No. 20-579

IN THE

# Supreme Court of the United States

ZIMMIAN TABB,

*Petitioner*,

v.

UNITED STATES OF AMERICA,

*Respondent.*

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

## BRIEF FOR THE NATIONAL ASSOCIATION OF HOME BUILDERS AND THE AMERICAN FARM BUREAU FEDERATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER


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### INTEREST OF *AMICI CURIAE*

*Amici curiae*—the National Association of Home Builders and the American Farm Bureau Federation—are business associations representing members of industries that federal agencies heavily regulate.[1] Their members have long been subject to the unpredictable winds of *Auer* deference—the doctrine that, until recently, required courts to defer to administrative agencies'

[1] Pursuant to this Court's Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than *amici* and their counsel made such a monetary contribution. Counsel of record for both parties received timely notice of *amici*'s intent to file this brief, and both have consented to its filing.

interpretations of their own regulations.[2] Last year, in *Kisor* v. *Wilkie*, 139 S. Ct. 2400 (2019), a bare majority of this Court retained *Auer* deference. But all nine Justices agreed that—at minimum—*Auer* deference had been allowed to grow largely unchecked and that its spread must be pared back substantially.

*Amici* were part of jointly filed briefs in *Kisor* itself. They and their co-*amici* first urged the Court to grant certiorari and then, on the merits, urged *Auer*'s abandonment in favor of judicial construction of regulatory texts. In both briefs, *amici* described the real-world impact that *Auer* had on the livelihoods of *amici's* members.

Because the ruling in *Kisor* addressed many of *amici*'s substantive concerns about *Auer* deference, despite not formally overruling *Auer*, *amici* are now focused on ensuring that lower courts honor *Kisor*'s directive. In April 2020, they filed joint *amicus* briefs in two lower-court cases involving the same issue presented here—lower courts' reflexive deference to the same "commentary" to the same unambiguous Sentencing Guideline.[3] As discussed below, the divided results in these and other cases only emphasize that—just a year and a half after *Kisor*—it is evident that the lower courts require further clarification to avoid *Kisor*'s sway turning on the accidents of geography.

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[2] The doctrine is so called because of the principles articulated in *Auer* v. *Robbins*, 519 U.S. 452 (1997). Sometimes courts call it "*Seminole Rock* deference," because *Auer* traced its eponymous rule to *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410 (1945). See *infra* Argument Part I.A.

[3] They supported a petition for rehearing *en banc* in *United States* v. *Lovato*, 950 F.3d 1337 (10th Cir. 2020), cert. pending (No. 20-6436), and filed an *amicus* brief on the merits in *United States* v. *Nasir*, __ F.3d __, 2020, WL 7041357, No. 18-2888 (3d Cir. Dec. 1, 2020). Both cases are discussed *infra*.

Both *amici* have a substantial interest that *Kisor* be honored in reality, not just in the breach, and that it is followed by all federal courts across the nation, and in every regulatory context. Specifically:

The **National Association of Home Builders** (NAHB) is a Washington, D.C.-based trade association whose mission is to enhance the climate for housing and the building industry. Chief among NAHB's goals are providing and expanding opportunities for all people to have safe, decent, and affordable housing. Founded in 1942, NAHB is a federation of more than 700 state and local associations. About one-third of NAHB's approximately 140,000 members are home builders or remodelers; its builder members construct about 80% of all new homes built in the United States. The remaining members are associates working in closely related fields within the housing industry, such as mortgage finance and building products and services. NAHB frequently participates as a party litigant and *amicus curiae* to safeguard the constitutional and statutory rights and economic interests of its members and those similarly situated.

The **American Farm Bureau Federation** (AFBF), headquartered in Washington, D.C., was formed in 1919 and is the largest nonprofit general farm organization in the United States. Representing about six million member families in all fifty states and Puerto Rico, AFBF's members grow and raise every type of agricultural crop and commodity produced in the United States. Its mission is to protect, promote, and represent the business, economic, social, and educational interests of American farmers and ranchers. To that end, AFBF regularly participates in litigation, including as *amicus curiae*, to represent its members.

## INTRODUCTION AND SUMMARY OF ARGUMENT

Why in the world would the nation's premier trade associations representing America's home builders and farmers file an *amicus* brief in this case—a criminal appeal challenging the sentence imposed on a defendant who repeatedly has been convicted of serious drug crimes? Petitioner, of course, is neither a home builder nor a farmer, and his sentence has nothing to do with the regulatory burdens faced by home builders or farmers.

Or so it would seem. *Amici* appear in this case because a court that can deploy *Auer* deference to extend petitioner's incarceration by *nine years* can use the same technique to destroy the settled expectations of American builders and farmers. *Amici* similarly participated in *Kisor* v. *Wilkie*, which involved veterans' benefits. Many home builders and farmers are veterans, and even more of them hold veterans' rights dear, but what motivated *amici*'s filings in *Kisor* was the same overarching principle that they invoke today. If courts will defer to *any* federal agency's "interpretation" of unambiguous regulations, then *every* agency will claim the same solicitude—and every American is at the same risk as petitioner here, even if the consequences vary from jail, to denied benefits, to capriciously enforced regulations.

*Amici*, in short, request this Court's review of this case because they recognize that their members' success depends on rigorous adherence to administrative-law principles in every context in which those principles arise. Both *amici* here dedicate their resources to facilitating the work and livelihoods of their respective members—both individuals and companies—and enhancing those members' abilities to serve the public throughout the United States. Regulatory certainty and reliability are indispensable for any business aiming to make stable

plans, appropriately invest in employees and infrastructure, and avoid costly surprises. When courts yield to interpretive rules, they threaten these rule-of-law values because interpretive rules can instantly change the meaning of even long-settled regulations without the careful process that, for example, notice-and-comment rulemaking entails. Interpretive rules often catch the public—including *amici*'s members—off guard.

This Court's decision in *Kisor* did not eliminate *all* deference to interpretive rules, but it expressly forbade the *reflexive* deference that had become routine. The judgment below—and a series of other cases involving the same question this case raises—indicate that lower courts are already having difficulty applying *Kisor* at even its most basic level. While the Third Circuit has saluted *Kisor* and no longer defers to Sentencing Guidelines "commentary"—*i.e.,* the Commission's "application notes," which are its own interpretation of the *actual* Guidelines—when the Guidelines themselves are unambiguous, other courts thus far have refused to yield to *Kisor* in this context. As the petition notes, the split is already wide and is deepening. Pet. 14-17.

The mere fact that America's home builders and farmers are supporting this petition illustrates the transcendence of the issues it presents. Arresting the disuniform responses to *Kisor* now will prevent far worse responses from taking root and will vindicate this Court's role in determining the proper level of deference to administrative interpretations of their own regulations. The Court should grant the petition.

## ARGUMENT

*Amici* seek to make two main points to explain why they take the nearly unprecedented step of participating in a criminal appeal unrelated to their core industries.

First, *Kisor* was this Court's response to a chorus of

voices—including *amici*'s—that sounded an alarm about the massive and harmful expansion of *Auer* deference. The public properly regards it as a momentous decision. Indeed, *Auer* deference should probably be called "*Kisor* deference" going forward.

Second, if *Kisor*'s promise is to be regarded as meaningful rather than illusory, the Court should nip in the bud the emerging division over *Kisor*'s scope. The questions here implicate an express, pre-existing, and deepening circuit split over whether to follow Sentencing Guideline §4B1.2(b)'s definition of "controlled substance offense" (which does not include inchoate offenses) or to follow the commentary to the Guideline (which *does* include inchoate offenses). One *en banc* court recently reversed course specifically because *Kisor* directed courts to defer only *after* finding ambiguity. Others facing the same question have refused to budge.

If this simple question is left to the vagaries of geography, more challenging *Kisor*-related questions will be subject to even more dramatically distinct treatment circuit to circuit, panel to panel, and judge to judge. It is this consequence of allowing petitioner's sentence enhancement to stand that is of great concern to *amici*.

## I. IF *KISOR*'S SUBSTANTIAL LIMITATION ON *AUER* DEFERENCE DOES NOT APPLY HERE, IT IS AT RISK EVERYWHERE

Federal and state regulations pervade nearly every aspect of home building, agriculture, and every other significant sector of the American economy (including, as petitioner has learned, criminal activities *forbidden* by law).

Unsurprisingly, therefore, the reliability and enforceability of federal regulations directly affect *amici*'s members' daily lives. Any citizen—including criminal defendants like petitioner—should be able to trust that a regu-

lation means what it says, and, more importantly, that courts will not allow agencies to evade the plain meaning of regulations adopted by those very agencies. For businesses, judicial commitment to that rule-of-law principle can make the difference between profit and loss—or even between solvency and bankruptcy. Before *Kisor*, however, *Auer* deference posed a serious threat to the public's ability to repose confidence in the judicial enforcement of federal regulations.

### A. Courts—like the Second Circuit—deferred to Guidelines "commentary" and other interpretive rules because they understood this Court's pre-*Kisor* precedent to require such deference

The petition describes in great detail the underlying question: whether *Auer* deference requires courts to accept Sentencing Commission "commentary" that adds inchoate offenses to Guideline §4B1.2(b)'s definition of "controlled substance offense" when the Guideline definition itself unambiguously does not go so far. The Third Circuit's recent decision in *United States* v. *Nasir* concisely and accurately addresses the premise—*i.e.*, that the Guideline itself indeed *is* unambiguous in not including inchoate offenses. __ F.3d __, 2020 WL 7041357, *8-9, No. 18-2888 (3d Cir. Dec. 1, 2020) *(en banc)*.

1. This case asks why some courts *still* follow "commentary" (the equivalent of an interpretive rule) rather than the Guideline itself (subject to notice and comment, like typical regulations). See Pet. 6-7. But before addressing that, the underlying question is why courts *ever* elevated commentary over text. The answer illustrates how deeply pervasive the judicial instinct was to defer—even when substantial portions of a human being's life (nine extra years in prison in this case) is at stake.

Essentially, the Second Circuit decided in 1995 the same thing that the Third Circuit had decided in 1994—

that a decision from this Court in 1993 required such marked deference:

- *Stinson* v. *United States*, 508 U.S. 36, 44-46 (1993), appeared to direct that commentary to Guidelines must be followed as a default (but still allowed the Guideline to trump if there was no way to square the commentary with it).
- *United States* v. *Hightower*, 25 F.3d 182, 187 (3d Cir. 1994), found that the commentary must be obeyed under *Stinson*, even though it "expand[ed]" the scope of Guideline §4B1.2(b)'s definition.
- *United States* v. *Jackson*, 60 F.3d 128, 131 (2d Cir. 1995), reached the identical result—essentially that, with enough stretching, the Guideline could be made to accommodate the commentary.

*Stinson* expressly followed *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410 (1945). *Auer* in turn underscored and extended *Seminole Rock* (thus, while calling *Stinson* an application of "*Auer* deference" may technically be anachronistic, it is nonetheless substantively accurate). While not every court thought that Guideline §4B1.2 could be manipulated enough to coexist with the commentary,[4] cases like *Hightower* and *Jackson* were more than defensible at the time. Indeed, just two weeks ago, the *en banc* Third Circuit openly put it this way: "Our interpretation of the commentary" to §4B1.2 in *Hightower* "was informed by the then-prevailing understanding of the deference that should be given to agency interpretations of their own regulations." *Nasir*, 2020 WL 7041357, at *8.

Quite right: *Stinson* was not a one-off, but rather one

[4] See *infra* p. 11 (discussing the D.C. and Sixth Circuit opinions in 2018 and 2019).

star in a larger constellation that signaled to lower courts this Court's mandate of judicial submission to administrative agencies' interpretation of their regulations—even when an agency's interpretation was informal, casual, and without notice to the public. *Auer* itself was just the brightest of those stars. Until *Kisor* substantially curtailed the entire doctrine, *Auer* systematized—and provided an especially agency-favoring exposition of—the preexisting principle that courts must defer to an agency's interpretation of its own regulations, unless that interpretation is plainly erroneous or flatly inconsistent with a regulation's text. See, *e.g.*, *Decker* v. *Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 613-614 (2013).

2. Federal administrative agencies unsurprisingly responded to this most welcome solicitude. The Chief Justice remarked that "[q]uestions of ∗ ∗ ∗ *Auer* deference arise as a matter of course on a regular basis." *Decker*, 568 U.S. at 616 (Roberts, C.J., concurring). And why not? Agencies reflexively invoked *Seminole Rock* or *Auer* whenever challenged because they expected that federal courts, equally reflexively, would yield to that invocation.[5] Agencies only needed—and courts typically found—some lawyerly way to squeeze a hint of ambiguity out of what may have been a lengthy, complex rule.

The consequences for *amici*'s members were massive. As then-Judge Kavanaugh observed, under *Auer*, a judge's "simple threshold determination of clarity versus ambiguity may affect billions of dollars, the individual rights of millions of citizens, and the fate of clean air rules, securities regulations, labor laws, or the like." Brett M. Kavanaugh, *Fixing Statutory Interpretation*,

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[5] *Amici* filed a brief on the merits in *Kisor* that provided various illustrations, particularly those relevant to their members. See http://www.supremecourt.gov/DocketPDF/18/18-15/86447/20190131110632766_18-15tsacNationalAssociationOfHomeBuilders.pdf.

129 Harv. L. Rev. 2118, 2153 (2016). Some courts applied *Auer* so reflexively that they deferred even *without* identifying a regulatory ambiguity to resolve. *See, e.g.*, *W. Mass. Elec. Co.* v. *FERC,* 165 F.3d 922 (D.C. Cir. 1999) (allowing FERC to splice missing words into a regulation without first identifying an ambiguity, frustrating a series of multi-million-dollar interconnection agreements). For *amici*'s members—even sophisticated participants in regulated industries, not to mention the many small businesses—attempting to overcome such extreme deference in judicial challenges was often cost-prohibitive if not utterly pointless. Even so, *Auer* enabled disruptions of settled understandings and unfair surprise, including in this Court. See, *e.g., Sec'y of Labor* v. *Beverly Healthcare-Hillview*, 541 F.3d 193, 201 (3d Cir. 2008) (applying *Auer* and reversing a finding that a nursing home lacked fair notice of an agency interpretation, despite "studiously vague" compliance directives and conflicting agency guidance).

3. Over time, as the kudzu of *Auer* deference became impossible to politely ignore any longer, Justices of this Court began to express dissatisfaction with its own precedent. *Auer* seemed in no real danger until 2011, when Justice Scalia—the very author of *Auer*—began publicly sounding an alarm that something had gone seriously amiss. "It is comforting to know that I would reach the Court's result even without *Auer*. For while I have in the past uncritically accepted that rule, I have become increasingly doubtful of its validity." *Talk Am., Inc.* v. *Mich. Bell Tel. Co.*, 564 U.S. 50, 68 (2011) (Scalia, J., concurring). He particularly worried about the misaligned incentives that *Auer* created, among other problems. *Id.* at 69.[6]

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[6] In *Kisor*, the portion of Justice Kagan's opinion that did not speak for the majority acknowledged this misaligned incentive, but also

Two years after that, Justice Scalia repudiated *Auer* altogether, as other Justices expressed comparable doubts. Given how the lower courts and federal agencies had read and applied *Auer*, he repudiated his own prior decision: "Enough is enough." *Decker*, 568 U.S. at 616 (Scalia, J., concurring in part, dissenting in part); *id.* at 621.

4. In 2018 and 2019, as the winds appeared to be changing, two circuits considered the very question that *Hightower* and *Jackson* had resolved two decades earlier. With *Auer* in seeming decline, despite remaining formally intact, they concluded that no *Auer* deference was due. Even while bound by *Auer*, those courts found that there was no need to defer to §4B1.2's *commentary* because §4B1.2 *itself* was so clear and unambiguous that even *Stinson* did not require deference. See *United States* v. *Havis*, 927 F.3d 382 (6th Cir. 2019) *(en banc) (per curiam)* (precedeing *Kisor* by only a few weeks); *United States* v. *Winstead*, 890 F.3d 1082 (D.C. Cir. 2018) (the year before *Kisor*).

### B. *Kisor* changed everything—and eliminated any basis for deferring to §4B1.2's commentary

Shortly after the D.C. and Sixth Circuit decisions, this Court decided *Kisor* v. *Wilkie*. The Guideline §4B1.2 question started as a seemingly routine application of *Auer* deference in the 1990s, became a debatable *Auer* question in the years leading up to *Kisor*, but was transformed by *Kisor* into an improper relinquishment of the judicial power.

1. *Kisor* did not overrule *Auer* altogether—but it fundamentally changed the landscape and "cabined *Auer*'s scope in varied and critical ways." 139 S. Ct. at 2418.

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expressed doubt that agencies *really* acted on the incentive. 139 S. Ct. at 2421 (op. of Kagan, J.).

The Chief Justice—the essential fifth vote who did not join all parts of the opinion—wrote separately to emphasize how much had changed. "[T]he distance between the majority and Justice Gorsuch is not as great as it may initially appear," he explained. *Id.* at 2424 (Roberts, C.J., concurring in part). Speaking for four Justices, Justice Gorsuch would have overruled *Auer* entirely; regardless, he wrote, "the doctrine emerges maimed and enfeebled—in truth, zombified." *Id.* at 2425 (Gorsuch, J., concurring in judgment).

The main difference may be that Justice Gorsuch's approach would have erased *all Auer*-based jurisprudence, while the majority saved *some* of it. Decisions relying on *Auer* that fail *Kisor*'s test became vulnerable, while others that satisfy *Kisor*'s test remain intact. The only question is in which category *Jackson* and *Hightower* (and other cases of this sort from other circuits) fall.

2. The Third Circuit rightly held that *Hightower* cannot survive *Kisor*. It suggested that it agreed with the D.C. and Sixth Circuits—that even *without Kisor* the question should have gone the other way—but made clear that *Kisor* eliminated any doubt. In *Hightower*, it explained, "we may have gone too far in affording deference," but "after the Supreme Court's decision last year in *Kisor* v. *Wilkie*, it is clear that such an interpretation is not warranted." *Nasir*, 2020 WL 7041357, at *8 (citation omitted).

The most cursory review of *Kisor* shows how clearly true this is. The mere "*possibility* of deference can arise *only* if a regulation is genuinely ambiguous. And when we use that term, we mean it—genuinely ambiguous, even after a court has resorted to all the standard tools of interpretation." *Kisor*, 139 S. Ct. at 2414 (emphasis added). "If uncertainty does not exist, there is no plausible reason for deference." *Id.* at 2415. When there is no es-

sential ambiguity, and an agency simply posits that it would be better if the regulation said something *different*, "[d]eference in that circumstance 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)).

But the commentary at issue here—"Application Note 1" to §4B1.2 of the Guidelines—does exactly what all Justices in *Kisor* deem disqualifying. Guideline §4B1.2(b) articulates what a "controlled substance offense" is, listing only completed crimes. The Sentencing Commission's commentary, however, *adds* to the actual Guideline, saying that it *also* "include[s]" inchoate offenses like "attempt[s] to commit such offenses." §4B1.2 cmt. n.1. Whether §4B1.2's text includes inchoate offenses is a legal question. It does not present a situation where an expert agency requires discretion to apply a general rule to unique facts—a circumstance where "the law runs out, and policy-laden choice is what is left over," thus making *Auer* deference at least potentially legitimate. See *Kisor*, 139 S. Ct. at 2415. To the contrary, the meaning of the "law"—the actual Guideline—is perfectly understandable to a court.[7]

In short, *Kisor* has eliminated the foundation for deference on which the lower courts built their adherence to §4B1.2's commentary rather than to §4B1.2 itself.

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[7] For two years, the Sentencing Commission has been contemplating changing this Guideline in a *proper* way—moving the language from the note into the text. *See* 83 Fed. Reg. 65,400, 65,412-65,415 (Dec. 20, 2018). Even if it eventually does so, that would not "moot" this or other pending cases, and the methodological issue that the Court would decide transcends the specific context of this particular Guideline or application note. That such a step (amendment of the Guideline) is even feasible illustrates that courts can read the *current* Guideline just fine—and that the proposed amendment cannot mean the same thing that the Guideline's text *already* says.

### C. Leaving the circuit split in place would discourage rigorous application of *Kisor*, thus transcending the sentencing context

1. *Kisor* acknowledged the "mixed messages we have sent" about *Auer* and grasped "the opportunity ∗ ∗ ∗ to clear up" the misconceptions that had taken root. 139 S. Ct. at 2414. "At times," the Court continued,

> this Court has applied *Auer* deference without significant analysis of the underlying regulation. At other times, the Court has given *Auer* deference without careful attention to the nature and context of the interpretation. And in a vacuum, our most classic formulation of the test—whether an agency's construction is "plainly erroneous or inconsistent with the regulation," may suggest a caricature of the doctrine, in which deference is "reflexive."

*Ibid.* (citations and parentheticals omitted).

The last sentence in that quotation has particular bearing in this case (and many others). *Stinson* quoted the very language ("plainly erroneous or inconsistent with the regulation") that *Kisor* deemed indicative of a "caricature" and leading to "reflexive" deference. See *Stinson*, 508 U.S. at 45. But that language, which *Kisor* repudiated, is what *Hightower* and *Jackson* both rested upon. See *Hightower*, 25 F.3d at 184, 187; *Jackson*, 60 F.3d at 131.

In other words, there can be no argument that *Kisor* expressly changed—indeed, eliminated—the core foundation of the case that is the basis of the judgment below.[8] Nor are *Hightower* and *Jackson* alone—the Tenth

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[8] Notably, Justice Kennedy wrote *Stinson*—and when *Kisor* attacked the language used in *Stinson* (and many other cases), it did so by quoting Justice Kennedy's concurring opinion in *Pereira* v. *Ses-*

Circuit, for example, likewise relied on *Stinson*'s use of that language to reach the same result. See *United States* v. *Martinez*, 602 F.3d 1166, 1174 (10th Cir. 2010). Indeed, that's the very point—courts considering the question before 2011 *reasonably* read Supreme Court precedents to require deference to "Application Note 1" of Guideline §4B1.2.[9]

2. Granting this petition would help effectuate *Kisor*'s own acknowledgment that some case law would have to fall in light of its decision. And failing to do so would risk serious methodological consequences in derogation of *Kisor*. Treating Application Note 1 as if it has the same force as the actual Guideline offers a potential end-run around normal administrative rulemaking and implicates precisely the same concerns that led courts to question *Auer* in the first place. As a general matter, at least, it would allow agencies "to control the extent of its notice-and-comment-free domain" by strategically drafting a rule that was subject to notice and comment and, after removing problematic portions (and thus immunizing them from post-promulgation challenges), to enforce those removed portions anyway in the form of interpretations. *Perez* v. *Mortg. Bankers Ass'n*, 575 U.S. 92, 111 (2015) (Scalia, J., concurring in judgment); *see also, e.g.*, *Marsh* v. *J. Alexander's LLC*, 905 F.3d 610, 637-38, 642 (9th Cir. 2018) *(en banc)* (Ikuta, J., joined by Callahan, J., dissenting) (lamenting how the court allowed a substantive rule to masquerade as an interpretation under *Auer*—creating one of "the worst dangers of improper *Seminole Rock* and *Auer* deference").

If the D.C. and Sixth Circuits divided from other courts even *before Kisor*, it is only because the deference extended to "Application Note 1" was already minimally

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*sions*, 138 S. Ct. 2105, 2120 (2018) (Kennedy, J., concurring).

[9] See *infra* Part II (further discussing the Tenth Circuit's approach).

justified. Other administrative interpretations will fail *Kisor*'s test, too—but perhaps less obviously than this one. Accordingly, if *this* issue is not susceptible to methodological correction by this Court, agencies and lower courts will be emboldened to retrench toward familiar *Auer* practices for even slightly more complicated questions, and much more for those questions that are genuinely complex.

* * *

Judge Bibas, in his concurring opinion, described the basis for the Third Circuit's recent about-face:

> Now the winds have changed. In *Kisor*, the Supreme Court awoke us from our slumber of reflexive deference: agency interpretations might merit deference, but only when the text of a regulation is truly ambiguous. Before deferring, we must first exhaust our traditional tools of statutory construction. Anything less is too narrow a view of the judicial role.

*Nasir*, 2020 WL at *24 (Bibas, J., concurring in part).

But not all courts have been "awakened" in the same way. If *Kisor* itself has not actually roused other courts, as it did the Third Circuit, this Court should take further action. A short, crisp, clear decision here would prevent further efforts among other circuits to continue hitting the snooze button.

## II. Other Pending Petitions Illustrate The Issue's Importance

At least two other petitions have been filed in this Court after this one yet raising identical issues. Those petitions illustrate that the need for this Court's review is ripe, acute, and will not abate.

The first is *Lovato* v. *United States* (No. 20-6436). That petition challenges the Tenth Circuit's decision in

*United States* v. *Lovato*, 950 F.3d 1337, 1347 (10th Cir. 2020), which applied that circuit's §4B1.2 precedent that (per *Stinson*) requires deference to the commentary. See *Martinez*, 602 F.3d at 1173-1175. *Martinez* was a pre-*Kisor* case that then-Judge Gorsuch joined. As these *amici* noted in their Tenth Circuit brief supporting Lovato's effort to obtain rehearing *en banc*, it is unlikely that Judge Gorsuch—who, as Justice Gorsuch, urged overruling *Auer* altogether—agreed to the reasoning or result in *Martinez* for any reason other than fidelity to the binding authority of this Court's precedent. Liberated from that precedent, the Tenth Circuit should have taken *Lovato en banc* to overrule *Martinez*. It refused, even though it knew that the Third Circuit had already granted *en banc* review. *Amici* now reiterate their support.

Likewise, the Eighth Circuit continues to insist on deference to §4B1.2's commentary, as mandated by that circuit's equivalent of *Hightower*, *Jackson*, and *Martinez*. See *United States* v. *Mendoza-Figueroa*, 65 F.3d 691, 693 (8th Cir. 1995) *(en banc)*. In *United States* v. *Broadway*, 815 F. App'x 95, 96 & n.2 (8th Cir. 2020), a panel identified *Kisor* as potentially relevant to *Mendoza-Figueroa*, but (likely incorrectly) claimed that even intervening Supreme Court authority prevented it from departing from that §4B1.2 precedent. The Eighth Circuit has subsequently denied rehearing *en banc* in another case presenting the same issue. See *United States* v. *Jefferson*, 975 F.3d 700 (8th Cir. 2020) (reh'g *en banc* denied Oct. 28, 2020). *Amici* understand that, almost simultaneously with the filing of this *amicus* brief, Broadway is filing a petition in this Court to challenge the Eighth Circuit's adherence to *Mendoza-Figueroa*.

This deluge of petitions reflects the massive inconsistency in the circuits' approach to *Kisor*, even in this very narrow context. *Amici* recommend granting this petition and either consolidating it with some or all of the

others (and others that may yet appear), or holding such related petitions for disposition after the Court resolves this case. At the very least, one of these petitions should be granted—denying all of them would leave intact a clear and deepening split *and* signal that courts will not be held to account for disregarding *Kisor*.

* * *

*Amici* therefore respectfully urge the Court to hold that *Kisor* prevents judicial deference to United States Sentencing Commission commentary—or any other agency's comparable "interpretation"—when the language of the Guidelines or other regulations is clear. Doing so will better ensure that agencies regulate in a clear, fair, and lawful manner—and that courts retain a firm grip on their interpretive function.

Resolving this question will far transcend this petitioner's specific sentence and even sentencing law generally. It will instead convey—to the regulated public, administrative agencies, and judges alike—that courts must take *Kisor* seriously and apply it rigorously.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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