

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*

REPLY BRIEF FOR THE UNITED STATES

D. JOHN SAUER
*Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217*

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As the government’s opening brief explains (Br. 14-28), this is a straightforward case. In *Stinson v. United States*, 508 U.S. 36 (1993), this Court held that the “measure” of deference to be afforded to the Sentencing Commission’s commentary to its sentencing guidelines is the same as the measure 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. In *Kisor v. Wilkie*, 588 U.S. 558 (2019), the Court “reinforc[ed] some of the limits inherent in” that measure of deference. *Id.* at 574. The plain result of adding those two decisions together is that the limits “inherent in” *Seminole Rock* deference apply to guidelines commentary as well. And while those limits will frequently be satisfied in that context, the court of appeals erred in ignoring them altogether, necessitating vacatur and remand of the decision below.

Neither petitioner nor the Court-appointed amicus curiae (amicus) can refute the simple logic that resolves this case. Indeed, until his opening merits brief in this Court, petitioner agreed with it, and it remains the core of his backup argument. See Pet. Br. 36-42. His new principal argument—that commentary in fact warrants *no* deference, see *id.* at 14-34, 42-45—is unpreserved, outside the question presented, and of no consistent benefit to criminal defendants, some of whom seek the benefit of commentary that would *lower* their guidelines ranges. Petitioner’s argument is also unsound on the merits, as he cannot justify overruling *Stinson*’s statutory-interpretation holding. Far from repudiating *Stinson*, Congress’s actions have been consistent with it. Indeed, just last year, Congress reviewed and permitted an update to Sentencing Guidelines § 1B1.7, which reiterated the longstanding instruction that commentary “may interpret [a] guideline or explain how it is to be applied” and that “[f]ailure to follow such commentary could constitute an incorrect application of the guidelines, subjecting the sentence to possible reversal on appeal.” Sentencing Guidelines App. C (Vol. IV), Amend. 836, at 358 (Nov. 1, 2025).

At the opposite extreme, amicus can defend the approach below—which would permit deference to commentary even if the guideline text is unambiguous—only by reconceiving *Stinson*, the statutes on which it relies, and the Commission’s own understanding of its Guidelines Manual. In particular, amicus posits that Congress, this Court, and the Commission have all been mistaken in the understanding that “commentary” is one of “*three* varieties” of text in the Guidelines Manual. *Stinson*, 508 U.S. at 41 (emphasis added). As amicus would have it, “commentary” is actually a “policy state-

ment” (Br. 18-24)—or even part of an actual “guideline” (Br. 39-47). But while the Commission might well have been able to enact what is now commentary, say, as a policy statement instead, that is not what it did. Accordingly, commentary promotes the goal of sentencing uniformity not through reflexive adherence, but through deference to the Commission’s formal expert interpretations of guidelines ambiguity under *Kisor*.

A. Guidelines Commentary Warrants *Seminole Rock* Deference

1. *Stinson* appropriately applies the *Seminole Rock* approach to guidelines commentary

As the government’s opening brief explains (Br. 16-17, 19-21), *Stinson* appropriately determined that the “measure” of deference given to an agency’s interpretations of its regulations under *Seminole Rock* should also supply the “standard” for deciding “whether particular interpretive or explanatory commentary is binding.” 508 U.S. at 43, 45. In making that determination, the Court drew an “analogy,” though a “not precise” one, between guidelines commentary and an executive agency’s interpretation of its own regulations, and found that replicating the *Seminole Rock* “measure of controlling authority” from the latter context “is consistent with the role the Sentencing Reform Act contemplates for the Sentencing Commission.” *Id.* at 44-45.

In that statute, “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)); see 28 U.S.C.

994(o). And one “method open to the Commission” for doing so “is amendment of the commentary, if the guideline[s] which the commentary interprets will bear the construction.” *Stinson*, 508 U.S. at 46.

From their very first iteration through the present day, commentary has been a central feature of the Guidelines Manual—and one that Congress and this Court have acknowledged and recognized. See *Stinson*, 508 U.S. at 41; see also, *e.g.*, *United States v. Rivera*, 76 F.4th 1085, 1090 (8th Cir. 2023) (citing post-*Stinson* statutes addressing commentary), cert. denied, 144 S. Ct. 861 (2024). Like other syntheses of guiding principles, such as the Restatements of the Law or the Model Penal Code, the Guidelines Manual utilizes below-the-line commentary—principally in the form of “Application Notes”—to authoritatively clarify the meaning of the more concise textual provisions. See *e.g.*, *Pugin v. Garland*, 599 U.S. 600, 606 (2023) (relying on comment to the Model Penal Code); *Universal Health Servs., Inc. v. United States*, 579 U.S. 176, 188 n.3, 190 n.4 (2016) (relying on commentary to Second Restatements of Contracts and Torts).

As the Restatements, Model Penal Code, and guidelines all reflect, it would be quite difficult as a practical matter for a comprehensive guide for practitioners to address every possible circumstance in the above-the-line text. “The list of potentially relevant features of criminal behavior is long; the fact that they can occur in multiple combinations means that the list of possible permutations of factors is virtually endless.” Sentencing Guidelines, Ch. 1, Pt. A.3 (1987). Historically, critical guidelines, such as the relevant-conduct guideline and the guidelines for grouping multiple charges into a single sentencing recommendation—all of which are central to the guidelines’ “‘real offense’ sentencing”

approach, *id.* Ch. 1, Pt. A.4(a)—come with pages of commentary. See *id.* §§ 1B1.3, 3D1.1-3D1.5 (2025).

Folding all of that into text, without creating unwarranted cross-inferences and negative inferences, all while maintaining the Manual’s utility for practitioners, would be a daunting task. The Commission has accordingly resolved some of the many complexities inherent in applying the guidelines text to real-world sentencing matters through plain-English expository commentary that typically undergoes public notice-and-comment and congressional review. See U.S. Sent. Comm’n R. 4.1, 4.3; cf. *Securities & Exchange Comm’n v. Chenery Corp.*, 332 U.S. 194, 203 (1947) (noting that a “problem may be so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule,” such that “the agency must retain power to deal with the problems on a case-to-case basis if the administrative process is to be effective”). And it has memorialized that practice in the actual text of Sentencing Guidelines § 1B1.7, which Congress has reviewed multiple times and which specifies that an interpretation of a guideline can be “incorrect” for “[f]ailure to follow” commentary that “interpret[s]” or “explain[s]” the guideline. Sentencing Guidelines §§ 1B1.7 (1987, 2025).

2. *Petitioner’s request to overrule Stinson is misconceived*

a. Petitioner’s claim of no deference is not within the proper scope of this Court’s review

In the courts below, petitioner’s sole *Stinson*-related contention was that the application of *Seminole Rock* deference to guidelines commentary should incorporate the limits explicated in *Kisor*. See U.S. Br. 9-11; see also Pet. 6 (describing briefing on appeal as contending

that “*Kisor* * * * cabined the level of deference” owed under *Seminole Rock* and thus “overruled [*Stinson*] to the extent that [*Stinson*] requires courts to adhere to the Commentary unless it actively conflicts with the text of the Guideline”) (emphasis added). And the petition for a writ of certiorari contended only that “*Kisor* * * * cast[] doubt on *Stinson*” by “emphasiz[ing] important limitations in *Seminole Rock*.” Pet. 16; see Pet. 15-17.

The second question presented thus asked only “[w]hether *Stinson v. United States* still accurately state [*sic*] the *level* of deference due to the Commentary of the Federal Sentencing Guidelines,” Pet. i (emphasis added), not whether deference should be discarded altogether. The Court’s slight rewording of the question presented, which replaced “level of deference” with “rule for *the* deference,” 2026 WL 1052007 (emphasis added), allowed the question to more precisely track the difference between the decision below and *Kisor*, whose limits concern both the “level” of deference (how much deference has accorded) and the conditions that must be satisfied for *any* deference to apply. See, e.g., *Kisor*, 588 U.S. at 577 (limiting deference to interpretations that are “actually made by the agency”).

Nonetheless, petitioner’s principal contention in his opening merits brief in this Court—to which the government has not previously had an opportunity to respond—is that “no deference” at all is warranted to guidelines commentary. Pet. Br. 14 (capitalization omitted); see *id.* at 14-34. That argument is neither properly preserved nor within the question presented. It would accordingly be appropriate for the Court to decline to entertain it, and to limit its review to the issues presented in the lower courts and at the certiorari stage.

b. Petitioner provides no sufficient justification for overruling Stinson

Even if petitioner’s request to overrule *Stinson* were properly before the Court, it should be rejected. “Overruling precedent is never a small matter.” *Kisor*, 588 U.S. at 586 (quoting *Kimble v. Marvel Entm’t, LLC*, 576 U.S. 446, 455 (2015)). “[D]eference decisions” like *Stinson* “are ‘balls tossed into Congress’s court, for acceptance or not as that branch elects.’” *Id.* at 587-588 (quoting *Kimble*, 576 U.S. at 456). And because “Congress remains free to alter what [the Court has] done,” adherence to precedent has “special force.” *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 274 (2014) (citation omitted). Here, in the 33 years since *Stinson* “tossed” its deference ball to Congress to accept or reject, “Congress has chosen acceptance,” *Kisor*, 588 U.S. at 587-588 (citation omitted)—if not outright endorsement.

i. As noted above, Congress has recently reviewed Sentencing Guidelines § 1B1.7, titled “Significance of Commentary,” which makes clear that it may be reversible error to apply the guidelines in a manner contrary to the commentary. See Sentencing Guidelines § 1B1.7. Congress has also reviewed numerous guidelines whose interpretation may turn on deference to commentary and allowed them to become effective. Since 1997, the Commission has, by rule, “endeavor[ed] to include amendments to * * * commentary in any submission of guideline amendments to Congress,” U.S. Sent. Comm’n R. 4.1, thereby apprising Congress of the role that commentary may play in guidelines’ application.

Congress has even gone so far as to direct the Commission to reconsider interpretive commentary in light

of policy concerns. See Stop Counterfeiting in Manufactured Goods Act, Pub. L. No. 109-181, § 1(c)(3), 120 Stat. 287 (2006) (requiring reconsideration of “the definition of ‘infringement amount’ set forth in application note 2 of section 2B5.3”); Artists’ Rights and Theft Prevention Act of 2005, Pub. L. No. 109-9, Tit. I, § 105(c)(3), 119 Stat. 223 (requiring reconsideration of “scope of ‘uploading’ set forth in application note 3 of section 2B5.3”). That makes little sense unless the commentary can, indeed, illuminate the meaning of an ambiguous guideline—precisely what *Stinson* says. See, e.g., *Ryan v. Gonzales*, 568 U.S. 57, 66 (2013) (“We normally assume that, when Congress enacts statutes, it is aware of relevant judicial precedent.”) (citation omitted).

ii. Petitioner cannot carry his “considerable burden,” *CBOCS W., Inc. v. Humphries*, 553 U.S. 442, 451 (2008), to provide a “‘special justification’—something more than ‘an argument that the precedent was wrongly decided’”—that would justify overruling *Stinson*. *Kisor*, 588 U.S. at 587 (quoting *Halliburton*, 573 U.S. at 266); see Amicus Br. 47-51. Indeed, petitioner primarily tries to avoid taking on that burden, asserting that “[t]his Court need not consider the *stare decisis* factors” to overrule *Stinson*, on the theory that *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), already shows that *Stinson* is incorrect and that *Kisor* is “an ‘aberration.’” Pet. Br. 42-43 (citation omitted); see e.g., *id.* at 14, 18, 23. That theory is unsound.

Loper Bright overruled deference to agency interpretations of statutes under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), on the ground that such deference “cannot be squared with the [Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, 701 *et seq.*],” which “makes clear that agency

interpretations of statutes” are “not entitled to deference.” *Loper Bright*, 603 U.S. at 392, 396 (emphasis omitted). That overruled *Chevron* doctrine has no meaningful bearing on *Stinson*, which expressly *rejected* an analogy between *Chevron* deference to agencies’ statutory interpretations and deference to guidelines commentary as “inapposite.” *Stinson*, 508 U.S. at 44.

Whereas *Chevron* deference rested on a “presumption” that Congress delegated authority to an agency to “resolve[]” “ambiguity in a statute” written by Congress, *Loper Bright*, 603 U.S. at 398 (citation omitted), the Commission’s commentary “explains the guidelines” that the Commission *itself* enacts, *Stinson*, 508 U.S. at 44. And because “[c]ommentary, unlike a legislative rule, is not the product of delegated authority for rule-making,” the closest analogue for guidelines commentary was not *Chevron* deference, but the *Seminole Rock* deference afforded to “an agency’s interpretation of its own legislative rule.” *Ibid.*

While *Loper Bright* overruled *Chevron* deference, *Kisor* “uph[e]ld” *Seminole Rock* deference. *Kisor*, 588 U.S. at 563. And when it did so, all five of the six Justices then on the Court who would later join the majority in *Loper Bright* made clear that “[i]ssues surrounding judicial deference to agency interpretations of their own regulations are distinct from those raised in connection with judicial deference to agency interpretations of statutes enacted by Congress.” *Id.* at 591 (Roberts, C.J., concurring in part); *id.* at 633 (Kavanaugh, J., joined by Alito, J., concurring in the judgment) (agreeing with the Chief Justice); see *id.* at 628 n.114 (Gorsuch, J., joined by Thomas and Kavanaugh, JJ., concurring in the judgment) (similarly stating that “it would be a mistake to suppose that *Auer*”—another name for

the *Seminole Rock* doctrine—“is in any way a ‘logical corollary to *Chevron*’”) (citation omitted).

Loper Bright itself favorably cites *Kisor* multiple times. See *Loper Bright*, 603 U.S. at 392-393, 401. And deference to guidelines commentary would be a particularly inapt context for extending *Loper Bright*, because the APA provision that is central to *Loper Bright*’s holding—5 U.S.C. 706 (see, e.g., *Loper Bright*, 603 U.S. at 390-394, 398)—does not apply to the guidelines. See 28 U.S.C. 994(x) (separately applying different APA provision); *United States v. Maiello*, 805 F.3d 992, 998 (11th Cir. 2015) (agreeing with the Third, Eighth, Ninth, and D.C. Circuits “that the Commission is not an ‘agency’ subject to the requirements of the APA”); S. Rep. No. 225, 98th Cong., 1st Sess. 180-181 & n.420 (1983).

Nor, for that matter, did *Stinson* even apply *Seminole Rock* deference as such. Instead, as noted above, *Stinson* simply replicated the “standard” and “measure” for deference in *Seminole Rock*, based on an “analogy” between the Commission’s interpretation of its own guideline and “an agency’s interpretation of its own legislative rule”—an analogy that it recognized was “not precise.” *Stinson*, 508 U.S. at 43-45. And while the analogy may be stronger today than it was when *Stinson* was decided, see U.S. Br. 20-21, *Loper Bright*’s APA-focused reasoning in no way undermines *Stinson*’s determination that the *Seminole Rock* approach is “consistent with the role the Sentencing Reform Act contemplates for the Sentencing Commission,” 508 U.S. at 45.

c. Petitioner’s criticisms of Stinson lack merit

To the extent that petitioner effectively contends (Br. 15-21) that *Stinson* was simply wrong as an original matter in finding *Seminole Rock* deference to be con-

sistent with the governing statutes, that contention provides no “special justification,” *Kisor*, 588 U.S. at 587 (citation omitted), for overruling *Stinson*. The contention is also mistaken.

Petitioner observes (Br. 14-17) that the sentencing statutes require a sentencing court to consider the “kinds of sentence” and “sentencing range” recommended in the guidelines, 18 U.S.C. 3553(a)(4), and “correctly” ascertain the advisory sentencing range, *Gall v. United States*, 552 U.S. 38, 49 (2007). But as the Court necessarily recognized in *Stinson*, those requirements are consistent with deferring to the Commission’s commentary when interpreting a guideline. See 508 U.S. at 45-46 (considering Commission’s role under Sentencing Reform Act). Indeed, the guidelines themselves direct courts to pay heed to the commentary. See Sentencing Guidelines § 1B1.7. Petitioner’s reliance (Br. 17-18) on decisions reflecting that courts are responsible for evaluating whether the Commission’s instructions are consistent with the relevant *statute* sheds no meaningful light on commentary’s role in interpreting ambiguous *guidelines*.

Petitioner is similarly mistaken in his claim (Br. 20) that *Seminole Rock* deference is an “end-run” around the procedures for promulgating and amending guidelines. Even putting aside the Commission’s practice of subjecting commentary to the same majority-vote, notice-and-comment, and congressional-review procedures as guidelines, see U.S. Sent. Comm’n R. 4.1, 4.3, petitioner errs in assuming that commentary can amend the guidelines sub silentio. Commentary is not itself a guideline; instead, it is dependent upon, and subsidiary to, the guidelines text. See *Stinson*, 508 U.S. at 46 (requiring that “the guideline which the commentary interprets will bear the construction”); see also *Kisor*, 588

U.S. at 574-576 (emphasizing that *Seminole Rock* deference is limited to “genuinely ambiguous” rules). As the Court has explained, *Seminole Rock* deference “does not, and indeed could not, go” so “far” as to “‘permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation.’” *Kisor*, 588 U.S. at 575 (citation omitted).

Much less does deference to the Commission’s commentary usurp Congress’ authority to “define crimes and fix punishments,” Pet. Br. 26 (citation omitted), or raise any other possible “constitutional concerns,” *id.* at 21. This Court has squarely rejected the claim that the promulgation even of *binding* sentencing guidelines is an impermissible “exercise * * * [of] legislative authority” to “make[] * * * sentencing policy.” *Mistretta v. United States*, 488 U.S. 361, 383 (1989); see *id.* at 384-397. It follows *a fortiori* that deference to commentary interpreting *nonbinding* guidelines—which the Commission does not enforce, and which have less legal force than binding ones, see U.S. Br. 21—is likewise constitutionally permissible. Cf. Amicus Br. 37.

B. *Kisor* Makes Clear That *Seminole Rock* Deference Cannot Overcome Unambiguous Regulatory Text

Because the “limits” emphasized in *Kisor* are “inherent in” *Seminole Rock* deference, *Kisor*, 588 U.S. at 574, they are necessarily inherent in *Stinson*’s adoption of that same “measure of controlling authority” as “the standard that governs the decision whether particular interpretive or explanatory commentary is binding,” *Stinson*, 508 U.S. at 43, 45. As *Kisor* makes clear, even the “classic formulation” of *Seminole Rock* deference that appears in *Stinson*—a shorthand reference to whether an agency’s construction is “‘plainly erroneous or inconsistent with the regulation’”—does not permit

deference in the absence of “genuine ambiguity” and the other prerequisites identified in *Kisor*. 588 U.S. at 574-575 (citation omitted); see *id.* at 574-579; see also U.S. Br. 18-19. Amicus errs in nonetheless urging a “reflexive,” *Kisor*, 588 U.S. at 574 (citation omitted), form of deference that would permit deference to commentary even when a guideline is unambiguous.

1. Rather than try to meaningfully defend *Stinson* on its own terms, amicus instead attempts to reconceptualize both that decision and the entire legal and practical framework that underlies it. Specifically, he contends (Br. 18-28) that the Commission’s “commentary” actually consists of “policy statement[s]” that Congress has “expressly” authorized under 28 U.S.C. 994(a)(2), and should therefore be treated as an “authoritative guide to the meaning of the applicable Guideline” under this Court’s decision in *Williams v. United States*, 503 U.S. 193, 201 (1992). But neither Congress, this Court, nor the Commission itself have understood commentary to be policy statements.

Amicus observes that Section 994(a)(2) authorizes the Commission “to promulgate ‘general policy statements regarding application of the guidelines.’” Br. 18 (quoting 28 U.S.C. 994(a)(2)). And it may well be the case that the Commission could have promulgated commentary, or something similar, under that authority. But just because policy statements may “regard[] application of the guidelines,” 28 U.S.C. 994(a)(2), does not mean that *everything* that regards application of the guidelines is a policy statement. Cf. *United States Dep’t of Justice v. Tax Analysts*, 492 U.S. 136, 154 (1989) (“If Congress had intended to enact the converse proposition * * * it was free to do so.”). Just as authorizing the production of cars that are red does not make every red

object a car, Section 994(a)(2) does not make commentary into policy statements.

Stinson instead explained that there are “three varieties” of text in the Guidelines Manual—“guideline,” “policy statement,” and “commentary”—each of which Congress distinctly addressed by name in the Sentencing Reform Act. 508 U.S. at 41 (emphasis added). *Stinson* accordingly treated the issue of the deference due to commentary as distinct from the issue of the deference due to a policy statement. The Court found that its “holding in *Williams*,” which required setting aside a sentence under 18 U.S.C. 3742(f)(1) for a prejudicial failure to follow a policy statement, “applie[d] with equal force to the commentary before us here.” *Stinson*, 508 U.S. at 43; see *id.* at 42 (citing *Williams*, 503 U.S. at 201, 203). It immediately cautioned, however, that “[i]t does not follow that commentary is binding in all instances.” *Id.* at 43. The Court then proceeded through several pages of analysis of “the standard that governs the decision whether particular interpretive or explanatory commentary.” *Ibid.*; see *id.* at 43-47. All of that analysis would have been unnecessary if the commentary were itself a policy statement.

Congress has likewise treated commentary as distinct from policy statements. The (now-invalidated) 18 U.S.C. 3553(b)(1) refers to “sentencing guidelines, policy statements, *and* official commentary of the Sentencing Commission,” 18 U.S.C. 3553(b)(1) (emphasis added), indicating that they are, in fact, three distinct things. See, e.g., *Parker Drilling Mgmt. Servs., Ltd. v. Newton*, 587 U.S. 601, 611 (2019) (recognizing the “‘cardinal principle’ of interpretation that courts ‘must give effect, if possible, to every clause and word of a statute.’”) (quoting *Loughrin v. United States*, 573 U.S.

351, 358 (2014)). Nor can it reasonably be supposed that when Congress has directed changes to, or reconsideration of, particular application notes, see p. 8, *supra*, it has failed to recognize that those application notes appear under the heading of “Commentary.” See Sentencing Guidelines § 2B5.3, comment. (nn.2-3) (2004); *id.* § 3E1.1, comment. (n.6) (2002); *id.* § 4B1.5, comment. (n.4) (2005).

The classification of application notes as commentary is also, in itself, a dispositive reason to reject petitioner’s recharacterization of those application notes as policy statements. The label attached by the Commission reflects that the Commission *itself* is not promulgating the application notes pursuant to its authority to promulgate policy statements. Although the Commission’s rules prescribe similar procedures for policy statements and commentary, see Amicus Br. 18-20, the separate denomination of each shows that the Commission—like Congress and this Court—views them as different things. See U.S. Sent. Comm’n R. 4.1, 4.3 (Commission rules referring to “promulgat[ing]” both “policy statements *and* commentary”) (emphasis added).

Sentencing Guidelines § 1B1.7, in addressing the “Significance of Commentary,” has likewise (in both its text and commentary) treated policy statements and commentary as distinct. See Sentencing Guidelines § 1B1.7 (1987) (using both terms); *id.* § 1B1.7 comment. (suggesting only that certain commentary would “have the force of policy statements”); Sentencing Guidelines § 1B1.7 comment. (2025) (same). The Commission’s actions to promulgate “commentary,” *ibid.*, cannot be reasonably understood to have actually been actions to promulgate “policy statements,” *ibid.*—let alone retroactively reclassified as such. Cf. *Garland v. Ming Dai*,

593 U.S. 357, 369 (2021) (noting the “traditional administrative law principle[]” that “judges generally must assess the lawfulness of an agency’s action in light of the explanations the agency offered for it rather than any *ex post* rationales a court can devise”).

Similar conceptual errors undermine amicus’s alternative theory (Br. 39-46) that “commentary” is actually a “guideline” provision to which the Commission has voluntarily assigned less weight. Amicus acknowledges (Br. 40) that accepting that theory would be a “reframing” that “would not track *Stinson*’s reasoning.” The theory also rests on an incurable circularity. In amicus’s view (*e.g.*, Br. 39), the reason why portions of a guideline denominated as commentary would be treated differently from the text is because the commentary to Sentencing Guidelines § 1B1.7 about the weight of guidelines commentary references *Stinson*. In other words, amicus’s argument relies on a reference *in commentary* to a decision adopted at a time when the Sentencing Guidelines § 1B1.7 contained *different* commentary, see *Stinson*, 508 U.S. at 46, and whose reasoning he admits that he does not defend, Amicus Br. 40. Such a conceptual ouroboros cannot provide a foundation for his approach.

2. Amicus separately contends (Br. 30-32) that application of *Kisor* to *Stinson* would conflict with *Loper Bright*. But like petitioner, amicus errs in attempting to transpose *Loper Bright*’s reasoning about *Chevron* into the context of *Seminole Rock* deference as incorporated by *Stinson*. In particular, *Loper Bright*’s reasoning does not undermine recognizing that *Kisor*’s “genuine ambiguity” limit on *Seminole Rock* deference, *Kisor*, 588 U.S. at 575, is similarly “inherent in” *Stinson*’s incorporation of that approach, *id.* at 574.

Amicus notes that *Chevron* deference to an agency’s interpretation of a congressional statute, which the Court discarded in *Loper Bright*, “rested on a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency.” Amicus Br. 30 (quoting *Loper Bright*, 603 U.S. at 398). And he additionally notes that *Loper Bright* set aside *Chevron* deference, in part, because it found *Chevron*’s “ambiguity” trigger to be too “impressionistic and malleable” to “‘stand as an everyday test for allocating’ interpretive authority between courts and agencies.” *Loper Bright*, 603 U.S. at 408 (citation omitted); see Amicus Br. 31. But far from foreclosing a determination of ambiguity from ever forming a part of statutory interpretation, *Loper Bright* simply rejected ambiguity as a basis for an approach that would require a court to “give up on its ‘interpretive work’” and simply “allow the Executive Branch to displace” the court’s own interpretation of the Legislative Branch’s enactments. *Loper Bright*, 603 U.S. at 409. The *Seminole Rock* approach under *Stinson*, as informed by *Kisor*, requires no such thing.

As a threshold matter, as noted above (see p. 9, *supra*), *Stinson* expressly rejected an analogy between *Chevron* deference (the subject in *Loper Bright*) and deference to guidelines commentary. And as discussed above (see *ibid.*), the *Loper Bright* presumption that amicus highlights—under which Congress was presumed to delegate authority to interpret Congress’s enactments to third-party executive agencies (which could switch positions over time), see *Loper Bright*, 603 U.S. at 398-406—plays no role in *Seminole Rock* deference under *Stinson*. As the Court explained in *Stinson*, the

Seminole Rock approach of deferring to an agency’s interpretation of its own regulations “is consistent with the role the Sentencing Reform Act contemplates for the Sentencing Commission,” which, “after all, *drafts the guidelines as well as the commentary interpreting them.*” *Stinson*, 508 U.S. at 45 (emphasis added).

Nor did *Loper Bright* cast general doubt on statutory-interpretation doctrines that turn on ambiguity. To the contrary, while the Court acknowledged that the dissent had identified several such doctrines, such as the “canon of constitutional avoidance,” *Loper Bright*, 603 U.S. at 474 (Kagan, J., dissenting), the Court did not deny either their viability or workability. See *id.* at 409 (majority opinion). And the “genuine ambiguity” analysis under *Kisor*, which limits deference to circumstances in which the traditional tools of statutory analysis leave more than “one reasonable construction of a regulation,” *Kisor*, 588 U.S. at 575, functions much like the ambiguity prerequisite for constitutional avoidance, which “comes into play only when, after the application of ordinary textual analysis, [a] statute is found to be susceptible of more than one construction,” *Jennings v. Rodriguez*, 583 U.S. 281, 296 (2018) (citation omitted).

C. Deference To Guidelines Commentary Will Frequently Satisfy The Limits Explicated in *Kisor*

As the government’s opening brief explains (Br. 22-28), even under the limits of *Seminole Rock* deference emphasized in *Kisor*, deference to guidelines commentary will frequently be warranted. The commentary represents the Commission’s formal, considered judgments on guidelines application (*id.* at 26); it embodies the Commission’s statutorily-mandated expertise on such matters (*id.* at 26-27); and its assistance to courts struggling with the genuine ambiguity that is inevitable

in generalized nationwide sentencing guidelines is typically reasonable (*id.* at 22-25). Deference under that approach does not inherently favor any particular outcome. As illustrated in *Stinson*, which itself involved commentary that suggested a lower sentencing range, see 508 U.S. at 38-39, commentary does not always favor harsher sentencing outcomes—it can go either way. Petitioner, however, urges this Court, if it accepts his original argument that *Stinson* should be understood in light of *Kisor*, to limit any deference to commentary that would lower a defendant’s guidelines range, while categorically rejecting deference to commentary that would suggest a higher advisory guidelines range. See Pet. Br. 40-41. But his sole basis for that one-sided approach—the rule of lenity—does not provide it with any support.

1. “[M]uch like the vagueness doctrine,” the rule of lenity is “founded on” two principles: (1) that “the power of punishment is vested in the legislative, not in the judicial department” and (2) that individuals are entitled to “fair notice of the law.” *United States v. Davis*, 588 U.S. 445, 464-465 (2019) (quoting *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820) (Marshall, C.J.)); accord *United States v. Bass*, 404 U.S. 336, 348 (1971) (stating that lenity is “founded on [those] two policies”). Accordingly, the logic underlying the Court’s rejection of separation-of-powers and vagueness challenges to the guidelines compels the conclusion that the rule of lenity does not apply in the context of deference to guidelines commentary. See *Beckles v. United States*, 580 U.S. 256, 262-267 (2017) (vagueness); *Mistretta*, 488 U.S. at 384-397 (separation of powers).

As discussed above (see p. 12, *supra*), deference to guidelines commentary does not implicate the principle that “legislatures and not courts should define criminal

activity,” *Bass*, 404 U.S. at 348. See *Mistretta*, 488 U.S. at 396. This Court has similarly made clear that “[t]he advisory Guidelines also do not implicate” concerns about “‘fair notice.’” *Beckles*, 580 U.S. at 262, 265 (citation omitted). The guidelines “do not regulate the public by prohibiting any conduct or by ‘establishing minimum and maximum penalties for any crime.’” *Id.* at 266 (citation and brackets omitted). Those functions are instead carried out exclusively by the underlying criminal statutes in a case. The now-advisory guidelines play the distinctly subsidiary role of “advis[ing] sentencing courts how to exercise their discretion within the bounds established by Congress.” *Ibid.* And courts’ exercise of such discretion, so long as it honors the minimum and maximum punishments established by Congress, has never given rise to the concerns underlying the rule of lenity. See *id.* at 267 (discussing the “unfettered discretion” of a sentencing judge to select a sentence within the statutory range).

Petitioner errs in suggesting (Br. 25-26) that the rule of lenity should nonetheless apply as a vestige of what he presumes to be Congress’s implicit intent before *United States v. Booker*, 543 U.S. 220 (2005), when the guidelines were treated as mandatory. To begin with, the more relevant focus is on the *Commission’s* intent, not Congress’s—“[t]he Commission, after all, drafts the guidelines” whose text might trigger a lenity presumption. *Stinson*, 508 U.S. at 45. Furthermore, the Court’s assessment of congressional intent in its pre-*Booker* decision in *Stinson*—which made clear that it was addressing the standard for *all* commentary, see *id.* at 43-44—indicates that Congress did not intend for the rule of lenity to limit deference only to defendant-favorable commentary. See *id.* at 45.

Finally, even if Congress had such an unstated intent at that time, it is far from clear that it would retain it for advisory guidelines. See *Booker*, 543 U.S. at 246 (examining what “Congress would have intended” if it knew that its original design for mandatory guidelines was constitutionally infirm) (citation omitted). To the contrary, after *Booker*, Congress has directed the Commission to reconsider interpretive commentary based on considerations that could suggest commentary that would favor higher sentencing ranges for certain criminal conduct. See p. 8, *supra* (discussing 120 Stat. 287 and 199 Stat. 223). Those statutory directives would have little effect if such commentary would simply be ignored.

2. In any event, even if the rule of lenity might otherwise be relevant, it applies “only when a criminal statute contains a ‘grievous ambiguity or uncertainty’” that leaves a court—even “‘after seizing everything from which [interpretive] aid can be derived’”—unable to “‘make * * * more than a guess as to what Congress intended.’” *Ocasio v. United States*, 578 U.S. 282, 295 n.8 (2016) (quoting *Muscarello v. United States*, 524 U.S. 125, 138 (1998)). For that reason, “[t]he rule ‘comes into operation at the end of the process of construing what Congress has expressed.’” *Wooden v. United States*, 595 U.S. 360, 377 (2022) (Kavanaugh, J., concurring) (quoting *Callanan v. United States*, 364 U.S. 587, 596 (1961)). Those limits do not allow it to be employed to foreclose *Seminole Rock* deference under *Stinson* and *Kisor*.

Petitioner errs in asserting (Br. 41) that “the rule of lenity” should “take precedence” over deference to the Commission’s commentary. The rule of lenity, like deference under *Kisor*, applies “only * * * *after* consulting traditional canons of statutory construction.” *Shular v.*

United States, 589 U.S. 154, 165 (2020) (emphasis added); see *Kisor*, 588 U.S. at 575. And at that point, no “grievous ambiguity,” *United States v. Castleman*, 572 U.S. 157, 173 (2014) (citation omitted), could exist. A court is not left to “simply guess” at the meaning of the guideline, *ibid.* (citation omitted), when the Commission has reasonably explained that meaning in the commentary.

When such commentary is present, it supplies the *best* source for ensuring that the guidelines are understood uniformly by the courts tasked with considering its nationwide guidance. *Stinson* soundly “presume[d] 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.” 508 U.S. at 45 (emphasis added). No legal, logical, or practical reason exists for categorically disregarding those explanatory interpretations whenever they do not match a defendant’s preferences. The proper disposition of this case is to remand for an evenhanded application of *Kisor*—not a lopsided one.

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For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be vacated and the case remanded for further proceedings.

Respectfully submitted.

D. JOHN SAUER
Solicitor General

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