves the resolution of Guidelines issues to the Commission. The Commission has a "statutory duty 'periodically to review and revise' the Guidelines." *Braxton* v. *United States*, 500 U.S. 344, 348 (1991) (quoting 28

U.S.C. 994(*o*) (1988)) (brackets omitted). Congress thus "necessarily contemplated that the Commission would periodically review the work of the courts, and would make whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest." *Ibid.* Given that the Commission can and does amend the Guidelines to eliminate conflicts or correct errors, this Court ordinarily does not review decisions interpreting the Guidelines. See *ibid.*; see also *United States* v. *Booker*, 543 U.S. 220, 263 (2005).

Petitioner contends (Pet. 23) that the Commission cannot resolve a methodological dispute concerning "the extent to which deference to its commentary is warranted," but an explicit guideline—which was subject to notice-and-comment and congressional review—already provides instructions for applying commentary. See Sentencing Guidelines § 1B1.7; pp. 2-3, *supra*. The Commission can also always resolve any dispute concerning the application of particular commentary by amending the text of the Guidelines. Additionally, the Commission has announced that one of its policy priorities for the immediate future is a "[m]ultiyear study of the *Guidelines Manual* to address case law concerning the validity and enforceability of guideline commentary." 87 Fed. Reg. 67,756, 67,756 (Nov. 9, 2022). The Commission "lacked a quorum of voting members" in recent years, *Guerrant* v. *United States*, 142 S. Ct. 640, 641 (2022) (statement of Sotomayor, J., respecting the denial of certiorari), but it has now returned to full strength and is more than capable of resolving any important controversies in the application of the Guidelines, whether based on disagreement about the commentary or otherwise.

c. This case would also be an unsuitable vehicle in which to address petitioner's *Kisor* question because petitioner's position on the application of the Guidelines to his case simultaneously defers to and disregards the Commission's commentary, with no sound explanation for that selectivity. As explained above (at p. 16), petitioner's theory that his 2013 conviction should not have counted towards the career-offender enhancement depends in crucial part on giving effect to the commentary to Section 4A1.2. It is only that commentary—not the text of any guideline—that expressly incorporates the relevant-conduct guideline into the analysis for applying the career-offender enhancement. See Sentencing Guidelines § 4A1.2, comment. (n.1).

3. Petitioner separately contends (Pet. 29-30) that the Court should grant further review to address whether deference to the Commission's commentary is "entirely inappropriate." Answering that question in petitioner's favor would require this Court to overrule its prior decision in *Stinson*, which the Court identified in *Kisor* as one of the many precedents to which it determined to adhere on stare decisis grounds. See *Kisor*, 139 S. Ct. at 2411 n.3 (opinion of Kagan, J.); *id.* at 2422 (majority opinion). Petitioner does not address the stare decisis factors, let alone identify any sound basis for his extraordinary suggestion that the Court should overrule or modify both *Stinson* and *Kisor* just three years after *Kisor* was decided.

Petitioner contends (Pet. 29) that the rule of lenity should operate to resolve any ambiguity in a guideline in a criminal defendant's favor. But the rule of lenity applies only in the face of "grievous ambiguity," *United States* v. *Castleman*, 572 U.S. 157, 172-173 (2014) (citation omitted), and petitioner fails to show any such

ambiguity here. Moreover, this Court's decision in *Beckles* v. *United States*, 137 S. Ct. 886 (2017), holding that the Guidelines are not susceptible to void-for-vagueness challenges, see *id.* at 895, casts serious doubt on whether the rule of lenity even applies to the Guidelines. Like the due process vagueness doctrine, the rule of lenity derives from concerns of fair warning and avoiding arbitrary enforcement that do not apply to the advisory Guidelines. See *Beckles*, 137 S. Ct. at 892-894; see also *United States* v. *Gordon*, 852 F.3d 126, 130 n.4 (1st Cir.) ("[A]s is now clear from *Beckles* * * * concerns about statutory vagueness, which underlie the rule of lenity, do not give rise to similar concerns regarding the Guidelines."), cert. denied, 138 S. Ct. 256 (2017).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 2022