No. _____

In the

Supreme Court of the United States

_____

Myron Dreun Cook,
Petitioner,

v.

United States of America,
Respondent.

_____

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

_____

PETITION FOR A WRIT OF CERTIORARI

_____

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QUESTION PRESENTED

Does *Stinson v. United States* still accurately state the level of deference due to the Commentary of the Federal Sentencing Guidelines?

PARTIES TO THE PROCEEDING

Petitioner is Myron Dreun Cook, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Federal Statutes

United States Sentencing Guidelines

Rules

Constitutional Provisions

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioner Myron Dreun Cook seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The unpublished opinion of the court of appeals is found at *United States v. Cook,* No. 24-10631, 2025 WL 561412 (5th Cir. February 20, 2025). It is reprinted in Appendix A to this Petition. The Petition arises from the judgment of conviction and sentence, which is attached as Appendix B.

JURISDICTION

The court of appeals issued an opinion affirming the district court judgment on February 20, 2025. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

RELEVANT STATUTES, GUIDELINES AND CONSTITUTIONAL PROVISIONS

28 U.S.C. §994(a) states in relevant part:

> (a) The Commission, by affirmative vote of at least four members of the Commission, and pursuant to its rules and regulations and consistent with all pertinent provisions of any Federal statute shall promulgate and distribute to all courts of the United States and to the United States Probation System—
>
> (1) guidelines, as described in this section, for use of a sentencing court in determining the sentence to be imposed in a criminal case, including—
>
> ***

(B) a determination as to the appropriate amount of a fine or the appropriate length of a term of probation or a term of imprisonment …

Federal Sentencing Guideline 2K2.1(a) provides in relevant part:

(a) Base Offense Level (Apply the Greatest)

***

(4) 20, if--

(A) the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense; or

(B) the (i) offense involved a (I) semiautomatic firearm that is capable of accepting a large capacity magazine; or (II) firearm that is described in 26 U.S.C. § 5845(a); and (ii) defendant (I) was a prohibited person at the time the defendant committed the instant offense; (II) is convicted under 18 U.S.C. § 922(d), § 932, or § 933; or (III) is convicted under 18 U.S.C. § 922(a)(6) or § 924(a)(1)(A) and committed the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person;

***

Application Notes

***

<2. Semiautomatic Firearm That Is Capable of Accepting a Large Capacity Magazine.--For purposes of subsections (a)(1), (a)(3), and (a)(4), a "semiautomatic firearm that is capable of accepting a large capacity magazine" means a semiautomatic firearm that has the ability to fire many rounds without reloading because at the time of the offense (A) the firearm had attached to it a magazine or similar device that could accept more than 15 rounds of ammunition; or (B) a magazine or similar device that could accept more than 15 rounds of ammunition was in close proximity to the firearm. This definition does not include a semiautomatic firearm with an attached tubular device capable of operating only with .22 caliber rim fire ammunition.>

Article III of the United States Constitution provides in relevant part:

Section 1

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

***

Section 2

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States…to Controversies to which the United States shall be a Party…

STATEMENT OF THE CASE

A. Facts and Proceedings in District Court

On January 2, 2021, police stopped Petitioner Myron Cook in his car and found a 9 millimeter pistol outfitted with a 17-round magazine. *See* (Record in the Court of Appeals, at 188). Because he had previously been convicted of certain drug felonies, the government obtained an indictment for possessing a firearm after a felony conviction, 18 U.S.C. §922(g)(1). *See* (Record in the Court of Appeals, at 11, 188). He pleaded guilty without a plea agreement. *See* (Record in the Court of Appeals, at 58-63).

The Presentence Report applied a six-level enhancement to the base offense level because it counted a 17-round magazine as a "large capacity magazine." *See* (Record in the Court of Appeals, at 190); USSG §2K2.1(a)(4). It therefore calculated a Guideline range of 92-115 months imprisonment, the product of a final offense level of 24 and a criminal history category of V. *See* (Record in the Court of Appeals, at 200). However, the court at sentencing reduced the offense level by two points for acceptance of responsibility, calculated a range of 77-96 months imprisonment, and announced its intent to impose 87 months. *See* (Record in the Court of Appeals, at 176-177). But then the government agreed to move for an additional one-point reduction for acceptance of responsibility, which moved the range to 70-87 months imprisonment. *See* (Record in the Court of Appeals, at 179). The court then imposed a sentence of 78 months, the midpoint of the range it believed applicable. *See* (Record in the Court of Appeals, at 179). It did not say the sentence would have

been the same under different Guidelines. *See* (Record in the Court of Appeals, at 176-180).

B. Appellate Proceedings

Petitioner appealed, arguing that the district court plainly erred in applying the enhancement for a large capacity magazine found in USSG §2K2.1(a)(4). *See* Initial Brief, in *United States v. Cook*, No. 24-10631, 2024 WL 4881358 (5th Cir. Filed Nov. 19, 2024)("Initial Brief"). He conceded that the Fifth Circuit had previously found the enhancement applicable in light of Application Note Two to §2K2.1, which defines every magazine capable of holding at least 15 rounds as a "large capacity magazine." *See* Initial Brief, at *4; *United States v. Martin*, 119 F.4th 410 (5th Cir. 2024). But he contended that the Commentary did not provide the most persuasive reading of the text, and that when all tools of statutory construction were employed, the term "large capacity magazine" referred to a magazine larger than the industry standard, which Petitioner's was not. *See id.* at **9-11. And he argued that *Kisor v. Wilkie*, 588 U.S. 558, 574–75 (2019), required the court to consider all traditional tools of statutory construction before deferring to Guideline Commentary, notwithstanding *Stinson v. United States*, 508 U.S. 36 (1993). *See id.* at **7-8.

The court of appeals found the issue foreclosed by circuit precedent and affirmed. *See* [Appx. A]; *United States v. Cook,* No. 24-10631, 2025 WL 561412 (5th Cir. February 20, 2025)(unpublished).

REASONS FOR GRANTING THE PETITION

The courts of appeals have divided as to the effect that *Kisor v. Wilkie* has on the validity of *Stinson v. United States*. That question affects the outcome of this case.

Section 994(a)(1) of Title 28 authorizes the Sentencing Commission to promulgate Guidelines for the sentencing of federal offenders. This Court has held that those Guidelines are advisory, but has also held that district courts must correctly calculate them. *See United States v. Booker*, 543 U.S. 220 (2005); *Rita v. United States*, 551 U.S. 338 (2007). Section 944 also calls for "general policy statements regarding application of the guidelines…" 28 U.S.C. §994(a)(2). The Commission has produced Application Notes or Commentary construing every Guideline it has promulgated.

In *Stinson v. United States*, 508 U.S. 36 (1993), this Court held that courts construing a Guideline must follow the Commentary unless "commentary and the guideline it interprets are inconsistent in that following one will result in violating the dictates of the other…" *Stinson*, 508 U.S. at 43. It described this circumstance as one of "flat inconsistency." *Id*. In doing so, it applied its prior holding in *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), which governs an agency's interpretations of its own legislative rule. Under *Seminole Rock*, "provided an agency's interpretation of its own regulations does not violate the Constitution or a federal statute, it must be given 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" *Stinson*, 508 U.S. at 43.

Kisor v. Wilkie, 588 U.S. 558 (2019), however, emphasized important limitations in *Seminole Rock*, casting doubt on *Stinson*. *See Kisor*, 588 U.S. at 568, n. 3 (citing *Stinson Seminole Rock*)(plurality op.). *Kisor* holds that an agency's interpretation of its own regulation is not entitled to deference until a reviewing court has "exhaust(ed) all the 'traditional tools' of construction," and only if the regulation thereafter remains "genuinely ambiguous." *Kisor*, 588 U.S. at 574-575. The "court must carefully consider the text, structure, history, and purpose of a regulation, in all the ways it would if it had no agency to fall back on." *Id*. at 575.

Following *Kisor*, the circuits have reached opposite conclusions as to whether *Kisor* upended *Stinson*. ***Compare*** *United States v. Dupree*, 57 F.4th 1269, 1275 (11th Cir. 2023)(en banc)(*Kisor* requires reevaluation of *Stinson*); *United States v. Nasir*, 17 F.4th 459, 471 (3d Cir. 2021)(same); *United States v. Riccardi*, 989 F.3d 476, 479 (6th Cir. 2021); *United States v. Castillo*, 69 F.4th 648, 656 (9th Cir. 2023)(same) ***with*** *United States v. Vargas*, 74 F.4th 673, 683 (5th Cir. 2023) (en banc)(*Stinson* unaffected); *United States v. Moses*, 23 F.4th 347, 357 (4th Cir. 2022)(same); *United States v. White*, 97 F.4th 532, 539 (7th Cir. 2024)(same); *United States v. Maloid*, 71 F.4th 795, 806 (10th Cir. 2023)(same).

This circuit split merits review. It is balanced and widespread, and therefore unlikely to resolve spontaneously. Further, the courts of appeals have themselves acknowledged the conflicts associated with this issue, *see White*, 97 F.4th at 539; *Vargas*, 74 F.4th at 684, and at least one commentator has noted a circuit split. Kevin O. Leske, *A New Split in the Rock: Reflexive Deference under* Stinson *or*

Cabined Deference under Kisor, 74 Admin. L. Rev. 761 (Fall 2022)(identifying and discussing split).

Finally, the issue is important and recurrent. The Guideline Manual is replete with Commentary that interprets the Guidelines in ways that the reader would not predict from the text. *See* USSG §2B1.1, comment. (n. (3)(E)(i))("loss" defined to be no less than $500 multiplied by the number of access devices involved in the offense, irrespective of amount defendant steals or intends to steal); USSG §2B2.1, comment. (n. (4)(C)(ii))(theft from certain mail containers defined to involve ten victims, irrespective of the number actually affected); USSG §2B3.1, comment. (n. 2)(fake gun defined as "dangerous weapon); USSG §2K2.1, comment. (n. 10)(excluding certain convictions from the term "felony convictions"); USSG §2S1.1, comment. (n. 1)(defining "laundering funds" to include any transaction in ill-gotten funds, whether or not undertaken with intent to make criminal proceeds appear innocent). Accordingly, the differing views about *Kisor* and *Stinson* can be expected to frustrate the goal of a uniform set of Sentencing Guidelines, and accordingly to frustrate the goal of sentencing uniformity generally. *See Rita*, 551 U.S. at 349.

The level of deference paid to the Guidelines is likely dispositive in this case, which turns on whether a 17-bullet magazine is a "large capacity magazine." Guideline 2K2.1 provides for an enhanced base offense level:

> if--
> (A) the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense; or
> (B) the (i) offense involved a (I) semiautomatic firearm that is capable of accepting **a large capacity magazine**; or (II) firearm that is

> described in 26 U.S.C. § 5845(a); and (ii) defendant (I) was a prohibited person at the time the defendant committed the instant offense; (II) is convicted under 18 U.S.C. § 922(d), § 932, or § 933; or (III) is convicted under 18 U.S.C. § 922(a)(6) or § 924(a)(1)(A) and committed the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person…

USSG §2K2.1(a)(4)(emphasis added). The text of the Guideline does not expressly define "large capacity magazine," but the Commentary does. Application Note Two says:

> Semiautomatic Firearm That Is Capable of Accepting a Large Capacity Magazine.--For purposes of subsections (a)(1), (a)(3), and (a)(4), a "semiautomatic firearm that is capable of accepting a large capacity magazine" means a semiautomatic firearm that has the ability to fire many rounds without reloading because at the time of the offense (A) the firearm had attached to it a magazine or similar device that could **accept more than 15 rounds of ammunition**; or (B) a magazine or similar device that could accept more than 15 rounds of ammunition was in close proximity to the firearm. This definition does not include a semiautomatic firearm with an attached tubular device capable of operating only with .22 caliber rim fire ammunition.

USSG §2K2.1, comment. (n.2) (emphasis added). So while the text says only that the enhancement applies to "a large capacity magazine," the Commentary says that it applies if the magazine accepts 15 rounds. The court below has held that the Commentary continues to bind the court in the absence of a flat inconsistency between the Commentary and text of the Guideline, and has further held that the Commentary defining 15 rounds as a "large capacity magazine" does not present such an inconsistency. *See United States v. Martin*, 119 F.4th 410 (5th Cir. 2024).

But in the absence of *Stinson* -- that is, in a framework that required the courts to exhaust tools of statutory construction before deferring to the Commentary

-- a 17-bullet magazine would not likely qualify for enhancement as a "large capacity magazine." When the courts' traditional tools of interpretation are exhausted, it becomes clear that a "large capacity magazine" refers to one that is larger than the industry standard. A 15-round magazine (and a 17-round magazine, at issue here) is a perfectly ordinary sized magazine in the contemporary consumer market. *Duncan v. Becerra*, 970 F.3d 1133, 1142 (9th Cir. 2020) ("Notably, [large capacity magazines] are commonly used in many handguns, which the Supreme Court has recognized as the 'quintessential self-defense weapon.'")(quoting *District of Columbia v. Heller*, 554 U.S. 570, 629 (2008)), *vacated en banc* 988 F.3d 1209 (9th Cir. 2021*), on rehearing en banc* 19 F.4th 1087 (9th Cir. 2021), *vacated and remanded by* 142 S.Ct. 2895 (2022), *on remand* 49 F.4th 1228, (9th Cir. 2022)(en banc).

Two "traditional tools of construction" – structure and history – make clear that a "large capacity magazine" must be large in relation to the industry standard. As to history, from 1995 through 2004, the federal government had in force an "assault weapons ban," which ban utilized 18 U.S.C. §921(a)(30) to define "semiautomatic assault weapon." *See* 18 U.S.C. §921(a)(30)(1995). From November 1, 2005 through November 1, 2006, Guideline 2K2.1 provided an enhanced base offense level when the defendant possessed either a weapon that was either defined in 26 U.S.C. §5845(a) or referenced in then-§921(a)(30). USSG §2K2.1(a)(4)(B)(1995). Shortly after the expiration of the ban, the Commission promulgated the current language -- "large capacity magazine" -- in place of a

reference to the former §921(a)(30). *See* USSG, App. C, Amend. 691 (Nov. 1, 2006). The history of the Guideline text thus supports an inference that the enhancement targeted a small class of exceptionally dangerous weapons. That intent is not consistent with a rule that provides extra punishment for mine-run semi-automatic weapons.

Even ignoring the Guideline's history, its structure strongly contravenes an enhancement for magazines that are not large in relation to the most common weapons available for lawful consumer purchase. The current §2K2.1(a)(4)(B) provides two alternative means to achieve a base offense level of 20: a "large capacity magazine," §2K2.1(a)(4)(B)(I), and "a firearm that is described in 26 U.S.C. § 5845(a)," §2K2.1(a)(4)(B)(II). The latter defines a class of exceptionally dangerous weapons such as sawed-off shotguns, explosive devices, silencers, and machineguns. The Commission's choice to place these two options in parallel positions in the Guideline, generating identical results, suggests that the weapons referenced by the term "large capacity magazines" are similar to those found in §5845(a). That is to say, the structure suggests an intent to capture only those weapons that are exceptionally dangerous and either inherently illegal, strictly regulated, or skirting the boundaries of illegality. That class does not include industry-standard semi-automatic firearms.

Petitioner did not object to the enhancement in district court, a fact that probably presents an insurmountable obstacle to a plenary grant of certiorari in this case. *See* Sup. Ct. R. 10. Nonetheless, the circuit split detailed above is worthy of

certiorari, and may well be presented to the court while the present case remains pending. This Court should grant certiorari to resolve the current status of *Stinson*, and should hold the instant case pending the outcome. *See Lawrence on behalf of Lawrence v. Chater*, 516 U.S. 163 (1998).

CONCLUSION

Petitioner respectfully submits that this Court should grant *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted this 19th day of May, 2025.

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