No. 25-5343

IN THE

Supreme Court of the United States

KENDRICK JARRELL BEAIRD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF OF THE NATIONAL ASSOCIATION OF FEDERAL DEFENDERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Keith M. Donoghue
Shelley Fite
Daniel Habib
Celia C. Rhoads
Jessica Stengel
Amicus Committee Members
Jennifer Niles Coffin
Conrad Kahn
Assistant Federal Public Defenders
NATIONAL ASSOCIATION OF FEDERAL DEFENDERS

Brian H. Fletcher
Counsel of Record
Easha Anand
Jeffrey L. Fisher
STANFORD LAW SCHOOL SUPREME COURT LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305
(650) 723-3085
bfletcher@law.stanford.edu

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.

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INTEREST OF *AMICUS CURIAE*

The National Association of Federal Defenders (NAFD) was originally created in 1995 as a nonprofit organization made up of attorneys who worked for federal public defender offices and community defender organizations authorized under the Criminal Justice Act, 18 U.S.C. § 3006A (CJA). In 2026, NAFD was reconstituted as an association of the heads of each of the nation's CJA-authorized federal public and community defender offices.

Each year, attorneys employed by federal public and community defender offices (collectively, federal defenders) represent tens of thousands of indigent criminal defendants in federal court. In every case that proceeds to sentencing, the U.S. Sentencing Guidelines anchor the district court's determination of the sentence. Federal defenders thus have deep experience interpreting and applying the Guidelines and, along with their clients, a profound interest in the enforcement of meaningful limitations on the use of Guidelines commentary to increase punishment.[1]

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[1] Pursuant to this Court's Rule 37.6, counsel for *amicus curiae* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus* and its counsel made a monetary contribution to the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court granted certiorari to decide whether courts interpreting the U.S. Sentencing Guidelines are still bound to defer to the Sentencing Commission's commentary under the rule set forth in *Stinson v. United States*, 508 U.S. 36 (1993). *Stinson* held that courts must treat commentary interpreting a guideline as "authoritative" unless it is "inconsistent with, or a plainly erroneous reading of, that guideline." *Id.* at 38. As the Government and Mr. Beaird agree, *Stinson* no longer controls.

Stinson rested on an "analogy" to the deference courts sometimes owe to "an agency's interpretation of its own legislative rule." 508 U.S. at 44. But in *Kisor v. Wilkie*, 588 U.S. 558 (2019), this Court clarified and limited that deference. In so doing, the Court rejected the specific formulation adopted in *Stinson* because it improperly suggests that Article III courts owe "reflexive" deference to agencies. *Id.* at 574 (citation omitted). After *Kisor*, there is likewise no justification for reflexive deference to the Sentencing Commission. To the contrary, "a strong judicial role," *id.* at 580, is all the more vital when individual liberty is at stake.

Mr. Beaird's brief persuasively shows why *Stinson* no longer governs. Rather than repeating those arguments, NAFD submits this brief to make three additional points grounded in federal defenders' experience litigating tens of thousands of cases affected by the Guidelines and the accompanying commentary.

I. This Court should not simply reject *Stinson* but should also give lower courts guidance on the correct approach to commentary. Whether the Court adopts *Kisor* (as urged by the Government) or an approach equivalent to *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) (as urged by Mr. Beaird), the relevant principles have "much in common." *Kisor*, 588 U.S. at 591 (Roberts, C.J., concurring in part). And it is especially important to give meaningful guidance on how those principles apply because even some courts that have nominally adopted *Kisor* have continued to reflexively defer to commentary—an error that this Court will have limited opportunities to correct in the future.

II. The Court's guidance should take account of the unique features of the Guidelines and the commentary. Those features are relevant at all three steps of the *Kisor* inquiry, and similar considerations would apply under a *Skidmore*-style approach.

First, a court may not resort to the commentary unless a guideline remains "genuinely ambiguous" after the court has exhausted "all the standard tools of interpretation." *Kisor*, 588 U.S. at 573. In this context, those standard tools include not just text and structure, but also the rule of lenity. That venerable canon will resolve many ambiguities by precluding courts from adopting the more punitive reading of an otherwise-ambiguous guideline.

Second, even in the rare cases where a guideline remains ambiguous after traditional interpretive tools are exhausted, a court may not defer unless the commentary falls "within the zone of ambiguity the court has identified." *Kisor*, 588 U.S. at 576. That limitation is especially important because the Guidelines Manual is shot through with commentary purporting to set down substantive rules that cannot plausibly be justified as resolving any ambiguity in the Guidelines themselves.

Third, even if commentary falls within the zone of ambiguity, "a court must make an independent inquiry into whether the character and context" of the commentary entitle it to "controlling weight." *Kisor*, 588 U.S. at 576. Too often, lower courts have reduced that critical step to a superficial box-checking exercise that the commentary automatically satisfies—an approach the Government now invites this Court to bless. The Court should reject that invitation and make clear that more is required. Before deferring, a court must at minimum ask whether the Commission is in a better position than the court to answer the particular interpretive question at issue and whether the Commission has adequately explained why its interpretation follows from the relevant guideline.

To be clear, those limitations do not mean that the commentary has no role to play. Some commentary merely provides background information and thus is not at issue here. And some interpretive commentary will be entitled to deference under *Kisor* (or will be persuasive under *Skidmore*). For example, courts routinely and appropriately follow operational commentary that addresses the internal workings of the Guidelines—often, by instructing sentencing courts not to apply duplicative enhancements.

III. Finally, although this case presents a narrow question about the interpretation of the Guidelines, this Court should ensure that its opinion does not inadvertently overstate the weight that the Guidelines should carry in a district court's determination of the appropriate sentence in a particular case. As a long line of this Court's precedents make clear, interpreting and applying the advisory Guidelines is only the first step of the sentencing process. A district court's ultimate obligation is to consider all relevant information and comply with the parsimony principle, which requires a sentence "sufficient, but not greater than necessary" to fulfill the purposes set forth in 18 U.S.C. § 3553(a). Often, that sentence will be below the applicable Guidelines range.

ARGUMENT

I. This Court should not just reject *Stinson*, but also provide guidance on the proper approach to the Commission's commentary.

As Mr. Beaird shows—and as the Government concedes—*Stinson v. United States*, 508 U.S. 36 (1993), no longer governs courts' treatment of commentary on the Sentencing Guidelines. Beaird Br. 34-42; Gov't Br. 15-21. *Stinson* analogized the Commission's commentary to a traditional agency's interpretation of its regulations and borrowed a rule of deference from that context, holding that commentary interpreting a guideline must be given "controlling weight unless it is plainly erroneous or inconsistent with the [guideline]." 508 U.S. at 45 (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U. S. 410, 414 (1945)). But in *Kisor v. Wilkie*, 588 U.S. 558 (2019), this Court clarified and significantly limited the circumstances in which Article III courts must defer to agencies' interpretations of their regulations. And the Court specifically rejected the formulation borrowed in *Stinson* because it "may suggest a caricature of the doctrine, in which deference is 'reflexive.'" *Kisor*, 588 U.S. at 574 (citation omitted).

There is no justification for continuing to apply *Stinson*'s now-rejected standard in the sentencing context. *Stinson* reasoned that the commentary should be "treated as an agency's interpretation of its own legislative rule." 508 U.S. at 44. By *Stinson*'s own logic, then, commentary does not warrant deference unless it satisfies the requirements clarified in *Kisor*. And it would be especially inappropriate to preserve *Stinson*'s reflexive deference in the criminal-sentencing context, where it is all the more essential for Article III courts "to perform their reviewing and restraining functions." *Kisor*, 588 U.S. at 574.

The Government argues that this Court should simply apply *Kisor* to the commentary. Gov't Br. 15-21. Mr. Beaird, in contrast, primarily argues that the commentary is never controlling and instead warrants only "respectful consideration." Beaird Br. 33 (quoting *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 386 (2024)). Under that approach, courts would follow commentary only if and to the extent they conclude that it has the "power to persuade." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

As the Chief Justice has explained, "the distance between" those two approaches "is not as great as it may initially appear." *Kisor*, 588 U.S. at 591 (Roberts, C.J., concurring in part). The "prerequisites for, and limitations on," deference under *Kisor* have "much in common" with the considerations that determine whether a court should be "persuaded to adopt an agency's interpretation" under *Skidmore*. *Id.* And the results yielded by the two standards should "largely overlap." *Id.*; *accord id.* at 631-32 (Kavanaugh, J., concurring in judgment). All of that means that this Court's formal choice between *Kisor* and *Skidmore* may well be less significant than the way the relevant standard is actually applied in practice.

Accordingly, whether the Court borrows from *Kisor* or *Skidmore*, it should give lower courts meaningful guidance on how the relevant principles of administrative deference apply in the unique context of criminal sentencing. *Kisor* itself provided detailed instructions on how courts should approach other agencies' interpretations of their regulations. 588 U.S. at 573-80. Similar guidance would be particularly helpful here for at least four reasons.

First, the interpretation of the Guidelines raises issues that courts interpreting traditional agency regulations do not confront. Most obviously, the Guidelines apply exclusively in criminal cases, a context where deference ordinarily plays no role. *See Abramski v. United States*, 573 U.S. 169, 191 (2014). The Court should explain how *Kisor* (or *Skidmore*) translates to this unique context, which raises special concerns about individual liberty, fair notice, and the separation of powers.

Second, as Judge Murphy has emphasized, even courts that have correctly rejected *Stinson* in favor of *Kisor* have sometimes "rejuvenate[d]" their "prior practice of 'reflexively' deferring to the Commission's commentary with barely any effort to interpret the guideline." *United States v. Kennert*, 2023 WL 4977456, at *6 (6th Cir. Aug. 3, 2023) (Murphy, J., concurring); *see id.* (collecting cases exemplifying this "recent trend"). Federal defenders' on-the-ground experience confirms that assessment. A decision simply adopting *Kisor* without additional elaboration thus would not put a stop to the sort of reflexive deference *Kisor* condemned. And a decision directing lower courts to apply *Skidmore* without meaningful guidance would run the same risk.

Third, this Court's certiorari practices would make it hard to correct those lower-court errors if the Court does not head them off now. The Court has long been "circumspect in using [its] certiorari power" to resolve circuit splits over the interpretation of the Guidelines. *Braxton v. United States*, 500 U.S. 344, 348 (1991). If the Court continues to adhere to that practice, it will rarely if ever review lower courts' treatment of the commentary in future cases.

Finally, the Government's brief makes clear that it plans to continue urging lower courts to resurrect *Stinson* by another name. This Court has emphasized that deference under *Kisor* is "cabined" in "varied and critical ways," such that it will "often" have no application. 588 U.S. at 580. Indeed, several Justices have explained that if courts properly apply *Kisor*, they will "almost always" resolve interpretive disputes with "no need" for deference. *Id.* at 632 (Kavanaugh, J., concurring in judgment); *see id.* at 631 (Gorsuch, J., concurring in judgment). But despite nominally accepting *Kisor*, the Government now insists that commentary should "often" or "frequently" be "dispositive." Gov't Br. 2, 11; *see id.* at 14-15, 22-28. The Court should reject that effort to concoct a special, watered-down version of *Kisor* for criminal sentencing.

II. *Kisor*'s limits on deference have special force in the context of the Sentencing Guidelines.

Kisor established three limits on deference that translate directly to the interpretation of the Guidelines. First, courts must start with the traditional tools of interpretation and may turn to commentary only if genuine ambiguity remains after those tools are exhausted. Second, even if a guideline is genuinely ambiguous, a court cannot defer to commentary unless it falls within the zone of ambiguity the court has independently identified. Third, even if those requirements are met, a court may not defer unless it also concludes based on the totality of the circumstances that the particular commentary at issue warrants deference. Equivalent limits should apply under a *Skidmore*, which gives even less weight to the agency's views. And those limits have special force in the context of the Sentencing Guidelines, where deferring to an agency interpretation can result not just in added regulatory burdens, but in the loss of liberty during months or years of extra prison time.

A. Courts may not turn to commentary unless genuine ambiguity remains even after all traditional interpretive tools are exhausted.

The most fundamental lesson from *Kisor* is that courts may not defer to the commentary unless the relevant guideline is "genuinely ambiguous." 588 U.S. at 574-75. The same principle governs under *Skidmore*. *See, e.g.*, *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 326-27 (2008). After all, "[i]f uncertainty does not exist, there is no plausible reason for deference" of any kind—the guideline "just means what it means." *Kisor*, 588 U.S. at 574-75. Critically, moreover, "a court must exhaust all 'traditional tools' of construction" before determining that a guideline is "genuinely ambiguous." *Id.* Exhausting those tools "will resolve many seeming ambiguities out of the box, without resort to [any] deference." *Id.* Three traditional tools are especially relevant in interpreting the Guidelines: text, structure, and the rule of lenity.

1. The foremost tool of interpretation is the text. This Court has "stated time and again that courts must presume that a legislature says in a statute what

it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). And if the text is "unambiguous," then "this first canon is also the last: 'judicial inquiry is complete.'" *Id.* at 254 (citation omitted). Accordingly, courts must begin with an independent analysis of the text of the relevant guideline and may not defer to commentary that is inconsistent with the text.

That fundamental principle has real force in this context because "the commentary brims with implausible readings of guidelines provisions." *Kennert*, 2023 WL 4977456, at *6 (Murphy, J., concurring); *see* Beaird Br. 27-28 (collecting examples). For instance, the guideline covering theft offenses provides a two-level increase if the offense had "10 or more victims." U.S.S.G. § 2B1.1(b)(2)(A)(i). But the commentary declares that any offense involving the theft of mail from a postal service vehicle, satchel, or cart "shall be considered to have involved at least 10 victims"—regardless of the actual number people affected. *Id.* § 2B1.1 cmt. n.4(C)(ii)(I).

Similarly, commentary defines a "dangerous weapon" to include an object that is *not* "capable of inflicting death or serious bodily injury" if the defendant used it "in a manner that created the impression" that it was dangerous—by, for example, "wrapp[ing] a hand in a towel" to "create the appearance of a gun." U.S.S.G. § 2B3.1 cmt. n.2. As Judges Murphy and Bibas have explained, "[n]o ordinary English speaker" would "say that a robber possesses a dangerous weapon when the robber merely *pretends* to possess one." *United States v. Tate*, 999 F.3d 374, 386 (6th Cir. 2021) (Murphy, J., concurring in judgment); *see United States v.*

Chandler, 104 F.4th 445, 461-62 (3d Cir. 2024) (Bibas, J., dissenting).

One final example: The Guidelines assign criminal history points for prior sentences imposed within a specified period before the "commencement of the instant offense." U.S.S.G. § 4A1.2(e). But commentary defines the "instant offense" to include not just the actual offense of conviction but also "relevant conduct." *Id.* § 4A1.2 cmt. n.8. That term, in turn, includes "all acts and omissions . . . that were part of the same course of conduct"—even if they predated the actual offense by many years. *Id.* § 1B1.3(a)(2); *see id.* § 1B1.1 cmt. n.1(H). Again, that flatly contradicts the text of the guideline, which unambiguously "refers to the start of the specific offense for which a defendant is being sentenced, meaning it does not include relevant conduct or other offenses." *United States v. Josey*, 155 F.4th 234, 241 (3d Cir. 2025).

2. Another fundamental interpretive principle instructs that words must be "read in their context and with a view to their place in the overall statutory scheme." *Davis v. Mich. Dep't of the Treas.*, 489 U.S. 803, 809 (1989); *see Kisor*, 588 U.S. at 575. Courts thus must closely examine a guideline's structure and context before turning to the commentary. And those traditional tools will often resolve any apparent ambiguity in a guideline's text.

Here, for example, the structure of U.S.S.G. § 2K2.1 provide clear guidance on the meaning of "large capacity magazine." Section 2K2.1(a)(3) imposes an unusually severe six-level increase in the base offense level for certain firearms offenses if the defendant possessed a "semiautomatic firearm that is capable of accepting a large capacity magazine." By comparison, possessing a stolen firearm results in only a two-level increase and using a firearm in another felony yields only a four-level increase. *Id.* § 2K2.1(b)(4) and (7)(B). Section 2K2.1(a)(3) also imposes the same six-level increase if the defendant possessed a "firearm that is described in 26 U.S.C. § 5845(a)"—a provision describing unusual and heavily regulated weapons such as sawed-off shotguns and machineguns. Those structural and contextual features make clear that the phrase "large capacity magazine" cannot plausibly include magazines that come standard on popular firearms lawfully owned by millions of Americans. *See* Beaird Br. 46-47.

3. A final interpretive tool that has particular relevance in the Guidelines context is the rule of lenity, which instructs that "ambiguities about the breadth of a criminal statute should be resolved in the defendant's favor." *United States v. Davis*, 588 U.S. 445, 464 (2019). The rule of lenity is among the most traditional tools of interpretation, being "perhaps not much less old than construction itself." *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820) (Marshall, C.J.); *see Davis*, 588 U.S. at 464. The rule is rooted in the fundamental principle that people should not "languish[] in prison unless the lawmaker has clearly said they should." *United States v. R.L.C.*, 503 U.S. 291, 305 (1992) (plurality opinion) (citation omitted). It thus applies equally "to sentencing as well as substantive provisions." *United States v. Batchelder*, 442 U.S. 114, 121 (1979).

Because the rule of lenity is a traditional interpretive tool that resolves ambiguities in favor of defendants, it should preclude deference to any "Guidelines comment that is harsher than the text."

United States v. Nasir, 17 F.4th 459, 474 (3d Cir. 2021) (en banc) (Bibas, J., concurring). And that is true even if one believes that lenity should ordinarily play a "limited role" in statutory interpretation because it "'comes into operation at the end of the process.'" *Wooden v. United States*, 595 U.S. 360, 376-77 (2022) (Kavanaugh, J., concurring) (citation omitted). *Kisor* could not have been clearer in instructing that a court may not defer to an agency interpretation unless it has first "exhaust[ed] all the 'traditional tools' of construction," meaning that "the legal toolkit is empty." 588 U.S. at 575 (citation omitted). The rule of lenity is indisputably among those traditional tools. And that means that "it must come before deference." *Chandler*, 104 F.4th at 464 (Bibas, J., dissenting).

Most courts have recognized that the rule of lenity is a traditional tool that serves to "resolve ambiguities in provisions of the Guidelines." *United States v. Edling*, 895 F.3d 1153, 1158 (9th Cir. 2018); *see, e.g.*, *United States v. Campbell*, 22 F.4th 438, 446 (4th Cir. 2022); *United States v. Winstead*, 890 F.3d 1082, 1092 n.14 (D.C. Cir. 2018) (Silberman, J.); *United States v. Savani*, 733 F.3d 56, 65-66 (3d Cir. 2013); *United States v. Welch*, 689 F.3d 529, 534 (6th Cir. 2012). But some judges have argued that the rule "no longer applies" now that the Guidelines are "advisory." *United States v. Vargas*, 74 F.4th 673, 698 (5th Cir. 2023) (en banc) (opinion of Duncan, J.) (citation omitted). That minority view is doubly wrong.

First, Congress originally made the Guidelines mandatory; they became advisory only because this Court invalidated the relevant statutory provisions to remedy the constitutional problem identified in *Booker v. United States*, 543 U.S. 220 (2005). But many of the guidelines in force today were adopted before *Booker*. If the rule of lenity applied to those guidelines when they were adopted, it must still apply today—the meaning of any law "is fixed at the time of enactment." *Wisconsin Cent. Ltd v. United States*, 585 U.S. 274, 284 (2018). And nothing in *Booker* purported to change the meaning of existing guidelines or alter the rules for interpreting guidelines adopted in the future. To the contrary, the Court emphasized that courts would remain obligated to calculate Guidelines ranges just as they have always done. *See Booker*, 543 U.S. at 264.

Second, and in any event, the Guidelines' advisory character would provide no reason to abandon the rule of lenity even if it were relevant. Although district courts are not bound to follow the Guidelines, they must "begin all sentencing proceedings by correctly calculating the applicable Guidelines range." *Peugh v. United States*, 569 U.S. 530, 536 (2013). And "the Guidelines are not only the starting point for most federal sentencing proceedings but also the lodestar." *Molina-Martinez v. United States*, 578 U.S. 189, 199-200 (2016). The range prescribed by the Guidelines "is intended to, and usually does, exert controlling influence on the sentence that the court will impose." *Peugh*, 569 U.S. at 545.

In short, the Guidelines continue to "exert a law-like gravitational pull on sentences." *Nasir*, 17 F.4th at 474 (Bibas, J., concurring). Applying the rule of lenity thus serves the rule's core purposes of protecting "our nation's strong preference for liberty" and "guarding against over-punishment." *Id.* at 473-74. Applying the rule of lenity also properly "places the weight of inertia upon the party that can best induce [the Commission] to speak more clearly"—that is, the Government. *United States v. Santos*, 553 U.S. 507, 514 (2008) (plurality opinion); *see* 28 U.S.C. § 991(a) ("The Attorney General, or the Attorney General's designee, shall be an ex officio, nonvoting member of the Commission.").

B. Even if a guideline is genuinely ambiguous, courts may not defer to commentary that is outside the zone of ambiguity.

Even if a guideline somehow remains genuinely ambiguous after the traditional tools of interpretation are exhausted, a court should not defer to the commentary unless it is "'reasonable'"—that is, unless it "come[s] within the zone of ambiguity" the court has independently identified "after employing all its interpretive tools." *Kisor*, 588 U.S. at 575-76 (citation omitted). The same logic applies under *Skidmore*: An unreasonable interpretation necessarily lacks any "power to persuade." *Skidmore*, 323 U.S. at 140. Commentary thus is not entitled to deference if it "expand[s] the Guideline" or goes beyond "the outer bounds of permissible interpretation." *United States v. Miller*, 172 F.4th 242, 250 (3d Cir. 2026) (citations omitted).

1. The Commission's practices give that principle special importance. Before *Kisor*, the Commission routinely used commentary not simply to interpret the Guidelines, but also to supplement them with additional substantive rules. Perhaps the most notorious example is U.S.S.G. § 2B1.1, the frequently applied guideline governing fraud, theft, and similar economic offenses. The primary determinant of the offense level under Section 2B1.1 is the amount of "loss," which the guideline itself defines only as "the greater of actual or intended loss." *Id.* § 2B1.1(b)(1)(A). But that terse

definition is followed by pages of commentary setting forth additional instructions, including "Special Rules" for certain classes of cases. *Id.* cmt. n.3(E).

Many of those rules cannot "be derived from § 2B1.1 by a process reasonably described as interpretation." *United States v. Riccardi*, 989 F.3d 476, 487 (6th Cir. 2021) (citation omitted). For instance, the commentary provides that in any case involving stolen or counterfeit credit or gift cards, the amount of loss "shall be not less than $500" per card. U.S.S.G. § 2B1.1 cmt. n.3(E)(i). In one case involving cards with an average value of just $35, that commentary would have resulted in a "loss" roughly 15 times greater than the actual loss—and, as a result, a dramatically higher sentencing range. *Riccardi*, 989 F.3d at 479-80. But as the Sixth Circuit explained, the commentary's "bright-line" $500 rule does not "fall 'within the zone of ambiguity' that exists" in the term "loss." *Id.* at 480. It thus "cannot be considered a reasonable interpretation of—as opposed to an improper expansion beyond—§ 2B1.1's text." *Id.*

Other examples abound. The guideline governing firearms offenses prescribes a four-level increase if the defendant possesses a gun "in connection with another felony." U.S.S.G. § 2K2.1(b)(7)(B). In general, the commentary says that the "in connection with" requirement is satisfied only if the gun "facilitated, or had the potential of facilitating, another felony offense." *Id.* § 2K2.1 cmt. n.13(A). But the commentary adds a special per se rule providing that a gun should be deemed to have been possessed in connection with a drug-trafficking offense whenever it is "found in close proximity to drugs" or related materials. *Id.* cmt. n.13(B). As Judge Bibas has explained, that per se rule is not a reasonable interpretation of the guideline "because it substitutes proximity for a connection to a drug crime." *United States v. Perez*, 5 F.4th 390, 402 (3d Cir. 2021) (Bibas, J., concurring in judgment).

2. Rigorous enforcement of *Kisor*'s second step is critical because the Commission's persistent attempts to use commentary to expand the Guidelines raise serious separation-of-powers concerns.

The Guidelines are an exercise of "legislative power" delegated by Congress. *Booker*, 543 U.S. at 243. In upholding that unusual delegation in *Mistretta v. United States*, 488 U.S. 361 (1989), this Court relied on the procedural safeguards imposed by the Sentencing Reform Act. The Commission must submit proposed Guidelines to Congress, which can "revoke or amend any or all of the Guidelines as it sees fit." *Mistretta*, 488 U.S. at 393-94; *see* 28 U.S.C. § 994(p). The Guidelines are also "subject to the notice and comment requirements of the Administrative Procedure Act." *Mistretta*, 488 U.S. at 394; *see* 28 U.S.C. § 994(x). "These constraints ensure that the Sentencing Commission's rulemaking authority does not 'upset the constitutionally mandated balance of powers among the coordinate Branches.'" *United States v. Castillo*, 69 F.4th 648, 663 (9th Cir. 2023) (quoting *Mistretta*, 488 U.S. at 412).

"Unlike the Guidelines themselves," however, the Commission's commentary is not required to "pass[] through the gauntlets of congressional review or notice and comment." *United States v. Havis*, 927 F.3d 382, 386 (6th Cir. 2019) (en banc). And even when the Commission voluntarily submits commentary to Congress along with amendments to the Guidelines, "nothing alerts Congress that it must (or even should) review proposed changes to the guidelines' commentary." *United States v. Havis*, 929 F.3d 317, 320 (6th Cir. 2019) (Sutton, J., concurring in denial of rehearing en banc).

Deferring to commentary that "adds to the Sentencing Guidelines' scope" would thus "allow circumvention of the checks Congress put on the Sentencing Commission." *Campbell*, 22 F.4th at 446 (brackets and citation omitted). And because those checks were an essential premise of this Court's decision upholding Congress's "extraordinary" delegation of legislative power over "individuals' liberty interests," such circumvention would raise "grave constitutional concerns." *Castillo*, 69 F.4th at 663-64. Rejecting commentary that expands the pertinent guideline is the only way to preserve the safeguards on which *Mistretta* relied.

In short, "if the Commission seeks to keep individuals behind bars for longer periods of time," that "substantive policy decision belongs in the guidelines, not in the commentary." *Riccardi*, 989 F.3d at 487. To the extent the Commission wishes to adopt special rules governing the calculation of loss or any of the other myriad issues addressed in the commentary, it is free to do so—"[i]t need only ensure that [the rule] makes its way into the guideline" by following the process prescribed by Congress. *Kennert*, 2023 WL 4977456, at *6 (Murphy, J., concurring). But unless and until the Commission takes that step, "criminal defendants have the same right to an Article III court's independent judgment that civil litigants possess." *Id.*

C. Courts must independently determine whether the particular commentary's character and context justify deference.

Even when a guideline is genuinely ambiguous and the commentary falls within the zone of reasonable interpretation, a court may not "reflexive[ly]" defer. *Kisor*, 588 U.S. at 574 (citation omitted). Instead, *Kisor* requires the court to "make an independent inquiry into whether the character and context of the [commentary] entitles it to controlling weight." *Id.* at 576. In the same vein, a court applying *Skidmore* must consider the full context of the agency's interpretation, including "the thoroughness evident in its consideration," "the validity of its reasoning," and "all those factors which give it power to persuade." *Skidmore*, 323 U.S. at 140. This Court should reaffirm that courts must consider all relevant aspects of the Commission's commentary before deferring.

1. This Court's guidance is needed because some lower courts have seriously misunderstood *Kisor*'s third step. This Court identified three "especially important markers" for determining when "deference is and is not appropriate": (a) the interpretation "must be the agency's 'authoritative' or 'official position,'" (b) "the agency's interpretation must in some way implicate its substantive expertise," and (c) the agency's reading "must reflect 'fair and considered judgment.'" *Kisor*, 588 U.S. at 576-79 (citations omitted). But the Court emphasized that those considerations are not "exhaustive" and that courts must always consider the full "character and context of the agency interpretation" before deferring. *Id.* at 576; *see id.* at 591 (Roberts, C.J., concurring in part)

(emphasizing that *Kisor* encompasses the full range of considerations relevant under *Skidmore*).

Too often, lower courts have ignored that clear instruction by treating the three markers listed in *Kisor* as the only relevant considerations—and by assuming that the Commission's commentary will always or nearly always satisfy all three of them. For example, in *United States v. You*, 74 F.4th 378 (6th Cir. 2023), the Sixth Circuit held that the commentary at issue there satisfied *Kisor*'s third step because it was the Commission's official position, because it implicated the Commission's purported expertise in "developing proportionate penalties," and because it was not an "ad hoc pronouncement"—all of which could be said about essentially *all* commentary. *Id.* at 398 (brackets and citations omitted). Other courts of appeals have engaged in equally cursory analysis. *See, e.g.*, *United States v. Holman*, 171 F.4th 303, 315-16 (4th Cir. 2026); *United States v. Yafa*, 136 F.4th 1194, 1199 (9th Cir. 2025). The Government embraces those decisions and urges this Court to endorse their superficial approach to *Kisor*'s third step. Gov't Br. 25-28. The Court should make clear that more is required.

2. Most obviously, the Government and some lower courts err in assuming that any interpretation of the Guidelines "almost by definition 'implicates the Commission's substantive expertise'" merely because the Commission is charged with developing the Guidelines. Gov't Br. 26 (quoting *Holman*, 171 F.4th at 315) (brackets and citation omitted); *see, e.g.*, *You*, 74 F.4th at 398. In fact, *Kisor* demands a far more nuanced inquiry. After all, every *Kisor* case involves an agency's interpretation of a regulation the agency itself adopted, so the fact that the agency was

authorized by Congress to adopt the regulation cannot be sufficient. Instead, the question is whether, "as between agencies and courts," the agency has "*comparative* expertise in resolving" the particular interpretive question at issue. *Kisor*, 588 U.S. at 578 (emphasis added). A court thus may not defer to the commentary unless it concludes that the Commission is in a better position than the court to resolve the particular interpretive dispute at issue. *Id.*

In cases involving traditional agency regulations, deference may sometimes be warranted because "[a]gencies (unlike courts) have 'unique expertise,' often of a scientific or technical nature, relevant to applying a regulation 'to complex or changing circumstances.'" *Kisor*, 588 U.S. at 571 (plurality opinion). But unlike, say, the Food and Drug Administration or the Transportation Security Administration, *see id.* at 566-67, the Sentencing Commission does not have any scientific or technical expertise that courts lack. The Commission is a body of lawyers and judges acting in an area—criminal sentencing—that falls squarely within courts' traditional experience and expertise. *See Mistretta*, 488 U.S. at 363-65.

To the extent the Commission has comparative expertise vis-à-vis the courts, it lies in gathering "data about past sentencing practices" and developing Guidelines based on that "'empirical data and national experience.'" *Kimbrough v. United States*, 552 U.S. 85, 96, 109 (2007) (citation omitted). That process of *aggregating* empirical sentencing data is the Commission's "characteristic institutional role." *Id.*

Many interpretive questions arising under the Guidelines will not implicate that characteristic role.

Some commentary purports to interpret guidelines that implicate technical matters on which the Commission is in no better position to opine than an Article III court. Here, for example, the Commission has no special expertise concerning the firearms market or what qualifies as a "large" magazine.

In other instances, commentary purports to define legal terms "that fall more naturally into a judge's bailiwick." *Kisor*, 588 U.S. at 578. As noted above, for example, the commentary defines a "dangerous weapon" to include any object that "closely resembles" an instrument capable of causing serious bodily injury, even if the instrument in question is itself innocuous. U.S.S.G. § 2B3.1 cmt. n.2; *see supra* at 10-11. But "dangerous weapon" is a familiar legal term that the Commission is in no better position to interpret than an Article III court. *See, e.g.*, *McLaughlin v. United States*, 476 U.S. 16, 17-18 (1986). Like an agency's interpretation of a regulation incorporating a "simple common-law property term," *Kisor*, 588 U.S. at 578, the Commission's interpretations of "dangerous weapon" and other ordinary legal terms are not entitled to deference.

3. Courts must also ask whether commentary reflects the Commission's "fair and considered judgment." *Kisor*, 588 U.S. at 579 (citation omitted). Some courts have suggested that the commentary will always satisfy that requirement because it is the Commission's formal position and is not "merely an internal memorandum or post-hoc litigating position." *Holman*, 171 F.4th at 315; *see* Gov't Br. 27-28. But again, *Kisor* demands more: Courts must also ask, at a minimum, whether the Commission has adequately considered the interpretive question and explained

why the commentary is the best reading of the relevant guideline. Or, put differently, courts should evaluate the "thoroughness evident in [the Commission's] consideration" and ask whether its explanation has "the power to persuade." *Skidmore*, 323 U.S. at 140; *see, e.g.*, *Young v. United Parcel Serv., Inc.*, 575 U.S. 206, 225 (2015) (declining to defer where the agency failed to adequately "explain the basis" for its interpretation).

Consistent with that understanding, courts have properly declined to defer to commentary when the Commission "did not do any of the interpretive work" or explain "how or why" its interpretation follows from the guideline. *United States v. Roberts*, 787 F. Supp. 3d 219, 253 (E.D. Va. 2025). In some cases, moreover, the Commission's explanation for its commentary makes clear that it is *not* an interpretation at all. In promulgating the commentary defining "dangerous weapon" to include objects that are neither dangerous nor weapons, for example, the Commission explained that the commentary specifies that "an object that is not an actual, dangerous weapon *should be treated as one* for purposes of guideline application." U.S.S.G. App. C, Vol. II, amend. 601 (effective Nov. 1, 2000) (emphasis added). There is no basis for deferring to commentary that does not even purport to reflect Commission's "fair and considered judgment" about the best reading of the guideline's text.

The guideline at issue here provides another example. In adopting the 15-round cutoff for "large capacity magazine[s]," the Commission ignored multiple comments opposing that proposal. Federal defenders, for example, explained that it would sweep in "extremely common" and "unremarkable" guns with standard, factory-issued magazines and would create "an artificial, inexplicable distinction between virtually identical handguns." Letter from Jon Sands, Chair, Federal Defender Sentencing Guidelines Committee, at 8 (Mar. 9, 2006). The Department of Justice likewise opposed the Commission's bright-line rule, favoring instead a "departure" approach that would have allowed a sentencing judge to "depart upward [from the applicable guideline range] based on a 'case-by-case' consideration of the "characteristic[s] of the weapon and the offense." Letter from Michael J. Elston, Sr. Counsel to Asst. Att'y Gen., at 8-9 (Mar. 28, 2006). Yet the Commission failed to offer any explanation for the 15-round rule—much less to ground it in any interpretation of the phrase "large capacity magazine." *See* U.S.S.G. App. C, Vol. III, amend. 691 (effective Nov. 1, 2006).

Such an ipse dixit does not reflect the "fair and considered judgment" *Kisor* demands. 588 U.S. at 579 (citation omitted). Or, put differently, Article III courts should not be compelled to defer to commentary without considering "its writer's thoroughness" and "logic." *United States v. Mead Corp.*, 533 U.S. 218, 235 (2001). And where, as here, both thoroughness and logic are absent, there is no basis for deference.

* * *

Although this brief has focused on the limits on deference to the commentary, we do not mean to suggest that the commentary has no role to play. Much of the Commission's commentary merely provides "background information, including factors considered in promulgating the guideline." U.S.S.G. § 1B1.7. That commentary is not at issue here, because *Stinson* concerns only "the Commission's interpretive commentary." *United States v. Adair*, 38 F.4th 341, 347-48 (3d Cir. 2022); *see Stinson*, 508 U.S. at 41-43; Beaird Br. 6 n.1.

Even in the realm of interpretive commentary, moreover, deference will sometimes be appropriate under either *Kisor* or *Skidmore*. Most obviously, some commentary simply explains how different provisions of the Guidelines are meant to function in relation to each other—often by avoiding duplicative enhancements. For example, U.S.S.G. § 2K2.4 addresses sentences for certain frequently charged firearms offenses, including the use of a gun in relation to a crime of violence or a drug trafficking crime in violation of 18 U.S.C. § 924(c). The accompanying commentary specifies that if "a sentence under this guideline is imposed in conjunction with a sentence for an underlying offense," the court should not "apply any specific offense characteristic for possession, brandishing, use, or discharge" of a firearm because that conduct is already accounted for in the guideline. U.S.S.G § 2K2.4 cmt. n.4(A). Similar examples appear throughout the Guidelines Manual. *See, e.g.*, *id.* cmt. n.4(B); *id.* § 2B1.1 cmt. nn.8(A) and 11.

Federal defenders' experience confirms that this sort of operational commentary is critical to the day-to-day implementation of the Guidelines' complicated scheme of offense levels, enhancements, and adjustments. And under either *Kisor* or *Skidmore*, courts should ordinarily follow such commentary. In general, it reasonably resolves operational questions on which the Guidelines themselves are silent. Deferring to commentary that avoids duplicative enhancements comports with the rule of lenity because it avoids making the Guidelines more punitive. And unlike the many interpretive questions on which the Commission has no comparative advantage over a court, the internal workings of the Guidelines Manual lie at the heart of the Commission's expertise.

III. This Court should avoid overstating the force of the Guidelines in post-*Booker* sentencing.

The question presented in this case concerns the role of commentary in the interpretation of the Guidelines. Understandably, the parties have focused their arguments on that narrow—and critical—issue. But in writing its opinion, this Court should take care to avoid overstating the force of the Guidelines in post-*Booker* sentencing. The opinion in this case will likely be the Court's first extended discussion of the federal sentencing process in several years, and the Court should ensure that the Guidelines-specific nature of the question presented does not obscure the broader principles established in a long line of its post-*Booker* decisions.

As this Court has explained, a sentencing court's ultimate obligation "in every case" is "to impose 'a sentence sufficient, but not greater than necessary, to comply with' the purposes of federal sentencing." *Freeman v. United States*, 564 U.S. 522, 529 (2011) (quoting 18 U.S.C. § 3553(a)). That foundational instruction is known as the "parsimony principle." *Holguin-Hernandez v. United States*, 589 U.S. 169, 174 (2020) (citation omitted). And in imposing a sentence consistent with that principle, courts must "consider" a range of factors including the "history and characteristics of the defendant," unwarranted sentencing disparities, and the applicable Sentencing Guidelines. 18 U.S.C. § 3553(a). The Guidelines range is thus but one factor to be considered in a court's ultimate sentencing decision.

Of course, that range is of enduring importance in federal sentencing practice because it anchors federal sentencing decisions. *See supra* at 14. Courts thus must correctly interpret and apply the Guidelines—as the rest of this brief explains. Ultimately, however, courts have both the power and the duty to disregard a guideline if they conclude that, either in general or in a specific case, it would "yield[] a sentence 'greater than necessary' to achieve § 3553(a)'s purposes." *Kimbrough*, 552 U.S. at 110 (citation omitted); *see Spears v. United States*, 555 U.S. 261, 265-66 (2009) (per curiam). Put differently, this Court's "post-*Booker* decisions make clear that a district court may in appropriate cases impose a non-Guidelines sentence based on a disagreement with the Commission's views." *Pepper v. United States*, 562 U.S. 476, 501 (2011). In describing the federal sentencing process here, the Court should avoid any statements that might inadvertently undermine that well-settled principle.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

Brian H. Fletcher
Counsel of Record
Easha Anand
Jeffrey L. Fisher
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305
(650) 723-3085
bfletcher@law.stanford.edu

Keith M. Donoghue
Shelley Fite
Daniel Habib
Celia C. Rhoads
Jessica Stengel
Amicus Committee Members
Jennifer Niles Coffin
Conrad Kahn
Assistant Federal Public Defenders
NATIONAL ASSOCIATION OF FEDERAL DEFENDERS

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