No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

TRYTON ALONZO THOMAS,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

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), governs the extent to which courts must defer to the Sentencing Commission's interpretations of its own guidelines and policy statements for federal criminal sentencing?

TABLE OF CONTENTS

APPENDIX INDEX

TABLE OF AUTHORITIES

GUIDELINES

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit affirming petitioner's conviction and sentence can be found *United States v. Thomas*, No. 22-30637, 2023 WL 8271970 (5th Cir. Nov. 30, 2023) (unpublished), and is set forth at App. 001.

JURISDICTION

The judgment of the court of appeals was entered on November 30, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 4B1.1(a) of the 2018 U.S. Sentencing Guidelines Manual provides:

> (a) A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

Section 4B1.2(b) of the Guidelines Manual provides:

> (b) The term "controlled substance offense" means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

Application Note 1 of the commentary to Section 4B1.2 provides:

> **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

Tryton Thomas pled guilty to conspiring to distribute fifty grams or more of methamphetamine. ROA.82. Following Thomas's guilty plea, a presentence investigation report (PSR) was prepared. ROA.170. When it was released to the parties, the PSR determined that the total offense level was 27 under the drug guidelines in U.S.S.G. § 2D1.1. ROA.165-166. Thomas's guideline range under the drug guideline was 130 – 162 months.

However, the PSR also determined that Thomas met the criteria for being sentenced as a "career offender" under § 4B1.1 because he had at least two prior convictions for a crime of violence or a controlled substance offense. ROA.176-77. Because his offense of conviction carried a potential life sentence, the PSR assigned him a base offense level of 37. ROA.177. After receiving a three-level reduction for accepting responsibility, Thomas had a total offense level of 34 under § 4B1.1. ROA.177.

The PSR's determination that he was a career offender required him to be placed in Criminal History Category VI. 1 ROA.183. Based on a total offense level of 34 and a criminal history category of VI, the PSR calculated Thomas's advisory guideline range under § 4B1.1 to be to be 262 - 327 months. ROA.174. Thomas objected to the PSR and argued that since his offense of conviction involved a conspiracy to commit a drug trafficking offense, he did not qualify as a career offender

under the text of § 4B1.2(b). ROA.142. He further argued that although the commentary attempted to expand the definition of § 4B1.2(b) to include inchoate offenses such as conspiracies, the Sentencing Commission's expansion of the Congressionally approved textual definition was unlawful. ROA.142-143

At the sentencing proceeding, the district court declined to grant Thomas's objection and imposed a bottom of the guideline 262-month sentence. The district court also stated: "Contrary to what I usually do, in the event the guideline determination made in this case is found to be incorrect, I would *not* impose the same sentence based on the factors contained in 3553." ROA.47 (emphasis added). Recall that without the career offender enhancement that Thomas would have faced a guideline range of 130 – 162 months.

Thomas appealed to the Fifth Circuit who affirmed his sentence under its recent precedent in *United States v. Vargas*, 74 F.4th 673, 690, 697-98 (5th Cir. 2023) (en banc), where the Fifth Circuit "reaffirm[ed] our longstanding precedent that inchoate offenses like conspiracy are included in the definition of 'controlled substance offense.'"

REASONS FOR GRANTING THE WRIT

In the wake of *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), the courts of appeals have once again "taken conflicting positions on the authoritative weight to be accorded to the commentary to the Sentencing Guidelines." *Stinson v. United States*, 508 U.S. 36, 39 (1993). Eleven circuits openly disagree over whether *Kisor*'s recalibration of the *Seminole Rock* deference standard governs the same doctrine's

application to Guidelines commentary. Four circuits answer, "yes," and so follow *Kisor*; six respond, "no," and thus don't; and one has published a pair of opinions going each way. The predictable result is that various guidelines mean different things and apply to similarly situated defendants in different ways in large areas of the country. En banc opinions now entrench the law of circuits on either side. This Court alone can resolve the dispute over this important question of federal sentencing law. It should do so in petitioner's case.

Kisor's impact on the degree of deference judges owe to Guidelines commentary has split the circuits. The acknowledged conflict is deep, entrenched, and ready for review. The Court should intervene, as only it can.

The Third, Sixth, Ninth, and Eleventh Circuits, and a first-in-time Fourth Circuit panel, squarely hold that *Kisor* applies in the Guidelines context. *See United States v. Nasir*, 17 F.4th 459 (3d Cir. 2021) (en banc); *United States v. Campbell*, 22 F.4th 438 (4th Cir. 2022); *United States v. Riccardi*, 989 F.3d 476 (6th Cir. 2021); *United States v. Castillo*, 69 F.4th 648 (9th Cir. 2023); *United States v. Dupree*, 57 F.4th 1269 (11th Cir. 2023) (en banc). These courts understand *Kisor* as having reformed *Seminole Rock* deference in all its applications, including as applied in *Stinson*. They thus hold that the Commission's commentary pulls rank only if, after resort to all the traditional interpretive tools, *Kisor*'s preconditions for deference—genuine ambiguity in the relevant guideline text, and a reasonable, considered, consistent, and expertise-based reading of that text—are satisfied. Under the law of any one of these circuits, petitioner would not have been a career offender.

The Third Circuit is a great example of a Circuit heeding this Court's instructions in *Kiser*. Both before and after an unrelated GVR from this Court, *see United States v. Nasir*, 982 F.3d 144, 156-160 (3d Cir. 2020) (en banc), *cert. granted, judgment vacated on other grounds*, 142 S. Ct. 56 (2021); *Nasir*, 17 F.4th at 468-72, the en banc Third Circuit in *Nasir* unanimously held that *Kisor* abrogated its precedent affording deference to the inchoate-offense commentary to Section 4B1.2 under "the then-prevailing understanding" of the *Seminole Rock* doctrine applied in *Stinson* (and later in *Auer*). *Nasir*, 17 F.4th at 470-71. The court acknowledged that, pre-*Kisor*, the "uncritical and broad" conception of *Seminole Rock*'s "plainly erroneous or inconsistent" formulation compelled it to defer despite "recogniz[ing] that the commentary expanded and did not merely interpret [the guideline's] definition of 'controlled substance offense.'" *Id.* at 470-71. But *Kisor* clarified that "*Seminole Rock* deference should only be applied when a regulation is genuinely ambiguous." *Id.* at 471. Heeding *Kisor*'s instruction to examine "text, structure, history, and purpose" as "it would if it had no agency to fall back on," *id.* (quoting *Kisor*, 139 S. Ct. at 2415), the Third Circuit held that "the plain language of" Section 4B1.2(b) "does not include inchoate crimes" and thus rejected the commentary's attempt to expand that unambiguous meaning. *Id.* at 468; *see id.* at 471-72. As a concurring Judge put it: *Kisor* "awoke [the federal judiciary] from [its] slumber of reflexive deference," requiring courts to defer to the "text, not what the Commission says about that text," when "commentary sweeps more broadly than the plain language of the guideline it interprets." *Id.* at 472 (Bibas, J., concurring).

Six circuits, in contrast, do not accept *Kisor*'s recalibrated standard and instead persist in following the plainly-erroneous-or-inconsistent formulation applied in *Stinson*. *United States v. Maloid*, 71 F.4th 795 (10th Cir. 2023); *United States v. Rivera*, 76 F.4th 1085 (8th Cir. 2023); *United States v. Smith*, 989 F.3d 575 (7th Cir.), *cert. denied*, 142 S. Ct. 488 (2021); *United States v. Tabb*, 949 F.3d 81 (2d Cir. 2020), *cert. denied*, 141 S. Ct. 2793 (2021); *United States v. Lewis*, 963 F.3d 16 (1st Cir. 2020), *cert. denied*, 141 S. Ct. 2826 (2021). The second-in-time Fourth Circuit panel, *United States v. Moses*, 23 F.4th 347 (4th Cir. 2022), has also endorsed that approach. Deference in these circuits is all-but automatic. It is afforded even if "the commentary's reading of the guideline is incorrect or implausible." And "exhaustion of traditional tools of construction is not required" before a defendant's claim of plain error or inconsistency will be rejected. *United States v. Coates*, 82 F.4th 953, 957 n.1 (10th Cir. 2023) (citing *Maloid*, 71 F.4th at 809).

In the Fifth Circuit below, the en banc court of appeals squarely held that "*Stinson*, not *Kisor*" would remain the law of the Fifth Circuit and that the Sentencing Commission would continue to enjoy the "ample deference *Stinson* affords to commentary." *Vargas*, 74 F.4th at 680, 685. The Fifth Circuit acknowledged that each of the five decisions discussed above hold that Kisor "curtailed the deference due to the commentary's interpretation of a guideline" but expressly "disagree[d]" with that conclusion. *Id.* at 681. The court of appeals allowed that *Kisor* "clarified the deference rule" of *Seminole Rock* and "has been sensibly interpreted as lowering the amount of deference given to agency interpretations of regulations." *Id.* at 682. But it understood

Stinson as having "set[] out a deference doctrine distinct from the one altered by *Kisor*" (*i.e.*, *Seminole Rock*), *id.* at 678, that only this Court had the authority to overrule. The court of appeals drew support for this view from its perception that "nothing in *Kisor* suggests [this Court] meant to modify *Stinson*." *Id.* at 681. It also highlighted several of the Commission's traits not shared by executive agencies—including its location, the composition of its members, and the "judicial nature" of its work—and "agree[d] with the Fourth Circuit['s]" *Moses* panel that these "'differences justify a distinct approach in considering Guidelines commentary'" as a matter of policy. *Id.* at 682-83 (citing *Moses*, 23 F.4th at 355).

The conflict over *Kisor*'s relevance to Guidelines commentary demonstrates that the question presented warrants urgent attention. The answer is exceptionally important to both the efficient and fair administration of the federal sentencing scheme. And petitioner's case presents an ideal opportunity for the Court to provide it because the court below indicated on the record that it would *not* impose the same sentence without the career offender designation. ROA.47.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted this February 28, 2024,

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