No. 23-5875

IN THE
SUPREME COURT OF THE UNITED STATES

ANDRES VARGAS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

REPLY BRIEF FOR PETITIONER

MARJORIE A. MEYERS
Federal Public Defender
Southern District of Texas

EVAN G. HOWZE
Assistant Federal Public Defender
Counsel of Record
440 Louisiana Street, Suite 1350
Houston, Texas 77002
(713) 718-4600
evan_howze@fd.org

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REPLY BRIEF FOR PETITIONER

This case presents a question of fundamental importance to federal sentencing practice and procedure: whether the standard for triggering judicial deference to an agency's interpretation of its own regulations, as clarified in *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), also governs the extent to which courts must defer to the U.S. Sentencing Commission's interpretive commentary to the federal Sentencing Guidelines. As it comes to this Court in this case, that question has all the hallmarks of one that warrants review. There is no dispute that *Kisor*'s relevance to the Guidelines has sharply divided the courts of appeals: five circuits have adopted *Kisor*'s recalibrated deference standard; six circuits have opted to retain the standard as articulated in *Stinson v. United States*, 508 U.S. 36 (1993)—the very formulation *Kisor* jettisoned; and each camp views its approach as consistent with, and the other's contrary to, *Stinson*. As is apparent, the disagreement stems from deep confusion over the scope and meaning of this Court's precedents. The en banc Fifth Circuit's decision below ended the possibility of a natural resolution. And, as the government agrees, that decision is wrong: "*Kisor* does apply to the Guidelines and commentary." Mem. in Opp. 2.

The government nevertheless maintains that this acknowledged circuit split is unworthy of review, leaning on "the reasons set forth in [its] brief in opposition to the petition for a writ of certiorari in *Ratzloff v. United States*, No. 23-310." Mem. in Opp. 2 (citing *Ratzloff* Br. in Opp. 12-18). But petitioner's case suffers from none of the case-specific prudential and jurisdictional vehicle objections spanning the bulk of the cross-referenced pages. The path to the question presented in this case, in contrast, is clean and free from obstruction. The

en banc majority made clear that its decision to retain *Stinson*, and reject *Kisor*, determined the outcome. And petitioner unquestionably retains a justiciable interest in securing the sentence that "would likely be *at least* five years shorter had he been convicted in one of th[e] jurisdictions" that—correctly, as the government agrees—embraces *Kisor*. Pet. App. 64a (Elrod, J., dissenting) (original emphasis).

The government's efforts to minimize the importance of the question presented, on account of its relationship to the Guidelines, also lack merit. Harmonizing the courts of appeals' "conflicting positions on the authoritative weight to be accorded to the commentary to the Sentencing Guidelines," *Stinson*, 508 U.S. at 39, is no less important now than it was when the Court previously granted review to do just that. As this case illustrates, those conflicting approaches produce the very sort of arbitrary sentencing disparities the Guidelines were designed to eliminate. The government identifies no persuasive reason to discount the common-sense observation that "such disparities will continue for many criminal defendants until" the lower courts receive "much needed guidance" on this "thorny question of vertical *stare decisis*." Pet. App. 46a, 64a (Elrod, J., dissenting). This case presents a perfect opportunity for the Court to answer that call, as only it can. The petition should be granted.

I. The decision below warrants review because it entrenched a deep and widely acknowledged circuit conflict stemming from irreconcilable interpretations of this Court's precedents.

This Court's interest in exercising certiorari jurisdiction nears its apex when the inconsistent application of federal law leads to different outcomes in some parts of the country than in others. The government does not contest that the courts of appeals' acknowledged

disagreement as to whether "*Stinson* sets out a deference doctrine distinct from the one refined by *Kisor*," Pet. App. 3a, has had that effect. That the now-intractable conflict stems from dueling interpretations of what this Court said and meant in those two decisions only underscores the need for this Court to clarify the state of agency-deference law as it applies to federal sentencing.

1. *Kisor*'s impact on the standard for affording deference to Guidelines commentary is the subject of a widely acknowledged, six-to-five split among the circuits. As the government rightly concedes, five circuits, including two sitting en banc, have embraced *Kisor*'s recalibrated standard and, as a result, declined to defer to various comments on the ground that the "relevant guidelines provision unambiguously required" a narrower interpretation. *Ratzloff* Br. in Opp. 16 (citing *United States v. Castillo*, 69 F.4th 648 (9th Cir. 2023); *United States v. Dupree*, 57 F.4th 1269 (11th Cir. 2023) (en banc); *United States v. Campbell*, 22 F.4th 438 (4th Cir. 2022); *United States v. Nasir*, 17 F.4th 459 (3d Cir. 2021) (en banc); *United States v. Riccardi*, 989 F.3d 476 (6th Cir. 2021)); *accord* Pet. 14-18. The en banc Fifth Circuit expressly "disagree[d]" with each of those opinions in the decision below, Pet. App. 8a-9a & n.11, holding that "*Stinson*'s highly deferential standard," not the "less deferential one in *Kisor*," remains controlling in the Guidelines context. *Id.* at 3a. And, as petitioner (Pet. 19-22), the government (*Ratzloff* Br. in Opp. 7-8), and the Fifth Circuit (Pet. App. 3a n.3, 8a n.11) have collectively observed, the First, Second, Seventh, Eighth, and Tenth Circuits also continue to apply the same pre-*Kisor* formulation of the standard.

2. The government's claim that "petitioner overstates the degree of any conflict" over the question presented, Mem. in Opp. 2 (citing *Ratzloff* Br. in Opp. 15-17), is unfounded. It directs the reader to the discussion on pages 15-17 of its *Ratzloff* opposition. Yet on those pages, the government disputes neither the contours of the split, nor the presence of en banc decisions on both sides. And its complaint (*Ratzloff* Br. in Opp. 16) that Mr. Ratzloff could not "show that the outcome of his case would have been any different in any other circuit" is plainly inapplicable here. Petitioner has shown that *six* circuits would not defer to the commentary that made him a career offender. *See* Pet. 15-16, 17-19; *see also* Pet. App. 14a n.18, 32a n.37. That includes all five circuits the government has conceded apply *Kisor*, *see Castillo*, 69 F.4th at 655; *Dupree* 57 F.4th at 1277; *Campbell*, 22 F.4th at 444-45; *Nasir*, 17 F.4th at 471-72; *United States v. Havis*, 927 F.3d 382, 385-87 (6th Cir. 2019) (en banc), plus the D.C. Circuit, *see United States v. Winstead*, 890 F.3d 1082, 1091-92 (D.C. Cir. 2018), which, as petitioner has noted (Pet. 19), and the government agrees (*Ratzloff* Br. in Opp. 17), operates under precedent that substantially accords with *Kisor*.

3. If anything, it is the government who seriously understates the conflict.

a. In this context, the standard for deference determines how district judges carry out the basic task of discerning the meaning of each and every guideline provision that will influence their sentencing discretion in a given case. The government cannot (and does not) dispute that the circuits' competing post-*Kisor* approaches to deference are antithetical to one another. Those circuits that apply *Kisor* start by "[a]pplying the traditional tools of statutory construction to the text of [a] guideline," *Castillo*, 69 F.4th at 657-58, and defer only where

commentary reasonably resolves "genuine" ambiguity in that text. Yet, under the deference regime maintained in the six non-*Kisor* circuits, "exhaustion of the traditional tools of construction is not required," *United States v. Coates*, 82 F.4th 953, 957 n.1 (10th Cir. 2023), and district courts are obliged to defer even if "the commentary's reading of the guideline is incorrect or implausible." Pet. App. 14a.

The difference is no small matter. As *Kisor* itself made clear, the presence of true ambiguity, after resort to all the ordinary interpretive tools, is essential to the "root" presumption behind agency-deference doctrine: Congress generally expects agencies "to interpret the *ambiguous* rules they issue." 139 S. Ct. at 2412 (plurality) (emphasis added); *see id.* at 2423 (majority). And the government does not contest that the circuits' opposing standards for deferring to the Sentencing Commission lead to vastly disparate outcomes, as they did in this case. *See* Pet. App. 64a (Elrod, J., dissenting) (flagging five-year disparity following from majority's application of *Stinson*, rather than *Kisor*).

b. The source of the disagreement reinforces the necessity of this Court's review. As the government agrees, the conclusion that *Kisor*'s refined approach to deference also applies in this setting follows *from Stinson*'s instruction that "the Commission's commentary . . . should be treated the same way" as an executive agency's interpretation of its regulations, *Ratzloff* Br. in Opp. 14 (citing *Stinson*, 508 U.S. at 44-46), and is bolstered by *Kisor*'s reference to *Stinson* as among the "legion" of prior decisions "applying" the very "*Seminole Rock* deference" standard the Court reformulated. *Id.* at 13 (citing, *inter alia*, *Kisor*, 139 S. Ct. at 2411 n.3 (plurality)); *accord* Pet. 29-31, 33-34. That is how the five circuits that follow *Kisor*

interpret both opinions. *See, e.g.*, *Dupree*, 57 F.4th at 1275-76. But the Fifth Circuit, and the five others that share its view, instead read *Stinson* as dictating the conclusion that they are "duty" bound to ignore *Kisor*'s refinements until this Court says otherwise; and they, too, read *Kisor*'s reference to *Stinson* as support for that position. *See, e.g.*, Pet. App. 9a-12a.

Whether or not this Court were to ultimately agree with petitioner and the government, it is apparent that the sharp division in the circuits is the product of deep confusion over the scope and meaning of this Court's decisions in *Stinson* and *Kisor*. Only this Court can definitively say whether its prior opinions actually mean one thing, or another.

II. The government's arguments against certiorari lack merit.

Faced with a decision entrenching an acknowledged circuit conflict over a legal standard relevant to every federal criminal case that proceeds to sentencing, and despite agreeing that decision is both wrong and contrary to this Court's precedents, the government nevertheless opposes review. As noted, the government incorporates by reference (Mem. in Opp. 2) the objections it marshaled on pages 12 through 18 of its opposition to the separate, now-denied petition in *Ratzloff*, *supra*. But petitioner's case is beset by none of the case-specific merits and vehicle objections on those pages. And the government's efforts to minimize the importance of the methodological conflict over *Kisor*'s impact in the Guidelines context, both generally and as applied to petitioner, do not withstand scrutiny.

1. The government's cross-referenced arguments against review in *Ratzloff* consist primarily of merits objections, as well as prudential and jurisdictional vehicle concerns, that are specific to that case. None apply to petitioner.

Petitioner's arguments—both as to the overarching methodological question, and the underlying merits—have not changed. *Cf. Ratzloff* Br. in Opp. 15-16. He has asserted, at all stages of the proceedings, that *Kisor* altered the standard for deference to Guidelines commentary, and that the relevant guideline text lacks the genuine ambiguity necessary to trigger deference to the commentary purporting to expand its substantive reach. *See* Pet. 9-10.

Nor is petitioner's case susceptible to the complaint that his "is not a case in which direct application of *Stinson*, rather than *Kisor*, makes a difference to the outcome." *Ratzloff* Br. in Opp. 14. The en banc majority made clear that direct application of "*Stinson*'s more deferential approach," as opposed to *Kisor*'s recalibrated standard, was dispositive of its decision to affirm the district court's deference to the relevant commentary. Pet. App. 13a-24a. Mr. Ratzloff could not "show that the outcome in his case would have been any different in any other circuit." *Ratzloff* Br. in Opp. 16. But, as noted above (at 4), petitioner has shown that the commentary at issue in his case is not afforded deference in each of the five circuits that follow *Kisor*. The government nowhere contests that petitioner's "sentence would likely be *at least* five years shorter had he been convicted in one of those jurisdictions." Pet. App. 64a (Elrod, J., dissenting) (original emphasis). And while the government spills much ink explaining its view that Mr. Ratzloff would have lost even under *Kisor*, and for an independent, alternative reason, *cf. Ratzloff* Br. in Opp. 12-15, it does not raise, and has likely waived, *see* Sup. Ct. R. 15.2, any such claims as to petitioner.

Finally, petitioner's case is not burdened by the serious potential jurisdictional impediment the government raised as to Mr. Ratzloff's petition: the likelihood that his release from

custody had mooted any claim for relief from the alleged improper application of the guideline enhancement at issue there. *Cf. Ratzloff* Br. in Opp. 18-21. As the government observed (*id.* at 21), the need to address that antecedent question, coupled with the prospect that the answer might preclude this Court from reaching the merits, at a minimum made that case an unsuitable vehicle to resolve the question presented. Petitioner, in contrast, is not scheduled for release from his career-offender enhanced sentence until 2034, and thus unquestionably retains a justiciable interest in a favorable ruling from this Court.

There is no dispute that this case squarely presents the question whether *Kisor* governs the degree of deference afforded to the Guidelines commentary. The government's collection of petitions denied well *before* the decision below entrenched the conflict over that question, *see* Mem. in Opp. 2 (citing *Ratzloff* Br. in Opp. 8 n.2), carries little weight, given that it was not unreasonable at that time to believe that the split might still resolve on its own. And, given the significant prudential and jurisdictional vehicle problems flagged by the government, the Court's recent denial in *Ratzloff* is unsurprising. The total absence of any such concerns here, in contrast, underscores that petitioner's case presents a straightforward path to this Court's resolution of the question presented.

2. The government's remaining objections (Mem. in Opp. 3-4; *Ratzloff* Br. in Opp. 17-18) consist of various attempts to downplay the importance of the question presented on the ground that it pertains to the Sentencing Guidelines. These arguments are misguided.

a. The government contends that the Court's policy of "typically leav[ing] the resolution of guidelines issues to the Commission," *Ratzloff* Br. in Opp. 17; *see Braxton v. United*

States, 500 U.S. 344 (1991), militates against review. As petitioner has noted (Pet. 27-28), however, that contention is the result of a mistaken category error: *Braxton* covers narrow disputes concerning the meaning or application of *particular* guideline provisions. *See* 500 U.S. at 348-49. The question presented here, in contrast, arises from division over the *standard* for determining when, and to what extent, *any* piece of commentary will bear on the task of interpreting *any* corresponding guideline. As several lower-court judges have observed, the conflict over *Kisor*'s impact in this context concerns "a meta-rule" at the heart of every effort to interpret and then apply the Guidelines "writ large," *Order Denying Rehearing* 13, *United States v. Moses*, No. 21-4067 (4th Cir. Mar. 23, 2022) (Wynn, J., joined by Motz, King, and Thacker, J.J., voting to grant rehearing en banc). And "'the Commission cannot, on its own, resolve th[at] dispute[.]'" Pet. App. 6a n.8 (quoting *Dupree*, 57 F.4th at 1289 n.6 (Grant, J., concurring in the judgment)).

That this sharp dispute over the across-the-board standard for deference differs in kind from those contemplated in *Braxton* is confirmed by the fact that, in *Stinson* itself, the Court granted review in response to a circuit conflict over the same subject. The government tellingly does not answer petitioner's observation (Pet. 27) that the Court took up *Stinson* several years *after* it announced the *Braxton* policy. And it provides no persuasive reason why the Court should view the courts of appeals' renewed adoption of "conflicting positions on the authoritative weight to be accorded to the [Guidelines] commentary," *Stinson*, 508 U.S. at 39, as any less worthy of its intervention now.

b. The government's reliance (Mem. in Opp. 3-4) on the fact that the Commission recently amended the guideline and commentary at issue here is similarly unconvincing.

The government claims (Mem. in Opp. 3) that the recent amendment "diminish[es]" the *prospective* importance of the question presented in the specific context in which it arises in this case. But, as is often the case, a footnoted concession belies that claim. The government admits (Mem. in Opp. 3 n.2) that the difference between the *Kisor* and *Stinson* circuits remains relevant—and, indeed, dispositive of the presence or absence of a claim for Ex Post Facto Clause relief under *Peugh v. United States*, 569 U.S. 530 (2013)—as to any defendant yet to be sentenced (or convicted) for an offense committed prior to the amendment's November 1, 2023, effective date. The government thus concedes that, even after the Commission's response to this particular dispute, the circuits' divergent deference tests continue to result in disparate treatment of defendants similarly situated to petitioner based on the happenstance of geography.

In any event, the amendment's effect as to the particular guideline and commentary at issue here neither lessens the suitability of petitioner's case as a vehicle for reaching the question presented, nor detracts from the need for this Court to provide the answer. There is no dispute that the amendment is inapplicable to petitioner, and thus poses no obstacle to this Court's ability to reach, and resolve, the overarching methodological question.

Nor does the amendment alter the desirability of using petitioner's case to answer that question. The Court's decision in *Beckles v. United States*, 580 U.S. 256 (2017), illustrates the point. Like this case, *Beckles* presented a question bearing on Guidelines application and

interpretation as a whole that had also divided the circuits: whether guideline provisions were subject to void-for-vagueness challenges. *Id.* at 258-61. But while the case was pending certiorari, the Commission adopted an amendment eliminating the particular guideline language that implicated that question. *See* USSG Supp. to App. C, amend 798 (Aug. 1, 2016). Indeed, just as it does here, *compare* Mem. in Opp. 3, the government argued that the amendment rendered the vagueness question of "limited and diminishing prospective importance" in opposing review. Brief for the United States in Opposition at 17, *Beckles v. United States*, 580 U.S. 256 (2017) (No. 15-8544), 2016 WL 3476564. Despite the intervening amendment, the Court did not hesitate to take up and resolve the broadly applicable vagueness question. *See Beckles*, 580 U.S. at 261 (attributing grant to desire "[t]o resolve a conflict among the Courts of Appeals on th[at] question").

The same course is warranted here. Petitioner's case is a mere preview of what is to come if, as the government urges, the circuits are to remain in a state of perpetual and intractable conflict over the degree of deference owed to Guidelines commentary. As petitioner has shown (Pet. 25-26), multiple still-effective commentary provisions currently receive deference, or do not, and the corresponding guidelines mean one thing, or another, depending on whether the sitting circuit follows *Kisor*, or *Stinson*. There is every reason to expect that the nature of the opposing standards—one predicated on the best reading as revealed by all the traditional interpretive tools; the other indifferent to those tools, even as to an "incorrect or implausible" reading, Pet. App. 14a—will lead to more disparities as to other Guidelines provisions (present and future). Indeed, Judge Elrod was well aware of the amendment the

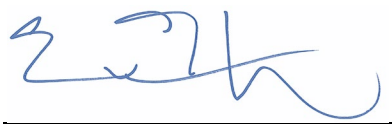
government touts. Yet she took care to stress that "disparities" in the application of various sentencing enhancements "will continue for many criminal defendants until th[is] Court provides [the lower courts] with much needed guidance" as to *Kisor*'s relevance to the Guidelines commentary. Pet. App. 64a (Elrod, J., dissenting). The government has offered no reason to discount that common-sense observation. This Court should grant certiorari and put an end to the lower courts' deep confusion over this important and oft-recurring question of federal sentencing law.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

MARJORIE A. MEYERS
Federal Public Defender
Southern District of Texas



EVAN G. HOWZE
Assistant Federal Public Defender
Counsel of Record
440 Louisiana Street, Suite 1350
Houston, Texas 77002
(713) 718-4600
evan_howze@fd.org

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