No. 20-

In the Supreme Court of the United States

ZIMMIAN TABB, PETITIONER,

v.

UNITED STATES OF AMERICA

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Court in *Stinson* v. *United States*, 508 U.S. 36 (1993), applying the *Seminole Rock* standard for agency deference, held "that commentary in the [U.S. Sentencing Commission's] Guidelines Manual that interprets * * * a guideline is authoritative unless it * * * is inconsistent with, or a plainly erroneous reading of, that guideline." *Id.* at 38. This Court in *Kisor* v. *Wilkie*, 139 S. Ct. 2400 (2019), "reinforce[d] the limits" of *Seminole Rock* and *Stinson*, holding that agencies may issue binding interpretations of their own regulations only when those regulations are "genuinely ambiguous," and a court errs when it defers to an agency's construction of its regulations without first "exhaust[ing] all the 'traditional tools' of construction." *Id.* at 2408, 2415; *id.* at 2424 (Roberts, C.J., concurring); *id.* at 2448 (Gorsuch, J., concurring); *id.* at 2448-2449 (Kavanaugh, J., concurring).

The courts of appeals are openly divided over a question that necessarily follows from *Kisor*—namely, whether courts may continue to defer to Guidelines commentary under *Stinson*'s "inconsistent with, or * * * plainly erroneous" standard without first deciding whether the underlying regulatory text is genuinely ambiguous. The Sixth and D.C. Circuits say no; seven others say yes.

The questions presented are:

1. Whether courts may defer to Sentencing Guidelines commentary without first determining that the underlying Guideline is genuinely ambiguous.

2. Whether the Sentencing Commission can use commentary to rewrite a Guideline that applies to "prohibit[ions]" on the "distribution" of drugs, U.S.S.G. § 4B1.2, to apply to conspiracies and attempts to distribute drugs.

RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

- *United States* v. *Tabb*, No. 16-cr-747, U.S. District Court for the Southern District of New York. Judgment entered January 25, 2018.
- *United States* v. *Tabb*, No. 18-338, U.S. Court of Appeals for the Second Circuit. Judgment entered February 6, 2020; rehearing denied June 1, 2020.

TABLE OF CONTENTS

Table of Contents—Continued Page

TABLE OF AUTHORITIES

Cases Page(s)

Cases—Continued Page(s)

Cases—Continued Page(s)

Cases—Continued Page(s)

Statutes and Regulations

Statutes and Regulations—Continued Page(s)

Other Authorities

Other Authorities—Continued Page(s)

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-14a) is reported at 949 F.3d 81. The sentencing order of the district court (App. 15a-23a) is unreported.

JURISDICTION

The court of appeals entered judgment on February 6, 2020. App.1a. The court denied a timely petition for rehearing en banc on June 1, 2020. App. 24a. This Court has jurisdiction under 28 U.S.C. 1254(1).

GUIDELINES PROVISIONS

Section 4B1.2 of the 2016 U.S. Sentencing Guidelines 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 to § 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.

Additional provisions of the U.S. Code and the 2016 U.S. Sentencing Guidelines are reproduced in appendices D and E.

INTRODUCTION

In *Kisor* v. *Wilkie*, this Court reaffirmed and "reinforce[d]," 139 S. Ct. 2400, 2408 (2019), one of the fundamental limits of administrative law: "a court should not * * * defe[r]" to an agency's interpretation of its own regulation "unless the regulation is genuinely ambiguous." *Id.* at 2415. That principle safeguards fundamental separation of powers interests. Otherwise, deferring to the agency's position would "permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation." *Ibid.* (quoting *Christensen* v. *Harris Cty.*, 529 U.S. 576, 588 (2000)).

This case involves the application of that principle in a context that directly affects the lives of hundreds of thousands of people: criminal sentencing. Applying the standard announced in *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945), this Court decades ago held that the U.S. Sentencing Commission's "commentary in the Guidelines Manual that interprets or explains a [sentencing] guideline is authoritative unless it * * * is inconsistent with, or a plainly erroneous reading of, that guideline." *Stinson* v. *United States*, 508 U.S. 36, 38 (1993). *Kisor* recognized that this "classic formulation of the [*Seminole Rock*] test" governing agency interpretive rules "may suggest a caricature of the doctrine, in which deference is 'reflexive.'" 139 S. Ct. at 2415 (quoting *Pereira* v. *Sessions*, 138 S. Ct. 2105, 2120 (2018) (Kennedy, J., concurring)). The courts of appeals are openly divided between circuits that defer to Guidelines commentary only after finding the underlying Guideline ambiguous, and circuits that are reflexively deferential.

While the significance of this split extends beyond any particular Guideline, it arises in the context of the "career offender" recidivism enhancement, which imposes "severe, even Draconian, penalties" on defendants with specified prior convictions. App. 3a n.2.

The Sentencing Commission, through notice-and-comment rulemaking and subject to congressional review, issued a Guideline that defined a predicate "controlled substance offense" as "an offense * * * that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance." U.S.S.G. § 4B1.2(b). The Commission then (*without* notice and comment or congressional review) issued commentary interpreting that phrase to reach not just criminal prohibitions on manufacturing, importing, exporting, distributing, and dispensing illegal drugs, but also conspiracies and attempts. The D.C. Circuit held that the Guideline's text unambiguously excluded such inchoate crimes and refused to defer to the commentary. See *United States* v. *Winstead*, 890 F.3d 1082, 1091 (2018) (Silberman, J.). The Sixth Circuit then reached the same conclusion en banc—and did so *unanimously*. *United States* v. *Havis*, 927 F.3d 382, 386-387 (per curiam), reconsideration denied, 929 F.3d 317 (2019).

By contrast, seven courts of appeals, including the Second Circuit here, have employed a reflexively deferential mode of analysis that requires no threshold determination of ambiguity. They have done so largely by summarily reaffirming pre-*Kisor* circuit precedent that did not analyze the Guideline text before granting deference. Several have made clear, however, that they "would follow the Sixth and D.C. Circuits' lead" if they "were free to do so." *United States* v. *Crum*, 934 F.3d 963, 966 (9th Cir. 2019) (per curiam). This split is enormously consequential even considering only the Career Offender Guideline, which affects approximately 1,500 defendants per year,[1] and drastically increases sentencing exposure—it added *more than nine years* to

[1] U.S. Sentencing Comm'n, *2018 Annual Report and Sourcebook of Federal Sentencing Statistics* 77, https://bit.ly/3e6AWTB.

petitioner's Guidelines range. And the standard for judicial review of commentary promulgated without notice and comment applies universally across the Guidelines, potentially affecting every one of the approximately 75,000 federal defendants sentenced each year. See U.S. Sentencing Comm'n, *Sentence Imposed Relative to the Guideline Range: Fiscal Year 2019*, https://bit.ly/2H00VjJ. Only this Court can resolve this disagreement, restore the national uniformity animating Congress's adoption of Guidelines sentencing, and ensure that agencies are not permitted to make new rules without following the procedures Congress has prescribed.

This case thus involves a frequently recurring and "important principle of administrative law as applied in the context of criminal sentencing practices." *United States* v. *Paauwe*, 968 F.3d 614, 618 (6th Cir. 2020). If anything, the Sentencing Commission's interpretations warrant even stricter limits than those applied in the civil context at issue in *Kisor*: "[A]s this is a criminal case, and applying [deference] would extend [petitioner's] time in prison, alarm bells should be going off." *United States* v. *Havis*, 907 F.3d 439, 450 (6th Cir. 2018) (Thapar, J., concurring), on rehearing, 927 F.3d 382. This Court's review is urgently needed.

STATEMENT

A. Legal Background

1. In *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), this Court addressed the meaning of a regulation issued by the Office of Price Administration. The Court explained that since the case "involve[d] an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt." *Id.* at 413-414. While the Court deemed the regulation "clear," it also stated that "the ultimate criterion is the

administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Id.* at 414. *Seminole Rock*'s "plainly erroneous or inconsistent" formulation soon became the definitive standard governing agency interpretations of their own rules, and later became known as *Auer* deference after this Court's leading decision applying *Seminole Rock* to an agency amicus brief, see *Auer* v. *Robbins*, 519 U.S. 452 (1997).

In the years that followed, courts applied *Seminole Rock* and *Auer* to uphold "agency interpretations sometimes without significant textual analysis of the underlying regulation." *Kisor*, 139 S. Ct. at 2414. Although for a time this Court sent "mixed messages," *ibid.*, by 2000 the Court was emphatic that "*Auer* deference is warranted only when the language of the regulation is ambiguous." *Christensen*, 529 U.S. at 588. Otherwise, deferring "to the agency's position would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation." *Ibid.*

2. Following a series of opinions by members of this Court questioning *Auer*, the Court granted certiorari in *Kisor* to decide whether to overrule it. The Court declined to do so. But all nine Justices agreed that at minimum the Court needed to "reinforc[e] some of the limits inherent in the *Auer* doctrine." 139 S. Ct. at 2415; *id.* at 2424 (Roberts, C.J., concurring); *id.* at 2448 (Gorsuch, J., concurring); *id.* at 2448-2449 (Kavanaugh, J., concurring). Central among those limits was that "a court should not afford *Auer* deference unless the regulation is genuinely ambiguous." *Id.* at 2415 (citing *Christensen*, 529 U.S. at 588). "And before concluding that a rule is genuinely ambiguous, a court must exhaust all the 'traditional tools' of construction." *Ibid.* (quoting *Chevron U.S.A. Inc.* v. *Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984)). The Court explained that limitation was

necessary because *Seminole Rock*—the "most classic formulation of the test"—"may suggest a caricature of the doctrine, in which deference is reflexive," and at times the Court "ha[d] applied *Auer* deference without significant analysis of the underlying regulation." *Id.* at 2414-2415 (quotation marks omitted).

3. The U.S. Sentencing Commission is a federal agency in the judicial branch charged with promulgating "guidelines * * * for use of a sentencing court in determining the sentence to be imposed in a criminal case." 28 U.S.C. 994(a). Congress directed that the Commission "periodically * * * review and revise, in consideration of comments and data coming to its attention, [its] guidelines." 28 U.S.C. 994(o).

The Commission must submit all proposed amendments to Congress, which then has six months to review amendments before they take effect. 28 U.S.C. 994(p). The Commission must comply with the Administrative Procedure Act (APA), 5 U.S.C. 553, by publishing notice of proposed amendments in the Federal Register and giving the public an opportunity to comment. 28 U.S.C. 994(x); see, *e.g.*, 83 Fed. Reg. 65,400 (Dec. 20, 2018). The Commission's promulgation of Guidelines thus closely resembles rulemaking conducted by other federal agencies like the EPA or the Department of Labor, which are similarly governed by the APA's notice-and-comment requirements and whose major rules are subject to a 60-day congressional review period pursuant to the Congressional Review Act of 1996, 5 U.S.C. 801; see *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress.").[2]

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[2] In *Mistretta* v. *United States*, 488 U.S. 361, 363-369 (1989), this Court held that despite the Commission's "unusual hybrid" nature,

Though the Commission's primary work product is the Sentencing Guidelines, it also produces official commentary on those Guidelines. Unlike with the Guidelines themselves, the Commission in issuing commentary need not seek congressional review and need not comply with the APA's notice-and-comment requirements.

4. This Court addressed the relationship between Guidelines and commentary in *Stinson* v. *United States*. *Stinson* explained that "the guidelines are the equivalent of legislative rules adopted by federal agencies" because "[t]he 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." 508 U.S. at 44-45 (citations omitted). And because the Guidelines were equivalent to other agency rules, *Stinson* concluded that the Commission's interpretive commentary on Guidelines "is akin to an agency's interpretation of its own legislative rules." *Id.* at 45. *Stinson* thus applied *Seminole Rock* and held that so long as the Commission's "interpretation of its own regulations does not violate the Constitution or a federal statute, it must be given 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" *Ibid.* Under *Seminole Rock*, the Court upheld the Commission's commentary, which provided that the possession of a firearm by a convicted felon was not a "crime of violence" because, in the Commission's judgment, it did not "involve[] conduct that presents a serious potential risk of physical injury to another." *Id.* at 38.

5. In 1987, the Sentencing Commission promulgated the Career Offender Guideline, U.S.S.G. § 4B1.1. See U.S. Sentencing Comm'n, *Guidelines Manual* § 4B1.1

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the body permissibly operated as an "independent agency" in promulgating and amending Guidelines subject to notice-and-comment procedures and congressional review. *Id.* at 393-394.

(1987), http://bit.ly/2F4lzL4. The Career Offender Guideline establishes substantially increased sentences for defendants convicted of a felony that is either a "crime of violence" or a "controlled substance offense" where the defendant had "at least two prior felony convictions of either a crime of violence or a controlled substance offense." U.S.S.G. § 4B1.1 (2016).[3]

Section 4B1.2 defines a "controlled substance offense." The term "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." *Id.* § 4B1.2(b).

Neither § 4B1.2's definition of a "controlled substance offense," nor the general statutory directive the Commission purported to follow when enacting it, 28 U.S.C. 994(h), includes inchoate drug offenses like attempts and conspiracies. But in 1989, the Commission amended the commentary to the Guideline to provide that the definition of a "'controlled substance offense' include[s] the offenses of aiding and abetting, conspiring, or attempting to commit such offenses." U.S. Sentencing Comm'n, *Guidelines Manual* § 4B1.2(2) n.2 (1989), http://bit.ly/2WpUhVn. That commentary has accompanied the Guideline since. U.S.S.G. §4B1.2 n.1 (2016).

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[3] The 2016 Guidelines govern petitioner's sentence. App.16a. The relevant portions of the Career Offender Guideline and its commentary remain identical today, see U.S.S.G. §§ 4B1.1, 4B1.2(b) (2018).

B. Proceedings Below

1. Petitioner Zimmian Tabb pleaded guilty to one count of aiding and abetting the possession of less than 4 grams of crack cocaine with intent to distribute it. App. 2a-3a. The government asserted that he qualified as a career offender under U.S.S.G. § 4B1.1 based on two prior convictions—one for attempted second-degree assault under New York law, and the other for conspiracy to distribute narcotics in violation of 21 U.S.C. 846. App. 3a. Petitioner objected to the career-offender designation, arguing, as relevant here, that the Section 846 conspiracy conviction did not qualify as a "controlled substance offense." App. 22a.[4]

2. The district court rejected his objection and applied § 4B1.1. *Id.* The court relied on the Second Circuit's decision in *United States* v. *Jackson*, 60 F.3d 128 (1995), which "explicitly held that drug conspiracy convictions under Section 846 'qualify as controlled substance offenses' for purposes of the career criminal enhancement." App. 21a. *Jackson* applied this Court's *Stinson* decision to hold that the Commentary expanding the Guideline to cover inchoate offenses was not "inconsistent with, or a plainly erroneous reading of," § 4B1.2. 60 F.3d at 131 (quoting *Stinson*, 508 U.S. at 38). Based on its career offender designation, the district court calculated a Sentencing Guidelines range of 151 to 188 months' imprisonment. App. 3a. The range without the career offender designation would have been 33 to 41 months, with no statutory minimum. *Ibid.* The court imposed a 120-month sentence. *Ibid.*

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[4] Petitioner also objected to use of the second-degree assault conviction as a predicate offense because attempted assault in New York does not require "the use, attempted use, or threatened use of physical force." App.5a-6a.

3. The court of appeals affirmed. App. 1a-14a. The court recognized that the "the Sixth and D.C. Circuits have recently agreed with Tabb's argument that Application Note 1 conflicts with the text of U.S.S.G. § 4B1.2(b) by including crimes that the Guideline text excludes." App. 11a. The court also acknowledged that "the career offender enhancement often dwarfs all other Guidelines calculations and recommends the imposition of severe, even Draconian, penalties." App. 3a n.2. But the panel recognized it was "not at liberty to revisit" its 1995 *Jackson* decision foreclosing "Tabb's proposed holding that the Guideline text forbids expanding the definition of a controlled substance offense to include conspiracies." App. 11a.

4. Petitioner sought panel rehearing and rehearing en banc. As at the panel stage, App. 46a-58a, he argued that the Second Circuit's *Jackson* decision could not be squared with the limitations on agency deference reinforced in *Kisor*, because the Career Offender Guideline was unambiguous and did not encompass conspiracy offenses. Reh'g Pet'n 3-12.

The government's initial opposition recognized the circuit split, Reh'g Opp. 7-10, but defended the decision below on the ground that the Commission is permitted to interpret the text of even unambiguous guidelines, *id.* at 5-6 (*Stinson* "did not purport to adopt the [*Auer*] doctrine's threshold requirement of ambiguity"). Approximately two months later, the government filed a "corrected" opposition conceding that, under *Kisor*, the Commission cannot interpret Guidelines unless they are "genuinely ambiguous." Corrected Reh'g Opp. 6-7. Instead, the government now argued that Application Note 1 was "the best reading" of the Guideline, or that "there is a 'genuine ambiguity'" and Application Note 1 "is a reasonable reading." *Ibid.* (quoting *Kisor*, 139 S. Ct. at 2415-2416)). The court of appeals denied rehearing.

REASONS FOR GRANTING THE PETITION

I. The Decision Below Cements A Circuit Split Over Whether Courts Must Make A Threshold Determination Of Ambiguity Before Deferring To An Agency's Interpretation Of Its Own Rule

Constrained by circuit precedent, the Second Circuit applied commentary "expand[ing] the definition of 'controlled substance offense'" to include inchoate offenses, App. 11a, without first making any threshold determination whether the Guideline itself is ambiguous. That decision cements a deep circuit split over whether the doctrine of agency deference articulated in *Seminole Rock*, *Stinson*, and *Auer*—whose limits were reinforced recently in *Kisor*—categorically requires courts to make a threshold determination that a regulation is genuinely ambiguous before deferring to the agency's interpretation. The D.C. Circuit and the *unanimous* en banc Sixth Circuit have held that the Commission, like any agency that promulgates rules, cannot use commentary to "interpret" unambiguous Sentencing Guidelines, and on that basis have held Application Note 1 invalid. Seven other circuits—some explicitly stating that they "would follow the Sixth and D.C. Circuits' lead" if circuit precedent left them "free to do so," *United States* v. *Crum*, 934 F.3d 963, 966 (9th Cir. 2019) (per curiam)—have held the opposite, applying a mode of analysis the clashes with what this Court has demanded.

The significance of this split extends far beyond the meaning of one particular Guideline—and indeed beyond the Guidelines as a whole—and therefore must be resolved by this Court.

A. At Least Two Circuits Refuse To Defer to Commentary When The Underlying Guideline Is Unambiguous

The Sixth Circuit and D.C. Circuit have held that the Commission cannot use commentary to expand the scope of unambiguous Guidelines language. *United States* v. *Havis*, 927 F.3d 382, 386-387 (6th Cir.) (en banc) (per curiam), reconsideration denied, 929 F.3d 317 (6th Cir. 2019); *United States* v. *Winstead*, 890 F.3d 1082, 1091 (D.C. Cir. 2018). Had petitioner been sentenced in either circuit, his Guidelines range would have been 33 to 41 months, not 151 to 188 months.

The D.C. Circuit in *Winstead* acknowledged "the decisions of several of [its] sister circuits * * * defer[ring] to Application Note 1." 890 F.3d at 1091. But the court consciously broke from the pack, holding that "the commentary adds a crime, 'attempted distribution,' that is not included in the guideline." *Id.* at 1090. The court concluded that "Section 4B1.2(b) presents a very detailed 'definition' of controlled substance offense that clearly excludes inchoate offenses. *Expressio unius est exclusio alterius*." *Id.* at 1091. Writing for the court, Judge Silberman reasoned "that venerable canon applies doubly here," because the Commission in the very same Guideline defined a "crime of violence" to include crimes requiring "attempted use" of physical force. *Ibid.* Thus, Judge Silberman explained, the Commission had shown that it "knows how to include attempted offenses when it intends to do so." *Ibid.*

In *Havis*, the en banc Sixth Circuit followed suit. The court *unanimously* refused the government's request to defer to Application Note 1, holding that "sidesteps [the] threshold question" whether there was any ambiguity requiring explanation. 927 F.3d at 386. The court found no ambiguity: "The guideline expressly names the crimes that qualify as controlled substance offenses

* * *; none are attempt crimes." *Ibid.* And, like the D.C. Circuit, the court noted that the Career Offender Guideline shows that "the Commission knows how to include attempt crimes when it wants to." *Ibid.* "To make attempt crimes a part of § 4B1.2(b)," the court explained, "the Commission did not interpret a term in the guideline itself—no term in § 4B1.2(b) would bear that construction." *Ibid.* Rather, the Commission had "used Application Note 1 to *add* an offense not listed in the Guideline." *Ibid.* If that addition could be sustained, then "the institutional constraints that make the Guidelines constitutional in the first place—congressional review and notice and comment—would lose their meaning." *Id.* at 386-387 (citing *Winstead*, 890 F.3d at 1092).

The Sixth Circuit had reconsidered the case en banc after the panel, in four separate opinions among the three judges, highlighted the need for reconsideration of precedent that had treated the commentary as controlling. 907 F.3d 439. Judge Thapar's separate concurring opinion explained that "[i]f there was ever a case to question deference to administrative agencies under *Auer* * * * or more specifically to the Sentencing Commission under the *Auer*-like *Stinson* * * * this is it." *Id.* at 450.

The Sixth Circuit has since applied *Havis* to other Sentencing Guidelines. Evaluating a Guideline that enhances sentences based on a pattern of sexual misconduct, the court invoked *Havis* as "an important principle of administrative law as applied in the context of criminal sentencing practices." *Paauwe*, 968 F.3d at 618. That principle is that "a Guideline's administrative commentary may not expand the scope of the Guideline beyond its plain text." *Ibid.*; see *id.* at 617 ("To determine a Guideline's scope, we begin, as always, with its text."); *United States* v. *Hill*, 963 F.3d 528, 537 (6th Cir. 2020) ("[T]he commentary's definition of abducted governs *on-*

ly if it comports with the ordinary import of the defined word in the guideline.").

Decades ago, the Third Circuit deferred under *Stinson* to the Guidelines "commentary's expansion of the definition of a controlled substance offense to include inchoate offenses." *United States* v. *Hightower*, 25 F.3d 182, 187 (1994). But this year, that court *sua sponte* granted rehearing en banc to address "whether, in light of *Kisor*, it remains appropriate to defer to the U.S. Sentencing Commission's commentary to U.S.S.G. § 4B1.2." Order, *United States* v. *Nasir*, No. 18-2888 (Mar. 4, 2020). Argument was held June 24, 2020. The decision is pending.

B. Seven Circuits Have Deferred To Commentary Without Making Any Determination That The Guideline Is Ambiguous

The First, Second, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits have held that the Commission's commentary is binding under a different mode of analysis that requires no threshold determination of ambiguity.

1. The Eighth Circuit, for example, recently reaffirmed circuit precedent that "deferred to the commentary [on § 4B1.2], not out of its fidelity to the Guidelines text, but rather because it is not a 'plainly erroneous reading' of it." *United States* v. *Broadway*, 815 Fed. Appx. 95, 96 (8th Cir. 2020) (quoting *United States* v. *Mendoza-Figueroa*, 65 F.3d 691, 693 (8th Cir. 1995) (en banc)). The court acknowledged that "[t]he commentary extends the reach of section 4B1.2(b) to attempted distribution, even though the provision itself lists only completed acts." *Ibid.* The panel bemoaned that it was "not in a position to overrule" that precedent, even though "there have been some major developments since 1995," including *Kisor*, which the panel noted holds that "*Au-*

er/Seminole Rock deference is triggered only by 'genuine[] ambigu[ity].'" *Id.* at 96 n.2.

Likewise, the Ninth Circuit stated that "[i]f we were free to do so, we would follow the Sixth and D.C. Circuits' lead." *Crum*, 934 F.3d at 966. But while the court was "troubled that the Sentencing Commission has exercised its interpretive authority to expand the definition of 'controlled substance offense' * * * without any grounding in the text of § 4B1.2," it was "compelled by" circuit precedent to defer to the commentary. *Ibid.*

Although acknowledging the split, the First Circuit likewise reaffirmed circuit precedent finding "no inconsistency" between the Guideline and commentary, despite the serious misgivings of judges on the panel. See *United States* v. *Lewis*, 963 F.3d 16, 22 (1st Cir. 2020). Two judges wrote a separate concurrence explaining "like the Ninth Circuit, were we free to do so," they "would follow the Sixth and D.C. Circuits' lead and hold that Application Note 1's expansion of § 4B1.2(b) to include conspiracies and other inchoate crimes does not warrant deference." *Id.* at 27 (Torruella & Thompson, JJ., concurring) (quotation marks omitted). The concurrence argued that Application Note 1 was unmoored from the Guidelines' text, and that the circuit precedent approving it "raises troubling implications for due process, checks and balances, and the rule of law." *Id.* at 28.

The Seventh Circuit has likewise reaffirmed precedent that "rejected the textual arguments that the D.C. Circuit later found persuasive in *Winstead*." *United States* v. *Adams*, 934 F.3d 720, 729 (7th Cir. 2019) ("the application note's inclusion of conspiracy did not conflict with the text of the Guideline itself."). And the Tenth Circuit recently cemented precedent deferring to the commentary's expansion not because the Guideline provision was ambiguous, but because the commentary "can be reconciled with the language of guideline § 4B1.2."

United States v. *Martinez*, 602 F.3d 1166, 1174 (10th Cir. 2010); accord *United States* v. *Chavez*, 660 F.3d 1215, 1228 (10th Cir. 2011) (holding that commentary including inchoate crimes "is authoritative"); see *United States* v. *Lovelace*, 794 Fed. Appx. 793, 795 (10th Cir. 2020).

The Eleventh Circuit has granted commentary even stronger deference. In holding that Application Note 1 controls, the court viewed the commentary as shaping the meaning of the terms in the Guideline's text: "Application Note 1 informs how we should interpret [§ 4B1.2's] definition. * * * *Because* Application Note 1 tells us that an offense prohibits the manufacture of a controlled substance when it prohibits aiding and abetting, conspiring, and attempting that manufacture, * * * we must not construe 'prohibit' too narrowly." *United States* v. *Lange*, 862 F.3d 1290, 1295 (11th Cir. 2017) (emphasis added). Although acknowledging the circuit split, the court expressly reaffirmed this conclusion and analytical approach after *Kisor*. *United States* v. *Bass*, No. 19-15148, 2020 WL 6065979, *2 (11th Cir. Oct. 15, 2020); *United States* v. *Cingari*, 952 F.3d 1301, 1308 (11th Cir. 2020).

The Second Circuit's decision here is of a piece with these holdings. Petitioner argued that *Kisor* demands a different mode of analysis that begins with the Guideline's text and considers commentary only if the Guideline is genuinely ambiguous. App. 51a-58a. The court nonetheless reaffirmed *Jackson* without conducting any independent analysis of the Guideline—even while acknowledging that the commentary "expand[ed] the definition of a controlled substance offense." App. 11a. The Second Circuit has even doubled down on its reasoning, recently acknowledging the sharp division among the courts of appeals but upholding Application Note 1's addition of inchoate offenses because it "is not inconsistent

with the guideline." *United States* v. *Richardson*, 958 F.3d 151, 155 (2d Cir. 2020).

C. This Court's Review Is Necessary To Resolve The Split

1. The split will not dissipate without this Court's intervention. Post-*Kisor*, the First, Second, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits have expressly declined to revisit prior circuit precedent deferring to this commentary without making a threshold determination of ambiguity. App. 11a; *Lewis*, 963 F.3d at 22; *Adams*, 934 F.3d at 729; *Broadway*, 815 Fed. Appx. at 96; *Crum*, 934 F.3d at 966; *Lovelace*, 794 Fed. Appx. at 795; *Bass*, 2020 WL 6065979. And aside from the Third Circuit, which will soon decide whether to overrule its circuit precedent in light of *Kisor*, see p. 14, *supra*, these courts have refused rehearing en banc. App. 24a; Order, *Lewis*, No. 18-1916 (1st Cir. Oct. 2, 2020); Order, *Crum*, No. 17-30261 (9th Cir. Oct. 29, 2019).

2. Nor can the Sentencing Commission resolve this split. When courts are divided over the meaning of a particular Sentencing Guideline, this Court often declines review on the theory that the Commission itself can amend the relevant Guideline. See *Braxton* v. *United States*, 500 U.S. 344, 348-349 (1991).[5] But no Guidelines amendment *could* answer the question presented. Cf. *Koon* v. *United States*, 518 U.S. 81 (1996) (granting re-

[5] Consideration of the Commission's ability to resolve splits as a factor counseling against review is itself questionable: If applied consistently, it would counsel against review to resolve splits over the meaning of a regulation on the theory that the agency could amend the regulation. But this Court (appropriately) routinely grants review to consider such issues. *E.g.*, *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 511-512 (1994) (granting review to resolve a circuit "conflict * * * concerning the validity of the Secretary's interpretation of" a regulatory clause).

view to determine standard for reviewing Guidelines departures).

First, the question dividing the circuits involves not just the application of a single Guideline, but a structural question governing the relationship between *all* Guidelines and their commentary. This involves "an important principle of administrative law as applied in the context of criminal sentencing practices," *Paauwe*, 968 F.3d at 618—namely, whether there is any "interpretive" role for the Commission to fulfill before a court has determined that the Guideline is ambiguous. The D.C. and Sixth Circuits hold that in deciding whether Guidelines commentary applies, courts must "begin * * * with [the] text" of the Guideline. *Id.* at 617-618. These courts hold that "a Guideline's administrative commentary may not expand the scope of the Guideline beyond its plain text." *Id.* at 618 (analyzing U.S.S.G. § 4B1.5(b)(1)).

The other set of courts, including the court below, take a fundamentally different approach: turning immediately to agency commentary; applying that commentary absent irreconcilable conflict with the regulatory text; and steadfastly refusing to reconsider precedent reflexively deferring to commentary even absent a threshold finding of ambiguity. The Eleventh Circuit, for example, recently reaffirmed that "the guideline and the commentary *must* be read together"—"[t]he commentary sometimes requires interpreting a guideline in a way that 'may not be compelled by the guideline text.'" *Cingari*, 952 F.3d at 1308 (emphasis added) (analyzing U.S.S.G. § 2B1.1).

Even if the Commission were to resolve one acute manifestation of this fundamental division by amending the Career Offender Guideline, the larger legal question would remain unresolved. Circuits frequently divide over how to interpret a Guideline and, to solve these conflicts, the Commission frequently proposes amendments not to

the Guideline itself, but to the commentary. *E.g., United States* v. *Muldrow*, 844 F.3d 434, 438-439 (4th Cir. 2016). Every time the Commission promulgates commentary to resolve a circuit split, it immediately raises the question presented in this case.[6]

Second, the division here is not specific to the Guidelines. It could just as easily arise with respect to any other administrative agency—and indeed already has. Courts that have adhered to precedent making no threshold finding of ambiguity not only flout *Kisor*, see Part II.A, *infra*, but also divide sharply with decisions expressly holding that prior judicial decisions that did not make a threshold finding of ambiguity "do[] not survive the Supreme Court's recent decision in *Kisor*." *Ovalle* v. *Att'y Gen. United States*, 791 Fed. Appx. 333, 336 (3d Cir. 2019); accord *Reyes-Vargas* v. *Barr*, 958 F.3d 1295, 1307 (10th Cir. 2020) ("*Kisor* has narrowed *Auer* deference, requiring more rigorous review by courts reviewing an agency's interpretation of its own regulation. We must apply *Kisor*'s framework, whatever * * * any other pre-*Kisor* case held."). That division of authority *cannot* be solved by the commission and independently warrants review.

II. The Decision Below Conflicts With This Court's Precedent

Review is also necessary because the analytical approach underlying the Second Circuit's decision here

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[6] It is thus of no moment that this Court has denied petitions raising the narrow question of whether Application Note 1 conflicts with the Career Offender Guideline under *Stinson*'s standard. *Crum* v. *United States*, No. 19-7811; *Richardson* v. *United States*, No. 20-5267; *Merritt* v. *United States*, No. 19-7103; *McWilliams* v. *United States*, No. 20-5513; *Adams* v. *United States*, No. 19-6748. None of the petitions presented broader questions with significance beyond that particular Guideline.

fundamentally conflicts with this Court's precedent limiting the deference owed to agency interpretations of their own rules. Under a proper application of this Court's precedents, the court below could not have treated the agency's commentary as binding. Absent this Court's intervention, it and like decisions will evade *Kisor*'s limits indefinitely.

A. The Second Circuit's Reflexive Deference To The Sentencing Commission Conflicts With This Court's Precedent

Neither the decision below nor the circuit precedent on which it relied analyzed the text of the Career Offender Guideline. *Jackson*, the court's 1995 precedent, reflexively deferred to the commentary's addition of inchoate offenses, explaining that "even though the broadened definition of 'controlled substance offenses' articulated in the commentary does not appear in an actual guideline, it is binding authority." 60 F.3d at 131. *Jackson*'s sole analysis on this point was its conclusion: "Application Note 1 is authoritative because it interprets and explains § 4B1.2 by listing offenses that constitute 'controlled substance offenses' and 'crimes of violence.'" *Ibid.* And the decision below, while openly acknowledging that Application Note 1 "expand[ed] the definition of a controlled substance offense," reaffirmed *Jackson* without any independent analysis of the Guideline. App. 11a. It did so without mentioning *Kisor*, despite petitioner's emphatic argument that *Kisor* required that *Jackson* be reevaluated. See App. 51a-58a.

That analysis cannot be squared with the approach this Court has required. *Kisor* explained that *Seminole Rock*'s and *Stinson*'s "classic formulation of the test" governing agency interpretive rules "may suggest a caricature of the doctrine, in which deference is 'reflexive.'" 139 S. Ct. at 2415 (quoting *Pereira*, 138 S. Ct. at 2120 (Kennedy, J., concurring)); *id.* at 2411 n.3. It described

courts as having sometimes "applied *Auer* deference without significant analysis of the underlying regulation." *Id.* at 2414. The Court thus took pains to "reinforce[e] some of the limits inherent in the *Auer* doctrine." *Id.* at 2415. "First and foremost" among the limits was that "a court should not afford *Auer* deference unless the regulation is genuinely ambiguous." *Ibid.* "[A] court cannot wave the ambiguity flag just because it found the regulation impenetrable on first read." *Ibid.* "And before concluding that a rule is genuinely ambiguous, a court must exhaust all the 'traditional tools' of construction"—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." *Ibid.* (quoting *Chevron*, 467 U.S. at 843 n.9; and *Pauley* v. *BethEnergy Mines, Inc.*, 501 U.S. 680, 707 (1991) (Scalia, J., dissenting)). "If uncertainty does not exist, there is no plausible reason for deference." *Ibid.* Courts are "obligat[ed]" to perform such analysis in "perform[ing] their reviewing and restraining functions." *Ibid.*

There is no basis for exempting the Commission from these principles. The Commission, like other agencies, engages in notice-and-comment rulemaking subject to congressional review. 28 U.S.C. 994(p), (x). The Commission, like other agencies, then further interprets those rules without those procedural safeguards. That is precisely why *Stinson* held that Guidelines commentary should "be treated as an agency's interpretation of its own legislative rule." 508 U.S. at 44. *Kisor* explicitly reaffirmed the analogy, citing *Stinson* as an example of a context where ordinary principles of agency deference apply. 139 S. Ct. at 2411 n.3.

If anything, the Commission's interpretations warrant *even stricter* limits than this Court has imposed in the civil context where *Auer* developed. "[A]s this is a criminal case, and applying *Auer* would extend [petition-

er's] time in prison, alarm bells should be going off." *Havis*, 907 F.3d at 450 (Thapar, J., concurring). "It is one thing to let the Commission, despite its 'unusual' character, promulgate Guidelines that influence how long defendants remain in prison. It is entirely another to let the Commission interpret the Guidelines on the fly and without notice and comment—one of the limits that the Supreme Court relied on in finding the Commission constitutional in the first place." *Id.* at 451 (quoting *Mistretta*, 488 U.S. at 412); see also *Guedes* v. *Bureau of Alcohol, Tobacco, Firearms & Explosives*, 140 S. Ct. 789, 790 (2020) (statement of Gorsuch, J., respecting denial of certiorari) ("[W]hatever else one thinks about [judicial deference], it has no role to play when liberty is at stake."); *Gutierrez-Brizuela* v. *Lynch*, 834 F.3d 1142, 1155 (10th Cir. 2016) (Gorsuch, J., concurring) ("The Supreme Court has expressly instructed us not to apply [judicial] deference when an agency seeks to interpret a criminal statute."). In the criminal context, strict enforcement of the limitations on agency deference set forth in *Kisor* is *the bare minimum*.

Just as the Commission cannot resolve the circuit split here, section I.C, *supra*, the Commission cannot resolve the conflict between the Second Circuit's rationale here and this Court's doctrine. The Commission can amend individual Guidelines, but cannot dictate the judicial standard of review governing the Commission's interpretations of its Guidelines. Nor can the Commission dictate whether courts may adhere to old precedent deferring to agency interpretations without analyzing whether the rule is genuinely ambiguous. This Court's review is necessary to ensure that courts do not permit agencies to effectively rewrite rules without the liberty-protective process Congress requires.

B. Application Note 1 Is Invalid

Under the principles this Court has established for considering agency interpretations, which look to the "plain meaning" of the regulation and "carefully consider[s] [its] text, structure, history, and purpose" before declaring it ambiguous, *Kisor*, 139 S. Ct. at 2419, 2415, Application Note 1 is entitled to no weight.

Petitioner was convicted under 21 U.S.C. 846, which prohibits conspiring to distribute drugs. The sole question is thus whether Section 846 is an offense "that prohibits the manufacture, import, export, distribution,[] dispensing," or "possession * * * with intent to distribute" drugs. U.S.S.G. § 4B1.2. Under the traditional tools of construction, it unambiguously is not. To "prohibit" something is to "forbid" it. See, *e.g.*, *Prohibit*, Black's Law Dictionary (10th ed. 2014) ("to forbid by law"). To say that forbidding *agreement* to distribute is the same as forbidding *distribution* "would take any modern English speaker (not to mention any criminal lawyer) by surprise." *Lewis*, 963 F.3d 16 at 27-28 (Torruella & Thompson, JJ., concurring). If the Guideline covered "offenses that prohibit driving under the influence," no one would think it captured underage drinking, or selling alcohol, or public drunkenness. See *Havis*, 927 F.3d at 382 (en banc) (per curiam) ("[T]he guideline's boilerplate use of the term 'prohibits' simply states the obvious: criminal statutes proscribe conduct.").

The text of §4B1.2(b) need not expressly exclude inchoate offenses to forbid the Commission from expanding it to include such offenses. "As a rule, a definition which declares what a term 'means' * * * excludes any meaning that is not stated." *Burgess* v. *United States*, 553 U.S. 124, 130 (2008); see Antonin Scalia & Bryan A. Garner, *Reading Law* 93 (2012) ("The principle that a matter not covered is not covered is so obvious that it seems absurd to recite it."). Section 4B1.2's definition

lists several particular prohibitions yet says nothing about prohibitions of agreements to distribute. *Havis*, 907 F.3d at 450 (Thapar, J., concurring) ("Interpreting a menu of 'hot dogs, hamburgers, and bratwursts' to include pizza is nonsense.").

If the text of § 4B1.2 left any doubt, the Commission "showed within § 4B1.2 itself that it knows how to include [inchoate] offenses when it intends to do so." *Winstead*, 890 F.3d at 1091. Section 4B1.2(a)(1)—part of the same Guideline housing the definition of a controlled substance offense—defines a "crime of violence" as an offense that "has as an element the use, *attempted use*, or threatened use of physical force." And a host of other Guidelines—including one addressing unlawful manufacturing, importing, exporting, or trafficking of narcotics—expressly cross-reference a Guideline that covers attempt, solicitation, and conspiracy. See U.S.S.G. §§ 2D1.1, 2X1.1, 2K1.3, 2K1.5, 2K2.5, 2L2.2.

Because the Guidelines are unambiguous on this question, commentary purporting to expand the Career Offender Guideline is without effect. This Court should grant review to resolve the circuit split and to vindicate the principles of agency deference under which the decision below cannot stand.[7]

III. The Questions Presented Are Important

The courts' failure to follow the limitations this Court in *Kisor* found necessary to reinforce is extremely

[7] The Commission has recognized the deficiency in the Guideline: it issued a notice of its proposal to amend § 4B1.2 by adding a new subsection that covers inchoate offenses. See 83 Fed. Reg. 65,400, 65,413 (Dec. 20, 2018). But the Commission has failed to act on the proposal for nearly two years—while literally *thousands* more defendants have been sentenced under the Career Offender Guideline—because it has only two voting members and has long lacked a quorum. See 28 U.S.C. 994(a), (p).

important, both constitutionally and practically. Decisions founded on deference to "interpretations" of unambiguous regulations violate the separation of powers, sanction *ultra vires* agency action, and deprive individuals of fair notice. This Court's review is necessary to reinforce that this Court meant what it has now repeatedly said: A regulation must be *ambiguous* before a court will defer to an agency's "interpretation" of it. *Kisor*, 139 S. Ct. at 2415; *Christensen*, 529 U.S. at 588 ("*Auer* deference is warranted only when the language of the regulation is ambiguous."). And this Court has not yet had occasion to apply *Kisor* in the criminal context.

A. The Continued Misreading Of *Stinson* Reveals That Courts Fail To Recognize That Deference Implicates Separation Of Powers Concerns

1. The scope of an agency's authority to interpret its own regulations raises separation of powers issues of the highest order, as reflected in this Court's frequent review of such issues. An agency with power to interpret *un*ambiguous regulatory text has, in effect, limitless authority to legislate as it sees fit without following even minimal formal limits designed to circumscribe lawmaking by non-legislative branches. See *In re Sinclair*, 870 F.2d 1340, 1343-1344 (7th Cir. 1989) (Easterbrook, J.) (explaining that procedural formality is essential to the lawful exercise of delegated lawmaking authority); *Havis*, 907 F.3d at 450-451 (Thapar, J., concurring) (same). And the delegation of legislative power occurs on a massive scale, given that the administrative state "wields vast power and touches almost every aspect of daily life." *Free Enter. Fund* v. *Public Co. Accounting Oversight Bd.,* 561 U.S. 477, 499 (2010).

Every member of this Court has either written, joined, or written approvingly of an opinion explaining that deference to interpretations of unambiguous regulatory text violates fundamental separation of powers

principles at the heart of our constitutional system. See *Kisor*, 139 S. Ct. at 2421 (explaining that *Auer* deference "properly understood" does not violate separation of powers principles); *id.* at 2438 (2019) (Gorsuch, J., concurring) ("*Auer* represents no trivial threat to these foundational [separation-of-powers] principles"); *Perez* v. *Mortg. Bankers Ass'n*, 575 U.S. 92, 119 (2015) (Thomas, J., concurring) ("*Seminole Rock* * * * represents a transfer of judicial power to the Executive Branch, and it amounts to an erosion of the judicial obligation to serve as a 'check' on the political branches"); *Decker* v. *Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 615 (2013) (Roberts, C.J., concurring) (Justice Scalia's separate opinion "raise[d] serious questions" about propriety of *Auer* deference); *Meza Morales* v. *Barr*, 973 F.3d 656, 664 (7th Cir. 2020) (Barrett, J.) ("*Auer* only applies, however, to agency interpretations of genuinely ambiguous regulations—and the Supreme Court has recently warned us not to leap too quickly to the conclusion that a rule is ambiguous." (citing *Kisor*, 139 S. Ct. at 2415)); *Gutierrez-Brizuela*, 834 F.3d at 1155 (Gorsuch, J., concurring) (the concentration of power in administrative agencies warrants "less deference from other branches, not more").

The lower courts continue to adhere to precedents that *mandate* deference to agency interpretations of *un*-ambiguous regulations, section I.B, *supra*—even when alerted that *Kisor* and similar authorities have identified the dangers of giving a single branch both law-making and law-interpreting functions. See App. 11a, 51a-58a; *Broadway*, 815 Fed. Appx. at 96 & n.2; *Crum*, 934 F.3d at 966; *Lewis*, 963 F.3d at 27 (Torruella & Thompson, JJ., concurring). As demonstrated by the numerous recent cases involving just the application of the Career Offender Guideline, this issue recurs frequently. And as this Court has noted, cases applying the very same test for agency deference applicable here "are legion." *Kisor*,

139 S. Ct. at 2412 n.3. This Court in *Kisor* found it necessary to "reinforc[e] some of the limits inherent in the *Auer* doctrine." *Id.* at 2415. The same action is urgently needed here.

B. The Hazards Of Reflexive Deference Are At Their Peak In Guidelines Sentencing

The separation of powers concerns with judicial deference to agency interpretations of their own regulations are at their apex in the criminal context. Pp. 21-22, *supra*. This Court's review would be badly needed even if this were a civil case, but in this "criminal case * * * alarm bells should be going off." *Havis*, 907 F.3d at 450 (Thapar, J., concurring). The need for review is heightened by the centrality of the Guidelines in criminal sentencing and the massive effect the Career Offender Guideline has on individual sentences.

1. The Guidelines play a "central role in sentencing" and frequently are determinative of the actual sentence. *Molina-Martinez* v. *United States*, 136 S. Ct. 1338, 1341 (2016). "The post-*Booker* federal sentencing scheme aims to achieve uniformity by ensuring that sentencing decisions are anchored by the Guidelines and that they remain a meaningful benchmark through the process of appellate review." *Peugh* v. *United States*, 569 U.S. 530, 541-542 (2013). "[D]istrict courts *must* begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process"; failing to calculate the correct Guidelines range constitutes procedural error; and deviations from the Guidelines range must be accompanied by a "justification * * * sufficiently compelling to support the degree of the variance." *Gall* v. *United States*, 552 U.S. 38, 50 n.6 (2007) (emphasis added); see also *Pepper* v. *United States*, 562 U.S. 476, 508 (2011) (Breyer, J., concurring in part and concurring in judgment) ("[T]he law permits the court to disregard the Guidelines only where it is 'reasonable' for a court to do

so." (citing *United States* v. *Booker*, 543 U.S. 220, 261-262 (2005)).

Even when a defendant's ultimate sentence falls within the correct Guidelines range, the mere failure to correctly calculate the range "can, *and most often will*, be sufficient to show a reasonable probability of a different outcome absent the error" that requires resentencing. *Rosales-Mireles* v. *United States*, 138 S. Ct. 1897, 1907 (2018) (emphasis added) (quotation marks omitted). For the last decade, judges have sentenced defendants in accordance with the Guidelines Manual more than 75 percent of the time. See U.S. Sentencing Comm'n, *Sentences Under the Guidelines Manual and Variances Over Time: Fiscal Years 2010-2019*, https://bit.ly/2FCNaXk. When courts defer to the Commission's interpretation of unambiguous Guidelines, they grant the Commission the unchecked authority to force sentencing judges to justify deviating from that the wrong Guidelines range.

2. The work of the Sentencing Commission touches the lives of tens of thousands of individuals every year. Over 75,000 federal defendants were sentenced in 2019 alone. See U.S. Sentencing Comm'n, *Sentence Imposed Relative to the Guideline Range Fiscal Year 2019*, https://bit.ly/2H00VjJ. In all of those cases, a federal district court was required to calculate a Guidelines range on the basis of the Guidelines and commentary, and in a sizeable subset of those cases the applicable range was determined, at least in part, by deference to the agency's interpretation of the language and the reach of the applicable Guideline. Thousands of individuals each year—1,597 in 2018 alone—receive the career offender enhancement at issue in this case, which can sometimes enhance a sentence by decades. U.S. Sentencing Comm'n, *2018 Annual Report and Sourcebook of Federal Sentencing Statistics* 77, https://bit.ly/3e6AWTB. And

courts throughout the federal system construe the Guidelines reflexively applying *Stinson*—deferring unless an agency's interpretation of a Guideline is "is inconsistent with, or a plainly erroneous reading of, that guideline"—notwithstanding this Court's acknowledgement in *Kisor* that such a "formulation of the test" suggests "a caricature of the doctrine." 139 S. Ct. at 2415.

3. The Career Offender Guideline is an especially stark example of the dramatic effect that misapplying basic principles of agency deference has on individual criminal defendants. With the career offender designation, petitioner's Guidelines range was 151 to 188 months' imprisonment. Without the designation, it would have been 33 to 41 months. The *minimum* difference to his Guidelines range from the career offender designation was *over nine years of imprisonment*—more than *tripling* the Guidelines sentence. The decision below acknowledged that application of the Guideline has a "severe," "Draconian" effect in many cases, including petitioner's. App. 3a n.2.

IV. This Case Is An Ideal Vehicle

This case cleanly presents the legal issues for resolution. Petitioner squarely raised both questions in the court of appeals, before the panel and again before the en banc court. The case was extensively briefed by both parties. At the Second Circuit's invitation, petitioner filed a supplemental brief responding to the government's submission regarding *Havis* and *Winstead*. Petitioner also squarely argued that *Kisor* requires a threshold determination of ambiguity, and that *Jackson*'s reflexive deference without making any such determination was no longer controlling. App. 52a. Moreover, this case has the benefit of not just one, but *two* government briefs opposing rehearing filed by one of the Nation's premier U.S. Attorney's Offices. It thus likely

reflects the government's most fully developed arguments on the division of authority implicated here.

Resolution of either question presented will resolve petitioner's case in his favor. Petitioner's career-offender designation rested on the determination that his prior conspiracy conviction was a controlled substance offense, which in turn depended on treating the commentary as binding. The career-offender designation more than tripled his Guidelines range. While the district court ultimately sentenced below that range, petitioner's sentence (120 months) was still triple his non–career offender range (33 to 41 months). Courts in the Second Circuit vary upward from the Guidelines range in approximately 1% of cases, U.S. Sentencing Comm'n, *Statistical Information Packet: Second Circuit* 12 tbl.8 (2019), https://bit.ly/2TrISpb, meaning that if the sentencing court had not applied the commentary, Zimmian Tabb would almost certainly be a free man now. As it is, the Bureau of Prisons expects to incarcerate him until April 2027. And unlike many cases involving misapplication of the Sentencing Guidelines, the government has never argued that the error here was harmless, nor has it ever identified other impediments to review of the legal questions. This case is the ideal vehicle to answer important and recurring structural questions that the Commission cannot resolve.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted.

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APPENDICES