NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

Calvin Carnell Edwards Jr.,

Petitioner,

-vs.-

United States of America,

Respondent.

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

Petition for Writ of Certiorari

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Question Presented for Review

Is this Court's three-part test, expressed in *Kisor v. Wilkie*, 588 U.S. 558 (2019), applicable only to agencies located in the Executive Branch, or does it apply with equal force to agencies in any branch of government, including the United States Sentencing Commission?

Related Proceedings

- *United States v. Edwards*, No. 4:22-cr-00162-SMR-HCA-1, U.S. District Court for the Southern District of Iowa. Judgment and sentence entered Aug. 3, 2023. Amended judgment and sentence entered Aug. 16, 2023.

- *United States v. Edwards*, No. 23-2794, U.S. Court of Appeals for the Eighth Circuit. Judgment entered May 9, 2024. Rehearing and rehearing *en banc* denied June 13, 2024.

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Opinion Below

Petitioner, Mr. Calvin Carnell Edwards Jr., respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit in Case No. 23-2794, entered on May 9, 2024. *United States v. Edwards*, No. 23-2794, 2024 WL 2069606 (8th Cir. May 9, 2024) (unpublished); Pet. App. at 1a–5a. On June 13, 2024, The Eighth Circuit denied Mr. Edwards's combined petition for rehearing and rehearing *en banc*. Pet. App. at 20a.

Jurisdiction

A panel of the Eighth Circuit entered its judgment on Mr. Edwards's appeal on May 9, 2024. Pet. App. at 1a. The Eighth Circuit denied rehearing and rehearing *en banc* on June 13, 2024. Pet. App. at 20a. The jurisdiction of this Court is invoked under 28 U.S.C. section 1254.

Constitutional and Guidelines Provisions Involved

The specific constitutional provisions and United States Sentencing Guidelines ("U.S.S.G." or "Guidelines") involved in this case include: Article, I, Section 1 of the U.S. Constitution; Article III, Section 1 of the U.S. Constitution; U.S.S.G. section 2K2.1(b)(6)(B) and Application Note 14(C); and U.S.S.G. section 3E1.1(a) and Application Notes 1(B) and 1(G), as these provisions appeared in the 2021 Guidelines Manual.

U.S. CONST. art. I, § 1

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

U.S. CONST. art. III, § 1

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

U.S.S.G. § 2K2.1—Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition

(b) Specific Offense Characteristics

(6) If the defendant—

. . .

(B) used or possessed any firearm or ammunition in connection with another felony offense; or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense,

increase by **4** levels. If the resulting offense level is less than **18**, increase to level **18**.

Application Notes:

14. **Application of Subsections (b)(6)(B) and (c)(1).**—

. . .

(C) **Definitions**—

"Another felony offense", for purposes of subsection (b)(6)(B), means any federal, state, or local offense, other than the explosive or firearms possession or trafficking offense, punishable by imprisonment for a term exceeding one year, regardless of whether a criminal charge was brought, or a conviction obtained.

U.S.S.G. § 3E1.1—Acceptance of Responsibility

(a) If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by **2** levels.

Application Notes:

1. In determining whether a defendant qualifies under subsection (a), appropriate considerations include, but are not limited to, the following:
   . . .
   (B) voluntary termination or withdrawal from criminal conduct or associations;
   . . .
   (G) post-offense rehabilitative efforts (*e.g.*, counseling or drug treatment);
   . . . .

Statement of the Case

Petitioner, Mr. Calvin Carnell Edwards Jr., pled guilty to one count of being a felon in possession of a firearm, 18 U.S.C. §§ 922(g)(1), 924(a)(8), and one count of illegal possession of a machine gun, *id.* §§ 922(o), 924(a)(2), in the United States District Court for the Southern District of Iowa.[1] The district court had jurisdiction over the prosecution pursuant to 18 U.S.C. section 3231.

Prior to sentencing, the Government objected to the presentencing investigation report's ("PSR") inclusion of a three-point reduction to Mr. Edwards's Total Offense Level for acceptance of responsibility under U.S.S.G. section 3E1.1. In support of the objection, the Government relied on Mr. Edwards's *post-arrest* and *post-conviction* conduct in the Polk County Jail. *See* R. Doc. 45, ¶¶ 18, 30–31 (initial PSR's inclusion of section 3E1.1 reduction); R. Doc. 46 (Government's objection to initial PSR). Similarly, Mr. Edwards objected to the PSR's application of a four-point enhancement for using or possessing a firearm "in connection with another felony

[1] Throughout this Petition, Mr. Edwards's record citations are identified as follows: "ST" refers to the Sentencing Hearing Transcript; "R. Doc." refers to the District Court's electronic docket; "PSR" refers to the final presentence investigation report, filed as Document 64 in the District Court's electronic docket; and "Op." refers to the Eighth Circuit's panel opinion affirming his sentence.

offense" per U.S.S.G. section 2K2.1(b)(6)(B). R. Doc. 63.

Deferring to Guidelines commentary interpreting section 3E1.1, the final PSR adopted the Government's acceptance-of-responsibility objection, removing the three-point reduction. PSR 28; *see also* R. Doc. 46 (Government's objection to PSR). Further, it rejected Mr. Edwards's objection to section 2K2.1(b)(6)(B)'s enhancement, again deferring to Guidelines commentary. Specifically, the PSR looked to Application Note 14(C) to define "another felony offense" for purposes of the enhancement. PSR 31.

These objections were the only Guidelines issues the district court confronted at sentencing. Ultimately, the district court rejected Mr. Edwards's arguments and adopted the PSR's Guideline calculation in full (78–97 months' imprisonment, PSR ¶ 93). In doing so, the district court similarly deferred to Guidelines commentary in calculating Mr. Edwards's sentence. ST at 12:7–12, 14:13–21. Relevant to this appeal, the district court sentenced Mr. Edwards to eighty-four (84) months' imprisonment. *See generally* R. Doc. 79 (amended judgment); *see also* ST at 20:9–21:22.

Mr. Edwards timely appealed his sentence to the United States Court of Appeals for the Eighth Circuit, invoking that court's jurisdiction under 28 U.S.C. section 1291. In the main, Mr. Edwards argued that this Court's opinion in *Kisor v. Wilkie*, 588 U.S. 558 (2019), required the court of appeals to vacate his sentence and remand for resentencing in accordance with that decision.

In *Kisor*, this Court reaffirmed that "defer[ence] to agencies' reasonable

readings of genuinely ambiguous regulations" is permissible, but only in very limited circumstances. *Id.* at 563. Specifically, this Court outlined three prerequisites a court must find satisfied before it can defer to an agency's interpretation: (1) the law being interpreted must be "genuinely ambiguous"; (2) the agency's proposed interpretation must be reasonable; and (3) if the first two prongs are met, "whether the character and context of the agency interpretation entitles it to controlling weight." *Id.* at 574–79. "There can be no thought of deference unless, after performing that thoroughgoing review, the regulation remains genuinely susceptible to multiple reasonable meanings and the agency's interpretation lines up with one of them." *Id.* at 581 (plurality op.). And even then, deference may still not be warranted. *See id.* Where a court does not undertake this analysis, reversal is required so that the court can conduct the analysis in the first instance. *Id.* at 589–90 (majority op.) (holding that "a redo is necessary").

Because the district court did not conduct the *Kisor* analysis before deferring to Guidelines commentary in imposing his sentence, Mr. Edwards sought reversal. On May 9, 2024, the Eighth Circuit affirmed Mr. Edwards's sentence without considering *Kisor*'s impact on the Guidelines. *See generally United States v. Edwards*, No. 23-2794, 2024 WL 2069606 (8th Cir. May 9, 2024) (unpublished); Pet. App. at 2a–5a. On June 13, 2024, Mr. Edwards's combined petition for panel rehearing and rehearing *en banc* was denied. *See* Pet. App. at 20a. Mr. Edwards hereby seeks a writ of certiorari to reverse the lower courts and speak on an important issue of federal law, especially given the significant circuit split.

Reasons for Granting the Writ

The United States Court of Appeals for the Eighth Circuit decided—or, more precisely, declined to decide—an important issue of federal law, leaving the law in that circuit contrary to the controlling decision of this Court (*Kisor*) and contrary to the majority of sister courts of appeals that have decided the issue. *See* Supr. Ct. R. 10(a), (c). Moreover, this Court has not yet had the opportunity to review *Kisor* or the level of deference owed to Judicial Branch agencies' interpretations of their own legislative rules following its recent decision in *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024), overruling the analogous deference doctrine established by *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *See* Supr. Ct. R. 10(c).

Since this Court's decision in *Kisor*, (I) the courts of appeals have sharply divided on the Question Presented; and (II) the Sentencing Commission has amended the Guidelines in conformance with the view that *Kisor* applies to it. Nevertheless, (III) the Eighth Circuit has refused to analyze the Question Presented, instead clinging to outdated circuit precedent. Accordingly, (IV) and in light of this Court's recent decision in *Loper*, certiorari, or, at a minimum, remand to the Eighth Circuit to consider *Kisor* and *Loper* in the first instance, is warranted.

Although, as Mr. Edwards argued below and as many other circuits have found, the Court's decision in *Kisor* provides a clear answer to the Question Presented, as the posture of this case demonstrates, the law in the United States, and certainly within the Eighth Circuit, is currently in disarray, *cf. Mistretta v. United*

States, 488 U.S. 361, 371 (1989) (noting certiorari was granted "because of," *inter alia*, "the disarray among the Federal District Courts"), and will not be settled until this Court speaks on this issue.

I. The courts of appeals are divided, but the majority have applied *Kisor* to the Guidelines.

The majority of circuits to confront the Question Presented in recent years have recognized, as *Kisor*'s analysis dictates, that Guidelines commentary is *not* entitled to reflexive deference: the Third, Fourth, Sixth, Ninth, Eleventh, and District of Columbia. *See, e.g.*, *United States v. Mercado*, 81 F.4th 352, 356–60 (3d Cir. 2023); *United States v. Campbell*, 22 F.4th 438, 445 n.3 (4th Cir. 2022); *United States v. Havis*, 927 F.3d 382, 386–87 (6th Cir. 2019) (per curiam), s*uperseded on other grounds as recognized in United States v. Dorsey*, 91 F.4th 453 (6th Cir. 2024);[2] *United States v. Castillo*, 69 F.4th 648, 662–63 (9th Cir. 2023); *United States v. Dupree*, 57 F.4th 1269, 1275 (11th Cir. 2023) (en banc); *United States v. Winstead*, 890 F.3d 1082, 1091–92 & n.14 (D.C. Cir. 2018).[3]

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[2] Mere weeks before *Kisor* was released, *United States v. Havis* held that Guidelines commentary must be subject to scrutiny—not reflexive deference. 927 F.3d at 385–87. *Kisor* reinforced that principal holding, which remains good law. *Havis* was "superseded" only because the Commission has since acknowledged *Kisor* and moved the problematic commentary at issue in *Havis* to the text of the Guideline itself. That the Sentencing Commission did so—the only abrogation of *Havis* which *United States v. Dorsey* recognized—in no way undercuts *Havis*'s *ratio decidendi*. It buttresses it. *See, e.g.*, *United States v. Riccardi*, 989 F.3d 476, 486 (6th Cir. 2021) ("We thus do not immediately defer to Application Note 3(F)(i). Rather, we first ask whether § 2B1.1 is 'genuinely ambiguous.' *Kisor*, 139 S. Ct. at 2415.").

[3] *Winstead*, like *Havis*, was decided pre-*Kisor* but accurately anticipates and tracks the holding of that case. There, the United States Court of Appeals for the District of Columbia Circuit held that the level of deference accorded Guidelines commentary "does not extend so far as to allow [the Sentencing Commission] to invoke its general interpretive authority via commentary . . . to impose such a massive impact on a defendant with no grounding in the guidelines themselves." *Winstead*, 890 F.3d at 1092. Effectively, then, the court held that the Guideline at issue (there, section 4B1.2's definition of a 'controlled substance offense') was not 'genuinely ambiguous,' and therefore the

Only three Circuits have squarely disagreed: the Fifth, Seventh, and Tenth. *See United States v. Vargas*, 74 F.4th 673, 698 (5th Cir. 2023) (en banc); *United States v. White*, 97 F.4th 532, 539 (7th Cir. 2024); *United States v. Maloid*, 71 F.4th 795, 805 (10th Cir. 2023).

Accordingly, of the courts of appeals to directly address and rule on *Kisor*'s applicability to the Guidelines, the majority of courts have agreed that *Kisor* limits courts' ability to defer to Guidelines commentary.[4] For practical purposes (as discussed below), however, the law is evenly split: *Kisor* only applies across half of

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commentary was not entitled to deference. *See id.* Under *Kisor*, the same analysis and result obtain. *Cf. Kisor*, 588 U.S. at 574 ("[A] court should not afford *Auer* deference unless the regulation is genuinely ambiguous.").

[4] The merits of the circuits' respective justifications for applying or declining to apply *Kisor* to the Guidelines are not as important at this juncture as the fact that they have all confronted the issue and have reached disparate outcomes. That said, Mr. Edwards agrees with the conclusion of the majority of circuits which have applied *Kisor* to the Guidelines. In doing so, these circuits recognized that there is no reason to treat the Sentencing Commission differently from other agencies. This conclusion is sound for a number of reasons including, *inter alia*, because *Stinson v. United States*, 508 U.S. 36 (1993), and *Auer v. Robbins*, 519 U.S. 452 (1997), applied identical levels of deference derived from an identical source—*Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945). Thus, when *Kisor* refined the circumstances in which *Auer/Seminole Rock* deference is appropriate, the Court's reasoning applied equally to *Stinson*'s specific application of *Auer/Seminole Rock* deference to the Sentencing Guidelines. *Kisor*, 588 U.S. at 568 & n.3 (plurality) (noting that "[b]efore the doctrine was called *Auer* deference, it was called *Seminole Rock* deference," and listing *Stinson* as merely one of many "(pre-*Auer*) decisions applying *Seminole Rock* deference"); *Riccardi*, 989 F.3d at 485 ("*Stinson* analogized to agency interpretations of regulations when adopting *Seminole Rock*'s plain-error test for the commentary. . . . So *Kisor*'s clarification of the plain-error test applies just as much to *Stinson* (and the Commission's guidelines) as it does to *Auer* (and an agency's regulations)."). In other words, because *Stinson* held that "[Guidelines] commentary [should] be treated as an agency's interpretation of its own legislative rule" is treated under *Auer/Seminole Rock*, 508 U.S. at 44–45, and because *Kisor* altered how agencies' interpretations of their legislative rules are treated, *Kisor* necessarily altered how the Sentencing Commission's interpretive commentary to the Guidelines should be treated.

At a minimum, though, *Kisor* left this as an open question, *see Kisor*, 588 U.S. at 630 (Gorsuch, J., concurring in the judgment) ("[I]f the majority is correct that abandoning *Auer* would require revisiting regulatory constructions that were upheld based on *Auer* deference, the majority's revision of *Auer* will yield exactly the same result. There are innumerable lower court decisions that have followed this Court's lead and afforded *Auer* deference mechanically, without conducting the inquiry the Court now holds is required. Today's ruling casts no less doubt on the continuing validity of those decisions than we would if we simply moved on from *Auer*.")—one which, as discussed in Section I.B, *infra*, the Eighth Circuit has refused to address.

the country; in the other half *Kisor* is irrelevant, and the Sentencing Commission's commentary is afforded binding deference, even where other agencies' legal interpretations are not. And, although narrow circuit splits on specific Guidelines provisions are not uncommon, the Question Presented is larger than the two Guideline provisions at issue in this case. It pervades the over 800 Application Notes contained within the Guidelines Manual.[5]

A. The Eighth Circuit has decided to not decide.

The issue in Mr. Edwards's case, and why review is particularly apt here, concerns the remaining circuits—the First, Second, and Eighth. Although the Question Presented has arisen before these three courts, it has not been definitively answered because the courts believe they are bound by prior circuit precedent (which itself did not confront *Kisor*) cementing *Auer/Seminole Rock*'s reflexive deference standard as applied to Guidelines commentary. *See United States v. Lewis*, 963 F.3d 16, 21–25 (1st Cir. 2020) (holding that the panel was bound by pre-*Kisor* caselaw but noting that "[n]one of this is to say how we would rule today were the option of an uncircumscribed review available"); *United States v. Wynn*, 845 Fed. App'x 63, 66 (2d Cir. 2021) ("As a threshold matter, although our decisions in *Tabb* and *Richardson* do not explicitly address whether *Kisor* unsettles *Jackson*, *Kisor* was decided well before *Tabb* and *Richardson*, and the *Kisor* argument advanced here was briefed and discussed at length during oral argument in *Tabb*. . . . Accordingly, based upon binding precedent, Wynn's procedural challenge to the

[5] By the undersigned's count, the Guidelines contain 814 distinct Application Notes (not separately counting the various subparts and definitions contained within).

Guidelines calculation fails."); *accord United States v. Chalas*, No. 22-3189, 2024 WL 878905, at *2 (2d Cir. Mar. 1, 2024) (citing *Wynn*); *see also United States v. Rivera*, 76 F.4th 1085, 1091 (8th Cir. 2023) ("The question, though interesting, is not one we are empowered to resolve today, as we are obligated to follow our precedent until it is overruled by the Court sitting en banc."), *cert. denied*, 144 S. Ct. 861 (Feb. 20, 2024) (mem.).

That three circuits, including the Eighth Circuit below, have affirmatively declined to even *decide* the Question Presented—and routinely reject attempts for *en banc* review—underscores the need for this Court to weigh in. If the courts of appeals will not decide, defendants' only opportunity in these circuits for *judicial* (as opposed to *agency*) review of the Guidelines will be before this Court (importantly, it is the former, not the latter, that is mandated by the Constitution).

B. Mr. Edwards's case exemplifies the Eighth Circuit's intractability on the Question Presented.

Indeed, the posture of Mr. Edwards's case exemplifies the Eighth Circuit's practice of declining substantive review on the Question Presented. In its cursory treatment of Mr. Edwards's challenge, the Eighth Circuit cited pre-*Kisor* circuit caselaw, *United States v. Mendoza-Figueroa*, 65 F.3d 691 (8th Cir. 1995) (en banc), as well as a recent panel decision similarly relying on that pre-*Kisor* precedent, *Rivera*, 76 F.4th at 1089–91. In *Rivera*, a panel of the Eighth Circuit acknowledged that *Kisor* "may cast doubt on our precedent in Mendoza-Figueroa," and that "the weight of authority may suggest that Kisor undermines the Court's decision in Mendoza-Figueroa," but explicitly declined to address the issue, reasoning it could

not do so unless the issue were presented for *en banc* review. *Rivera*, 76 F.4th at 1089–91 ("The question, though interesting, is not one we are empowered to resolve today, as we are obligated to follow our precedent until it is overruled by the Court sitting en banc."); *see also id.* at 1093 (Stras, J., concurring in part and concurring in the judgment) ("I have no doubt that we will need to address the impact of *Kisor* at some point.").

Nevertheless, when presented with opportunities for *en banc* review, the Eighth Circuit has refused to take up its own call. *See, e.g.*, *United States v. Rivera*, No. 22-1295, 2023 WL 6472270, at *1 (8th Cir. Oct. 5, 2023) (denying rehearing *en banc*). Indeed, when Mr. Edwards petitioned for *en banc* review, the Eighth Circuit denied his petition without opinion or analysis. *See* Pet. App. at 20a. Absent certiorari review here, the same obstacle will undoubtedly be placed in the path of future petitioners.

Although Mr. Edwards's case was thus not the first time the Eighth Circuit has declined substantive review on the Question Presented, it should be the last. Mr. Edwards respectfully requests this Court grant his Petition, correct the Eighth Circuit's approach, and bring clarity to, *inter alia*, defendants and district courts awaiting this Court's guidance.

II. The Sentencing Commission has acted in conformance with the view that *Kisor* applies, but it cannot resolve the Question Presented alone.

Following *Kisor*, the Sentencing Commission has made a number of amendments to the Guidelines. In doing so, it has directly responded to *Kisor* by moving text from the commentary to the Guidelines themselves. The Sentencing

Commission appreciates the difference. For instance, in response to the split of authority applying *Kisor* to section 4B1.2's Application Note 1, the Sentencing Commission simply "mov[ed], without change, the commentary . . . to the text of the Guidelines." U.S. SENT'G COMM'N, *Amendments to the Sentencing Guidelines* 96 (Apr. 27, 2023) [hereinafter 2023 AMENDMENTS].[6] As the Sentencing Commission explained:

> More recently, courts have relied on *Kisor v. Wilkie*, 139 S. Ct. 2400 (20[19]), to hold that guideline commentary should not be afforded deference unless the guideline text is genuinely ambiguous. *See, e.g.*, *Dupree*, 57 F.4th at 1275. Applying the *Kisor* holding to the guidelines, courts have concluded that the plain language definition of "controlled substance offense" in §4B1.2 unambiguously excludes inchoate offenses. Similarly, courts have held that "crime of violence" excludes conspiracies because the §4B1.2 commentary does not warrant *Kisor* deference. *See, e.g.*, *United States v. Abreu*, 32 F.4th 271, 277–78 (3d Cir. 2022).
>
> 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.

The Sentencing Commission has adopted a similar change to section 2B1.1, also in response to *Kisor*. U.S. SENT'G COMM'N, *Amendments to the Sentencing Guidelines* 6–15 (Apr. 30, 2024) [hereinafter 2024 AMENDMENTS][7] ("To ensure consistent loss calculation across circuits, the amendment creates Notes to the loss table in §2B1.1(b)(1) and moves the general rule establishing loss as the greater of

[6] Available at https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/202305_RF.pdf.

[7] Available at https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/202405_RF.pdf.

actual loss or intended loss from the commentary to the guideline itself as part of the Notes.").

Indeed, even where no circuit split over a particular comment has developed, the Sentencing Commission has moved commentary to the text of the Guidelines to account for *Kisor*. *See* 2023 AMENDMENTS at 96 ("While not the subject of the circuit conflict, the amendment also moves the definitions of enumerated offenses (i.e., 'forcible sex offense' and 'extortion') and 'prior felony conviction' from the commentary to a new subsection (e) in the guideline to avoid similar challenges to their applicability.").

These recent amendments reveal that the Sentencing Commission acknowledges *Kisor* applies to it. That acknowledgement, and the Sentencing Commission's actions—and *in*actions—in response, have important implications in cases like Mr. Edwards's. To wit, although the Sentencing Commission has moved some commentary to the 'above-the-line' Guidelines provisions themselves, the recent amendments have *not* altered the Guidelines commentary at issue in Mr. Edwards's case (Application Note 14(C) to section 2K2.1 and Application Notes 1(B) and 1(G) to section 3E1.1). Indeed, even though the Sentencing Commission has recently made *other* amendments to those very Guidelines,[8] it made no similar alterations to the commentary to account for *Kisor*. It knew how to do so had that been its desire.

[8] *See* 2023 AMENDMENTS 57–71 (amending section 2K2.1 without altering subsection (b)(6)(B) or Application Note 14); *id.* at 72–76 (amending section 3E1.1 without altering Application Note 1); *see also* 2024 AMENDMENTS 18–21 (amending section 2K2.1 without altering subsection (b)(6)(B) or Application Note 14).

Because it did not, the commentary must first withstand *Kisor*'s straightforward, obligatory test.

Although the Sentencing Commission has recognized *Kisor*'s impact, it cannot act to make *Kisor* applicable to commentary it intends to keep in place; yet, that is precisely where *Kisor* matters most. Where the Sentencing Commission has not acted to address the issue, and circuits like the Eighth opt to simply ignore *Kisor*, criminal defendants are left subject to potentially vast differences in sentencing depending on the circuit in which they are located. Mr. Edwards respectfully requests this Court grant certiorari to harmonize the courts of appeals, give meaning to *Kisor* where the Sentencing Commission has not (and some courts of appeals will not), and bring much needed clarity to this issue.

III. The Eighth Circuit's position raises constitutional separation-of-powers concerns.

The Eighth Circuit's pattern of declining substantive review on this issue compounds the constitutional concerns already underlying *Auer/Seminole Rock* deference, making certiorari even more imperative here.

As Justice Gorsuch's concurrence in the judgment in *Kisor* recognized, *Auer/Seminole Rock* deference "sits uneasily with the Constitution," *viz.*, Article III, Section 1's vesting clause. *Kisor*, 588 U.S. at 612 (Gorsuch, J., concurring in the judgment). Joined by Justices Thomas, Alito, and Kavanaugh, Justice Gorsuch explained how *Auer/Seminole Rock* deference, rather than facilitating the separation of powers outlined in the Constitution, in fact unites "the powers of making, enforcing, and interpreting laws . . . in the same hands—and in the process a

cornerstone of the rule of law is compromised." *Id.* at 615; *see also Mistretta*, 488 U.S. at 420–21 (Scalia, J., dissenting) (explaining how the Sentencing Commission itself may violate the separation-of-powers doctrine, and noting that "[t]o disregard structural legitimacy is wrong in itself-but since structure has purpose, the disregard also has adverse practical consequences").

Justice Gorsuch's concerns exist whether the agency is located in the Executive or, as here, the Judicial Branch. *See Mistretta*, 488 U.S. at 384–85 (majority op.) (discussing the Sentencing Commission's location within the Judicial Branch). A Judicial Branch agency, no less than an Executive Branch one, may not wield the power of multiple branches. *See id.* at 382–83 ("[W]e have not hesitated to strike down provisions of law that . . . accrete to a single Branch powers more appropriately diffused among separate Branches . . . . In cases specifically involving the Judicial Branch, we have expressed our vigilance against two dangers: first, that the Judicial Branch neither be assigned nor allowed 'tasks that are more properly accomplished by [other] branches,' . . . ." (second alteration in original) (quoting *Morrison v. Olson*, 487 U.S. 654, 680–81 (1988))).

Congress cannot circumvent the Constitution's established structure (and this Court's authority) by edict—merely declaring that an agency is 'located' in one branch though in fact wielding the powers of multiple. Yet, if *Kisor* is not applicable to the Commission, both the legislative power, vested by Article I, Section 1 in Congress, *see* U.S. CONST. art. I, § 1, and the judicial power, vested by Article III, Section 1 in the courts, *see id.* art. III, § 1, will be wielded, unchecked, by one and the same agency.

See Kisor, 588 U.S. at 616 (Gorsuch, J., concurring in the judgment) ("*Auer* allows an agency to do exactly what this Court has always said a legislature cannot do: 'compel the courts to construe and apply' a law on the books, 'not according to the judicial . . . judgment,' but according to the judgment of another branch." (quoting T. Cooley, CONSTITUTIONAL LIMITATIONS 95 (1868))); *Mistretta*, 488 U.S. at 421 (Scalia, J., dissenting).

Indeed, if anything, the separation-of-powers concerns are elevated in this context given the "peculiar" status of the Commission. *See Mistretta*, 488 U.S. at 384 (majority op.) ("The Sentencing Commission unquestionably is a peculiar institution within the framework of our Government."). Although located in the Judicial Branch, this Court has stated that the Commission exercises *no* judicial power whatsoever. *Id.* at 384–85. But, when it is empowered to interpret its own Guidelines and have its interpretation entitled to binding deference, the Commission in fact exercises judicial power. *See Kisor*, 588 U.S. at 616 (Gorsuch, J., concurring in the judgment). This "peculiar"—indeed, contradictory—posture blurs the lines between the Commission's nominal Judicial Branch status, its overt legislative powers, and its covert judicial ones, creating opportunities for abuse and impermissible commingling of functions.

The *Kisor* majority disagreed with Justice Gorsuch's conclusion that, as a result of these separation-of-powers concerns, *Auer/Seminole Rock* deference should be overruled entirely. But it did not refute the concurrence's explanation of how *Auer/Seminole Rock* deference "sits uneasily with the Constitution." *Kisor*, 588 U.S. at 612 (Gorsuch, J., concurring in the judgment). It instead strove to moot

the concurrence's valid concerns by significantly limiting *Auer/Seminole Rock* deference through the three-part test it outlined. *See id.* at 574 & n.4, 580 (majority op.) (agreeing the petitioner "has a bit of grist for his claim that *Auer* 'bestows on agencies expansive, unreviewable' authority," but rejecting the petitioner's argument for overruling *Auer/Seminole Rock* deference while "reinforcing some of the limits inherent in the *Auer* doctrine") ("As described above, this Court has cabined *Auer*'s scope in varied and critical ways—and in exactly that measure, has maintained a strong judicial role in interpreting rules."); *id.* at 586 (plurality op.) (rejecting the petitioner's separation-of-powers argument because, "[i]n all the ways we have described, courts retain a firm grip on the interpretive function"). But, where *Kisor*'s "critical" refinements of the scope of *Auer/Seminole Rock* deference are not applied—e.g., in the context of Guidelines commentary—the courts retain no "firm grip on the interpretive function," *id.* at 586 (plurality op.), and no "judicial role in interpreting rules," *id.* at 580 (majority op.). The bases for upholding that deference doctrine evaporate, and separation-of-powers concerns remain.

By declining substantive review of the Question Presented, that is precisely the position in which the Eighth Circuit leaves this issue. Indeed, the Eighth Circuit's approach takes that court an extra step closer to the constitutional precipice—implicitly acquiescing in Congress's façade of hiding agencies within the Judicial Branch to avoid the courts and prevent the judiciary from judging. This creative end-run should not be countenanced. Congress cannot circumvent the Constitution's established structure and this Court's authority by edict. The Eighth Circuit's

approach undermines the judicial role to interpret and apply the law as decided by this Court in favor of belied circuit precedent and untested, unreviewed agency interpretations, and must be corrected.

IV. Alternatively, this case should be remanded so the Eighth Circuit can consider the impact of *Kisor* and *Loper* in the first instance.

Although the *Kisor* majority refined *Auer/Seminole Rock* deference in an effort to preserve its constitutionality, this Court recently refused to do the same in the analogous *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), context. *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2272 (2024) (overruling *Chevron*, and noting that the doctrine "cannot be constrained by admonishing courts to be extra careful, or by tacking on a new batch of conditions").

In *Loper*, a majority of this Court overruled *Chevron*, implicitly (if not explicitly) acknowledging separation-of-powers concerns similar to those raised by Justice Gorsuch in his *Kisor* concurrence. Indeed, in framing *Chevron*'s dissonance with the Administrative Procedures Act, the Court began with the text and structure of Article III—namely, its grant of the judicial power, including "the 'interpretation of the laws,' " to the Judiciary. *Id.* at 2257 (quoting The Federalist No. 78, p. 525 (J. Cooke ed. 1961) (A. Hamilton)). It noted how "the Framers structured the Constitution to allow judges to exercise that judgment [(i.e., the judicial power)] independent of influence of the political branches." *Id.*; *see also id.* at 2268. And that structure, it held, was preserved and incorporated by the Administrative Procedures Act, which "codifies for agency cases the unremarkable, yet elemental proposition

reflected by judicial practice dating back to *Marbury*: that courts decide legal questions by applying their own judgment." *Id.* at 2261.

Chevron upset that structure by ceding the judicial power to interpret the law to administrative agencies. *See id.* at 2265–68 ("[A]lthough exercising independent judgment is consistent with the 'respect' historically given to Executive Branch interpretations, *Chevron* insists on much more. It demands that courts mechanically afford *binding* deference to agency interpretations, including those that have been inconsistent over time." (citations omitted)). In so doing, as the Court succinctly summarized, "*Chevron* . . . prevent[ed] [judges] from judging." *Id.* at 2268.

In concurrence, Justices Thomas and Gorsuch tied these threads together, making the implicit explicit: "By allowing agencies to definitively interpret laws so long as they are ambiguous, *Chevron* 'transfer[s]' the Judiciary's 'interpretive judgment to the agency.' " *Id.* at 2274–75 (Thomas, J., concurring) (alteration in original) (quoting *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 124 (2015) (Thomas, J., concurring in the judgment)); *id.* at 2284–85 (Gorsuch, J., concurring) (concluding "*Chevron* deference undermines all that," referring to, *inter alia*, Article III, section 1's "vest[ing] the judicial power in decisionmakers with life tenure").

Loper's holding thus reaffirms, if not expands upon, *Kisor*'s clear implications for the binding deference previously accorded Guidelines commentary. *See Perez*, 575 U.S. at 119–24 (Thomas, J., concurring in the judgment) ("Just as it is critical for judges to exercise independent judgment in applying statutes, it is critical for judges to exercise independent judgment in determining that a regulation properly covers

the conduct of regulated parties. Defining the legal meaning of the regulation is one aspect of that determination. *Seminole Rock* deference, however, precludes judges from independently determining that meaning."). Indeed, *Loper* overruled *Chevron* despite that doctrine's claim to at least some "conformity with the long history of judicial review of executive action." *Id.* at 111 (Scalia, J., concurring in the judgment). But no "such history justif[ies] deference to agency interpretations of [their] own regulations." *Id.* at 112. It is all the more important, then, for *Kisor*'s limits on that deference to be enforced. *See Kisor*, 588 U.S. at 580 ("But that phrase 'when [*Auer/Seminole Rock* deference] applies' is important—because it often doesn't. As described above, this Court has cabined *Auer*'s scope in varied and critical ways—and in exactly that measure, has maintained a strong judicial role in interpreting rules.").

Given that the Eighth Circuit lacked the benefit of *Loper* when considering Mr. Edwards's case, if this Court declines to conduct its own review, it should remand to the Eighth Circuit to have that court conduct a substantive review accounting for *Loper* and *Kisor*.

Conclusion

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted, and the opinion of the United States Court of Appeals for the Eighth Circuit reversed and remanded.

Respectfully submitted,

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