APPENDIX

TABLE OF CONTENTS

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-4067

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

LENAIR MOSES, a/k/a Bones,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of North Carolina, at Raleigh.

Louise W. Flanagan, District Judge. (5:19-cr-00339-FL-1)

Argued: October 29, 2021

Decided: January 19, 2022

Before NIEMEYER and KING, Circuit Judges, and Thomas T. CULLEN, United States District Judge for the Western District of Virginia, sitting by designation.

Affirmed by published opinion. Judge Niemeyer wrote the opinion, in which Judge Cullen joined. Judge King wrote a separate opinion dissenting in part and concurring in the judgment.

ARGUED: Marshall Hood Ellis, HORNTHAL, RILEY, ELLIS & MALAND, LLP, Elizabeth City, North Carolina, for Appellant. David A. Bragdon, OFFICE OF THE UNITED STATES ATTORNEY, Raleigh, North Carolina, for Appellee. **ON BRIEF:** G. Norman Acker, III, Acting United States Attorney, Jennifer P. May-Parker, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Raleigh, North Carolina, for Appellee.

NIEMEYER, Circuit Judge:

In this appeal, we determine the enforceability of and the weight to be given the official commentary of the Sentencing Guidelines. And to make that determination, we must consider whether we are required to continue to apply the rules set forth in *Stinson v. United States*, 508 U.S. 36 (1993), which held that Guidelines commentary, *even when the related Guideline is unambiguous*, is authoritative and therefore *binding* on courts unless the commentary is inconsistent with law or the Guideline itself, *id*. at 38, 43, 44, or whether *Stinson* was overruled by the Supreme Court's recent decision in *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), which limited controlling deference to an executive agency's reasonable interpretation of its own regulations to where "the regulation is *genuinely ambiguous*," *id*. at 2415 (emphasis added). Thus, under *Stinson*, Guidelines commentary would be authoritative and binding regardless of whether the Guideline to which it is attached is ambiguous, whereas under *Kisor*, Guidelines commentary would receive such deference only if the Guideline is "genuinely ambiguous." The distinction is meaningful to federal courts' continued reliance on Guidelines commentary when sentencing criminal defendants.

In the case before us, after Lenair Moses was convicted of two counts of drug trafficking, the district court sentenced him as a career offender under U.S.S.G. § 4B1.1, based on two prior drug-trafficking convictions. Moses argues, however, that the conduct involved in one of the prior convictions that was counted as a predicate was actually part of the same course of conduct as his current offenses and therefore

should have been considered "relevant conduct" under § 1B1.3, rather than as part of his criminal history, thereby resulting in a substantially lower Guidelines sentencing range.

Application Note 5(C) to § 1B1.3, however, defines the line between a defendant's conduct involved in a prior conviction and his relevant conduct, stating that "conduct *associated with a sentence that was imposed prior to*" the conduct of the instant offense "is not considered" to be relevant conduct. (Emphasis added). Therefore, if Application Note 5(C) is authoritative and binding, the conduct associated with Moses's prior offense — an offense for which he was convicted and sentenced years before he committed the instant offenses — was properly found not to be conduct relevant to his current offenses. Moses argues, however, that *Kisor* controls whether Application Note 5(C) is binding and that when *Kisor*'s limitations on deference are applied, "Application Note 5(C) is not entitled to controlling weight." Accordingly, he contends that the district court erred in relying on Application Note 5(C) to sentence him as a career offender.

Upon consideration of the unique role served by the Sentencing Commission and its Guidelines Manual and a careful reading of both *Stinson* and *Kisor*, we conclude that *Kisor* did not overrule *Stinson*'s standard for the deference owed to Guidelines commentary but instead applies in the context of an executive agency's interpretation of its own legislative rules. While we recognize that our conclusion is not shared by at least two circuits — *see United States v. Nasir*, 17 F.4th 459, 469–72 (3d Cir. 2021) (en banc); *United States v. Riccardi*, 989 F.3d 476, 484–86 (6th Cir.

2021) — we believe that subjecting Guidelines commentary to the *Kisor* framework would deny courts the benefit of much of the Guidelines commentary that both Congress and the Sentencing Commission intended courts to apply when sentencing defendants. Indeed, the Guidelines themselves state that *the failure to follow commentary* could result in "an incorrect application of the guidelines" and subject sentences to "possible reversal on appeal." U.S.S.G. § 1B1.7. Because we conclude that *Stinson* continues to apply unaltered by *Kisor* and that Application Note 5(C) must be afforded binding effect under *Stinson*, we also conclude that the district court did not err in applying the career-offender enhancement when calculating Moses's advisory Guidelines range. In addition, we reject Moses's alternative argument that the district court's downward variance sentence of 120 months' imprisonment was substantively unreasonable. Accordingly, we affirm the judgment of the district court.

I

In October 2018, Lenair Moses sold $20 worth of crack cocaine to a confidential informant in an "open air drug market" in Raleigh, North Carolina. Six days later, he again sold $20 worth of crack cocaine to a confidential informant in the College Park area of Raleigh. The total quantity of crack cocaine sold by Moses in these transactions was 0.49 grams. Moses pleaded guilty to two counts charging him with the distribution of a quantity of cocaine base, in violation of 21 U.S.C. § 841(a)(1).

In the presentence report prepared for Moses's sentencing, the probation officer determined that, based on the quantity of drugs distributed, Moses's base offense level was 12. But concluding that Moses qualified as a career offender under

U.S.S.G. § 4B1.1(a), the probation officer increased his offense level from 12 to 32. The two predicate convictions identified for finding Moses to be a career offender were (1) a 2009 North Carolina felony conviction for possession with intent to sell or deliver cocaine and (2) a 2013 North Carolina felony conviction for the same offense. After reducing Moses's offense level by 3 levels for his acceptance of responsibility, the probation officer reached a total offense level of 29. He also determined that Moses had a criminal history score of 23 based on his long record of prior convictions, which included two juvenile adjudications for making terroristic threats; a felony firearm conviction; a felony conviction for engaging in a robbery conspiracy; a misdemeanor conviction for assault by pointing a gun; two other misdemeanor convictions for simple assault; a felony conviction for conspiracy to commit robbery with a dangerous weapon; and a felony conviction for interfering with an electronic monitoring device. Moses's criminal history score of 23 far exceeded the 13 criminal history points necessary for Criminal History Category VI, the maximum under the Guidelines. The combination of an offense level of 29 and Criminal History Category VI resulted in an advisory sentencing range of 151 to 188 months' imprisonment. Had Moses's offense level not been enhanced by his career-offender status, however, the resulting sentencing range would have been 21 to 27 months' imprisonment.

Moses objected to the career-offender designation, arguing that his 2013 North Carolina felony conviction for possession with intent to sell or deliver cocaine should not have been counted as a predicate conviction for purposes of the career-offender enhancement but rather that the conduct associated with that prior conviction should

have been taken as "relevant conduct" to the instant offenses under U.S.S.G. § 1B1.3, resulting in a much lower sentencing range. He pointed to § 4B1.2(c), § 4A1.1, and § 4A1.2(a)(1), arguing that those provisions, taken together, require a prior predicate conviction to have been "*for conduct not part of the instant offense*." U.S.S.G. § 4A1.2(a)(1) (emphasis added). But, he argued, the conduct associated with his 2013 drug-trafficking conviction did indeed constitute "part of the instant offense" because it qualified as "relevant conduct" under § 1B1.3, which provides that, for certain types of offenses (including drug offenses), relevant conduct includes conduct that was "part of the same course of conduct or common scheme or plan as the offense of conviction." *Id.* § 1B1.3(a)(2); *see also id.* § 4A1.2 cmt. n.1 (stating that "[c]onduct that is part of the instant offense means conduct that is relevant conduct to the instant offense under the provisions of § 1B1.3"). In short, according to Moses, "the conduct underlying the 2013 incident [was] 'part of the instant offense,' and the sentence imposed for that conduct . . . is not a 'prior sentence'" that can be "relied upon to enhance [his] sentence [as a career offender] under § 4B1.1."

Alternatively, Moses objected to the sentence proposed in the presentence report on the ground that it was substantively unreasonable, and he requested a "substantial downward variance." He pointed to potential irregularities with his 2009 felony drug conviction and argued that "no one should have to spend 12+ years in prison for selling *less than 1/2 gram* of a controlled substance."

The government argued that the probation officer had properly counted Moses's 2013 conviction as a predicate conviction for career-offender status because

Moses had been *convicted and sentenced* for the 2013 conduct well before he committed the instant offenses and had indeed been incarcerated from August 2014 through March 2018. It was not until October 2018, seven months after his release, that he sold the cocaine involved in the instant convictions. Based on this, the government argued that Moses's time in prison "between the 2013 offense and the instant conduct in this case" meant that there was not a "sufficient connection" for the two to be considered as part of the same course of conduct or a common scheme or plan. For support, it relied on Application Note 5(C) to § 1B1.3, which states that "offense conduct associated with *a sentence that was imposed prior to the acts or omissions* constituting the instant federal offense (the offense of conviction) is not considered as part of the same course of conduct or common scheme or plan as the offense of conviction." U.S.S.G. § 1B1.3 cmt. n.5(C) (emphasis added).

The government also opposed Moses's request for a downward variance, noting that Moses had continued to commit crimes "despite serving at least two lengthy prison sentences" in state custody. It argued that Moses had shown "no remorse for his actions" and that "only a significant criminal sentence will prevent him from committing crimes in the future."

At sentencing, the district court confirmed with Moses's counsel that his position was that the court "should disregard [Application] Note 5(C)." But the court then rejected that argument and concluded that the 2013 conviction qualified as a prior predicate conviction, rather than as relevant conduct. While the court thus overruled Moses's objection to his career-offender status, it nonetheless imposed a

downward variant sentence of 120 months' imprisonment, stating that "[s]ome of the defendant's arguments resonate . . . as to why a variance should be imposed," including the "amount of the drug" involved in the instant offenses.

From the district court's judgment dated February 9, 2021, Moses filed this appeal, challenging both the court's reliance on Application Note 5(C) to § 1B1.3 in concluding that the career-offender enhancement was applicable and the substantive reasonableness of a 120-month sentence for distributing one-half a gram of crack cocaine.

II

Moses contends that while the district court concluded that his 2013 drug-trafficking conviction was one of two predicate convictions that qualified him as a career offender, that conviction was actually based on conduct relevant to his current drug-trafficking convictions. Defining the line between conduct constituting a prior conviction and conduct relevant to the current offense, Application Note 5(C) to U.S.S.G. § 1B1.3 states that "offense conduct associated *with a sentence that was imposed prior to the acts or omissions constituting the instant federal offense* (the offense of conviction) is not considered as" relevant conduct. (Emphasis added). If Application Note 5(C) were binding, then Moses's argument that he does not qualify as a career offender would have to be rejected, as both parties acknowledge.

But Moses urges us to conclude that the district court erred in applying Application Note 5(C), relying on the Supreme Court's recent decision in *Kisor*, which, he argues, "chang[ed] the analysis that *Stinson* once gave us with respect to

Guidelines commentary." He argues that under the *Kisor* deference standard, Application Note 5(C) cannot be considered as authoritative and that, as a result, his sentence must be vacated and his case remanded to enable the district court to determine, without applying Application Note 5(C), whether his 2013 conduct qualifies as relevant conduct under § 1B1.3(a)(2).

Stinson, which was decided before *Kisor*, directly addressed the enforceability of and weight to be given Guidelines commentary, such as Application Note 5(C), recognizing that "commentary explains the guidelines and provides concrete guidance as to how even *unambiguous* guidelines are to be applied" in sentencing criminal defendants. *Stinson*, 508 U.S. at 44 (emphasis added). It further observed that the commentary provides "the most accurate indication[] of how the [Sentencing] Commission deems that the guidelines should be applied," *id*. at 45, and it held accordingly that, subject to some exceptions, the commentary is "authoritative," "binding," and "controlling," *id*. at 38, 42–43, 45–47.

Kisor, on the other hand, addressed whether the Court should overrule *Auer v. Robbins*, 519 U.S. 452 (1997), which had broadly authorized judicial deference to an agency's interpretation of its own rules. Conducting its analysis against a backdrop of concerns that executive agencies were using such rule interpretations to circumvent the notice-and-comment procedures required by the Administrative Procedure Act ("APA"), 5 U.S.C. § 553, the *Kisor* Court nonetheless declined to overrule *Auer*. *See* 139 S. Ct. at 2408. The Court did, however, "cabin[] *Auer*'s scope" with respect to the deference owed to an agency's interpretation of its own rules. *Id*.

at 2418. Specifically, the Court held that a "court should not afford *Auer* deference unless the regulation is *genuinely ambiguous*," *id.* at 2415 (emphasis added), and that even if a genuine ambiguity were found, the agency's interpretation still "must come within the zone of ambiguity," *id.* at 2415–16.

Moses now contends that *Kisor* changed the analysis that *Stinson* previously provided with respect to the enforceability and weight of Guidelines commentary. And when *Kisor* is applied here, he maintains, Application Note 5(C) is not owed controlling deference.

After considering the distinct contexts and actual holdings of *Stinson* and *Kisor*, we conclude that even though the two cases addressed analogous circumstances, *Stinson* nonetheless continues to apply when courts are addressing Guidelines commentary, while *Kisor* applies when courts are addressing executive agency interpretations of legislative rules.

We begin with the recognition that Congress enacted the Sentencing Reform Act of 1984, 18 U.S.C. § 3551 *et seq.*, and 28 U.S.C. §§ 991–998, to replace "a system of indeterminate sentencing" with one that made "all sentences basically determinate." *Mistretta v. United States*, 488 U.S. 361, 363, 367 (1989). To this end, Congress created the United States Sentencing Commission "and charged it with the task of 'establish[ing] sentencing policies and practices for the Federal criminal justice system.'" *Stinson*, 508 U.S. at 40–41 (quoting 28 U.S.C. § 991(b)(1)). The Commission was "established as an independent commission *in the judicial branch* of the United States," with seven voting members, at least three of whom must be

federal judges, appointed by the President with the advice and consent of the Senate, 28 U.S.C. § 991(a) (emphasis added), making it "unquestionably . . . a peculiar institution within the framework of our Government," *Mistretta*, 488 U.S. at 384. Congress charged the Commission with the task of promulgating guidelines "for use of a sentencing court in determining the sentence to be imposed in a criminal case," 28 U.S.C. § 994(a)(1), and directed that the Commission's guidelines "establish a sentencing range" "for each category of offense involving each category of defendant," *id.* at § 994(b)(1). Congress also charged the Commission with additional tasks, including, among others: (1) to "establish sentencing policies and practices" that "provide certainty and fairness . . . [and] avoid[] unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct," *id.* § 991(b)(1)(B); (2) to "promulgate and distribute to all courts of the United States . . . general policy statements regarding application of the guidelines," *id*. § 994(a)(2); and (3) to "issue instructions to probation officers concerning the application of Commission guidelines and policy statements," *id.* § 995(a)(10).

To fulfill the tasks assigned to it by Congress, the Sentencing Commission promulgated and published the "United States Sentencing Commission Guidelines Manual," the first version of which went into effect on November 1, 1987. The Guidelines Manual includes Guidelines, policy statements, and official commentary, all of which are interrelated and serve specific functions in fulfilling the Commission's designated tasks. Before the first Guidelines Manual went into effect, a proposed

version of it was published in the Federal Register for public comment and submitted to Congress for review. *See* Notice of Sentencing Guidelines and Policy Statements for the United States Courts as submitted to Congress, together with Certain Technical, Conforming, and Clarifying Amendments, 52 Fed. Reg. 18,046 (May 13, 1987); *see also* 28 U.S.C. § 994(x) (requiring the Commission to comply with the notice-and-comment procedures of 5 U.S.C. § 553 with respect to "the promulgation of guidelines"); *id.* § 994(p) (requiring the Commission to submit "amendments to the guidelines" to Congress). While the Commission has taken the position that it can promulgate and amend policy statements and official commentary, as distinct from Guidelines, without using this notice-and-comment and congressional-submission procedure, it nonetheless follows the practice of providing, "to the extent practicable, comparable opportunities for public input on proposed policy statements and commentary considered in conjunction with guideline amendments," and it also "endeavor[s] to include amendments to policy statements and commentary in any submission of guideline amendments to Congress." United States Sentencing Commission, Rules of Practice and Procedure 6–7 (as amended Aug. 18, 2016). Thus, the Commission, in practice, generally follows the same process for adopting and amending policy statements and commentary as it uses for the promulgation and amendment of the Guidelines themselves.

Of particular relevance here, one of the Commission's original Guidelines — the text of which remains unchanged from when it was first published and submitted to Congress for review, *see* 52 Fed. Reg. at 18,110 — addresses the "Significance of

Commentary," providing that "[t]he Commentary that accompanies the guideline sections may serve" three functions:

> First, it may *interpret the guideline or explain how it is to be applied*. Failure to follow such commentary could constitute an incorrect application of the guidelines, subjecting the sentence to possible reversal on appeal. Second, the commentary may *suggest circumstances which, in the view of the Commission, may warrant departure from the guidelines. Such commentary is to be treated as the legal equivalent of a policy statement*. Finally, the commentary may provide background information, including factors considered in promulgating the guideline or reasons underlying promulgation of the guideline. *As with a policy statement, such commentary may provide guidance in assessing the reasonableness of any departure from the guidelines*.

U.S.S.G. § 1B1.7 (emphasis added) (citation omitted).

Following the promulgation of the first Guidelines Manual and as district judges around the country began sentencing criminal defendants under the new scheme, questions arose about the legal force of both the policy statements and the official commentary. In response, the Supreme Court held in *Williams v. United States*, 503 U.S. 193 (1992), that "[w]here . . . a policy statement prohibits a district court from taking a specified action, *the statement is an authoritative guide to the meaning of the applicable Guideline*," such that "[a]n error in interpreting such a policy statement could lead to . . . an incorrect application of the sentencing guidelines." *Id.* at 201 (emphasis added) (cleaned up). And about a year later, the Court in *Stinson* held that its "holding in *Williams* dealing with policy statements *applies with equal force to the commentary before us here*." 508 U.S. at 43 (emphasis added). The Court gave several reasons for reaching that conclusion. It noted that "[a]lthough the Sentencing Reform Act [did] not in express terms authorize the

issuance of commentary," that Act had been amended subsequent to the promulgation of the first Guidelines Manual to "refer to it." *Id.* at 41 (citing 18 U.S.C. § 3553(b)(1) (providing that "[i]n determining whether a circumstance was adequately taken into consideration [so as to preclude a departure], the court shall consider only the sentencing guidelines, policy statements, *and official commentary of the Sentencing Commission*" (emphasis added))). The Court also emphasized that § 1B1.7 provides for the use of commentary and delineates the distinct "functions" that "commentary may serve," *id.*, which includes "explain[ing] the guidelines and provid[ing] concrete guidance as to how even unambiguous guidelines are to be applied in practice," *id.* at 44. Moreover, the Court recognized that "[a]ccording [a] measure of controlling authority to the commentary is consistent with the role the Sentencing Reform Act contemplates for the Sentencing Commission." *Id.* at 45.

In sum, the Sentencing Commission, as a unique government institution located in the Third Branch, promulgated the Guidelines Manual to guide and cabin the sentencing discretion of individual district judges. And to address the multifarious circumstances that can be relevant to each individual defendant and statutory sentencing objectives, *see* 28 U.S.C. § 994(a)(1), (2); § 994(c); and § 994(d), the Guidelines Manual is structured with interrelated layers of explanation consisting of Guidelines, policy statements, and official commentary. In this context, therefore, the policy statements and commentary are especially meaningful in understanding the Guidelines, regardless of whether any Guideline is ambiguous. The only limitation to the binding effect of commentary occurs, as the Supreme Court

held, when the commentary "violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, [the] guideline." *Stinson*, 508 U.S. at 38. And it defined "inconsistent" strictly such that it is generally understood to mean that "following one will result in violating the dictates of the other." *Id.* at 43; *see also United States v. Allen*, 909 F.3d 671, 674 (4th Cir. 2018).

Over the years, district judges have routinely consulted commentary to understand and apply the Guidelines, and they never felt themselves restrained in doing so by any notion that commentary was binding only when the Guideline was ambiguous or when the commentary purported to resolve a textual ambiguity. Indeed, *Stinson* explicitly recognized that commentary can be useful even when a Guideline is "unambiguous." 508 U.S. at 44. And the *Stinson* Court's deference to the particular commentary at issue did not depend on a determination that it was a reasonable interpretation of a genuine ambiguity. In *Stinson*, the Guideline at issue was one that defined the term "crime of violence" as including any felony that "involves conduct that presents a serious potential risk of physical injury to another." *Id.* at 38 (quoting U.S.S.G. § 4B1.2(1) (Nov. 1992)). That term, however, was explained in an application note "not [to] include the offense of unlawful possession of a firearm by a felon." *Id.* at 39 (quoting § 4B1.2 cmt. n.2). In upholding "the commentary [as] a binding interpretation of the phrase 'crime of violence,'" the Court "recognize[d] that the exclusion of the felon-in-possession offense from the definition of 'crime of violence' may not be compelled by the guideline text." *Id.* at 47. But because the application note did "not run afoul of the Constitution or a federal statute,

and it [was] not plainly erroneous or inconsistent with" the Guideline, it was binding on the federal courts in their calculation of defendants' sentencing ranges. *Id.* (cleaned up).

Unlike the formally published Guidelines Manual that includes not only Guidelines and policy statements but also official commentary, all three of which were, in practice, generally promulgated by the notice-and-comment and congressional-submission procedure and which operate together as a reticulated whole, executive agency interpretations have been made more casually and broadly through, for example, the issuance of letters, opinions, press releases, and legal briefs without the notice-and- comment procedures of rulemaking. In addition, while both the Sentencing Commission and an executive agency are in a broad sense agencies, their purposes and roles are quite distinct. The Sentencing Commission is judicial in nature, and its Guidelines Manual, including its policy statements and commentary, is directed at providing guidance to district judges tasked with the duty of imposing an individualized sentence on a criminal defendant. *See United States v. Booker*, 543 U.S. 220, 245 (2005). In contrast, the role of other federal agencies is typically executive. Their interpretations seek not just to inform and guide but also to regulate the broad range of people covered by the particular agency's jurisdiction, and they do so without the express authorization of Congress. These differences justify a distinct approach in considering Guidelines commentary, on the one hand, and an agency's interpretation of its legislative rules, on the other. And treating the two differently is entirely consistent with *Kisor*.

In *Kisor*, the issue presented to the Court was whether it should overrule its prior decisions in *Auer* and *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945), both of which provided that agencies' interpretations of their own rules should be given controlling deference, even though the interpretations did not go through the notice-and- comment procedure that the APA requires for the promulgation of rules. It was perceived by some that "*Auer* . . . [had] obliterate[d] a distinction Congress thought vital and supplie[d] agencies with a shortcut around the APA's required procedures for issuing and amending substantive rules that bind the public with the full force and effect of law." *Kisor*, 139 S. Ct. at 2434 (Gorsuch, J., concurring in the judgment). Nonetheless, the *Kisor* Court declined to overrule *Seminole Rock* and *Auer*. But it did, understandably, impose substantial restrictions on courts' reliance on agencies' interpretations of their rules.

First, the Court held that "a court should not afford *Auer* deference *unless* the regulation is *genuinely ambiguous*" and that, "before concluding that a rule is genuinely ambiguous, a court must exhaust all the traditional tools of construction" by "carefully consider[ing] the text, structure, history, and purpose of a regulation, in all the ways it would if it had no agency to fall back on." *Kisor*, 139 S. Ct. at 2415 (emphasis added) (cleaned up). *Second*, it held that even where the regulation is found to be genuinely ambiguous, "the agency's reading must still be reasonable," meaning that "it must come within the zone of ambiguity the court has identified after employing all its interpretive tools." *Id.* at 2415–16 (cleaned up). And *third*, it held that even if the agency has reasonably read a genuinely ambiguous rule, a court

still "must make an independent inquiry into whether the character and context of the agency interpretation entitles it to controlling weight." *Id.* at 2416.

It readily appears that *Kisor*, considered on its own terms, does not apply to the Sentencing Commission's official commentary in the Guidelines Manual. While the Court explicitly cabined the scope of deference afforded by *Seminole Rock* and *Auer*, there is scant suggestion in *Kisor* that the Court thought that those cases *applied* to the enforceability of and weight to be given to Guidelines commentary.* Nor did *Stinson* itself so indicate. To be sure, the *Stinson* Court did look at the *Seminole Rock* line of cases as providing a helpful "analogy" when it "articulate[d] the standard that governs the decision whether particular interpretive or explanatory commentary is binding." 508 U.S. at 43–45. Yet, even while looking to those cases in fashioning its standard, the *Stinson* Court acknowledged that "the analogy is not precise," *id.* at 44, and that became even clearer with the remainder of the Court's analysis.

Moreover, *Kisor* deference, as the *Kisor* Court explained, comes into play only when agencies are *interpreting* their regulations. But the Sentencing Guidelines provide a broader role for commentary, as recognized in *Stinson*. *See* 508 U.S. at 44. As the Guidelines themselves provide, commentary was provided not only to interpret Guidelines but also to "*explain how [they are] to be applied*." U.S.S.G. § 1B1.7

* We recognize that a footnote in the *Kisor* plurality opinion did include a citation to *Stinson* as part of a string cite of 16 cases supporting the proposition that the Court's "pre-*Auer*[] decisions applying *Seminole Rock* deference are legion." 139 S. Ct. at 2411 n.3 (plurality opinion). But close consideration of *Stinson* shows, as discussed herein, that while the Court drew from *Seminole Rock*, *it did not conclude that the doctrine applied* to the official commentary of the Guidelines.

(emphasis added). And as the *Stinson* Court explained, commentary "provides concrete guidance as to how even unambiguous guidelines are to be applied in practice," 508 U.S. at 44, and it helps ensure that each Guideline is applied in a manner most "consistent with the Guidelines Manual as a whole as well as the authorizing statute," *id.* at 45; *see also Allen*, 909 F.3d at 674 ("The Guidelines necessarily are structured at a level of generality that permits their application to the many varied facts and circumstances presented in the sentencing process. In this context, the commentary puts 'flesh on the bones' of the Guidelines" (citation omitted)). Indeed, the commentary's particularized role in this regard supported *Stinson*'s holding that commentary is authoritative and binding, regardless of whether the Guideline is ambiguous, except when inconsistent with the Constitution, federal statute, or the Guideline.

Taking the issue more broadly, a central overarching purpose of the Sentencing Reform Act and its creation of "an independent commission in the judicial branch" was for that commission to "establish sentencing policies and practices for the Federal criminal justice system that . . . provide certainty and fairness in meeting the purposes of sentencing" and that "avoid[] *unwarranted sentencing disparities* among defendants with similar records who have been found guilty of similar criminal conduct." 28 U.S.C. § 991(a), (b)(1)(B) (emphasis added). And the Sentencing Commission *promulgated commentary* specifically to satisfy that purpose, relying on its commentary to amplify and explain how the Guidelines are to be applied. *See* U.S.S.G. § 1B1.7.

Were we now to relegate commentary to a status where it could be considered only when the relevant Guideline is genuinely ambiguous, we would negate much of the Commission's efforts in providing commentary to fulfill its congressionally designated mission. Doing so would impose such a burden on the use of commentary that, in many cases, district judges would be unable to consult it, thus denying them the benefits of the substantive explanation that both Congress and the Commission intended for them to have. In addition, the application of *Kisor* to Guidelines commentary would undoubtedly lead to substantial litigation and divisions of authority regarding the extent to which each Guideline is "genuinely ambiguous," even after "all the traditional tools of construction" have been "exhaust[ed]." *Kisor*, 139 S. Ct. at 2415 (cleaned up). The surely resulting circuit splits would substantially increase the extent to which the advisory sentencing ranges for similarly situated offenders would be calculated differently — sometimes dramatically so — depending on the circuit in which they were convicted. Such a result would vitiate the core purpose of the Sentencing Reform Act.

Finally, it is noteworthy that *Kisor* did not purport to overrule *Stinson*, and it is not our role to say it did. *See State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) ("Despite what [one circuit judge] aptly described as [the] 'infirmities, and . . . increasingly wobbly, moth-eaten foundations' [of a prior Supreme Court decision,] . . . [t]he Court of Appeals was correct in applying [it] despite [its] disagreement with [the prior decision], *for it is this Court's prerogative alone to overrule one of its precedents*" (emphasis added) (cleaned up)); *see also Payne v. Taslimi*, 998 F.3d 648, 654 (4th Cir.

2021), *cert. denied*, No. 21-617, 2021 WL 5869448 (U.S. Dec. 13, 2021) ("[A]s an inferior court, the Supreme Court's precedents do constrain us[,] . . . . [and] [i]t is beyond our power to disregard a Supreme Court decision, even if we are sure the Supreme Court is soon to overrule it").

At bottom, we hold that Guidelines commentary is authoritative and binding, regardless of whether the relevant Guideline is ambiguous, except when the commentary "violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of," the Guideline. *Stinson*, 508 U.S. at 38. And having concluded that *Stinson* continues to provide "the standard that governs the decision whether particular interpretive or explanatory commentary is binding," *id.* at 43, we readily conclude that Application Note 5(C) is owed controlling deference.

While § 1B1.3(a)(2) specifies that, with respect to certain offenses, including drug- trafficking offenses, "all acts and omissions . . . that were part of the same course of conduct or common scheme or plan as the offense of conviction" are relevant conduct for purposes of sentencing a defendant, Application Note 5(C) explains that "offense conduct [that was] associated *with a sentence that was imposed prior* to the acts or omissions constituting the instant federal offense (the offense of conviction) is *not considered as part of the same course of conduct* or common scheme or plan as the offense of conviction." U.S.S.G. § 1B1.3(a)(2) & cmt. n.5(C) (emphasis added). Application Note 5(C) thus "provides concrete guidance as to" § 1B1.3(a)(2)'s application and, in particular, ensures that the relevant conduct guideline is applied in a manner "consistent with the Guidelines Manual as a whole." *Stinson*, 508 U.S.

at 44–45. It certainly "does not run afoul of the Constitution or a federal statute, and it is not plainly erroneous or inconsistent with" § 1B1.3. *Id.* at 47 (cleaned up). As a result, Application Note 5(C) authoritatively excludes from relevant conduct the 2013 conviction for which Moses had been sentenced prior to the acts and omissions constituting his offenses of conviction here. We therefore reject Moses's argument that the district court erred by relying on Application Note 5(C) to § 1B1.3 when it calculated his advisory sentencing range under the Guidelines.

III

Moses also contends that even if the district court correctly calculated his advisory sentencing range as 151 to 188 months' imprisonment, his 120-month sentence of imprisonment was substantively unreasonable given that the instant federal crimes for which he was being sentenced involved his distribution of "less than *one-half of a gram* of crack cocaine." He refers to language in *Booker* stating that the Guideline system retains "a strong connection between the sentence imposed and the offender's real conduct," 543 U.S. at 246, and he argues that "[a] sentence imposed through rote application of the career offender enhancement has nothing to do with an offender's real conduct." He also claims that the career-offender enhancement has been the subject of "serious criticism from courts and relevant commentators over the years."

The presentence report prepared for Moses's sentencing calculated his sentencing range, after application of the career-offender enhancement of § 4B1.1, as

151 to 188 months' imprisonment. At the sentencing hearing, Moses objected vigorously to that proposal as too severe for the conduct involved, stating:

> [A]t the end of the day, we're talking about less than a half gram of a drug, and . . . does that really warrant over 12 years in prison? Our position is it doesn't, even with somebody with a bad record. And we're asking you to go below that amount in sentencing him here today.

In asking the court for a downward variance, however, Moses did not propose a specific sentence. Rather, when asked by the court "where [he] [thought] the Court should go," his counsel stated, "I leave that to your discretion. Again, I've been careful about trying not to put a number there because I'm not sure what that number is, personally. But I think it's less than 151, [and] I think it's more than 30. And ultimately I'll leave that up to you and your wisdom."

The district court agreed with Moses and granted him a downward variance, stating, "what I'm thinking about is the motion for downward variance premised on the amount of the drug and the other arguments the defendant raises with respect to the 2009 conviction." The court then sentenced Moses to 120 months' imprisonment, which, it said, was "sufficient but not greater than necessary."

Because the district court granted Moses precisely what he requested, it is bold, perhaps even inappropriate, for him now to ask us to conclude that the district court abused its discretion by failing to impose a greater variance. Yet, Moses does just that, although he provides scant support for the argument.

In the Sentencing Reform Act, Congress specifically directed the Sentencing Commission to ensure "that the guidelines specify a sentence to a term of imprisonment *at or near the maximum term* authorized for categories of defendants

in which the defendant is" (1) at least 18 years old, (2) "has been convicted of a felony that is" a crime of violence or a controlled substance offense, and (3) "has previously been convicted of two or more prior felonies" for a crime of violence or a controlled substance offense. 28 U.S.C. § 994(h) (emphasis added). Of course, even with that congressional directive, the district court was also required to consider all of the § 3553(a) sentencing factors in selecting a sentence "sufficient, but not greater than necessary, to comply with the purposes" of sentencing, as articulated in the Sentencing Reform Act. 18 U.S.C. § 3553(a).

In this case, the district court imposed a sentence consistent with these statutory directives, specifically taking into account, among other things, the requirements for career-offender status, the small quantity of crack cocaine involved in the instant offenses, Moses's arguments regarding his 2009 convictions, and his very serious criminal history. After conducting an individualized assessment, the court selected a sentence of imprisonment that was 31 months lower than the bottom of the advisory guidelines range.

Given the level of deference that we owe to district courts' sentencing judgments and the presumption of reasonableness that attaches to sentences within or below the Guidelines' advisory sentencing range, *see United States v. Susi*, 674 F.3d 278, 289 (4th Cir. 2012), we cannot conclude that the district court imposed a substantively unreasonable sentence here.

The judgment of the district court is accordingly

AFFIRMED.

KING, Circuit Judge, dissenting in part and concurring in the judgment:

I write separately to briefly explain my disagreement with my friends of the panel majority in this appeal.

On January 7, 2022, another panel of this Court published a unanimous opinion in *United States v. Campbell*, No. 20-4256 (4th Cir. Jan. 7, 2022), authored by our good colleague Judge Motz. The legal analysis of the panel majority in this case conflicts with the *Campbell* precedent in concluding that the Supreme Court's decision in *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), is inapplicable. Crucially, no panel of this Court is entitled to circumscribe or undermine an earlier panel decision. *See McMellon v. United States*, 387 F.3d 329, 333 (4th Cir. 2004) (en banc) ("When published panel opinions are in direct conflict on a given issue, the earliest opinion controls, unless the prior opinion has been overruled by an intervening opinion from this court sitting en banc or the Supreme Court."); *see also United States v. Williams*, 808 F.3d 253, 261 (4th Cir. 2015); *Payne v. Taslimi*, 998 F.3d 648, 654 (4th Cir. 2021). Moreover, I am entirely persuaded of the correctness of the analysis set forth by Judge Motz in the *Campbell* decision.

I therefore dissent from those aspects of the panel majority's opinion that conflict with *Campbell*. Nevertheless, because I agree with the result reached by the panel majority, I concur in the judgment.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-4067
(5:19-cr-00339-FL-1)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

LENAIR MOSES, a/k/a Bones,

Defendant-Appellant.

NEW CIVIL LIBERTIES ALLIANCE,

Amicus Supporting Rehearing Petition.

Filed: March 23, 2022

ORDER

The court denies the petition for rehearing en banc.

A requested poll of the court failed to produce a majority of judges in regular active service and not disqualified who voted in favor of rehearing en banc. Chief Judge Gregory, Judge Motz, Judge King, Judge Wynn, and Judge Thacker voted to grant rehearing en banc. Judge Wilkinson, Judge Niemeyer, Judge Agee, Judge Diaz, Judge Harris, Judge Richardson, Judge Quattlebaum, Judge Rushing, and Judge Heytens voted to deny rehearing en banc.

The court further denies the motion for rehearing before the panel. Judge Niemeyer and Judge Cullen voted to deny panel rehearing, and Judge King voted to grant panel rehearing.

Entered at the direction of Judge Niemeyer.

For the Court

/s/ Patricia S. Connor, Clerk

NIEMEYER, Circuit Judge, supporting the denial of rehearing en banc:

At the root of this case lies the question of whether the Supreme Court's decision in *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), overruled its earlier decision in *Stinson v. United States*, 508 U.S. 36 (1993), for determining the enforceability of and weight to be given the official commentary of the Sentencing Guidelines. *Stinson* held that Guidelines commentary, *even when the related Guideline is unambiguous*, is authoritative and binding on courts, unless the commentary is inconsistent with law or the Guideline itself. *Id*. at 38, 43, 44. *Kisor*, on the other hand, limited controlling deference to an executive agency's reasonable interpretation of its own regulations to where "the regulation is *genuinely ambiguous*." 139 S. Ct. at 2415 (emphasis added). Thus, under *Stinson*, Guidelines commentary would be authoritative and binding regardless of whether the Guideline to which it is attached is ambiguous, whereas under *Kisor*, Guidelines commentary would receive such deference only if the Guideline were "genuinely ambiguous." The distinction is meaningful to federal courts' continuing reliance on Guidelines commentary when sentencing criminal defendants.

The panel concluded that until the Supreme Court expresses its view on the point, we should not hold that the Court has overruled one of its earlier opinions, recognizing the Court's instruction that "it is this Court's prerogative alone to overrule one of its precedents." *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997); *see also Payne v. Taslimi*, 998 F.3d 648, 654 (4th Cir. 2021) ("It is beyond our power to disregard a Supreme Court decision, even if we are sure the Supreme Court is soon to overrule it"), *cert. denied*, 142 S. Ct. 716 (2021). Accordingly, the panel concluded that in

determining the enforceability of and weight to be given Guidelines commentary — which was the precise issue before the Court in *Stinson*, but not in *Kisor* — we should continue to apply *Stinson*.

While this case was pending in this court and the panel opinion was being prepared, another case, *United States v. Campbell*, 22 F.4th 438 (4th Cir. 2022), was also pending before another panel as the opinion was being prepared. The opinion in *Campbell*, however, was filed several days before the opinion in this case.

Campbell held that a prior conviction for a "controlled substance offense," as that term is defined in U.S.S.G. § 4B1.2(b), does not include a conviction for "*attempting* to commit such [an] offense[]," as stated in the commentary to that Guideline. U.S.S.G. § 4B1.2 cmt. n.1 (emphasis added). The court concluded that the commentary was "plainly" inconsistent with the Guideline because "an attempt offense . . . is not a 'controlled substance offense,'" as the latter is defined in the Guideline itself. *Campbell*, 22 F.4th at 444. Applying the guidance of *Stinson* "that commentary to the Sentencing Guidelines 'is authoritative unless it . . . is *inconsistent* with . . . [the] guideline,'" the court therefore held that the commentary before it was unenforceable. *Id*. (emphasis added) (quoting *Stinson*, 508 U.S. at 38). The *Campbell* court also provided additional but *conditional* support to its holding, stating that "*if there were any doubt* that under *Stinson* the plain text requires this result," then *Kisor* would also support it, *id.* (emphasis added), as the *Kisor* Court held that a court is not to afford controlling deference to an agency's interpretation of its own regulation unless the regulation is found to be "genuinely ambiguous after exhausting all the traditional

tools of construction," *id*. at 445 (cleaned up) (quoting *Kisor*, 139 S. Ct. at 2415). Considering those traditional tools, the *Campbell* court found that the Guideline unambiguously excluded attempt offenses. *Id*. As a result, there was no need to explore the conflict between *Stinson* and *Kisor*, and it was not explored.

In his dissent from the panel opinion in this case, Judge King stated,

> The legal analysis of the panel majority in this case conflicts with the *Campbell* precedent in concluding that the Supreme Court's decision in *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), is inapplicable. Crucially, no panel of this Court is entitled to *circumscribe or undermine* an earlier panel decision. *See McMellon v. United States*, 387 F.3d 329, 333 (4th Cir. 2004) (en banc).

23 F.4th 347, 359 (4th Cir. 2022) (King, J., dissenting in part and concurring in the judgment) (emphasis added). The *McMellon* court, however, held more narrowly that "when there is an *irreconcilable conflict* between opinions issued by three-judge panels of this court, the first case to decide the issue is the one that must be followed, unless and until it is overruled by this court sitting *en banc* or by the Supreme Court." 387 F.3d at 334 (emphasis added).

While there is some tension between the analyses in the two opinions relating to the reach of *Kisor*, there is a legitimate question about whether the panel opinion here is in "irreconcilable conflict" with *Campbell*. *Campbell*, after all, relied *only* on *Stinson* for its holding — reasoning that its conclusion was "require[d]" by *Stinson*, 22 F.4th at 444 — as did the panel in this case, and *Campbell*'s discussion of *Kisor* was not only conditional but was given because *Kisor*'s application would lead to the same result. *Campbell* did not address, nor did it need to address, the tension

between *Stinson* and *Kisor*, even as it relied on *Stinson*. In this case, the panel did explore the tension, holding that *Stinson* continues to apply.

I submit therefore that whether there is an irreconcilable conflict between this case and *Campbell* is both an open and a debatable question, as it does not appear that resolution of the tension would alter the outcomes, as both cases applied *Stinson*. Thus, the tension between this case and *Campbell* would be better addressed in a future case where the issue becomes meaningful to that case's disposition. In the meantime, we would welcome the Supreme Court's advice on whether *Stinson* or *Kisor* controls the enforceability of and weight to be given Guidelines commentary, an issue that could have far-reaching results. But for now, I believe it wise to postpone addressing the issue until it is presented to us directly in a future case. Therefore, I vote against rehearing this case en banc.

DIANA GRIBBON MOTZ, Circuit Judge, with whom Judges KING, WYNN and THACKER join, dissenting from the denial of rehearing en banc and voting to grant rehearing en banc:

I respectfully dissent from the denial of rehearing en banc and vote to grant rehearing en banc. As Judge King correctly noted in his dissent from the panel opinion, a central holding in this case — that *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), does not apply to the Sentencing Guidelines' Commentary — directly conflicts with an earlier panel opinion of our court, *United States v. Campbell*, 22 F.4th 438 (4th Cir. 2022). I continue to believe that *Campbell* was correctly decided, but merits aside, resolving intra-circuit conflicts is a quintessentially proper basis for en banc rehearing. *See* Fed. R. App. P. 35(b)(1)(A). I fear the court's failure to resolve this conflict now risks stoking confusion over the state of our precedent.

Absent resolution via en banc rehearing, it is worth remembering that the en banc court (with only a single judge dissenting on the question) has long expressly held that "[w]hen published panel opinions are in direct conflict on a given *issue*, the earliest opinion controls, unless the prior opinion has been overruled by an intervening opinion from this court sitting en banc or the Supreme Court." *McMellon v. United States*, 387 F.3d 329, 333 (4th Cir. 2004) (en banc) (emphasis added). That remains the law. *See, e.g.*, *United States v. Runyon*, 994 F.3d 192, 201 (4th Cir. 2021) (Niemeyer, J.) (relying on *McMellon* to reject litigant's request to overturn panel precedent).

Campbell was argued, decided, and published before *Moses*. The two cases are in direct and irreconcilable conflict on a given issue, *i.e.*, whether *Kisor* applies to the Commentary to the Sentencing Guidelines.[1] *Compare Campbell*, 22 F.4th at 444 (holding that *Kisor v. Wilkie* applies to the Commentary), *with Moses*, 23 F.4th at 349 ("*Stinson* continues to apply unaltered by *Kisor*."). And contrary to Judge Niemeyer's suggestion that *Campbell*'s discussion of *Kisor* is dicta; in fact *Campbell*'s discussion of *Kisor* is an alternative holding. *See Campbell*, 22 F.4th at 444 (noting that if there is "doubt" as to the correctness of our holding "under *Stinson*," *Kisor* "renders this conclusion indisputable."). "[A]lternative holdings are not dicta." *Gestamp South Carolina, LLC v. NLRB*, 769 F.3d 254, 262 n.4 (4th Cir. 2014). Thus, under our well-established *en banc* precedent in *McMellon*, unless and until the Supreme Court or this court sitting en banc say otherwise, the panel opinion in the case that is first argued, decided, and published controls. *Campbell* is that opinion.

[1] Judge Niemeyer places great emphasis on *McMellon*'s use of the word "irreconcilable." *See ante* at *5. A glance at *McMellon* reveals that we there used "irreconcilable conflict" and "direct conflict" interchangeably. *See* 387 F.3d at 333–34. In any case, it is quite clear that *Campbell* and *Moses* are directly and irreconcilably in conflict on an issue at the heart of each case.

WYNN, Circuit Judge, with whom Judges MOTZ, KING, and THACKER join, voting to grant rehearing en banc:[1]

To the extent that there is an irreconcilable conflict between our opinions in *United States v. Campbell*, 22 F.4th 438 (4th Cir. 2022), and *United States v. Moses*, 23 F.4th 347 (4th Cir. 2022), we all agree that *Campbell*, as the earlier published opinion, must control. *See McMellon v. United States*, 387 F.3d 329, 333 (4th Cir. 2004) (en banc) ("When published panel opinions are in direct conflict on a given issue, the earliest opinion controls, unless the prior opinion has been overruled by an intervening opinion from this court sitting *en banc* or the Supreme Court.").

Our disagreement stems over the proper use of Federal Rule of Appellate Procedure 35. That rule could not be clearer: an en banc hearing is "not favored and ordinarily will not be ordered *unless*" "en banc consideration is necessary to secure or maintain uniformity of the court's decisions" or "the proceeding involves a question of exceptional importance." Fed. R. App. P. 35(a) (emphasis added). Both factors are unquestionably present in the instant case.

To start, the majority opinion in *Moses*—decided January 19, 2022—flatly contradicts our earlier circuit precedent in *Campbell*—decided January 7, 2022. In *Campbell*, the three-judge panel, consisting of Chief Judge Gregory, Judge Motz, and Judge Thacker, unanimously held that the framework articulated in *Kisor v. Wilkie*,

[1] A majority of this Court's fourteen active judges vote to summarily deny, *without opinion*, to rehear this matter en banc. The one opinion expressing the reasons of a single judge for denying en banc rehearing and the two opinions expressing the reasons of four judges to grant en banc review represent only the views of those judges. In short, nine of the fourteen voting judges offer no opinion regarding why they voted to deny or grant rehearing en banc.

139 S. Ct. 2400 (2019), applies to the Sentencing Commission's commentary to the Sentencing Guidelines. 22 F.4th at 444–47. A mere twelve days later, the two-judge majority in *Moses*, consisting of Judge Niemeyer and District Judge Cullen (sitting by designation), issued an opinion stating that the *Kisor* framework was *in*applicable to the Guidelines commentary.[2] 23 F.4th at 349. That is an undeniable—and irreconcilable—conflict.

But despite the clear contradiction with *Campbell*, the *Moses* majority, over the protestations of Judge King in dissent, did not even deign to mention *Campbell*, much less distinguish it (because it couldn't).

Due to that clear conflict, *Campbell* must control as the earlier published opinion. *See McMellon*, 387 F.3d at 333. But that settled rule did not stop the *Moses* majority from blatantly contradicting *Campbell* a mere twelve days after it was issued—even though the *Moses* dissent alerted the majority to the conflict and spelled out the earliest-published- opinion rule. *See Moses*, 23 F.4th at 359–60 (King, J., dissenting in part). And if that well- settled rule can be so casually—and apparently knowingly—ignored, then what's to stop future panels from doing precisely the same? Especially when the full Court is evidently unwilling to correct such an overreach?

Judge Niemeyer, writing in support of the denial of rehearing en banc, suggests that no such overreach occurred here. He opines that while there is "some

---

[2] The *Moses* majority reached this conclusion even though both parties in that case agreed that *Kisor does* apply to the Guidelines commentary. *See* Response Br. at 14–15; Reply Br. at 1–2. And in doing so, it candidly acknowledged that its holding departed from those of other circuits. *Compare Moses*, 23 F.4th at 349, *with United States v. Nasir*, 17 F.4th 459, 469–72 (3d Cir. 2021) (en banc) (reaching the opposite conclusion of *Moses*), *and United States v. Riccardi*, 989 F.3d 476, 484–86 (6th Cir. 2021) (same).

tension" between *Campbell* and *Moses*, *Campbell*'s discussion of *Kisor* was "only conditional" and *Campbell* failed to address, "nor did it need to address, the tension between *Stinson* and *Kisor*." Niemeyer Op. at 5. In other words, Judge Niemeyer is suggesting that *Campbell*'s discussion of *Kisor* is dicta, so *McMellon*'s earliest-published-opinion rule does not apply here.

If that is true, it is hard to understand why the *Moses* majority did not address it in their opinion. Surely that discussion would have been helpful to future panels and litigants, especially if, as Judge Niemeyer acknowledges, there is "some tension" between the two opinions. *Id.* at 5. It is also not clear why Judge Niemeyer's critique of *Campbell*—that it did not need to address the applicability of *Kisor* at all—does not apply with even greater force to his majority opinion in *Moses*. After all, both parties in *Moses agreed* that *Kisor* applied to the Guidelines commentary. *See* Response Br. at 14–15; Reply Br. at 1–2.

At any rate, *Campbell*'s analysis of *Kisor* is hardly dicta. *Campbell* spends nearly four pages discussing the impact of *Kisor* on the question at issue. *See* 22 F.4th at 444–47. It does not, as Judge Niemeyer suggests, "rel[y] *only* on *Stinson* for its holding." Niemeyer Op. at 5. Rather, it expressly relies on *Kisor* to hammer home its conclusion. *See Campbell*, 22 F.4th at 444–45 (stating that *Kisor* "renders [the Court's] conclusion indisputable"). So, *Campbell*'s repeated citations to *Kisor* are hardly unnecessary flourishes; they are key analytical building blocks that support its overall conclusion.

The fact that at least four judges of this Court unequivocally believe that *Campbell* controls, while Judge Niemeyer alone seems to believe that *Moses* should control, highlights the need for en banc review. *Compare* Motz Op. (joined by Judges King, Wynn, and Thacker), *and* Wynn Op. (joined by Judges Motz, King, and Thacker), *with* Niemeyer Op. If we are confused about which rule applies, how can we expect litigants to know better?

In fact, there is evidence that *Moses* is already confusing lawmakers and the public. *See* Michael Garcia, Cong. Rsch. Serv., LSB10690, *Congressional Court Watcher: Recent Appellate Decisions of Interest to Lawmakers (Jan. 17–Jan. 23, 2022)* (informing Congress, incorrectly, that *Moses* created a circuit split on the applicability of *Kisor* to the Guidelines commentary, when it could do no such thing due to *Campbell*); Bernie Pazanowski, *Long Sentence Upheld Despite Challenge to Guidelines Commentary*, Bloomberg Law (Jan. 19, 2022) (also erroneously reporting that *Moses* created a circuit split). Our failure to resolve this confusion can only undermine the rule of law and destabilize our circuit precedent.

Today's failure to act also makes little sense as a matter of best practice. After all, a careful gardener does not allow weeds to grow unchecked, trusting that they will be shaded out by her taller, earlier-planted sprouts; she removes the weeds before they can threaten the health of the plants she is trying to cultivate. *Cf. McMellon*, 387 F.3d at 334 & n.2 (recognizing that while "the first case to decide the issue is the one that must be followed," an en banc rehearing can provide an avenue to "more quickly resolve" an "intra-circuit conflict" when a later-decided case fails to follow

earlier precedent); *id.* at 354 (Niemeyer, J., dissenting in part) (rejecting the en banc majority's earliest-published- opinion rule in part because "we can always resolve intra-circuit splits by *en banc* rehearings").

Judge Niemeyer suggests that any weed pulling here would be premature. Rather, he contends, it would be "wise to postpone addressing the [tension between *Stinson* and *Kisor*] until it is presented to us directly in a *future* case." Niemeyer Op. at 6 (emphasis added). However, Judge Niemeyer also notes that the tension between *Stinson* and *Kisor* is the very "root of *this* case." *Id.* at 3 (emphasis added). If that's true, *Moses* would seem to be the perfect vehicle to address the tension he is concerned about in an en banc rehearing.

A proactive approach seems especially wise here, where the present case involves an issue of exceptional importance. *Moses* did not just purport to interpret a single subsection of the Guidelines commentary. Rather, it attempted to craft a meta-rule that would govern our interpretation of the commentary writ large. *See Moses*, 23 F.4th at 352. Because the Guidelines commentary plays a key role in criminal sentencing, *Moses*'s putative rule could impact hundreds, if not thousands, of cases in the Fourth Circuit.

Sheer numbers aside, Rule 35 also explains that a "proceeding presents a question of exceptional importance if it involves an issue on which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue." Fed. R. App. P. 35(b)(1)(B). And *Moses* frankly acknowledged that its holding departed from the law of the Third and Sixth Circuits. *See*

Moses, 23 F.4th at 349 (citing *United States v. Nasir*, 17 F.4th 459, 469–72 (3d Cir. 2021) (en banc), and *United States v. Riccardi*, 989 F.3d 476, 484–86 (6th Cir. 2021)). So, *Moses* not only created an *intra*-circuit split, but it also attempted to create an old-fashioned *circuit* split. That alone makes it an exceptionally important case worthy of en banc review.

In sum, it would be hard to imagine a more suitable candidate for en banc rehearing. Yet somehow the majority of my colleagues declined to grant a petition for such a rehearing. Though I generally do not favor separate opinions on matters like this, I cannot be associated with what I view as a serious departure from the purposes of Rule 35. So, with great respect for my colleagues in the majority, I vote to grant rehearing en banc.