NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

Brandon Michael Elwell,

Petitioner,

v.

United States of America,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the administrative law principles articulated in *Kisor v. Wilkie*, 588 U.S. 558 (2019), limit the deference owed to the United States Sentencing Commission's commentary on the Sentencing Guidelines?

2. Whether Mr. Elwell's conviction under 18 U.S.C. § 922(g)(1) is plainly unconstitutional under the Second Amendment in light of *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022)?

RELATED PROCEEDINGS

This case arises from the following proceedings:

- *United States v. Elwell*, No. 23-1407 (10th Cir. April 11, 2025)
- *United States v. Elwell*, No. 22-cr-00104 (D. Colo. Dec. 7, 2023)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Brandon Michael Elwell, respectfully petitions for a writ of certiorari to review the order and judgment of the United States Court of Appeals for the Tenth Circuit entered on April 11, 2025.

OPINION BELOW

The unpublished decision of the United States Court of Appeals for the Tenth Circuit in *United States v. Elwell*, No. 23-1407, 2025 WL 1088540 (10th Cir. Apr. 11, 2025) appears in the Appendix at App. 1.

JURISDICTION

The United States District Court for the District of Colorado had jurisdiction in this criminal case under 18 U.S.C. § 3231. The Tenth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742. The circuit entered judgment on April 11, 2025. App. at 1. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

FEDERAL PROVISIONS INVOLVED

As to the first question presented, USSG §2K2.1 (2021) provided, as relevant here, as follows:

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

(a) Base Offense Level (Apply the Greatest):

(4) 20, if —

(A) the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense; or

(B) the (i) offense involved a (I) semiautomatic firearm that is capable of accepting a large capacity magazine; or (II) firearm that is described in 26 U.S.C. § 5845(a); and (ii) defendant (I) was a prohibited person at the time the defendant committed the instant offense; (II) is convicted under 18 U.S.C. § 922(d); or (III) is convicted under 18 U.S.C. § 922(a)(6) or § 924(a)(1)(A) and committed the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person;

* * *

(6) 14, if the defendant (A) was a prohibited person at the time the defendant committed the instant offense; (B) is convicted under 18 U.S.C. § 922(d); or (C) is convicted under 18 U.S.C. § 922(a)(6) or § 924(a)(1)(A) and committed the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person;

Additionally, Application Note 1 to USSG §2K2.1 provided, as relevant here, that, "[f]or purposes of this guideline":

> "Crime of violence" has the meaning given that term in §4B1.2(a) and Application Note 1 of the Commentary to §4B1.2.

In turn, USSG §4B1.2 (2021) provided, as relevant here:

§4B1.2. Definitions of Terms Used in Section 4B1.1

(a) The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—

> (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
>
> (2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).

Additionally, Application Note 1 to USSG §4B1.2 also at the time provided that "[f]or 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.

* * *

Finally, as to the second question presented, the Second Amendment of the United States Constitution, U.S. CONST. amend. II, provides:

> A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

And 18 U.S.C. § 922(g)(1) provides that:

> It shall be unlawful for any person . . . who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

STATEMENT OF THE CASE

Mr. Elwell pleaded guilty, without a plea agreement, to a single count of possessing a firearm after having been convicted of a felony, in violation of 18 U.S.C. § 922(g)(1). At sentencing, the parties disputed whether Mr. Elwell's prior Colorado conviction for attempted first degree assault, Colo. Rev. Stat. § 18-3-202(1)(a), was a crime of violence under the Sentencing Guidelines. *See* U.S.S.G. §2K2.1, §4B1.2.

If it was, as the government and probation office argued, Mr. Elwell's base offense level would be 20 under U.S.S.G. §2K2.1(a)(4)(A), which guideline applies to § 922(g)(1) convictions where the defendant has one prior crime of violence. If it was not, as Mr. Elwell contended, his base offense level should have been 14 under U.S.S.G. §2K2.1(a)(6), which applies when the defendant has no prior crimes of violence. Relevant here, Mr. Elwell preserved a challenge that "attempt" crimes under the applicable version of the Sentencing Guidelines (the 2021 Sentencing Guidelines Manual) should not be included as crimes of violence because inchoate crimes of "attempt" do not count as crimes of violence under §4B1.2(a). In short, this was because that version of the Sentencing Guidelines provided that "attempt" crimes were "crimes of violence" not in the text of the Guideline itself, but in the accompanying commentary. And, Mr. Elwell contended, this Court's decision in *Kisor v. Wilkie*, 588 U.S. 558 (2019), provided the analytical framework for evaluating whether the Guidelines' commentary impermissibly expands the Guidelines text,

which, as noted, in the 2021 Guidelines, notably did not include "attempts." *See* §4B1.2(a) & cmt. n.1 (providing in the *commentary* that attempts to commit a crime of violence are to be included).

The answer to the question of whether the prior assault conviction was a crime of violence represented the difference between Mr. Elwell's advisory guideline range being 51 to 63 months on the one hand, or 30 to 37 months on the other.[1]

The district court determined that the prior attempted assault conviction was a 'crime of violence' under the guidelines' definition, U.S.S.G. §4B1.2(a), and that under current law "attempts to commit a crime also qualify as a crime of violence." Namely, the court was referencing Tenth Circuit's decision in *United States v. Maloid*, which held that *Kisor* does not extend to Guidelines commentary, and that, therefore, the argument was currently foreclosed in the circuit. 71 F.4th 795, 808-09 (10th Cir. 2023). The court sentenced Mr. Elwell to 52 months' imprisonment.

On appeal, Mr. Elwell pressed his *Kisor* challenge, which he acknowledged was foreclosed. He also preserved for further review a new claim that under this Court's decision in *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022), section

[1] The first range corresponded to a criminal history category VI and an offense level of 17, representing the base offense level of 20 minus three levels for acceptance of responsibility under U.S.S.G. §3E1.1(a), (b). The second range corresponded (with the same criminal history category) to a total offense level of 12, representing the base offense level of 14, minus *two* levels for acceptance of responsibility under §3E1.1(b), which guideline limits the third-level reduction to offense levels that are 16 or higher.

922(g)(1) was unconstitutional both facially and as applied to him. He acknowledged that this claim too was foreclosed by Tenth Circuit precedent holding that pre-*Bruen* circuit precedent foreclosing both facial and as applied challenges to section 922(g)(1) remained good law after *Bruen* and that the statute was, therefore, constitutional. *See, e.g.*, *Vincent v. Garland*, 80 F.4th 1197 (10th Cir. 2023), *cert. granted, judgment vacated,* 144 S. Ct. 2708, 219 L. Ed. 2d 1314 (2024), *and adhered to sub nom. Vincent v. Bondi*, 127 F.4th 1263 (10th Cir. 2025) (relying on *United States v. McCane*, 573 F.3d 1037 (10th Cir. 2009)). Accordingly, he presented this claim also for preservation only, on the chance that the law may change while his direct appeal was pending, rendering § 922(g)(1) *plainly* unconstitutional under current law.

The Tenth Circuit affirmed based on its decisions in *Maloid* and *Vincent*. *See* App. at 4. This petition follows.

REASONS FOR GRANTING THE WRIT

I. The Court should resolve the entrenched circuit split regarding *Kisor*'s application to the Sentencing Guidelines.

The Sentencing Guidelines are treated as legislative rules, and the commentary is treated as an agency's interpretation of its own legislative rules, meant to "assist in the interpretation and application of those rules." *Stinson v. United States*, 508 U.S. 36, 44-45 (1993). Historically, courts deferred to the Sentencing Commission's interpretation of its own Guidelines in the commentary,

as they deferred to other agencies' interpretations of their own regulations. *See id.* at 46-47. In *Kisor*, however, this Court made clear that a regulation must be "genuinely ambiguous" before the Court will defer to the agency's interpretation. *Kisor v. Wilkie*, 588 U.S. 558, 572-74 (2019). If the Guideline or regulation is not genuinely ambiguous, it "just means what it means-and the court must give it effect[.]" *Id.* at 2415. Anything else would "permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation." *Id.* (citation omitted).

Furthermore, "before concluding that a rule is genuinely ambiguous, a court must exhaust all the 'traditional tools' of construction" including analyzing "the text, structure, history, and purpose of a regulation[.]" *Id.* If the Court finds genuine ambiguity does exist, the agency's interpretation must still be "reasonable." *Id.*

Since 2019, circuit courts have considered *Kisor's* application to the Sentencing Guidelines. As the Seventh Circuit calculated last year, the circuits have split down the middle in considering whether to give controlling weight to §4B1.2 Application Note 1's directive to include convictions for inchoate offenses as crimes of violence. *United States v. White*, 97 F.4th 532, 538-39 (7th Cir. 2024) (counting six circuits on each side of the issue).

On the one hand, many circuits have held that *Kisor* applies to the Guidelines and invalidated Guidelines commentary that contradicts the unambiguous meaning

of the operative text. For instance, the en banc Eleventh Circuit held that, because the Guideline term "controlled substance offense" in §4B1.2 (a parallel provision to the "crime of violence" definition at issue here) was unambiguous, *Kisor* does not permit deference to commentary that expands the definition to inchoate offenses, like attempt. *United States v. Dupree*, 57 F.4th 1269, 1276-79 (11th Cir. 2023) (en banc); *accord Smith*, 97 F.4th at 538 *citing e.g., United States v. Castillo*, 69 F.4th 648 (9th Cir. 2023); *United States v. Campbell*, 22 F.4th 438 (4th Cir. 2022); *United States v. Nasir*, 982 F.3d 144 (3d Cir. 2020) (en banc), *vacated on other grounds*, 142 S. Ct. 56 (2021) (mem.); *United States v. Havis*, 927 F.3d 382 (6th Cir. 2019) (en banc) (per curiam); *United States v. Winstead*, 890 F.3d 1082 (D.C. Cir. 2018).

In contrast, other circuits have held that they will continue to apply *Stinson* deference to Guidelines' commentary. *See Smith*, 97 F.4th at 537-41 & at 538 *citing United States v. Vargas*, 74 F.4th 673, 697-98 (5th Cir. 2023) (en banc); *United States v. Maloid*, 71 F.4th 795, 805-08, 809-13 (10th Cir. 2023); *United States v. Jefferson*, 975 F.3d 700, 708 (8th Cir. 2020); *United States v. Lewis*, 963 F.3d 16, 18, 25 (1st Cir. 2020); *United States v. Richardson*, 958 F.3d 151, 154 (2d Cir. 2020).

All told then, there is a clear circuit conflict not just on the general question whether *Kisor* applies to the Guidelines, but also on the specific Guidelines commentary at issue here. The split is pronounced and fully developed with every

circuit weighing in. Moreover, there is no chance it will resolve on its own. Indeed, not only is there a split, but at least three courts of appeals have decided the issue *en banc*, and those *en banc* decisions themselves have *also* reached conflicting positions on *Kisor*. *Compare, e.g.*, *Dupree*, 57 F.4th at 1275-76 (11th Cir. 2023) (en banc) (concluding that *Kisor*'s limitations apply in deciding whether to defer to guidelines commentary); *Nasir*, 17 F.4th at 470-72 (3d Cir. 2021) (en banc) (same) *with United States v. Vargas*, 74 F.4th at 681-85 (5th Cir. 2023) (en banc) (concluding *Kisor* does not apply to the guidelines).

Put simply, this Court must step in and provide clarity. Indeed, judges of the courts of appeals have called for guidance from this Court. *See Vargas*, 74 F.4th at 703 (Elrod, J., dissenting) ("We would benefit from further guidance in this area."); *Dupree*, 57 F.4th at 1286 (Grant, J., concurring in the judgment) (the relevant stare decisis considerations "should be weighed by the Supreme Court").

This Court's intervention is also warranted because the issue is important. The Guidelines "assist federal courts across the country in achieving uniformity and proportionality in sentencing." *Rosales-Mireles v. United States*, 585 U.S. 129, 140 (2018). Had Mr. Elwell been sentenced Miami rather than Denver, his recommended sentence would have been nearly *two years* lower on the bottom end of the guideline range (30 months, compared to 51 months). This inconsistency

starkly undermines the Guidelines' interest in uniformity and proportionality, and, as here, can significantly impact the sentence a defendant receives. *See id.* at 139 (noting that "any amount of actual jail time' is significant, . . . and 'ha[s] exceptionally severe consequences for the incarcerated individual [and] for society which bears the direct and indirect costs of incarceration'") (internal citations omitted).

And while the Sentencing Commission theoretically could address this broad circuit split across the board, that theoretical possibility does not counsel towards denial of certiorari under the particular circumstances of this case. In *Braxton v. United States*, this Court observed that Congress "contemplated that the Commission would periodically review the work of the courts, and would make whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest." 500 U.S. 344, 348 (1991). This, the Court suggested, "might induce us to be more restrained and circumspect in using our certiorari power as the primary means of resolving such conflicts." *Id.*

For two reasons, this general rule abstention is ill-suited the question presented here. First, the question turns not on the meaning of any particular guideline, per se, but on which of this Court's two cases, *Stinson* or *Kisor*, provide the

appropriate framework for evaluating Guidelines' commentary. This Court, not the Sentencing Commission, is the proper forum to make that decision.

Second, to date, the Commission's efforts to address *Kisor*'s impact on the guidelines in some circuits have been targeted at a handful of specific guidelines on which the courts have splintered, not a wholesale approach to how other guidelines and their commentary should be approached. This includes, for example, moving the inchoate provision at issue here from the commentary to the Guidelines' text. *See* USSG Amendment 822 (eff. Nov. 1, 2023). But while that change may have impacted individuals sentenced for conduct *after* that amendment, it does not address the disparities in sentencing that have already resulted in the years since *Kisor*, including those sentences of individuals like Mr. Elwell whose cases remain on direct appeal.[2]

More importantly, these changes do nothing to address the ongoing and deep split about *Kisor*'s application to the Sentencing Guidelines generally. Accordingly,

[2] Although Mr. Elwell was sentenced *after* Amendment 822 went into effect, his offense conduct occurred in January 2022, prior to the amendment's enactment. Accordingly, were this Court to determine that *Kisor* applies to the Guidelines and that, therefore, §4B1.2 Application Note 1's direction prior to Amendment 822 to include convictions for inchoate offenses as crimes of violence was invalid, Mr. Elwell would be entitled to application of the 2021 Guidelines. *See Peugh v. United States*, 569 U.S. 530, 544 (2013) (explaining that ex post facto clause is violated by use of a more onerous later-enacted Guideline provision in effect on the date of sentencing).

because the Commission has not systemically addressed the question underlying this important circuit split, and in many ways cannot resolve the question at the heart of this split, any presumption of abstention should not govern here. *See Early v. United States*, 502 U.S. 920, 920 (1991) (White, J., dissenting from the denial of certiorari) (suggesting that *Braxton*'s presumption against certiorari is inapplicable where "[t]he United States Sentencing Commission has not addressed [a] recurring issue" that has divided the circuits); *see also Dupree*, 57 F.4th 1269 at 1289 n.6 (en banc) (Grant, J., concurring in the judgment) ("[T]he [Sentencing] Commission cannot, on its own, resolve the dispute about what deference courts should give to the commentary. Given the burgeoning circuit split, it appears that only the Supreme Court will be able to answer that question.").

And while Congress charged the Sentencing Commission with periodically reviewing and revising the Guidelines, it also imposed a duty on the courts "to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6). This Court has reaffirmed that important function, and the intolerability of sentencing approaches that undermine the purposes of the Sentencing Reform Act and Sentencing Guidelines "to create a comprehensive sentencing scheme in which those who commit crimes of similar severity under similar conditions receive similar

sentences." *Hughes v. United States*, 584 U.S. 675, 688 (2018). It should, accordingly, grant review here to bring clarity and consistency to this important area of federal sentencing law.

* * *

The courts of appeals have widely acknowledged that the circuits are "fractured" and "split" and that the general issue of *Kisor*'s application to the Guidelines has been "hotly debated" at the appellate level. *Maloid*, 71 F.4th at 798, 804 & n.12; *Vargas*, 74 F.4th at 684. Just as only this Court could determine what deference courts owe to an agency's interpretation of its own regulations, *see Kisor*, 588 U.S. 558, so, too, must it determine the degree of deference courts owe to Guidelines commentary. Accordingly, it should grant review in this case to do so.

II. The Court also should grant review of Section 922(g)(1)'s constitutionality in another pending case and hold this petition to grant, vacate, and remand when it resolves that important question.

When Mr. Elwell appealed to the Tenth Circuit, that court's precedent in *Vincent* foreclosed his constitutional arguments with respect to section 922(g)(1). *See* App. at 1-2. A petition for a writ of certiorari in *Vincent* is currently pending before this Court. *See Vincent v. Bondi*, Sup. Ct. case no. 24-1155 (filed May 8, 2025). This Court should grant the *Vincent* petition for the reasons articulated therein: namely, that even after *Rahimi* the circuits are starkly split over section 922(g)(1)'s validity, the

Tenth Circuit's decision in *Vincent* is wrong, the issue is important and recurring, and Ms. Vincent's case is a good vehicle to resolve the question.

If granted, this Court's determination of *Vincent* will again control the outcome of Mr. Elwell's case before the Tenth Circuit. This is because even though Mr. Elwell did not present this claim in the district court, if this Court grants certiorari in *Vincent* and determines that § 922(g)(1) is unconstitutional in all or some applications, then Mr. Elwell likely will be able to meet each prong of plain error review, as conviction under a plainly unconstitutional statute is prejudicial and merits reversal. *See, e.g.*, *Montgomery v. Louisiana*, 577 U.S. 190, 203 (2016) ("A conviction under an unconstitutional law is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment.") (quotation omitted)); *see also Henderson v. United States*, 568 U.S. 266, 272-73 (2013) (explaining that an error need only be obvious while a case is on direct appeal to satisfy the second prong of plain error review). Accordingly, he respectfully requests that if this Court grants review in *Vincent* (or another case addressing the constitutionality of section 922(g)(1)), it hold his petition until *Vincent*'s resolution, and, thereafter, grant this petition for a writ of certiorari, vacate the underlying judgment, and remand for reconsideration by the Tenth Circuit in light of the resolution of *Vincent*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted as to the first question presented. Alternatively, as to the second question presented, the Court should grant the petition in *Vincent* (or another case addressing the constitutionality of section 922(g)(1)). Thereafter, it should grant this petition, vacate the underlying judgment, and remand for reconsideration in light of that case's resolution.

Respectfully submitted,

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July 10, 2025