No. 18-2888

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

United States of America,
Plaintiff-Appellee,
v.
Malik Nasir,
Defendant-Appellant.

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

Appeal from the United States District Court
for the District of Delaware
District Court No. 1-16-cr-00015-001
District Judge: The Honorable Leonard P. Stark

Ilya Shapiro
Counsel of Record
Trevor Burrus*
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, DC 20001
(202) 842-0200
ishapiro@cato.org

**Not admitted in this court*

CORPORATE DISCLOSURE STATEMENT

The Cato Institute states that it has no parent companies, subsidiaries, or affiliates, and that it does not issue shares to the public.

Dated: April 22, 2020

/s/ Ilya Shapiro
Ilya Shapiro

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

IDENTITY AND 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 federal courts. 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 people 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

[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.

which deference is warranted, and the steps courts must take 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 three drug counts and unlawful possession of a firearm and received a harsher sentence than he would have received for these crimes alone based on being designated a "career offender." That designations was based on two prior drug convictions, one of which was an attempted possession—attempted because what appellant may have believed was *cocaine* was actually *procaine*. Under its definition of prior "controlled substance offenses" for the purpose of sentencing determinations, the Sentencing Commission's guidelines make no mention of attempted drug crimes. 18 USCS Appx § 4B1.2. In the commentaries, however, the Commission has specified that this definition "include[s] the offenses of aiding and abetting, conspiring, and attempting to commit such offenses." § 4B1.2 comment. n.1.

Under *United States v. Hightower*, 25 F.3d 182 (3d Cir. 1994) and *Stinson v. United States*, 508 U.S. 36 (1993), this court would uphold appellant's sentence and the deference extended to the commentaries. *Hightower* affirmed 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. *Hightower,* likewise, gives 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 *Hightower*, 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 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 *Stinson* 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. 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 an aspect of *Stinson* deference 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.* at 2448. 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.* at 2414. *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, in that sense, identical to the deference given to agency 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 agency interpretation. 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.* at 47.

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 are unambiguous 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. HIGHTOWER* IS INCONSISTENT WITH CURRENT SUPREME COURT DOCTRINE

This Court's decision in *Hightower*—the precedent on point—is faithful to *Stinson* and thus replicates its problems under *Kisor*. The *Hightower* Court did not ascertain whether the guideline was ambiguous before determining if deference was due. 25 F.3d at 186. Instead, as the guidelines state, the commentaries were said to weigh on the implementation of the guideline on one of three fronts. 18 USCS Appx § 1B1.7. They may "(1) explain or interpret the guidelines, (2) suggest circumstances warranting departure from the guidelines [or] (3) provide background information on the guidelines." *Id.*

So, while *Hightower* does not view all the commentaries as interpretative, and its tripartite approach is derived from the guidelines, these elements do not save it

from *Kisor*. The tripartite approach is found in Guideline 1B1.7, but not in the Sentencing Reform act, which, as the *Hightower* court acknowledged, does not authorize the commentaries. 25 F.3d at 184. And whether a given commentary is interpretative seems to be determined by whether it is "inconsistent" with the guidelines, not by whether the guidelines ae ambiguous. *Id.* at 187. How the three-pronged structure actually strengthens deference to the commentaries, contra *Kisor*, was demonstrated by how the *Hightower* court found the self-limiting principle in the commentary to Guideline 4B1.1—limiting career offenders to their statutory definition—to be merely a statement of background information. *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 187.

How the *Hightower* 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. *Hightower* merely stated the absence of an inconsistency and found that the commentary "explains how the guideline should be applied, and we therefore hold that it is binding." *Id.* at 187. This ability to expand a regulation, where it says nothing, is well outside *Kisor*. 139 S. Ct. at 2448.

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

Side-stepping the outdated *Stinson* and *Hightower* decisions, 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.(b) says that a controlled substance offence "includes an element of an manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense" but says nothing of attempt. 18 USCS Appx § 4B1.2. Furthermore, via the canon of *expresio unius est exclusio alterius*, attempt is excluded from the other provisions of Guideline 4B1.2 because it is referenced in Guideline 4B1.2(a)(1), under the definition of a "crime of violence." If the guidelines were written to include attempted drug crimes, as they include some but not all attempted violent crimes, this would be specified in their text. *Id*.

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 reverse the district court.

Date: April 22, 2020

Respectfully submitted,

By: /s/ Ilya Shapiro
Ilya Shapiro
Counsel of Record
Trevor Burrus*
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, DC 20001
(202) 842-0200
ishapiro@cato.org

**Not admitted in this court*

CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with the typeface and style requirements of Fed. R. App. P. 32(a)(5)-(6) because it has been prepared in a proportionally spaced typeface (14-point Times New Roman) using Microsoft Word 2010.

2. This brief also complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), as modified by Fed. R. App. P. 29(d), because this brief contains 1,932 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

3. The text of the electronic version of this Brief filed on ECF is identical to the text of the paper copies filed with the Court.

4. The electronic version of this Brief filed on ECF was virus-checked using ESET Cyber Security, Version 6.8.300.0, and no virus was detected.

Dated: April 22, 2020

By: /s/ Ilya Shapiro
Ilya Shapiro
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, DC 20001
(202) 842-0200
ishapiro@cato.org

Attorney for Amicus Curiae Cato Institute

LOCAL RULE 28.3(d) CERTIFICATION

I hereby certify that at least one of the attorneys whose names appear on the foregoing brief, including the undersigned, is a member of the bar of this Court.

Dated: April 22, 2020

By: /s/ Ilya Shapiro
Ilya Shapiro
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, DC 20001
(202) 842-0200
ishapiro@cato.org

Attorney for Amicus Curiae Cato Institute

CERTIFICATE OF SERVICE

I hereby certify that on April 22, 2020 I caused to be filed the foregoing document with the United States Court of Appeals for the Third Circuit, via the CM/ECF system, which will provide notice to all counsel of record.

Dated: April 22, 2020

By: /s/ Ilya Shapiro
Ilya Shapiro
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, DC 20001
(202) 842-0200
ishapiro@cato.org

Attorney for Amicus Curiae Cato Institute