

No. 23-5875

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IN THE SUPREME COURT OF THE UNITED STATES

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ANDRES VARGAS, PETITIONER

v.

UNITED STATES OF AMERICA

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

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends (Pet. 8-9, 28) that the district court erred in calculating his Sentencing Guidelines range under the career-offender guideline, which applies when "the instant offense of conviction is a felony that is \* \* \* a controlled substance offense" and the defendant "has at least two prior felony convictions of \* \* \* a controlled substance offense." Sentencing Guidelines § 4B1.1(a) (2021). Petitioner argues (Pet. 8-9, 28) that, under the Guidelines applicable when he was sentenced, Application Note 1 to Sentencing Guidelines § 4B1.2 invalidly interpreted the definition of "controlled substance offense" to include inchoate offenses. See § 4B1.2 comment. (n.1) (2021) ("For

purposes of [the career-offender] guideline \* \* \* '[c]rime of violence' and 'controlled substance offense' include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses."); see also § 4B1.2(b) (2021).

Petitioner seeks certiorari on the question whether this Court's decision in Kisor v. Wilkie, 139 S. Ct. 2400 (2019), which concerns the degree of deference to an agency's interpretation of its own regulations, applies to Guidelines commentary. Pet i; see Pet. 9, 14-35. For reasons set forth in the government's brief in opposition to the petition for a writ of certiorari in Ratzloff v. United States, No. 23-310, a copy of which is being served on petitioner's counsel, while the government agrees that Kisor does apply to the Guidelines and commentary, that question does not warrant this Court's review. See Br. in Opp. at 12-18, Ratzloff, supra (No. 23-310) (filed Dec. 6, 2023). In particular, petitioner overstates the degree of any conflict about whether and how Kisor applies in the distinct context of the Sentencing Commission's commentary to the guidelines. Id. at 15-17. This Court has repeatedly and recently denied petitions for writs of certiorari seeking review of questions concerning the applicability of Kisor to the guidelines, see id. at 8 n.2 (collecting cases), and the same course is warranted here.<sup>1</sup>

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<sup>1</sup> Other pending petitions for writs of certiorari also raise the Kisor question. See, e.g., Choulat v. United States, No. 23-5908 (filed Oct. 25, 2023); Maloid v. United States, No. 23-6150 (filed Nov. 22, 2023); Netro-Perales v. United States, No. 23-6157 (filed Nov. 29, 2023).

Moreover, the Sentencing Commission -- which has now returned to full strength after lacking a quorum of voting members in recent years -- has amended Section 4B1.2, effective November 1, 2023, to incorporate the substance of former Application Note 1 into the guideline text itself. Sentencing Guidelines App. C Supp. 245 (Amendment 822); see Sentencing Guidelines § 4B1.2(d) (2023) ("The terms 'crime of violence' and 'controlled substance offense' include the offenses of aiding and abetting, attempting to commit, or conspiring to commit any such offense."). The deference owed to former Application Note 1 is thus of diminishing importance.<sup>2</sup>

As that episode illustrates, the Commission is fully capable of resolving disputes concerning the application of particular commentary by amending the text of the Guidelines. See Indeed, the Commission has announced that one of its policy priorities for the immediate future is the "[c]ontinuation of its multiyear study of the Guidelines Manual to address case law concerning the validity and enforceability of guideline commentary." 88 Fed. Reg. 60,536, 60,537 (Sept. 1, 2023); cf. Braxton v. United States, 500 U.S. 344, 348 (1991) (explaining that this Court should be "restrained and circumspect in using [its] certiorari power" to resolve guidelines issues in light of the Commission's "statutory

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<sup>2</sup> In circuits that previously declined to defer to former Application Note 1, the government has agreed that the 2023 amendment should not be applied to defendants who committed their offenses before its effective date. See Peugh v. United States, 569 U.S. 530, 544 (2013) (finding that Ex Post Facto Clause is implicated for Guidelines enhancements enacted between the time of the crime and the time of sentencing).

duty 'periodically to review and revise' the Guidelines") (brackets and citation omitted).

The petition for a writ of certiorari should be denied.<sup>3</sup>

Respectfully submitted.

ELIZABETH B. PRELOGAR  
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DECEMBER 2023

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<sup>3</sup> The government waives any further response to the petition unless this Court requests otherwise.