No. 25-227

In the Supreme Court of the United States

RAYMOND POORE, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

D. JOHN SAUER
Solicitor General
Counsel of Record
MATTHEW R. GALEOTTI
Acting Assistant Attorney General
SOFIA M. VICKERY
Attorney
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the district court correctly determined that petitioner's prior state-law conviction for substantial battery as a party to the crime constitutes a "crime of violence" under Section 2K2.1(a)(4)(A) (2021) of the advisory Sentencing Guidelines.

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OPINION BELOW

The order of the court of appeals (Pet. App. 1a-8a) is available at 2025 WL 1201946.

JURISDICTION

The judgment of the court of appeals was entered on April 25, 2025. On July 9, 2025, Justice Barrett extended the time within which to file a petition for a writ of certiorari to and including August 25, 2025, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Western District of Wisconsin, petitioner was convicted of possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1). Judgment 1. The district court sentenced petitioner to 42 months of imprisonment, to be followed by three years of super-

vised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1a-8a.

1. a. The Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, ch. II, 98 Stat. 1987, established the United States Sentencing Commission (Commission) "as an independent commission in the judicial branch of the United States." 28 U.S.C. 991(a). Congress directed the Commission to promulgate "guidelines * * * for use of a sentencing court in determining the sentence to be imposed in a criminal case," as well as "general policy statements regarding application of the guidelines." 28 U.S.C. 994(a)(1) and (2). Congress further directed the Commission to "periodically * * * review and revise" the Sentencing Guidelines. 28 U.S.C. 994(*o*).

The Sentencing Guidelines are structured as a series of numbered guidelines and policy statements followed by additional commentary. See Sentencing Guidelines § 1B1.6 (2021).[1] Congress has directed that district courts, when imposing a criminal sentence, must consider "the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission." 18 U.S.C. 3553(b)(1). The Guidelines similarly provide that a sentencing court "applying the [Sentencing Guidelines]" must consider any relevant "commentary in the guidelines." Sentencing Guidelines § 1B1.1(a) and (b).

The Sentencing Commission has explained that commentary "may serve a number of purposes," including to "interpret the guideline or explain how it is to be applied." Sentencing Guidelines § 1B1.7. The Guidelines also state that "[f]ailure to follow such commentary could constitute an incorrect application of the guide-

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[1] Unless otherwise noted, all citations of the Sentencing Guidelines in this brief refer to the 2021 edition used at petitioner's sentencing.

lines, subjecting the sentence to possible reversal on appeal." *Ibid.* Those guideline provisions addressing the salience of official commentary were subject to both notice-and-comment and congressional-review procedures. See, *e.g.*, 52 Fed. Reg. 18,046, 18,053, 18,091-18,110 (May 13, 1987).

Under 28 U.S.C. 994(x), to promulgate or amend a guideline, the Commission must comply with the notice-and-comment procedures for rulemaking by executive agencies. See 5 U.S.C. 553(b) and (c). And under 28 U.S.C. 994(p), the Commission must "submit to Congress" any proposed amendment to the Guidelines, along with "a statement of the reasons therefor." Proposed amendments generally may not take effect until 180 days after the Commission submits them to Congress. *Ibid.*

Although the notice-and-comment and congressional-submission requirements of 28 U.S.C. 994(p) and (x) do not apply to policy statements and commentary, the Commission's rules provide that "the Commission shall endeavor to include amendments to policy statements and commentary in any submission of guideline amendments to Congress." U.S. Sent. Comm'n R. 4.1. The rules similarly provide that the Commission "will endeavor to provide, to the extent practicable, comparable opportunities for public input on proposed policy statements and commentary." U.S. Sent. Comm'n R. 4.3. And like amendments to the text of a guideline, an "affirmative vote of at least four members of the Commission" is required to promulgate or amend any policy statement or commentary. 28 U.S.C. 994(a); see U.S. Sent. Comm'n R. 2.2(b).

b. Before this Court's decision in *United States* v. *Booker*, 543 U.S. 220 (2005), the Sentencing Guidelines

were "mandatory" and limited a district court's discretion to impose a non-Guidelines sentence, *id.* at 227, 233. In *Stinson* v. *United States*, 508 U.S. 36 (1993), this Court addressed the role of guideline commentary and determined that "commentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline." *Id.* at 38.

In making that determination, the Court drew an "analogy" to the principles of deference applicable to an executive agency's interpretation of its own regulations. *Stinson*, 508 U.S. at 44. The Court stated that, under those principles, as long as the "agency'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.'" *Id.* at 45 (quoting *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)). The Court acknowledged that the analogy was "not precise," but nonetheless viewed affording "this measure of controlling authority to the commentary" as the appropriate approach in the particular circumstances of the Guidelines. *Id.* at 44-45.

2. In November 2021, police officers in Madison, Wisconsin attempted to conduct a traffic stop of a car with no license plates that they believed had been stolen. Presentence Investigation Report (PSR) ¶¶ 9-10. The car sped away, prompting a high-speed chase in which the car drove recklessly, repeatedly steering into oncoming traffic. PSR ¶¶ 10-11. Officers terminated their ground pursuit but followed the car by aircraft. PSR ¶ 11. Officers subsequently deployed a tire deflation device. *Ibid.* The car evaded it by driving through

several front yards, but wound up puncturing a tire during the off-road driving. PSR ¶ 13.

Both the driver and petitioner—the passenger—jumped out of the car and ran. PSR ¶ 13. While petitioner was being chased on foot, he reached into his waistband area. PSR ¶ 14. After he was tackled by an officer, he reached around his stomach while the officer attempted to secure him. *Ibid.* Once petitioner had been handcuffed, officers discovered that he had a loaded 9mm handgun, five additional rounds in a magazine, illegal drugs, and drug paraphernalia. *Ibid.*; see Pet. App. 3a.

3. A federal grand jury in the Western District of Wisconsin indicted petitioner on one count of possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1). Indictment 1. Petitioner pleaded guilty. Judgment 1. The case proceeded to sentencing.

a. The principal Sentencing Guideline applicable to petitioner's Section 922(g)(1) offense—Section 2K2.1—provides that the offense carries a base offense level of at least 14. Sentencing Guidelines § 2K2.1(a)(6) & comment. (n.3). Section 2K2.1 further provides that the base offense level is 20 if the defendant committed the Section 922(g)(1) offense after having been convicted for a felony "crime of violence." *Id.* § 2K2.1(a)(4)(A). The text of Section 2K2.1 does not itself define "crime of violence." Instead, the Commission's commentary for Section 2K2.1 states that "[f]or purposes of this guideline," "'[c]rime of violence' has the meaning given that term in § 4B1.2(a) and Application Note 1 of the Commentary to § 4B1.2." *Id.* § 2K2.1, comment. (n.1) (emphasis omitted).

Both of the two definitional sources for "crime of violence" cited by Section 2K2.1's commentary concern a

different guidelines provision—Section 4B1.2—which separately provides "[d]efinitions of [t]erms [u]sed in Section 4B1.1," a guideline for career offenders that is not at issue in this case. Sentencing Guidelines § 4B1.2; see *id.* § 4B1.1. The first cited source—Section 4B1.2(a)—provides that the "term 'crime of violence'" (in the career-offender guideline) includes a felony offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another." *Id.* § 4B1.2(a)(1). Since 2023, Section 4B1.2(d) has further provided that "'crime of violence' * * * include[s] the offenses of aiding and abetting, attempting to commit, or conspiring to commit any such offense." *Id.* § 4B1.2(d) (2025) (effective Nov. 1, 2023).

When petitioner committed his offense in 2021, however, the Commission had yet to promulgate Section 4B1.2(d). Its content was instead contained in the Commission's commentary in Application Note 1 to Section 4B1.2—the second definitional source cited by Section 2K2.1's commentary. Specifically, when petitioner committed his offense, Application Note 1 to Section 4B1.2 provided that "'[c]rime of violence' * * * include[s] the offenses of aiding and abetting, conspiring, and attempting to commit such [an] offense[]." Sentencing Guidelines § 4B1.2, comment. (n.1) (emphasis omitted).

b. At sentencing, petitioner challenged the Probation Office's calculation of the advisory Sentencing Guidelines range for his term of imprisonment. See Pet. App. 11a-13a. He argued that the base offense level for his Section 922(g)(1) offense under Section 2K2.1 of the Sentencing Guidelines should be determined without considering the official commentary to Section 4B1.2 of the Guidelines. See *ibid.*; cf. PSR ¶ 25.

Petitioner did not dispute that the undefined term "crime of violence" as used in Section 2K2.1's provisions governing the base offense level for a Section 922(g)(1) offense is genuinely ambiguous. Nor did petitioner dispute that the district court could properly interpret that undefined term based on Section 2K2.1's commentary, which, as noted, stated that the term "'[c]rime of violence'" in Section 2K2.1 has the meaning identified in two other guidelines sources: "[Sentencing Guideline] § 4B1.2(a) and Application Note 1 of the Commentary to § 4B1.2," Sentencing Guidelines § 2K2.1, comment. (n.1) (emphasis omitted). Petitioner instead argued that although he had previously been convicted of the state-law offense of substantial battery as a party to the crime, see Wis. Stat. Ann. §§ 939.05, 940.19(2) (West 2023) (last amended 2001), that offense was not a "crime of violence" under Section 2K2.1. D. Ct. Doc. 20, at 1 (Oct. 26, 2022).

In particular, petitioner contended that (1) Wisconsin law allowed him to be convicted for his party-to-the-crime offense if he was "'a party to a conspiracy with another to commit'" the battery, and (2) the first of the two definitional sources incorporated by Section 2K2.1's commentary—Sentencing Guidelines § 4B1.2(a) itself—"d[id] not include a conspiracy offense" as a crime of violence. D. Ct. Doc. 20, at 1. Petitioner acknowledged that "Application Note 1" to Section 4B1.2—the second definitional source incorporated by Section 2K2.1's commentary—included conspiracies as crimes of violence. *Ibid.* But he argued that, in light of *Kisor* v. *Wilkie*, 588 U.S. 558 (2019), deference to Application Note 1's interpretation of Section 4B1.2(a)'s definition of crime of violence was unwarranted because the text of Section 4B1.2(a) is not itself ambiguous. D. Ct. Doc. 20, at 2.

The district court overruled petitioner's objection to the Probation Office's guidelines calculation. Pet. App. 11a-13a. As a result, it applied a base offense level of 20 under Section 2K2.1(a)(4)(A). *Id.* at 12a. The court then applied other adjustments to reach a total offense level of 21. *Id.* at 13a. Combined with his level IV criminal history, that offense level produced an advisory guidelines range of 57 to 71 months of imprisonment. *Ibid.* The court ultimately imposed a below-range sentence of 42 months of imprisonment, to be followed by three years of supervised release. *Id.* at 27a-28a; see Judgment 2-3.[2]

4. The court of appeals affirmed in an unpublished order. Pet. App. 1a-8a. The court observed that its recent decision in *United States* v. *White*, 97 F.4th 532 (7th Cir.), cert. denied, 145 S. Ct. 293 (2024), had rejected an argument similar to petitioner's "about the effect of *Kisor*" on the court of appeals' prior precedents on Application Note 1. Pet. App. 2a, 4a-6a. The court explained that it had reached that result in *White* because (1) *Stinson* had concluded that deference to Commission commentary on the Sentencing Guidelines was warranted based on an "analogy [to federal agency rules that] was not precise" and the Commission's role within the Judicial Branch implicated different considerations; (2) the court of appeals had "repeatedly afforded *Auer* deference"—another name for *Seminole Rock* deference—"to Application Note 1" based on *Stinson*; (3) this Court's subsequent decision in *Kisor* did "not purport to overrule or even modify *Stinson*"; and

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[2] If the base offense level for petitioner's offense had been 14, as he contended, the advisory Guidelines range would have been 30-37 months of imprisonment. See Sentencing Guidelines, Ch. 5, Pt. A (sentencing table).

(4) the court found no sound reason to change its prior precedent in the face of "an entrenched circuit split about Application Note 1's weight." *Id.* at 4a-6a; see *White*, 97 F.4th at 534-535 (declining to overrule pre-*Kisor* precedents that deferred to Application Note 1's interpretation of "crime of violence" and "controlled substance offense").

The court of appeals panel also observed that this Court's more recent decision in *Loper Bright Enterprises* v. *Raimondo*, 603 U.S. 369 (2024), did not authorize the panel itself to overrule its precedential decision in *White*. Pet. App. 6a-8a. The court emphasized that petitioner "blurs th[e] distinction between *Auer* deference," which is given to a federal agency's interpretation of its own regulations, "and *Chevron* deference," which *Loper Bright* eliminated and which applied only to an agency's interpretation of a federal statute it administered. *Id.* at 6a-7a. And the court found that because *Loper Bright* "did not purport to overrule or even modify *Auer* or *Stinson* nor to explain the effect of the decision (if any) on *Kisor*," that decision did not supply a sound reason to change its position regarding *Stinson* in light of the circuit split regarding "Application Note 1." *Id.* at 7a-8a.

ARGUMENT

Petitioner renews his contention (Pet. 19-26) that the district court's classification of his prior state conviction as a "crime of violence" under Sentencing Guidelines § 2K2.1(a)(4)(A) rests on deference to the Commission's commentary in former Application Note 1 to Section 4B1.2 that is inappropriate under *Kisor* v. *Wilkie*, 588 U.S. 558 (2019), and *Loper Bright Enterprises* v. *Raimondo*, 603 U.S. 369 (2024). Petitioner's challenge to his term of imprisonment is moot because he has now

served that term and been released from prison. In any event, the court of appeals correctly upheld the district court's application of Section 2K2.1(a)(4)(A) in calculating petitioner's advisory sentencing range, and its decision does not implicate any conflict with other courts of appeals that would warrant further review in this case. Further review is also unwarranted because the question presented in this case is of limited and diminishing importance. This Court has recently and repeatedly denied certiorari petitions seeking review of issues concerning the application of administrative-law deference to the distinct context of the guidelines.[3] It should follow the same course here.

1. As a threshold matter, petitioner's challenge to the calculation of his term of imprisonment under Sentencing Guidelines § 2K2.1(a)(4)(A) is now moot because petitioner recently completed his term of imprisonment. See U.S. Dep't of Justice, Bureau of Prisons, *Find an Inmate*, https://www.bop.gov/inmateloc/ (showing Nov. 7, 2025 release for register number 92314-509).

"It has long been settled that a federal court has no authority 'to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.'" *Church of Scientology* v. *United States*, 506 U.S. 9, 12 (1992) (quoting *Mills* v. *Green*, 159 U.S. 651,

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[3] See, *e.g.*, *Munoz* v. *United States*, No. 25-5114, 2025 WL 2824323 (Oct. 6, 2025); *Elwell* v. *United States*, No. 25-5110, 2025 WL 2824264 (Oct. 6, 2025); *Cook* v. *United States*, 145 S. Ct. 2830 (2025) (No. 24-7265); *Trumbull* v. *United States*, 145 S. Ct. 1952 (2025) (No. 24-6848); *Zheng* v. *United States*, 145 S. Ct. 1899 (2025) (No. 24-604); see also, *e.g.*, Br. in Opp. at 10 n.2, *Zheng*, *supra* (Mar. 4, 2025) (citing 19 additional denials of certiorari petitions seeking review of similar *Kisor*-based challenges to the Guidelines commentary).

653 (1895)). "To qualify as a case fit for federal-court adjudication, 'an actual controversy must be extant at all stages of review.'" *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 67 (1997) (citation omitted); see *Spencer* v. *Kemna*, 523 U.S. 1, 7 (1998). That means that "throughout the litigation," the party challenging a court's decision "'must have suffered, or be threatened with, an actual injury'" that is "'likely to be redressed by a favorable judicial decision.'" *Spencer*, 523 U.S. at 7 (quoting *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 477 (1990)); see *West Va.* v. *EPA*, 597 U.S. 697, 718 (2022) (standing to appeal). Where, as here, a federal prisoner has been released from custody, "some concrete and continuing injury other than the now-ended incarceration * * * must exist if the suit is to be maintained." *Spencer*, 523 at 7.

A defendant's release from prison will not ordinarily moot an appeal challenging his conviction, because the conviction itself is presumed to have "continuing 'collateral consequences.'" *Spencer*, 523 U.S. at 8, 12. But that "presumption of significant collateral consequences" does not extend beyond the conviction itself. *Id.* at 12. To avoid mootness in such a case, a defendant's completed sentence must therefore not only have "collateral consequences adequate to meet Article III's injury-in-fact requirement," *id.* at 14; see *id.* at 12 (citing *Lane* v. *Williams*, 455 U.S. 624 (1982)), the consequences must be "likely to be redressed by a favorable judicial decision," *id.* at 7 (citation omitted). That is not the case here.

When petitioner petitioned this Court for certiorari, he had less than 75 days left in his prison sentence, yet he identifies no ongoing collateral consequences caused by the length of his term of imprisonment that would

likely be redressed by a favorable judicial decision in this case, and none are apparent. In particular, nothing indicates that petitioner's challenge to his term of imprisonment would have an effect on his current service of supervised release. "Supervised release fulfills rehabilitative ends, distinct from those served by incarceration," and is "intended * * * to assist individuals in their transition to community life." *United States* v. *Johnson*, 529 U.S. 53, 59 (2000). Accordingly, "[t]he objectives of supervised release would be unfulfilled if excess prison time were to offset and reduce terms of supervised release." *Ibid.*

Although a sentencing judge generally has discretion to terminate supervised release after one year of supervision if the judge finds such action warranted by the "conduct of the defendant" and "the interest of justice," 18 U.S.C. 3583(e)(1); see *Johnson*, 529 U.S. at 60, the record here does not suggest that petitioner would obtain such relief if this Court were to grant review. Before the court could exercise its discretion to reduce his term of supervision, it would have to "consider[] [a series of] factors," including the nature and circumstances of petitioner's offense, the need to afford adequate deterrence to criminal conduct, and the need both to protect the public and to provide the defendant with the most effective correctional treatment. 18 U.S.C. 3583(e); see 18 U.S.C. 3553(a).

No sound basis exists for concluding that the sentencing judge's future "choices * * * will be made in such manner as to * * * permit redressability of injury." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 562 (1992); cf. *West Va.*, 597 U.S. at 718. To the contrary, the record underscores the need for petitioner's ongoing supervision. At sentencing, the district court emphasized

that petitioner's earlier "performance on state supervision ha[d] * * * been poor," Pet. App. 26a-27a, and that petitioner's "history of serious crimes" showed that "it will be important that he be supervised" after his release from prison to dissuade him from "further criminal conduct," *id.* at 28a-29a. The court further determined that "[s]upervision in particular" would provide petitioner "needed programming" and assistance in "community reintegration." *Id.* at 28a. Among other things, the court observed that petitioner's drug possession while on state supervision "demonstrate[d] the need for mandatory drug testing" during his supervised release, which the court ordered. *Id.* at 29a.

Ultimately, "[t]he possibility that the sentencing court will use its discretion to modify the length of [a defendant's] term of supervised release * * * is so speculative" that it cannot preserve a defendant's continuing challenge to his fully served sentence from mootness. *Burkey* v. *Marberry*, 556 F.3d 142, 149 (3d Cir.), cert. denied, 558 U.S. 969 (2009); see *Rhodes* v. *Judiscak*, 676 F.3d 931, 934-935 (10th Cir.) (similar), cert. denied, 567 U.S. 935 (2012).[4] Certiorari should be denied on that basis alone.

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[4] Other courts of appeals have concluded that the possibility that the sentencing court would exercise its discretion to reduce a defendant's supervised-release term can be sufficient to prevent his sentencing challenge from becoming moot upon completion of his prison term. See, *e.g.*, *United States* v. *Ketter*, 908 F.3d 61, 66 (4th Cir. 2018); *Pope* v. *Perdue*, 889 F.3d 410, 414 (7th Cir. 2018); *Levine* v. *Apker*, 455 F.3d 71, 77 (2d Cir. 2006); *Mujahid* v. *Daniels*, 413 F.3d 991, 994-995 (9th Cir. 2005), cert. denied, 547 U.S. 1149 (2006); *Johnson* v. *Pettiford*, 442 F.3d 917, 917-918 (5th Cir. 2006) (per curiam). Regardless, the need for this Court to resolve the mootness question at a minimum makes this case a poor vehicle for considering the question presented.

2. In any event, the court of appeals correctly rejected petitioner's challenge to the district court's classification of his prior conviction for substantial battery as a party to the crime as a "crime of violence" under Section 2K2.1(a)(4)(A) of the Sentencing Guidelines. Petitioner focuses (Pet. 19-24, 29-30) on the question whether deference to the Commission's commentary for Section 4B1.2—which is not directly applicable to his case—is warranted in light of *Kisor* and *Loper Bright*. But his challenge to his sentence fails on two antecedent grounds regardless whether such deference is warranted.

a. First, the district court's calculation of petitioner's advisory Guidelines range rests on its determination that petitioner's conviction for substantial battery as a party to the crime is a "crime of violence" under Section 2K2.1(a)(4)(A), not Section 4B1.2(a). Pet. App. 2a, 12a; see pp. 5, 7-8, *supra*. Section 2K2.1 does not itself define "crime of violence," and petitioner has not disputed that the undefined term in Section 2K2.1 is genuinely ambiguous. Nor has he disputed that, given that ambiguity, it is appropriate to consider the Commission's commentary to Section 2K2.1 when interpreting the term. And that commentary expressly incorporates the application note whose applicability petitioner disputes.

Petitioner's claim presupposes that the district court correctly followed Section 2K2.1's commentary, because that is the only way that the definition of "crime of violence" under Section 4B1.2 would even matter to his case. Section 2K2.1's commentary states that Section 2K2.1 incorporates the definition of "crime of violence" in Section 4B1.2(a). See Sentencing Guidelines § 2K2.1, comment. (n.1). Petitioner's position is simply

that "*Section 4B1.2* unambiguously excludes conspiracy and aiding-and-abetting offenses," which, he argues, makes it inappropriate to defer to the commentary in Application Note 1 *to Section 4B1.2* in order to interpret the unambiguous terms of *Section 4B1.2(a)*. Pet. 29 (emphasis added); see Pet. 2, 29-30; Pet. App. 2a.

But the commentary to Section 2K2.1—which petitioner necessarily accepts—provides that "[f]or purposes of this guideline" (*i.e.*, Section 2K2.1), "'[*c*]*rime of violence*' has the meaning given that term in § 4B1.2(a) *and* Application Note 1 of the Commentary to § 4B1.2." Sentencing Guidelines § 2K2.1, comment. (n.1) (second emphasis added). The commentary thus expressly incorporates the meaning supplied in two definitional sources: (1) Section 4B1.2(a) itself and (2) the commentary in Application Note 1 to Section 4B1.2. Petitioner's disagreement with the use of the application note to interpret the first source (Section 4B1.2), see Pet. 2, 29-30, fails to account for the *independent* and express adoption of that application note in the context of Section 2K1.2. If one source is adopted, as petitioner agrees the first one (Section 4B1.2) is, then so is the other (the application note). And that second source undisputedly covers his prior conviction.

b. Even if petitioner were correct in focusing exclusively on the definition of "crime of violence" in Section 4B1.2(a), he provides no basis for concluding that his state-law conviction for substantial battery as a party to the crime fails to satisfy that definition. In particular, he has not shown that it falls out of the "crime of violence" definition provided in the text of (not the commentary for) Section 4B1.2(a), which encompasses a felony offense that "has as an element the use, attempted

use, or threatened use of physical force against the person of another," Sentencing Guidelines § 4B1.2(a)(1).

Petitioner has never disputed that the substantive state-law offense of substantial battery, which requires proof of "an act done with intent to cause bodily harm" that "causes substantial bodily harm," Wis. Stat. Ann. § 940.19(2) (West 2023), is a crime of violence. See *United States* v. *Peters*, 462 F.3d 716, 720 (7th Cir. 2006) (holding that the offense satisfies the Guidelines definition); see also *Delligatti* v. *United States*, 604 U.S. 423, 430-432 (2025) (holding that "whenever someone knowingly causes physical harm, he uses force within the meaning of [the materially similar definition of 'crime of violence' in 18 U.S.C. 924(c)(3)(A)]," even if the force is "applied indirectly," such as through the act of poisoning a victim's drink, which "does not itself involve force"). Any such contention that petitioner might now attempt to raise has been forfeited.

And unlike a statute defining a wholly inchoate offense, the party-to-a-crime statute under which petitioner was convicted, Wis. Stat. Ann. § 939.05 (West 2023), requires an affirmative showing that the substantive crime —here, substantial battery—was actually "consummated" as a prerequisite for conspiracy or aiding-and-abetting liability. *State* v. *Sample*, 573 N.W.2d 187, 195 (Wis. 1998); see *State* v. *Jackson*, 701 N.W.2d 42, 46 (Wis. Ct. App. 2005); cf. Wis. Stat. Ann. § 939.31 (West 2023) (inchoate conspiracy). The elements of petitioner's party-to-a-crime offense thus necessarily included all of the elements of the substantial-battery offense. Accordingly, if the latter is a crime of violence—a proposition that petitioner has never disputed—then so too is the former. That is true whether or not Application Note 1—which addresses application of the "crime of violence" definition

to wholly inchoate offenses that do not require proof of the substantive offense—is appropriately considered.

3. At all events, even if petitioner's principal contention (Pet. i, 19-24)—that the principles governing deference to federal agency interpretations of regulations and statutes announced, respectively, in *Kisor* and *Loper Bright* extend to the deference afforded to the Commission's commentary interpreting the Sentencing Guidelines—were relevant, it would provide no sound basis for further review here.

a. In *Stinson* v. *United States*, 508 U.S. 36 (1993), the Court determined that the Commission's commentary interpreting provisions of the Sentencing Guidelines should be afforded the same measure of deference as afforded to a federal agency's interpretation of its own ambiguous regulation under *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). See *Stinson*, 508 U.S. at 45; see also *id.* at 38. Petitioner contends (Pet. 19-22) that such deference to the Commission's commentary must be applied in a manner consistent with this Court's decision in *Kisor*, which clarified that *Seminole Rock* deference (also called *Auer* deference) applies, among other things, only where a federal regulation is "genuinely ambiguous," *Kisor*, 588 U.S. at 573-575; see *id.* at 563. The government agrees. As petitioner notes (Pet. 22), the government has previously taken the position, including in this Court, that *Kisor* sets the standard for determining whether particular guideline commentary is entitled to deference.

The dispute below, however, was different and significantly narrower. Petitioner argued that the court of appeals panel should overrule its precedent in *United States* v. *White*, 97 F.4th 532 (7th Cir.), cert. denied, 145 S. Ct. 293 (2024), which, after considering *Kisor*, had

itself declined to overrule the court's pre-*Kisor* precedents affording deference to the particular commentary in Application Note 1 of Section 4B1.2, *id.* at 534-535 (declining to overrule pre-*Kisor* precedents that deferred to Application Note 1's interpretation of "crime of violence" and "controlled substance offense"). See Pet. App. 2a-3a. He argued that the panel here could overrule *White* itself (without recourse to en banc proceedings) because this Court's more recent decision in *Loper Bright* had sufficiently undermined the court of appeals' precedent. *Id.* at 6a-8a. The panel correctly rejected that contention. *Ibid.*

Loper Bright eliminated the *Chevron* doctrine, which addressed a different type of deference—deference to an agency's interpretation of a statute it administers. *Loper Bright*, 603 U.S. at 377-379, 412-413. *Stinson* previously found *Chevron* deference to be an "inapposite * * * analogy" for the guidelines commentary context. *Stinson*, 508 U.S. at 44; see *Kisor*, 588 U.S. at 591 (Roberts, C.J., concurring in part) (explaining that "[i]ssues surrounding [*Seminole Rock*] deference to agency interpretations of their own regulations are distinct from those raised in connection with [*Chevron*] deference"). *Loper Bright* then repeatedly cited *Kisor* without calling into doubt the continued vitality of *Seminole Rock* deference as clarified by *Kisor*. See *Loper Bright*, 603 U.S. at 392-393, 403.

Kisor itself, in turn, rejected the argument that it should overrule the "'long line of precedents'" from this Court and lower courts that had previously applied *Seminole Rock* deference, adding that such action would have introduced undesirable "instability" into the law. *Kisor*, 588 U.S. at 587 (citation omitted). Petitioner's argument that the court of appeals' pre-*Kisor* pre-

cedent applying Sentencing Guidelines § 4B1.2 to inchoate offenses should be overruled would produce precisely such instability. The interpretive question that petitioner posits is accordingly not directly implicated in this case, whose result is consistent with *Kisor*.

b. The panel in this case noted the existence of "an entrenched circuit split about Application Note 1's weight." Pet. App. 6a; see *id.* at 7a-8a. But this case—which involves the continuing vitality of precedent, rather than an application of deference in the first instance—is not an appropriate vehicle for addressing any disagreement about the general methodological question of *Kisor*'s applicability to guidelines commentary. Questions about deference to the Commission's commentary arise only as a result of the Commission's decisions regarding what to address in the commentary rather than in the text of the guidelines. And the panel's conclusion that it should not itself overrule its precedent affording deference to Application Note 1 to Section 4B1.2—like the division of authority about Application Note 1—has both limited and diminishing prospective importance.

As even petitioner acknowledges, the Commission's 2023 amendment to Section 4B1.2, which moved the substance of (former) Application Note 1 into the text of Section 4B1.2(d), means that "courts will not be called on to defer to [what is now former] Application Note 1" on a prospective basis. Pet. 27; see Pet. 10, 28 n.3; p. 6, *supra*. In addition, the Commission has undertaken a "multiyear study of the Guidelines Manual to address case law concerning the validity and enforceability of guideline commentary, and possible consideration of amendments that might be appropriate." 88 Fed. Reg. 60,536, 60,537 (Sept. 1, 2023) (statement of annual priorities) (emphasis omitted). That ongoing process

reflects the Commission's discharge of its "statutory duty 'periodically to review and revise' the Guidelines," which "Congress necessarily contemplated" would involve "review[ing] the work of the courts" and "mak[ing] whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest." *Braxton* v. *United States*, 500 U.S. 344, 348 (1991) (quoting 28 U.S.C. 994(*o*)) (brackets omitted).

As the updated version of Sentencing Guidelines § 4B1.2 illustrates, those revisions can include updating the text of specific guidelines provisions to incorporate what formerly appeared only in commentary. And given that the Commission can and does amend the Guidelines to eliminate conflicts or correct errors, this Court ordinarily does not exercise its "certiorari power" to review decisions concerning guideline interpretations. See *Braxton*, 500 U.S. at 348; see also p. 10 & n.3, *supra* (listing recent denials of certiorari petitions seeking review of issues concerning the application of deference to the guidelines context); Pet. 27 (acknowledging that "the Court's normal practice is to deny certiorari in Guidelines cases"). The Court should adhere to that practice here, particularly because the Commission has already resolved prospectively any relevant circuit conflict concerning (former) Application Note 1.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

D. JOHN SAUER
Solicitor General
MATTHEW R. GALEOTTI
Acting Assistant Attorney General
SOFIA M. VICKERY
Attorney

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