

No. 25-5343

In the Supreme Court of the United States

KENDRICK JARRELL BEAIRD, PETITIONER

v.

UNITED STATES OF AMERICA

*ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT*

**BRIEF FOR THE UNITED STATES
SUPPORTING VACATUR**

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QUESTION PRESENTED

Whether *Stinson v. United States*, 508 U.S. 36 (1993), still correctly states the rule for the deference that courts must give the commentary to the Sentencing Guidelines.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statutes, guidelines, and rules involved	1
Introduction	1
Statement.....	3
A. Legal background	4
B. Factual and procedural background	8
Summary of argument	11
Argument.....	14
<i>Stinson v. United States</i> , understood in light of <i>Kisor</i> <i>v. Wilkie</i> , continues to frequently require deference to guidelines commentary	14
A. <i>Stinson</i> adopted <i>Seminole Rock</i> deference in the context of Sentencing Commission commentary interpreting its guidelines under the Sentencing Reform Act.....	15
1. <i>Stinson</i> reasoned that <i>Seminole Rock</i> provides the appropriate standard for deference to guidelines commentary	16
2. <i>Stinson</i> adopted the entirety—not a caricature—of the <i>Seminole Rock</i> approach.....	18
3. No intervening developments have undermined <i>Stinson</i> ’s invocation of <i>Seminole Rock</i>	19
B. The <i>Seminole Rock</i> approach, as explicated by <i>Kisor</i> , will frequently require deference to guidelines commentary	22
1. Commentary explains the guidelines and frequently provides a reasonable interpretation of genuine ambiguity in guideline text	22
2. The character and context of Commission commentary will entitle it to controlling weight.....	25
C. The proper course is to vacate the judgment below and remand for further proceedings	28

IV

Table of Contents—Continued:	Page
Conclusion.....	33
Appendix — Statutory provisions, guidelines, and rules.....	1a

TABLE OF AUTHORITIES

Cases:

<i>Beckles v. United States</i> , 580 U.S. 256 (2017).....	18
<i>Bowles v. Seminole Rock & Sand Co.</i> , 325 U.S. 410 (1945)	2, 6, 9, 11, 12, 14-19
<i>Braxton v. United States</i> , 500 U.S. 344 (1991)	19, 25
<i>Buford v. United States</i> , 532 U.S. 59 (2001)	25
<i>Cutter v. Wilkinson</i> , 544 U.S. 709 (2005)	32
<i>Gall v. United States</i> , 552 U.S. 38 (2007)	21
<i>Kimbrough v. United States</i> , 552 U.S. 85 (2007)	27
<i>Kisor v. Wilkie</i> , 588 U.S. 558 (2019)	2, 3, 9-20, 22, 24-27, 29
<i>Loper Bright Enters. v. Raimondo</i> , 603 U.S. 369 (2024)	31
<i>Mistretta v. United States</i> , 488 U.S. 361 (1989)	4, 20, 27, 30
<i>Molina-Martinez v. United States</i> , 578 U.S. 189 (2016)	32
<i>Peugh v. United States</i> , 569 U.S. 530 (2013).....	21
<i>Stinson v. United States</i> , 508 U.S. 36 (1993)	2, 4, 6, 7, 11-27, 29, 30
<i>Tapia v. United States</i> , 564 U.S. 319 (2011)	4
<i>United States v. Booker</i> , 543 U.S. 220 (2005)	4, 21, 22
<i>United States v. Holman</i> , 171 F.4th 303 (4th Cir. 2026).....	26, 27, 31
<i>United States v. Martin</i> , 119 F.4th 410 (5th Cir. 2024), cert. denied, 145 S. Ct. 1454 (2025)	28, 31

V

Cases—Continued:	Page
<i>United States v. McIntosh</i> , 124 F.4th 199 (3d Cir. 2024)	28, 31
<i>United States v. Trumbull</i> , 114 F.4th 1114 (9th Cir. 2024), cert. denied, 145 S. Ct. 1952 (2025)	28, 32
<i>United States v. Vargas</i> , 74 F.4th 673 (5th Cir. 2023), cert. denied, 144 S. Ct. 828 (2024)	3, 14, 28-30
Constitution, statutes, guidelines, and rules:	
U.S. Const. Amend. VI	4, 21
Administrative Procedure Act, 5 U.S.C. 551 <i>et seq.</i> , 701 <i>et seq.</i>	16
5 U.S.C. 553	7, 16
5 U.S.C. 553(b)	5
5 U.S.C. 553(c)	5
Congressional Review Act, 5 U.S.C. 801 <i>et seq.</i>	20
5 U.S.C. 801-808	20
5 U.S.C. 801(a)(1)(A)	20
5 U.S.C. 801(a)(3)(A)	20
5 U.S.C. 801(a)(4)	20
5 U.S.C. 801(b)(1)	21
5 U.S.C. 802	21
5 U.S.C. 807-808	20
Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, Ch. II, 98 Stat. 1987	4
§ 235(a)(1)(B)(i), (ii)(I) and (III), 98 Stat. 2031-2032	5
18 U.S.C. 3553(b)	4, 23, 3a
18 U.S.C. 3553(b)(1)	4, 3a
18 U.S.C. 3742(f)(1)	21
28 U.S.C. 991(a)	4, 6, 26-27

VI

Statutes, guidelines, and rules—Continued:	Page
28 U.S.C. 991(b)(1)	26
28 U.S.C. 994	5, 6a
28 U.S.C. 994(a)	6, 26, 6a
28 U.S.C. 994(a)(1)	4, 23, 6a
28 U.S.C. 994(a)(2)	4, 23, 6a
28 U.S.C. 994(b)(1)	4, 7a
28 U.S.C. 994(o)	4, 27, 28, 8a
28 U.S.C. 994(p)	5, 20, 23, 8a
28 U.S.C. 994(w)	27, 9a
28 U.S.C. 994(x)	5, 16, 23, 10a
Small Business Regulatory Enforcement Fairness	
Act of 1996, Pub. L. No. 104-121, Tit. II, § 251,	
110 Stat. 868-874	20
18 U.S.C. 922(g)(1)	3, 8
U.S. Sentencing Guidelines:	
Sentencing Guidelines Manual (1987)	23
Ch. 1:	
§ 1B1.6 (1987)	4
§ 1B1.6	4
§ 1B1.7 (1987)	2, 4, 23
§ 1B1.7	2, 4, 5, 23, 10a
Ch. 2:	
§ 2K2.1	8, 10, 28, 11a
§ 2K2.1(a)(3)	8, 9, 31, 11a
§ 2K2.1, comment. (nn.1-13)	23
§ 2K2.1, comment. (n.2)	9, 13a
Ch. 4:	
§ 4B1.2	6
Fed. R. Crim. P. 52(a)	32
U.S. Sent. Comm'n R.:	
Rule 2.2(b)	6, 26, 28, 14a

VII

Rules—Continued:	Page
Rule 4.1	6, 24, 14a
Rule 4.3	6, 23, 24, 15a
Miscellaneous:	Page
52 Fed. Reg.:	
p. 18,046 (May 13, 1987)	5
p. 44,674 (Nov. 20, 1987)	6
53 Fed. Reg. 15,530 (Apr. 29, 1988)	6
54 Fed. Reg.:	
p. 9122 (Mar. 3, 1989)	6
p. 21,348 (May 17, 1989)	5
60 Fed. Reg.:	
p. 14,054 (Mar. 15, 1995)	5
p. 25,074 (May 10, 1995)	5
62 Fed. Reg. 38,598 (July 18, 1997)	6, 26
71 Fed. Reg.:	
p. 4782 (Jan. 27, 2006)	9
p. 28,063 (May 15, 2006)	9

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OPINION BELOW

The opinion of the court of appeals (J.A. 1-3) is available at 2025 WL 1410410.

JURISDICTION

The judgment of the court of appeals was entered on May 15, 2025. The petition for a writ of certiorari was filed on August 11, 2025, and granted on April 20, 2026. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES, GUIDELINES, AND RULES INVOLVED

Pertinent statutes, sentencing guidelines, and rules are reproduced in an appendix to this brief. See App., *infra*, 1a-15a.

INTRODUCTION

Throughout the nearly 40-year history of the federal Sentencing Guidelines, a congressionally reviewed guide-

line has made clear that “Commentary that accompanies the guideline sections * * * may interpret the guideline or explain how it is to be applied.” Sentencing Guidelines § 1B1.7 (1987, 2025). Commentary supplies helpful guidance to the Probation Office, the parties, and the courts in applying complex guidelines provisions. And it can often be dispositive of interpretive disputes.

In *Stinson v. United States*, 508 U.S. 36 (1993), this Court incorporated the approach in *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), which governs deference to an agency’s interpretation of a legislative rule, as the proper approach for deference to guidelines commentary. See *Stinson*, 508 U.S. at 45. Such deference remains sound; if anything, the analogy that *Stinson* drew between guidelines and legislative rules is even stronger now that congressional-review requirements apply to both.

At the same time, this Court’s more recent decision in *Kisor v. Wilkie*, 588 U.S. 558 (2019), makes clear that *Stinson*’s incorporation of *Seminole Rock* deference should not be understood as “a caricature of the doctrine, in which deference is ‘reflexive,’” *id.* at 574 (citation omitted). In referencing *Seminole Rock* deference, *Stinson* quoted *Seminole Rock*’s “most classic formulation of the test—whether an agency’s construction is ‘plainly erroneous or inconsistent with the regulation,’” *ibid.* (quoting *Seminole Rock*, 325 U.S. at 414). See, *e.g.*, *Stinson*, 508 U.S. at 45. But whatever that language might seem to “suggest” “in a vacuum,” it is not a basis for disregarding the “limits inherent” in *Seminole Rock* deference. *Kisor*, 588 U.S. at 574.

Those limits, however, do not diminish the general utility of commentary as an illustrative and explanatory guide through the complex process of applying the guide-

lines. In providing such guidance, commentary will frequently identify “reasonable” interpretations of guidelines that are “genuinely ambiguous,” *Kisor*, 588 U.S. at 575, in their application to certain circumstances. When that happens, the commentary—which was adopted by the Sentencing Commission, embodies its expertise, and has typically gone through notice-and-comment and congressional review—has all of the “especially important markers” that would entitle it to “controlling weight,” *id.* at 576-577.

The court below, however, reached the untenable conclusion that “under *Stinson*, the commentary controls even unambiguous guidelines.” *United States v. Vargas*, 74 F.4th 673, 682 (5th Cir. 2023) (en banc), cert. denied, 144 S. Ct. 828 (2024). Allowing commentary to override unambiguous guideline text is the very “caricature” of *Seminole Rock* deference that the Court rejected in *Kisor*, 588 U.S. at 574. And while it is unlikely that clarification of that doctrinal point would result in a new sentence in this case, the proper course is to vacate the court of appeals’ judgment, remand, and allow the lower courts to address petitioner’s arguments for case-specific relief in the first instance.

STATEMENT

Following a guilty plea in the United States District Court for the Northern District of Texas, petitioner was convicted of possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1). J.A. 4-5. The district court sentenced petitioner to 72 months of imprisonment, to be followed by three years of supervised release. J.A. 6-7. The court of appeals affirmed. J.A. 1-3.

A. Legal Background

1. The Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, Ch. II, 98 Stat. 1987, “overhaul[ed] federal sentencing practices.” *Tapia v. United States*, 564 U.S. 319, 325 (2011). Among other measures aimed at making prison terms more determinate, Congress established the United States Sentencing Commission “as an independent commission in the judicial branch of the United States.” 28 U.S.C. 991(a); see *Tapia*, 564 U.S. at 325; *Mistretta v. United States*, 488 U.S. 361, 368, 384-397 (1989).

The Act directs the Commission, *inter alia*, to promulgate “guidelines,” which the Commission “periodically shall review and revise,” that “establish a sentencing range” based on offense and offender characteristics “for use of a sentencing court in determining the sentence to be imposed in a criminal case.” 28 U.S.C. 994(a)(1), (b)(1), and (o). The Act further directs the Commission to issue “general policy statements regarding application of the guidelines.” 28 U.S.C. 994(a)(2).

The Act also references the “official commentary of the Sentencing Commission.” 18 U.S.C. 3553(b); see *Stinson v. United States*, 508 U.S. 36, 41 (1993) (“Although the Sentencing Reform Act does not in express terms authorize the issuance of commentary, the Act does refer to it.”); cf. *United States v. Booker*, 543 U.S. 220, 226-227, 245 (2005) (invalidating 18 U.S.C. 3553(b)(1) on Sixth Amendment grounds). The annually published Sentencing Guidelines Manual has accordingly been structured, for each of the nearly 40 years in which it has existed, as a series of numbered guidelines and policy statements that are typically accompanied by commentary. See Sentencing Guidelines §§ 1B1.6, 1B1.7 (1987, 2025); see also *Stinson*, 508 U.S. at 41.

2. As the Commission has explained in a guideline entitled “Significance of Commentary,” which has been included in every version of the Guidelines Manual, the commentary following each guideline “may serve a number of purposes,” including to “interpret the guideline or explain how it is to be applied.” Sentencing Guidelines § 1B1.7 (2025). The “Significance of Commentary” guideline also warns that “[f]ailure to follow such commentary could constitute an incorrect application of the guidelines, subjecting the sentence to possible reversal on appeal.” *Ibid.*

The guideline on the significance of commentary, like all guidelines, was adopted pursuant to the procedural requirements of 28 U.S.C. 994. Under Section 994(x), promulgation of guidelines must comply with the notice-and-comment procedures for rulemaking by executive agencies (5 U.S.C. 553(b) and (c)). 28 U.S.C. 994(x). The Sentencing Reform Act also requires the Commission to “submit to Congress” not only its initial guidelines but also any amendments thereto, along with “a statement of the reasons therefor,” at least 180 days before they would become effective. 28 U.S.C. 994(p) (amendments); see Pub. L. No. 98-473, Tit. II, Ch. II, § 235(a)(1)(B)(i), (ii)(I) and (III), 98 Stat. 2031-2032 (initial guidelines); 52 Fed. Reg. 18,046, 18,110 (May 13, 1987) (submission of Section 1B1.7).

The statutory notice-and-comment and congressional-review requirements of 28 U.S.C. 994(p) and (x) do not apply to the Commission’s policy statements and commentary. Nonetheless, since its inception, the Commission has often submitted commentary to notice and comment and congressional review. See, *e.g.*, 60 Fed. Reg. 25,074, 25,087 (May 10, 1995); 60 Fed. Reg. 14,054, 14,055 (Mar. 15, 1995); 54 Fed. Reg. 21,348, 21,379 (May

17, 1989); 54 Fed. Reg. 9122, 9162 (Mar. 3, 1989); 53 Fed. Reg. 15,530, 15,530 (Apr. 29, 1988); 52 Fed. Reg. 44,674, 44,729 (Nov. 20, 1987) (commentary to Sentencing Guidelines § 4B1.2).

When it first adopted its formal internal rules of practice and procedure in 1997, the Commission expressly provided that it “will endeavor to provide, to the extent practicable, comparable opportunities for public input on * * * commentary,” U.S. Sent. Comm’n R. 4.3, and “shall endeavor to include amendments to * * * commentary in any submission of guideline amendments to Congress,” U.S. Sent. Comm’n R. 4.1. See 62 Fed. Reg. 38,598, 38,598-38,599 (July 18, 1997) (promulgating rules). The rules further codified preexisting practices by specifying that, as with guidelines text and policy statements, the “[p]romulgation of * * * official commentary[] and amendments thereto shall require the affirmative vote of at least four members [of the seven-member Commission] at a public meeting.” U.S. Sent. Comm’n R. 2.2(b); 62 Fed. Reg. at 38,598; see 28 U.S.C. 991(a), 994(a).

3. Six years after the Guidelines Manual was first published, this Court’s 1993 decision in *Stinson v. United States* addressed “the authoritative weight to be accorded to the commentary to the Sentencing Guidelines.” 508 U.S. at 40; see *id.* at 42-47. Quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), and citing other cases involving agency interpretations of legislative rules, the Court noted that it “ha[d] often stated, 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 45 (quoting *Bowles*, 325 U.S.

at 414). And the Court stated that “[a]ccording this measure of controlling authority to the commentary is consistent with the role the Sentencing Reform Act contemplates for the Sentencing Commission.” *Ibid.*

The Court explained that “[a]lthough the analogy is not precise because Congress has a role in promulgating the guidelines,” the correct approach to deference in the context of guidelines commentary was “that the commentary be treated as an agency’s interpretation of its own legislative rule.” *Stinson*, 508 U.S. at 44. Noting that the Commission “promulgates the guidelines by virtue of an express congressional delegation of authority for rulemaking, * * * and through the informal rulemaking procedures in 5 U.S.C. § 553,” the Court reasoned that “the guidelines are the equivalent of legislative rules adopted by federal agencies.” *Id.* at 44-45. And it observed that “[t]he functional purpose” of the guideline interpretations in commentary was “to assist in the interpretation and application of those rules, which are within the Commission’s particular area of concern and expertise and which the Commission itself has the first responsibility to formulate and announce.” *Id.* at 45.

The Court further reasoned that “the interpretations of the guidelines contained in the commentary represent the most accurate indications of how the Commission deems that the guidelines should be applied to be consistent with the Guidelines Manual as a whole as well as the authorizing statute.” *Stinson*, 508 U.S. at 45. And it explained that the Commission’s statutory responsibility to make periodic “revisions,” including “clarifying revisions,” to the guidelines could be carried out either through “amendments to guidelines provisions” or “amendment of the commentary, if the guideline which

the commentary interprets will bear the construction.” *Id.* at 46 (citation omitted).

B. Factual And Procedural Background

1. In October 2022, a Dallas police officer, while covertly conducting a routine crime-prevention investigation, saw petitioner pull a firearm from his waistband and point it at another person at an abandoned fast-food restaurant. Presentence Investigation Report (PSR) ¶ 10. When additional officers arrived, they recovered a Glock firearm, with an inserted magazine that was capable of holding 17 rounds of ammunition, from petitioner’s waistband. PSR ¶¶ 10, 18.

Petitioner told officers that he had received the firearm earlier that day and had been attempting to sell it. PSR ¶ 11. At the time, petitioner had four prior state felony convictions. PSR ¶¶ 31, 33, 35, 37. A federal grand jury in the Northern District of Texas indicted petitioner on one count of possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1). Indictment 1. Petitioner pleaded guilty to that count. J.A. 4.

2. The Probation Office calculated petitioner’s guidelines sentencing range to be 63-78 months of imprisonment. PSR ¶¶ 18-27, 93. That calculation was based in part on the application of Sentencing Guidelines § 2K2.1(a)(3), which enhances the base offense level for an unlawful-possession offense that, *inter alia*, “involved” a “semiautomatic firearm that is capable of accepting a large capacity magazine.” *Ibid.*; see PSR ¶ 18.

Section 2K2.1 does not contain an explicit definition of “large capacity magazine.” But when the Commission published, promulgated, and submitted to Congress the relevant text of Section 2K2.1(a)(3) in 2006, the Commission contemporaneously published its com-

mentary on the phrase for public notice and comment, adopted the commentary by majority vote, and submitted it for congressional review. See 71 Fed. Reg. 28,063, 28,069 (May 15, 2006) (notice of congressional submission); 71 Fed. Reg. 4782, 4789-4790 (Jan. 27, 2006) (notice of proposed amendment and commentary).

Application Note 2 of that commentary provides that, “[f]or purposes of * * * [Section 2K2.1](a)(3),” the phrase “‘semiautomatic firearm that is capable of accepting a large capacity magazine’ means,” *inter alia*, “a semiautomatic firearm that has the ability to fire many rounds without reloading because at the time of the offense * * * the firearm had attached to it a magazine or similar device that could accept more than 15 rounds of ammunition.” Sentencing Guidelines § 2K2.1, comment. (n.2) (emphasis omitted). Here, the Probation Office cited Application Note 2 and reported that petitioner “possessed a Glock firearm which had a magazine capable of holding 17 rounds of ammunition attached and inserted into it.” PSR ¶ 18.

3. Petitioner objected to the application of Section 2K2.1(a)(3), arguing that the Probation Office had erroneously “relied on commentary to which the court owes no deference under *Kisor v. Wilkie*, [588 U.S. 558] (2019).” D. Ct. Doc. 40, at 1 (May 14, 2024).

Kisor, while “uphold[ing]” *Seminole Rock* deference (also called “*Auer* deference”) despite a request to “overrule” it, 588 U.S. 563, had “reinforc[ed]” the “limits inherent in” the doctrine, *id.* at 574. *Kisor* had noted that “in a vacuum, [the Court’s] most classic formulation of the test” for deference to an agency interpretation of a legislative rule—“whether an agency’s construction is ‘plainly erroneous or inconsistent with the regulation,’ *Seminole Rock*, 325 U.S., at 414—may suggest a carica-

ture of the doctrine, in which deference is ‘reflexive.’” *Kisor*, 588 U.S. 574 (citation omitted). And *Kisor* had emphasized that “the possibility of deference can arise only if a regulation is genuinely ambiguous,” *id.* at 573; that only “‘reasonable’” interpretations warrant deference, *id.* at 575 (citation omitted); and that the “controlling weight” of an agency interpretation depends on its “character and context,” *id.* at 576.

The district court rejected petitioner’s request to apply *Kisor*’s teachings on deference in the context of guidelines commentary, concluding (as petitioner had acknowledged) that petitioner’s request was “foreclosed” by circuit precedent. J.A. 18; see D. Ct. Doc. 40, at 2. The court accordingly “defer[red] to the commentary in [Section] 2K2.1.” J.A. 18. It then adopted the Probation Office’s “statement and guideline applications” as “its final findings of fact.” J.A. 19; see D. Ct. Doc. 55, at 6 (Aug. 20, 2024) (statement of reasons for judgment).

After determining that petitioner’s advisory guidelines range was 63 to 78 months, the district court sentenced petitioner to 72 months of imprisonment, to be followed by three years of supervised release. J.A. 19–20. The court added that, “even if the guideline range was not calculated or applied correctly,” it “would have imposed the same sentence for the reasons given during th[e] sentencing hearing regardless of the applicable guideline range.” J.A. 21; see D. Ct. Doc. 55, at 6.

4. On appeal, petitioner again argued that “*Kisor* displaces *Stinson*,” contending that under *Kisor*, “Guideline Commentary is not binding unless [there is] a genuine ambiguity that persists even after all traditional tools of interpretation have been exhausted”; that “‘traditional tools of construction’” show that “a ‘large capacity magazine’ [under Sentencing Guidelines § 2K2.1]

must be large in relation to the industry standard”; that a 17-round magazine “is an ordinary sized magazine in the contemporary consumer market”; and that no deference was owed to Application Note 2. Pet. C.A. Br. 37, 39-40 (citations omitted); see *id.* at 35-42. The court of appeals affirmed, noting that petitioner “rightly concede[d]” that circuit precedent “foreclosed” “his argument.” J.A. 2.

SUMMARY OF ARGUMENT

Since their inception, the federal sentencing guidelines have been accompanied by formalized commentary designed to guide their application and ensure consistency across the many circumstances to which the guidelines will be applied. In *Stinson v. United States*, 508 U.S. 36 (1993), this Court held that guidelines commentary should receive the same “measure” of deference that is afforded to “an agency’s interpretation of its own regulations” under *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945). *Stinson*, 508 U.S. at 45. The Court’s decision in *Kisor v. Wilkie*, 588 U.S. 558 (2019), reaffirmed the *Seminole Rock* approach in the context of legislative rules, while emphasizing the “limits inherent” in it. *Id.* at 574; see *id.* at 563-564. In light of the intertwined nature of guidelines and commentary, deference to commentary interpreting a sentencing guideline will frequently satisfy those limits. But the court below has erred in disregarding them altogether. The judgment below should be vacated and the case remanded for further proceedings.

A. In determining the appropriate measure of deference for Sentencing Commission commentary that interprets a sentencing guideline, *Stinson* drew an “analogy” between such commentary and “an agency’s interpretation of its own legislative rule.” 508 U.S. at 44.

The Court reasoned that “the guidelines are the equivalent of legislative rules adopted by federal agencies,” and that commentary interpreting the guidelines “is akin to an agency’s interpretation of its own legislative rules.” *Id.* at 45.

The Court accordingly invoked “[this Court’s] most classic formulation” of deference from *Seminole Rock*, which references “whether an agency’s construction is ‘plainly erroneous or inconsistent with the regulation.’” *Kisor*, 588 U.S. at 574 (quoting *Seminole Rock*, 325 U.S. at 414); see *Stinson*, 508 U.S. at 38, 45, 47. It then confirmed the appropriateness of the approach taken in *Seminole Rock* through an examination of the Sentencing Reform Act. *Stinson*, 508 U.S. at 45-46. As it did so, *Stinson* evidenced its understanding that it was incorporating the whole of the *Seminole Rock* approach, not just a single pithy quote that might “in a vacuum” suggest a reflexively deferential “caricature” of the doctrine, *Kisor*, 588 U.S. at 574.

Nothing has happened in the 33 years since *Stinson* that would undermine its determination that *Seminole Rock* provides the correct standard for deference to guidelines commentary under the Sentencing Reform Act. This Court’s subsequent decision in *Kisor* reaffirmed the *Seminole Rock* approach for legislative rules, and Congress has never repudiated the approach either overall or as the appropriate measure of deference to commentary under the Sentencing Reform Act. *Stinson*’s analogy between guidelines and legislative rules would have been even stronger just three years later, after Congress adopted congressional-review requirements for legislative rules that are similar to the preexisting ones for the guidelines. And the constitutional invalidation of statutory provisions that made

guidelines sentencing ranges mandatory in no way reduced the import of commentary in interpreting the guidelines themselves.

B. Notwithstanding the “limits inherent” in the *Seminole Rock* doctrine that are emphasized in *Kisor*, 588 U.S. at 574, commentary to the guidelines retains an important explanatory function and will often warrant deference. Commentary is designed to provide “concrete guidance as to how even unambiguous guidelines are to be applied in practice,” *Stinson*, 508 U.S. at 44, such as by illustrating how a complicated guideline shakes out for a particular offense and offender. And in the recurrent circumstance in which there is “genuine ambiguity” in how guideline text should apply, *Kisor*, 588 U.S. at 575, the commentary will typically supply a ““reasonable”” interpretation, *ibid.* (citation omitted), that warrants deference. As *Stinson* recognized, one of the Sentencing Commission’s principal roles is to resolve inconsistencies in guidelines application, and one way to do so “is amendment of the commentary, if the guideline which the commentary interprets will bear the construction.” *Stinson*, 508 U.S. at 46.

Commentary has all of the “especially important markers” of interpretive guidance that would entitle it “controlling weight,” *Kisor*, 588 U.S. at 576-577. Commentary’s interpretations of guidelines are “actually made by the agency,” *id.* at 577, as reflected by the Commission’s rules, which require that such interpretations be approved by a majority of the Sentencing Commission’s voting members. Commentary also heavily “implicate[s] [the] substantive expertise” of the Commission, *ibid.*, which has a statutory duty to continuously and intensely study the courts’ sentencing and guidelines-application practices. And commentary by

the Commission reflects “fair and considered judgment,” *id.* at 579 (citation omitted); indeed, commentary to the guidelines is frequently adopted along with the guidelines they explain, using the same notice-and-comment and congressional-review procedures that are statutorily required for guidelines themselves.

C. The court of appeals resolved the guidelines-interpretation dispute underlying this case by deferring reflexively to commentary, without any consideration of whether such deference was consistent with *Kisor*’s clarification of *Seminole Rock* deference. But the court offered no sound basis for singling out *Stinson*, alone among the many decisions that invoke *Seminole Rock* deference, as allowing an agency interpretation to override even “unambiguous” regulatory text, *United States v. Vargas*, 74 F.4th 673, 682 (5th Cir. 2023) (en banc), cert. denied, 144 S. Ct. 828 (2024). While clarification of the applicability of *Kisor*’s teachings would likely not require granting petitioner a resentencing, the proper course is to vacate the judgment below, remand, and allow the lower courts to address petitioner’s arguments for relief in the first instance.

ARGUMENT

***STINSON V. UNITED STATES*, UNDERSTOOD IN LIGHT OF *KISOR V. WILKIE*, CONTINUES TO FREQUENTLY REQUIRE DEFERENCE TO GUIDELINES COMMENTARY**

In *Stinson v. United States*, 508 U.S. 36 (1993), this Court held that Sentencing Commission commentary that interprets one of the Commission’s sentencing guidelines should receive the same “measure” of deference that courts afford to “an agency’s interpretation of its own regulations” under *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945). *Stinson*, 508 U.S. at 44-45. And while this Court’s later decision in *Kisor v.*

Wilkie, 588 U.S. 558 (2019), emphasizes that *Seminole Rock*’s measure of deference “is potent in its place, but cabined in its scope,” *id.* at 564, the Commission’s commentary will frequently fall within the heartland of that measure of deference. That commentary reflects the considered views of an expert agency, and when it reasonably addresses the all-too-common issues that have not been addressed with sufficient clarity in a guideline’s text, it is entitled to “controlling weight,” *id.* at 576. The court below, however, has erred in completely disregarding the “limits inherent” in the doctrine, *id.* at 574, that are spelled out in *Kisor*. Although that misunderstanding would likely not require a different result in this case, the appropriate course would be to vacate the lower court’s judgment, remand, and allow any case-specific issues to be addressed in the first instance by the lower courts.

A. *Stinson* Adopted *Seminole Rock* Deference In The Context Of Sentencing Commission Commentary Interpreting Its Guidelines Under The Sentencing Reform Act

In *Stinson*, this Court addressed the standard for deferring to “interpretive or explanatory commentary” in the context of applying the federal sentencing guidelines. 508 U.S. at 43. The Court resolved that issue by finding such commentary to be “akin to an agency’s interpretation of its own legislative rules,” *id.* at 45, and reciting the “most classic formulation of the test,” *Kisor*, 588 U.S. at 574, for deference in that context: *Seminole Rock*’s reference to “whether an agency’s construction is ‘plainly erroneous or inconsistent with the regulation,’” *ibid.* (quoting *Seminole Rock*, 325 U.S. at 414); see *Stinson*, 508 U.S. at 45. Through that shorthand, the Court adopted the complete *Seminole Rock* approach as the measure of deference for commentary

to guidelines under the Sentencing Reform Act. And its reasons for doing so remain valid today.

1. Stinson reasoned that Seminole Rock provides the appropriate standard for deference to guidelines commentary

In considering how to “articulate the standard” that should apply, *Stinson* considered “[d]ifferent analogies” that had “been suggested as helpful characterizations of the legal force of commentary.” 508 U.S. at 43. “Some”—including analogies to “legislative committee reports” or “an agency’s construction of a federal statute that it administers”—were “reject[ed].” *Id.* at 43-44. But the Court concluded that “the Government [wa]s correct in suggesting that the commentary be treated as an agency’s interpretation of its own legislative rule.” *Id.* at 44. And in describing the appropriate standard, the Court invoked “[the Court’s] most classic formulation,” *Kisor*, 588 U.S. at 574, of *Seminole Rock* deference.

a. *Stinson* first observed that, like an agency promulgating regulations, “[t]he Sentencing Commission promulgates the guidelines by virtue of an express congressional delegation of authority for rulemaking” that requires the Commission to follow the Administrative Procedure Act’s notice-and-comment “rulemaking procedures in 5 U.S.C. § 553.” *Stinson*, 508 U.S. at 44-45 (citing 28 U.S.C. 994(x)). “Thus,” the Court reasoned, “the guidelines are the equivalent of legislative rules adopted by federal agencies.” *Id.* at 45.

The Court then observed that, like agency interpretations of their own regulations, “[t]he functional purpose of commentary (of the kind at issue here) is to assist in the interpretation and application of those rules, which are within the Commission’s particular area of

concern and expertise and which the Commission itself has the first responsibility to formulate and announce.” *Stinson*, 508 U.S. at 45. “In these respects,” the Court continued, “this type of commentary is akin to an agency’s interpretation of its own legislative rules.” *Ibid.*

b. In light of that analogy, the Court quoted the “most classic formulation of the test” for deference to agency interpretations of legislative rules—a quotation from *Seminole Rock*—to refer to the deference approach that it was incorporating. See *Kisor*, 588 U.S. at 574. “As we have often stated,” *Stinson* observed, “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.’” 508 U.S. at 45 (quoting *Seminole Rock*, 325 U.S. at 414); see *ibid.* (citing four additional decisions of this Court and an administrative-law treatise).

Stinson’s opening paragraph echoed that formulation. See 508 U.S. at 38 (“We decide that commentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline.”). And the Court again quoted *Seminole Rock*’s classic formulation when it resolved the particular deference issue that the case presented. See *id.* at 47 (observing that the commentary “d[id] not run afoul of the Constitution or a federal statute, and it [wa]s not ‘plainly erroneous or inconsistent’” with the guideline and “[a]s a result” was “a binding interpretation”) (quoting *Seminole Rock*, 325 U.S. at 414).

2. *Stinson* adopted the entirety—not a caricature—of the *Seminole Rock* approach

Stinson’s shorthand reference to *Seminole Rock* deference was a reference to *Seminole Rock* deference in all of its particulars—not some abbreviated or mutated form of it. As *Kisor* later observed, “in a vacuum,” the “classic formulation” of *Seminole Rock* deference of the sort that appears in *Stinson* “may suggest a caricature of the doctrine, in which deference is ‘reflexive.’” *Kisor*, 588 U.S. 574 (citation omitted). But *Kisor* makes clear that it should not be treated as such, see *ibid.*, and *Stinson* did not do so.

Seminole Rock itself had concerned the interpretation of a wartime price regulation that “clearly applie[d] to the facts of th[e] case.” 325 U.S. at 415. The Court had consulted the agency’s interpretation of that price regulation only to eliminate “[a]ny doubts” that the Court’s analysis of the regulatory text had been correct. *Id.* at 417. Indeed, the oft-quoted classic formulation came just two sentences after the Court had explained that in “an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt.” *Id.* at 413-414.

Stinson likewise did not reflexively defer to an agency’s interpretation. The actual guideline at issue in *Stinson* involved a definition of the term “crime of violence” that, while permissible under the guidelines, is so vague as to be unconstitutional when incorporated into a statute. *Stinson*, 508 U.S. at 38, 47 (citation omitted); see *Beckles v. United States*, 580 U.S. 256, 262-267 (2017). Accordingly, *Stinson* appeared to recognize that the guideline text could reasonably be interpreted in multiple ways. See 508 U.S. at 47 (recognizing that

“the exclusion of the felon-in-possession offense from the definition of ‘crime of violence’ may not be compelled by the guideline text”).

More generally, *Stinson*’s explanation of why the degree of deference it had invoked was “consistent with the role the Sentencing Reform Act contemplates for the Sentencing Commission,” 508 U.S. at 45, mirrored *Seminole Rock*’s own reference to “doubt” about the regulatory text, 325 U.S. at 414. *Stinson* observed that, through the provisions of the Act, “Congress necessarily contemplated that the Commission would periodically review the work of the courts, and would make whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest.” *Stinson*, 508 U.S. at 46 (quoting *Braxton v. United States*, 500 U.S. 344, 348 (1991)). And *Stinson* emphasized that while “amendments to guidelines provisions are one method of incorporating revisions, another method * * * is amendment of the commentary, if the guideline which the commentary interprets will bear the construction.” *Id.* at 46. A guideline that is unambiguous in one direction would not “bear the construction,” *ibid.*, of commentary pointing in another.

3. No intervening developments have undermined *Stinson*’s invocation of *Seminole Rock*

Although *Stinson* was decided in 1993, nothing in the interim has undermined its adoption of *Seminole Rock* deference in the context of guidelines commentary. *Kisor* rejected a request that the Court dispense with *Seminole Rock* deference altogether, see *Kisor*, 588 U.S. at 563—in part, because of concerns about “introduc[ing] so much instability into * * * areas of law” that incorporate such deference, *id.* at 587. And Congress has never repudiated the approach, either in general or

in respect to the Sentencing Reform Act. See *id.* at 587-588 (“Our deference decisions are ‘balls tossed into Congress’s court, for acceptance or not as that branch elects.’ And so far, at least, Congress has chosen acceptance.”) (internal citation and internal quotation marks omitted).

Indeed, if *Stinson* had been decided at a later date, its analogy between agency interpretations of legislative rules and guidelines commentary would have been even stronger. *Stinson* qualified the analogy as “not precise because Congress has a role in promulgating the guidelines.” 508 U.S. at 44. As *Stinson* noted, “[a]mendments to the Guidelines must be submitted to Congress for a 6-month period of review, during which Congress can modify or disapprove them.” *Id.* at 41 (citing 28 U.S.C. 994(p)); see *Mistretta v. United States*, 488 U.S. 361, 393-394 (1994) (observing that Congress may “revoke or amend any or all of the Guidelines as it sees fit either within the 180-day waiting period or at any time”) (internal citation omitted). At the time, there was no similar statutory requirement for congressional review of agency regulations.

That soon ceased to be the case. Three years after *Stinson*, Congress enacted the Congressional Review Act, 5 U.S.C. 801 *et seq.*, which generally requires each federal agency to submit its new rules to Congress before the rules take effect and, for major rules, must submit them at least 60 days in advance of their effective date. 5 U.S.C. 801(a)(1)(A), (3)(A), and (4); see 5 U.S.C. 807-808 (exceptions); Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, Tit. II, § 251, 110 Stat. 868-874 (enacting 5 U.S.C. 801-808). The Congressional Review Act further provides that if Congress enacts a joint resolution disapproving the rule either before or after the rule’s effective date,

the rule shall not take, or shall not continue in, effect. 5 U.S.C. 801(b)(1), 802.

The only other potentially relevant post-*Stinson* development is the Court’s decision in *United States v. Booker*, 543 U.S. 220 (2005), which resolved a Sixth Amendment infirmity in the Sentencing Reform Act by invalidating statutory provisions under which sentencing courts were generally obligated to adhere to the sentencing ranges calculated under the guidelines. See *id.* at 227, 233. But the question of how much weight to give the sentencing ranges produced under the guidelines (addressed in *Booker* and subsequent decisions) is distinct from the question of how much weight to give to commentary that interprets particular guidelines (addressed in *Stinson*).

Stinson’s analogy between commentary that interprets a guideline and an agency interpretation of a rule was based principally on procedural similarities, not the substantive force that guidelines and legislative rules have in practice. See *Stinson*, 508 U.S. at 44-45. In any event, even after *Booker*, the guidelines have “sufficient legal effect to attain the status of a ‘law’ within the meaning of the *Ex Post Facto* Clause.” *Peugh v. United States*, 569 U.S. 530, 546 (2013). And to the extent that any of *Stinson*’s reasoning was premised on its observation that “failure to follow, or a misreading of” commentary could result in “an incorrect application of the sentencing guidelines” that could warrant reversal on appeal, *Stinson*, 508 U.S. at 43 (quoting 18 U.S.C. 3742(f)(1)), misapplication of the guidelines can likewise warrant appellate reversal post-*Booker*, see, e.g., *Gall v. United States*, 552 U.S. 38, 51 (2007).

B. The *Seminole Rock* Approach, As Explicated By *Kisor*, Will Frequently Require Deference To Guidelines Commentary

Kisor rejected the suggestion that *Seminole Rock* deference “‘bestows on agencies expansive, unreviewable’ authority” and “reinforc[ed] some of the limits inherent” in the doctrine. *Kisor*, 588 U.S. at 574 (citation omitted). While those limits necessarily apply to *Stinson*’s incorporation of the *Seminole Rock* approach for guidelines commentary, see Part A.2, *supra*, the nature of commentary is such that it will frequently warrant deference when interpretive questions arise in applying the guidelines.

1. *Commentary explains the guidelines and frequently provides a reasonable interpretation of genuine ambiguity in guideline text*

Kisor emphasizes that an agency interpretation can have controlling weight under *Seminole Rock* only when a regulation is a “reasonable” reading of a “genuinely ambiguous” regulation. *Kisor*, 588 U.S. at 574-575. If “only one reasonable construction of a regulation” remains after employing “all the ‘traditional tools’ of construction,” “there is no plausible reason for deference” and “a court has no business deferring to any other reading.” *Id.* at 575 (citation omitted). But in light of the circumstances in which the Sentencing Commission most often issues commentary, and “the increased uniformity of sentencing that Congress intended [the] Guidelines system to achieve,” *Booker*, 543 U.S. at 246, Commission commentary provides helpful guidance that frequently includes reasonable resolutions of genuine ambiguities in guidelines application.

a. The framework of the Sentencing Guidelines has a unique tripartite structure. See *Stinson*, 508 U.S. at

41. Beyond just the “guidelines” that are analogous to legislative rules, the Sentencing Reform Act authorizes the promulgation of policy statements and explicitly references commentary. See *id.* at 41, 45 (citing 28 U.S.C. 994(a)(1) and (2) and 18 U.S.C. 3553(b)). Accordingly, since its inception, the Sentencing Commission’s Sentencing Guidelines Manual has “contain[ed] text of three varieties”: guidelines, policy statements, and commentary. *Id.* at 41; see Sentencing Guidelines Manual (1987).

Since their inception, the guidelines have also included Sentencing Guidelines § 1B1.7—a guideline subjected to notice-and-comment and congressional review, 28 U.S.C. 994(p) and (x)—which specifies that commentary may function to “interpret the guideline or explain how it is to be applied.” Sentencing Guidelines § 1B1.7 (1987, 2025). Commentary is commonly organized into “Application Notes” that address particular issues and scenarios. See, *e.g.*, Sentencing Guidelines § 2K2.1, comment. (nn.1-13). Like the guideline that it accompanies, commentary is adopted by majority vote of the Sentencing Commissioners. See U.S. Sent. Comm’n R. 4.3. And placing specific notes in commentary can avoid excessively lengthy guidelines, bloated with explanations, that would be more difficult to navigate, parse, and use.

When the Commission drafts commentary, it necessarily intends for the commentary to clarify a guideline, both in general and with regard to specific anticipated circumstances. “The Commission, after all, drafts the guidelines as well as the commentary interpreting them, so we can presume that the interpretations of the guidelines contained in the commentary represent the most accurate indications of how the Commission deems that

the guidelines should be applied to be consistent with the Guidelines Manual as a whole as well as the authorizing statute.” *Stinson*, 508 U.S. at 45. And in the common circumstance in which the commentary is included in the notice-and-comment and congressional-review phases of guidelines promulgation, see U.S. Sent. Comm’n R. 4.1, 4.3, it provides important context to stakeholders, Congress, and the public at large about how a proposed guideline (or amended guideline) is designed to function if it is adopted.

b. Because it “explains the guidelines,” commentary “provides concrete guidance as to how even unambiguous guidelines are to be applied in practice.” *Stinson*, 508 U.S. at 44. As *Kisor* recognized, even unambiguous regulatory text may be “impenetrable on first read,” or at least “make the eyes glaze over.” 588 U.S. at 575. Thus, separate and apart from deference, commentary can provide a shortcut for understanding how a guideline should be applied. But in light of the many scenarios in which the guidelines may be applied, and the expectation that the commentary will explain the application, instances of genuine guideline ambiguity will not be uncommon. And when they occur, the commentary will typically point the way to a construction within the textual “zone of ambiguity,” *id.* at 576, and warrant deference.

The Sentencing Reform Act effectively anticipates both the existence of guidelines ambiguity and the Sentencing Commission’s ability to resolve it through commentary. Pursuant to the Act, the Sentencing Commission “gathers information on the sentences imposed by different courts,” “views the sentencing process as a whole,” “has developed a broad perspective on sentencing practices throughout the Nation,” and “can, by adjusting the Guidelines or the application notes”—*i.e.*,

the commentary—“produce more consistent sentencing results among similarly situated offenders sentenced by different courts.” *Buford v. United States*, 532 U.S. 59, 66 (2001). And it is principally the role of the Commission, rather than this Court, to resolve the inevitable disagreements among various courts about how to interpret and apply certain guidelines. *Braxton*, 500 U.S. at 348.

“Although amendments to guidelines provisions are one method of incorporating revisions, another method open to the Commission is amendment of the commentary, if the guideline which the commentary interprets will bear the construction.” *Stinson*, 508 U.S. at 46. The Commission’s employment of that latter method is a paradigmatic circumstance for deference to a reasonable interpretation of genuine ambiguity. And deference would be no less warranted when the Commission anticipates ambiguities in the guideline text and preemptively addresses them in the commentary that accompanies the guideline’s initial promulgation.

2. *The character and context of Commission commentary will entitle it to controlling weight*

While *Kisor* emphasized that deference is warranted under *Seminole Rock* only when “the character and context of the agency interpretation entitles it to controlling weight,” 588 U.S. at 576, commentary has all three of the “markers” that *Kisor* identified as “especially important * * * for identifying” when “deference is * * * appropriate,” *id.* at 576-577. Commentary is “the agency’s ‘authoritative’ or ‘official position,’” *id.* at 577 (citation omitted); “implicate[s] its substantive expertise,” *ibid.*; and “reflect[s] fair and considered judgment,” *id.* at 579 (citation and internal quotation marks omitted).

a. As a threshold matter, the Commission’s commentary on a guideline necessarily reflects the Commission’s own “‘authoritative’ or ‘official position.’” *Kisor*, 588 U.S. at 577 (citation omitted). The Commission’s rules in 1997 codified its preexisting practice of requiring “the affirmative vote of at least four” of the Commission’s seven voting members to adopt commentary. U.S. Sent. Comm’n R. 2.2(b); see 28 U.S.C. 991(a) (voting members); 62 Fed. Reg. 38,598, 38,598 (July 18, 1997). That is the same vote that is required to promulgate the guideline itself. 28 U.S.C. 994(a); see U.S. Sent. Comm’n R. 2.2(b).

Thus, even before 1997, commentary was drafted in a way that allowed this Court to presume that it contained “accurate indications of how the Commission deems that the guidelines should be applied.” *Stinson*, 508 U.S. at 45. The Commission’s formalized commentary processes leave no doubt that commentary “emanate[s] from those actors, using those vehicles, understood to make authoritative policy in the relevant context.” *Kisor*, 588 U.S. at 577.

b. Commentary also “almost by definition ‘implicate[s] [the Commission’s] substantive expertise.’” *United States v. Holman*, 171 F.4th 303, 315 (4th Cir. 2026) (quoting *Kisor*, 588 U.S. at 577) (brackets in original). Indeed, *Stinson* explicitly recognized that “[t]he functional purpose of commentary (of the kind at issue here) is to assist in the interpretation and application” of the guidelines, “which are within the Commission’s particular area of concern and expertise.” 508 U.S. at 45.

The Commission’s central statutory function is to “establish sentencing policies and practices for the Federal criminal justice system.” 28 U.S.C. 991(b)(1). “Congress placed the Commission in the Judicial Branch precisely because of the Judiciary’s special knowledge

and expertise.” *Mistretta*, 488 U.S. at 396; see 28 U.S.C. 991(a). The Sentencing Reform Act also requires the Commission to ensure that its knowledge and expertise remain up-to-date.

The Act requires the Commission to “review the presentence report, the guideline worksheets, the tribunal’s sentencing statement, and any written plea agreement * * * with respect to every federal criminal sentence.” *Stinson*, 508 U.S. at 45-46 (citing 28 U.S.C. 994(w)) (citation, internal quotation marks, and brackets omitted). The Commission must also consult at least annually with representatives from, *inter alia*, the Judicial Conference of the United States, the Department of Justice, and Federal Public Defenders. 28 U.S.C. 994(o).

Receiving all of that feedback is critical to the Commission’s “statutory obligation ‘periodically [to] review and revise’ the guidelines,” *Stinson*, 508 U.S. at 45 (quoting 28 U.S.C. 994(o)) (brackets in original), “in consideration of comments and data coming to its attention,” 28 U.S.C. 994(o). And as a result of its intensive process, the Commission has the institutional “capacity courts lack to base its determinations on empirical data and national experience, guided by a professional staff with appropriate expertise.” *Kimbrough v. United States*, 552 U.S. 85, 109 (2007) (citation and internal quotation marks omitted).

c. The “intensive process required to promulgate the commentary,” *Holman*, 171 F.4th at 315-316, additionally ensures that the end product “reflect[s] fair and considered judgment,” *Kisor*, 588 U.S. 579 (citation and internal quotation marks omitted). Consistent with its internal rules, the Commission typically employs notice-and-comment procedures for proposed commentary, and submits its final commentary as part of congressional

guidelines review. See *United States v. McIntosh*, 124 F.4th 199, 205 n.2 (3d Cir. 2024); *United States v. Trumbull*, 114 F.4th 1114, 1120 n.7 (9th Cir. 2024), cert. denied, 145 S. Ct. 1952 (2025). It did so for the particular interpretive commentary to Sentencing Guidelines § 2K2.1 at issue in this case. See pp. 8-9, *supra*.

But even absent such procedures, the Commission’s adoption of commentary by majority vote “at a public meeting,” U.S. Sent. Comm’n R. 2.2(b), will necessarily be informed by the range of perspectives that it regularly receives from judges, further ensuring that the adoption reflects the Commission’s fair and considered judgment. See 28 U.S.C. 994(o).

**C. The Proper Course Is To Vacate The Judgment Below
And Remand For Further Proceedings**

In the proceedings below, petitioner urged the court of appeals to apply *Kisor*’s understanding of *Seminole Rock* deference to his challenge to a sentence enhancement under Sentencing Guidelines § 2K2.1. See Pet. C.A. Br. 36-37, 39. That court, however, had previously decided in an en banc decision—*United States v. Vargas*, 74 F.4th 673 (5th Cir. 2023), cert. denied, 144 S. Ct. 828 (2024)—that “*Stinson* sets out a deference doctrine distinct from the one refined by *Kisor*.” *Id.* at 678. And it resolved petitioner’s challenge by adhering to precedent that had applied *Vargas* to resolve the particular guidelines issue in his case based on the commentary. See J.A. 2 (citing *United States v. Martin*, 119 F.4th 410, 414-415 (5th Cir. 2024), cert. denied, 145 S. Ct. 1454 (2025)). While that approach is unlikely to have affected the ultimate result, further proceedings in the lower courts would be appropriate.

1. In the court of appeals’ view, notwithstanding *Kisor*, *Stinson* makes guidelines commentary “‘binding’

and ‘control[ing]’—“even for ‘unambiguous’ guidelines,”—unless it “‘violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline.’” *Vargas*, 74 F.4th at 680 (quoting *Stinson*, 508 U.S. at 38, 42, 44) (brackets in original). None of the reasons proffered by the court of appeals in *Vargas* justify that “caricature,” *Kisor*, 588 U.S. at 574, of the *Seminole Rock* approach that *Stinson* adopted.

The court of appeals’ view that “nothing in *Kisor* suggests it meant to modify *Stinson*,” *Vargas*, 74 F.4th at 681, reflects a misconception of how this Court’s decisions interrelate. As the court of appeals itself recognized, *Stinson* “borrowed *Seminole Rock*’s rule,” and *Kisor* “clarified the deference rule from * * * *Seminole Rock*.” *Ibid.* *Kisor*’s “clarifi[cation]” of the *Seminole Rock* rule (*ibid.*) therefore applies with full force to *Stinson*. This Court was not required to explicitly identify *Stinson* for *Kisor*’s teachings to apply. In any event, the Court was well aware of *Stinson*, which four of the majority Justices explicitly cited as an exemplar of the “legion” of decisions “applying *Seminole Rock* deference.” *Kisor*, 588 U.S. at 568 n.3 (opinion of Kagan, J.).

The court of appeals likewise erred in reading two portions of *Stinson* itself as requiring deference to commentary even when a guideline is “unambiguous.” See *Vargas*, 74 F.4th at 682. Although *Stinson* noted that commentary “provides concrete guidance as to how even unambiguous guidelines are to be applied in practice,” 508 U.S. at 44, it did not say that commentary can override unambiguous text. As discussed above, even unambiguous guidelines can be complicated, and commentary illustrating particular applications can be helpful to the parties, the Probation Office, and the courts. See p. 24, *supra*. Nor is *Stinson*’s statement that “prior

judicial constructions of a particular guideline cannot prevent the Commission from adopting a conflicting interpretation,” 508 U.S. at 46, an endorsement of commentary at odds with unambiguous text. Instead, that statement is consistent with the preceding sentence’s observation that Commission may resolve judicial disagreements through “amendment of the commentary, if the guideline which the commentary interprets will bear the construction,” *ibid*.

The court of appeals’ observation that “the Sentencing Commission and administrative agencies are different animals,” *Vargas*, 74 F.4th at 682, is similarly unsupportive of its caricatured version of *Seminole Rock* deference to guidelines commentary. The Court in *Stinson* was doubtless aware of the details of the Commission’s composition and location in the Judicial Branch. See *Stinson*, 508 U.S. at 41-42, 45-46 (citing Court’s prior decision in *Mistretta*); *Mistretta*, 488 U.S. at 385 (discussing Commission’s unique composition and role). But it found the analogy between commentary interpreting the guidelines and executive-agency interpretations of legislative rules to be apt nonetheless. See *Stinson*, 508 U.S. at 44-45. And nothing in *Stinson* suggests that it deemed the structural differences between the Commission and an executive agency as a reason for deviation from the *Seminole Rock* approach.

Finally, the court of appeals was mistaken in its view that “consistency in applying the guidelines would be frustrated if *Kisor* governed whether the commentary controlled.” *Vargas*, 74 F.4th at 683. As discussed above, see Part B.1, *supra*, Commission commentary retains an important role in guiding courts even if it cannot override an unambiguous guideline. Nor is the

power to overrule unambiguous text necessary to maintain consistency. Absent interpretive error by the courts, an interpretation based on unambiguous text will yield the same guidelines range for similarly situated criminal defendants.

2. The court of appeals’ decision in this case relied on circuit precedent that declined to apply *Kisor*’s teachings to the interpretation of Section 2K2.1(a)(3). See J.A. 2 (citing *Martin*, 119 F.4th at 414-415); *Martin*, 119 F.4th at 414. Vacatur of the judgment below and remand would allow the court to address any arguments that petitioner may raise for case-specific relief under a clarified view of *Seminole Rock* deference under *Stinson*.

In addressing such arguments, the court of appeals could consider, *inter alia*, whether clarification about the degree of deference for guidelines commentary in fact requires it to disregard its existing precedent interpreting Sentencing Guidelines § 2K2.1(a)(3). As this Court has made clear with respect to its own precedents, even a wholesale revision in the proper level of deference to administrative interpretations “do[es] not call into question prior cases” that applied the former level of deference to resolve an interpretive issue. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412 (2024).

If the court of appeals were, in fact, to deem it appropriate to revisit the merits of the interpretive issue, it would then consider whether a clarified understanding of *Seminole Rock* deference under *Stinson* in fact warrants a different interpretation of Section 2K2.1(a)(3). Every court of appeals that has applied *Kisor* to a guidelines claim like petitioner’s has rejected it. See *Holman*, 171 F.4th at 314-316 (4th Cir.); *McIntosh*, 124

F.4th at 205-211 (3d Cir.); *Trumbull*, 114 F.4th at 1118-1121 (9th Cir.).

The court of appeals could also consider whether any error in the guidelines calculation would be harmless. See Fed. R. Crim. P. 52(a). The district court in this case made clear “even if the guideline range was not calculated or applied correctly,” it “would have imposed the same sentence for the reasons given during th[e] sentencing hearing regardless of the applicable guideline range.” J.A. 21; see D. Ct. Doc. 55, at 6; see also *Molina-Martinez v. United States*, 578 U.S. 189, 200, (2016) (noting that guidelines error can be nonprejudicial where, “for example,” the record “show[s] * * * that the district court thought the sentence it chose was appropriate irrespective of the Guidelines range”).

Because petitioner would need to prevail on all three of those issues in order to justify a resentencing, and because it is unlikely that a resentencing would as a practical matter result in a different sentence, he is unlikely to obtain meaningful relief in the lower courts. Nonetheless, because this Court is “a court of review, not of first view,” *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005), and the question presented is limited to determination of the proper degree of deference to guidelines commentary, the appropriate course would be to vacate the judgment below and remand the case to allow him to make any arguments for relief to the lower courts in the first instance.

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded for further proceedings.

Respectfully submitted.

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APPENDIX

TABLE OF CONTENTS

	Page
Statutes:	
18 U.S.C. 3553.....	1a
28 U.S.C. 994.....	6a
Sentencing Guidelines:	
Section 1B1.7	10a
Section 2K2.1	11a
U.S. Sentencing Commission Rules of Practice and Procedure:	
Rule 2.2	13a
Rule 4.1	14a
Rule 4.3	15a

APPENDIX

1. 18 U.S.C. 3553 provides in pertinent part:

Imposition of a sentence

(a) FACTORS TO BE CONSIDERED IN IMPOSING A SENTENCE.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(1a)

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.¹

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

(b) APPLICATION OF GUIDELINES IN IMPOSING A SENTENCE.—

(1) IN GENERAL.— Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offend-

¹ So in original. The period probably should be a semicolon.

ers, and to the applicable policy statements of the Sentencing Commission.

(2) CHILD CRIMES AND SEXUAL OFFENSES.—

(A)² SENTENCING.— In sentencing a defendant convicted of an offense under section 1201 involving a minor victim, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117, the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless—

(i) the court finds that there exists an aggravating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence greater than that described;

(ii) the court finds that there exists a mitigating circumstance of a kind or to a degree, that—

(I) has been affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or policy statements issued under section 994(a) of title 28, taking account of any amendments to such sentencing guidelines or policy statements by Congress;

(II) has not been taken into consideration by the Sentencing Commission in formulating the guidelines; and

² So in original. No subpar. (B) has been enacted.

(III) should result in a sentence different from that described; or

(iii) the court finds, on motion of the Government, that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense and that this assistance established a mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence lower than that described.

In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission, together with any amendments thereto by act of Congress. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission, together with any amendments to such guidelines or policy statements by act of Congress.

(c) STATEMENT OF REASONS FOR IMPOSING A SENTENCE.—* * * *

* * * * *

2. 28 U.S.C. 994 provides in pertinent part:

Duties of the Commission

(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—

(A) a determination whether to impose a sentence to probation, a fine, or a term of imprisonment;

(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;

(C) a determination whether a sentence to a term of imprisonment should include a requirement that the defendant be placed on a term of supervised release after imprisonment, and, if so, the appropriate length of such a term;

(D) a determination whether multiple sentences to terms of imprisonment should be ordered to run concurrently or consecutively; and

(E) determination under paragraphs (6) and (11)¹ of section 3563(b) of title 18;

(2) general policy statements regarding application of the guidelines or any other aspect of sentenc-

¹ See References in Text note below.

ing or sentence implementation that in the view of the Commission would further the purposes set forth in section 3553(a)(2) of title 18, United States Code, including the appropriate use of—

(A) the sanctions set forth in sections 3554, 3555, and 3556 of title 18;

(B) the conditions of probation and supervised release set forth in sections 3563(b) and 3583(d) of title 18;

(C) the sentence modification provisions set forth in sections 3563(c), 3564, 3573, and 3582(c) of title 18;

(D) the fine imposition provisions set forth in section 3572 of title 18;

(E) the authority granted under rule 11(e)(2) of the Federal Rules of Criminal Procedure to accept or reject a plea agreement entered into pursuant to rule 11(e)(1); and

(F) the temporary release provisions set forth in section 3622 of title 18, and the prerelease custody provisions set forth in section 3624(c) of title 18; and

(3) guidelines or general policy statements regarding the appropriate use of the provisions for revocation of probation set forth in section 3565 of title 18, and the provisions for modification of the term or conditions of supervised release and revocation of supervised release set forth in section 3583(e) of title 18.

(b)(1) The Commission, in the guidelines promulgated pursuant to subsection (a)(1), shall, for each category of offense involving each category of defendant, es-

establish a sentencing range that is consistent with all pertinent provisions of title 18, United States Code.

* * * * *

(o) The Commission periodically shall review and revise, in consideration of comments and data coming to its attention, the guidelines promulgated pursuant to the provisions of this section. In fulfilling its duties and in exercising its powers, the Commission shall consult with authorities on, and individual and institutional representatives of, various aspects of the Federal criminal justice system. The United States Probation System, the Bureau of Prisons, the Judicial Conference of the United States, the Criminal Division of the United States Department of Justice, and a representative of the Federal Public Defenders shall submit to the Commission any observations, comments, or questions pertinent to the work of the Commission whenever they believe such communication would be useful, and shall, at least annually, submit to the Commission a written report commenting on the operation of the Commission's guidelines, suggesting changes in the guidelines that appear to be warranted, and otherwise assessing the Commission's work.

(p) The Commission, at or after the beginning of a regular session of Congress, but not later than the first day of May, may promulgate under subsection (a) of this section and submit to Congress amendments to the guidelines and modifications to previously submitted amendments that have not taken effect, including modifications to the effective dates of such amendments. Such an amendment or modification shall be accompanied by a statement of the reasons therefor and shall take effect on a date specified by the Commission, which

shall be no earlier than 180 days after being so submitted and no later than the first day of November of the calendar year in which the amendment or modification is submitted, except to the extent that the effective date is revised or the amendment is otherwise modified or disapproved by Act of Congress.

* * * * *

(w)(1) The Chief Judge of each district court shall ensure that, within 30 days following entry of judgment in every criminal case, the sentencing court submits to the Commission, in a format approved and required by the Commission, a written report of the sentence, the offense for which it is imposed, the age, race, sex of the offender, and information regarding factors made relevant by the guidelines. The report shall also include—

(A) the judgment and commitment order;

(B) the written statement of reasons for the sentence imposed (which shall include the reason for any departure from the otherwise applicable guideline range and which shall be stated on the written statement of reasons form issued by the Judicial Conference and approved by the United States Sentencing Commission);

(C) any plea agreement;

(D) the indictment or other charging document;

(E) the presentence report; and

(F) any other information as the Commission finds appropriate.

The information referred to in subparagraphs (A) through (F) shall be submitted by the sentencing court in a format approved and required by the Commission.

* * * * *

(x) The provisions of section 553 of title 5, relating to publication in the Federal Register and public hearing procedure, shall apply to the promulgation of guidelines pursuant to this section.

* * * * *

3. Sentencing Guidelines § 1B1.7 provides:

Significance of Commentary

The Commentary that accompanies the guideline sections may serve a number of purposes. It may interpret the guideline or explain how it is to be applied. Failure to follow such commentary could constitute an incorrect application of the guidelines, subjecting the sentence to possible reversal on appeal. *See* 18 U.S.C. § 3742. In addition, the commentary may provide background information, including factors considered in promulgating the guideline or reasons underlying promulgation of the guideline.

Commentary

Portions of this document not labeled as guidelines or commentary also express the policy of the Commission or provide guidance as to the interpretation and application of the guidelines. These are to be construed as commentary and thus have the force of policy statements.

“[C]ommentary in the *Guidelines Manual* that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline.” *Stinson v. United States*, 508 U.S. 36, 38 (1993).

4. Sentencing Guidelines § 2K2.1 provides in pertinent part:

Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition

(a) Base Offense Level (Apply the Greatest):

- (1) **26**, if (A) the 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 (B) the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense;
- (2) **24**, if the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense;
- (3) **22**, if (A) the 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 (B) 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;
- (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;
 - (5) 18, if the offense involved a firearm described in 26 U.S.C. § 5845(a);
 - (6) 14, if the defendant (A) was a prohibited person at the time the defendant committed the instant offense; (B) is convicted under 18 U.S.C. § 922(d), § 932, or § 933; or (C) 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;
 - (7) 12, except as provided below; or
 - (8) 6, if the defendant is convicted under 18 U.S.C. § 922(c), (e), (f), (m), (s), (t), or (x)(1), or 18 U.S.C. § 1715.
- (b) Specific Offense Characteristics

* * * * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 922(a)–(p), (r)–(w), (x)(1), 924(a), (b), (e)–(i), (k)–(o), 932, 933, 1715, 2332g; 26 U.S.C. § 5861(a)–(l). For additional statutory provisions, *see* Appendix A (Statutory Index).

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.

* * * * *

5. U.S. Sentencing Commission Rule 2.2 provides in pertinent part:

Voting Rules for Action by the Commission

- (a) Except as otherwise provided in these rules or by law, action by the Commission requires the affirmative vote of a majority of the members at a public

meeting at which a quorum is present. A quorum shall consist of a majority of the members then serving. Members shall be deemed “present” and may participate and vote in meetings from remote locations by electronic means, including telephone, satellite, and video conference devices.

- (b) Promulgation of guidelines, policy statements, official commentary, and amendments thereto shall require the affirmative vote of at least four members at a public meeting. *See* 28 U.S.C. § 994(a).

Publication for comment of proposed amendments to guidelines, policy statements, or official commentary shall require the affirmative vote of at least three members at a public meeting.

Approval of a notice of priorities shall require the affirmative vote, at a public meeting, of a majority of the members then serving.

Adoption or revision of the minutes of a public meeting shall require the affirmative vote, at a public meeting, of a majority of the members then serving.

* * * * *

- 6. U.S. Sentencing Commission Rule 4.1 provides:

Promulgation of Amendments

The Commission may promulgate and submit to Congress amendments to the guidelines after the beginning of a regular session of Congress and not later than May 1 of that year. Amendments shall be accompanied by an explanation or statement of reasons for the amendments. Unless otherwise specified, or unless Congress legislates to the contrary, amendments submitted for review shall

take effect on the first day of November of the year in which submitted. 28 U.S.C. § 994(p).

At other times, pursuant to special statutory enactment, the Commission may promulgate amendments to accomplish identified congressional objectives.

Amendments to policy statements and commentary may be promulgated and put into effect at any time. However, to the extent practicable, the Commission shall endeavor to include amendments to policy statements and commentary in any submission of guideline amendments to Congress and put them into effect on the same November 1 date as any guideline amendments issued in the same year.

7. U.S. Sentencing Commission Rule 4.3 provides in pertinent part:

Notice and Comment on Proposed Amendments

In proposing and promulgating guidelines and amendments thereto, the Commission shall comply with the requirements of section 553 of title 5, United States Code, relating to publication in the *Federal Register* and public hearing procedure. 28 U.S.C. § 994(x).

The Commission may promulgate commentary and policy statements, and amendments thereto, without regard to the provisions of 28 U.S.C. § 994(x). Nevertheless, the Commission will endeavor to provide, to the extent practicable, comparable opportunities for public input on proposed policy statements and commentary considered in conjunction with guideline amendments.

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