NO._____

IN THE SUPREME COURT OF THE UNITED STATES

JIMMY LEE SMART,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

MARJORIE A. MEYERS
Federal Public Defender
Southern District of Texas
Attorney of Record

KATHRYN SHEPHARD
Assistant Federal Public Defender
Attorneys for Petitioner
440 Louisiana Street, Suite 1350
Houston, Texas 77002-1056
Telephone: (713) 718-4600

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 court of appeals applied its *en banc* decision that deepened an entrenched 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.

LIST OF PARTIES

All parties are named in the caption of the case on the cover page.

RELATED CASES

- *United States v. Jimmy Lee Smart*, No. 21-cr-292, U.S. District Court for the Southern District of Texas. Judgment entered Aug. 10, 2022.
- *United States v. Jimmy Lee Smart*, No. 22-20409, U.S. Court of Appeals for the Fifth Circuit. Judgment entered Oct. 19, 2023.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

Page

TABLE OF CITATIONS

Page

CASES

TABLE OF CITATIONS – (cont'd)

Page

CASES – (cont'd)

TABLE OF CITATIONS – (cont'd)

Page

CASES – (cont'd)

TABLE OF CITATIONS – (cont'd)

Page

CASES – (cont'd)

STATUTES AND RULES

TABLE OF CITATIONS – (cont'd)

Page

STATUTES AND RULES – (cont'd)

SENTENCING GUIDELINES

TABLE OF CITATIONS – (cont'd)

Page

SENTENCING GUIDELINES – (cont'd)

MISCELLANEOUS

PETITION FOR WRIT OF CERTIORARI

Petitioner Jimmy Lee Smart 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 opinion is attached to this petition as an Appendix. The district court did not issue a written opinion.

JURISDICTION

The Fifth Circuit issued its opinion on October 19, 2023. *See* Appendix. This petition is filed within 90 days after entry of judgment. *See* Sup. Ct. R. 13.1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT GUIDELINES PROVISIONS

Section 2B1.1(b)(1) of the 2018, 2021, and 2023 U.S. Sentencing Guidelines Manuals provides:

(b) Specific Offense Characteristics

(1) If the loss exceeded $6,500, increase the offense level as follows:

Loss (Apply the Greatest)		Increase in Level
(A)	$6,500 or less	no increase
(B)	More than $6,500	add **2**
(C)	More than $15,000	add **4**
(D)	More than $40,000	add **6**
(E)	More than $95,000	add **8**
(F)	More than $150,000	add **10**
(G)	More than $250,000	add **12**
. . .		
(P)	More than $550,000,000	add **30**.

***

Application Notes 3(A) and 3(F)(i) in the 2018, 2021, and 2023 Guidelines Manual provide:

3. Loss Under Subsection (b)(1).—This application note applies to the determination of loss under subsection (b)(1).

(A) General Rule.—Subject to the exclusions in subdivision (D), loss is the greater of actual loss or intended loss.

(i) Actual Loss.—"Actual loss" means the reasonably foreseeable pecuniary harm that resulted from the offense.

(ii) Intended Loss.—"Intended loss" (I) means the pecuniary harm that the defendant purposely sought to inflict; and (II) includes intended pecuniary harm that would have been impossible or unlikely to occur (e.g.,

as in a government sting operation, or an insurance fraud in which the claim exceeded the insured value).

(iii) Pecuniary Harm.—"Pecuniary harm" means harm that is monetary or that otherwise is readily measurable in money. Accordingly, pecuniary harm does not include emotional distress, harm to reputation, or other non-economic harm.

(iv) Reasonably Foreseeable Pecuniary Harm.—For purposes of this guideline, "reasonably foreseeable pecuniary harm" means pecuniary harm that the defendant knew or, under the circumstances, reasonably should have known, was a potential result of the offense.

(v) Rules of Construction in Certain Cases.—In the cases described in subdivisions (I) through (III), reasonably foreseeable pecuniary harm shall be considered to include the pecuniary harm specified for those cases as follows:

(I) Product Substitution Cases.—In the case of a product substitution offense, the reasonably foreseeable pecuniary harm includes the reasonably foreseeable costs of making substitute transactions and handling or disposing of the product delivered, or of retrofitting the product so that it can be used for its intended purpose, and the reasonably foreseeable costs of rectifying the actual or potential disruption to the victim's business operations caused by the product substitution.

(II) Procurement Fraud Cases.—In the case of a procurement fraud, such as a fraud affecting a defense contract award, reasonably foreseeable pecuniary harm includes the reasonably foreseeable administrative costs to the government and other participants of repeating or correcting the procurement action affected, plus any increased costs to procure the product or service involved that was reasonably foreseeable.

(III) Offenses Under 18 U.S.C. § 1030.—In the case of an offense under 18 U.S.C. § 1030, actual loss includes the following pecuniary harm, regardless of whether such pecuniary harm was reasonably foreseeable: any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other damages incurred because of interruption of service.

. . .

(F) Special Rules.—Notwithstanding subdivision (A), the following special rules shall be used to assist in determining loss in the cases indicated:

(i) Stolen or Counterfeit Credit Cards and Access Devices; Purloined Numbers and Codes.—In a case involving any counterfeit access device or unauthorized access device, loss includes any unauthorized charges made with the counterfeit access device or unauthorized access device and shall be not less than $500 per access device. However, if the unauthorized access device is a means of telecommunications access that identifies a specific telecommunications instrument or telecommunications account (including an electronic serial number/mobile identification number (ESN/MIN) pair), and that means was only possessed, and not used, during the commission of the offense, loss shall be not less than $100 per unused means. For purposes of this subdivision, "counterfeit access device" and "unauthorized access device" have the meaning given those terms in Application Note 10(A).

USSG § 2B1.1, comment. (n.3(A)), (n.3(F)(i)).

BASIS OF FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT

This case was originally brought as a federal criminal prosecution under 18 U.S.C. § 1704. The district court therefore had jurisdiction under 18 U.S.C. § 3231.

STATEMENT OF THE CASE

I. The Sentencing Commission and its Guidelines

"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." *Id.*

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 (Sentencing Table).

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. In 2022, that percentage was 67.8%. U.S. Sentencing Comm'n, *2022 Annual Report* 9.

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.*

II. The doctrine of judicial deference to agency rule interpretations

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]

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 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

[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).

"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).

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.* (citation 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.

III. Factual and procedural background

Petitioner Jimmy Lee Smart pleaded guilty to a single-count indictment charging him with possessing a counterfeit U.S. mail key with the intent to dispose of it improperly, in violation of 18 U.S.C. § 1704. The district court ordered the probation officer to prepare a presentence report, and in that report, the probation officer calculated petitioner's total offense level under the Sentencing Guidelines as follows:

Calculation	Levels	USSG §	Description
Base offense level	6	2B1.1(a)(2)	18 U.S.C. § 1704
Specific offense characteristic	+12	2B1.1(b)(1)(G)	Intended loss amount of more than $250,000 but not more than $550,000
Specific offense characteristic	+2	2B1.1(b)(2)(A)	Offense involved 10 or more victims
Adjustment to offense level	-3	3E1.1(a), (b)	Acceptance of responsibility
Total offense level	**17**		

With a total offense level of 17, and a criminal history category of V based on a total of 11 criminal history points, the probation officer calculated petitioner's Guidelines range to be 46 to 57 months.

Petitioner objected to the 12-level enhancement under USSG § 2B1.1(b)(1)(G) for "intended" loss, arguing that the district court should calculate the offense level based only

on actual, not intended, loss, which would result in zero levels under USSG § 2B1.1(b)(1), instead of +12. Petitioner based his argument on the text of USSG § 2B1.1(b)(1) and the plain meaning of the word "loss" as "actual loss." He further contended that, under this Court's decision in *Kisor v. Wilke*, 139 S. Ct. 2400 (2019), the district court should not defer to the commentary's contrary definition of loss as the greater of actual or intended loss. Without the 12-level enhancement, the Guidelines range would have been 9 to 15 months. The district court denied petitioner's objection, adopted the probation officer's calculations, and imposed a within-Guidelines sentence of 57 months in custody.

On appeal to the Fifth Circuit, petitioner renewed his argument that the 12-level "loss" enhancement was improperly applied, in light of the plain meaning of the word "loss" as "actual loss" and the lack of deference owed to the Guidelines commentary under *Kisor*. He further argued that courts should not defer to the commentary's "Special Rule" defining "loss" in a case involving any counterfeit or unauthorized access device to be "not less than $500 per access device." USSG § 2B1.1, comment. (n.3(F)(i)).

The Fifth Circuit affirmed in an unpublished decision solely based on that court's *en banc* decision in *United States v. Vargas*, 74 F.4th 673 (5th Cir. 2023) (*en banc*), *petition for cert. filed* (U.S. Oct. 23, 2023) (No. 23-5875), which issued during the pendency of petitioner's appeal. *See* Appendix. The particular guideline at issue in *Vargas* was the career offender guideline, which increases the Guidelines range if a person committed the instant federal "crime of violence" or "controlled substance offense" after having sustained at least two prior "crime of violence" or "controlled substance offense" convictions. USSG

§ 4B1.1(a). The guideline itself defines "controlled substance offense" to mean "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," USSG § 4B1.2(b), and does not mention conspiracy or attempts to commit such offenses. The commentary, however, purports to add inchoate offenses by providing that the phrase "'controlled substance offense' include[s] the offenses of aiding and abetting, conspiring, and attempting to commit" the offenses listed in the guideline itself. USSG § 4B1.2, comment. (n.1).

The Fifth Circuit in *Vargas* issued a fractured decision, with only two holdings commanding a majority of the *en banc* court. 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*" and that lower courts therefore remained duty-bound to apply "*Stinson*'s framework" unmodified. 74 F.4th at 678. 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 677 (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 680 n.11.

Second, Judge Duncan, joined by nine other judges, concluded that the specific commentary at issue in *Vargas* was entitled to the "generous deference" mandated by

Stinson. *Id.* at 685. 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 684-85 (citation omitted) (brackets in original), 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 684. "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 684-685 & n.20 (citations omitted).

Applying that "high bar," the majority approved of the specific commentary at issue in *Vargas*, even though it recognized that the Third, Fourth, Sixth, Ninth, Eleventh, and D.C. Circuits had rejected that same commentary as impermissibly expanding unambiguous guideline text. *Id.* at 686, 688. In doing so, the majority stressed that, "under *Stinson* deference," it "need not" determine which reading of the guideline "is the correct or even the better one." *Id.* 689. It thus declined to engage with the full panoply of textual and contextual features and tools that the six circuits just mentioned and the dissenting opinion in *Vargas* flagged as bearing on the interpretive inquiry, *see id.* at 703-08 (Elrod, J., dissenting). Instead, the majority concluded that the defendant had failed to show the "kind of 'flat inconsistency'" it understood *Stinson* to require and accordingly deferred. *Id.*

at 690 (quoting *Stinson*, 508 U.S. at 43).[2]

Judge Oldham, joined by Judge Jones, concurred in part. *Id.* at 699-701. Although Judge Oldham agreed that *Kisor* didn't speak to *Stinson*, *id.* at 699, he expressed the view that subsequent developments in federal sentencing law had undermined *Stinson*'s rationale for deferring to Guidelines commentary. *Id.* at 699-701. 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 700-01.

Judge Elrod dissented in part and dissented in the judgment. *Id.* at 701-12. Joined by five other judges, Judge Elrod concluded that the ordinary tools of construction revealed that the text of the particular guideline at issue resolved the dispute about its meaning in the defendant's favor. 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 703-04, 708. Because she viewed that to be the case in *Vargas*, Judge Elrod concluded that the commentary purporting to expand the text of the

[2] Judge Duncan authored two additional sections that did not command a majority. The first section, joined by five other judges, *id.* at 690 n.31, took the position that the commentary at issue should receive deference even under the *Kisor* framework. *See id.* at 690-97. The second, joined by seven other judges, *id.* at 697 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 697-98.

guideline deserved no deference whether evaluated under the standard as articulated in *Stinson*, *id.* at 703-08, or as recalibrated by *Kisor*. *Id.* at 708-09.

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*." *Id.* at 701. 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 702 (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 the defendant, 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 711-12 (emphasis in original). 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." *Id.* at 712.

REASONS FOR GRANTING THE PETITION

The question presented here—of the deference owed to the Guidelines commentary after *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), recalibrated the *Seminole Rock* standard—implicates a deep, entrenched split in the circuits. The same question has been raised by the petition for writ of certiorari in *Vargas v. United States*, No. 23-5875 (U.S. Oct. 23, 2023). This Court should grant that petition, or this petition, to resolve the intractable conflict.

I. The Court should grant certiorari in *Vargas* and give petitioner the benefit of any favorable decision.

This petition raises the same important question as the petition in *Vargas v. United States*, No. 23-5875 (U.S. Oct. 23, 2023). The Court should grant certiorari in *Vargas* and then grant this petition, vacate the judgment, and remand to the Fifth Circuit, if the decision in *Vargas* is favorable. If the Court does not grant that petition or that case does not resolve the question presented, the Court should grant this petition because this Court alone can resolve the entrenched split among circuits, including *en banc* decisions on either side, about the recurring question presented.

II. The Court should grant this petition because 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 restore uniformity.

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's Guidelines range likely would have been about three to three-and-a-half years shorter.

Kisor has controlled judicial deference to all agency rule interpretations—including Guidelines commentary—in the Third and Sixth Circuits the longest. 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 commentary to the "career offender" guideline, USSG § 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" USSG § 4B1.2(b) "does not include inchoate crimes" and thus rejected the commentary's attempt to expand that unambiguous meaning by adding inchoate crimes. *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).

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 the commentary defining "the 'loss' from a stolen gift card as an automatic $500" fell well beyond any reasonable zone of ambiguity. *Id.* at 486.

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

Sitting *en banc* in *Dupree*, the Eleventh Circuit 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.

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 the other 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).

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 applied below highlights. *See Vargas*, 74 F.4th at 678, 686-87.

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 Vargas*, 74 F.4th at 680-90; *United States v. Maloid*, 71 F.4th 795 (10th Cir. 2023), *petition for cert. filed* (U.S. Nov. 22, 2023) (No. 23-6150); *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." *Vargas*, 74 F.4th at 684. 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).

In the decision applied in petitioner's case below, the *en banc* Fifth Circuit 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." *Vargas*, 74 F.4th at 680, 695. The Fifth Circuit acknowledged that each of the five decisions discussed above (Pet. 18-23) hold that *Kisor* "curtailed the deference due

to the commentary's interpretation of a guideline" but expressly "disagree[d]" with that conclusion. *Id.* at 680-81 & 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 681. But it understood *Stinson* as having "set[] out a deference doctrine distinct from the one altered by *Kisor*" (i.e., *Seminole Rock*), *id.* at 678, 682, that only this Court had the authority to overrule. *Id.* at 680, 683. 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 681. 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 682-83 (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.

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 Fed. Appx. 63, 66 (2d Cir. 2021) (unpublished) (same); *Lewis*, 69 F.3d at 22-24 (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.

The deep and acknowledged circuit split over *Kisor*'s relevance in the Guidelines context will not dissipate without this Court's intervention. The *en banc* decision applied 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* Fifth Circuit held that judges in that circuit remain bound to defer to Guidelines commentary without exhausting their interpretive tools and irrespective of genuine ambiguity in a guideline's text. *Vargas*, 74 F.4th at 678, 682-83. The court of appeals recognized that its decision placed 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 678 & n.2, 680-81 & n.11. Only this Court can resolve this square, 2–1 conflict between *en banc* courts of appeals.

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.

III. 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.

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

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 the commentary would effectively reduce the corresponding guideline to "inoperable" gibberish, leaving it "without any practical effect." *Vargas*, 74 F.4th at 684-85 (quoting *United States v. Cramer*, 777 F.3d 597, 606 (2d Cir. 2015)).

As Judge Elrod observed in her *Vargas* dissent, the result is a federal system that "countenance[s]" intolerable sentencing "disparities" for similarly situated defendants based on the fortuity of geography. *Id.* at 712. Petitioner's case is an apt example. In Texas, commentary lengthened his Guidelines range by about three to three-and-a-half years, and the district court imposed a sentence corresponding precisely to the top end of that enhanced range—57 months. But had petitioner's case arisen in, for example, Pennsylvania, his sentence, if imposed again at the high end, would be 15 months. 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.

This untenable consequence of the circuits' inconsistent approaches to the question presented extends further than any particular guideline-and-commentary combination. In addition to the inchoate-offense, $500-per-access-device, and loss examples discussed above, the Third and Eleventh Circuits have recognized that deferring to the commentary at issue in *Nasir* and *Dupree* would likewise expand the unambiguous reach of USSG § 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." *Vargas*, 74 F.4th at 712 (Elrod, J., dissenting).

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." *Vargas*, 74 F.4th at 712 (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 different standards to the basic task of figuring out what any particular guideline means.

Finally, 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 and on appeal. Petitioner's case squarely implicates the circuit conflict over the proper deference standard. And, 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.

IV. 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.

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 Department of Veterans Affairs' interpretation at issue in *Kisor*. *Vargas*, 74 F.4th at 681; *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 starker 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*

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.

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, *Vargas*, 74 F.4th at 682-83, 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," *Vargas*, 74 F.4th at 683, existed

---

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).

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." *Vargas*, 74 F.4th at 682.

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."); *Vargas*, 74 F.4th 700 (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." *Vargas*, 74 F.4th at 681. 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. *Vargas*, 74 F.4th at 681.

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. 33-34 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." *Vargas*, 74 F.4th at 704 (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 Court should grant the petition in *Vargas*, resolve the question presented in petitioner's favor, and then grant this petition, vacate the judgment, and remand to the Fifth Circuit. Alternatively, the Court should grant this petition.

Date: January 12, 2024

Respectfully submitted,

MARJORIE A. MEYERS
Federal Public Defender
Southern District of Texas
Attorney of Record

KATHRYN SHEPHARD
Assistant Federal Public Defender
Attorneys for Petitioner
440 Louisiana Street, Suite 1350
Houston, Texas 77002-1056
Telephone: (713) 718-4600