No. 23-_____

IN THE

SUPREME COURT OF THE UNITED STATES

Andre Reese,

Petitioner,

v.

United States of America,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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Question Presented

In *Stinson v. United States*, 508 U.S. 36 (1993), this Court held that the United States Sentencing Commission's commentary to the Sentencing Guidelines should be treated like "an agency's interpretation of its own legislative rules" and therefore afforded "controlling weight" unless "plainly erroneous or inconsistent with" the text of the guidelines themselves. *Id.* at 45 (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)). In *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), however, this Court clarified that deference to an agency's interpretation of its own legislative rule is appropriate only when the rule is "genuinely ambiguous," the agency interpretation is reasonable, and the "character and context" of the interpretation entitle it to "controlling weight." *Id.* at 2414-16.

The question presented is whether *Kisor* applies to the commentary to the Sentencing Guidelines.

Related Proceedings

- *United States v. Reese*, No. 1:22-cr-000151-PAB-1, United States District Court for the District of Colorado (judgment entered January 19, 2023).
- *United States v. Reese*, No. 23-1022, United States Court of Appeals for the Tenth Circuit (judgment entered September 29, 2023).

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Opinion Below

The decision of the United States Court of Appeals for the Tenth Circuit, *United States v. Reese*, No. 23-1022 (Sept. 29, 2023), can be found in the Appendix at 1a.

Basis for Jurisdiction

The Tenth Circuit issued its opinion affirming the district court on September 29, 2023. App. 1a. This petition is being timely filed within 90 days of that decision. *See* Sup. Ct. R. 13.1 & 13.3. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Guideline Provisions Involved

Section 2K2.1(a)(4)(A) of the 2018 edition of the United States Sentencing Guidelines[1] provides that the base offense level for an unlawful firearms possession offense is:

> (4) **20**, if—
>
> > (A) the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense[.]

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[1] Unless otherwise noted, citations to the guidelines in this position are to the 2018 manual used at Mr. Reese's sentencing.

At the time of Mr. Reese's offense, § 4B1.2(a) of the United States Sentencing Guidelines provided as follows:

> (a) The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—
>
> (1) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).

Application note 1 to § 4B1.2 provided, in relevant part, as follows:

> 1. **Definitions.**—For purposes of this guideline—
>
> ***"Crime of violence"*** and ***"controlled substance offense"*** include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.

Statement of the Case

I. Legal Background

The United States Sentencing Commission is a federal agency that issues "guidelines . . . for use of a sentencing court in determining the sentence to be imposed in a criminal case." 28 U.S.C. § 994(a)(1). Although they are not strictly binding, these guidelines play a "central role in sentencing." *Molina-Martinez v. United States*, 578 U.S. 189, 191 (2016). District courts are required to "begin their analysis" of the appropriate sentence "with the Guidelines and remain cognizant of them throughout the sentencing process." *Gall v. United States*, 552 U.S. 38, 50 n.6 (2007). The guidelines thus function "not only [as] the starting point for most federal sentencing proceedings but also the lodestar," with most sentencing courts imposing "either within-

Guidelines sentences or sentences that depart downward from the Guidelines on the Government's motion." *Molina-Martinez*, 578 U.S. at 200, 199.

Although the Sentencing Commission differs from other federal agencies in that it is located within the Judicial Branch, it "promulgates the guidelines by virtue of an express congressional delegation of authority for rulemaking," similar to the way in which other federal agencies promulgate regulations. *Stinson v. United States*, 508 U.S. 36, 44-45 (1993). Like other federal agencies, the Commission follows the notice-and-comment requirements of the Administrative Procedure Act in order to promulgate a guideline. 28 U.S.C. § 994(x). Proposed guidelines are also submitted to Congress, which has six months to modify or disapprove of them. *See id.* § 994(p).

In addition, the Commission issues explanatory commentary to accompany the guidelines. This commentary "assist[s] in the interpretation and application of" the guidelines. *Stinson*, 508 U.S. at 45. Unlike the guidelines themselves, this commentary is not required to go through the formal notice-and-comment process or congressional review, and it may be modified by the Commission at any time. *See* U.S. Sent'g Comm'n, Rules of Prac. & Proc. 4.1, 4.3 (2016). This case, for example, concerns the commentary to Sentencing Guideline § 4B1.2, which purports to define the term "crime of violence" to "include the offenses of aiding and abetting, conspiring, and attempting to commit" any crime of violence. U.S.S.G. § 4B1.2, comment. (n.1) (2018).

In *Stinson*, 508 U.S. 36, this Court reasoned that "the guidelines are the equivalent of legislative rules adopted by federal agencies," and held that the commentary should "be treated as an agency's interpretation of its own legislative rule." 508 U.S.

at 45, 44. The Court therefore applied the rule it had previously established for judicial review of such agency interpretations in *Seminole Rock*, 325 U.S. 36, concluding that guidelines commentary that "does not violate the Constitution or a federal statute . . . must be given 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" 508 U.S. at 45 (quoting *Seminole Rock*, 325 U.S. at 414). This type of deference to an agency's interpretation of its own regulations is also known as *Auer* deference, following *Auer v. Robbins*, 519 U.S. 452 (1997).

In *Kisor*, this Court rearticulated the "classic formulation" of *Auer* deference in a distinctly narrower fashion, acknowledging that the prior formulation was susceptible to being interpreted to require "reflexive" deference to an agency's interpretation of its own regulation. 139 S. Ct. at 2415. Without eliminating *Auer* deference entirely, the Court "t[ook] the opportunity to restate, and somewhat expand on," the subject in order "to clear up some mixed messages [it] had sent" and "reinforc[e] some of the limits" that should apply to the doctrine. *Id.* at 2414-15. In particular, the Court held that courts should defer to an agency's interpretation of its own regulation only if application of "the 'traditional tools' of construction" reveal the regulation to be "genuinely ambiguous," the interpretation is "reasonable," and "the character and context of the agency interpretation entitles it to controlling weight." *Id.* at 2415-16 (quoting *Chevron U.S.A. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 843 n.9 (1984)).

II. Procedural History

Mr. Reese pleaded guilty to one count of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). At sentencing, the parties disagreed about the applicable sentencing guidelines. Specifically, there was a dispute over whether Mr. Reese's prior conviction for Colorado attempted first degree murder was a "crime of violence" within the meaning of U.S.S.G. § 2K2.1(a)(4)(A), which provides for an enhanced base offense level of 20 if the defendant has a prior conviction for a "crime of violence."

At the time, the term "crime of violence" was defined in U.S.S.G. § 4B1.2(a), with two subparts. The first was the "elements clause" contained in § 4B1.2(a)(1), which provided that an offense is a crime of violence if it "has as an element the use, attempted use, or threatened use of physical force against the person of another." The second was the "enumerated offenses clause" contained in § 4B1.2(a)(2), which provided that an offense is a crime of violence if it "is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession" of a machinegun or explosive materials as defined under federal law. Mr. Reese contended that his prior conviction for attempted first degree murder did not qualify as a "crime of violence" under either provision. Relevant here, in objecting that the prior conviction did not qualify as a "crime of violence" under the enumerated offenses clause, he argued that the commentary purporting to define the term "crime of violence" to include attempt offenses was owed no deference under *Kisor*. Specifically, Mr. Reese argued that no deference was warranted because

the guideline itself was not "genuinely ambiguous" and "[did] not even mention" the inchoate offense of attempt. *United States v. Nasir*, 17 F.4th 459, 471 (3d Cir. 2021) (en banc).

The district court overruled Mr. Reese's objection, relying on the commentary to § 4B1.2 to find that Mr. Reese had a prior conviction for a crime of violence. App. 10a-12. The district court agreed with Mr. Reese with respect to the elements clause, *see* App. 10a, but it concluded that his prior conviction qualified as a crime of violence under the enumerated offense clause in light of the commentary to § 4B1.2(a), App. 10a-12a. Specifically, the district court reasoned that, although the text of § 4B1.2(a)(2) did not include attempt offenses, "the commentary does." App. 11a. The district court therefore applied the enhanced base offense level contained in § 2K2.1(a)(4)(A). App. 12a.

Mr. Reese appealed to the Tenth Circuit. Again, he argued that his prior conviction did not qualify as a "crime of violence" within the meaning of § 2K2.1(a)(4)(A) or § 4B1.2(a)(2) because the commentary purporting to expand the definition of the term to include attempt offenses was owed no deference under *Kisor*.

The Tenth Circuit affirmed. In doing so, it relied on its recent decision in *United States v. Maloid*, 71 F.4th 795 (10th Cir. 2023), to conclude that *Kisor* does not apply to the Sentencing Commission's interpretation of the Sentencing Guidelines. *See* App. 2a-3a.

Reasons for Granting the Petition

The question presented in this case is the subject of a deep and acknowledged circuit split and is recurring and important. The Tenth Circuit position on the question, moreover, is wrong, and this case presents a good vehicle for review of the question. Certiorari should be granted in this case, or in another case raising the same question, such as *Ratzloff v. United States*, No. 23-310 (U.S. Sept. 22, 2023), or *Vargas v. United States*, No. 23-5875 (U.S. Oct. 23, 2023). If certiorari is granted on this issue in another case, this Court should resolve the question in the petitioner's favor, grant Mr. Reese's petition, vacate the judgment, and remand to the Tenth Circuit for further proceedings.

I. The courts of appeal are divided over the question presented.

The courts of appeal have divided, deeply and intractably, over whether *Kisor* applies to the Sentencing Commission's commentary to the guidelines.

The Third, Sixth, Ninth, and Eleventh Circuits have squarely held that *Kisor* applies to the Sentencing Commission's interpretation of the guidelines, just as it does to other federal agencies' interpretations of their own regulations. *See United States v. Nasir*, 17 F.4th 459, 471 (3d Cir. 2021) (en banc); *United States v. Riccardi*, 989 F.3d 476, 484-85 (6th Cir. 2021); *United States v. Castillo*, 69 F.4th 648, 657-58 (9th Cir. 2023); *United States v. Dupree*, 57 F.4th 1269, 1275-76 (11th Cir. 2023), So has a panel of the Fourth Circuit. *See United States v. Campbell*, 22 F.4th 438, 444-45 & n.3 (4th Cir. 2022). The D.C. Circuit also appears to apply *Kisor* to evaluate the commentary to the guidelines. *See United States v. Jenkins*, 50 F.4th 1185, 1197

(D.C. Cir. 2022) (citing *Kisor* in determining whether to defer to guidelines commentary). Courts in these circuits are therefore much less likely to defer to the commentary to the guidelines, consistent with *Kisor*'s instruction that deference to an agency's interpretation of its own regulation is appropriate only when exhaustion of the "traditional tools" of construction reveals the regulation to be "genuinely ambiguous," the agency's interpretation is reasonable, and "an independent inquiry into . . . the character and context of the agency interpretation entitles it to controlling weight." 139 S. Ct. at 2415-16.

By contrast, the First, Second, Fifth, Eighth, and Tenth Circuits have continued to defer to the Sentencing Commission's interpretation of the guidelines under the parameters set in *Stinson*, without adopting *Kisor*'s limitations on such deference. *See United States v. Lewis*, 963 F.3d 16, 24-25 (1st Cir. 2020); *United States v. Richardson*, 958 F.3d 151, 154 (2d Cir. 2020); *United States v. Vargas*, 74 F.4th 673, 678 (5th Cir. 2023) (en banc); *United States v. Smith*, 989 F.3d 575, 584 (7th Cir. 2021); *United States v. Rivera*, 76 F.4th 1085, 1089-91 (8th Cir. 2023); and *Maloid*, 71 F.4th at 798 (10th Cir.). So has a panel of the Fourth Circuit, notwithstanding an earlier panel decision applying *Kisor*. *See United States v. Moses*, 23 F.4th 347, 349 (4th Cir. 2022). In these circuits, courts continue to defer to the commentary to the guidelines so long as it "does not violate the Constitution or a federal statute" and is not "plainly erroneous or inconsistent with" the guidelines, *Stinson*, 508 U.S. at 45 (quoting *Seminole Rock*, 325 U.S. at 414), without conducting any threshold inquiry into whether the guideline is "genuinely ambiguous," as required by *Kisor*, 139 S. Ct. at 2415. As

a result, these courts are more likely to defer to guidelines commentary. *Compare, e.g.*, *Nasir*, 17 F.4th at 470-72 (applying *Kisor* and refusing to defer to guidelines commentary purporting to expand the definition of "crime of violence" to include inchoate offenses), *with Maloid*, 71 F.4th at 813-14 (refusing to apply *Kisor* and concluding that deference to guidelines commentary purporting to expand the definition of "crime of violence" to include inchoate offenses was proper).

This divide is fully developed—essentially all of the courts of appeal have taken a position on the question—and will not resolve without the intervention of this Court. Indeed, three circuits have gone en banc to address the question presented—and reached conflicting results. *Compare Nasir*, 17 F.4th at 470-71 (3d Cir.) (en banc) (applying *Kisor* in guidelines context); *Dupree*, 57 F.4th at 1275-76 (11th Cir.) (en banc) (same), *with Vargas*, 74 F.4th at 681-85 (5th Cir.) (en banc) (holding *Kisor* does not apply in guidelines context).

II. The question presented is recurring, important, and warrants review by this Court.

As the sheer number of precedential opinions, concurrences, and dissents issued by the courts of appeal demonstrates, the question presented is recurring, important, and warrants review by this Court.

Every federal sentencing requires proper calculation of the application sentencing guidelines range. *See Gall*, 552 U.S. at 49. Most sentencing guidelines are accompanied by commentary, and the degree of deference afforded to this commentary can substantially affect the guideline calculation. In Mr. Reese's case, for example, the commentary's assertion that the term "crime of violence" includes inchoate

offenses increased his base offense level by six levels, from 14 to 20. *Compare* U.S.S.G. § 2K2.1(a)(6) (providing for a base offense level of 14 for possessing a firearm as a prohibited person), *with id.* § 2K2.1(a)(4)(A) (providing for a base offense level of 20 for possessing a firearm as a prohibited person "subsequent to sustaining one felony conviction of . . . a crime of violence"). This increase in the base offense level substantially increased his advisory guidelines range, from 21-27 months (without application of § 2K2.1(a)(4)(A)) to 37-46 months (with application of § 2K2.1(a)(4)(A)). And as this Court has recognized, the applicable advisory guidelines range has a "real and pervasive effect . . . on sentencing," operating as "not only the starting point for most federal sentencing proceedings but also the lodestar." *Molina-Martinez*, 578 U.S. at 199-200. Put simply, "when a Guidelines range moves up or down, offenders' sentences move with it." *Peugh v. United States*, 569 U.S. 530, 544 (2013).

Furthermore, unlike many other questions related to the interpretation of the sentencing guidelines, the question of when courts should defer to the commentary to the guidelines cannot be answered by the Sentencing Commission itself. This is not, in other words, the kind of dispute that the Commission can "eliminate" through the amendment process. *Braxton v. United States*, 500 U.S. 344, 348-49 (1991); *see also Dupree*, 57 F.4th at 1289 n.6 (Grant, J., concurring) ("[T]he Commission cannot, on its own, resolve the dispute about what deference courts should give to the commentary"). Rather, the methodological question of what degree of deference is appropriate for the Sentencing Commission's commentary to the guidelines is the kind of

question that can only be decided by this Court—as this Court evidently concluded when it first addressed it over thirty years ago in *Stinson*, 508 U.S. 36.

III. The Tenth Circuit position is wrong.

The Tenth Circuit's failure to apply *Kisor* to the commentary to the guidelines is wrong and should be corrected by this Court. In *Stinson*, this Court held that the commentary to the sentencing guidelines should be treated like "an agency's interpretation of its own legislative rules." 508 U.S. at 44. Subsequently, in *Kisor*, this Court clarified that an agency's interpretation of its own legislative rules should be afforded deference only when exhaustion of the "traditional tools" of construction reveals the regulation to be "genuinely ambiguous," the agency's interpretation is reasonable, and "an independent inquiry into . . . the character and context of the agency interpretation entitles it to controlling weight." 139 S. Ct. at 2415-16. Indeed, the plurality decision in *Kisor* recognized *Stinson* as just one in a long line of "pre-*Auer*" decisions "applying *Seminole Rock* deference." *See id.* at 2411 n.3. Neither *Stinson* nor the Sentencing Commission were singled out as somehow exempt from *Kisor*'s rearticulation of the *Seminole Rock-Auer* standard. Following *Stinson*'s instruction to treat the commentary to the guidelines as an agency's interpretation of its own legislative rules, then, requires that these rearticulated limitations be applied to the commentary to the sentencing guidelines.

There is no merit to the Tenth Circuit's argument that the Commission is exempt from *Kisor* because it is located within the judicial branch and is intended to assist judges. *See Maloid*, 71 F.4th at 806-07. To begin with, both of these things were

true when *Stinson* was decided—when this Court nevertheless concluded that the commentary to the guidelines should be treated like an agency's interpretation of its own legislative rules. *See* 508 U.S. at 44. These structural differences cannot justify affording extra deference to the Commission's commentary today, when they did not when *Stinson* was decided. If anything, the unique structure and role of the Commission in promulgating the sentencing guidelines weigh *against* affording extra deference to the commentary: "Whatever the virtues of giving experts flexibility to adapt rules to changing circumstances in civil cases, in criminal cases those virtues cannot outweigh life and liberty." *Nasir*, 17 F.4th at 474 (Bibas, J., concurring).

IV. This case is an appropriate vehicle for resolution of the question presented.

If this Court does not grant the petition in *Ratzloff* or *Vargas*, it should grant this petition. The question of whether *Kisor* applies to the commentary to the guidelines is squarely presented in this case. The question was fully briefed in and definitely answered by the Tenth Circuit, relying upon its prior decision in *Maloid*. App. 2a-3a.

There is, moreover, good reason to believe that the Tenth Circuit's decision to defer to the commentary without application of *Kisor* affected Mr. Reese's sentence. The district court relied exclusively on the commentary to § 4B1.2(a) to conclude that Mr. Reese had a prior conviction for a crime of violence within the meaning of § 2K2.1(a)(4)(A). If that deference was unlawful, then the enhanced base offense level contained in § 2K2.1(a)(4)(A) was improperly applied, and Mr. Reese was sentenced under an improperly inflated advisory guidelines range.

That is so notwithstanding the fact that the Sentencing Commission recently moved the language of the commentary to the text of the guideline, so that the § 4B1.2 now expressly defines the term "crime of violence" to include attempting to commit a crime of violence. *See* U.S.S.G. § 4B1.2(d) (2023). Although Mr. Reese's prior attempt conviction could qualify for the enhanced base offense level under the amended guidelines, those amendments do not apply to him because the Ex Post Facto Clause requires application of the lower range from the guidelines in effect at the time of his offense. *See Peugh*, 569 U.S. at 533.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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