

No. 20-579

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*

SUPPLEMENTAL BRIEF FOR THE PETITIONER

RICHARD E. SIGNORELLI
LAW OFFICE OF
RICHARD E. SIGNORELLI
*52 Duane Street
7th Floor
New York, NY 10007
(212) 254-4218*

JOHN P. ELWOOD
Counsel of Record
R. STANTON JONES
ANDREW T. TUTT
SAMUEL F. CALLAHAN
NORA ELLINGSEN
ARNOLD & PORTER
KAYE SCHOLER LLP
*601 Massachusetts Ave., NW
Washington, DC 20001
(202) 942-5000
john.elwood@arnoldporter.com*

SUPPLEMENTAL BRIEF FOR THE PETITIONER

Petitioner submits this supplemental brief to bring to the Court's attention a court of appeals decision, *United States v. Riccardi*, ___ F.3d ___, 2021 WL 799727 (6th Cir. Mar. 3, 2021), issued after the filing of petitioner's reply brief. *Riccardi*, applying *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), declined to defer to commentary to a Sentencing Guideline governing theft offenses. *Riccardi* confirms that this case presents frequently recurring methodological questions that only this Court can resolve.

1. The defendant in *Riccardi* was convicted of stealing gift cards and sentenced under U.S.S.G. § 2B1.1, whose sentences depend on "loss" caused by the theft. The district court applied commentary establishing a \$500 minimum loss per gift card, no matter the card's value. The Sixth Circuit reversed and remanded for resentencing "without the use of the commentary[]." 2021 WL 799727, at *1.

Writing for the court, Judge Murphy addressed a methodological question: "Should *Kisor* affect our approach to the commentary?" 2021 WL 799727, at *5. The court answered "yes." "*Stinson* * * * told courts to follow basic administrative-law concepts despite Congress's decision to locate the relevant agency (the Commission) in the judicial branch rather than the executive branch." *Ibid.* "So *Kisor*'s clarification of [*Auer*'s] plain-error test"—*i.e.*, that agencies may only issue interpretations within the "zone of ambiguity" of a "genuinely ambiguous" regulation—"applies just as much to *Stinson* (and the Commission's guidelines) as it does to *Auer* (and an agency's regulations)." *Id.* at *5-*6. The court relied extensively on its unanimous en banc decision in *United States v. Havis*, 927 F.3d 382 (2019), which though decided

before *Kisor* had made these principles clear. 2021 WL 799727, at *1, *4-*5; see Pet. 12-13; Reply 3-4.

The Sixth Circuit rejected the government’s efforts to “distinguish * * * *Havis*” as limited to the Career Offender Guideline. 2021 WL 799727, at *8. The court also did not consider itself bound by precedent interpreting the same Application Note, explaining that the prior decision “did not address *Kisor*’s recent clarification about the limited nature of *Auer*.” *Ibid.*

The Sixth Circuit confirmed that it was “not alone in th[e] conclusion” that *Kisor* forbids “reflexively defer[ring]” to Guidelines commentary. 2021 WL 799727, at *5-*6. “The en banc Third Circuit recently adopted the same view.” *Id.* at *6 (citing *United States v. Nasir*, 982 F.3d 144, 158 (2020)). *Nasir* “recognized that its pre-*Kisor* cases had upheld commentary expanding the guidelines. Yet these cases could not stand after *Kisor*, the court found, because it ‘cut back on what had been understood to be uncritical and broad deference to agency interpretations of regulations[.]’” *Ibid.* (citations omitted).

The Sixth Circuit also held that it was irrelevant that the Commission had voluntarily “sent the [commentary] amendment adopting this \$500 minimum amount to Congress for its review” and had gratuitously used “notice-and-comment rulemaking.” 2021 WL 799727, at *8. “By placing this loss amount in the commentary, the Commission has retained the power to adjust it tomorrow without satisfying the same procedural safeguards. So the normal administrative principles should apply.” *Ibid.* (citation omitted). See Reply 8-9.

Riccardi thus applied *Kisor* and “first ask[ed] whether § 2B1.1 is ‘genuinely ambiguous’” as to the meaning of “loss.” 2021 WL 799727, at *6. It concluded that no matter whether there was such ambiguity, “the commentary’s \$500 minimum loss amount for gift cards does not

fall ‘within the zone of [any] ambiguity’ in this guideline.” *Id.* at *7 (quoting *Kisor*, 139 S. Ct. at 2415).

2. Concurring in the judgment, Judge Nalbandian explained that he “would continue to apply *Stinson* deference to guideline commentary cases rather than *Kisor*.” 2021 WL 799727, at *10. He viewed “*Stinson* deference as its own free-standing directive,” under which “[c]ommentary is authoritative as long as the interpretation does not violate the Constitution or a federal statute and is not plainly erroneous or inconsistent with the provision’s text.” *Id.* at *11 (quotation marks omitted). He relied on “two Fifth Circuit cases” that he viewed as “reject[ing] the idea that *Kisor*’s holding about *Auer*” affected the Guidelines. *Ibid.* (citing *United States v. Cruz-Flores*, 799 Fed. Appx. 245, 246 (5th Cir. 2020) (per curiam); and *United States v. Vivar-Lopez*, 788 Fed. Appx. 300, 301 (5th Cir. 2019) (per curiam)). But see Opp. 15 (“*Kisor* ‘sets forth the authoritative standards for determining whether commentary is entitled to deference’”).

3. *Riccardi* confirms that the circuits are divided over a broad, recurring, methodological question: Whether *Kisor* requires courts to make a finding of genuine ambiguity before deferring to commentary, notwithstanding deferential pre-*Kisor* circuit precedent. Pet. 11-17; Reply 3-4. The interpretive methodology that the Sixth Circuit applied to the theft-offense Guideline is irreconcilable with the methodology applied by the court below and by the First, Fifth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits. Reply 3-4. *Riccardi* thus dispels any notion that this division “turns on the particulars” of the Career Offender Guideline, Opp. 25; see Reply 4. The methodological nature of the dispute means that the Commission cannot resolve the questions presented. Pet. 17-19; Reply 5.

Riccardi also stands as yet another decision rejecting that the Commission can elevate commentary to the

status of a Guideline by using its ordinary practice of submitting the commentary to Congress, Reply 8-9; and it reaffirms the importance of proper Guidelines interpretation given that the Guidelines “significantly affect individual liberty because a court must use them as the initial benchmark for a proper sentence,” 2021 WL 799727, at *4 (citing *Havis*, 927 F.3d at 385); see Pet. 27-28; Reply 11.

CONCLUSION

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

Respectfully submitted.

RICHARD E. SIGNORELLI
LAW OFFICE OF
RICHARD E. SIGNORELLI
*52 Duane Street
7th Floor
New York, NY 10007
(212) 254-4218*

JOHN P. ELWOOD
Counsel of Record
R. STANTON JONES
ANDREW T. TUTT
SAMUEL F. CALLAHAN
NORA ELLINGSEN
ARNOLD & PORTER
KAYE SCHOLER LLP
*601 Massachusetts Ave., NW
Washington, DC 20001
(202) 942-5000
john.elwood@arnoldporter.com*

MARCH 2021