No. _____

In the Supreme Court of the United States

MICHAEL JAMES CHOULAT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari
to the
United Sates Court of Appeals for the Fifth Circuit

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QUESTION PRESENTED FOR REVIEW

The U.S. Sentencing Commission issues Guidelines that yield a recommended sentence for criminal defendants. The Commission also issues Commentary, to assist in the interpretation of the Guidelines. This Court has held that the Commentary is like "an agency's interpretation of its own legislative rules." *Stinson v. United States*, 408 U.S. 36, 44 (1993). This Court recently cabined the deference courts should afford to agencies' interpretations of their own rules: permitting deference only when the rule is genuinely ambiguous, the interpretation is within the zone of ambiguity, and the interpretation reflects the agency's substantive expertise. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415-17 (2019).

Michael Choulat is a felon who possessed a firearm along with methamphetamine and marijuana. U.S.S.G. § 2K2.1(b)(6)(B) mandated an enhanced sentence if his firearm was possessed "in connection with another felony offense." Comment 14(B) created an irrebuttable presumption that, because the firearm was close to drug trafficking, they were connected. The question presented:

> Whether *Kisor*'s limits on courts' deference to an agency's interpretation of its own regulation permitted deference to Comment 14(B), which expands the application of § 2K2.1(b)(6)(B).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Constitutional Provisions

United States Sentencing Guidelines

PETITION FOR WRIT OF CERTIORARI

Michael James Choulat asks that a writ of certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on July 27, 2023.

PARTIES TO THE PROCEEDING

The caption of the case names all the parties to the proceedings in the court below.

OPINION BELOW

The published opinion of the court of appeals, reported at 75 F.4th 489 (2023), is appended to this petition.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The opinion and judgment of the court of appeals were entered on July 27, 2023. This petition is filed within 90 days after entry of judgment. *See* Supreme Court Rule 13.1. The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the U.S. Constitution provides, in pertinent part, that "no person shall be … deprived of … liberty … without due process of law." U.S. Const. amend. V.

GUIDELINE PROVISION INVOLVED

U.S.S.G. § 2K2.1(b)(6)(B) requires a four-level enhancement "if the defendant … used or possessed any firearm or ammunition in connection with another felony offense."

Comment 14 to § 2K2.1 instructs that the (b)(6)(B) enhancement should apply "if the firearm … facilitated, or had the potential of facilitating, another felony offense … ." But, "Subsection[ ] (b)(6)(B) … appl[ies] … in the case of a drug trafficking offense in which a firearm is found in close proximity to drugs, drug-manufacturing materials, or drug paraphernalia."

STATEMENT OF THE CASE

Petitioner Michael James Choulat was found guilty after a guilty plea of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1).

Local police pulled Choulat over for driving with an expired license plate in August 2021. Choulat consented to a search of his car, where officers discovered (1) a small baggy of marijuana, (2) a metal grinder with marijuana residue in it, (3) a digital scale, and (4) a 9mm handgun. The handgun was found in a zippered bag on the floor behind the driver's seat.

The officers also searched Choulat's person, where they found another bag of marijuana and a bag of crystal methamphetamine. Altogether, the marijuana weighed 0.16 ounces, the meth four grams. At the scene, the officers learned that Choulat had a felony conviction and arrested him for possessing the firearm as a felon.

Choulat pleaded guilty to being a felon in possession of a firearm. A probation officer prepared the presentence investigation report. That report calculated a recommended sentence. One of the enhancements applied during that calculation was for possessing the firearm "in connection with another felony offense." U.S.S.G. § 2K2.1(b)(6)(B). Specifically, the probation officer found that the possession of the drugs, combined with the grinder and scale, indicated drug trafficking. Applying Comment 14(B), the probation officer found an irrebuttable presumption that the gun was possessed in connection with another felony offense because the other offense was drug trafficking and the gun was in close proximity to drugs … or drug paraphernalia." U.S.S.G. § 2K2.1 cmt. 14(B).

Choulat objected that the district court should not defer to Comment 14(B), in light of this Court's decision in *Kisor*. Choulat argued that § 2K2.1(b)(6)(B)'s requirement that the firearm be

possessed "in connection with another felony offense" was not ambiguous, that Comment 14(B)'s irrebuttable presumption that a spatial connection sufficed was not within the zone of ambiguity, and that courts, not the Commission, were in the best institutional position to determine whether a firearm was connected to another felony offense.

The district court overruled the objection, deferring to Comment 14(B). The district court sentenced Choulat to 57 months' imprisonment to be followed by three years' supervised release.

Choulat urged the same arguments on appeal. The Fifth Circuit found:

> Although Choulat's reading of *Kisor* is not unreasonable, it is foreclosed. Our en banc court recently clarified that *Kisor* did not expressly overrule or modify *Stinson*. *United States v. Vargas*, 74 F.4th 673, 681-82 (5th Cir. 2023). It follows that we defer to Guidelines commentary unless it is "inconsistent with, or a plainly erroneous reading of," the Guidelines. *Id*. at 677. Because *Kisor* did not overrule or modify *Stinson*, our pre-*Kisor* cases deferring to various notes in the Sentencing Guidelines based on *Stinson* are still good law.

Appendix, at 8-9.

REASONS FOR GRANTING CERT

When a criminal defendant is found guilty, the U.S. Sentencing Commission Guidelines Manual provides instructions on how to calculate a recommended sentence. The sentence involves, sometimes complex, calculations that attempt to account for both the nature of the offense and characteristics of the offender in arriving at a recommended sentence that comprises a range of months.

The Manual contains Guidelines, Policy Statements, and Commentary. The Guidelines play the primary role in calculating the recommended range, but the Commentary tells courts how to apply the Guidelines and the Policy Statements. Sometimes, the Commentary dictates a broader application of Guideline enhancements than the text of the Guideline itself. This case raises the issue of the degree to which courts should defer to the Commentary when it interprets a Guideline that is not genuinely ambiguous or when it interprets an ambiguous Guideline in an unreasonable manner.

The degree of deference courts should give the Commentary is a recurring issue that impacts many cases in different contexts.

For example, a Guideline recommends "harsher sentences" for "people who commit multiple drug crimes." *Vargas*, 74 F.4th at 677. The Guideline "does not say" whether that includes "people who have engaged in multiple drug conspiracies." *Id*. "But the official commentary says, yes, conspiracies are included." *Id*. (citing U.S.S.G. § 4B1.2 cmt. 1). The same Guideline similarly counsels enhanced convictions for people who commit multiple crimes of violence but does not include people who have engaged in multiple conspiracies to commit crimes of violence. *United States v. Maloid*, 71 F.4th 795, 801 (10th Cir. 2023). But, the official commentary says, yes, conspiracies are included. *Id*.

In an entirely separate context, a Guideline recommends a higher sentence for a felon who possesses a firearm "in connection with another felony offense." *Appendix* at 8 (quoting U.S.S.G. § 2K2.1(b)(6)(B)). But, the Commentary, U.S.S.G. § 2K2.1 cmt. 14(B) "provides that a gun is '*automatically*' connected to a drug offense if it is found in close proximity to drugs or drug paraphernalia." *Id*. (citing *United States v. Jeffries*, 587 F.3d 690, 692 (5th Cir. 2009). The Commentary, thus, permits the application of the enhancement when the government establishes a spatial relation-

ship between a firearm and a felony, whereas the Guideline requires a casual or logical relationship. *United States v. Perez*, 5 F.4th 390, 404 (3d Cir. 2021) (Bibas, J., concurring).

In yet another context, a Guideline recommends higher sentences for theft proportional to higher dollar amounts lost by the victims. *United States v. Riccardi*, 989 F.3d 476, 481 (6th Cir. 2021) (citing U.S.S.G. § 2B1.1). In cases that involve unauthorized access devices, including gift cards, the Commentary instructs courts to find a minimum loss of "$500 per access device" regardless of the actual value lost. *Id*. at 482 (quoting U.S.S.G. § 2B1.1 cmt. 3(F)(i)).

These examples are only the tip of the iceberg of currently existing Commentary that questionably interprets Guidelines, examples that are always subject to expansion with further amendments to the Commentary. *See, e.g., United States v. Adair*, 38 F.4th 341, 354 (3d Cir. 2022) (Commentary mandating multi-factor test for applying leadership enhancement, U.S.S.G. § 3B1.1, cmt. 4, does not deserve deference because it is not genuinely ambiguous); *United States v. Phillips*, 54 F.4th 374, 384-85 (6th Cir. 2022) (Commentary's mandate that one video equals seventy-five

images for application of image-based enhancement to child pornography Guideline, U.S.S.G. § 2G2.2 cmt. 6(B) deserves deference as reasonable reading of ambiguous Guideline); *United States v. Tate*, 999 F.3d 374 (6th Cir. 2021) (Commentary's mandate to apply dangerous weapon enhancement to robbery offenses when an object is used in manner that creates an impression that it is a dangerous weapon, U.S.S.G. § 2B3.1 cmt. 2, deserved deference because dangerous weapon unambiguously included a robber pretending to be armed).

The extent to which these Comments—that expand the application of Guidelines—deserve deference has recently come into question in light of this Court's holding, in *Kisor*, that an agency's interpretation of its own rule deserves deference only if: "the regulation is genuinely ambiguous," the interpretation falls "within the zone of ambiguity the court has identified after employing all its interpretive tools," and "the character and context of the agency interpretation entitles it to controlling weight." 139 S. Ct. at 2415-16. This holding called into question Comments that interpret unambiguous Guidelines as well as Comments that fall outside the zone of ambiguity or do not reflect the Commission's substantive expertise.

Some Circuits have found that *Kisor*, by cabining the degree to which agencies deserve deference when interpreting their own regulations, requires courts to evaluate, more closely, whether the Commentary deserves deference. That evaluation is required because of this Court's prior holding that "the commentary should 'be treated as an agency's interpretation of its own legislative rule.'" *United States v. Nasir*, 17 F.4th 459, 470 (3d Cir. 2021) (en banc) (quoting *Stinson v. United States*, 508 U.S. 36, 44 (1993)); *see also United States v. Campbell*, 22 F.4th 438, 444-45 (4th Cir. January 7, 2022); *Riccardi*, 989 F.3d at 485; *United States v. Castillo*, 69 F.4th 648, 656 (9th Cir. 2023); *United States v. Dupree*, 57 F.4th 1269, 1274 (11th Cir. 2023) (en banc); *United States v. Jenkins*, 50 F.4th 1185, 1197 (D.C. Cir. 2022); *accord United States v. Winstead*, 890 F.3d 1082, 1090-91 (D.C. Cir. 2018) (pre-*Kisor* decision finding U.S.S.G. § 4B1.2 cmt. 1 impermissibly expanded the Guideline, under *Stinson* test, that Commentary deserves deference unless it is inconsistent with or a plainly erroneous reading of the Guideline).

"The First and Second Circuits have expressed a desire to follow the lead of these circuits but found themselves bound by their precedent." *United States v. Rivera*, 76 F.4th 1085, 1090 (8th Cir.

2023) (citing *United States v. Lewis*, 963 F.3d 16, 24-25 (1st Cir. 2020); *United States v. Tabb*, 949 F.3d 81, 87 (2d Cir. 2020)). Following the First and Second Circuits, the Eight Circuit, after analyzing the deepening split, also expressed that "the weight of authority may suggest that *Kisor* undermines" its precedent that U.S.S.G. § 4B1.2 cmt. 1 deserves deference but concluded that it was "obligated to follow [its] precedent until it is overruled." *Rivera*, 76 F.4th at 1091.

Other Circuits, on the other hand, have found that *Kisor* "did not expressly overrule or modify *Stinson*." Appendix at 8 (citing *United States v. Vargas*, 74 F.4th 673, 681-82 (5th Cir. 2023) (en banc)); *see also United States v. Moses*, 23 F.4th 347, 349 (4th Cir. January 19, 2022); *United States v. Smith*, 989 F.3d 585 (7th Cir. 2021), *cert. denied,* 142 S. Ct. 488 (2021); *Maloid*, 71 F.4th at 798.

The Court should take this case to resolve this deep circuit split that implicates the interpretation of a widening array of Guidelines.

The decision to defer to Comment 14(B) deepens a circuit split—about whether district courts should defer to the Commentary—that this Court should resolve.

The Court should review the split by taking this case. The deep split between the Circuits over when courts may defer to the Commentary is important; it impacts thousands of cases nationwide. Further, the Fifth Circuit incorrectly decided that Comments deserve deference even when the Guideline is not genuinely ambiguous, the Comment falls outside the zone of ambiguity, and the Comment does not implicate the agency's substantive expertise. Finally, this case presents an ideal vehicle because the issue was preserved below, and this case involves a Guideline and Comment that the Commission is not currently considering amending in a way that would moot the specific issue as raised.

Whether, and to what degree, the Commentary deserves deference is "a meta-rule that would govern our interpretation of the commentary writ large," affecting "hundreds, if not thousands, of cases in the Fourth Circuit." Order Denying Rehearing En Banc, *United States v. Moses*, No. 21-4067, at 13 (4th Cir. March 23, 2023) (Wynn, J., dissenting from denial of rehearing en banc).

The district court's deference to Comment 14(B), and its application of the enhancement to Choulat's sentence, continues to impact him. With a sentence of 57 months' imprisonment to be followed by three years' supervised release, [1] this Court's decision to revisit the district court's deference to the Commentary will have the potential to shorten his term of imprisonment.[2]

1. Kisor requires that courts no longer defer § 2K2.1 Comment 14(B).

The Sentencing Commission established the Guidelines pursuant to Congress's directive in the Sentencing Reform Act of 1984 to establish sentencing policies and practices. *Stinson*, 508 U.S. at 40-41. The Guideline Manual contains three types of text: the Guideline—which provides direction as to the type and extent of punishment, the Commentary—which provides guidance for applying the Guideline provision, and Policy Statements. *Id*. at 41.

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[1] *Compare*, *Cory Ratzloff v. United States*, No. 23-310, Petition, at 10, n.3 (2023) (noting that the defendant has been released from prison and his term of supervised release will expire in December 2024).

[2] Choulat is currently incarcerated for parole violations associated with his arrest for this offense. Choulat, Michael, Texas Department of Criminal Justice, Inmate Information Details *available at* https://inmate.tdcj.texas.gov/InmateSearch/. After release from Texas's custody, Choulat will be transferred to federal custody to complete the remainder of his federal sentence.

The Guidelines may only be amended by the Commission after a six-month review, during which Congress can modify or disapprove them. *Id*. The commentary, on the other hand, is issued and amended by the Commission alone. *Id*.

Analogizing to administrative law, this Court, in *Stinson*, determined that the Commentary should "be treated as an agency's interpretation of its own rule" and given deference "unless it is plainly erroneous or inconsistent" with the Guideline. *Id*. at 44-45. "Further, the Court instructed that, 'if the guideline which the commentary interprets will bear the construction,' the commentary can expand the guidelines, particularly when the commentary is 'interpretive and explanatory.'" *United States v. Nasir*, 982 F.3d 144, 157 (3d Cir. 2020) (quoting *Stinson*, 508 U.S. at 46-47.).

The deference to an agency's interpretation of its own rules came to be called *Auer* or *Seminole Rock* deference and was applied by courts to § 2K2.1(b)(6)(B) and Comment 14(B), interpreting it.

In *Kisor*, however, this Court took steps to define the limits of the deference due to an agency's interpretation of its own regulation. First, "a court should not afford *Auer* deference unless the regulation is genuinely ambiguous." *Kisor*, 139 S. Ct. at 2415. "And before concluding that a rule is genuinely ambiguous, a court must

exhaust all the 'traditional tools' of construction." *Id*. "[I]f 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.'" *Id*.

An agency creates a *de facto* new regulation when its interpretation expands the regulation to new applications—beyond the plain text of the regulation. In the context of the Guidelines, the agency must take care that the commentary does not expand the application of the Guideline beyond its plain meaning, else the Commission substitutes its judgment for Congress's. *Nasir*, 982 F.3d at 160.

Second, the agency's resolution of an ambiguity must be reasonable. *Kisor*, 139 S. Ct. at 2415. The resolution "must come within the zone of ambiguity the court has identified after employing all its interpretive tools." *Id*. at 2416.

Finally, the character and context of an agency interpretation must entitle it to deference, meaning: (a) the agency must, itself, make the interpretation, (b) the interpretation must implicate the

agency's substantive expertise—which is most applicable to technical rules, and (c) the agency's interpretation must reflect a fair and considered judgment. *Id*. at 2416-18.

Comment 14(B) does not meet *Kisor*'s requirements for an interpretation of a regulation that merits deference.

U.S.S.G. § 2K2.1(b)(6)(B), formerly (b)(5)(B), has long called for an enhancement when a firearm was possessed "in connection with another felony offense." Prior to 2006, the Guideline did not provide a definition of "in connection with," leading to substantial litigation.

In *United States v. Condren*, the Fifth Circuit found that "in connection with required a 'causal or logical relation or sequence'." 18 F.3d 1190, 1196 (5th Cir. 1994). The Fifth Circuit later clarified that "there is no conclusive presumption, either statutory or jurisprudential, that a 'connection' exists automatically between guns and drugs ... ." *United States v. Mitchell*, 166 F.3d 748, 756 (5th Cir. 1999). Instead, the opinion in *Condren* was a fact-intensive analysis, in which the Fifth Circuit was "mindful of the actual context of the case." *Jeffries*, 587 F.3d at 693.

That fact-intensive inquiry fell away when, in 2006, the Sentencing Commission issued Comment 14(B). Comment 14(B) required the automatic application of the enhancement "in the case of

a drug trafficking felony in which a firearm was found in close proximity to drugs," while in other offenses "no presumption is made." *Jeffries*, 587 F.3d at 692-93. *Jeffries*, in relying on Comment 14(B), noted that Comments "are given controlling weight so long as they are not plainly erroneous or inconsistent with the guidelines." *Id.* at 694.

Comment 14(B), though it passed *Stinson*'s test, fails *Kisor*'s. First, the enhancement provided by U.S.S.G. § 2K2.1(b)(6)(B) is not ambiguous. While the enhancement's operative phrase "'in connection with' is 'broad' and expansive,' . . . a term is not ambiguous merely because it is broad in scope." *Perez*, 5 F.4th at 404 (Bibas, J., concurring in judgment).[3] "Here, the text has a single core meaning: a causal or logical relationship, not a spatial one. So the text is not ambiguous. *Id.*" (internal citations omitted).

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[3] In *Perez*, a panel of the Third Circuit read Comment 14(B), contrary to the Fifth Circuit's reading in *Jeffries*, as ambiguous. 5 F.4th at 395-96. Nonetheless, the panel in *Perez* agreed that Comment 14(B) "would be unreasonable if it applied" as the Fifth Circuit has held it does, in a manner that "mandates the enhancement applies any time guns and drugs are in close physical proximity to each other even if there is no relationship between them." *Id.* at 396. The panel avoided that result by

By adding an irrebuttable presumption, Comment 14(B) expands the Guideline to applications beyond its plain text. "Under the plain text, the defendant's gun possession must be involved with and related to the other felony." *Perez*, 5 F.4th at 404 (Bibas, J., concurring in judgment). But, Comment 14(B) "authorizes the enhancement whenever the gun is found near drugs ... . This *spatial* relationship falls outside any textual ambiguity because it does not ensure a *causal or logical* relationship between the gun and the crime. The Note improperly 'expands the Guideline's substantive law.' It deserves no deference." *Id*. (quoting *Nasir*, 982 F.3d at 159).

Further, by imposing an irrebuttable presumption based solely on a spatial relationship between the firearm and the drugs, Com-

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reading Comment 14(B) as creating a rebuttable presumption, instead of an irrebuttable presumption, based on proximity. *Id*. at 400.

As argued by the concurrence in *Perez*, "[t]he majority defer[red] to the Note only because it misread[ ] the Note's clear rule." *Id*. at 404 (Bibas, J., concurring).

Thus, the Fifth Circuit's holding, *Appendix* at 7-9, splits with the Third Circuit's holding in *Perez* both in that it declines to apply *Kisor* to the Commentary and in that it reads Comment 14(B) as creating an irrebuttable presumption that physical proximity creates a connection between a firearm and drug trafficking. Choulat agrees with the Fifth Circuit that the plain language of Comment 14(B) creates an irrebuttable presumption, instead of a rebuttable one.

ment 14(B) is both unreasonable and exceeds the character and context in which an agency's interpretation is entitled to deference. Whatever ambiguity there may be in § 2K2.1(b)(6)(B), it clearly requires a logical, not a spatial relationship between the gun and the other felony. Comment 14(B), therefore, falls outside of the "zone of ambiguity." *Kisor*, 139 S. Ct. at 2420.

Further, an agency's interpretation sometimes falls outside of the agency's substantive expertise when it involves an "interpretive issue[which] may fall more naturally into a judge's bailiwick[, such as] one requiring the elucidation of a simple common-law property term, or one concerning the award of attorney's fees." *Id.* at 2417 (internal citations omitted). Courts are called on in many circumstances to determine the relationship between a firearm and another offense. *See e.g.*, 18 U.S.C. § 924(c); U.S.S.G. § 2D1.1(b); U.S.S.G. § 4B1.4(b)(3). Determining whether a firearm was possessed in connection with another felony offense is a fact-intensive analysis that courts are better equipped to make.

Congress created the Sentencing Commission to create Guidelines that serve as an "initial benchmark" for sentencing, "to formulate and constantly refine national sentencing standards." *Kimbrough v. United States*, 552 U.S. 85, 108 (2007). The Commission

"fills an important institutional role: It has the capacity courts lack to base its determinations on empirical data and national expertise, guided by a professional staff with appropriate expertise." *Id.* (internal quotations omitted).

The Sentencing Commission's expertise in data and national experience with sentencing outcomes support its determination that possession of a firearm should be punished more harshly when that possession occurs in connection with another felony offense. But, whether the firearm was causally related to the felony is not implicated by the Commission's expertise nor is it easily solved by a one-size-fits-all rule. Instead, that determination is better made in a case-by-case evaluation by judges, who frequently engage in that sort of inquiry.

Considering *Kisor*, Comment 14(B) no longer deserves deference. Instead, courts must determine whether the firearm was possessed in connection with another felony offense, rather than defer to the Sentencing Commission's irrebuttable presumption.

2. This case presents an ideal vehicle to resolve the well-defined circuit split over the deference due to the Commentary.

The questions of whether *Kisor* or *Stinson* governs deference to the Commentary and whether Comment 14(B) merits deference

was fully briefed both in the district and appellate courts. The Fifth Circuit did not decide whether Comment 14(B) would apply to Choulat's case absent *Stinson*'s mandatory deference because Comment 14(B) "does not violate the constitution or a federal statute" and is not "plainly erroneous or inconsistent" with § 2K2.1(b)(6)(B). *Stinson*, 508 U.S. at 45.

Further, unlike other petitions that this Court has denied, this case presents a Guideline's interpretation issue that is not subject to pending revision by the Commission. The Court has repeatedly declined to review a split over whether an inchoate offense can be a predicate offense for identifying career offenders. *See, e.g., Lomax v. United States*, No. 22-644 (cert. denied Feb. 21, 2023). While that case presented the same question—whether and when the Commentary deserves deference—it did so in a context that the Sentencing Commission planned to and now will resolve.

The Sentencing Commission has adopted amendments, effective November 1, 2023, that will resolve the circuit split over inchoate offenses. Specifically, the Sentencing Commission amended U.S.S.G. § 4B1.2 "by inserting" a new subsection (d):

(d) *Inchoate Offenses Included.*—The terms 'crime of violence' and 'controlled substance offense' include the offenses of aiding and abetting, attempting to commit, or conspiring to commit any offense.

U.S. Sentencing Commission, Amendment 9, Amendments to the Sentencing Guidelines, at 54-59 (May 2023, effective November 1, 2023) *available at* https://www.ussc.gov/sites/default/files/pdf/amendment-process/official-text-amendments/202305_Amendments.pdf. The Commission explains that the Amendment "makes several changes to address a circuit conflict regarding the authoritative weight afforded to certain commentary to §4B1.2." *Id.* at 57. "The amendment addresses this circuit conflict by moving, without change, the commentary including certain inchoate and accessory offenses in the definitions of 'crime of violence' and 'controlled substance offense' to the text of the guideline." *Id.* at 58.

While the Amendment to U.S.S.G. § 4B1.2 resolves the question of whether inchoate crimes count as controlled substances offenses or crimes of violence, the greater issue of the relationship between the Commentary and Guideline cannot be resolved by the Commission. The Commission "cannot, on its own, resolve the dispute about what deference courts should give to the commentary."

Dupree, 57 F.4th at 1289 n.6 (Grant, J., concurring in judgment). Rather, this Court must determine the extent to which the Commission's interpretation of the Guidelines deserves deference. *Cf. Kisor*, 139 S. Ct. at 2416.

Further, the issue of whether certain Comments deserve deference pervades the Guidelines. *See, e.g., Riccardi*, 989 F.3d at 481 (analyzing U.S.S.G. § 2B1.1 cmt. 3(F)(i)); *Adair*, 38 F.4th at 354 (U.S.S.G. § 3B1.1 cmt. 4); *Phillips*, 54 F.4th 374, 384-85 (6th Cir. 2022) (U.S.S.G. § 2G2.2 cmt. 6(B)); *Tate*, 999 F.3d at 380 (U.S.S.G. § 2B3.1 cmt. 2).

This case presents a superior vehicle to previous petitions that have been rejected because the Commission is not currently considering an amendment to U.S.S.G. § 2K2.1(b)(6)(B) that will resolve whether Comment 14(B) merits deference.

CONCLUSION

For these reasons, Petitioner asks that this Court grant a writ of certiorari and review the judgment of the court of appeals.

s/ Shane O'Neal
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Dated: October 25, 2023