Case No. 18-1468

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

United States of America,
Plaintiff-Appellee,

v.

Daniel Lovato,
Defendant-Appellant.

On Appeal from the United States District Court
for the District of Colorado
The Honorable Raymond P. Moore, District Judge
D.C. No. 18-cr-00213-RM

BRIEF FOR *AMICUS CURIAE* CATO INSTITUTE IN SUPPORT OF DEFENDANT-APPELLANT ON PETITION FOR REHEARING EN BANC

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Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for amicus certifies that (1) amicus does not have any parent corporations, and (2) no publicly held companies hold 10% or more of the stock or ownership interest in amicus.

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato has participated as *amicus curiae* in numerous cases before this court and others. Cato also works to defend individual rights through publications, lectures, conferences, public appearances, and the annual *Cato Supreme Court Review*. This case is of central concern to Cato because it involves an extra-legislative power to make law-like interpretations that can cost American citizens years of freedom.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), the Supreme Court preserved some form of judicial deference to administrative agencies' interpretations of their own regulations, as previously recognized in *Auer v. Robbins*, 519 U.S. 452 (1997), and *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945). The Court placed restraints on so-called *Auer* deference by making clear the limited circumstances in which deference is warranted, and the steps courts must take

[1] Pursuant to Fed. R. App. P. 29, counsel for *amicus* states that all parties have consented to the filing of this brief. Further, no party's counsel authored any part of this brief and no person other than *amicus* made a monetary contribution to fund its preparation or submission.

before applying it. *Kisor*, 139 S. Ct. at 2420. How lower courts would apply this newly adapted deference—call it "*Kisor* deference"—would show whether the *Kisor* majority was right that the doctrine just needed tightening, rather than that it was beyond repair as the dissent would've had it.

This case presents one of the first tests of the reformed regulatory deference, asking the important question: whether deference to the U.S. Sentencing Commission's interpretation of sentencing guidelines should survive despite its clear incompatibility with *Kisor*.

Appellant was convicted of felony firearm possession and received a harsher sentence than he would have received for the gun crime alone based on a prior conviction for *attempted* second-degree assault. Under its definition of prior "crimes of violence" for the purpose of sentencing determinations, the Sentencing Commission's guidelines do not include all attempt crimes, nor even all violent attempt crimes. 18 USCS Appx § 4B1.2. In the commentaries, however, the Commission has specified that all attempt crimes, where the underlying offence has an element of violence, are "crimes of violence." *Id*.

In keeping with *United States v. Martinez*, 602 F.3d 1166 (10th Cir. 2010), and *Stinson v. United States*, 508 U.S. 36 (1993), a panel of this Court upheld appellant's sentence and the deference extended to the commentaries. Both cases affirm a form of deference that gives controlling force to the commentaries unless

they are clearly inconsistent with the guidelines or federal statutory law.

A fair reading of *Kisor*, however, shows that it is incompatible with and thus implicitly overturned—or at least obviated—*Stinson*, which required no preconditions for the application of deference. *Martinez* and the panel decision likewise give a level of deference to the guidelines beyond that allowed by *Kisor*.

ARGUMENT

I. *KISOR* RESTRICTED THE APPLICATION OF *AUER* DEFERENCE AND OVERTURNED OR OBVIATED *STINSON*

Stinson, which established the rule on which this Court relied in *Martinez*, made clear that it was applying *Seminole Rock*, later *Auer*, deference. 508 U.S. at 45. After considering several alternatives—including analogizing the commentaries to statements of intent and the agency interpretation of statutes—Justice Kennedy's unanimous opinion concluded that the deference the Court would give to the sentencing-guideline commentaries was the same that it customarily gave to administrative-agency interpretations of regulations. *Id*.

Justice Kennedy's opinion acknowledges that the analogy between the commentaries and agency regulations is imperfect, and the government might point to that language to argue that *Stinson*'s fate is unconnected to *Auer*'s reworking. *Id.* at 44. Even if accepted, however, that argument does not affect the outcome of this case. The *Stinson* Court noted that sentencing guidelines are different from agency regulations because Congress is involved in the enactment of the guidelines. *Id*.

While the *Stinson* Court explicitly declined to follow this logic to the point of making the commentaries subject to *Chevron* deference, *Chevron U.S.A., Inc. v. NRDC, Inc.,* 467 U.S. 837 (1984), it can still be said that to whatever extent *Stinson* deference is distinguishable from S*eminole Rock* deference it is analogous to *Chevron* deference. *Id.* The result of this version of *Auer* deference, as Justice Gorsuch described it, is to make *Auer* subject to the same two-step structure—beginning with the discernment of ambiguity—as *Chevron,* refusing to allow deference to agencies' regulatory interpretations where it would not be granted to their statutory interpretation. *Kisor*, 139 S. Ct. at 2448 (Gorsuch, J., dissenting). Accordingly, if there is some aspect of *Stinson* deference that is not subject to *Kisor*'s requirements, it is only because it was already subject to those same requirements by analogy to *Chevron*. But it would make no sense for a hybrid *Auer/Chevron* doctrine, if indeed that is what *Stinson* was, to give a far more powerful form of deference than either of those doctrines independently do.

In any event, the commentaries are agency interpretations subject to a level of deference that needs to be reevaluated in light of *Kisor*. While the Supreme Court did not jettison *Auer* deference entirely in *Kisor*, as the dissent would have done, neither did it leave the doctrine entirely intact, at least as the Court has employed it in prior cases. 139 S. Ct. at 2425 (Gorsuch, J., dissenting).

Moreover, as the chief justice pointed out in concurrence, the gulf between

the majority and dissent is not great. *Kisor*, 139 S. Ct. at 2424 (Roberts, C.J., concurring). *Kisor* restricted *Auer* by laying out several preconditions that courts must find before deference may be applied. *Id.* Even Justice Kagan's majority opinion, which places itself in the *Auer/Seminole Rock* tradition, acknowledged that the Supreme Court has given confusing guidance and that some cases have not observed these preconditions. *Id*. Given that "the Court has given *Auer* deference without careful attention to the nature and context of the interpretation," some *Auer*-based rulings must have been set aside by *Kisor*. *Id.* *Stinson* is one of them.

In establishing preconditions for *Auer* deference, *Kisor* effectively prescribed the order in which courts must consider sources of legal authority and interpretative tools when a question of regulatory interpretation arises. *Id*. at 2414. A court must first consider the text of the regulation in question. Next come the canons of interpretation and other normal interpretive aids, then consideration of the relevance of the interpreting agency's expertise to the question at hand. Finally, there's a potential inquiry into whether the agency has offered a reasonable and authoritative interpretation. *Id.* at 2419. If these conditions are met, *Auer* deference can be applied to the interpretation of the agency.

A court may not move beyond the text unless it can find a genuine material ambiguity therein. Nor is it enough for the regulation not to be unambiguous upon initial inspection. A court must employ the full range of normal interpretative

tools, including dictionaries and all the relevant traditional canons, before declaring a bona fide ambiguity. *Id*. at 2415. If, at this stage, a court does not find any such ambiguity, it need not look to any other material, nor should other materials color its discernment of ambiguity. The modified *Auer* analysis is thus identical to the deference given to agency statutory interpretations under *Chevron*, with *Kisor* having removed any exceptional deference given to regulatory interpretations. *Id.* at 2416.

Contrary to all the above, *Stinson* looked first to the agency interpretation: the commentaries. The Sentencing Commission's commentary can govern, the Court said, unless it "is inconsistent with, or a plainly erroneous reading of" the guidelines themselves. *Stinson*, 508 U.S. at 38. More than a useful interpretation, *Stinson* seemed to regard the commentaries as a binding expression of law. "Failure to follow such commentary could constitute an incorrect application of the guidelines, subjecting the sentence to possible reversal." *Id.* at 43 (quoting 18 USCS Appx § 1B1.7).

Kisor held that a court shouldn't find a regulation to be ambiguous merely because it can't be deciphered on first reading. But *Stinson* doesn't even require a first regulatory reading, at least not before bringing in the commentaries. *Id.* Framed in *Auer* and *Kisor's* terms, *Stinson* treats statutes as presumptively ambiguous unless they can be shown to be materially clear in a way that disfavors

the interpretation made by the Sentencing Commission's guidelines. *Id*.

Any way you read it, *Stinson* is incompatible with *Kisor*, reversing the order of consideration of authorities. Under *Stinson*, there will be fewer cases where an agency interpretation will be found to be plainly inconsistent with a regulation than under *Kisor*. Even unambiguous guidelines could be supplemented in various ways by agency interpretations under the *Stinson* approach. That type of super-deference is simply unwarranted.

II. *UNITED STATES V. MARTINEZ* IS INCONSISTENT WITH CURRENT SUPREME COURT DOCTRINE

This Court's decision in *Martinez*—cited by the panel as precedent against appellant's claim that an attempt is not necessarily a crime of violence, *United States v. Lovato*, 950 F.3d 1337, 1347 (10th Cir. 2020)—is faithful to *Stinson* and thus replicates its problems under *Kisor*. The *Martinez* court did not ascertain whether the guideline was ambiguous before determining if deference was due. 602 F.3d at 1173. Instead, it looked to the commentaries as a matter of custom. *Id.* At no point did the court entertain the possibility, as *Kisor* now requires, that Guideline 4B1.2 might not be ambiguous on the relevant point. Nor did it inquire if the commentary was a reasonable interpretation of the guidelines, only whether the two could be reasonably reconciled. *Id*. at 1174.

How the *Martinez* court went about this reconciliation process is a perfect example of the difference between *Kisor's* requirement of ambiguity and *Stinson's*

plain inconsistency rule. *Martinez* found that the guideline commentary could either be considered as (1) a definitional provision that tells the court "that when the guideline uses the word for a specific offense, that word is referring to not just the completed offense but also 'aiding and abetting' the offense, 'conspiring' to commit the offense, and 'attempting' to commit the offense"; or (2) an expression of the commission's belief that that all attempted violent crimes represent a "'serious potential risk of physical injury to another' comparable to that presented by the completed offense." *Id*. Both these approaches far exceed *Kisor* deference.

The *Martinez* court even noted the level of its deference, commenting that "inclusion of attempt offenses as crimes of violence depends on empirical data." *Id.* at 1175. And while including attempts "may be "'wrong' as a factual matter," nevertheless, "[w]e cannot invalidate an application note merely because our view of empirical data differs from that of the Sentencing Commission." *Id.* Suffice it to say, after *Kisor*, courts can now act differently.

III. THE COURT'S NORMAL INTERPRETIVE TOOLS CAN RESOLVE THIS CASE IN FAVOR OF APPELLANT

Side-stepping the outdated *Stinson* and *Martinez*, the application of *Kisor* here is relatively straightforward: any seeming ambiguities in the sentencing guidelines can be resolved without recourse to further interpretive tools, the commentaries included. Guideline 4B1.2.(a)(1) says that a crime of violence that includes an element of an "attempt" to use violence requires something more than

an attempt to commit a statutory offence, an element of which, itself, is the use of violence. 18 USCS Appx § 4B1.2. Furthermore, via the canon of *expresio unius est exclusio alterius*, and the related anti-surplusage canon, attempt is excluded from the other provisions of Guideline 4B1.2 because it's referenced in Guideline 4B1.2(a)(1). If the guidelines were written to include attempted violent crimes broadly, the narrower language targeting crimes that require actual attempts of violent acts—not violent crimes—would be unnecessary. *Id.*

Further, a close reading of the text of Guideline 4B1.1.(a)(1) reveals that, in order for an attempt crime to be considered a crime of violence, it must only punish attempts that have progressed to a point at which the violent element of the crime was *per se* attempted, not merely a broader offence of which it is a part. For example, pulling the trigger of a firearm that happens to jam is an attempted shooting and therefore a crime of violence, assuming the offence is narrowly defined. But attempting a burglary by purchasing a lockpick, black gloves, and some binoculars would not be an attempted crime of violence. *Cf. James v. United States*, 550 U.S. 192, 206 (2007) (holding that Florida's attempted burglary statute created a crime of violence but leaving open the question of whether "more attenuated conduct . . . presents a potential risk of serious injury").

Nor does that reading hamstring legislators. Those wishing to punish all forms of attempted crimes while still maximizing sentences under the guidelines

would only need to define separate degrees or kinds of attempt. For instance, a first-degree attempt might require an actual attempted violent act, ensuring that those who pull triggers are maximally punished. A second-degree attempt might include any attempt at an ultimately violent crime so that no attempted criminals are left uncovered by the law.

What is certain, however, is that the deference to the sentencing guidelines here was given unconstitutionally, and not in line with *Kisor*.

CONCLUSION

For these reasons and those stated by the appellant, this Court should grant rehearing en banc and reverse the district court.

Respectfully submitted,

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April 22, 2020

CERTIFICATE OF COMPLIANCE WITH RULE 28.1(e) OR 32(a)

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1. Type-Volume Limitation: Any Reply or Amicus brief may not exceed 7,000 words or 650 lines. Counsel may rely on the word or line count of the word-processing program used to prepare the document. The word-processing program must be set to include footnotes in the count. Line count is used only with monospaced type.

   This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2) or 32(a)(7)(B) because this brief contains 2,098 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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/s/ *Ilya Shapiro* Dated: April 22, 2020

Attorney for *amicus curiae* Cato Institute

CERTIFICATE OF DIGITAL SUBMISSION

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/s/ *Ilya Shapiro* Dated: April 22, 2020

Attorney for *amicus curiae* Cato Institute

CERTIFICATE OF SERVICE

The undersigned, attorney of record for *amicus*, hereby certifies that on April 22, 2020, an identical electronic copy of the foregoing amicus brief was uploaded to the Court's CM/ECF system, which will automatically generate and send by electronic mail a Notice of Docket Activity to all registered attorneys participating in the case. Such notice constitutes service on those registered attorneys.

/s/ *Ilya Shapiro* Dated: April 22, 2020

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