No. 22-____

IN THE

Supreme Court of the United States

LENAIR MOSES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Stinson* v. *United States*, 508 U.S. 36 (1993), this Court held that *Seminole Rock* deference, now generally known as *Auer* deference, applies to interpretive or explanatory commentary in the U.S. Sentencing Guidelines Manual. *Id.* at 38. In *Kisor* v. *Wilkie*, 139 S. Ct. 2400 (2019), this Court clarified the limits on this deference, and made clear that courts may extend *Auer* or *Seminole Rock* deference only where the law remains "genuinely ambiguous" after the court has "exhausted all the traditional tools of construction." *Id.* at 2415 (quotation marks omitted). The circuits are deeply divided over whether *Kisor*'s holding applies in the Guidelines context.

The questions presented are:

1. Whether the limits on agency deference announced in *Kisor* constrain the deference that courts may accord to the commentary to the Sentencing Guidelines.

2. Whether deference to the Guidelines commentary is impermissible in any form.

PARTIES TO THE PROCEEDING

Lenair Moses, petitioner on review, was the appellant below.

The United States of America, respondent on review, was the appellee below.

RELATED PROCEEDINGS

U.S. Court of Appeals for the Fourth Circuit:

- *United States* v. *Moses*, No. 21-4067 (4th Cir. Jan. 19, 2022) (reported at 23 F.4th 347)
- *United States* v. *Moses*, No. 21-4067 (4th Cir. Mar. 23, 2022) (not reported)

U.S. District Court for the Eastern District of North Carolina:

- *United States* v. *Moses*, No. 5:19-cr-00339-FL-1 (E.D.N.C. Feb. 9, 2021)

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Lenair Moses respectfully petitions for a writ of certiorari to review the judgment of the Fourth Circuit in this case.

OPINIONS BELOW

The Fourth Circuit's opinion is reported at 23 F.4th 347 (2022). Pet. App. 1a-27a. That court's order denying rehearing and rehearing en banc is not reported. Pet. App. 47a-60a. The Eastern District of North Carolina's sentencing order is not currently reported. Pet. App. 28a-46a.

JURISDICTION

The Fourth Circuit entered judgment on January 19, 2022. The petition for rehearing en banc was denied on March 23, 2022. Chief Justice Roberts granted a 60-day extension of the period for filing this petition to August 20, 2022. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

GUIDELINES PROVISIONS INVOLVED

Section 4B1.1 of the U.S. Sentencing Guidelines provides in relevant part that a "defendant is a career offender if * * * the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense."

Section 1B1.3 of the U.S. Sentencing Guidelines provides in relevant part that prior convictions cannot be predicates for a career-offender enhancement if they involved "acts and omissions * * * that were part of the same course of conduct or common scheme or plan as the offense of conviction."

INTRODUCTION

This case implicates a deep and acknowledged circuit split over whether the limitations imposed by *Kisor* v. *Wilkie*, 139 S. Ct. 2400 (2019), constrain the deference that courts accord the commentary interpreting the U.S. Sentencing Guidelines.

In *Stinson* v. *United States*, 508 U.S. 36, 44-45 (1993), this Court held that Guidelines commentary is subject to deference under *Seminole Rock*, now generally known as *Auer* deference. Under this form of deference, "provided an agency's interpretation of its own regulations does not violate the Constitution or a federal statute, it must be given 'controlling weight unless it is plainly erroneous or inconsistent with the

regulation.' " *Id.* at 45 (quoting *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)); *see also Auer* v. *Robbins*, 519 U.S. 452, 461 (1997) (same).

Kisor, however, sharply limited the circumstances in which courts may accord *Auer* or *Seminole Rock* deference. Addressing concerns that such deference gives rise to a "systematic judicial bias in favor of the federal government," *Kisor*, 139 S. Ct. at 2425 (Gorsuch, J., concurring in the judgment) (quotation marks omitted), the Court made clear that "reflexive" deference to agency interpretations is inappropriate, *id.* at 2415 (majority op.) (quotation marks omitted). After *Kisor*, a court may defer to an agency's interpretation of its own regulation only where the regulation remains "genuinely ambiguous" after the court has "exhaust[ed] all the traditional tools of construction." *Id.* (quotation marks omitted). *Kisor*'s constraints safeguard fundamental separation-of-powers interests and prevent agencies from adopting new regulations "under the guise of interpreting" existing regulations. *Id.* (quoting *Christensen* v. *Harris County*, 529 U.S. 576, 588 (2000)).

In the decision below, however, a divided Fourth Circuit panel concluded that *Kisor*'s limits do not constrain the deference courts must accord the Guidelines commentary. According to the panel majority, deference to the Guidelines commentary was "unaltered by *Kisor*." Pet. App. 4a-5a. Thus, in the Fourth Circuit, Guidelines commentary still remains "authoritative and binding, regardless of whether the relevant Guideline is ambiguous," unless the interpretation is unlawful or plainly wrong. *Id*. at 22a. Deferring to the Guidelines commentary, and without attempting to evaluate whether the commentary was

ambiguous, the panel majority subjected Petitioner Lenair Moses to a sixfold sentence enhancement, ordering that he spend a decade in federal prison for selling $40 worth of crack cocaine.

The decision below deepened a circuit split over whether *Kisor*'s limitations govern deference to the Guidelines commentary. As the panel itself recognized, its approach diverges from that taken in "at least" the Third and Sixth Circuits, both of which require courts to determine whether a Guideline is genuinely ambiguous before deferring to the commentary. *Id.* at 4a.

The panel was right to say "at least," because this split implicates a far greater divide: Four circuits have applied *Kisor* in the Guidelines context, four have expressly refused to apply *Kisor*, and four have continued to defer to the commentary under *Stinson* without even acknowledging *Kisor*. Thus, every court of appeals that hears criminal cases has weighed in.

The panel's holding that Guidelines commentary remains binding "regardless of whether the relevant Guideline is ambiguous" is not defensible after *Kisor*. *Stinson* held that *Seminole Rock* deference applies to Guidelines commentary. *Kisor* held that courts may apply *Seminole Rock* deference only after confirming that the underlying rule is "genuinely ambiguous." *Kisor*, 139 S. Ct. at 2415 (quotation marks omitted). It follows that courts must determine whether a Guideline is genuinely ambiguous *before* asking whether deference to the commentary is warranted. The panel majority's grounds for ignoring *Kisor* boil down to policy arguments about the efficiency and expertise of government bureaucracies. Those arguments could not justify the panel's departure from this

Court's precedent even if they were correct—and they are categorically incorrect. No doubt for that reason, even the government below acknowledged that the panel's refusal to apply *Kisor* was wrong.

This issue is exceptionally important. In refusing to apply *Kisor* in the Guidelines context, the Fourth Circuit revived the freewheeling approach to deference that *Kisor* constrained. And because of the Guidelines' unique importance to federal sentencing, a rule of mandatory deference will affect every criminal case in the circuits that refuse to apply *Kisor*. No agency or commission should have such sway over a federal court's interpretation of federal law.

The impropriety of deference is even more apparent here because this is a criminal case, where deference to the government can mean years longer in prison for defendants like Moses. Deference should have "no role to play when liberty is at stake." *Guedes* v. *Bureau of Alcohol, Tobacco, Firearms & Explosives*, 140 S. Ct. 789, 790 (2020) (Gorsuch, J., respecting denial of certiorari). In these circumstances more than any other, a defendant is entitled to nothing less than a court's "best independent judgment of the law's meaning." *Kisor*, 139 S. Ct. at 2426 (Gorsuch, J., concurring in the judgment).

In his statement supporting the denial of rehearing en banc below, Judge Niemeyer, the author of the panel opinion, declared that he "would welcome the Supreme Court's advice on" this issue. Pet. App. 52a. This Court should accept the invitation.

STATEMENT

A. The Sentencing Guidelines

In response to "[f]undamental and widespread dissatisfaction with the uncertainties and the disparities" involved in federal sentencing, Congress enacted the Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. II, 98 Stat. 1987. *Mistretta* v. *United States*, 488 U.S. 361, 366 (1989). The 1984 Act established the United States Sentencing Commission "as an independent commission in the judicial branch of the United States." 28 U.S.C. § 991(a). Congress charged the Commission with issuing "guidelines * * * for use of a sentencing court in determining the sentence to be imposed in a criminal case," as well as "general policy statements regarding application of the guidelines." *Id.* § 994(a)(1), (2).

The Commission periodically issues the U.S. Sentencing Guidelines Manual, which is structured as a series of Guidelines and policy statements. The Commission must comply with the Administrative Procedure Act's notice-and-comment requirements when promulgating or amending a Guideline. *See* 28 U.S.C. § 994(x). The Commission must also "submit to Congress amendments to the guidelines" along with "a statement of the reasons therefor." *Id.* § 994(p).

The Sentencing Reform Act's procedural constraints reflect the Guidelines' centrality to sentencing. Until *United States* v. *Booker*, 543 U.S. 220 (2005), the Guidelines were "binding on judges" and had "the force and effect of laws." *Id.* at 234. Even after *Booker* made the Guidelines advisory, district courts remain obligated to "begin their [sentencing] analysis with

the Guidelines and remain cognizant of them throughout the sentencing process." *Gall* v. *United States*, 552 U.S. 38, 50 n.6 (2007).

The Guidelines Manual includes the Commission's commentary on the Guidelines. Such commentary "may interpret the guideline or explain how it is be applied." U.S.S.G. § 1B1.7. Commentary may also "suggest circumstances which, in the view of the Commission, may warrant departure from the guidelines." *Id.* Or it "may provide background information, including factors considered in promulgating the guideline or reasons underlying promulgation of the guideline." *Id.*

As is typical when an agency interprets its own rules, the Commission's Guidelines commentary is not itself subject to public notice and comment. Nor is it subject to the Sentencing Reform Act's congressional-review procedures. *See* 28 U.S.C. § 994(p), (x); *see also* U.S. Sent'g Comm'n R. 4.3 ("The Commission may promulgate commentary and policy statements, and amendments thereto, without regard to the provisions of 28 U.S.C. § 994(x)."). The Commission's rules do, however, provide that "the Commission shall endeavor to include amendments to * * * commentary in any submission of guideline amendments to Congress" and "provide, to the extent practicable, comparable opportunities for public input on proposed policy statements and commentary." U.S. Sent'g Comm'n R. 4.1, R. 4.3. The rules also prohibit amendments to the commentary without "the affirmative vote of at least four members at a public meeting." *Id*. R. 2.2(b).

B. *Stinson* v. *United States*

In its 1993 decision in *Stinson*, this Court addressed the level of deference courts should accord to Guidelines commentary. *Stinson*'s answer: a lot. According to *Stinson*, "commentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline." 508 U.S. at 38.

The Court concluded that granting "this measure of controlling authority to the commentary" was appropriate because "commentary [should] be treated as an agency's interpretation of its own legislative rule." *Id.* at 44-45. Although this analogy was "not precise," the Court reasoned that "the guidelines are the equivalent of legislative rules adopted by federal agencies." *Id.* And because "[t]he functional purpose of commentary" is to assist courts "in the interpretation and application of those rules, * * * this type of commentary is akin to an agency's interpretation of its own legislative rules." *Id.* at 45.

The Court therefore concluded that courts should accord Guidelines commentary the level of deference owed to an agency's interpretation of its own legislative rule: *Seminole Rock* deference. *Stinson*'s holding quoted *Seminole Rock*: "provided an agency's interpretation of its own regulations does not violate the Constitution or a federal statute, it must be given 'controlling weight unless it is plainly erroneous or inconsistent with that regulation.' " *Id.* (quoting 325 U.S. at 414). The Court then applied *Seminole Rock* deference in accepting the Sentencing Commission's interpretation of the Guideline at issue. *Id.* at 47.

C. *Kisor* v. *Wilkie*

Seminole Rock deference eventually was relabeled *Auer* deference. *See Auer*, 519 U.S. at 461. For more than 20 years, this Court relied on *Auer* deference to uphold agency interpretations "without significant analysis of the underlying regulation" or "without careful attention to the nature and context of the interpretation." *Kisor*, 139 S. Ct. at 2414.

Then came *Kisor*. There, the Court considered whether to overrule *Seminole Rock* and *Auer* and "discard[ ] the deference they give to agencies." *Id.* at 2408. Relying on *stare decisis*, a majority of this Court declined to overrule *Auer* entirely. *Id.* at 2422-23. But every member of the Court agreed that the Court needed to "reinforc[e]"—and "somewhat expand on"—"some of the limits inherent in the *Auer* doctrine." *Id.* at 2414, 2415 (majority op.); *see also id.* at 2448 (Gorsuch, J., concurring in the judgment); *id.* at 2448-49 (Kavanaugh, J., concurring in the judgment). Such "clear[ing] up" was necessary because, "in a vacuum," *Seminole Rock*'s "classic formulation of the test—whether an agency's construction is plainly erroneous or inconsistent with the regulation—may suggest a caricature of the doctrine, in which deference is reflexive." *Id.* at 2414-15 (majority op.) (quotation marks and citations omitted). Properly applied, this Court emphasized, *Auer* does not "bestow[ ] on agencies expansive, unreviewable authority." *Id.* at 2415 (quotation marks omitted). On the contrary, *Auer* "gives agencies their due, while also allowing—indeed, obligating—courts to perform their reviewing and restraining functions." *Id.*

Kisor thus emphasizes, "[f]irst and foremost," that "a court should not accord *Auer* deference unless the

regulation is genuinely ambiguous." *Id.* "And before concluding that a rule is genuinely ambiguous, a court must exhaust all the 'traditional tools' of construction." *Id.* (citation omitted). "If genuine ambiguity remains, moreover, the agency's reading must still be 'reasonable.' " *Id.* (citation omitted). And then courts "must make an independent inquiry into whether the character and context of the agency interpretation entitles it to controlling weight." *Id.* at 2416.

Kisor explained that *Auer* deference and *Seminole Rock* deference are synonymous. *Id.* at 2408. And the *Kisor* plurality identified *Stinson* as one of this Court's "pre-*Auer*[ ] decisions applying *Seminole Rock* deference." *Id.* at 2411 n.3 (plurality op.).

D. Procedural History

1. Police in Raleigh enlisted a confidential informant to buy crack cocaine from Petitioner Lenair Moses on two occasions in October 2018. Pet. App. 5a. The total amount of cocaine at issue—less than half a gram—was sold for $40. *Id.*

Moses pleaded guilty to two counts of distributing a controlled substance in violation of 21 U.S.C. § 841(a)(1). *Id.* The "probation officer determined that, based on the quantity of drugs distributed, Moses's base offense level was 12." *Id.* But that base offense level skyrocketed to 32 after the probation officer recommended that Moses be sentenced as a "career offender" under § 4B1.1 of the Sentencing Guidelines, which imposes a sentencing enhancement if, among other things, a defendant "has at least two prior felony convictions" for controlled substance offenses. U.S.S.G. § 4B1.1(a); Pet. App. 5a. One of the prior convictions on which the probation officer relied

was a 2013 guilty plea for selling crack cocaine in Raleigh. Pet. App. 5a.

Applying this enhancement, the probation officer recommended a Guidelines range of 151 to 188 months' imprisonment. *Id.* at 6a. Had the career-offender enhancement not applied, Moses's Guidelines range would have been roughly a sixth of that: "21 to 27 months[ ]." *Id.*

Moses objected to the career-offender recommendation. *Id.* Guideline § 1B1.3 provides that a prior conviction does not qualify as a career-offender predicate if it involves "relevant conduct" to the current offense. *See* U.S.S.G. § 1B1.3(a)(2) (capitalization altered); *see also id.* §§ 4A1.2(a)(1), 4B1.2(c). The Guideline defines "relevant conduct" to include acts "that were part of the same course of conduct or common scheme or plan as the offense of conviction." *Id.* § 1B1.3(a)(2). Moses explained that his 2013 guilty plea involved relevant conduct because the act at issue—the sale of a small amount of crack cocaine in Raleigh—was "relevant conduct" to the act underlying his current offense—the sale of a small amount of crack cocaine in Raleigh. Pet. App. 6a-7a. And Moses noted that the government often treats drug offenses committed years in the past as relevant conduct for purposes of *enhancing* a defendant's sentence. *See, e.g.*, *United States* v. *Govan*, 165 F.3d 912 (4th Cir. 1998) (per curiam) (drug offense five years earlier was relevant conduct). Moses maintained that the same understanding that applies to enhance sentences should equally apply to limit them.

The government, by contrast, urged the trial court to impose the career-offender enhancement. Pet. App. 7a-8a. It relied on the Commission's commentary in

Application Note 5(C) to Guideline § 1B1.3, which interprets the Guideline to mean that "conduct associated with a sentence that was imposed prior to" 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); *see* Pet. App. 8a.

The district court agreed with the government and sentenced Moses as a career offender. Pet. App. 8a.

2. A divided panel of the Fourth Circuit affirmed. The panel framed its task as deciding "the enforceability of and the weight to be given the official commentary of the Sentencing Guidelines." *Id.* at 2a. "[T]o make that determination," the majority continued, it "must consider whether" courts "are required to continue to apply the rules set forth in *Stinson* * * * or whether *Stinson* was overruled" in *Kisor*. *Id.* at 2a-3a. Thus, to determine the weight to be accorded to the Guidelines commentary, the panel first had to decide whether the Guidelines are subject "to the *Kisor* framework." *Id.* at 4a.

In the panel majority's view, the answer was no. Recognizing that its conclusion "is not shared by at least two circuits," the majority held that *Kisor* is categorically inapplicable in the Guidelines context and that *Stinson* "continues to apply unaltered by *Kisor*." *Id.* at 4a-5a.

The panel reached this conclusion by distinguishing the Commission—"a unique government institution located in the Third Branch" that is "judicial in nature," *id.* at 15a, 17a—from other agencies, which the panel described as "typically executive" bodies whose "interpretations seek * * * to regulate the broad range

of people covered by the particular agency's jurisdiction," *id.* at 18a. And the panel found "scant suggestion in *Kisor* that the Court thought" *Seminole Rock* and *Auer* "*applied* to the enforceability of and weight to be given to Guidelines commentary." *Id.* at 19a (emphasis in original). As for the *Kisor* plurality's identification of *Stinson* as "applying *Seminole Rock* deference," 139 S. Ct. at 2411 n.3, the panel concluded that the *Kisor* plurality had not given sufficiently "close consideration" to *Stinson*, Pet. App. 19a n.*. As the panel saw it, while *Stinson* "drew from *Seminole Rock*, *it did not conclude that the doctrine applied* to the official commentary of the Guidelines." *Id.* (emphasis in original).

The panel majority also emphasized policy arguments it viewed as favoring deference to the commentary. It opined, for example, that if Guidelines commentary were "relegate[d] * * * to a status where it could be considered only when the relevant Guideline is genuinely ambiguous," it would impose such a high bar "on the use of commentary that, in many cases, district judges would be unable to consult it." *Id.* at 21a.

The panel thus held "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." *Id.* at 22a (quoting *Stinson*, 508 U.S. at 38). Then, "having concluded that *Stinson* continues to provide the 'standard that governs the decision whether particular interpretive or explanatory commentary is binding,' " the panel majority "readily conclude[d] that Application Note 5(C)

is owed controlling deference," such that the district court correctly sentenced Moses as a career offender. *Id.* at 22a-23a (quoting *Stinson*, 508 U.S. at 43).

Judge King dissented in part and concurred in the judgment. He explained that the majority erred "in concluding that the Supreme Court's decision in *Kisor* v. *Wilkie*, 139 S. Ct. 2400 (2019), is inapplicable" in the Guidelines context. *Id.* at 27a.

3. Moses petitioned for rehearing en banc. The government opposed rehearing en banc but supported panel rehearing, agreeing that the panel's reasoning was erroneous. The government "acknowledge[d] that *Kisor* applies in the guidelines context and governs how much deference the commentary receives." U.S. Resp. to Pet. for Reh'g En Banc at 11.

The Fourth Circuit denied panel rehearing, and denied rehearing en banc over five dissenting votes. Pet. App. 47a-48a. In a statement supporting the denial of rehearing en banc, Judge Niemeyer—the author of the panel opinion—reiterated that the question "[a]t the root of this case" is whether *Kisor* "overruled" *Stinson* "for determining the enforceability of and weight to be given the official commentary of the Sentencing Guidelines." *Id.* at 49a. Judge Niemeyer rejected the view of *Kisor* pressed by both parties. Instead, he announced that, unless "the Supreme Court expresses its view" to the contrary, the Fourth Circuit will continue to accord binding deference to Guidelines commentary even where the relevant Guideline itself is unambiguous. *Id.* at 49a-50a. Judge Niemeyer concluded by inviting "the Supreme Court's advice" on this issue. *Id.* at 52a.

This petition follows.

REASONS FOR GRANTING THE PETITION

I. THE CIRCUITS ARE DEEPLY DIVIDED OVER THE LEVEL OF DEFERENCE OWED TO THE GUIDELINES COMMENTARY.

The decision below deepens an acknowledged circuit split over whether *Kisor* constrains the deference courts accord to the Guidelines commentary. Consistent with *Kisor*, four courts of appeals—the First, Third, Sixth, and D.C. Circuits—have held that deference to the commentary is warranted only where the relevant Guideline is genuinely ambiguous. In stark contrast, four courts of appeals—the Fourth, Fifth, Ninth, and Eleventh Circuits—have held that *Kisor*'s limits on deference do not apply to the Guidelines commentary. And four other courts of appeals—the Second, Seventh, Eighth, and Tenth Circuits—have continued to adhere to *Stinson* without acknowledging *Kisor*, such that circuit precedent now binds them to adhere to *Stinson*. In total, all twelve circuits that hear criminal cases have weighed in. This deep split on an important question of federal law warrants this Court's intervention.

A. Four Circuits Adhere To *Kisor* In the Guidelines Context.

In the First, Third, Sixth, and D.C. Circuits, courts may only consult the Guidelines commentary only when the Guideline itself is "genuinely ambiguous."

The Third Circuit adopted this view in *United States* v. *Nasir*, 17 F.4th 459, 469-472 (3d Cir. 2021) (en banc). An earlier Third Circuit panel had held that *Stinson* required deference to the commentary's inclusion of inchoate crimes within the Guidelines' definition of a "controlled substance offense." *United States*

v. *Hightower*, 25 F.3d 182, 184, 187 (3d Cir. 1994). After *Kisor*, however, the Third Circuit reconsidered that conclusion en banc and unanimously overruled it. The en banc court explained that, under "the then-prevailing understanding of the deference that should be given to agency interpretations of their own regulations," *Hightower* had been correct. *Nasir*, 17 F.4th at 470. But after *Kisor*, "it is clear that such an interpretation is unwarranted." *Id.* at 471. Applying *Kisor*, the Third Circuit held that the Guidelines themselves did not define "controlled substance offenses" to include inchoate crimes—and neither could the commentary. *See id.* at 471-472. As Judge Bibas explained in concurrence, if the "commentary sweeps more broadly than the plain language of the guideline it interprets, we must not reflexively defer," because a judge's "lodestar must remain the law's text, not what the Commission says about that text." *Id.* at 472 (Bibas, J., concurring).

In *United States* v. *Riccardi*, the Sixth Circuit followed suit, holding under *Kisor* that courts may defer to the commentary only when the Guideline itself is "genuinely ambiguous." 989 F.3d 476, 485 (6th Cir. 2021) (quoting *Kisor*, 139 S. Ct. at 2414). Acknowledging that the court had "previously been quick to give 'controlling weight' to the commentary without asking" whether the underlying Guideline was ambiguous, the court acknowledged that *Kisor* required a new approach. *Id.* at 484-485. The reason, the Sixth Circuit explained, was "simple"—*Stinson* held that courts must accord deference to the commentary under *Seminole Rock*; *Kisor* limited the circumstances in which deference under *Seminole Rock* is appropriate. *Id.* at 485. Thus, *Kisor* "applies just as much to *Stinson* (and the Commission's guidelines) as it does to

Auer (and an agency's regulations)." *Id.* Applying *Kisor*'s guideposts, the Sixth Circuit concluded that even if the relevant Guideline could have multiple meanings, the definition articulated in the commentary "cannot be considered a reasonable interpretation of—as opposed to an improper expansion beyond—[the Guideline's] text." *Id.* at 480.

The First Circuit has similarly recognized that *Kisor*'s limitations on deference apply to Guidelines commentary. In *United States* v. *Lewis*, the court acknowledged "that *Kisor* sought to clarify the nuances of judicial deference to agency interpretations of regulations," and that after *Kisor*, "a court should not afford *Auer* deference unless the regulation is genuinely ambiguous." 963 F.3d 16, 24 (1st Cir. 2020) (quoting *Kisor*, 139 S. Ct. at 2415). The court then applied *Kisor*'s limits in a case involving the Guidelines commentary, concluding that circuit precedent survived *Kisor* because those cases did not "defer[ ] to an application note that strayed beyond the zone of ambiguity in the Sentencing Guidelines." *Id.*

In a pre-*Kisor* decision, the D.C. Circuit similarly refused to defer to commentary "with no grounding in the guidelines themselves." *United States* v. *Winstead*, 890 F.3d 1082, 1092 (D.C. Cir. 2018). Applying the same interpretive tools this Court later highlighted in *Kisor*, the D.C. Circuit held that the Commission had "exceed[ed] its authority" by purporting to add a new offense through Guidelines commentary. *Id.* at 1090-91. The court added that "surely *Seminole Rock* deference does not extend so far as to allow" the Sentencing Commission "to invoke its general interpretive authority via commentary" to impose "a massive impact on a defendant." *Id.* at 1092. Anticipating

Kisor's reasoning, the court held that no deference was owed because the Guideline at issue was not actually "ambiguous." *Id.* at 1092 n.14.

B. Four Circuits Expressly Refuse To Adhere To *Kisor* In The Guidelines Context.

The Fourth, Fifth, Ninth, and Eleventh Circuits have refused to apply *Kisor*'s limits when deferring to the Guidelines commentary.

In the decision below, the Fourth Circuit squarely held that "*Kisor* did not overrule *Stinson*'s standard for the deference owed to Guidelines commentary." Pet. App. 4a. Instead, the court held that *Kisor* applies only "in the context of an executive agency's interpretation of its own legislative rules." *Id.* The court concluded that "*Stinson* continues to apply unaltered by *Kisor*," *id.* at 4a, and that the "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," *id.* at 22a (quoting *Stinson*, 508 U.S. at 38). The court acknowledged that "at least" two other circuits—the Third and Sixth—hold that *Kisor* governs deference to the Guidelines commentary, but rejected their conclusion based on the "belie[f] that subjecting Guidelines commentary to the *Kisor* framework would deny courts the benefit of much of the Guidelines commentary." *Id.* at 4a.

The Fifth Circuit reached the same conclusion in *United States* v. *Vargas*, 35 F.4th 936, 940 (5th Cir. 2022). The court acknowledged that "*Kisor* cabined the scope of *Seminole Rock*/*Auer* deference," and further acknowledged "the divergence among our sister

circuits" on *Kisor*'s applicability to Guidelines commentary. *Id.* at 940 & n.3. But the court concluded that it must continue to adhere to its pre-*Kisor* precedent according controlling deference to the commentary. "If we were writing on a blank slate," the court explained, "we might well agree with [the] argument that *Kisor* changed *Stinson*'s calculus regarding the deference owed to the Guidelines commentary." *Id.* at 940. But because "*Kisor* did not discuss the Sentencing Guidelines or *Stinson*," and because other Fifth Circuit panels "have continued to afford deference to the Guidelines commentary under *Stinson*, even after *Kisor*," the court concluded that it was bound by *Stinson*. *Id.*; *see also United States* v. *Cruz-Flores*, 799 F. App'x 245, 246 (5th Cir. 2020) (per curiam) (deferring to Guidelines commentary "[b]ecause there is currently no case law from the Supreme Court or this court addressing the effect of *Kisor* on the Sentencing Guidelines").

The Ninth Circuit has also "continued to follow *Stinson* after *Kisor*." *United States* v. *Pratt*, No. 20-10328, 2021 WL 5918003, at *2 (9th Cir. Dec. 15, 2021). In one recent case, for example, the court noted that it was "troubled that the Sentencing Commission has exercised its interpretive authority to expand the definition of" a particular offense "without any grounding in the text" of the Guideline, but concluded that it was "nonetheless compelled" by circuit precedent to defer to the commentary. *United States* v. *Crum*, 934 F.3d 963, 966 (9th Cir. 2019) (per curiam); *see also United States* v. *Cuevas-Lopez*, 934 F.3d 1056, 1061 (9th Cir. 2019) (applying *Stinson*). As Judge Bress noted—in a portion of a dissenting opinion with which the majority did not take issue—the Ninth Circuit "has continued to apply *Stinson* to Guidelines commentary after

Kisor," such that, "[i]n this circuit, *Stinson* is still the governing law for evaluating Guidelines commentary." *United States* v. *Kirilyuk*, 29 F.4th 1128, 1149 (9th Cir. 2022) (Bress, J. dissenting); *see id.* at 1138-39 (majority op.) (noting that the majority's interpretation "relied on *Stinson*," rather than "the narrower deference set out in *Kisor*"). Judge Bress likewise recognized the "disagree[ment]" among the circuits over whether "courts should now evaluate the validity of Guidelines commentary under the less deferential test set forth in *Kisor*," or instead whether "*Stinson* continues to apply to Guidelines commentary." *Id.* at 1149 (Bress, J., dissenting).

The Eleventh Circuit has also continued to accord binding deference to the commentary under *Stinson*. *See, e.g.*, *United States* v. *Cingari*, 952 F.3d 1301, 1308-11 (11th Cir. 2020); *United States* v. *Dugger*, No. 21-14010, 2022 WL 2800204, at *4 (11th Cir. July 18, 2022) (per curiam). And the Eleventh Circuit recently granted rehearing en banc to resolve the precise interpretive question the full Third Circuit addressed and resolved in *Nasir*. *See* Pet. for Reh'g En Banc 1, *United States* v. *Dupree*, No. 19-13776 (11th Cir. July 19, 2021); *United States* v. *Dupree*, 25 F.4th 1341 (11th Cir. 2022) (per curiam).

C. Four Circuits Continue To Defer To The Commentary Under *Stinson* Even After *Kisor*.

Even after *Kisor*, the Second, Seventh, Eighth, and Tenth Circuits have continued to accord binding deference to the Guidelines commentary under *Stinson* without directly addressing whether *Stinson* remains valid.

The Second Circuit in 2020 rejected the argument that the Guidelines commentary "conflicts with the Guidelines text by improperly expanding it" because, under *Stinson*, commentary "is valid and binding on the judiciary unless it is 'plainly erroneous or inconsistent with' the Guidelines text." *United States* v. *Tabb*, 949 F.3d 81, 87 (2d Cir. 2020) (quoting *Stinson*, 508 U.S. at 45); *see also United States* v. *Houtar*, 980 F.3d 268, 278 (2d Cir. 2020) ("we must follow the commentary's direction" under *Stinson*). The Second Circuit has adhered to *Stinson* even where "the *Kisor* argument * * * was briefed and discussed at length during oral argument." *United States* v. *Wynn*, 845 F. App'x 63, 66 (2d Cir. 2021).

After *Kisor*, the Seventh Circuit has similarly continued to hold commentary "binding under *Stinson*" as long as it is not plainly erroneous, without asking whether the Guideline itself is ambiguous. *United States* v. *Jett*, 982 F.3d 1072, 1078 (7th Cir. 2020); *see also United States* v. *Smith*, 989 F.3d 575, 584 (7th Cir. 2021).

The Eighth Circuit, too, has continued to defer to commentary under *Stinson*, adhering to its longstanding tradition of "deferr[ing] to the commentary, not out of its fidelity to the Guidelines text, but rather because it is not a plainly erroneous reading of it." *United States* v. *Broadway*, 815 F. App'x 95, 96 & n.2 (8th Cir. 2020) (per curiam) (quotation marks omitted) (declining to overrule prior circuit precedent deferring to the commentary under *Stinson*); *see also United States* v. *Clayborn*, 951 F.3d 937, 940 (8th Cir. 2020) (applying same circuit precedent).

The same is true in the Tenth Circuit, which, even after *Kisor*, has highlighted that the "Guidelines commentary plays a significant role in elaborating on" the meaning of the Guidelines under *Stinson*. *United States* v. *Nkome*, 987 F.3d 1262, 1269 (10th Cir. 2021) (deferring to commentary without citing *Kisor* or addressing whether underlying Guideline was ambiguous); *see also United States* v. *Cantrell*, 817 F. App'x 614, 619 (10th Cir. 2020) (same).

Although these circuits have not expressly refused to apply *Kisor*'s constraints in the Guidelines context, circuit precedent now precludes them from doing so. Thus, all twelve circuits have weighed in on the split.

D. The Split Will Not Resolve Without This Court's Intervention.

The deep split among twelve circuits is highly unlikely to resolve itself without this Court's intervention.

Since *Kisor*, most courts on both sides of the split, including the Fourth Circuit below, have refused to reconsider the issue en banc. *See* Pet. App. 47a-48a; Order, *Lewis*, No. 18-1916 (1st Cir. Oct. 2, 2020); Order, *United States* v. *Tabb*, No. 18-338 (2d Cir. June 1, 2020); Order, *United States* v. *Tate*, No. 20-5071 (6th Cir. July 16, 2021); Order, *United States* v. *Crum*, No. 17-30261 (9th Cir. Oct. 29, 2019); *United States* v. *Lovato*, No. 18-1468 (10th Cir. June 23, 2020); *see also* Order, *United States* v. *Winstead*, No. 12-3036 (D.C. Cir. Sept. 5, 2018) (per curiam). Only the Third and Eleventh Circuits have granted rehearing en banc to address whether controlling deference to the Guidelines commentary remains appropriate. *See Nasir*, 17 F.4th at 470-472; *Dupree*, 25 F.4th 1341; *see also* Pet.

for Reh'g En Banc, *Vargas*, No. 21-20140 (5th Cir. June 23, 2022) (pending).

Nor can the Sentencing Commission itself resolve this split. This Court often declines review in cases involving the interpretation of a particular Guideline, where the Commission itself can resolve the matter. *See Braxton* v. *United States*, 500 U.S. 344, 348-349 (1991) (declining to resolve a question presented "because the Commission has already undertaken a proceeding that will eliminate circuit conflict over the meaning" of the Guideline at issue); *see also, e.g.*, *Guerrant* v. *United States*, 142 S. Ct. 640, 640-641 (2022) (statement of Sotomayor, J., respecting the denial of certiorari) ("It is the responsibility of the Sentencing Commission" to address a split concerning the meaning of a Guideline). The Commission, however, is not in a position to resolve the predicate question regarding the extent to which deference to its commentary is warranted. It is solely the Judiciary's responsibility to "make an independent inquiry into whether the character and context of the agency interpretation entitles it to controlling weight." *Kisor*, 139 S. Ct. at 2416. The split will persist until this Court resolves it.

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENT.

As the government has conceded, the decision below is incorrect. Applying *Kisor*, courts must evaluate whether the underlying Guideline is genuinely ambiguous before deferring to the Sentencing Commission's commentary, just as courts must evaluate whether any other agency rule is genuinely ambiguous before

deferring to an agency's interpretation. This Court should grant certiorari and reverse.

1. In *Stinson*, this Court held that the Guidelines commentary is entitled to deference under *Seminole Rock*. That conclusion was based on an analogy between the Commission and other "federal agencies." *Stinson*, 508 U.S. at 45. Just as an agency promulgates rules by virtue of a delegation from Congress, "[t]he Sentencing Commission promulgates the guidelines by virtue of an express congressional delegation of authority for rulemaking." *Id.* at 44-45. And, just like other agencies, the Commission promulgates the Guidelines "through the informal rulemaking procedures" in the Administrative Procedure Act. *Id.* at 45 (citing 28 U.S.C. § 994(x)). Thus, the Court explained, it was "correct" that the commentary should "be treated as an agency's interpretation of its own legislative rule." *Id.* at 44.

Applying this analogy, the *Stinson* Court held that the commentary should be accorded deference under *Seminole Rock*. In describing the deference that should apply to the commentary, the Court repeated the *Seminole Rock* standard without quotation marks, stating that commentary "is authoritative unless it violates the Constitution or a federal statute, or is consistent with, or a plainly erroneous reading of, that guideline." *Id.* at 38. The *Stinson* Court also quoted from *Seminole Rock* twice, including in the sentence setting forth the holding of the case. *Id.* at 45, 47 (quoting *Seminole Rock*, 325 U.S. at 414). Driving the point home, *Stinson* supported its description of the applicable deference by citing four cases granting *Seminole Rock* deference to other agencies' interpretations of their legislative rules. *See id.* at 45 (citing

Robertson v. *Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989) (U.S. Forest Service); *Lyng* v. *Payne*, 476 U.S. 926, 939 (1986) (Farmers Home Administration); *United States* v. *Larionoff*, 431 U.S. 864, 872-873 (1977) (Department of the Navy); *Udall* v. *Tallman*, 380 U.S. 1, 16-17 (1965) (Department of the Interior)).

Kisor subsequently clarified "the limits inherent in" *Seminole Rock* deference. 139 S. Ct. at 2415. Because *Stinson* accorded *Seminole Rock* deference to the Guidelines commentary, and because *Kisor* limited the circumstances in which *Seminole Rock* deference may be accorded, the limits identified in *Kisor* equally govern the commentary. Indeed, the *Kisor* plurality identified *Stinson* as one of the "legion" of "pre-*Auer*[ ] decisions applying *Seminole Rock* deference." *Id.* at 2411 n.3 (plurality op.); *accord Perez* v. *Mortg. Bankers Ass'n*, 575 U.S. 92, 114 (2015) (Thomas, J., concurring in the judgment) (noting that *Stinson* held that commentary is "entitled to *Seminole Rock* deference").

The merits of this case are thus straightforward. "*Stinson* analogized to agency interpretations of regulations when adopting *Seminole Rock*'s plain-error test for the commentary." *Riccardi*, 989 F.3d at 485. It follows that "*Kisor*'s clarification of the plain-error test applies just as much to *Stinson* (and the Commission's guidelines) as it does to *Auer* (and an agency's regulations)." *Id.* As Judge Bibas reasoned, while the Sentencing Commission's commentary used to be "almost dispositive," the *Stinson* rule no longer governs after *Kisor*. *Nasir*, 17 F.4th at 473 (Bibas, J., concurring) (citing *Kisor*, 139 S. Ct. at 2415).

No doubt for that reason, the government acknowledged below "that *Kisor* applies in the guidelines context and governs how much deference the commentary receives." U.S. Resp. to Pet. for Reh'g En Banc at 11. It has previously taken the same position in this Court, conceding that "*Kisor* sets forth the authoritative standards for determining whether particular commentary is entitled to deference." Br. in Opp. at 15, *Tabb* v. *United States*, No. 20-579 (U.S. Feb. 16, 2021) (quotation marks omitted).

2. The panel majority nonetheless refused to apply *Kisor*. No part of the majority's rationale withstands scrutiny.

The panel first maintained that *Stinson* did not actually apply *Seminole Rock* deference. That is unsustainable. *Stinson* was rooted in an analogy between the commentary and "an agency's interpretation of its own legislative rules." 508 U.S. at 45. *Stinson* quoted *Seminole Rock* twice, including as part of its core holding that deference was owed to the Guidelines commentary because it "does not run afoul of the Constitution or a federal statute, and it is not 'plainly erroneous or inconsistent' with" the Guideline. *Id.* at 47; *see id.* at 45. The panel majority dutifully quoted this holding, but followed the quotation with a "cleaned up" parenthetical omitting *Stinson*'s citation to *Seminole Rock*. Pet. App. 17a.

The panel also omitted key context from *Stinson*'s caveat that the analogy between the Guidelines commentary and other agency interpretations "is not precise." Pet. App. 20a (quoting *Stinson*, 508 U.S. at 44). *Stinson*'s full quote was: "Although the analogy is not precise because Congress has a role in promulgating the guidelines, *we think the Government is correct in*

suggesting that the commentary be treated as an agency's interpretation of its own legislative rule." 508 U.S. at 44 (emphasis added). *Stinson* thus adopted the analogy notwithstanding its imprecision. And the analogy has only grown more apt in the years since. In 1996, Congress enacted the Congressional Review Act, which requires agencies to submit proposed rules to Congress for review and possible rejection. 5 U.S.C. §§ 801, 802. Congress thus now plays effectively the same role in the legislative rulemaking process as it does in promulgating the Guidelines. *See* 28 U.S.C. § 994(p).

The panel "recognize[d]" that the *Kisor* plurality "did include a citation to *Stinson*" as one of this Court's pre-*Auer* decisions "applying *Seminole Rock*." Pet. App. 19a n.*. But the *Kisor* plurality's reference to *Stinson* did not satisfy the panel, which concluded, after "close consideration of *Stinson*," that the plurality got it wrong. *Id.* Instead, the panel maintained that the Commission does not resemble other federal agencies and the Guidelines do not resemble legislative rules. *Id.* at 17a-18a. But *Stinson* already considered these same arguments and came to the opposite conclusion: "[T]he guidelines are the equivalent of legislative rules adopted by federal agencies," and "commentary is akin to an agency's interpretation of its own legislative rules." 508 U.S. at 45.

Having freed itself from this Court's precedent, the panel concluded that mandatory deference to Guidelines commentary (absent unlawfulness or plain error) was desirable on policy grounds. Pet. App. 20a-22a. "Over the years," the panel observed, "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." *Id.* at 16a. The panel refused to "relegate" the Guidelines commentary "to a status where it could be considered only when the relevant Guideline is genuinely ambiguous," because doing so would impose a "burden on the use of commentary" and thus deprive courts of the Sentencing Commission's expertise. *Id.* at 21a.

This Court in *Kisor* rejected virtually identical logic. *See* Br. of Administrative Law Scholars at 6, *Kisor*, 139 S. Ct. 2400 (No. 18-15) (arguing that *Auer* deference should be preserved because it "reflects appropriate respect for the superior fact-finding and policy-making capabilities of administrative agencies"). The Court recognized that agencies often possess "substantive expertise," and treated that as a reason not to abandon deference entirely. *Kisor*, 139 S. Ct. at 2417. But it also noted that agency expertise cannot justify abdicating courts' "critical role" in interpreting the law. *Id.* at 2423; *see id.* at 2415. And it highlighted the "far-reaching influence of agencies and the opportunities such power carries for abuse." *Id.* at 2423. *Kisor* limited the risk of such abuse by ensuring that courts "must first exhaust [the] traditional tools of statutory construction" before deferring to agency expertise. *Nasir*, 14 F.4th at 472 (Bibas, J., concurring). The panel majority was not at liberty to refashion the balance that *Kisor* struck merely because it did not share this Court's view.

III. DEFERENCE IS ENTIRELY UNWARRANTED IN THE CRIMINAL CONTEXT.

In the alternative, this Court should conclude that deference to the Guidelines commentary in the criminal context is entirely inappropriate, *Kisor* notwithstanding. Where courts are asked to defer to a government agency's interpretation of the law in *criminal* cases, "alarm bells should be going off." *United States* v. *Havis*, 907 F.3d 439, 450 (6th Cir. 2018) (Thapar, J., concurring), *opinion vacated on reh'g en banc*, 927 F.3d 382 (6th Cir. 2019) (per curiam). Whatever else one thinks about agency deference, it should have "no role to play when liberty is at stake." *Guedes*, 140 S. Ct. at 790 (Gorsuch, J., respecting denial of certiorari).

"Courts play a vital role in safeguarding liberty and checking punishment." *Nasir*, 17 F.4th at 474 (Bibas, J., concurring). Acting in that role, common-law courts have for centuries applied the rule of lenity, under which courts must construe penal laws "strictly." *Wooden* v. *United States*, 142 S. Ct. 1063, 1082 (2022) (Gorsuch, J., concurring in the judgment). This rule reflects "the tenderness of the law for the rights of individuals," *id.* (citation omitted), and "serves our nation's strong preference for liberty," *Nasir*, 17 F.4th at 473 (Bibas, J., concurring). In light of this "presumption of liberty," there is "no compelling reason to defer to a Guidelines comment that is harsher than the text." *Id.* at 474; *cf. Whitman* v. *United States*, 574 U.S. 1003 (2014) (Scalia, J., respecting the denial of certiorari) (deference in criminal cases turns normal interpretive principles "upside-down, replacing the doctrine of lenity with a doctrine of severity" (quotation marks omitted)).

The panel allowed that *Kisor* "understandably" imposed "substantial restrictions on courts' reliance on agencies' interpretations of their rules" in the civil context. Pet. App. 18a. But the panel maintained that the reasons for limiting agency deference in the civil context apply with *less* force in the criminal context. *Id.* That is exactly backwards. *See Kisor*, 139 S. Ct. at 2433 (Gorsuch, J., concurring in the judgment) (if a judge "said he was sending a defendant to prison for longer than he believed appropriate only in deference to the government's 'reasonable' sentencing recommendation, would anyone really think that complied with the law?"). Particularly in the criminal context, "judges owe the people who come before them nothing less than a fair contest, where every party has an equal chance to persuade the court of the interpretation of the law's demands." *Id.* at 2425. The panel abdicated that obligation, and subjected Moses to a sixfold sentence enhancement—not because the commentary reflects the correct understanding of the Guideline, but merely because it is not a plainly erroneous one. The "binding" and "controlling" deference that the panel held must be granted to the Guidelines commentary deprives criminal defendants of their right to an independent judiciary in cases where that right is most critical.

IV. THIS CASE IS AN IDEAL VEHICLE TO ADDRESS THE IMPORTANT QUESTIONS PRESENTED.

1. The question whether and in what circumstances courts must defer to the Guidelines commentary is exceptionally consequential.

The Guidelines play a "central role in sentencing." *Molina-Martinez* v. *United States*, 578 U.S. 189, 191 (2016). "[D]istrict courts *must* begin their analysis

with the Guidelines and remain cognizant of them throughout the sentencing process." *Gall*, 552 U.S. at 50 n.6 (emphasis added). "A district court that improperly calculates a defendant's Guidelines range * * * has committed a significant procedural error." *Molina-Martinez*, 578 U.S. at 199 (quotation marks and brackets omitted). By contrast, a sentence within a properly calculated Guidelines range may be presumed reasonable. *See Rita* v. *United States*, 551 U.S. 338, 347 (2007); *see also, e.g.*, *United States* v. *White*, 850 F.3d 667, 674 (4th Cir. 2017). Given the centrality of the Guidelines in federal sentencing, it is no surprise that from 2012 through 2021, judges imposed a within-Guidelines sentence 75% of the time.[1]

In circuits that continue to apply *Stinson*'s rule of mandatory deference to the Guidelines commentary, courts must evaluate the commentary in calculating a defendant's Guidelines range, even where the applicable Guideline is unambiguous. If a court declines to follow the commentary, it must provide a persuasive reason for the departure. *See Gall*, 552 U.S. at 50 (district courts must offer a "sufficiently compelling" "justification" for varying from a within-Guidelines sentence). The *Stinson* rule thus transforms the sentencing court's task—from applying the Guidelines to applying the commentary. District courts in circuits that adhere to *Stinson*, for example, must apply the three-page-long interpretation of the word "loss" in the commentary to Sentencing Guideline § 2B1.1, or persuasively explain why they are not. *See* U.S.S.G. § 2B1.1 cmt. n.3. District courts must even defer to

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[1] U.S. Sent'g Comm'n, *2021 Annual Report & Sourcebook of Federal Sentencing Statistics* at 85, *available at* https://bit.ly/3caZg9U.

silences in the commentary, or, again, persuasively explain why they are not. *See United States* v. *Yepez*, 704 F.3d 1087, 1090-91 (9th Cir. 2012) (en banc) (per curiam).

Mandatory deference to the commentary, moreover, permits the Sentencing Commission to circumvent the procedural restrictions that Congress imposed on amending the Guidelines. The Commission may amend a Guideline only through notice-and-comment rulemaking and congressional review. *See* 28 U.S.C. § 994(p), (x). But in the circuits that continue to apply *Stinson*, the Commission can effectively amend a Guideline by amending the commentary. Under *Stinson*, "[a]mended commentary is *binding* on the federal courts even though it is not reviewed by Congress." 508 U.S. at 46 (emphasis added). Mandatory deference to the commentary thus empowers the Commission "to use its commentary as a Trojan horse for rulemaking." *Lewis*, 963 F.3d at 28 (Torruella & Thompson, JJ., concurring); *see also Riccardi*, 989 F.3d at 485 (similar).

The rule of mandatory deference to Guidelines commentary also creates a strange tension where federal regulatory crimes are concerned. Federal statutes frequently impose criminal penalties for violating agency regulations. *E.g.*, 42 U.S.C. § 7413(c)(1) (Clean Air Act); 18 U.S.C. § 1520(b) (Sarbanes-Oxley Act); 21 U.S.C. § 333(a)(1) (Food, Drug, and Cosmetic Act); 7 U.S.C. § 13(a)(3) (Commodity Exchange Act). In circuits that adhere to *Stinson*, defendants sentenced for such crimes may encounter stacked levels of deference—a rigorous *Kisor* inquiry into the agency's interpretation of its regulations, followed by obliging *Stinson* deference to the Guidelines commentary.

Mandatory deference to the Guidelines commentary affects thousands of individuals every year. Of the more than 57,000 criminal defendants sentenced in 2021, nearly two-thirds were sentenced in the four circuits that expressly refuse to follow *Kisor*, and nearly 90% were sentenced in the eight circuits that have adhered to *Stinson* even after *Kisor*. *See* U.S. Sent'g Comm'n, *supra*, at 35-36. In these circuits, the Commission, rather than the sentencing court, has the primary say over what even an *unambiguous* Guideline means—raising the exact concerns this Court in *Kisor* intended to quell, in a context where the case for deference is at its weakest.

In the four circuits that properly follow *Kisor*, by contrast, a sentencing court cannot defer to the Guidelines commentary without first establishing that the underlying Guideline is genuinely ambiguous. The circuits' inconsistent approaches to federal sentencing undermine one of the primary goals of the Sentencing Reform Act, which "was to achieve uniformity in sentencing * * * imposed by different federal courts for similar criminal conduct." *Molina-Martinez*, 578 U.S. at 192 (quotation marks omitted).

2. This case is an ideal vehicle to address whether *Kisor* governs deference to the Guidelines commentary. The decision below squarely confronted that question. *See* Pet. App. 2a-3a. It acknowledged that its decision deepened a circuit split. *Id*. at 4a. And in his opinion supporting the denial of rehearing en banc, Judge Niemeyer offered that the Fourth Circuit "would welcome the Supreme Court's advice on whether *Stinson* or *Kisor* controls" deference to the Guidelines commentary. *Id*. at 52a.

Although this Court has previously denied a petition purporting to present a similar question, *see Tabb* v. *United States*, No. 20-579 (cert. denied June 21, 2021), that petition suffered from vehicle problems not implicated here. It arose in the context of a split over whether to defer to commentary that interpreted the career-offender Guideline to include inchoate offenses. *See* Pet. for a Writ of Cert., *Tabb*, No. 20-579 (Oct. 28, 2020). As the government noted in opposing certiorari, this Court had repeatedly denied review of that issue, and the Sentencing Commission had "already begun the process of addressing the recent disagreement." Br. in Opp. at 9, *Tabb*, No. 20-579 (U.S. Feb. 16, 2021). Here, by contrast, the Sentencing Commission itself cannot decide what deference is owed to the commentary. Only this Court can. In addition, the Second Circuit decision from which the petitioner in *Tabb* sought review "did not address th[e] methodological question" whether courts must first conclude that a Guideline is ambiguous under *Kisor* before deferring. *Id.* at 18. Here, by contrast, the panel majority unmistakably concluded that deference was warranted "*even when the related Guideline is unambiguous*." Pet. App. 2a. And the split has deepened since this Court denied review in *Tabb*, making this Court's review all the more urgent.

In the proceedings below, the government conceded that the panel erred in refusing to apply *Kisor*, but nonetheless opposed rehearing en banc on the ground that deference would be appropriate even under *Kisor*, because the commentary is a "reasonable interpretation" of the Guideline. U.S. Resp. to Pet. for Reh'g En Banc at 6. That argument provides no basis for denying review. For one thing, it is incorrect: Under the

plain meaning of the Guidelines, the conduct underlying Moses's earlier conviction—the sale of a small amount of crack cocaine in Raleigh—was relevant to the conduct underlying his current conviction—the sale of a small amount of crack cocaine in Raleigh. *See* U.S.S.G. § 1B1.3(a)(2). As Moses noted below, courts and the government often treat offenses committed years in the past as "relevant conduct" for purposes of *enhancing* defendants' sentences. *See, e.g.*, *United States* v. *Chambers*, 878 F.3d 616, 622-623 (8th Cir. 2017) (per curiam) (seven years); *Govan*, 165 F.3d 912 (five years); *United States* v. *Roederer*, 11 F.3d 973, 979-980 (10th Cir. 1993) (five years). Courts and the government also discount temporal gaps between the current offense and prior relevant conduct where, as here, the lapse coincided with a participant's arrest and incarceration. *See* Pet. App. 7a-8a; *see, e.g.*, *United States* v. *Nunez*, 958 F.2d 196, 198 (7th Cir. 1992); *see also, e.g.*, Br. of United States, Plaintiff-Appellee at 17-18, *United States* v. *Reina*, 244 F.3d 141 (11th Cir. 2000) (Table) (No. 99-15198), 1999 WL 33649942. There is no basis for adopting a different rule in cases where it would work to the defendant's benefit.

More importantly, however, the panel majority below never addressed whether the Guideline at issue is genuinely ambiguous after exhausting "all the traditional tools of construction." *Kisor*, 139 S. Ct. at 2415 (quotation marks omitted). Nor did it address whether, if the Guideline *is* genuinely ambiguous, the commentary is a "reasonable interpretation" of that ambiguity, or "whether the character and context of the agency interpretation entitles it to controlling weight." *Id.* at 2416 (quotation marks omitted). In-

stead, its holding was predicated entirely on its conclusion that deference did not depend on whether the Guideline was ambiguous. *See* Pet. App. 22a-23a ("having concluded that *Stinson* continues to" apply unaffected by *Kisor*, "we readily conclude that Application Note 5(C) is owed controlling deference"). This Court could therefore hold that *Kisor* applies to the Guidelines commentary, then remand for the Court of Appeals to conduct the appropriate analysis.

3. This case is just as ideal a vehicle to address whether deference in criminal cases can ever be warranted. The panel majority never attempted to provide "its best independent judgment" of the meaning of the Guideline under which Moses was sentenced. *Kisor*, 139 S. Ct. at 2426 (Gorsuch, J. concurring in the judgment). Instead, it delegated that judgment to the Sentencing Commission, approved a sentence that was *six times* longer than the sentence that would have applied under the better reading of the Guideline, and subjected Moses to a ten-year sentence for selling $40 worth of crack cocaine. This case exemplifies the harm to individual liberty that results from reflexive deference in the criminal context.

CONCLUSION

The petition for a writ of certiorari should be granted and the decision below reversed.

Respectfully submitted,

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