No. 23-

IN THE

Supreme Court of the United States

LARRY COATES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Stinson* v. *United States*, this Court held that the Sentencing Commission's commentary on the Sentencing Guidelines "is akin to an agency's interpretation of its own legislative rules," and is thus entitled to *Seminole Rock* deference—now called *Auer* deference. 508 U.S. 36, 45 (1993). The Court more recently clarified in *Kisor* v. *Wilkie* that "a court should not afford *Auer* deference unless [a] regulation is genuinely ambiguous," so *Auer* deference applies only after a court has "exhaust[ed] all the 'traditional tools' of construction." 139 S. Ct. 2400, 2415 (2019). The question presented is:

Whether the Sentencing Commission, when interpreting the Guidelines, should receive a more deferential version of *Auer* deference than all other federal agencies.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is Larry Coates. Respondent is the United States. No party is a corporation.

RULE 14.1(B)(iii) STATEMENT

This case arises from the following proceedings:

United States v. *Larry Coates*, No. 6:21-cr-10037-EFM (July 1, 2022), U.S. Court for the District of Kansas.

United States v. *Larry Coates*, No. 22-3122 (Sept. 18, 2023), U.S. Court of Appeals for the Tenth Circuit.

No other proceedings are directly related to this case.

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Larry Coates respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The Tenth Circuit's opinion is reported at 2 F.4th 953 and reproduced at Pet. App. 1a–11a. The district court's judgment is reproduced at Pet. App. 12a–19a.

JURISDICTION

The Tenth Circuit entered judgment on September 18, 2023. On December 1, 2023, Justice Gorsuch extended the time to file this petition to January 17, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

GUIDELINES PROVISIONS INVOLVED

U.S.S.G. § 1B1.3(a)(1)(A) provides, as relevant:

> Unless otherwise specified, … (ii) specific offense characteristics … shall be determined on the basis of the following:
>
> > (1)(A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and … that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense.

U.S.S.G. § 2G2.2(b)(5) provides, as relevant:

> If the defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor, increase by 5 levels.

Application Note 1 to U.S.S.G. § 2G2.2 provides, as relevant:

> "Pattern of activity involving the sexual abuse or exploitation of a minor" means any combination of two or more separate instances of the sexual abuse or sexual exploitation of a minor by the defendant,

whether or not the abuse or exploitation (A) occurred during the course of the offense; (B) involved the same minor; or (C) resulted in a conviction for such conduct.

INTRODUCTION

The courts of appeals openly disagree about the degree of deference they owe the Sentencing Commission's commentary on the Sentencing Guidelines—is it the same version of *Auer* deference that every other agency gets, or a more-deferential, otherwise-defunct version? The Court should resolve this entrenched split by making clear that the Commission's commentary—which can dictate whether someone spends years or decades in prison—warrants no less scrutiny than agency rules with far lower stakes for liberty.

This Court first adopted *Auer* deference (then called *Seminole Rock* deference) for Guidelines commentary in *Stinson* v. *United States*, 508 U.S. 36 (1993). *Stinson* reasoned that the "guidelines are the equivalent of legislative rules adopted by federal agencies," and the Commission's commentary is thus "akin to an agency's interpretation of its own legislative rules." *Id.* at 45. As a result, the commentary must be given "controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Id.*

But since then, the Court "has cabined *Auer*'s scope in varied and critical ways." *Kisor* v. *Wilkie*, 139 S. Ct. 2400, 2418 (2019). In particular, courts must exhaust "all the standard tools of interpretation" to determine whether the relevant text is "genuinely ambiguous." *Id.* at 2414. Even if genuine ambiguity exists, deference is improper unless the agency's reading is "reasonable"; it must fall "within the zone of ambiguity the court has identified after employing all its interpretive tools." *Id.* at 2416.

Because *Stinson* adopted *Auer* deference for Guidelines commentary, and *Kisor* clarified *Auer*'s limits, the conclusion is inescapable: *Kisor* now dictates the degree of deference owed to the commentary. And five circuits have gotten the message, applying *Auer* as

clarified by *Kisor* in this context. But five other circuits refuse to do so. Those courts either claim mistakenly that *Stinson* and *Auer* are different or—like the court below—simply await "clear direction from the [Supreme] Court." *United States* v. *Maloid*, 71 F.4th 795, 798 (10th Cir. 2023).

Only this Court can resolve this disagreement. The circuits that refuse to follow *Kisor* believe they have no choice, because "[o]nly the Supreme Court can overrule its own precedents." *Id.* at 808. And unlike with other sentencing issues, the Commission itself cannot break the logjam. At most, the Commission can moot specific situations in which this question arises. But it cannot answer the broader question of how much deference its own interpretations warrant—the Court must decide that question "independent[ly]." See *Kisor*, 139 S. Ct. at 2416.

This case is a superior vehicle to other denied or pending petitions raising this issue. Some of those petitions were filed before the split had grown and solidified. And others had vehicle problems because they raised threshold jurisdictional issues, involved Guidelines the Commission had since amended, or did not turn on the level of deference applied. This case, by contrast, is an ideal vehicle, and it arises after the lower courts have dug in on irreconcilable positions. The petition should be granted.

STATEMENT OF THE CASE

Mr. Coates pleaded guilty to one count of possessing child pornography under 18 U.S.C. § 2252A(a)(5)(B). Pet. App. 3a. The relevant Sentencing Guideline for this offense is § 2G2.2. Paragraph 2G2.2(b)(5) calls for a five-level sentencing enhancement if the defendant engaged in "a pattern of activity involving the sexual abuse or exploitation of a minor." § 2G2.2(b)(5). The probation officer recommended applying this enhancement based on two sex offenses from 2001 and 2002 that were unrelated to the victim or the possession offense in this case. Pet. App. 3a–4a.

The Guidelines' default rule is that such specific offense characteristics are determined based on "relevant conduct." § 1B1.3(a) (capitalization omitted). "Unless otherwise specified" in another Guideline, "specific offense characteristics … shall be determined on the basis of" acts or omissions "that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense." *Id.* And there is no dispute that Mr. Coates's decades-old, unrelated offenses are not "relevant conduct." Even so, the probation officer relied on Commission commentary stating that a "pattern of activity" encompasses non-relevant conduct. According to that commentary, such a pattern including "separate instances … *whether or not* the abuse or exploitation (A) occurred during the course of the offense; (B) involved the same minor; or (C) resulted in a conviction for such conduct." § 2G2.2, cmt. (n.1) (emphasis added).

Relying on *Kisor*, Mr. Coates objected to the pattern-of-activity enhancement. Pet. App. 4a. The text of § 2G2.2(b)(5) and § 1B1.3(a)(1)(A) unambiguously requires a "pattern of activity" to be based only on relevant conduct, which his prior offenses are not. Thus, Mr. Coates argued that deferring § 2G2.2's commentary is improper. *Id*. But while the district court agreed that his prior offenses were not relevant conduct, it still applied the enhancement, finding that deference to the commentary was warranted under *Stinson*.

The Tenth Circuit affirmed. It acknowledged that the courts of appeals lack "clear direction as to whether *Kisor*'s stricter concept of deference applies to the Sentencing Commission" and "are split as to how to treat sentencing Commentary." Pet. App. 6a. It also recognized that "both parties[]" argued for applying *Kisor* here. *Id.* But newly-minted circuit precedent had placed the Tenth Circuit on the anti-*Kisor* side of the circuit split. *Id.* at 6a–7a; see *Maloid*, 71 F.4th 795. Applying that precedent—and thus refusing to exhaust the "traditional tools of construction" that *Kisor* mandates—the panel determined that neither

§ 2G2.2(b)(5) nor § 1B1.3(a) "renders the § 2G2.2 Commentary plainly erroneous or inconsistent." Pet. App. 7a & n.1. The panel did not suggest that it could have reached the same result under *Kisor*.

REASONS FOR GRANTING THE PETITION

I. The decision below reinforces a wide and entrenched circuit split.

The courts of appeals openly disagree about whether *Kisor* governs the level of deference due to Guidelines commentary. Five circuits have said yes (though one inconsistently). But five other circuits reject *Kisor* in this context. Only this Court can resolve this entrenched and well-ventilated dispute.

A. Five circuits apply *Kisor* in the Guidelines context.

The Third, Fourth, Sixth, Ninth, and Eleventh Circuits have recognized that *Kisor* governs the level of deference afforded to the commentary. Understanding that *Kisor* clarified *Auer*'s limits in all cases, these circuits have held that the commentary deserves deference only where the relevant Guideline remains genuinely ambiguous after a court has exhausted all traditional interpretive tools.

The *en banc* Third Circuit unanimously held that *Kisor*, by modifying the deference standard for agencies' interpretations of their regulations, adjusted the deference afforded to the Commission's commentary. *United States* v. *Nasir*, 17 F.4th 459, 469–72 (3d Cir. 2021) (en banc). *Nasir* recognized that this Court had adopted the *Auer* standard for Guidelines commentary because the commentary "should 'be treated as an agency's interpretation of its own legislative rule.'" *Id.* at 470 (quoting *Stinson*, 508 U.S. at 44). So when *Kisor* "cut back on" the deference owed to agency interpretations of regulations, it also limited the deference owed to Guidelines commentary. *Id.* (quoting *Kisor*, 139 S. Ct. at 2414–15); see*, e.g.*, *United States* v. *Banks*, 55 F.4th 246, 255–258 (3d Cir. 2022) (applying *Kisor* and "accord[ing] the Commentary no weight" because the

commentary "expand[ed] the definition" of a term in the relevant Guideline).

The Fourth Circuit has likewise held that *Kisor* "explicitly" modified *Auer* deference, including as applied in *Stinson*. *United States* v. *Campbell*, 22 F.4th 438, 445 n.3 (4th Cir. 2022). The court also emphasized that *Kisor*'s warning about the "opportunities" for agencies to "abuse" their "far-reaching influence" is "even more acute in the context of the Sentencing Guidelines, where individual liberty is at stake." *Id.* at 446 (quoting *Kisor*, 139 S. Ct. at 2423). So before deferring to Commission commentary, a court must employ the *Kisor* framework—including the use of "the 'traditional tools' of statutory construction to determine if" the Guideline "is 'genuinely ambiguous.'" *Id.* at 445 (quoting *Kisor*, 139 S. Ct. at 2415).

Two weeks after *Campbell*, a divided Fourth Circuit panel said that commentary "is authoritative and binding, regardless of whether the relevant Guideline is ambiguous," unless it is "inconsistent with, or a plainly erroneous reading of the guideline." *United States* v. *Moses,* 23 F.4th 347, 357 (4th Cir. 2022) (internal citations omitted), *reh'g en banc denied*, No. 21-4067 (4th Cir. Mar. 23, 2022) (*Moses* Reh'g Order), *cert. denied*, 143 S. Ct. 640 (2023). But as the earlier of two conflicting decisions, *Campbell* controls. See *Moses* Reh'g Order 8 (Motz, J., dissenting from denial of rehearing en banc). And even Fourth Circuit judges who believe *Campbell* and *Morse* might be reconcilable "would welcome the Supreme Court's advice on whether *Stinson* or *Kisor* controls the enforceability of and weight to be given Guidelines commentary, an issue that could have far-reaching results." *Id.* at 6 (Niemeyer, J., supporting denial of rehearing en banc).

For its part, the Sixth Circuit determined that *Kisor* cabined *Stinson* for two reasons. First, *Stinson* adopted *Seminole Rock*'s deference test for the Guidelines commentary by "analog[izing] to agency interpretations of regulations." *United States* v. *Riccardi*, 989 F.3d 476, 485 (6th Cir. 2021). Thus, *Kisor*'s clarification of *Seminole Rock*'s test applied "just as much to

Stinson (and the commission's Guidelines) as it does to *Auer*." *Id.* Second, *Kisor* limited *Auer* deference to cases of genuine ambiguity to address concerns that agencies would effectively change rules via interpretation while skirting the typical procedural safeguards. *Id.* Because this concern exists in the Guidelines context, *Kisor*'s reasoning squarely applies to the commentary—and its limitations should too. *Id.*

The Ninth Circuit, too, applies *Kisor*'s "more demanding deference standard" because *Kisor* "directly examined and narrowed *Seminole Rock* and *Auer* deference." *United States* v. *Castillo*, 69 F.4th 648, 655 (9th Cir. 2023). The "only way to harmonize" *Kisor*'s and *Stinson*'s applications of the doctrine, therefore, is "to conclude that *Kisor*'s gloss on *Auer* and *Seminole Rock* applies to *Stinson*." *Id.* at 656 (citation omitted). Moreover, the "lack of accountability in" the "creation and amendment of the Commentary" creates "constitutional concerns" when courts "defer to Commentary … that expands unambiguous Guidelines." *Id.* at 663–64. Indeed, these concerns are heightened "because of the extraordinary power [that] the Commission has over individuals' liberty interests." *Id.*

The *en banc* Eleventh Circuit agrees that *Kisor* necessarily refined *Stinson*. *United States* v. *Dupree*, 57 F.4th 1269, 1275 (11th Cir. 2023) (en banc). *Stinson* "adopted word for word the test the *Kisor* majority regarded as a 'caricature,' so the continued mechanical application of that test would conflict directly with *Kisor*." *Id*. Extending *Kisor* to the Guidelines context, then, is the only way to "honor *Stinson*'s instruction to 'treat[]' the Commentary 'as an agency's interpretation of its own legislative rule.'" *Id.* at 1276 (quoting *Stinson*, 508 U.S. at 44). Chief Judge Pryor, who served on the Sentencing Commission, agreed that the majority "correctly explains" *Kisor*'s effect on the level of deference owed. *Id.* at 1280 (Pryor, J., concurring).

B. Five circuits refuse to apply *Kisor*.

The Second, Fifth, Seventh, Eighth, and Tenth Circuits continue to apply an unaltered version of *Stin-*

son's deference standard—that is, they apply *Auer* deference in its pre-*Kisor* form. Some courts are waiting for this Court's explicit direction before applying *Kisor*; others have squarely held that *Kisor* does not apply to the commentary, viewing *Stinson*'s *Auer* deference as distinct from *Kisor*'s *Auer* deference.

The Second Circuit has held that its *Stinson*-rooted precedent forecloses applying *Kisor*. In *United States* v. *Tabb*, 949 F.3d 81 (2d Cir. 2020), *Kisor*'s applicability "was briefed and discussed at length during oral argument," *United States* v. *Wynn*, 845 F. App'x 63, 66 (2d Cir. 2021), but the panel stuck with *Stinson*'s "plainly erroneous or inconsistent with" test, *Tabb*, 949 F.3d at 87; see also *United States* v. *Richardson*, 958 F.3d 151, 154–55 (2d Cir. 2020) (similar). Subsequent Second Circuit panels thus recognize that these published decisions "made clear that [the *Stinson*-based approach] is still binding precedent in this Circuit." *Wynn*, 845 F. App'x at 66.

The *en banc* Fifth Circuit similarly rejected the argument that *Kisor*'s "reformulat[ion]" of *Auer* deference applies to Guidelines commentary. *United States* v. *Vargas*, 74 F.4th 673, 681 (5th Cir. 2023) (en banc). *Stinson* deference, it reasoned, is distinct from *Auer* deference for two reasons. First, *Stinson* gives commentary controlling weight even when a Guideline is "unambiguous," whereas *Auer* deference applies only when ambiguity is present. *Id.* at 682. Second, the Fifth Circuit read *Stinson* to allow the Commission to interpret the Guidelines in a manner that "conflict[s]" with prior judicial constructions. *Id*. Ultimately, the Fifth Circuit concluded, while "some of our sister circuits" disagree, *Kisor*'s effect on *Stinson* "is the Supreme Court's business." *Id.* at 681 n.11, 683. Six dissenting judges agreed that "[w]hether *Kisor* modified *Stinson* is an unusually thorny question of vertical *stare decisis*," on which the lower courts "would benefit from further guidance." *Id.* at 701, 703 (Elrod, J., dissenting).

The Seventh Circuit has not squarely resolved *Kisor*'s application in this context—but it has continued

to apply *Stinson*-based pre-*Kisor* circuit precedent to foreclose defendants' Guidelines challenges. See *United States* v. *Smith*, 989 F.3d 575, 583–85 (7th Cir. 2021) (analyzing commentary under *Stinson*), *cert denied,* 142 S. Ct. 488 (2021) (mem.); *United States* v. *Jett*, 982 F.3d 1072, 1078 (7th Cir. 2020) (same); see also *United States* v. *States*, 72 F.4th 778, 791 n.12 (7th Cir. 2023).

The Eighth Circuit considers itself bound to keep applying *Stinson* instead of *Kisor*. It has acknowledged "circuit disagreement on the deference to be afforded the Guidelines' commentary," admitting that "the weight of authority may suggest that *Kisor* undermines" *Stinson*-based precedent. *United States* v. *Rivera*, 76 F.4th 1085, 1091 (8th Cir. 2023). But it nevertheless holds that *Kisor* did not sufficiently abrogate the *Stinson* line of cases, and thus it continues to follow that approach. See *id.*; see also *United States* v. *Clayborn*, 951 F.3d 937, 940 (8th Cir. 2020).

The Tenth Circuit, as it did below, treats the Guidelines commentary as binding unless it flunks the unmodified *Stinson* standard. *Maloid*, 71 F.4th at 789, 808. In the court's view, *Kisor* identified *Stinson* merely as "one of 16 background examples of 'pre-*Auer*' cases 'applying *Seminole Rock* deference.'" *Id.* at 808 (quoting *Kisor*, 139 S. Ct. at 2411 n.3 (plurality opinion)). The Tenth Circuit also identified several differences between executive agencies and the Sentencing Commission—differences that, it believed, mean *Kisor*'s "new standard" does not "reach the Commission." *Id.* at 806–07. In short, the Tenth Circuit "will not extend *Kisor*" to the commentary "absent clear direction from th[is] Court." *Id.* at 798. The court reiterated that point in the decision below: "*Kisor* does not apply to sentencing guideline commentary and the *Stinson* standard controls." Pet. App. 6a.

C. Only this Court can resolve the split.

This split is firmly entrenched and will not dissipate without this Court's intervention. That is so for four reasons.

First, *en banc* rehearing cannot resolve the dispute. There is already at least one *en banc* ruling on each side of the split, see *Vargas*, 74 F.4th 673; *Dupree*, 57 F.4th 1269; *Nasir*, 17 F.4th 459, and other courts on both sides have denied rehearing *en banc*—sometimes over vigorous dissents, and sometimes inviting this Court's guidance.[1]

Second, the anti-*Kisor* camp does not merely follow pre-*Kisor* circuit precedent. The Tenth Circuit and the *en banc* Fifth Circuit have rejected arguments to follow *Kisor* on the merits, reasoning (incorrectly) that Commission commentary differs from other agencies' interpretations of their own rules. See Pet. App. 6a; *Vargas*, 74 F.4th at 681–82; *Maloid*, 71 F.4th at 798 ("We will not extend *Kisor* to the Commission's commentary absent clear direction from the [Supreme] Court.").

Third, some circuits, including the court below, have rejected *Kisor* in this context *even though the government conceded that Kisor applied*. See Pet. App. 6a (noting "both parties' arguments" that *Kisor* applied); *Moses* Reh'g Order 10 n.2 (Wynn, J., dissenting from denial of rehearing *en banc*) (same); *Vargas*, 74 F.4th at 680 (same). If the anti-*Kisor* courts will not even accept the government's appellate positions, there is no chance that the split will resolve itself without intervention.

Fourth, "the Commission cannot, on its own, resolve the dispute about what deference courts should give to the commentary." *Dupree*, 57 F.4th at 1289 n.6 (Grant, J., concurring in the judgment). Though this Court generally prefers to let the Commission resolve conflicts about the Guidelines, see *Braxton* v. *United States*, 500 U.S. 344, 348 (1991), that principle does not apply here because this case involves "a meta-

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[1] See *Morse* Reh'g Order 1; Order, *Lewis*, No. 18-1916 (1st Cir. Oct. 2, 2020); Order, *Tabb*, No. 18-338 (2d Cir. June 1, 2020); Order, *United States* v. *Tate*, No. 20-5071 (6th Cir. July 16, 2021); Order, *United States* v. *Crum*, No. 17-30261 (9th Cir. Oct. 29, 2019); Order *United States* v. *Lovato*, No. 18-1468 (10th Cir. June 23, 2020).

rule that would govern our interpretation of the commentary writ large." *Moses* Reh'g Order 13 (Wynn, J., dissenting). And a "court should not defer to an agency until the court decides, on its own, that the agency is entitled to deference. " *City of Arlington* v. *FCC*, 569 U.S. 290, 312 (2013) (Roberts, C.J., dissenting). Indeed, that is why the Court granted review in *Stinson* itself—years after *Braxton*. See 508 U.S. at 40 ("The various Courts of Appeals have taken conflicting positions on the authoritative weight to be accorded to the commentary to the Sentencing Guidelines, so we granted certiorari."). The most the Commission can do is kick the can down the road by resolving particular instances of Guideline-commentary conflict. Thus, "only the Supreme Court will be able to answer" the question presented. *Dupree*, 57 F.4th at 1289 n.6 (Grant, J., concurring in the judgment).

II. The decision below is incorrect.

The Tenth Circuit took the wrong side. *Kisor* clarified how to determine whether *Auer* deference is available in all contexts. And since *Stinson* adopted *Auer* for Guidelines commentary, *Kisor* applies equally to commentary. Nor is there any sound reason to apply *more* deference when the Commission interprets a Guideline dictating the length of a prison term than when, for example, the Department of Veterans Affairs interprets a benefits rule. See *Kisor*, 139 S. Ct. at 2409. On the contrary, due process and lenity principles support applying at least as much scrutiny here. Indeed, the United States *agrees* that "*Kisor* sets forth the authoritative standards for determining whether particular commentary is entitled to deference." Br. Opp. 15, *Tabb* v. *United States*, No. 20-579 (Feb. 16, 2021). Had the Tenth Circuit properly followed *Kisor* below, it would have held that deference to the commentary was improper.

A. *Kisor* applies to Guidelines commentary.

Kisor's reasoning and result apply here. In the "classic" formulation of *Auer*, the agency receives deference unless its "construction is 'plainly erroneous or inconsistent with the regulation.'" *Kisor*, 139 S. Ct. at 2415

(quoting *Seminole Rock*, 325 U.S. at 414). *Kisor* clarified this standard by reinforcing its limitations, thereby protecting the doctrine from becoming a "caricature" in which courts defer reflexively. *Id.* at 2414–15. Even so, the Tenth Circuit ruled that *Kisor* applies only to executive agencies. The Sentencing Commission, the court reasoned, should receive reflexive deference because "'if the Supreme Court meant *Kisor* to reach sentencing, it would have said so.'" Pet. App. 6a (quoting *Maloid*, 71 F.4th at 809).

But *Kisor* is not so narrow. Rather, this Court framed the issue as "whether [it] should overrule" *Auer* and *Seminole Rock*, "discarding the deference they give to agencies." *Kisor*, 139 S. Ct. at 2408. In other words, this Court addressed the deference *standard* that originated in those cases and has been applied in many cases since. And though this Court declined to overrule *Auer* and *Seminole Rock*, it "reinforce[d] [the] limits" of the deference standard derived from them. *Id.*

Stinson itself underscores the point. It directly and unequivocally adopted *Auer* deference (then *Seminole Rock* deference) as the standard for determining whether Guidelines commentary deserves controlling weight. *Stinson* identified the deference owed to the Commission's commentary by reciting *Seminole Rock*'s deference formula verbatim, reasoning that when the Commission promulgates commentary to its Guidelines, it functions like an agency interpreting its own legislative rules. 508 U.S. at 45. The "functional purpose" of the Commission's commentary, the Court said, is "akin to an agency's interpretation of its own legislative rules" because the commentary "assist[s] in the interpretation of [those] rules." *Id.* And in extending the *Seminole Rock* standard to the sentencing context, *Stinson* did not alter that standard in any way. *See id.*; *Kisor*, 139 S. Ct. at 2412 n.3 (plurality) (listing *Stinson* among the "legion" of "pre-*Auer*[] decisions applying *Seminole Rock* deference"); *see also id.* at 2422 (majority) (citing the plurality's footnote 3 with approval). In short, "*Stinson* adopted word for word the test the *Ki-*

sor majority regarded as a 'caricature,' so the continued mechanical application of that test would conflict directly with *Kisor*." *Dupree*, 57 F.4th at 1275.

To be sure, the analogy between agency rules and Guidelines commentary is not perfect, "because Congress has a role in promulgating the Guidelines," *Maloid*, 71 F.4th at 807–08 (quoting *Stinson*, 508 U.S. at 44), and Congress ordinarily reviews commentary amendments too, see *Dupree*, 57 F.4th at 1281 (Pryor, C.J., concurring). But those facts do not justify greater deference here. For one thing, the analogy has only become more apt: Congress today plays a lesser role in Guidelines promulgation than it did when *Stinson* was decided, and a greater role in reviewing other agency rules. "[A]fter the Congressional Review Act, Congress's involvement in the promulgation of Sentencing Guidelines is not materially different than its role in the promulgation of agency regulations." John S. Acton, *The Future of Judicial Deference to the Commentary of the United States Sentencing Guidelines*, 45 Harv. J.L. & Pub. Pol'y 349, 360 (2022). What's more, "the Commission's rules of procedure and the underlying statutes do not *require* that commentary revisions undergo the same process as guideline revisions." *Dupree*, 57 F.4th at 1281 (Pryor, C.J., concurring). In any event, whatever its imprecision, this analogy was authoritatively adopted in *Stinson*, making clear that Auer deference *as it operates elsewhere* applies to Guidelines commentary too. See *id.*

There is also powerful reason to apply at least as much judicial scrutiny in this context as in any other: The Guidelines—and how they are interpreted—directly dictate how long people will spend in federal prison. See *Castillo*, 69 F.4th at 663–64. And unthinking deference "has no role to play when liberty is at stake." *Guedes* v. *Bureau of Alcohol, Tobacco, Firearms & Explosives*, 140 S. Ct. 789, 790 (2020) (Gorsuch, J., respecting denial of certiorari). "[A]s this is a criminal case, and applying *Auer* would extend [Mr. Coates's] time in prison, alarm bells should be going off." *United States* v. *Havis*, 907 F.3d 439, 450 (6th Cir. 2018) (Thapar, J., concurring), *vacated on reh'g en*

banc, 927 F.3d 382 (6th Cir. 2019) (per curiam). "Applying *Auer* here … would both transfer the judiciary's power to say what the law is to the Commission and deprive the judiciary of its ability to check the Commission's exercise of power," thus eroding the separation of powers. *Id.* at 450–51. And while, "in criminal cases, ambiguity typically favors the defendant," applying "*Auer* would mean that rather than benefiting from any ambiguity in the Guidelines, [a defendant] would face the possibility of more time in prison than he otherwise would. So in this context, *Auer* not only threatens the separation of powers but also endangers fundamental legal precepts as well." *Id.* at 451. At a minimum, these considerations militate against preserving, in this context alone, the lax deference approach that *Kisor* rejected.

B. Under *Kisor*, Mr. Coates prevails.

Under the Guidelines, the "pattern of activity" enhancement applied below is a "specific offense characteristic" that must be based on relevant conduct. Only by deferring to the commentary, which unreasonably departs from the Guidelines' own instructions, could the courts below conclude otherwise.

Kisor instructs that "the possibility of deference can arise only if a regulation is genuinely ambiguous … even after a court has resorted to all the standard tools of interpretation" like "text, structure, history, and purpose." 139 S. Ct. at 2414–15. If those tools yield a clear meaning, "a court has no business deferring to any other reading, no matter how much the agency insists it would make more sense." *Id.* at 2415.

Here, the Guidelines' text and structure, analyzed as "if [there were] no agency to fall back on," establish "only one reasonable construction," *id.*: Only relevant conduct can trigger § 2G2.2(b)(5)'s pattern enhancement. "After determining the appropriate offense guideline," a sentencing court must "determine the applicable guideline range in accordance with § 1B1.3 (Relevant Conduct)." § 1B1.2(b). In turn, § 1B1.3 directs that "[u]nless otherwise specified … specific offense characteristics"—*i.e.*, offense-specific increases

or decreases from the base offense level, *e.g.*, *United States* v. *Carter*, 19 F.4th 520, 529 (1st Cir. 2021)—"shall be determined on the basis of" relevant conduct. § 1B1.3(a). The word "shall," of course, "is mandatory and normally creates an obligation impervious to … discretion." *Kingdomware Techs., Inc.* v. *United States*, 136 S. Ct. 1969, 1977 (2016) (cleaned up). So unless another Guideline says otherwise, the district court "*shall* (or *must*)," *id.*, determine any specific offense characteristics based solely on relevant conduct.

And the pattern enhancement is a specific offense characteristic. Section 2G2.2 lists the enhancement as one of seven "Specific Offense Characteristics" for this offense. § 2G2.2(b)(5). Thus, whether this enhancement applies "shall be determined on the basis of" relevant conduct alone. § 1B1.3(a); see *United States* v. *Surratt*, 87 F.3d 814, 819 (6th Cir. 1996) (the pattern enfacement's "placement … under the listing of 'Specific Offense Characteristics' confines its application to … activities related to the offense of conviction"); accord *United States* v. *Chapman*, 60 F.3d 894, 901 (1st Cir. 1995). And there is no contention that Mr. Coates's prior offenses were relevant conduct.

In nevertheless holding that the pattern enhancement applies here, the Tenth Circuit deferred under *Stinson* to the Commission's commentary, which says the enhancement applies "whether or not" the misconduct at issue "(A) occurred during the course of the offense; (B) involved the same minor; or (C) resulted in a conviction for such conduct." § 2G2.2, cmt. (n.1). The court acknowledged the "presumption that only conduct related to the underlying offense will be used in evaluating specific offense characteristics." Pet. App. 9a. But it emphasized that this relevant-conduct restriction applies "[u]nless otherwise specified," and it concluded that Commission commentary—not just other Guidelines—can "specif[y]" a departure from this rule. *Id.*

Kisor's rigorous approach forecloses that conclusion. Text and structure show that the "[u]nless otherwise

specified" carve-out is triggered only by specific language in the Guidelines themselves. After laying out the relevant-conduct rule (including this "otherwise specified" caveat), § 1B1.3(a) states a catchall provision allowing the sentencing court to consider "any other information specified in the applicable guideline." § 1B1.3(a)(4). And traditional interpretive tools teach that, when a statute or rule uses this structure—"A, B, or any other C"—category C's limitations apply to A and B as well. *E.g.*, *United States* v. *Standard Brewery, Inc.*, 251 U.S. 210, 218 (1920). So when paragraph (a)(4) says "any *other* information specified *in the applicable guideline*," it reflects that the rest of subsection (a)—including the "[u]nless otherwise specified" language—refers to "the applicable guideline" too.

The Guidelines' broader structure confirms the point. As the Tenth Circuit has elsewhere acknowledged, the relevant-conduct rule is a "basic structural norm of the Guidelines system." *United States* v. *Allen*, 488 F.3d 1244, 1256 (10th Cir. 2007). Given that norm's importance, it makes no sense to read the "[u]nless otherwise specified" carveout as giving the Commission *carte blanche* to use informal commentary to write exceptions into § 1B1.3(a)'s formal requirements. Even the Commission's own commentary reflects this limitation: The "[u]nless otherwise specified" language merely makes clear that § 1B1.3(a) does not trump "more explicit instructions in the context of a specific guideline," as when other "guidelines … are explicit as to the specific factors to be considered." § 1B1.3, cmt. (background).

In short, the Tenth Circuit's *Stinson* analysis fails under *Kisor*—either because the Guidelines are simply unambiguous, or because the commentary's attempted expansion does not "fall within the bounds of reasonable interpretation." 139 S. Ct. at 2416 (cleaned up).

III. The question presented is important and recurring.

Whether *Stinson* or *Kisor* governs is "meaningful to federal courts' continuing reliance on Guidelines commentary when sentencing criminal defendants," and is thus a question with "far-reaching results." *Morse* Reh'g Order 3 (Niemeyer, J., supporting the denial of rehearing en banc). After all, this issue arises constantly. In 2021, for example, over 57,000 people were sentenced in federal court.[2] And the Commission has provided commentary to help courts interpret almost every Guideline. That means Guidelines issues—and interpretations reflected in Commission commentary—can potentially arise in tens of thousands of cases each year. In 2022, over 1,600 people were sentenced using § 2G2.2 alone.[3]

And these issues have real impacts on people's lives. "[D]istrict courts must begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process." *Gall* v. *United States*, 552 U.S. 38, 50 n.6 (2007). And that is what district judges do: From 2012 through 2021, judges imposed a within-Guidelines sentence 75% of the time.[4] Thus, determining the correct Guidelines range is a weighty task. "Any amount of actual jail time is significant and has exceptionally severe consequences for the incarcerated individual and for society which bears the direct and indirect costs of incarceration." *Rosales-Mireles* v. *United States*, 138 S. Ct. 1897, 1907 (2018) (cleaned up). Whether a sentence should be months or years longer or shorter—based on an interpretation that would not withstand scrutiny in a civil case dealing with money or property instead of liberty—is thus a vitally important question. "[A]dministrative law doctrines must take account of the far-reaching influence

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[2] U.S. Sentencing Comm'n, *Fiscal Year 2021 Overview of Federal Criminal Cases* at 3 (Apr. 2022), https://shorturl.at/sLNSX.

[3] U.S. Sentencing Comm'n, *2022 Sourcebook of Federal Sentencing Statistics* (2022).

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

of agencies and the opportunities such power carries for abuse," *Kisor*, 139 S. Ct. at 2423, and the Commission's power over many Americans is far-reaching indeed.

Allowing this split to persist also undermines the purpose of the Guidelines themselves, which "assist federal courts across the country in achieving uniformity and proportionality in sentencing." *Rosales-Mireles*, 138 S. Ct. at 1908. The Guidelines cannot bring uniformity if the courts do not apply them uniformly. As things stand, commentary nearly always controls in some circuits, while other courts look mainly to the Guidelines themselves. That result produces arbitrary sentencing disparities.

IV. This case is a better vehicle than other denied or pending petitions.

This case is an ideal vehicle. The question presented was preserved at each level, was squarely addressed below, does not depend on any disputed facts, and dictates the correct Guidelines range here. And the proper Guidelines calculation is so important that, "when a defendant is sentenced under an incorrect Guidelines range," even *unpreserved* calculation errors generally warrant correction, *Rosales-Mireles*, 138 S. Ct. at 1907—meaning the preserved error here easily warrants a remand for resentencing.

Although the Court has denied other petitions raising the same question, those cases were poor vehicles. In the most recent case, the "petitioner ha[d] been released from prison and so his challenge [was arguably] moot." Br. in Opp. 8, 19–21, *Ratzloff* v. *United States*, No. 23-310 (cert denied Jan. 8, 2024). What's more, the Guideline at issue in *Ratzloff* could have applied to the petitioner for at least two reasons independent of the commentary, see *id.* at 11–12, and the petitioner had changed his argument about whether the Guideline was ambiguous. *Id.* at 15. None of that is true here.

Other recent petitions, both denied and pending, have involved inchoate offenses under § 4B1.2's career-offender Guideline. See Pet. i, *Lomax* v. *United States*, No. 22-644 (cert. denied Feb. 21, 2023); Pet. i,

Vargas v. *United States*, No. 23-5875 (pending). The Commission recently amended that Guideline to incorporate the former commentary language on inchoate offenses into the Guideline itself, thus mooting the question presented as relevant there. See Br. in Opp. 3, *Vargas*, No. 23-5875; U.S. Sentencing Comm'n, *Amendments to the Sentencing Guidelines* 55 (Effective November 1, 2023), (Apr. 27, 2023), https://shorturl.at/ejvQW. *Vargas* also held alternatively that a *Kisor* analysis would produce the same result, 74 F.4th at 690, so the level of deference did not dictate the outcome there.

Another pending petition similarly involves language in § 4B1.2 that the Commission recently amended. See Pet. 16, *Maloid* v. *United States*, No. 23-6150. By contrast, the Commission has not resolved or proposed to resolve the conflict between the Guideline and commentary applicable here. See generally *Notice of Proposed 2023–2024 Amendments*, 88 Fed. Reg. 89142 (Dec. 26, 2023).

This case is also a better vehicle than the pending petition in *Choulat* v. *United States*, No. 23-5908. At least one court of appeals has already held that the Guideline at issue in *Choulat* "deserves deference" even under *Kisor*, see *United States* v. *Perez*, 5 F.4th 390, 390, 395–99 (3d Cir. 2021), so the question presented is not dispositive there. Finally, the pending petition in *Netro-Perales* v. *United States* does not contend that the petitioner's sentence depended on deference to the relevant commentary. See Pet. 7, No. 23-6157 (filed Nov. 29, 2023).

In short, this case is a superior vehicle to resolve this entrenched split among the circuits.

CONCLUSION

For these reasons, the petition should be granted.

Respectfully submitted,

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