No. ____

IN THE
SUPREME COURT OF THE UNITED STATES

ANDRES VARGAS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth 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 a court tasked with deciding whether to defer to the U.S. Sentencing Commission's interpretive commentary to the Sentencing Guidelines should apply the same standard that governs when all other federal agencies purport to interpret their own regulations—*Seminole Rock* (or *Auer*) deference. In *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), this Court recalibrated that standard, clarifying that the possibility of deference under *Seminole Rock* (and *Auer*) may arise only where the pertinent regulatory text is "genuinely ambiguous, even after a court has resorted to all the standard tools of interpretation." *Id.* at 2414.

In this case, the en banc court of appeals deepened and entrenched the circuit conflict that has arisen over *Kisor*'s impact on the standard for deciding whether and when to defer to the Commission's Guidelines commentary. On the premise that *Stinson* demands adherence to the "plainly erroneous or inconsistent" formulation *Kisor* discarded as a "caricature" of this Court's deference doctrine, 139 S. Ct. at 2415, sentencing judges in at least six circuits—the First, Second, Fifth, Seventh, Eighth, and Tenth—continue to defer even to commentary that operates to expand the substantive scope of unambiguous guideline text. In contrast, judges in at least four circuits—the Third, Sixth, Ninth, and Eleventh—apply *Kisor*, and so defer only to commentary that reasonably resolves genuine ambiguity in the corresponding guideline. Meanwhile, judges in the Fourth Circuit are left to parse conflicting panel decisions holding both that *Kisor* controls, and the exact opposite.

The question presented is:

Whether the standard for triggering judicial deference to an agency's interpretation of its own regulations, as clarified in *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), governs the extent to which courts must defer to the Sentencing Commission's interpretations of its own guidelines and policy statements for federal criminal sentencing.

RELATED PROCEEDINGS

The following proceedings are directly related to this case:

- *United States v. Andres Vargas*, No. 4:20-cr-80-1, United States District Court for the Southern District of Texas. Judgment entered March 15, 2021.

- *United States v. Andres Vargas*, No. 21-20140, United States Court of Appeals for the Fifth Circuit. Judgment entered July 24, 2023.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Andres Vargas petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Fifth Circuit's en banc opinion (App. 1a-64a) is reported at 74 F.4th 673 (2023). The prior, now-vacated panel opinion that preceded rehearing (App. 65a-70a) is reported at 35 F.4th 936 (2022).

JURISDICTION

The Fifth Circuit entered judgment on July 24, 2023. App. 1a. This petition is filed within 90 days of that date. *See* Sup. Ct. R. 13.1 & 13.3. The Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT GUIDELINES PROVISIONS

Section 4B1.1(a) of the 2018 U.S. Sentencing Guidelines Manual provides:

> (a) A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

Section 4B1.2(b) of the Guidelines Manual provides:

> (b) The term "controlled substance offense" means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

Application Note 1 of the commentary to Section 4B1.2 provides:

> 1. **Definitions.**—For purposes of this guideline—
>
> "***Crime of violence***" and "***controlled substance offense***" include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.

STATEMENT OF THE CASE

A. The Sentencing Commission and its Guidelines

1. "Fundamental and widespread dissatisfaction with the uncertainties and the disparities" endemic in federal sentencing led Congress to enact 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 Act created the United States Sentencing Commission "as an independent

commission in the judicial branch," 28 U.S.C. § 994(a), and directed the agency to promulgate rules designed to "establish a range of determinate sentences for categories of offenses and defendants according to various specific factors, 'among others.'" *Mistretta*, 488 U.S. at 368 (citing 28 U.S.C. § 994(b)-(d)).

The Act authorizes the Commission to issue two types of rules: (1) "guidelines" for a court's use "in determining the sentence to be imposed in a criminal case," and (2) "general policy statements regarding application of the guidelines" or other aspects of sentencing. 28 U.S.C. § 994(a)(1), (2). When issuing "guidelines," the Commission, like other federal agencies, must comply with the notice-and-comment provisions of the Administrative Procedure Act. § 994(x). It must also periodically "review and revise" the "guidelines," and it "may" issue "amendments to" them. § 994(*o*), (p). Proposed amendments must be "submit[ted] to Congress," along with "a statement of reasons therefor," and take effect 180 days later unless "modified or disapproved by Act of Congress." *Ibid.*

The Commission discharges its delegated rulemaking authority by regularly publishing and updating the United States Sentencing Guidelines Manual. The Guidelines Manual is structured as a series of numbered guidelines and policy statements, the primary function of which is to identify the baseline sentencing range for all federal crimes by assigning numerical values keyed to the characteristics of the offense and the offender. *See* 28 U.S.C. § 994(b)(1); USSG Ch. 5, Pt. A.

2. Though no longer "binding on judges," *United States v. Booker*, 543 U.S. 220, 234 (2005), the Guidelines and the now-advisory range they produce set the "essential

framework" for federal sentencing and serve as the "'anchor [for] the district court's discretion.'" *Molina-Martinez v. United States*, 578 U.S. 189, 198-99 (2016) (quoting *Peugh v. United States*, 569 U.S. 530, 549 (2013)). District courts remain obliged to "begin their sentencing analysis" with the Guidelines, "use them to calculate the sentencing range correctly," and "ensure that the justification" for any deviation from the applicable range "is sufficiently compelling to support the degree of the variance." *Peugh*, 569 U.S. at 541, 549 (citation omitted); *see* 18 U.S.C. § 3553(a)(4)(A). Miscalculating a defendant's range is "a significant procedural error." *Molina-Martinez*, 578 U.S. at 199 (citation omitted). And the anchoring effect of a properly calculated range is well documented: from 2012 through 2021, federal defendants were sentenced within the Guidelines range (either as initially calculated or as adjusted by virtue of a Guidelines-based departure provision) in approximately 75% of cases nationwide. *See* U.S. Sentencing Comm'n, *2021 Annual Report* 85. Last year, that percentage was 67.8 percent. App. 61a (Elrod, J., dissenting) (citing U.S. Sentencing Comm'n, *2022 Annual Report* 9).

3. The all-important benchmark range often hinges on a third variety of text that appears in the Manual: "commentary" appended to individual guideline provisions and policy statements. Among other purposes, commentary is meant to "interpret the [corresponding] guideline or explain how it is to be applied." USSG § 1B1.7. Unlike the guidelines it supplements, commentary falls outside of the Commission's delegated rulemaking authority, *see* 28 U.S.C. § 994(a), and accordingly is not subject to the Sentencing Reform Act's notice-and-comment and Congressional-review safeguards. *See* § 994(p), (x). As the

Commission observes in its governing rules, "[a]mendments to policy statements and commentary may be promulgated and put into effect at any time" and "without regard to the provisions of [Section] 994(x)." U.S. Sentencing Comm'n R. 4.1 and 4.3. The rules do, however, register the Commission's aspiration to "endeavor to include amendments to policy statements and 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." *Id.* 4.1 and 4.3.

B. The doctrine of judicial deference to agency rule interpretations

1. Even where Congress has delegated an agency authority to make legislative rules, it is the responsibility of the courts to "say what the law is" in cases or controversies implicating the meaning and application of those rules. *Marbury v. Madison*, 5 U.S. 137, 177 (1803). In *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), this Court announced a limited but important caveat to this principle. *Seminole Rock* explained that, where tasked with interpreting an agency's legislative rule, a court should "look to" the issuing agency's "construction of the regulation if the meaning of the words used is in doubt." *Id.* at 413-14. In that situation, the reviewing court should defer to the agency's interpretation "unless it is plainly erroneous or inconsistent with the regulation." *Id.* at 414.[1]

2. In *Stinson v. United States*, 508 U.S. 36 (1993), this Court agreed to resolve a circuit split over the degree of deference to be afforded to the Sentencing Commission and

[1] *Seminole Rock* deference later came to be known as *Auer* deference—an homage to a subsequent case applying the doctrine. *See Auer v. Robbins*, 519 U.S. 452, 460-61 (1997).

its commentary "interpret[ing] or explain[ing]" the Guidelines. 508 U.S. at 38. The Court held, unanimously, that the "standard that governs the decision whether particular interpretive or explanatory commentary is binding" is *Seminole Rock* deference—that is, commentary "must be given 'controlling weight unless it is plainly erroneous or inconsistent with'" the relevant guideline. *Id.* at 43, 45 (quoting *Seminole Rock*, 325 U.S. at 414).

Stinson explained that the Commission's power to promulgate individual guidelines, like any agency's power to issue regulations, derives from "an express congressional delegation of authority for rulemaking" and is exercised through the APA's "informal rulemaking procedures." *Id.* at 44-45 (citing *Mistretta*, 488 U.S. at 371-79). That makes guidelines "the equivalent of legislative rules adopted by federal agencies." *Id.* at 45. The commentary, in contrast, "is not the product" of the Commission's rulemaking authority, *id.* at 44, and it serves the distinct "functional purpose" of "assist[ing] in the interpretation and application of th[e] rules" issued pursuant to that authority. *Id.* at 45. And so, the Court held that Guidelines commentary "is akin to" and "should be treated as" the Commission's "interpretation of its own legislative rule." *Id.* at 44-45. *Stinson* thus applied the *Seminole Rock* standard—as understood at the time—and deferred upon concluding that the commentary at issue was "'not plainly erroneous or inconsistent' with" the relevant guideline text. *Id.* at 47 (quoting *Seminole Rock*, 325 U.S. at 414).

3. But this Court's understanding of *Seminole Rock* deference has changed. In *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), the Court declined to overrule *Seminole Rock* (and *Auer*) but wrote extensively to clarify and reinforce "the limits inherent in" the doctrine. *Id.* at

2408, 2415. This recalibration was in order because, "in a vacuum," *Seminole Rock*'s "classic formulation of the test—whether the 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 (quoting *Seminole Rock*, 325 U.S. at 414). Acknowledging its role in that state of affairs, the Court stressed that *Seminole Rock* deference, as clarified, "is potent in its place, but cabined in its scope," and thus "gives agencies their due, while also allowing—indeed, obligating—courts to perform their reviewing and restraining functions." *Id.* at 2408, 2415.

"First and foremost," *Kisor* admonished, courts "should not afford [*Seminole Rock*] deference unless the regulation is genuinely ambiguous." *Id.* at 2415. "And before concluding that a rule is genuinely ambiguous, a court must exhaust all the 'traditional tools' of construction." *Id.* (quoted source omitted). "If genuine ambiguity remains, moreover, the agency's reading must still be reasonable"—that is, it must "come within the zone of ambiguity the court has identified after employing all its interpretive tools." *Id.* at 2415-16. Finally, where these hurdles are cleared, the reviewing court "must make an independent inquiry into" the "character and context of the agency interpretation." *Id.* at 2416. So long as it is "official," in "some way implicates the [agency's] substantive expertise," and represents a "fair and considered" judgment, the agency's reasonable reading of its genuinely ambiguous rule will command deference. *Id.* at 2416-18.

C. Factual and procedural background

1.a. Petitioner Andres Vargas pleaded guilty to one count of conspiring to possess

with intent to distribute an aggravated amount of cocaine, 21 U.S.C. §§ 841(b)(1)(B) & 846. App. 3a. At the time, petitioner had two prior convictions for crimes involving controlled substances: a 1999 federal conviction for possessing with intent to distribute amphetamine; and a 2011 federal conviction for conspiring to possess methamphetamine with intent to manufacture and distribute it. *Id.* at 4a.

b. At sentencing, the government asserted that petitioner's instant and two prior drug convictions qualified him as a "career offender" under Guidelines Section 4B1.1. App. 3a-4a. That provision imposes substantial increases in offense level and criminal history category if, as relevant here, (1) the defendant committed the instant federal offense as an adult, (2) that offense is a felony "controlled substance offense," and (3) the defendant's criminal history includes "at least two prior felony convictions of . . . a controlled substance offense." USSG § 4B1.1(a). Without the proposed career-offender enhancement, petitioner's final Guidelines range would have rested at 100–125 months in prison. App. 3a-4a n.4. With the enhancement, that range ballooned to 188–235 months. *Id.* at 4a.

Guidelines Section 4B1.2(b) defines "controlled substance offense." At the time of petitioner's offense, the guideline said that term "means an offense under federal or state law, punishable" by more than a year in prison, "that":

> prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

USSG § 4B1.2(b). An application note in the commentary to Section 4B1.2 added that, for

"purposes of this guideline," the term crime of violence and controlled substance offense "include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses." § 4B1.2, comment. (n.1).

c. Petitioner objected to the career-offender designation. App. 4a, 65a-66a. As pertinent here, petitioner argued that *Kisor* modified the *Seminole Rock* deference standard in all its applications, including as applied to the Guidelines commentary in *Stinson*, and that *Kisor* accordingly abrogated the circuit precedent that required the district court to defer to Section 4B1.2's inchoate-offense commentary. C.A. ROA. 137-40, 178-80. That commentary did not warrant deference under *Kisor*, petitioner further contended, because Section 4B1.2(b) is best read as limiting the meaning of "controlled substance offense" to the listed generic drug crimes. *Ibid*. Because his instant and prior conspiracy offenses fell outside the reach of unambiguous guideline text, he urged the court to reject the career-offender enhancement. App. 4a. The district court overruled the objection and, anchoring its discretion to the enhanced range, imposed a low-end term of 188 months. *Ibid.*

2.a. Petitioner appealed, pressing the same arguments. App. 4a, 66a. Finding itself bound by then-controlling circuit precedent, a panel affirmed. App. 65a-70a.

b. Petitioner successfully sought rehearing en banc. App. 5a. As before the panel, petitioner maintained that *Kisor* set the governing deference framework and argued that, under *Kisor*, Section 4B1.2(b)'s unambiguous meaning precluded deference to the inchoate-offense commentary. Def. En Banc Br. 17-28, 29-44. The government agreed that "*Kisor* sets forth the standards for determining whether particular commentary is entitled to

deference" and joined petitioner in urging the en banc court to so hold. Gov't En Banc Br. 29; App. 8a. It nevertheless maintained that deference was appropriate under *Kisor*. Gov't En Banc Br. 30-52.

3. The en banc court of appeals affirmed in a fractured decision. App. 1a-64a.

a. Only two holdings represented the views of a majority of the en banc court. *See* App. 6a-13a, 13a-24a, 40a (opinion of Duncan, J.). First, Judge Duncan, joined by ten other judges, took the view that "*Stinson* sets out a deference doctrine distinct from the one refined by *Kisor*," App. 3a, and reasoned that the inferior lower courts remained duty-bound to apply "*Stinson*'s framework" unmodified. *Id.* at 6a-7a. The en banc court thus held that judges in the Fifth Circuit must still defer "unless [commentary] is 'inconsistent with, or a plainly erroneous reading of the guideline" it purports to augment. *Id.* at 7a (quoting *Stinson*, 508 U.S. at 38). The majority acknowledged that this conclusion placed it squarely at odds with published decisions of five other circuits. *Id.* at 8a n.11.

Second, Judge Duncan, joined by nine other judges, concluded that the commentary at issue is entitled to the "generous deference" mandated by *Stinson*. App. 14a-15a. Understanding its "role under *Stinson* as seeking to 'reconcile[]" any conflict between guideline and commentary so as "to avoid the need to 'declar[e] which must prevail over the other,'" *id.* at 15a (quoted source omitted; court of appeals' alterations), the en banc majority explained that "merely showing that the commentary's reading of the guideline is incorrect or implausible" is insufficient to establish the "flat inconsistency" that must exist before a court may consult the standard interpretive tools and discern the right answer. *Id.* at 14a.

"Rather," the majority observed that *Stinson*'s "strict" standard compels deference absent "some irreconcilable variance," such as where "commentary render[s] a guideline 'functionally inoperable,'" or where following the "commentary would leave the guideline without 'any practical effect.'" *Id.* at 14a-15a & n.20 (quoted sources omitted).

Applying that "high bar," the majority acknowledged that Section 4B1.2(b) sets out a list of "*offense[s]* that *prohibit[]*" specific drug-related conduct, but "says nothing" about "conspiracies and attempts." App. 16a. It also allowed that one could not reasonably read any of the listed items to include those inchoate crimes, or their necessary elements, if the term "prohibits" is given its primary common meaning—to "forbid by law." *Id.* at 21a. And it recognized that the Third, Fourth, Sixth, Ninth, Eleventh, and D.C. Circuits had relied on these interpretive points and others to reject the inchoate-offense commentary as impermissibly expanding unambiguous guideline text. *Id.* at 17a, 20a-21a.

Nevertheless, the majority stressed that, "under *Stinson* deference," it "need not" determine which reading of the guideline "is the correct or even the better one." App. 22a. It thus declined to engage with the full panoply of textual and contextual features and tools that petitioner, the six circuits just mentioned, and Judge Elrod flagged as bearing on the interpretive inquiry, *see* Def. En Banc Br. 32-42; *accord* App. 49a-58a (Elrod, J., dissenting). Instead, the majority rested on its belief that the guideline's silence as to inchoate crimes failed to implicate the "*expresso unius* canon" to the extent some circuits have suggested, App. 17a-21a, and its view that the Commission "could have" meant to capture inchoate crimes through the phrase "offense that prohibits" by embracing an alternative,

secondary dictionary definition of the term "prohibit"—to "prevent" or "hinder." *Id.* at 21a-23a. Because the dictates of the commentary and the guideline would not be impossible to reconcile under this reading, the majority concluded that petitioner had failed to show "the kind of 'flat inconsistency'" it understood *Stinson* to require and accordingly deferred. *Id.* at 24a (quoting *Stinson*, 508 U.S. at 43).[2]

b. Judge Oldham, joined by Judge Jones, concurred in part. App. 41a-45a. Although Judge Oldham agreed that *Kisor* didn't speak to *Stinson*, *id.* at 41a-42a, he expressed the view that subsequent developments in federal sentencing law had undermined *Stinson*'s rationale for deferring to Guidelines commentary. *Id.* at 42a-45a. Analogizing to the Advisory Committee's notes to the Federal Rules, Judge Oldham suggested that the Commission's commentary, like the Committee's notes, ought not enjoy "*Seminole Rock*, *Auer*, or any other form of deference," but rather should be viewed as helpful reference material in the same sense as legislative history. *Id.* at 43a-44a.

c. Judge Elrod dissented in part and dissented in the judgment. App. 46a-64a. Joined by five other judges, Judge Elrod concluded that the ordinary tools of construction reveal that Section 4B1.2(b) is best read as an exhaustive definition that locates "only substantive

[2] Judge Duncan authored two additional sections that did not command a majority. The first section, joined by five other judges, App. 25a n.31, took the position that the commentary at issue should receive deference even under the *Kisor* framework. *See id.* at 25a-36a. The second, joined by seven other judges, *id.* at 37a n.41, expressed the view that the rule of lenity, if applicable at all in the Guidelines context, should have no role in the deference inquiry because lenity is triggered only by "grievous" ambiguity, which Judge Duncan perceived to be distinct from the "genuine" ambiguity referenced in *Kisor*. *See id.* at 37a-39a.

drug offenses and not conspiracies [or attempts]" within the class of predicate "controlled substance offenses." *Id.* at 49a; *see id.* at 48a-59a. Judge Elrod explained that, even assuming *arguendo* that the plainly-erroneous-or-inconsistent standard controls, she would consult the full interpretive toolkit and deem that standard met where commentary purports to "change the meaning of" and thus "add" to guideline text. *Id.* at 49a-50a, 59a. Because she viewed that to be the case here, Judge Elrod concluded that the inchoate-offense commentary deserves no deference whether evaluated under the standard as articulated in *Stinson*, *id.* at 48a-58a, or as recalibrated by *Kisor*. *Id.* at 58a-59a.

In light of her view that petitioner should "prevail[] under either framework," Judge Elrod opted not to take a position on the "unusually thorny question of vertical *stare decisis*" of "[w]hether *Kisor* modified *Stinson*." App. 46a. She nevertheless noted that the case for applying *Kisor* had some force, particularly given that *Stinson* "adopted a formulation" of the *Seminole Rock* "standard that *Kisor* has now deemed a 'reflexive' 'caricature of the doctrine.'" *Id.* at 47a (quoting *Kisor*, 139 S. Ct. at 2415). Judge Elrod also highlighted the consequences of the court's adherence to that reflexive standard. The upshot for petitioner, she stressed, is that his sentence "would likely be *at least* five years shorter" had his case arisen in any one of the six circuits that have applied the full assortment of interpretive tools to deem this particular commentary unworthy of deference. *Id.* at 64a (original emphasis). And she closed by warning that, until this Court "provides [the lower courts] with much needed guidance," confusion over the appropriate deference standard "will continue" to countenance similar sentencing disparities "for many criminal defendants." *Ibid.*

REASONS FOR GRANTING THE PETITION

In the wake of *Kisor v. Wilkie*, the courts of appeals have once again "taken conflicting positions on the authoritative weight to be accorded to the commentary to the Sentencing Guidelines." *Stinson*, 508 U.S. at 39. Eleven circuits openly disagree over whether *Kisor*'s recalibration of the *Seminole Rock* deference standard governs the same doctrine's application to Guidelines commentary. Four circuits answer, "yes," and so follow *Kisor*; six respond, "no," and thus don't; and one has published a pair of opinions going each way. The predictable result is that various guidelines mean different things and apply to similarly situated defendants in different ways in large areas of the country. The decision below has extinguished any hope that the split might dissipate naturally, as en banc opinions now entrench the law of circuits on either side. This Court alone can resolve the dispute over this important question of federal sentencing law. It should do so in petitioner's case.

I. The courts of appeals are intractably divided over the question presented.

Kisor's impact on the degree of deference judges owe to Guidelines commentary has split the circuits. The acknowledged conflict is deep, entrenched, and ready for review. The Court should intervene, as only it can.

A. At least four circuits hold that *Kisor v. Wilkie* governs the degree of deference owed to Guidelines commentary.

The Third, Sixth, Ninth, and Eleventh Circuits, and a first-in-time Fourth Circuit panel, squarely hold that *Kisor* applies in the Guidelines context. *See United States v. Nasir*, 17 F.4th 459 (3d Cir. 2021) (en banc); *United States v. Campbell*, 22 F.4th 438 (4th Cir.

2022); *United States v. Riccardi*, 989 F.3d 476 (6th Cir. 2021); *United States v. Castillo*, 69 F.4th 648 (9th Cir. 2023); *United States v. Dupree*, 57 F.4th 1269 (11th Cir. 2023) (en banc). These courts understand *Kisor* as having reformed *Seminole Rock* deference in all its applications, including as applied in *Stinson*. They thus hold that the Commission's commentary pulls rank only if, after resort to all the traditional interpretive tools, *Kisor*'s preconditions for deference—genuine ambiguity in the relevant guideline text, and a reasonable, considered, consistent, and expertise-based reading of that text—are satisfied. Under the law of any one of these circuits, petitioner would not have been a career offender.

1. *Kisor* has controlled judicial deference to all agency rule interpretations—including Guidelines commentary—in the Third and Sixth Circuits the longest.

a. Both before and after an unrelated GVR from this Court, *see United States v. Nasir*, 982 F.3d 144, 156-160 (3d Cir. 2020) (en banc), *cert. granted, judgment vacated on other grounds*, 142 S. Ct. 56 (2021); *Nasir*, 17 F.4th at 468-72, the en banc Third Circuit in *Nasir* unanimously held that *Kisor* abrogated its precedent affording deference to the inchoate-offense commentary to Section 4B1.2 under "the then-prevailing understanding" of the *Seminole Rock* doctrine applied in *Stinson* (and later in *Auer*). *Nasir*, 17 F.4th at 470-71. The court acknowledged that, pre-*Kisor*, the "uncritical and broad" conception of *Seminole Rock*'s "plainly erroneous or inconsistent" formulation compelled it to defer despite "recogniz[ing] that the commentary expanded and did not merely interpret [the guideline's] definition of 'controlled substance offense.'" *Id*. at 470-71. But *Kisor* clarified that "*Seminole Rock* deference should only be applied when a regulation is genuinely ambiguous."

Id. at 471. Heeding *Kisor*'s instruction to examine "text, structure, history, and purpose" as "it would if it had no agency to fall back on," *id.* (quoting *Kisor*, 139 S. Ct. at 2415), the Third Circuit held that "the plain language of" Section 4B1.2(b) "does not include inchoate crimes" and thus rejected the commentary's attempt to expand that unambiguous meaning. *Id.* at 468; *see id.* at 471-72. As a concurring Judge put it: *Kisor* "awoke [the federal judiciary] from [its] slumber of reflexive deference," requiring courts to defer to the "text, not what the Commission says about that text," when "commentary sweeps more broadly than the plain language of the guideline it interprets." *Id.* at 472 (Bibas, J., concurring).

b. The Sixth Circuit, in *Riccardi*, 989 F.3d at 483-89, was the next to hold that *Kisor* changed *Stinson*'s calculus as to the deference due to Guidelines commentary. By "analog[izing] to agency interpretations of regulations when adopting *Seminole Rock*'s plain-error test for the commentary," the court reasoned, *Stinson* "told courts to follow basic administrative-law concepts despite Congress's decision to locate" the Commission "in the judicial branch rather than the executive branch." *Id.* at 485. It thus followed 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)"—a conclusion bolstered by *Kisor*'s citation to *Stinson* "as a decision applying *Seminole Rock* deference before *Auer*." *Id.* (citing *Kisor*, 139 S. Ct. at 2411 n.3 (plurality)). Applying *Kisor*'s framework to the fraud guideline's enhancement for "loss," USSG § 2B1.1(b)(1), the Sixth Circuit concluded that a comment defining "the 'loss' from a stolen gift card as an automatic $500" fell well beyond any reasonable zone of ambiguity. *Id.* at 486.

2. As in *Nasir*, the inchoate-offense commentary to Section 4B1.2 has served as the catalyst for *Kisor*'s adoption in the Fourth, Ninth, and Eleventh Circuits.

a. Like the Third and Sixth Circuits before it, the Fourth Circuit, in *Campbell*, recognized that *Kisor* "limited" the "*Seminole Rock*/*Auer* deference" doctrine applied in *Stinson* and held that those limitations "apply equally to judicial interpretations of the Sentencing Commission's commentary." *Campbell*, 22 F.4th at 444-47 & n.3. Because "plain text" and several "'traditional tools' of statutory construction" revealed the guideline to unambiguously include only substantive drug offenses, the court found "no support" for the notion that the commentary's counter-textual addition of inchoate crimes warranted deference after *Kisor*. *See id.* at 444-45. Although a later panel purported to answer the *Kisor* question the opposite way as to different commentary, *see United States v. Moses*, 23 F.4th 347, 349 (4th Cir. 2022), *cert. denied*, 143 S. Ct. 640 (2023), the Fourth Circuit has consistently applied *Campbell* to vacate career-offender sentences predicated on inchoate drug crimes. *See, e.g.*, *United States v. Locklear*, No. 19-4443, 2022 WL 2764421 (4th Cir. July 15, 2022); *United States v. Monroe*, No. 20-4083, 2022 WL 1655662 (4th Cir. May 25, 2022). But one panel has followed *Moses*, at least as to the same commentary and guideline before the *Moses* panel. *United States v. Brewington*, No. 21-4444, 2023 WL 3845310, at *1 (4th Cir. June 6, 2023). And an equally divided court declined to resolve the internal conflict en banc. *See* Order, *United States v. Moses*, No. 21-4067 (4th Cir. Mar. 23, 2022). So while the first-in-time *Campbell* decision is presumptively controlling, the Fourth Circuit's status is unclear.

b. Sitting en banc in *Dupree*, the Eleventh Circuit likewise adopted "*Kisor*'s refined deference scheme" and applied it to "conclude that the plain language definition of 'controlled substance offense' in § 4B1.2 unambiguously excludes inchoate offenses." 57 F.4th at 1277; *see id.* at 1273-79. The court made clear that it did not understand *Kisor* as having overruled *Stinson*. *Id.* at 1276-77. To the contrary, the court explained that to apply *Kisor* to Guidelines commentary was to praise *Stinson*, not bury it, as doing so is "the only way to harmonize the two cases" and "honor *Stinson*'s instruction to 'treat[]' the commentary 'as an agency's interpretation of its own legislative rule." *Id.* at 1275-76 (quoting *Stinson*, 508 U.S. at 44). Given that "*Stinson* adopted word for word the test the *Kisor* majority regarded as a 'caricature,'" the court reasoned that "the continued application of that test would conflict directly with *Kisor*." *Id.* at 1275.

c. In *Castillo*, the Ninth Circuit became the most recent circuit to squarely adopt *Kisor* and reject the inchoate-offense commentary as failing that "more demanding deference standard." 69 F.4th at 655; *see id.* at 655-64. Building on the observations of several of its circuits on this side of the split, the Ninth Circuit took care to stress that, in light of "the Sentencing Commission's lack of accountability in its creation and amendment of the commentary," it would raise "grave constitutional concerns" to exempt the agency from *Kisor*'s guardrails and instead "defer to commentary . . . that expands unambiguous Guidelines, particularly because of the extraordinary power the Commission has over individuals' liberty interests." *Id.* at 663-64; *accord Campbell*, 22 F.4th at 446 (airing similar separation-of-powers concerns); *Riccardi*, 989 F.3d at 485 (same).

d. Finally, it is worth noting that the only circuit yet to directly clarify its stance as to *Kisor*—the D.C. Circuit—operates under precedent that substantially accords with *Kisor*'s approach. In its pre-*Kisor* decision in *United States v. Winstead*, 890 F.3d 1082 (D.C. Cir. 2018), the D.C. Circuit made clear its view that courts should forgo deference to the Commission where commentary expands the corresponding guideline's substantive meaning, as illuminated by all the interpretive tools. *See id.* at 1092 ("[S]urely *Seminole Rock* deference does not extend so far as to allow [the Commission] to invoke its general interpretive authority via commentary . . . to impose such a massive impact on a defendant with no grounding in the guidelines themselves."). Indeed, *Winstead* was the first circuit-level decision to reject the inchoate-offense commentary on account of its expansion of Section 4B1.2(b)'s plain meaning. *See id.* at 1091-92; *accord United States v. Havis*, 927 F.3d 382, 385-87 (6th Cir. 2019) (en banc) (reaching the same conclusion, also pre-*Kisor*). And *Winstead*'s interpretive-toolkit approach to assessing inconsistency between commentary and guideline is irreconcilable with the version of "*Stinson*" deference applied on the other side of the split, as the Fifth Circuit's express disagreement with *Winstead* in the decision below highlights. *See* App. 14a, 17a-18a.

B. At least six circuits continue to defer under the pre-*Kisor* standard.

Six circuits, in contrast, do not accept *Kisor*'s recalibrated standard and instead persist in following the plainly-erroneous-or-inconsistent formulation applied in *Stinson*. *See* App. 6a-24a; *United States v. Maloid*, 71 F.4th 795 (10th Cir. 2023); *United States v. Rivera*, 76 F.4th 1085 (8th Cir. 2023); *United States v. Smith*, 989 F.3d 575 (7th Cir.), *cert.*

denied, 142 S. Ct. 488 (2021); *United States v. Tabb*, 949 F.3d 81 (2d Cir. 2020), *cert. denied*, 141 S. Ct. 2793 (2021); *United States v. Lewis*, 963 F.3d 16 (1st Cir. 2020), *cert. denied*, 141 S. Ct. 2826 (2021). The second-in-time Fourth Circuit panel mentioned above, *Moses*, 23 F.4th 347, has also endorsed that approach. Deference in these circuits is all-but automatic. It is afforded even if "the commentary's reading of the guideline is incorrect or implausible." App. 14a. And "exhaustion of traditional tools of construction is not required" before a defendant's claim of plain error or inconsistency will be rejected. *United States v. Coates*, 82 F.4th 953, 957 n.1 (10th Cir. 2023) (citing *Maloid*, 71 F.4th at 809).

1. In the decision below, the en banc court of appeals squarely held that "*Stinson*, not *Kisor*" would remain the law of the Fifth Circuit and that the Sentencing Commission would continue to enjoy the "ample deference *Stinson* affords to commentary." App. 6a, 16a. The Fifth Circuit acknowledged that each of the five decisions discussed above (Pet. 15-18) hold that *Kisor* "curtailed the deference due to the commentary's interpretation of a guideline" but expressly "disagree[d]" with that conclusion. *Id.* at 8a-9a & n.11. The court of appeals allowed that *Kisor* "clarified the deference rule" of *Seminole Rock* and "has been sensibly interpreted as lowering the amount of deference given to agency interpretations of regulations." *Id.* at 8a. But it understood *Stinson* as having "set[] out a deference doctrine distinct from the one altered by *Kisor*" (i.e., *Seminole Rock*), *id.* at 3a, 10a, that only this Court had the authority to overrule. *Id.* at 6a, 12a. The court of appeals drew support for this view from its perception that "nothing in *Kisor* suggests [this Court] meant to modify *Stinson*." *Id.* at 9a. It also highlighted several of the Commission's traits not shared by

executive agencies—including its location, the composition of its members, and the "judicial nature" of its work—and "agree[d] with the Fourth Circuit['s]" *Moses* panel that these "'differences justify a distinct approach in considering Guidelines commentary'" as a matter of policy. *Id.* at 10a-11a (citing *Moses*, 23 F.4th at 355).

The Fourth Circuit's *Moses* panel majority expressed each of these views, *see* 23 F.4th at 354-57, in purporting to hold 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." *Id.* at 352; *but see Campbell*, 22 F.4th at 444-46. So did the Tenth Circuit, in *Maloid*, when that court embraced the same bifurcated deference regime. *See* 71 F.4th at 805-08. In doing so, the Tenth Circuit helpfully reduced the position of these three circuits to essentials: "Because judicial agencies are different, [they] cannot say that *Kisor* meant for its new standard—crafted entirely in the context of executive agencies—to reach the Commission." *Id.* at 808.

2. The remaining four circuits—the First, Second, Seventh, and Eighth—likewise continue to defer to commentary unless it offers a plainly erroneous or inconsistent reading of the relevant guideline text. These courts, however, have largely avoided engaging the merits of *Kisor*'s impact, preferring to reject defendants' *Kisor*-based claims as foreclosed by circuit precedent affording deference under *Stinson*. *See, e.g.*, *Rivera*, 76 F.4th at 1089-91 (8th Cir.) (declining to disturb circuit precedent notwithstanding *Kisor*); *United States v. Wynn*, 845 F. App'x 63, 66 (2d Cir. 2021) (same); *Lewis*, 69 F.3d at 23-24 (1st Cir.)

(same); *cf. Smith*, 989 F.3d at 584-85 (7th Cir.) (same, without mentioning *Kisor*); *Tabb*, 949 F.3d at 87-89 (2d Cir.) (same, also without mentioning *Kisor*).

Several judges in these circuits have, however, voiced reservations with the practice of ignoring *Kisor*. Most recently, in *Rivera*, the Eighth Circuit noted the circuit conflict on the subject and allowed that "the weight of authority may suggest that *Kisor* undermines" its precedent. 76 F.4th at 1091. A concurring judge "ha[d] no doubt that [the Eighth Circuit] will need to address the impact of *Kisor* at some point." *Id.* at 1093 (Stras, J., concurring). The Seventh Circuit also recently admitted that it "may need to revisit [its] decisions on this subject in light of *Kisor*." *United States v. States*, 72 F.4th 778, 791 n.12 (7th Cir. 2023). And, concurring in *Lewis*, Judges Torruella and Thompson jointly expressed concern that the First Circuit's precedent could not be reconciled with *Kisor*'s instruction that "a court's duty to interpret the law requires it to 'exhaust all the 'traditional tools' of construction' . . . before it defers to an agency's 'policy-laden choice' between two reasonable readings of a rule." *Lewis*, 963 F.3d at 28 (quoting *Kisor*, 139 S. Ct. at 2415). Nevertheless, the more extreme form of deference that reigned pre-*Kisor* remains the standard in these circuits.

C. The conflict is entrenched and ripe for resolution.

The Court has denied several prior petitions that raised the question presented before the circuit split fully developed—when it was not unreasonable to think the conflict might resolve itself. That is no longer the case. And there is no need for further percolation.

1. The deep and acknowledged circuit split over *Kisor*'s relevance in the Guidelines context will not dissipate without this Court's intervention.

The decision below ensured as much. Cementing its view that *Stinson* adopted a special deference regime independent of the *Seminole Rock* doctrine at issue in *Kisor*, the en banc court of appeals held that judges in the Fifth Circuit remain bound to defer to Guidelines commentary without exhausting their interpretive tools and irrespective of genuine ambiguity in a guideline's text. App. 3a, 10a-13a. As the court of appeals recognized, that places it directly at odds with the published decisions of at least five other circuits—including of the Third and Eleventh Circuits sitting en banc. *Id.* at 2a & n.2, 8a-9a & n.11. Only this Court can resolve this square, 2–1 conflict between en banc courts of appeals.

2. The conflict is also ripe for review. Eleven circuits have now confronted *Kisor*'s applicability to Guidelines commentary and either adopted the updated deference framework or declined to do so. Three en banc courts have devoted substantial resources to the issue, producing numerous cogent and considered opinions spelling out the merits of the various positions. And the only circuit yet to directly address the question, the D.C. Circuit, embraces a deference inquiry that closely approximates the degree of interpretive rigor *Kisor* demands. *See Winstead*, 890 F.3d at 1089-92. There is thus no reason to think that further percolation would sharpen this Court's review.

II. The question presented is important, and this case is an excellent vehicle.

The conflict over *Kisor*'s relevance to Guidelines commentary demonstrates that the question presented warrants urgent attention. The answer is exceptionally important to both the efficient and fair administration of the federal sentencing scheme. And petitioner's case presents an ideal opportunity for the Court to provide it.

1. The standard for triggering deference to Guidelines commentary is important.

a. The Sentencing Guidelines' significance to the federal criminal-justice system hardly needs elaboration. The Guidelines exert their influence at every stage, from charging decisions, to plea negotiations, to conditions of probation and supervised release, and even appellate review. Most of all, as the "lodestar" of federal sentencing, *Molina-Martinez*, 578 U.S. at 200, the Guidelines range must be correctly calculated and considered in *every* case—"even if the sentencing judge sees a reason to vary" from the Commission's advice. *Peugh*, 569 U.S. at 542. And the agency's commentary plays a critical, often-times dispositive role in the vast majority of Guidelines calculations. Four judges voting to rehear the Fourth Circuit's *Moses* decision put the "exceptional importance" of *Kisor*'s relevance to Guidelines commentary in stark terms:

> *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. Because the Guidelines commentary plays a key role in criminal sentencing, [that] putative rule could impact hundreds, if not thousands, of cases in the Fourth Circuit.

Order, *Moses*, No. 21-4067, at 13 (Wynn, J., joined by Motz, King, and Thacker, J.J., voting to grant rehearing en banc). Just so in each of the other circuits with criminal jurisdiction.

b. Allowing the conflict to persist will continue to result in real-world harm.

At present, sentencing judges in a significant portion of the country look to all relevant tools of construction before deciding whether commentary will influence a federal defendant's Guidelines range. Judges in the rest of the country, in contrast, defer to commentary as a matter of course, engaging the interpretive tools, if at all, only in response to

a credible suggestion that following a comment would effectively reduce the corresponding guideline to "inoperable" gibberish, leaving it "without any practical effect." App. 15a (quoting *United States v. Cramer*, 777 F.3d 597, 606 (2d Cir. 2015)).

As Judge Elrod observed below, the result is a federal system that "countenance[s]" intolerable sentencing "disparities" for similarly situated defendants based on the fortuity of geography. App. 64a. Petitioner's case is an apt example. In Texas, commentary made him a career offender where guideline text alone would not, and the district court accordingly anchored its discretion to a range that started at more than 15 years. Had petitioner's case arisen in Pennsylvania, North Carolina, Michigan, California, Florida, or Washington D.C., however, he would not be a career offender; his range would settle at 8–10 years; and his sentence, even if imposed at the high end, would be "*at least* five years shorter." App. 64a (Elrod, J., dissenting) (original emphasis).

But this untenable consequence of the circuits' uneven approaches to the question presented extends further than any particular guideline-and-commentary combination. The courts that have dusted off their interpretive toolkits at *Kisor*'s direction have, in addition to the inchoate-offense (*Nasri*, *Campbell*, *Dupree*, and *Castillo*) and $500-per-access-device (*Riccardi*) comments discussed above, declined to defer to commentary addressed to an array of unambiguous guideline provisions. For instance, in *United States v. Banks*, 55 F.4th 246 (3d Cir. 2022), the Third Circuit followed text and traditional tools to hold that the guideline enhancement predicated on the "loss" resulting from basic economic offenses is unambiguous in that it reaches only "actual loss"; the court thus accorded no weight to

the commentary purporting to expand enhanceable loss to "the greater of actual loss or intended loss." *Id.* at 255-59. District courts located within the Eleventh Circuit, *United States v. Patel*, No. 19-CR-80181-RAR, 2023 WL 5453747, at *2-*3 (S.D. Fla. Aug. 23, 2023), and the Fourth Circuit, *United States v. Wheeler*, No. 5:22-CR-38-FL-1, 2023 WL 4408939, at *2-*3 (E.D.N.C. July 6, 2023), have reached the same conclusion.

The Third and Eleventh Circuits have also recognized that deferring to the commentary at issue in *Nasir* and *Dupree* (and here) would likewise expand the unambiguous reach of Section 4B1.2(a)'s definition of "crime of violence," and have accordingly invalidated enhancements premised on conspiracy convictions under the career-offender guideline, *United States v. Henderson*, 64 F.4th 111, 116-21 (3d Cir. 2023), and the firearm guideline. *United States v. Abreu*, 32 F.4th 271, 276-78 (3d Cir. 2022); *United States v. Ellis*, No. 19-10156, 2023 WL 4447020, at *3-*5 (11th Cir. July 11, 2023). And the Third Circuit has refused to follow commentary where doing so would narrow the scope of unambiguously broader text in the acceptance-of-responsibility guideline. *See United States v. Adair*, 38 F.4th 341, 359-60 (3d Cir. 2022).

In the circuits that reject *Kisor*, in contrast, the practice of unexamined deference to the same commentary exposes similar defendants to significantly higher Guidelines ranges. This Court can be sure that, absent its intervention, the patten of disparate sentencing outcomes resulting from the circuits' divergent interpretive standards "will continue for many criminal defendants." App. 64a (Elrod, J., dissenting).

c. This is also why the Sentencing Commission is not in a position to untangle the knot the circuits have tied themselves into over *Kisor*. This Court has long observed the practice of declining to settle disputes over the interpretation of particular guideline provisions, on the premise that the Commission can itself "eliminate such conflicts, at least as far as their continuation into the future," through the amendment process. *Braxton v. United States*, 500 U.S. 344, 348-49 (1991); *see Longoria v. United States*, 141 S. Ct. 978, 979 (2021) (Sotomayor, J., respecting the denial of certiorari) (flagging circuit conflict over the meaning of the acceptance-of-responsibility guideline). The question presented here, however, concerns the *standard* governing a federal court's decision whether to defer to *any* commentary's gloss on *any* guideline in the first place.

That methodological question is beyond the Commission's power to answer, and the circuit split it has engendered thus is not of the sort *Braxton* contemplated—a fact well illustrated by the Court's decision, several years after *Braxton*, to grant review of the same question in *Stinson*. *See* 508 U.S. at 39 (attributing grant to fact that "various Courts of Appeals ha[d] taken conflicting positions on the authoritative weight to be accorded to the commentary to the Sentencing Guidelines"); *see also Dupree*, 57 F.4th at 1289 n.6 (Grant, J., concurring in the judgment) (noting that "the Commission cannot, on its own, resolve the dispute about what deference courts should give to the commentary").

Nor is it any answer to observe that, even as the circuits continue to apply divergent standards, the Sentencing Commission can resolve conflicts as to any particular commentary's entitlement to deference—on a prospective basis—by amending the guideline text.

That was equally true at the time of *Stinson*; but this Court still exercised its certiorari jurisdiction. For good reason: a laissez faire approach would deprive the lower courts of "much needed guidance." App. 64a (Elrod, J., dissenting); *see* Order, *Moses*, No. 21-4067, at 6 (Neimeyer, J., supporting denial of rehearing en banc) ("welcom[ing] the Supreme Court's advice on whether *Stinson* or *Kisor* controls" in the Guidelines context). Even when the Commission is able to respond to a particular deference-related dispute, moreover, criminal defendants on the wrong side of the geographic divide will still endure arbitrary and unredressable sentencing outcomes in the interim. And no matter how many times the Commission responds, it is powerless to prevent the new conflicts (and resulting disparities) that inevitably will materialize so long as the circuits apply incoherent standards to the basic task of figuring out what any particular guideline means.

2. This case is an excellent vehicle for this Court to restore the clarity and predictability of a uniform deference standard. Petitioner preserved the *Kisor* argument at every stage, briefing it in the district court, to the panel, and before the en banc court of appeals on rehearing. As Judge Elrod observed, there is no dispute that the commentary that made petitioner a career offender would not get deference in the circuits that apply *Kisor*. App. 64a (Elrod, J., dissenting). Petitioner's case thus squarely implicates the circuit conflict over the proper deference standard. And, given that Judge Duncan's view that deference would be appropriate even under *Kisor* did not hold a majority, *see* App. 25a n.31, a favorable answer to the question presented would necessitate reversal of the Fifth Circuit's judgment and remand for reconsideration under the correct deference framework.

III. The Fifth Circuit's decision is incorrect.

Petitioner and the government agree: the Fifth Circuit's failure to apply *Kisor* is wrong and contrary to this Court's precedent. The Court need not disturb *Stinson*; it need only make clear that it meant what it said: *Seminole Rock* is the standard, and now (as it was always supposed to) that standard conditions deference to Guidelines commentary on genuine ambiguity after resort to all the interpretive tools.

1. *Kisor* clarified "the limits inherent" in the *Seminole Rock* deference doctrine. 139 S. Ct. at 2415. Properly applied, that doctrine requires courts to "defer[] to agencies' *reasonable* readings of *genuinely ambiguous* regulations." *Id.* at 2408 (emphasis added). As the Fifth Circuit recognized, that clarification applies to all agency interpretations subject to *Seminole Rock* (or *Auer*), not just the VA's interpretation at issue in *Kisor*. App. 8a; *see Johnson v. BOKF Nat'l Ass'n*, 15 F.4th 356, 362-65 (5th Cir. 2021) (applying *Kisor* to an Office of the Controller of Currency's rule interpretation).

The question, then, is whether any principled reason exists to treat the Sentencing Commission's self-proclaimed interpretations and explanations, USSG § 1B1.7, of its own legislative rules any differently. Or, put in more stark terms: what possible basis could there be for a court to defer to an *unreasonable* interpretation of an *unambiguous* rule simply because the Sentencing Commission is the agency doing the interpreting? No such reason or basis appears in *Kisor*, *Stinson*, or common sense. Just the opposite. *Kisor* "cabined [the] scope" of *Seminole Rock* deference in all its applications. 139 S. Ct. at 2408. And *Stinson* confirms that *Seminole Rock* deference applies to the Commission's commentary.

Stinson analogized the Sentencing Commission to all other federal agencies, noting that, like those agencies, the Commission's power to issue the Guidelines derives from an "express congressional delegation of authority for rulemaking" and must be exercised through "the informal rulemaking procedures" of the APA. 508 U.S. at 44-45. This led the Court to hold that, as a product of that statutory grant of rulemaking authority, the Guidelines are the "equivalent of legislative rules adopted by federal agencies." *Id.* at 45. The commentary, in contrast, is not a legislative rule—both because it lacks those two essential features, *see id.* at 44, 46, and because the Commission expressly assigns it the quite different function of "assist[ing] in the interpretation and application of [such] rules." *Id.* at 45; *see id.* at 41 (citing § 1B1.7). That makes the commentary "akin to," and means that it "should be treated as," the "agency's interpretation of its own legislative rules." *Id.* at 44-45. Having so held, *Stinson* went on—in the very next sentence—to hold that the commentary is subject to the then-controlling "plainly erroneous or inconsistent" formulation of the *Seminole Rock* deference standard. *See id.* (quoting *Seminole Rock*, 325 U.S. at 414). Driving the point home, *Stinson* supported its quotation of the *Seminole Rock* standard by citing, "*e.g.*," four cases in which the Court deferred to other agencies' rule interpretations and, for good measure, an administrative law treatise. *Id.*[3]

[3] *See 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); 2 K. Davis, Administrative Law Treatise § 7:22, at 105-07 (2d ed. 1979).

In short, *Stinson* held that *Seminole Rock* deference governs the extent to which federal courts must give the Commission's commentary controlling weight. *Kisor* limited the scope of *Seminole Rock* deference to agencies' reasonable interpretations of genuine ambiguity in their own rules. It follows that the same limitations govern the same doctrine's application to Guidelines commentary.

2. The Fifth Circuit's contention that *Stinson* "drew from" but did not apply *Seminole Rock*, and instead used it as a template for inventing a "distinct" deference doctrine premised on the "differences" between the Sentencing Commission and other federal agencies, App. 10a-11a, does not withstand scrutiny.

For one, that claim is irreconcilable with *Stinson*'s unanimous holding that the Commission's commentary to the Guidelines and "an agency's interpretation of its own legislative rule" are to "be treated as" one and the same. 508 U.S. at 44. After *Kisor*, agency interpretations are given controlling weight only to the extent they reasonably resolve genuine ambiguity in the relevant regulation. To give commentary controlling weight even in the absence of genuine ambiguity in the relevant guideline, then, is to "treat" the Commission's interpretations of its legislative rules differently from other agency rule interpretations, not "as" and "akin to" them. *Stinson*, 508 U.S. at 44-45.

Moreover, all of the "differences" between the Commission and other agencies the Fifth Circuit perceived to "justify" this "distinct approach," App. 11a, existed when *Stinson* was decided. Then, as now, the Commission was "lodge[d] in the Judicial Branch"; then, as now, the Commission "addresse[d] federal judges" and not "the public"; and then, as

now, its seven members had to be "appointed by the President" and included "at least three federal judges." App. 11a.

Yet *Stinson* regarded Commission commentary as akin to agency interpretation, and so controlling only to the extent it satisfies the criteria for *Seminole Rock* deference. Indeed, even before *Stinson*, this Court rejected the notion that delegated rulemaking authority is meaningfully different simply by virtue of its placement in the hands of an "independent rulemaking body" located in the Judicial Branch and tasked with "promulgating sentencing guidelines." *Mistretta*, 488 U.S. at 385; *see id.* at 386-87 & n.14. And if anything, the nature of the Commission's work—setting policy that bears directly on the grave judicial task of determining how long an individual will lose his liberty—suggests that the alternative to *Seminole Rock* deference, as modified by *Kisor*, is not a return to reflexive deference, but *no deference* to the commentary. *See Nasir*, 17 F.4th at 474 (Bibas, J., concurring) ("There is no compelling reason to defer to a Guidelines comment that is harsher than the text. Whatever the virtues of giving experts flexibility to adapt rules to changing circumstances in civil cases, in criminal justice those virtues cannot outweigh life and liberty."); App. 44a (Oldham, J., concurring) (suggesting that Guidelines commentary "should not receive any deference that the Advisory Committee's notes to the Federal Rules do not").

The Fifth Circuit's view likewise finds no footing in *Kisor*. Nothing in the Court's opinion suggests that its recalibration of the *Seminole Rock* doctrine was confined to cases involving judicial review of executive agency rule interpretations. Surely, the Securities and Exchange Commission would not be heard to complain that, as an independent rather

than executive agency, its readings of its own *unambiguous* rules remain entitled to deference even after *Kisor*. *See Doe v. Sec. & Exch. Comm'n*, 28 F.4th 1306, 1313-16 (D.C. Cir. 2022) (applying *Kisor* to SEC rule interpretation). It makes just as little sense to infer a silent exemption for the Sentencing Commission from *Kisor*'s unremarkable failure to expressly "mention the Sentencing Guidelines, the Commission, or the commentary." App. 10a. What the Fifth Circuit failed to appreciate is that *Kisor* spoke to each of those topics at the higher level of generality befitting the Court's explication of the standard for affording *Seminole Rock* deference across the board—that is, to any agency (Commission) when it purports to interpret (commentary) its regulations (guidelines).

Kisor did not purport to reform *Seminole Rock* only as to a subset of agency rule interpretations. It did, however, list *Stinson* among the "legion" of its "decisions applying *Seminole Rock* deference." *Kisor*, 139 S. Ct. at 2411 n.3 (plurality). The Fifth Circuit was unimpressed, disregarding this Court's statement that *Stinson* "appli[ed]" *Seminole Rock* because only a plurality of Justices joined that portion of the opinion. App. 9a.

But, as the author of both the majority and plurality portions of *Kisor* has elsewhere admonished, "a good rule of thumb for reading [this Court's] decisions is that what they say and what they mean are one and the same." *Mathis v. United States*, 579 U.S. 500, 514 (2016). The plurality said that *Stinson* was one of the Court's "pre-*Auer*" decisions "applying *Seminole Rock* deference," and listed it among many others the plurality understood to have done the same—including all four cases *Stinson* itself cited as additional examples of *Seminole Rock* decisions. *Compare Kisor*, 139 S. Ct. at 2411 n.3, *with Stinson*, 508 U.S. at

45, *and supra* Pet. 31 n.3. There is no indication that any member of the Court who did not join *Kisor*'s Section II.A. might have quarreled with the plurality's factual observation about *Stinson*. It is clear, however, that at least one Justice who did not join the majority or plurality sections *has* read *Stinson* the same way. *See Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 114 (2015) (Thomas, J., concurring in the judgment) (describing *Stinson* as "concluding that the Sentencing Commission's commentary on its Guidelines is analogous to an agency interpretation of its own regulations, entitled to *Seminole Rock* deference").

There is simply no basis for reading *Kisor* or *Stinson* as contemplating that Guidelines commentary deserves a special degree of deference enjoyed by no other agency, and that this enhanced deference would forever attach irrespective of ambiguity in the corresponding guideline. Quite the contrary: *Stinson* itself noted that "amendment[s] [to] the commentary" represent a permissible avenue for the Commission to revise the Guidelines, but only "if the guideline which the commentary interprets will bear the construction." 508 U.S. at 46. No guideline (or any legal text) can "bear" a construction that falls outside its unambiguous meaning. Yet commentary purporting to give guideline text just such a construction is what is at stake here. As Justice Gorsuch noted in his *Kisor* concurrence, *Seminole Rock* deference "matters only when a court would conclude that the agency's interpretation is *not* the best or fairest reading of the regulation." *Kisor*, 139 S. Ct. at 2429 (Gorsuch, J., concurring in the judgment) (original emphasis). No less in the sentencing context, *Kisor*'s updated standard will alter the equation only where commentary gives guideline text a reading that does *not* fall within the permissible bounds of interpretation.

The Fifth Circuit identified no persuasive reason why *Kisor*, *Stinson*, or any of this Court's cases would condone deference to the Commission—and that agency alone—in those circumstances. "It does not take a great stretch of the imagination to see the pitfalls of a rule that writes the Sentencing Commission that kind of blank check." App. 51a (Elrod, J., dissenting). And the fact that the Fifth Circuit's acceptance of this bifurcated deference regime depends on adherence to a formulation of the *Seminole Rock* test that *Kisor* labeled a "caricature of the doctrine," 139 S. Ct. at 2415, is as telling a sign as any that the court of appeals has strayed from the path of this Court's precedent.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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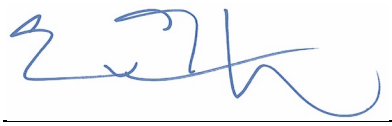

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