No. 23-310

IN THE

Supreme Court of the United States

CORY RATZLOFF,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY TO BRIEF IN OPPOSITION

Branden A. Bell
MORGAN PILATE LLC
926 Cherry Street
Kansas City, MO 64106

Amanda K. Rice
Counsel of Record
JONES DAY
150 W. Jefferson Ave.
Suite 2100
Detroit, MI 48226
(313) 733-3939
arice@jonesday.com

Krista Perry Heckmann
JONES DAY
51 Louisiana Ave., N.W.
Washington, DC 20001

Counsel for Petitioner

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INTRODUCTION

The Government agrees that the limits on deference articulated in *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), apply to the Sentencing Commission's commentary on the Sentencing Guidelines. Nevertheless, *six circuits* refuse to apply those limits and instead strictly defer to Guidelines commentary under *Stinson v. United States*, 508 U.S. 36 (1993). The Government does not meaningfully dispute that the circuits are split or that the Question Presented is important. It is clear, moreover, that this split will not resolve itself unless this Court intervenes. And this case "presents the best opportunity yet" for the Court to do so. Cato Am. Br. 2–3.

The Government's Brief in Opposition tries, and fails, to muddy those clear waters. In so doing, the Government purports to rewrite the Question Presented, calls for (ironically enough) deference to the Sentencing Commission, makes a meritless mootness argument, and gestures at potential alternative grounds for affirmance. This Court should not be deterred by any of that. It is high time for the Court to clarify that the administrative law principles articulated in *Kisor* limit the deference owed to Guidelines commentary. Certiorari should be granted.

ARGUMENT

I. THE CIRCUITS ARE DEEPLY DIVIDED.

The Government does not dispute that the circuits are deeply divided about whether *Kisor*'s limitations on deference apply to Guidelines commentary. *See* Pet. 11–18 (cataloging the six-to-six split). That split has been repeatedly acknowledged by Courts of Appeals across the country. *See, e.g.*, Pet.App. 5a ("The courts

of appeals are divided on whether *Kisor* changed how courts should apply *Stinson*."); *United States v. Maloid*, 71 F.4th 795, 798, 804 & n.12 (10th Cir. 2023) (recognizing that the Courts of Appeals have "fractured"); *United States v. Vargas*, 74 F.4th 673, 680–81 & n.11 (5th Cir. 2023) (en banc) (noting disagreement with "our sister circuits"); *United States v. Lewis*, 963 F.3d 16, 25 (1st Cir. 2020) (acknowledging that "the circuits are split").

Unable to undermine that clear split on the question actually presented here, the Government clings to the argument that there is no split with respect to the *specific Guidelines provision* at issue in this case. *See* BIO 16; *see also id.* at I (reframing the Question Presented accordingly). But the Question Presented is about the much more important question of what standard applies to *all* Guidelines commentary. Pet i. The dearth of caselaw addressing the application of deference principles to Application Note 14(B) is irrelevant to the certworthiness of *that* question—which the Government cannot evade by recasting. *Cf.* Sup. Ct. R. 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court.").

The Government also tries to sow confusion by (1) noting that courts applying *Kisor* have concluded that deference was not warranted where the underlying Guidelines were unambiguous, while (2) pointing out that Petitioner argued below that deference was not warranted because the commentary was unreasonable. BIO 16–17. But *Kisor* is clear that courts may defer to an agency's interpretation of its own regulations only if the regulation is genuinely ambiguous *and* the agency's interpretation is

reasonable. 139 S. Ct. at 2414–16. Petitioner knows of no court that applies the first limitation on deference to Guidelines commentary but not the second. *Contra*, *e.g.*, *United States v. Perez*, 5 F.4th 390, 395 (3d Cir. 2021) ("Under *Kisor*, . . . we afford the Guidelines' Commentary *Auer* deference when the Guidelines' language is ambiguous, the Commentary itself is reasonable, and the 'character and context' of the Commentary 'entitle[ ] it to controlling weight.'" (citation omitted)). And for good reason: A provision that is ambiguous as between two reasonable readings does not give an agency carte blanche to endorse some other unreasonable one.

II. ONLY THIS COURT CAN ANSWER THIS IMPORTANT QUESTION.

The Government does not deny that the Question Presented arises frequently and will prove outcome determinative in many cases. *See* Pet. 21–23. It does not deny that the degree of deference owed to the Sentencing Commission's commentary implicates important issues of agency power, individual liberty, and uniformity in sentencing. *See id.* at 23–25. And it does not attempt to argue that the split will resolve on its own. *See, e.g.*, *Vargas*, 74 F.4th at 683 ("[I]t is our duty to follow squarely applicable Supreme Court precedent. *Stinson* is that."); *Maloid*, 71 F.4th at 798 ("We will not extend *Kisor* to the Commission's commentary absent clear direction from the Court.").

The Government's suggestion (BIO 18) that the Sentencing Commission might be able to resolve the split is meritless. An agency cannot compel judicial deference by declaring its regulations to be binding on courts. Just as only this Court could determine what

deference courts owe to an agency's interpretation of its own regulations, *see Kisor*, 139 S. Ct. 2400, so too must it determine the degree of deference courts owe to Guidelines commentary. *See United States v. Dupree*, 57 F.4th 1269, 1289 n.6 (11th Cir. 2023) (en banc) (Grant, J., concurring in the judgment) ("[T]he 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.").

III. THE GOVERNMENT AGREES THAT *KISOR*'S LIMITS ON DEFERENCE APPLY TO GUIDELINES COMMENTARY.

On the merits of the Question Presented, the Government agrees "that *Kisor* sets forth the authoritative standards for determining whether particular commentary is entitled to deference." BIO 14.

Moreover, the Government's position on *Kisor*'s applicability to Guidelines commentary does not turn on the particular Guideline at issue. That only underscores the distinction between the level-of-deference question presented here and the question the Government attempts to pose regarding the construction of § 2K2.1(b)(6)(B). As reflected in *every* appellate decision addressing the deference question, the arguments on both sides—arguments about *Stinson*'s vitality, its interaction with *Kisor*, and distinctions between the Sentencing Commission and other agencies—have nothing to do with any particular Guidelines provision. *See* Pet. 25–29 (outlining the merits arguments); *see also, e.g.*,

Dupree, 57 F.4th at 1273–77 (holding, based on considerations applicable to every Guidelines provision, that *Kisor* applies); *Maloid*, 71 F.4th at 806–08 (holding, based on considerations applicable to every Guidelines provision, that *Stinson* applies).

Because Petitioner and the Government agree on the answer to the Question Presented, the Court may find it necessary to appoint an amicus to defend the Tenth Circuit's position that *Kisor* does not apply. But that will be just as true in any other case presenting this question. And it is neither unusual nor a reason for this Court to stay its hand. *See*, *e.g.*, *Collins v. Yellen*, No. 19-422 (Aug. 17 2020) (appointing amicus "in support of the position that the structure of the Federal Housing Finance Agency does not violate the separation of powers").

IV. THIS CASE IS AN IDEAL VEHICLE.

This case "presents the best opportunity yet for the Court to provide much-needed guidance to the lower courts" on what level of deference courts owe to Guidelines commentary. Cato Am. Br. 2–3. The split is now fully developed, so there is nothing to be gained from further percolation. *See id.* at 10–13; Pet. 18–19. The Question Presented was raised below. Pet. 30. And the Tenth Circuit relied on *Stinson* deference—and only *Stinson* deference—to affirm Petitioner's sentence. *See* Pet.App. 6a–8a; Cato Am. Br. 7–10. This petition thus lacks the vehicle problems that have plagued prior petitions presenting this question. *See* Pet. 32–33.

The Government's attempts to manufacture new vehicle problems fail. Its mootness argument is meritless. And its remaining arguments all implicate

issues for remand—and are forfeited and wrong in any event.

A. This Case Is Not Moot.

A court may not dismiss a case as moot unless "it is impossible for a court to grant any effectual relief whatever to [the party seeking relief] assuming [he] prevails." *Mission Product Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652, 1660 (2019) (internal quotation marks omitted). Because Petitioner continues to serve the supervised release portion of his sentence, his sentencing challenge is not moot. Pet. 10 & n.3. If he prevails on his argument that the § 2K2.1(b)(6) enhancement is inapplicable, "the district court would need to resentence him and the term of supervised release could be modified in his favor." *United States v. Babcock*, 40 F.4th 1172, 1176 n.3 (10th Cir. 2022); *see United States v. Johnson*, 529 U.S. 53, 60 (2000) (explaining that trial courts may "modify an individual's conditions of supervised release" or "terminate an individual's supervised release obligations" where a defendant has served "excess time . . . in prison"); *see also United States v. Epps*, 707 F.3d 337, 345 (D.C. Cir. 2013) (noting "a very substantial likelihood" of a reduction in those cases). For that reason, *every* Court of Appeals to have considered the question has held that direct appeals challenging the length of a prison sentence remain live while the defendant is still serving supervised release. *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); *Epps*, 707 F.3d at 344–46; *Watkins v. Haynes*, 445 F. App'x 181, 183 (11th Cir. 2011); *Levine v. Apker*, 455 F.3d 71, 77 (2d Cir. 2006); *Johnson v. Pettiford*,

442 F.3d 917, 917–18 (5th Cir. 2006) (per curiam); *Mujahid v. Daniels*, 413 F.3d 991 (9th Cir. 2005).

The two cases from this Court on which the Government relies (BIO 19)—*Lane v. Williams*, 455 U.S. 624 (1982), and *Spencer v. Kemna*, 523 U.S. 1 (1998)—in no way undermine that consensus view. Neither case involved a defendant who remained on supervised release. Instead, both arose in the context of habeas challenges to parole revocations maintained after the sentences had fully concluded. *See Lane*, 455 U.S. at 631; *Spencer*, 523 U.S. at 6. And *Spencer* expressly acknowledged that the Court has "allow[ed] a convict who had already served his time to challenge the length of his sentence" because of "[t]he possibility of consequences collateral to the imposition of [a] sentence." 523 U.S. at 9–10 (citing *Pollard v. United States*, 352 U.S. 354 (1957)).

The Government's attempt to draw support from the Courts of Appeals (BIO 20) fall similarly flat. Both cases to which the Government points—*Burkey v. Marberry*, 556 F.3d 142 (3d Cir. 2009), and *Rhodes v. Judiscak*, 676 F.3d 931 (10th Cir. 2012)—have been superseded. *See United States v. Scripps*, 961 F.3d 626, 631 (3d Cir. 2020) (explaining that *Burkey* "appears to have been superseded by more recent Supreme Court case law, which clarifies that a case is not moot if there is *any* theoretical avenue of relief"); *Babcock*, 40 F.4th at 1176 n.3 (noting that *Rhodes* relied on caselaw that had "since been rejected" in light of "more recent Supreme Court case law"). And neither involved a direct appeal of a criminal sentence. *Burkey* addressed a habeas petition raising an APA challenge to the Bureau of Prisons' determination that the petitioner was ineligible for early release. 556 F.3d

at 145–46. The petitioner thus "was not challenging his sentence, but was instead challenging the [Bureau's] execution of its own early release policy." *United States v. Prophet*, 989 F.3d 231, 235 n.3 (3d Cir. 2021) (citing *Burkey*, 556 F.3d at 144–48). And *Rhodes* addressed a challenge "to the execution of [a] prison sentence . . . in a habeas proceeding under 28 U.S.C. § 2241 . . . where [the court] could not order any relief because [it] lacked authority to reduce the term of supervised release." *Babcock*, 40 F.4th at 1176 n.3. The law is in fact crystal clear in both the Third and Tenth Circuits: Where, as here, "an erroneous Guidelines enhancement 'would likely merit a credit against [the defendant's] period of supervised release for the excess period of imprisonment,'" a direct appeal "is not moot." *Prophet*, 989 F.3d at 235 (citation omitted); *see also, e.g.*, *United States v. Salazar*, 987 F.3d 1248, 1252–53 (10th Cir. 2021).

Thus, as the Tenth Circuit recognized, Pet.App. 3a n.1, Petitioner's challenge to his sentence remains live.[1]

B. The Government's Remaining Arguments Are Premature, Forfeited, And Wrong.

The Government's remaining points merely preview its position on remand that the Tenth Circuit should affirm Petitioner's sentence for a host of new reasons—including that Application Note 14(B) warrants deference even under *Kisor* (BIO 14–16) and that the plain text of the Guideline supports the

[1] If this Court has any lingering doubts on that score, it could simply add a question presented about whether a defendant on supervised release may maintain a challenge to the length of his prison term.

enhancement (BIO 9–12). But the availability of alternative arguments on remand will not impede the Court's review of the Question Presented. The Tenth Circuit upheld Petitioner's sentence enhancement *solely* because *Stinson* required deference to Application Note 14(B). *See* Pet.App. 6a–8a; *id.* at 8a n.3 (expressly declining to reach plain text arguments). In line with its ordinary practice, this Court should review the Tenth Circuit's decision on its own terms and leave issues "not decided below" to be addressed "in the first instance" on remand. *National Collegiate Athletic Assn. v. Smith*, 525 U.S. 459, 470 (1999); *cf. Kisor*, 139 S. Ct. at 2410–24 (remanding for the Court of Appeals to apply the new deference principles to the agency interpretation at issue).

In any event, the Government's remand arguments are both forfeited and wrong. The Government forfeited the argument for deference under *Kisor* by failing to raise it before the District Court. *See* Pet. 30. And forfeiture aside, the Commission's construction of the § 2K2.1(b)(6)(B) enhancement—which applies to defendants who "use[ ] or possess[ ] any firearm or ammunition *in connection* with *another* felony offense" (emphases added)—as categorically applicable to a burglary involving the theft of firearms is unreasonable and thus not entitled to deference. The Government fails to cite even a single case in which a court applying *Kisor* deferred to the relevant portion of Application Note 14(B). [2] Further, in the absence of the

[2] The Government's reliance (BIO 16) on *Perez*, 5 F.4th 390 is misplaced. *Perez* addressed a different provision of Application Note 14(B), which states that the enhancement applies if the

Commission's commentary, at least three Courts of Appeals had held that the § 2K2.1(b)(6)(B) cannot be read to apply to such a burglary if, as here, the defendant did not use the firearm during the course of the crime. *See, e.g.*, *United States v. Fenton*, 309 F.3d 825, 827 (3d Cir. 2002); *United States v. Szakacs*, 212 F.3d 344, 350 (7th Cir. 2000); *United States v. Sanders*, 162 F.3d 396, 400 (6th Cir. 1998).

They did so for good reasons. "'[A]nother felony offense' cannot apply to the same felonious conduct for which the criminal defendant is being sentenced." *Fenton*, 309 F.3d at 827; *see also Sanders*, 162 F.3d at 400 ("The Guidelines do not authorize a major four-level increase . . . simply because the state also could have brought a prosecution for the one and the same burglary."). It is thus by no means clear—as the Government suggests—that the formalistic test used to define "offense" for purposes of the Double Jeopardy Clause is the one invoked in § 2K2.1(b)(6)(B). *See* Pet. 31–32; *see also United States v. Keller*, 666 F.3d 103 (3d Cir. 2011). And merely obtaining an unloaded weapon does not facilitate the completion of an already-completed burglary. *See* Pet. 31.

The Government's contrary interpretation "would require enhancement for almost every weapons

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firearm "is found in close proximity to drugs, drug-manufacturing materials, or drug paraphernalia." *Id.* at 394. Moreover, the Third Circuit concluded that that aspect of the commentary was reasonable only *after* giving it a narrowing construction, including by interpreting it as a rebuttable presumption. *Id.* at 396–402. And the court ultimately vacated the sentence to allow the defendant the opportunity to put forth evidence to establish that mere proximity was insufficient to justify the enhancement. *Id.* at 402.

offense," *Fenton*, 309 F.3d at 828, defeating the purpose of a proportional system "that imposes appropriately different sentences for criminal conduct of differing severity," Sentencing Guidelines Ch. 1 Pt. A. "[T]he Guidelines differentiate between base-offense levels and specific-offense characteristics, and courts should not adjust a sentence upward based on factors already reflected in the base-offense level." *Szakacs*, 212 F.3d at 350.

The Government's suggestion that a *different* provision of § 2K2.1(b)(6)(B)—which applies where a defendant "possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense"—might independently support the enhancement (BIO 11–12) fares no better. The Government failed to preserve that argument below. *See generally* Brief of Appellee, *United States v. Ratzloff*, No. 22-3128, 2023 WL 6280326 (10th Cir. Jan. 27, 2023). The Tenth Circuit never passed on it. *See* BIO 12 (acknowledging that "the court of appeals did not rely on that alternative ground"). And the district court never made a finding that Petitioner had the mental state required by that provision.

* * *

The Tenth Circuit affirmed Petitioner's sentence because it applied strict *Stinson* deference—without *Kisor*'s limiting principles—to Application Note 14(B). *See* Pet.App. 4a–8a. In so doing, the Tenth Circuit squarely held, in line with circuit precedent and five other Courts of Appeals, that the limitations on deference articulated in *Kisor* do not apply to

Guidelines commentary. *See id.* at 4a–6a; Pet. 15–18. The Government concedes that Tenth Circuit's position is wrong. Its arguments about § 2K2.1(b)(6)(B) are, at best, issues for remand.

CONCLUSION

The petition for a writ of certiorari should be granted.

December 19, 2023

Respectfully submitted,

Branden A. Bell
MORGAN PILATE LLC
926 Cherry Street
Kansas City, MO 64106

Amanda K. Rice
Counsel of Record
JONES DAY
150 W. Jefferson Ave.
Suite 2100
Detroit, MI 48226
(313) 733-3939
arice@jonesday.com

Krista Perry Heckmann
JONES DAY
51 Louisiana Ave., N.W.
Washington, DC 20001

Counsel for Petitioner