No. _____

IN THE

Supreme Court of the United States

BROCK MELANCON,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Does this Court's decision in *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), govern the extent to which district courts may defer to the U.S. Sentencing Commission's commentary to the Guidelines Manual in calculating a criminal defendant's sentencing range?

(2) Is Application Note 1 to U.S.S.G. § 4B1.2 in the 2018 Guidelines Manual invalid under the *Kisor* framework?

RELEATED PROCEEDINGS

The following proceedings are directly related to this case:

- *United States v. Melancon*, No. 2:19-CR-119-1, U.S. District Court for the Eastern District of Louisiana. Judgment entered October 27, 2022.
- *United States v. Melancon*, No. 22-30701, U.S. Court of Appeals for the Fifth Circuit. Judgment entered December 28, 2023.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Brock Melancon respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

Mr. Melancon moved for summary affirmance of his judgment because his sole challenge on appeal is currently foreclosed by the Fifth Circuit's en banc decision in *United States v. Vargas*, 74 F.4th 673 (5th Cir. 2023) (en banc). The Fifth Circuit's order granting his motion for summary affirmance (1a-2a) is not reported.

JURISDICTION

The Fifth Circuit entered judgment on December 28, 2023, and no petition for rehearing was filed. This petition for a writ of certiorari is thus timely filed pursuant to Supreme Court Rule 13 because it is being filed within 90 days of that Fifth Circuit's final judgment. This Court has jurisdiction under 28 U.S.C. § 1254(1).

SENTENCING GUIDELINE PROVISIONS

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

> 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.

U.S.S.G. § 4B1.2(b) of the 2018 Guidelines Manual provides:

> 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 in the commentary to § 4B1.2 in the 2018 Guidelines Manual provides, in relevant part:

> **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.

INTRODUCTION

Congress's objective in enacting the Sentencing Reform Act of 1984 was to create an "effective, fair sentencing system" that would achieve "reasonable uniformity" and "proportionality in sentencing." U.S.S.G. Ch. 1 Pt. A.1(3). To that end, it created the U.S. Sentencing Commission and tasked it with promulgating a set of federal Sentencing Guidelines. In creating the Guidelines Manual, the Commission likewise aimed to achieve "a more honest, uniform, equitable, proportional, and therefore effective sentencing system." *Id.* at Pt. A.1(3).

At its inception, this Court determined that the Commission is an "independent agency in every relevant sense," "fully accountable to Congress" and "subject to the notice and comment requirements of the Administrative Procedures Act[.]" *Mistretta v. United States*, 488 U.S. 361, 393–94 (1989). Accordingly, when the Commission generated informal commentary to the Guidelines that did not undergo administrative rulemaking procedures, the Court properly applied principles of agency deference in determining that interpretive commentary was controlling unless it "violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline." *Stinson v. United States*, 508 U.S. 36, 38 (1993). And when the Commission introduced commentary that was inconsistent with the underlying statutory directive, this Court rejected it. *See United States v. LaBonte*, 520 U.S. 751, 753 (1997).

Over the last decade, the practice of *Auer* deference (as it came to be known) has been the subject of intense criticism, including from members of this Court, past

and present. Many suggested that it was time to reconsider the doctrine altogether, and that opportunity presented itself in *Kisor v. Wilkie*, in which the petitioner urged this Court to overrule *Auer* and its predecessor. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2408 (2019). A majority of the Court declined that invitation and upheld the doctrine, but also endeavored to "reinforce its limits." *Id.*

In *Kisor*, this Court detailed a specific set of steps courts must take and factors they must consider before deferring to an agency's interpretation of its own rule, stressing the importance of knowing *when* to apply it. 139 S.Ct. at 2414–18. "First and foremost," the court must determine that the regulation at issue is "genuinely ambiguous" by exhausting all of the traditional tools of statutory construction. *Id.* at 2415. If it is genuinely ambiguous, the court must then determine whether the agency's interpretation is a "reasonable reading" of the ambiguous text. *Id.* at 2415–16. That is, the agency's reading must fall "within the zone of ambiguity the court has identified after employing all its interpretive tools" to be entitled to deference. *Id.* at 2416. Finally, this Court explained in *Kisor* that even "not every reasonable agency reading of a genuinely ambiguous rule should receive *Auer* deference." *Id.* Rather, the interpretation must *also* "in some way implicate [the agency's] substantive expertise" and "reflect fair and considered judgment." *Id.* at 2417 (cleaned up).

In the wake of *Kisor*, deeply entrenched circuit conflict has developed among the U.S. Courts of Appeals over whether *Kisor* governs deference to Sentencing Guideline commentary and whether certain commentary is valid and entitled to deference under the applicable doctrine. Considering that extensive conflict, this

Court's review of the questions presented is critically important. Indeed, the intractable division that has emerged "poses the same threat of sentencing disparities and arbitrariness that the Sentencing Reform Act was initially passed to remedy[.]" Jarrett Faber, *Kisor v. Wilkie as a Limit on Auer Deference in the Sentencing Context*, 70 Emory L. J. 905, 938 (2021) (citations omitted). And the conflict over the proper application of deference principles to the 2018 career offender Guideline commentary, in particular, has created widespread disparities. Mr. Melancon and countless others like him "would not be considered a career offender" if they were sentenced in any of several other circuits. *Vargas*, 74 F.4th at 711 (Elrod, J., dissenting). And the broader question of the commentary's authoritative weight is even more far reaching, impacting scores of criminal defendants. It is clear from the balance of authority that the circuit conflict over these questions will persist until this Court provides guidance on the proper application of *Auer* deference to the commentary.

STATEMENT OF THE CASE

A. Legal Background

1. Constitutionality of the U.S. Sentencing Commission and Guidelines

Through the Sentencing Reform Act of 1984, Congress created the U.S. Sentencing Commission and charged it with the task of promulgating guidelines to govern all federal sentencings. *See* 28 U.S.C. § 991(b)(1), 28 U.S.C. § 994(a). The Commission issued the first Sentencing Guidelines Manual in 1987, which immediately gave rise to constitutional challenges. Those challenges centered around concerns regarding nature and scope of the Sentencing Commission's unique role and

authority, and they were ultimately brought before this Court in *Mistretta*. In *Mistretta*, the petitioner argued that Congress granted the Commission "excessive legislative discretion" in violation of the nondelegation doctrine by "delegating [to it] the power to promulgate sentencing guidelines for every federal criminal offense[.]" 488 U.S. at 371. The petitioner also argued that the legislation violated the constitutional principle of separation of powers because Congress delegated the rulemaking authority to an independent agency within the Judiciary. *Id.* at 383.

This Court rejected the petitioner's nondelegation doctrine challenge, relying on Congress's "sufficiently specific and detailed" delegation of authority to affirm the constitutionality of the Commission and Guidelines. *Id.* at 374–79. After discussing several "overarching constraints" that the Act imposes on the Commission, *see id.* at 374–77, the Court highlighted Congress's "even more detailed guidance to the Commission about categories of offenses and offender characteristics." *Id.* at 376. For example, the Court noted Congress's directive in 28 U.S.C. § 994(h) that the Guidelines "require a term of confinement at or near the statutory maximum for certain crimes of violence and for drug offenses, particularly when committed by recidivists." *Id.* at 376. Citing § 994(h) and other targeted directives, the Court explained:

> In other words, although Congress granted the Commission substantial discretion in formulating guidelines, in actuality it legislated a full hierarchy of punishment . . . *and stipulated the most important offense and offender characteristics to place defendants within these categories*.

Id. at 377 (emphasis added).

The *Mistretta* Court also rejected the petitioner's separation of powers challenge. *Id.* at 412. The Court recognized that the "degree of political judgment integral to the Commission's formulation of sentencing guidelines" and the "scope of the substantive effects of its work does to some extent set its rulemaking powers apart from prior judicial rulemaking"—*e.g.*, the promulgation of the federal rules of civil procedure. *Id.* at 387–93. Nevertheless, it did not believe that "the significantly political nature of the Commission's work renders unconstitutional its placement within the Judicial Branch." *Id.* at 393. In reaching that conclusion, the Court explained that the Commission "is an independent agency in every relevant sense," "is fully accountable to Congress, which can revoke or amend any or all of the Guidelines as it sees fit," and engages in rulemaking that "is subject to the notice and comment requirements of the Administrative Procedure Act[.]" *Id.* at 393–94. Thus, "because Congress vested the power to promulgate sentencing guidelines in an independent agency, not a court, there can be no serious argument that Congress combined legislative and judicial power within the Judicial Branch." *Id.* at 394.

Notably, the late Justice Scalia dissented from the majority ruling in *Misretta*, calling the creation of the Sentencing Commission "a pure delegation of legislative power" and stating that "[i]t is irrelevant whether the standards are adequate, because they are not standards related to the exercise of executive or judicial powers; they are, plainly and simply, standards for further legislation." *Mistretta*, 488 U.S. at 420 (Scalia, J., dissenting). Referring to the Commission as a "sort of junior-varsity Congress," *id.* at 427, Justice Scalia explained that he could "find no place within our

constitutional system for an agency created by Congress to exercise no governmental power other than the making of laws." *Id.* at 413. Justice Scalia warned that this Court must be especially vigilant in protecting the structural framework imposed by the Constitution, stating:

> Precisely because the scope of delegation is largely uncontrollable by the courts, we must be particularly rigorous in preserving the Constitution's structural restrictions that deter excessive delegation. The major one, it seems to me, is that the power to make law cannot be exercised by anyone other than Congress, except in conjunction with the lawful exercise of executive or judicial power.

Id. at 416–17.

2. The "Legal Force" of Guideline Commentary

In the years following *Misretta*, this Court actively policed the Commission's exercise of authority, including its promulgation of "commentary" to the Guidelines—a practice that Congress did not mention, much less direct, in the enabling legislation. *See Stinson*, 508 U.S. at 41. Indeed, while the Act explicitly instructs the Commission to promulgate the Guidelines and policy statements, *see id.* at 41 (citing 28 U.S.C. § 994(a)), it "does not in express terms authorize the issuance of commentary[.]" *Id.* As a result, the commentary is distinct from the Guidelines in a very important respect: "Amendments to the Guidelines must be submitted to Congress for a 6-month period of review, during which Congress can modify or disapprove them," while the commentary "is not reviewed by Congress" and may be amended at any time by the Commission. *Id.* at 41, 44–46 (citing 28 U.S.C. § 994(p)).

In *Stinson*, this Court grappled with the "legal force of the commentary," considering and rejecting various analogies. *Stinson*, 508 U.S. at 43–44. The Court

ultimately agreed with the government's suggestion that the commentary should "be treated as an agency's interpretation of its own legislative rule," explaining:

> The Sentencing Commission promulgates the guidelines by virtue of an express congressional delegation of authority for rulemaking, and through the informal rulemaking procedures in 5 U.S.C. § 553. Thus, the guidelines are the equivalent of legislative rules adopted by federal agencies. The functional purpose of commentary (of the kind at issue here) is to assist in the interpretation and application of those rules, which are within the Commission's particular area of concern and expertise and which the Commission itself has the first responsibility to formulate and announce.

Id. at 44–45 (citations omitted). Accordingly, commentary "that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline." *Id.* at 38; *see also id.* at 45–47 (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)). In the event of inconsistency between the Guideline and the commentary, "the Sentencing Reform Act itself commands compliance with the guideline." *Id.* at 43 (citing 18 U.S.C. § 3553(a)(4), (b)).

This Court was compelled to enforce its holding in *Stinson* four years later, when it confronted (and rejected) the Sentencing Commission's use of commentary to fundamentally change the very Guideline at issue here: U.S.S.G. § 4B1.1 (the "career offender Guideline"). *See United States v. LaBonte*, 520 U.S. 751 (1997). At issue in *LaBonte* was the meaning of the term "offense statutory maximum," which is used in § 4B1.1(b) to determine the degree of enhancement for "career offender" defendants. *See id.* at 753–54. The term implemented § 994(h)'s requirement that the Guidelines specify a sentence for career offenders "at or near the maximum term authorized." *Id.*

at 753. However, the Guideline did not indicate whether "maximum" referred to the "basic" maximum provided by the statute of conviction or, if applicable, an *enhanced* maximum penalty that may apply to a recidivist offender.[1] *Id.* at 754. After Courts of Appeals concluded that the term must refer to the enhanced maximum, the Commission revised the commentary "to preclude consideration of statutory enhancements in calculating the 'offense statutory maximum.'" *Id.*

In *LaBonte*, a majority of this Court "conclude[d] that the Commission's interpretation [was] inconsistent with § 994(h)'s plain language" and thus held "that 'maximum term authorized' must be read to include all applicable statutory enhancements." 420 U.S. at 753. The Court explained that while Congress delegated "significant discretion" to the Commission to formulate the Guidelines, "it [still] must bow to the specific directives of Congress." *Id.* at 757 ("If the Commission's revised commentary is at odds with § 994(h)'s plain language, it must give way."). Because, in the majority's view, "the phrase 'at or near the maximum term authorized' is unambiguous," courts are required to take into account "all relevant statutory sentencing enhancements" in applying the Guideline. *Id.* at 762. Three Justices dissented, expressing their view that the statutory term *is* ambiguous, and therefore, applying traditional principles of agency deference, courts should defer to the

[1] For example, "the maximum term" for a conviction under § 841(b)(1)(B) ordinarily is 40 years of imprisonment, corresponding to an offense level of 34 under U.S.S.G. § 4B1.1(b)(2), but it can be enhanced to life imprisonment—corresponding to an offense level of 37 under § 4B1.1(b)(1)—if the defendant was previously convicted of a qualifying offense.

Commission's "permissible" interpretation of the language. *Id.* at 763, 776–80 (Breyer, J., Stevens, J., and Ginsburg, J., dissenting).

3. "Reinforc[ing] the Limits" of Auer Deference in Kisor v. Wilkie

The same year as *LaBonte*, this Court decided *Auer v. Robbins*, in which it employed its decades-old precedent requiring judicial deference to an agency's interpretation of its own regulation so long as the interpretation is not "plainly erroneous or inconsistent with the regulation." 519 U.S. 452, 461 (1997); *see also Seminole Rock*, 325 U.S. at 414. Thereafter, the practice became known as "*Auer* deference." *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2408 (2019).

Auer deference has long been criticized by courts and legal scholars alike. *See* Jarrett Faber, *Kisor v. Wilkie as a Limit on Auer Deference in the Sentencing Context*, 70 Emory L. J. 905, 923–26 (2021). Those criticisms gained more force in the last decade, as members of this Court began expressing their own views that the doctrine had gone too far and, perhaps, was a mistake in the first place. *See, e.g.*, *Decker v. Nw. Env't Def. Ctr.*, 568 U.S. 597, 616 (2013) (Scalia, J., concurring) ("For decades, and for no good reason, we have been giving agencies the authority to say what their rules mean, under the harmless-sounding banner of 'defer[ring] to an agency's interpretation of its own regulations.'" (citation omitted)); *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 112–13 (2015) (Thomas, J., concurring) (stating that the line of cases beginning with *Seminole Rock* "call[s] into question the legitimacy of our precedents requiring deference to administrative interpretations of regulations" and "undermines our obligation to provide a judicial check on the other branches, and it

subjects regulated parties to precisely the abuses that the Framers sought to prevent"). Multiple members of the Court began calling for its reconsideration. *See, e.g.*, *Decker v. Nw. Env't Def. Ctr.*, 568 U.S. 597, 616 (2013) (Roberts, C.J., and Alito, J., concurring) ("It may be appropriate to reconsider that principle in an appropriate case."); *id.* at 617 (Scalia, J., concurring) ("[R]espondent has asked us, if necessary, to 'reconsider *Auer*.' I believe that it is time to do so."); *Perez*, 575 U.S. at 133 (Thomas, J., concurring) ("[T]he entire line of precedent beginning with Seminole Rock raises serious constitutional questions and should be reconsidered in an appropriate case.").

This Court recently took that opportunity in *Kisor v. Wilkie*, confronting the question of whether it should overrule *Auer* and its *Seminole Rock* predecessor. 139 S. Ct. at 2408. A majority of the Court ultimately reaffirmed the continued validity of the doctrine but also "reinforce[d] its limits," recognizing that its past decisions have sent "some mixed messages." *Id.* at 2408, 2414. In particular, the Court acknowledged that, "[a]t times, [it] has applied *Auer* deference without significant analysis of the underlying regulation" or "careful attention to the nature and context of the interpretation." *Id.* at 2414. The Court thus clarified that "*Auer* deference is not the answer to every question of interpreting an agency's rules." *Id.* To the contrary, it "is sometimes appropriate and sometimes not," and whether to apply it "depends on a range of considerations[.]" *Id.* at 2408. To that end, the Court "enumerated a new multi-step test for courts to use in determining whether *Auer* deference is warranted." Jarrett Faber, *Kisor v. Wilkie as a Limit on Auer Deference in the Sentencing Context*, 70 Emory L. J. 905, 928–29 (2021).

"First and foremost, a court should not afford *Auer* deference unless the regulation is *genuinely ambiguous*." *Kisor*, 139 S. Ct. at 2415 (emphasis added). "If uncertainty does not exist, there is no plausible reason for deference. The regulation then just means what it means—and the court must give it effect, as the court would any law." *Id.* "And before concluding that a rule is genuinely ambiguous, a court must exhaust all the 'traditional tools' of construction." *Id.* at 2415 (citation omitted). More specifically, it "must carefully consider the text, structure, history, and purpose of a regulation, in all the ways it would if it had no agency to fall back on," before resorting to deference. *Id.* (quotation marks, alterations, and citation omitted). Warning of the consequences of reflexive deference to unambiguous rules, the Court explained:

> [T]he core theory of *Auer* deference is that sometimes the law runs out, and policy-laden choice is what is left over. But if 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." *Auer* does not, and indeed could not, go that far.

Id. (quoting *Christensen v. Harris Cnty.*, 529 U.S. 576, 588 (2000)); *see also id.*at 2423 (emphasizing "the critical role courts retain in interpreting rules").

Even if an agency's rule is "genuinely ambiguous," that does not give the agency free reign to change it under the guise of "interpretation." An agency's reading "must still be 'reasonable.'" *Id.* at 2415 (citation omitted). "In other words, it must come within the zone of ambiguity the court has identified after employing all its interpretive tools." *Id.* at 2415–16 (explaining that the "text, structure, history, and so forth [can] at least establish the outer bounds of permissible interpretation"); *see*

also id. at 2416 ("Under *Auer* . . . the agency's reading must fall within the bounds of reasonable interpretation." (quotation marks and citations omitted)).

Finally, this Court explained that "not every reasonable agency reading of a genuinely ambiguous rule should receive *Auer* deference." *Id.* at 2416. Instead, courts "must make an independent inquiry into whether the character and context of the agency interpretation entitles it to controlling weight." *Id.* That requires determining, among other things, that agency's reading "implicate[s] its substantive expertise" and reflects "fair and considered judgment[.]" *Id.* at 2147. The Court instructed that courts "should decline to defer to a merely convenient litigation position or *post hoc* rationalization advanced to defend past agency action against attack." *Id.* (quotation marks, alterations, and citation omitted).

The Court concluded its guidance by emphasizing the need for judges to carefully consider whether deference is appropriate before reflexively relying on an agency's interpretation. The Court explained: "When it applies, *Auer* deference gives an agency significant leeway to say what its own rules mean [and thereby] fill out the regulatory scheme Congress has placed under its supervision. But that phrase 'when it applies' is important—because it often doesn't." *Id.* at 2418. By "cabin[ing] *Auer*'s scope in varied and critical ways," as outlined in *Kisor*, the Court aimed to "maintain[] a strong judicial role in interpreting rules." *Id.*

B. Procedural Background

On May 20, 2022, Petitioner Brock Melancon pleaded guilty to federal drug and firearm offenses pursuant to a plea agreement with the government. Applying

the 2018 Sentencing Guideline Manual, the U.S. Probation Office determined—and the district court agreed—that Mr. Melancon qualified as a "career offender" under U.S.S.G. § 4B1.1(a). The enhancement was based on two prior convictions that were identified as "controlled substance offenses" under § 4B1.2(b), one of which was a conspiracy to distribute narcotics. That determination relied solely on the commentary to § 4B1.2, as the Guideline's text limited "controlled substance offenses" to substantive drug crimes, while the commentary added conspiracies and other inchoate offenses to the definition. Application of the career offender enhancement to Mr. Melancon's Guidelines calculation generated an advisory Guidelines range of 262 to 327 months, and the district court sentenced him to 262 months of imprisonment.

Mr. Melancon timely appealed the district court's judgment. On appeal, he sought to challenge the validity of the commentary adding conspiracies to the definition of "controlled substance offense," arguing that it is not a "reasonable reading" of a "genuinely ambiguous" Guideline. Recognizing that his argument was foreclosed by the Fifth Circuit's en banc decision in *Vargas*, Mr. Melancon moved for summary affirmance, preserving his challenge for further review. The government did not oppose the request for summary affirmance, and the Fifth Circuit granted his motion on December 28, 2023. App. 1a-2a.[2]

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[2] Although Mr. Melancon's plea agreement contained a broad and restrictive appeal waiver, waiving his right to appeal any sentence below the statutory maximum, the government did not invoke the waiver in the proceedings below. Accordingly, the appeal waiver has not been enforced. *See United States v. Story*, 439 F.3d 226, 231 (5th Cir. 2006) (holding that an appeal waiver "is enforceable to the extent that the government invokes the waiver provision").

REASONS FOR GRANTING THE PETITION

I. The Courts of Appeals are intractably divided over whether *Kisor* governs deference to the Sentencing Guideline commentary and, relatedly, whether certain commentary is entitled to deference.

This Court should grant certiorari because there are clear, deeply entrenched circuit splits among the U.S. Courts of Appeals regarding the questions presented.

First, the question of whether *Kisor* applies to the Sentencing Commission's Guideline commentary has divided the country. The Third, Fourth, Sixth, Ninth, and Eleventh Circuits have held that it does. *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 *Auer* deference in all of its applications, including as applied in *Stinson*. They thus hold that commentary is only authoritative if the district court determines, after resorting to all the traditional interpretive tools, that the commentary is a "reasonable reading" of "genuinely ambiguous" Guideline text that also reflects the Commission's "substantive expertise" and "fair and considered judgment." Notably, judges in the Fourth Circuit have been forced to parse conflicting panel decisions, with a first panel holding that *Kisor* controls and a second holding the exact opposite. *Compare Campbell*, 22 F.4th at 444–49, *with United States v. Moses*, 23 F.4th 347, 355-57 (4th Cir. 2022).

In contrast, the First, Second, Fifth, Seventh, Eighth, and Tenth Circuits do not accept *Kisor*'s recalibrated standard and instead persist in following the "plainly erroneous or inconsistent" formulation applied in *Stinson*, which *Kisor* discarded as

a "caricature" of the deference doctrine (at 2415). *See United States v. Lewis*, 963 F.3d 16 (1st Cir. 2020); *United States v. Tabb*, 949 F.3d 81 (2d Cir. 2020); *United States v. Vargas*, 74 F.4th 673 (5th Cir. 2023) (en banc); *United States v. Smith*, 989 F.3d 575 (7th Cir. 2021); *United States v. Rivera*, 76 F.4th 1085 (8th Cir. 2023); *United States v. Maloid*, 71 F.4th 795 (10th Cir. 2023). The second-in-time Fourth Circuit panel mentioned above, *Moses*, 23 F.4th 347, 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." *Vargas*, 74 F.4th at 684. 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).

Several judges in these circuits have, however, voiced reservations with the practice of ignoring *Kisor*. For example, in *Rivera*, the Eighth Circuit noted the circuit conflict on the subject and allowed that "the weight of authority may suggest that *Kisor* undermines" its precedent. 76 F.4th at 1091. A concurring judge "ha[d] no doubt that [the Eighth Circuit] will need to address the impact of *Kisor* at some point." *Id.* at 1093 (Stras, J., concurring). The Seventh Circuit also recently admitted that it "may need to revisit [its] decisions on this subject in light of *Kisor*." *United States v. States*, 72 F.4th 778, 791 n.12 (7th Cir. 2023). And, concurring in *Lewis*, Judges Torruella and Thompson jointly expressed concern that the First Circuit's precedent could not be reconciled with *Kisor*'s instruction that "a court's duty to interpret the law requires it to 'exhaust all the 'traditional tools' of construction' . . . before it defers

to an agency's 'policy-laden choice' between two reasonable readings of a rule." *Lewis*, 963 F.3d at 28 (quoting *Kisor*, 139 S. Ct. at 2415). Nevertheless, the "reflexive" form of deference that developed pre-*Kisor* remains the standard in these circuits.

In addition to the split over *Kisor*, there is *also* a circuit split over whether Application Note 1 to the 2018 career offender Guideline is entitled to deference. Several circuits have held that the commentary impermissibly expands the definition of "controlled substance offense" and therefore should receive no deference from sentencing courts. *See United States v. Winstead*, 890 F.3d 1082, 1092 (D.C. Cir. 2018); *United States v. Havis*, 927 F.3d 382, 387 (6th Cir. 2019); and *Nasir*, 17 F.4th at 472. Others maintain that Application Note 1 is valid and enforceable notwithstanding this Court's holding in *Kisor*. *See, e.g.*, *Lewis*, 963 F.3d at 23–25; *Smith*, 989 F.3d at 584–85; *United States v. Jefferson*, 975 F.3d 700, 708 (8th Cir. 2020). As a result of this conflict, identically situated defendants have been sentenced under vastly different Guideline ranges based solely on their location, undermining the central purpose of the Guidelines to achieve "uniformity and proportionality in sentencing." *Rita v. United States*, 551 U.S. 338, 348–49 (2007).

As this Court has explained, the Guidelines must "be the starting point and initial benchmark" for all sentencings, and it is critically important that courts begin each sentencing with a *correct* calculation of the Guidelines. *See Gall v. United States*, 552 U.S. 38, 49 (2007); *see also Molina–Martinez v. United States*, 136 S. Ct. 1338, 1345–46 (2016); *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1908 (2018). That is impossible when courts fundamentally disagree about the proper interpretation

and application of the Sentencing Guidelines. Accordingly, this Court's guidance is needed to restore fairness and uniformity to federal sentencing. Otherwise, people like Mr. Melancon will continue to receive significantly longer sentences than identically situated defendants in other courts based solely on how their particular circuit reads *Kisor* and applies it to the Guideline commentary.

II. Fifth Circuit precedent holding that "*Stinson* sets out a deference doctrine distinct from the one refined by *Kisor*" is wrong.

In *Vargas*, the en banc Fifth Circuit joined other circuits in holding that "*Stinson* sets out a deference doctrine distinct from the one refined by *Kisor*." 74 F.4th at 678. That holding is wrong. *Kisor* clarified "the limits inherent" in deference doctrine, making clear that the doctrine only permits courts to "defer[] to agencies' reasonable readings of genuinely ambiguous regulations." 139 S. Ct. at 2408. That clarification applies to all agency interpretations subject to *Auer* (or *Seminole Rock*) deference principles.

The central question is whether any principled reason exists to treat the Sentencing Commission's self-proclaimed interpretations and explanations, U.S.S.G. § 1B1.7, of its own rules and policy statements any differently than other agency interpretations. No such reason or basis appears in *Kisor*, *Stinson*, or any other decision of this Court. Quite the opposite, *Kisor* "cabined [the] scope" of *Auer* deference in all its applications. 139 S. Ct. at 2408. And this Court's prior decisions—including *Stinson* itself—confirm that the same form of *Auer* deference applicable to other agencies applies to the Commission's commentary.

As previously discussed, this Court originally affirmed the constitutionality of the Sentencing Commission based specifically on the detailed guidance issued by Congress to the Commission, and the Court concluded that the Commission was "an independent agency in every relevant sense"—including the fact that it is subject to the requirements of the Administrative Procedures Act. *Mistretta*, 488 U.S. at 374–79, 393–94. Following *Misretta*, this Court actively policed the Commission's exercise of authority, including its promulgation of "commentary" to the Guidelines. *See Stinson*, 508 U.S. at 41; *Labonte*, 420 U.S. at 753. In *Stinson*, the Court expressly stated that the commentary should "be treated as an agency's interpretation of its own legislative rule." 508 U.S. at 44–45. Thus, relying on the deference doctrine articulated in *Seminole Rock*, the Court held that commentary "that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline." *Id.* at 38; *see also id.* at 45–47.

In short, *Stinson* clearly held that the same deference principles that apply to other federal agencies apply to the Commission's promulgation of commentary. The Fifth Circuit's contention that Stinson "drew from" but did not apply *Seminole Rock* deference, and instead used it as a template for inventing a "distinct" deference doctrine premised on the "differences" between the Sentencing Commission and other federal agencies, is simply incorrect. *Vargas*, 74 F.4th at 681. This Court was clear in *Stinson* that the Commission's commentary to the Guidelines and "an agency's

interpretation of its own legislative rule" are to "be treated as" one and the same. 508 U.S. at 44.

Moreover, all of the "differences" between the Commission and other agencies that the Fifth Circuit perceived to "justify" a "distinct approach," *see Vargas*, 74 F.4th at 682–83, existed when Stinson was decided. Then, as now, the Commission was "lodge[d] in the Judicial Branch"; then, as now, the Commission "addresse[d] federal judges" and not "the public"; and then, as now, its seven members had to be "appointed by the President" and include "at least three federal judges." *Id.* at 682. And if anything, the nature of the Commission's work—setting policy that bears directly on the grave judicial task of determining how long an individual will lose his liberty—suggests that the alternative to *Auer* deference, as modified by *Kisor*, should not be a return to reflexive deference, but no deference to the commentary. *See Nasir*, 17 F.4th at 474 (Bibas, J., concurring) ("There is no compelling reason to defer to a Guidelines comment that is harsher than the text. Whatever the virtues of giving experts flexibility to adapt rules to changing circumstances in civil cases, in criminal justice those virtues cannot outweigh life and liberty."); *Vargas*, 74 F.4th at 700 (Oldham, J., concurring) (suggesting that Guidelines commentary "should not receive any deference that the Advisory Committee's notes to the Federal Rules do not").

The Fifth Circuit's view likewise finds no support in *Kisor*. Nothing in the Court's opinion suggests that its clarification of *Auer* deference principles was confined to cases involving judicial review of executive agency rule interpretations. Surely, the Securities and Exchange Commission would not be heard to complain

that, as an independent rather than executive agency, its readings of its own unambiguous rules remain entitled to deference even after *Kisor*. *See Doe v. Sec. & Exch. Comm'n*, 28 F.4th 1306, 1313-16 (D.C. Cir. 2022) (applying *Kisor* to SEC rule interpretation). It makes just as little sense to infer a silent exemption for the Sentencing Commission from *Kisor*'s unremarkable failure to expressly "mention the Sentencing Guidelines, the Commission, or the commentary." *See Vargas*, 74 F.4th at 681. In fact, *Kisor* specifically mentioned *Stinson* among the Court's numerous prior decisions addressing agency deference principles. *Kisor*, 139 S. Ct. at 2411 n.3 (citing *Stinson* among the "legion" of "decisions applying *Seminole Rock* deference.").

Put simply, *Kisor* did not purport to reform *Auer* deference for only a subset of agency interpretations, and this Court's entire body of jurisprudence establishes that *Kisor* applies equally to the Sentencing Commission's commentary as to any other agency's interpretations of its own rules. There is simply no basis for reading *Kisor* or *Stinson* as contemplating that Guidelines commentary deserves a special degree of deference enjoyed by no other agency, or that enhanced deference would forever attach irrespective of ambiguity in the corresponding guideline. Indeed, "[i]t does not take a great stretch of the imagination to see the pitfalls of a rule that writes the Sentencing Commission that kind of blank check." *Vargas*, 74 F.4th at 704 (Elrod, J., dissenting). And the fact that the Fifth Circuit's acceptance of this bifurcated deference regime depends on adherence to a formulation of *Auer* deference that *Kisor* labeled a "caricature of the doctrine," 139 S. Ct. at 2415, is as telling a sign as any that the court of appeals has strayed from the path of this Court's precedent.

III. The Fifth Circuit's ruling on the career offender Guideline is wrong and conflicts with this Court's decision in *Kisor v. Wilkie*.

As this Court recognized in *Mistretta*, the U.S. Sentencing Commission is an "independent agency in every relevant sense." 488 U.S. at 393; *see also Stinson*, 508 U.S. at 45 ("The Sentencing Commission promulgates the guidelines by virtue of an express congressional delegation of authority for rulemaking, and through the informal rulemaking procedures in 5 U.S.C. § 553." (citations omitted)). Thus, the commentary to the Guidelines—which the Commission generates alone—is "akin to an agency's interpretation of its own legislative rules." *Stinson*, 508 U.S. at 45. Consistent with agency deference rules, the commentary may only be used to "interpret[] or explain[] a guideline." *Id.* at 38. In the event of inconsistency between the commentary and Guideline, the Guideline controls. *See id.* at 43–47.

In *Kisor*, this Court restated and expanded upon agency deference principles, describing the factors that courts need to consider in determining whether deference to an agency's purported "interpretation" is appropriate. 139 S. Ct. at 2408, 2414. Before deferring to an agency's interpretation of its own regulation, courts must determine: (1) that the regulation "is genuinely ambiguous"; (2) that the agency's interpretation is a "reasonable reading" of the regulation; and (3) that "the character and context of the agency interpretation entitles it to controlling weight." *Id.* at 2415–16. If those requirements are not met, the court may not defer.

As the Third Circuit concluded in *Nasir*, Application Note 1 fails to satisfy the very first prong of *Kisor* because the Guideline definition of "controlled substance offense" is not "genuinely ambiguous." *Nasir*, 17 F.4th at 471-72. To the contrary, it

exclusively identifies substantive drug crimes—*i.e.*, violations of statutes that criminalize certain drug-related acts—and "does not even mention inchoate offenses." *Id.* The Guideline states:

> 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.

U.S.S.G. § 4B1.2(b) (emphasis added); *see also* U.S.S.G. § 4B1.1, cmt. n.1 (stating that the term "controlled substance offense" is defined in § 4B1.2).

In contrast with the crimes identified in the Guideline, a drug *conspiracy* under 21 U.S.C. § 846 "is merely an agreement to commit" a drug offense—it does not "prohibit" any affirmative act. *See United States v. Davis*, 903 F.3d 483, 485 (5th Cir. 2018), *aff'd in part, vacated in part*, 139 S. Ct. 2319 (2019); *see also United States v. Moody*, 664 F. App'x 367, 369 (5th Cir. 2016) (explaining that "the crime of conspiracy is complete upon the formation of the illegal agreement"). Indeed, "proof of an overt act is not required to establish a violation of 21 U.S.C. § 846." *United States v. Shabani*, 513 U.S. 10, 11 (1994). Moreover, the Guideline's use of the word "means" indicates that the definition was intended as an exhaustive list of qualifying offenses, not merely illustrative examples. *See Burgess v. United States*, 553 U.S. 124, 130 (2008) ("As a rule, a definition which declares what a term 'means' excludes any meaning that is not stated."); *see also Christopher v. Smith-Kline Beecham Corp.*, 567 U.S. 142, 162 (2012) (explaining that "Congress used the narrower word 'means' [in statutes] when it wanted to cabin a definition to a specific list of enumerated items").

And this "plain-text reading of section 4B1.2(b) is strengthened when contrasted with the definition of 'crime of violence' in the previous subsection," which explicitly includes inchoate crimes. *Nasir*, 2021 WL 5173485, at *9 (citing § 4B1.2(a)(1)).

The history and purpose of the career offender Guideline further establish that the term "controlled substance offense" excludes inchoate offenses. The Guideline was created to implement Congress's directive in 28 U.S.C. § 994(h), which instructs the Commission to provide enhanced penalties "at or near the maximum term authorized" for certain recidivist offenders. *See* U.S.S.G. § 4B1.1 cmt. background (1994). In § 994(h), Congress identified two categories of offenses that should trigger the enhancement: (1) crimes of violence, and (2) offenses "*described in* section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and chapter 705 of title 46." *See* § 994(h)(1)(B), § 994(h)(2)(B) (emphasis added). The types of offenses listed in the Guideline thus mirror the offenses listed in § 994(h).[3] Tellingly, Congress did not include "offenses described in 21 U.S.C. § 846" in § 994(h), nor did it state that the offenses triggering the career offender enhancement should include conspiracies or attempts to commit drug offenses. This background further

[3] Section 401 of the Controlled Substances Act makes it unlawful to "manufacture, distribute, or dispense" any controlled substance or counterfeit substance, or "possess with intent to manufacture, distribute, or dispense" a controlled or counterfeit substance, while the Controlled Substances Import and Export Act prohibits conduct related to the importation and/or exportation of controlled substances.

supports the conclusion that the Guideline, which implements and mirrors § 994(h), unambiguously excludes inchoate offenses.

Importantly, the Commission has itself acknowledged that Application Note 1 *modifies* rather than interprets § 4B1.2's definition of "controlled substance offense." In its original form, the Guideline relied exclusively on § 994(h) for its authority to promulgate § 4B1.1. *See* U.S.S.G. § 4B1.1 cmt. background (1994). However, because § 994(h) does not include inchoate offenses, some Courts of Appeals determined that the commentary was invalid. *See, e.g.*, *United States v. Price*, 990 F.2d 1367 (D.C. Cir. 1993); *United States v. Bellazerius*, 24 F.3d 698, 701–02 (5th Cir. 1994). In response, the Commission revised the background commentary to state that while the Guideline's "definition of a career offender track[s] in large part the criteria set forth in" § 994(h), the Commission "has *modified* this definition" pursuant to its "general guideline promulgation authority under 28 U.S.C. § 994(a)-(f), and its amendment authority under 28 U.S.C. § 994(o) and (p)[.]" U.S. SENTENCING COMM'N, amend. 528 (Nov. 1, 1995) (emphasis added). In other words, the Commission itself admitted that it used the commentary to substantively change—and not merely interpret—the career offender Guideline.

In sum, under the plain text, history, and purpose of the § 4B1.2(b), there is "only one reasonable construction" of the term "controlled substance offense," and "there is no plausible reason for deference" to Application Note 1. *See Kisor*, 139 S. Ct. at 2415. The Guideline "just means what it means—and the court must give it effect," regardless of whether the Commission insists that the commentary's

expanded definition "would make more sense." *See id.* "Deference in [this] circumstance would permit the [Commission], under the guise of interpreting [the Guidelines], to create de facto a new [Guideline]" without Congress's input, review, or oversight. *See id.* (quotation marks and citations omitted). *Kisor* made clear that such deference is not permitted. Accordingly, the law of the Fifth Circuit and others upholding the validity of the commentary to § 4B1.2 in the 2018 Guideline Manual is wrong and irreconcilable with this Court's decisions, and it must be reversed.

CONCLUSION

For the reasons discussed above, the Court should grant this petition for writ of certiorari.

Respectfully submitted,

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