No. 22-163

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

REPLY BRIEF IN SUPPORT OF CERTIORARI

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INTRODUCTION

The government does not defend the panel's holding that the deference owed to the Guidelines commentary was "unaltered by *Kisor*." Pet. App. 4a-5a. And for good reason. As the government acknowledges (at 14-15), "*Kisor* sets forth the authoritative standards" for whether to defer to the commentary. That is why *the government* urged the panel to grant rehearing to correct its refusal to adhere to *Kisor*. The panel denied rehearing anyway. Although the panel recognized that its "conclusion is not shared by at least two

circuits," Pet. App. 4a, and although Judge Niemeyer acknowledged that this issue "could have far-reaching results," Pet. App. 52a, the panel's opinion stands as the law of the Fourth Circuit.

Faced with a decision it acknowledges was wrong on an issue affecting the liberty of thousands of criminal defendants that has divided the circuits, the government nevertheless disputes the need for this Court's review. All of the government's arguments against certiorari fail.

The government attempts to minimize the split by discounting the views of several circuits, including by arguing that the decision below may not be binding in the Fourth Circuit. That is self-evidently incorrect. The panel issued a published opinion holding that *Stinson* governs the deference afforded to the commentary. That holding is the law of the circuit. As for the government's other quibbles about the scope of the split, it cannot plausibly deny what has broadly been acknowledged: Whether "*Kisor* modified the deference owed to the Guidelines' commentary" is "the subject of a circuit split." *United States* v. *Cordova-Lopez*, 34 F.4th 442, 444 (5th Cir. 2022) (per curiam).

Unable to defend the panel's holding, the government dedicates the bulk of its brief to arguing that Moses's sentence might nonetheless survive under *Kisor*. That argument is wrong, but, more importantly, it is beside the point. The panel did not address that argument, and it is not encompassed by either question presented. The proper forum to address it is the Fourth Circuit on remand.

The government's argument that deference might be warranted under *Kisor* is particularly inapposite be-

cause 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). The government's only response is to invoke *stare decisis*. But the reflexive deference required by *Stinson* was never warranted, and this Court's intervening precedent has further undermined it. It is time for the Court to clarify that deference is entirely improper in criminal cases.

Finally, the government suggests that the Commission can decide for itself how much deference federal courts must give it. That contravenes bedrock requirements of Article III. *This Court* determines the weight accorded agency interpretations of the law. For that reason, only this Court can resolve the split over whether *Kisor* prohibits the reflexive deference the panel below endorsed.

ARGUMENT

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

1. The government attempts to explain away the Fourth Circuit's part in a deep split by claiming that the decision below is not actually the law in the Fourth Circuit. The government is wrong.

The panel's holding, issued in a published opinion, was unequivocal: "we conclude that *Stinson* continues to apply unaltered by *Kisor*." Pet. App. 4a. Thus: "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." Pet. App. 22a (quoting *Stinson* v. *United States*, 508 U.S. 36, 38 (1993)). The en banc Fourth Circuit—over five votes to grant rehearing—declined to revisit this holding, even though Moses and the government agreed the panel had erred.

The government suggests (at 15) that the panel's decision may not have "prospective significance" because it conflicts with the Fourth Circuit's earlier decision in *United States* v. *Campbell*, 22 F.4th 438 (2022). But as Judge Niemeyer explained in distinguishing *Campbell*, that case had "no need to explore the conflict between *Stinson* and *Kisor*." Pet. App. 50a-51a. *Campbell* held that the "plain text" of the Guideline and the commentary at issue there were "plainly" "inconsistent," such that deference was not warranted under *Stinson*. 22 F.4th at 444 (quotation marks omitted). *Campbell* addressed *Kisor* only in the alternative, and that discussion was not integral to its holding. The government therefore acknowledged below that "the dispute about *Kisor*'s application did not affect the result" in *Campbell*. U.S. Resp. to Pet. for Reh'g En Banc at 10.

Any doubt about whether the decision below is binding has been resolved by how courts have interpreted it. Since denying rehearing below, the Fourth Circuit has continued to apply *Stinson* in deferring to the Guidelines commentary. *See United States* v. *Arias*, No. 20-4515, 2022 WL 5240610, at *1 & n.* (4th Cir. Oct. 6, 2022) (per curiam). The Fifth Circuit has likewise recognized that the Fourth Circuit has "held that '*Kisor* does not apply to the Sentencing Commission's official commentary." *Cordova-Lopez*, 34 F.4th at 444

(citing Pet. App. 19a) (alteration omitted). The decision below is the law of the Fourth Circuit.

2. Because the panel held that "*Stinson* continues to apply unaltered by *Kisor*," Pet. App. 4a, there is a clear split. Even the panel conceded that its decision split with "at least two circuits." *Id.* Citing the decision below, the Fifth Circuit has recognized that whether "*Kisor* modified the deference owed to the Guidelines' commentary" is "the subject of a circuit split." *Cordova-Lopez*, 34 F.4th at 444; *accord United States* v. *Kirilyuk*, 29 F.4th 1128, 1149 (9th Cir. 2022) (Bress, J., dissenting).

The split is also deeper than the panel acknowledged. Four circuits—the First, Third, Sixth, and D.C. Circuits—follow *Kisor* rather than *Stinson* in the Guidelines context, a fact the government does not dispute. Pet. 15-18. Four other circuits—the Fourth, Fifth, Ninth, and Eleventh Circuits—have expressly held that *Kisor* did not alter the deference owed to the commentary. Pet. 18-20. And the remaining four circuits—the Second, Seventh, Eighth, and Tenth Circuits—have continued to apply *Stinson* even after *Kisor*. Pet. 20-22.

The government's attempts to downplay this deep split are misplaced. The government contends (at 18) that the Ninth Circuit "treat[s] the question as an open one." No; that court "continue[s] to follow *Stinson* after *Kisor*." *United States* v. *Pratt*, No. 20-10328, 2021 WL 5918003, at *2 (9th Cir. Dec. 15, 2021) (collecting cases); *accord Kirilyuk*, 29 F.4th at 1149 (Bress, J., dissenting) ("In this circuit, *Stinson* is still the governing law for evaluating Guidelines commentary.").

The government also argues that the four circuits that apply *Stinson* without addressing *Kisor* should not count toward the split. But these courts defer to the Guidelines under *Stinson*, such that circuit precedent binds them to that conclusion. The Second Circuit acknowledged *Kisor*, but chose to adhere to its precedent applying *Stinson*. *United States* v. *Wynn*, 845 F. App'x 63, 66 (2d Cir. 2021); *see United States* v. *Tabb*, 949 F.3d 81 (2d Cir. 2020). The Seventh and Tenth Circuits acknowledged decisions from other circuits relying on *Kisor*, but nevertheless deferred under *Stinson*. *See, e.g.*, *United States* v. *Babcock*, 40 F.4th 1172, 1184-86 (10th Cir. 2022); *United States* v. *Smith*, 989 F.3d 575, 584-585 (7th Cir. 2021). And the Eighth Circuit appreciated that *Kisor* was a "major development[]," but applied *Stinson* anyway. *United States* v. *Broadway*, 815 F. App'x 95, 96 n.2 (8th Cir. 2020) (per curiam); *accord United States* v. *Clayborn*, 951 F.3d 937, 940 (8th Cir. 2020). In each of these circuits, *Stinson* applies.

3. This split will not resolve without the Court's guidance. In recent months, several circuits have doubled down on their positions. The Sixth Circuit reaffirmed that "*Kisor* clarified *Auer's* narrow scope and provided the framework that we must follow in determining whether to defer to the Guidelines commentary." *United States* v. *Phillips*, __ F.4th __, 2022 WL 17246309, at *4 (6th Cir. Nov. 28, 2022) (quotation marks omitted). The Third Circuit reiterated that "[i]f the Sentencing Commission's commentary sweeps more broadly than the plain language of the guideline it interprets, we must not reflexively defer." *United States* v. *Banks*, __ F.4th __, 2022 WL 17333797, at *6 (3d Cir. Nov. 30, 2022) (quotation marks omitted).

And the D.C. Circuit acknowledged that the commentary is entitled to the same degree of deference as "an agency's interpretation of its own regulations." *United States* v. *Jenkins*, 50 F.4th 1185, 1197 (D.C. Cir. 2022).

The government notes (at 18-19) that two circuits that have adhered to *Stinson*—the Fifth and Eleventh—have voted to reconsider their decisions en banc. But even if those two courts reverse course, the circuits would still be intractably split, with six circuits continuing to adhere to *Stinson* and six circuits adhering to *Kisor*. Given that this Court will inevitably have to intervene, awaiting the results of these en banc proceedings would simply mean subjecting criminal defendants in half the country to deference that even the government concedes is unlawful.

II. DEFERENCE IS ENTIRELY UNWARRANTED IN THE CRIMINAL CONTEXT.

Whatever one thinks of deference under any standard, it should have "no role to play when liberty is at stake." *Guedes*, 140 S. Ct. at 790 (Gorsuch, J., respecting denial of certiorari). 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," that would plainly violate the law. *Kisor* v. *Wilkie*, 139 S. Ct. 2400, 2433 (2019) (Gorsuch, J., concurring in the judgment). But in declaring the commentary "authoritative and binding," Pet. App. 22a, that is exactly what the panel did.

The government makes no effort to defend deference in the criminal context. Instead (at 21), it relies on *stare decisis*. But none of the *stare decisis* reasons this Court invoked to uphold the general *Auer* framework

apply here. Prohibiting deference in this context would require this Court to overrule "a single case"—*Stinson*—not "a long line of precedents." *Kisor*, 139 S. Ct. at 2422 (quotation marks omitted). And "subsequent legal developments" have called *Stinson* into doubt, *see Kimble* v. *Marvel Ent., LLC*, 576 U.S. 446, 458 (2015), by disapproving of the reflexive deference that *Stinson* endorsed.

Adhering to *Stinson* on *stare decisis* grounds is particularly unwarranted where the rule of lenity requires that genuine ambiguity in criminal cases be resolved in the defendant's favor. The government discounts lenity's role in resolving ambiguous Guidelines, asserting (at 21) that it "applies only in the face of grievous ambiguity." (quotation marks omitted). But the degree of ambiguity required to trigger lenity is far less settled than the government suggests. *See Wooden* v. *United States*, 142 S. Ct. 1063, 1084-86 (2022) (Gorsuch, J., concurring in the judgment). And in any event, the panel never addressed whether the Guideline here met that mark.

Invoking void-for-vagueness challenges as a comparison, the government suggests that lenity may be entirely inapplicable in the Guidelines context. But "[e]ven though the Guidelines are advisory, they exert a law-like gravitational pull on sentences," such that "courts must still attend to" lenity in this context. *United States* v. *Nasir,* 17 F.4th 459, 474 (3d Cir. 2021) (en banc) (Bibas, J., concurring). The rule of lenity eliminates any need for deference to the commentary.

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

1. This case is an excellent vehicle for merits review. As Judge Niemeyer explained in his statement supporting denial of rehearing, the very "root of this case" is whether this Court's "decision in *Kisor* overruled its earlier decision in *Stinson* for determining the enforceability of and weight to be given the official commentary of the Sentencing Guidelines." Pet. App. 49a (citations omitted). The government does not dispute that the panel held that "Application Note 5(C) must be afforded binding effect under *Stinson*." Pet. App. 5a. Nor does the government dispute that the panel held that this deference was "unaltered by *Kisor*." Pet. App. 4a-5a. And the government concedes (at 14-15) that the panel's holding was wrong. That makes this case an unusually strong vehicle for evaluating whether reflexive deference to the commentary survives *Kisor*.

The government's principal response is that Moses's career-offender enhancement might be proper absent deference, or that deference might be warranted under *Kisor*. But, as the government acknowledges (at 13), the panel below did not address the text of the career-offender Guideline; it largely ignored the Guideline and deferred to the commentary. Nor did the panel address whether deference to the commentary would be warranted under *Kisor*, because it deemed *Kisor* categorically inapplicable. These arguments and any others can be resolved by the Fourth Circuit on remand.

The government's arguments are, in any event, mistaken. The career-offender Guideline permits an en-

hancement based on "any sentence previously imposed upon adjudication of guilt * * * for conduct not part of the instant offense." U.S.S.G. § 4A1.2(a)(1). But the conduct underlying Moses's prior offense—the sale of a small amount of crack cocaine in Raleigh—*is* conduct part of the instant offense—the sale of a small amount of crack cocaine in Raleigh. And even if the Guideline itself is ambiguous—a question the panel did not attempt to answer—Application Note 5(C) is not a reasonable interpretation under *Kisor* because it categorically excludes conduct associated with a prior sentence, even though the text of the career-offender Guideline specifically contemplates that conduct underlying a "prior sentence" *can* constitute conduct "part of the instant offense."

The government highlights (at 16) a statement in Moses's brief below that the text of the relevant-conduct Guideline is ambiguous. That does not automatically compel deference under *Kisor*. Rather, courts must carefully consider "the text, structure, history, and purpose of a regulation" before deferring. *Kisor*, 139 S. Ct. at 2415. And even if a regulation is "genuinely ambiguous," an agency cannot, "under the guise of interpreting a regulation," adopt "*de facto* a new regulation." *Id.* (quotation marks omitted). Moses argued below that Application Note 5(C) "is not entitled to controlling weight" because it rewrites the relevant-conduct Guideline under the guise of interpreting it. *See* CA4 Reply Br. 4. The Fourth Circuit would need to address that argument on remand.

The government's suggestion that Moses's argument requires following the commentary in some respects but not others is meritless. Moses addressed Application Note 5(C) because the panel held that

"Application Note 5(C) is owed controlling deference." Pet. App. 22a-23a. And there would be nothing inconsistent about maintaining that *Kisor* deference is warranted for § 4B1.2 cmt. n.1, but that *Kisor* deference is *un*warranted for Application Note 5(C).

The case against deference here is particularly strong given that the government often seeks to *lengthen* a sentence based on prior offenses like Moses's. *See, e.g.*, *United States* v. *White*, 519 F.3d 342 (7th Cir. 2008) (nine-year-old conduct); *United States* v. *Brogdon*, 503 F.3d 555, 559-561 (6th Cir. 2007) (greater than ten-year-old conduct). Contrary to the government's assertion (at 17), that is true even where the defendant was "arrested and imprisoned" in the interim. At the government's urging, for example, the Sixth Circuit has treated drug offenses dating back *seventeen years* as "relevant conduct," even though the defendant served six of those seventeen years in prison. *United States* v. *Easley*, 306 F. App'x 993, 997 (6th Cir. 2009). Interpreting the relevant-conduct Guideline expansively where it lengthens a sentence—but narrowly where it shortens it—is an unbecoming incongruity in any context, and all the more so where liberty hangs in the balance.

2. The government asserts (at 20) that the Commission can "resolve any dispute concerning the application of particular commentary by amending the text of the Guidelines." But this case is about the predicate question: How much deference should the Guidelines commentary receive in the first place?

That sets this petition apart from the string of cert denials the government invokes (at 9 n.2) as reason to deny this petition. *Every single* petition string-cited

by the government involved a split over whether to defer to commentary interpreting a particular Guideline—either the commentary that expands the career-offender Guideline to include inchoate offenses, or the commentary interpreting "loss" to require a $500 multiplier per stolen gift card. *See Smith*, 989 F.3d at 584 (recognizing inchoate-offense split); *Kirilyuk*, 29 F.4th at 1138 (refusing to defer to $500 multiplier); *United States* v. *Rueda*, 933 F.3d 6, 9 (1st Cir. 2019) (deferring to $500 multiplier). The Commission could resolve those underlying splits by clarifying the meaning of those Guidelines now that a quorum has been restored. Here, by contrast, the split does not involve the meaning of a particular Guideline, but the level of deference owed to the commentary more generally. Denying review simply because the Commission could change the Guideline itself would allow the split to persist in perpetuity.

The government also suggests (at 20) that the Commission can resolve for itself how much deference courts should give it. That suggestion borders on alarming. Government agencies cannot compel Article III courts to defer to their interpretations of the law. It is the Judiciary's responsibility independently to analyze "whether the character and context of the agency interpretation entitles it to controlling weight." *Kisor*, 139 S. Ct. at 2416.

The government characterizes this petition (at 18) as presenting an "abstract methodological question." But *Chevron*, *Stinson*, and *Kisor* all involved methodology; that is the nature of the issue. Circuit judges agree that this question is exceptionally "weighty," *Kirilyuk*, 29 F.4th at 1149 (Bress, J., dissenting), and "important" because "judges have a duty to interpret

the law, even when administrative agencies are involved," *Phillips*, 2022 WL 17246309, at *10 (Larsen, J., concurring in the judgment). As Judge Niemeyer below recognized, the Court's guidance on this "far-reaching" issue would be "welcome." Pet. App. 52a. This Court should grant the petition.

CONCLUSION

For the foregoing reasons, and those in the petition, the petition should be granted.

Respectfully submitted,

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