No. 23-___

IN THE

Supreme Court of the United States

CORY RATZLOFF,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Stinson v. United States*, 508 U.S. 36 (1993), this Court held that the United States Sentencing Commission's commentary on the Sentencing Guidelines should be treated like "an agency's interpretation of its own legislative rules." *Id.* at 45. At the time, that meant the commentary had to be afforded " 'controlling weight unless it [was] plainly erroneous or inconsistent with' " the Guidelines themselves. *Id.* (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)). In *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), this Court articulated administrative law principles that circumscribe the deference courts must afford to agencies' interpretations of their own legislative rules. *Id.* at 2414–16. Notwithstanding *Kisor*, six Courts of Appeals continue to apply *Stinson*'s more extreme form of deference to Guidelines commentary. The Question Presented is:

Whether the administrative law principles articulated in *Kisor* limit the deference owed to the United States Sentencing Commission's commentary on the Sentencing Guidelines.

PARTIES TO THE PROCEEDING AND RULE 29.6 DISCLOSURE STATEMENT

Petitioner is Cory Ratzloff.

Respondent is the United States of America.

There are no publicly held corporations involved in this proceeding.

RELATED PROCEEDINGS

United States of America v. Cory Ratzloff, No. 22-3128, U.S. Court of Appeals for the Tenth Circuit. Judgment entered June 27, 2023.

United States of America v. Cory Ratzloff, No. 5:20-cr-40062, U.S. District Court for Kansas. Judgment entered June 24, 2022.

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INTRODUCTION

The Courts of Appeals have split six to six on the question of what deference they must afford to commentary from the United States Sentencing Commission interpreting the Sentencing Guidelines. Half apply ordinary administrative law principles as set forth in this Court's decision in *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), and thus do not defer to commentary interpreting the Guidelines where the Guideline is unambiguous or the commentary unreasonable, *id.* at 2414–16. The other half continue to apply the more extreme form of deference set forth in *Stinson v. United States*, 508 U.S. 36 (1993), and thus give Guidelines commentary " 'controlling weight unless it is plainly erroneous or inconsistent with' " the Guidelines, *id.* at 45 (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)).

That split is acknowledged and deeply entrenched. *E.g.*, Pet.App. 5a ("The [C]ourts of [A]ppeals are divided on whether *Kisor* changed how courts should apply *Stinson*."). Despite three Courts of Appeals taking the issue en banc in the last few years, the split is no closer to resolution. *See United States v. Dupree*, 57 F.4th 1269 (11th Cir. 2023) (en banc) (applying *Kisor*); *United States v. Nasir*, 17 F.4th 459 (3d Cir. 2021) (en banc) (same); *United States v. Vargas*, 74 F.4th 673 (5th Cir. 2023) (en banc) (applying *Stinson*). Judges across the country have expressed that they would "welcome the Supreme Court's advice on whether *Stinson* or *Kisor* controls the enforceability of and weight to be given Guidelines commentary." Order, *United States v. Moses*, No. 21-4067, at 6 (4th Cir. Mar. 23, 2022) (Niemeyer, J., supporting the denial of rehearing en banc); *see also United States v.*

Maloid, 71 F.4th 795, 798 (10th Cir. 2023) (declining to "extend *Kisor* to the Commission's commentary" absent "clear direction from the Court"). And unlike disagreements about how to interpret a particular Guideline, the "dispute about what deference courts should give to the commentary" cannot be resolved by the "Commission . . . on its own." *Dupree*, 57 F.4th at 1289 n.6 (Grant, J., concurring in the judgment). "[O]nly the Supreme Court will be able to answer that question." *Id.*

This issue is also profoundly important. Judges interpret the Guidelines in nearly every federal criminal case. Compelled deference to Guidelines commentary will be outcome determinative of the proper Guidelines range—and thus the ultimate sentence imposed—in many of those cases. *See* Order, *Moses*, No. 21-4067, at 13 (Wynn, J., voting to grant rehearing en banc) (The issue is "of exceptional importance," affecting "hundreds, if not thousands, of cases in the Fourth Circuit" alone.); *id.* at 6 (Niemeyer, J., supporting the denial of rehearing en banc) (explaining that this is "an issue that could have far reaching results"). In addition, the Question Presented implicates core separation of powers principles and individual liberty interests, and answering it will promote uniformity in criminal sentencing.

Moreover, the courts that have refused to apply *Kisor*'s limiting principles to Guidelines commentary—like the Tenth Circuit below—are simply wrong. The Sentencing Commission is not due more deference in construing Guidelines than an executive agency is in construing its own regulations. If anything, the Guidelines' unique attributes—

including Congress's role in their creation, their advisory nature, and their impact on individual liberty—cut against deference to the Commission's commentary.

Finally, this case is an ideal vehicle for the Court to resolve this split once and for all. The question whether *Kisor* or *Stinson* governs Guidelines commentary is squarely presented, was fully briefed below, and was definitively answered by the Tenth Circuit. The Tenth Circuit exclusively relied on *Stinson* in upholding Petitioner's sentence. *Id.* at 1a–8a. And under *Stinson*, the Tenth Circuit had no choice but to defer to Application Note 14(B), which concludes that a defendant who "finds and takes a firearm" "during the course of a burglary" necessarily "used or possessed [that] firearm . . . in connection with another felony offense" for purposes of Guideline § 2K2.1(b)(6)(B). United States Sentencing Commission, *Guidelines Manual*, § 2K2.1(b)(6)(B) & comment. (n.14(B)) (Nov. 2021).[1] The Tenth Circuit expressly declined to decide, however, whether it would have construed § 2K2.1(b)(6)(B) to apply to Petitioner's case absent *Stinson*. Pet.App. 8a n.3. There is good reason to believe that it would not have—and, accordingly, that the Question Presented will prove outcome determinative here.

This Court should grant certiorari and hold that *Kisor* limits the amount of deference the Tenth Circuit owes to Guidelines commentary.

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[1] Unless otherwise indicated, citations are to the 2021 version of the Guidelines Manual.

OPINIONS BELOW

The District Court's judgment in Petitioner's criminal case is unreported and reproduced at Pet.App. 9a–23a. The relevant portions of the sentencing transcript are reproduced at Pet.App. 24a–29a. [2] The Tenth Circuit's unpublished decision affirming the District Court's judgment is unreported and reproduced at Pet.App. 1a–8a.

JURISDICTION

The Tenth Circuit entered judgment on June 27, 2023. This petition was timely filed within 90 days of that judgment. This Court has jurisdiction under 28 U.S.C. § 1254(1).

GUIDELINES PROVISIONS INVOLVED

Section 2K2.1(b)(6)(B) of the United States Sentencing Guidelines provides, in relevant part, that a four-level enhancement to the offense level applies "if the defendant . . . used or possessed any firearm or ammunition in connection with another felony offense."

Application Note 14 to § 2K2.1 of the Guidelines provides, in relevant part:

> **(A) In General.**—Subsection[ ] (b)(6)(B) . . . appl[ies] if the firearm or ammunition facilitated, or had the potential of facilitating, another felony offense . . . .

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[2] These portions of the record, along with Petitioner's name, were unsealed in the Tenth Circuit. *See* Appellant's Br., *United States v. Ratzloff*, No. 22-3128, at 56–68 (10th Cir. July 14, 2023); *see also* Sealed Order, *United States v. Ratzloff*, No. 22-3128 (10th Cir. July 7, 2023).

(B) Application When Other Offense is Burglary . . . .—Subsection[ ] (b)(6)(B) appl[ies] . . . in a case in which a defendant who, during the course of a burglary, finds and takes a firearm, even if the defendant did not engage in any other conduct with that firearm during the course of the burglary . . . . In these cases, application of subsection[ ] (b)(6)(B) . . . is warranted because the presence of the firearm has the potential of facilitating another felony offense . . . .

(C) Definitions.—

"Another felony offense", for purposes of subsection (b)(6)(B), means any federal, state, or local offense, other than the explosive or firearms possession or trafficking offense, punishable by imprisonment for a term exceeding one year, regardless of whether a criminal charge was brought, or a conviction obtained.

STATEMENT

1. The United States Sentencing Commission is a federal agency that issues "guidelines . . . for use of a sentencing court in determining the sentence to be imposed in a criminal case." 28 U.S.C. § 994(a)(1). To promulgate a Sentencing Guideline, the Commission must comply with the notice-and-comment requirements of the Administrative Procedure Act. *Id.* § 994(x). In addition, the Commission must submit the proposed Guideline to Congress, which generally has six months to review before the new Guideline

takes effect. *Id.* § 994(p). The Commission also produces commentary that accompanies the Guidelines, including Application Notes that "interpret [a] [G]uideline or explain how it is to be applied." USSG § 1B1.7. That commentary is not subject to mandatory notice-and-comment and congressional review procedures. *See* U.S. Sent'g Comm'n, Rules of Practice & Procedure 4.1, 4.3 (2016).

The Sentencing Guidelines play a "central role in sentencing." *Molina-Martinez v. United States*, 578 U.S. 189, 191 (2016). Although the Guidelines are no longer strictly mandatory, *see United States v. Booker*, 543 U.S. 220 (2005), district courts remain obligated to "begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process." *Gall v. United States*, 552 U.S. 38, 50 n.6 (2007). As a result, the Guidelines—and the commentary that expounds them—exert a strong gravitational pull on sentences. *See Peugh v. United States*, 569 U.S. 530, 543–44 (2013); U.S. Sent'g Comm'n, 2022 Annual Report and Sourcebook of Federal Sentencing Statistics 9 (reporting that during the year Petitioner was sentenced, 67.8% of offenders received sentences that were either within the Guidelines range or justified by a Guidelines ground for departure). Indeed, "[f]ailure to follow . . . commentary could constitute an incorrect application of the [G]uidelines, subjecting the sentence to possible reversal on appeal." USSG § 1B1.7. That is because "[a] district court that improperly calculates a defendant's Guidelines range . . . has committed a significant procedural error." *Molina-Martinez*, 578 U.S. at 199 (quotation marks and brackets omitted). By contrast, a sentence within a properly calculated

Guidelines range may be presumed reasonable on appeal. *See Rita v. United States*, 551 U.S. 338, 347 (2007).

The Sentencing Guidelines have long required enhanced sentences for defendants who "used or possessed" a firearm "in connection with another felony offense." *See* United States Sentencing Commission, *Guidelines Manual*, § 2K2.1(b)(5) (Nov. 1991), later renumbered as USSG § 2K2.1(b)(6)(B), USSG Supp. App. C, amend. 691. As courts wrestled with the meaning of that provision, a circuit split developed over "whether a burglary involving the theft of firearms permitted the application of this enhancement," even if the defendant did not use the firearm during the course of the burglary. *United States v. Johnson*, 558 F.3d 193, 195 (2d Cir. 2009) (per curiam) (collecting cases); *see also United States v. Morris*, 562 F.3d 1131, 1134–35 (10th Cir. 2009) (same). To "address[] that circuit conflict," the Sentencing Commission added Application Note 14(B) in 2006. *See* 71 Fed. Reg. 4782 (Jan. 27, 2006) (request for public comment on various versions of Application Note 14(B)); 71 Fed. Reg. 28063 (May 15, 2006) (notice of submission to Congress of amendments including addition of Application Note 14(B)); USSG Supp. App. C, amend. 691. Application Note 14(B) explains that the enhancement in § 2K2.1(b)(6)(B) applies to "case[s] in which a defendant who, during the course of a burglary, finds and takes a firearm, even if the defendant did not engage in any other conduct with that firearm during the course of the burglary." USSG § 2K2.1, comment. (n.14(B)). The enhancement is warranted "[i]n these cases," the Commission explained, because "the presence of the firearm has

the potential of facilitating another felony offense"—itself a necessary condition for imposing the enhancement, per Application Note 14(A). *Id.*

2. In *Stinson v. United States*, this Court held that the Sentencing Commission's commentary should "be treated as an agency's interpretation of its own legislative rule"—and thus is entitled to significant deference under *Seminole Rock*, 325 U.S. 410. 508 U.S. at 44. That is, the Court held that, so long as the Commission's commentary "does not violate the Constitution or a federal statute, it must be given 'controlling weight unless it is plainly erroneous or inconsistent with' " the Guidelines. *Id.* at 45 (quoting *Seminole Rock*, 325 U.S. at 414). The Court also explained that such deference is warranted even when the relevant Guideline is silent or "unambiguous," and even when the commentary conflicts with a prior judicial ruling. *Id.* at 44, 46, 47. This strong form of deference to agencies' interpretations of their own regulatory pronouncements later became known as *Auer* deference. *See Auer v. Robbins,* 519 U.S. 452 (1997).

In 2019, this Court in *Kisor* narrowly declined to overrule *Auer* and *Seminole Rock*. 139 S. Ct. at 2418–23; *id.* at 2424 (Roberts, C.J., concurring in part). The Court acknowledged that the "classic formulation" of *Auer* deference—like the one from *Seminole Rock* applied in *Stinson*—could effectively bestow agencies with "expansive, unreviewable" authority. *Id.* at 2414–15; *see also id.* at 2411 n.3 (noting that *Stinson* was one of the Court's *Seminole Rock* cases that pre-dated *Auer*). But relying on principles of *stare decisis*, a majority of the Court declined to eliminate *Auer* deference entirely. *Id.* at 2422–23. Even so, every

member of the Court agreed that the Court needed to at least "reinforc[e]"—and "somewhat expand on"—"the limits inherent in the *Auer* doctrine." *Id.* at 2414, 2415; *see also id.* at 2425–48 (Gorsuch, J., concurring in the judgment); *id.* at 2448–49 (Kavanaugh, J., concurring in the judgment). *Kisor* thus held that courts should only defer to an agency's interpretation of its own regulations if (1) the regulation is "genuinely ambiguous" even after using all the traditional tools of statutory interpretation; (2) the agency's interpretation is reasonable; and (3) the "character and context" of the agency's interpretation entitle it to "controlling weight." 139 S. Ct. at 2414–16.

3. In September 2019, Petitioner and two others broke into a firearms store in Topeka, Kansas seeking to steal guns that they could later sell. Pet.App. 1a–2a. The three men took 11 firearms and left on foot. *Id.*

Petitioner pleaded guilty to stealing firearms from a federally licensed firearms dealer in violation of 18 U.S.C. §§ 922(u) and 924(i)(1). *Id.* at 2a. On the theory that he had "used or possessed [a] firearm . . . in connection with another felony offense" (here, Kansas burglary with intent to steal a firearm, Kan. Stat. § 21-5807(c)(1)(B)(ii)), his Presentence Investigation Report recommended a four-level enhancement to his offense level based on USSG § 2K2.1(b)(6)(B). *Id.* Petitioner objected to the enhancement, arguing that he did not possess the firearms "in connection with" the burglary because they were merely the object of the burglary and he had obtained them only after the burglary was complete. *See id.* He also argued that, after *Kisor*, the court owed no deference to the contrary Guidelines commentary

in Application Note 14(B). *Id.* at 7a; *see also id.* at 24a–29a.

The District Court nevertheless applied the enhancement, finding that Petitioner's conduct was covered by the plain language of § 2K2.1(b)(6)(B). *Id.* at 2a, 8a & n.3, 24a–29a. The District Court then sentenced Petitioner to 20 months of imprisonment followed by 2 years of supervised release and ordered restitution of $12,002. Pet.App. 9a–23a.[3]

The Tenth Circuit affirmed, but pointedly did not do so on the basis of the Guideline's plain text. *Id.* at 8a n.3. Instead, the court concluded that it was bound by *Stinson* to defer to Application Note 14(B). *Id.* at 1a–8a. In so doing, the court acknowledged that the Courts of Appeals are divided over whether *Kisor* changed the level of deference owed to Guidelines commentary under *Stinson*. *Id.* at 4a–5a & n.2. But it was bound by circuit precedent holding that *Kisor* did not affect *Stinson*'s strict deferential standard. *Id.* at 6a–8a (citing *Maloid*, 71 F.4th 795). Applying the *Stinson* standard, the court concluded—again consistent with circuit precedent—that Application Note 14(B) is entitled to deference because it does not "violate[] the Constitution or a federal statute," and it is neither "inconsistent with, [n]or a plainly erroneous reading of" § 2K2.1(b)(6)(B). *Id.*; *see also Morris*, 562 F.3d at 1136 ("[R]egardless whether we approve of the

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[3] Petitioner was released from prison during the pendency of his Tenth Circuit appeal, but his supervised release term does not expire until December 2024. Pet.App. 2a–3a n.1. This case is not moot because his supervised-release term may be reduced if he is successful on appeal. *Id.* (citing *United States v. Salazar*, 987 F.3d 1248, 1252 (10th Cir. 2021)).

interpretation of § 2K2.1(b)(6) reflected in Application Note 14(B), we must defer to the Sentencing Commission's view" under *Stinson*). Accordingly, the Tenth Circuit affirmed Petitioner's sentence, including the § 2K2.1(b)(6)(B) enhancement. Pet.App. 8a.

The District Court had jurisdiction pursuant to 18 U.S.C. § 3231. The Tenth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291. This petition followed.

REASONS FOR GRANTING THE WRIT

The Courts of Appeals have split six to six on the Question Presented. That split is deep, acknowledged, and entrenched. The issue is important. The decision below is wrong. And this case is an ideal vehicle. Certiorari should be granted.

I. THE COURTS OF APPEALS ARE DEEPLY DIVIDED.

The Courts of Appeals are in deep disagreement about whether *Kisor*'s deference principles extend to the Sentencing Commission's commentary on its Guidelines. Six circuits say "yes" and apply *Kisor* to Guidelines commentary. Six circuits say "no" and apply *Stinson* to Guidelines commentary. Only this Court can provide a definitive answer and restore uniformity.

A. Six Circuits Apply *Kisor* In The Guidelines Context.

Six circuits apply *Kisor*'s ordinary administrative law principles—rather than *Stinson*'s extreme form of deference—to Guidelines commentary.

1. Just a few months ago, in *United States v. Castillo*, the Ninth Circuit squarely held that "[t]he more demanding deference standard articulated in

Kisor applies to the Guidelines' commentary." 69 F.4th 648, 655 (9th Cir. 2023). In so holding, the court noted that "the Sentencing Commission's lack of accountability in its creation and amendment of the commentary raises constitutional concerns when we defer to commentary . . . that expands unambiguous Guidelines, particularly because of the extraordinary power the Commission has over individuals' liberty interests." *Id.* at 663–64.

2. The en banc Eleventh Circuit reached the same result in *United States v. Dupree*. 57 F.4th at 1275–76. *Stinson*, the court reasoned, "adopted word for word the test the *Kisor* majority regarded as a 'caricature,' so the continued mechanical application of that test would conflict directly with *Kisor*." *Id.* at 1275. In order to "follow *Stinson*'s instruction to treat the commentary like an agency's interpretation of its own rule," it concluded, "we must apply *Kisor*'s clarification of *Auer* deference to *Stinson*." *Id.* at 1276.

Chief Judge William H. Pryor Jr.—a former Commissioner and Acting Chair of the Sentencing Commission—concurred. *Id.* at 1280 (Pryor, C.J., concurring). He "join[ed] the majority opinion in full because it correctly explains the effect [of] the decision in *Kisor*." *Id.* He also agreed that courts are bound by *Stinson* to treat Guidelines commentary differently from the Guidelines themselves. *Id.* He noted, however, that the Commission often voluntarily uses the same procedures to revise its commentary as it does to revise the Guidelines themselves. *Id.* at 1281.

3. In *United States v. Nasir*, the en banc Third Circuit also applied *Kisor*'s limiting principles to the Sentencing Commission's commentary. 17 F.4th at

470–71. The court recognized that "Congress has delegated substantial responsibility to the Sentencing Commission." *Id.* at 472. "[B]ut, as the Supreme Court emphasized in *Kisor*, the interpretation of regulations ultimately 'remains in the hands of the courts.' " *Id.* (quoting 139 S. Ct. at 2420). So the court proceeded to apply *Kisor*'s more limited form of deference to Guidelines commentary. *See id.*

Judge Bibas—joined by five other judges—concurred to emphasize that "[i]f the Sentencing Commission's commentary sweeps more broadly than the plain language of the [G]uideline it interprets, we must not reflexively defer." *Id.* (Bibas, J., concurring). Agency interpretations of their own rules "might merit deference," the concurrence acknowledged, when the text is "truly ambiguous" after "exhaust[ing] our traditional tools of statutory construction" including "the rule of lenity." *Id.* But deferring in the absence of true ambiguity reflects "too narrow a view of the judicial role." *Id.* Accordingly, "old precedents relying strictly on the commentary no longer bind." *Id.* at 474; *see also United States v. Henderson*, 64 F.4th 111, 120 (3d Cir. 2023) ("Because *Kisor* preempts our analysis . . . 'that turned to the commentary rather than the text, [that analysis] no longer hold[s]' . . . .").

4. The Sixth Circuit also applies *Kisor* to Guidelines commentary. *See United States v. Riccardi*, 989 F.3d 476, 484–85 (6th Cir. 2019). It does so for two reasons. First, *Stinson* "told courts to follow basic administrative-law concepts" in Sentencing Commission cases "despite Congress's decision to locate the . . . Commission[ ] in the judicial branch rather than the executive branch." *Id.* at 485. Accordingly, "*Kisor*'s clarification" of the appropriate

deference standard "applies just as much" to the Commission's Guidelines as it does to an executive agency's regulations. *Id.* Second, "*Kisor*'s limitations on *Auer* deference restrict an agency's power to adopt a new legislative rule under the guise of reinterpreting an old one." *Id.* The same concern applies to the Sentencing Commission: Strong deference to commentary would permit the Commission to effectively amend the Guidelines while bypassing the procedural protections required by Congress. *Id.* "[H]ealthy judicial review," on the other hand, "restrict[s] the Commission's ability" to evade those protections. *Id.*

5. The D.C. Circuit also appears to apply *Kisor* in the Guidelines context. *See United States v. Jenkins*, 50 F.4th 1185, 1197 (D.C. Cir. 2022) (citing *Kisor*, as well as *Stinson*, in construing Guidelines commentary). Even pre-*Kisor*, the D.C. Circuit had declined to defer to Guidelines commentary where the Guidelines themselves were not ambiguous. *See United States v. Winstead*, 890 F.3d 1082, 1092 & n.14 (D.C. Cir. 2018) ("[S]urely *Seminole Rock* deference does not extend so far as to allow [the Commission] to invoke its general interpretive authority via commentary . . . to impose such a massive impact on a defendant with no grounding in the [G]uidelines themselves[.]").

6. Finally, the Fourth Circuit held in *United States v. Campbell* that *Kisor's* modifications to *Auer* deference "apply equally to judicial interpretations of the Sentencing Commission's commentary." 22 F.4th 438, 444–47 & n.3 (4th Cir. 2022). Twelve days later, however, the Fourth Circuit published *United States v. Moses*, which held the exact opposite: that "*Stinson*

continues to apply unaltered by *Kisor*." 23 F.4th 347, 349 (4th Cir. 2022). The Fourth Circuit is thus internally divided on the Question Presented; however, as *Campbell* is the earlier ruling, it should control. *See McMellon v. United States*, 387 F.3d 329, 333 (4th Cir. 2004); *Moses*, 23 F.4th at 359 (King, J., dissenting in part and concurring in the judgment).

The Fourth Circuit has denied rehearing en banc on this issue, but even Judge Niemeyer—the author of *Moses*—invited "the Supreme Court's advice on whether *Stinson* or *Kisor* controls the enforceability of and weight to be given Guidelines commentary, an issue that could have far-reaching results." Order, *Moses*, No. 21-4067, at 6 (Niemeyer, J., supporting the denial of rehearing en banc). Several other judges also noted that the issue is "of exceptional importance": it does not just "interpret a single subsection of the Guidelines commentary," but deals with "a meta-rule that would govern our interpretation of the commentary writ large," impacting "hundreds, if not thousands, of cases in the Fourth Circuit." *Id.* at 13 (Wynn, J., joined by Motz, King, and Thacker, J.J., voting to grant rehearing en banc).

B. Six Circuits Apply *Stinson*'s More Extreme Form Of Deference To Guidelines Commentary.

The Tenth Circuit is one of six circuits that continue to apply full-throated *Stinson* deference—without *Kisor*'s limitations—to the Sentencing Commission's commentary.

1. The Tenth Circuit has acknowledged—both in *Maloid* and in the decision below—that the Courts of Appeals are "fractured" on "what weight" to give to

"commentary from the U.S. Sentencing Commission." *Maloid*, 71 F.4th at 798, 804 n.12; *see also* Pet.App. 5a ("The [C]ourts of [A]ppeals are divided on whether *Kisor* changed how courts should apply *Stinson*."). And it has taken a side in that split, continuing to apply *Stinson* and declining to "extend *Kisor* to the Commission's commentary" until it receives "clear direction" from this Court. *Maloid*, 71 F.4th at 798, 808. In so doing, the Tenth Circuit has further reasoned that the Sentencing Commission—which is located within the judicial branch and which was created to help courts rather than to regulate the public or make policy choices—is materially different from executive agencies. *Id.* at 806–07; *see also id.* at 809–13 (arguing that deference to the Sentencing Commission's commentary is less concerning than deference to executive agencies). As a result, in the Tenth Circuit, "commentary in the Guidelines Manual governs unless it runs afoul of the Constitution or a federal statute or is plainly erroneous or inconsistent with the [G]uideline provision it addresses." *Id.* at 798.

2. The en banc Fifth Circuit likewise recently concluded that "*Stinson* continues to bind" the lower courts—which must "adhere strictly to Supreme Court precedent, whether or not [they] think a precedent's best days are behind it." *Vargas*, 74 F.4th at 679, 683. The court reasoned, moreover, that "nothing in *Kisor* suggests it meant to modify *Stinson*," that "*Stinson* deference differs from *Seminole Rock* [deference] in important ways," and that the Sentencing Commission is unique among federal agencies. *Id.* at 681–83. It then applied the "ample deference *Stinson* affords the commentary." *Id.* at 685.

Judge Oldham, joined by Judge Jones, wrote separately. *Id.* at 699 (Oldham, J., concurring). They agreed that lower courts are bound by *Stinson* until this Court says otherwise. *Id.* But they highlighted the incongruity of requiring deference to Guidelines commentary given that the Guidelines themselves are no longer binding. *Id.* In "a post-*Booker* world," they observed, "one could reasonably argue that the commentary to the Guidelines should not receive *any* deference" beyond their potential usefulness as scholarly commentary or legislative history. *Id.* at 700 (emphasis added).

3. The Eighth Circuit also recently weighed in on the split, concluding that it was bound by prior precedent applying *Stinson* to Guidelines commentary. *United States v. Rivera*, 76 F.4th 1085, 1089–91 (8th Cir. 2023) (citing *United States v. Mendoza-Figueroa*, 65 F.3d 691, 693–94 (8th Cir. 1995) (en banc)). In so doing, the court identified grounds for "questioning th[e] reasoning" of the circuits on the other side of the split: that the Commission routinely sends its commentary to Congress and that Congress has actively overseen the Commission's work. *Id.* Even so, the court admitted that "the weight of authority may suggest that *Kisor* undermines" precedent requiring more extreme deference under *Stinson*. *Id.* at 1091.

4. Three other circuits have, with less fanfare, continued to apply *Stinson* deference notwithstanding *Kisor*.

In *United States v. Smith*, the Seventh Circuit reaffirmed its prior ruling that Guidelines commentary is authoritative. 989 F.3d 575, 583–85

(7th Cir. 2021) (citing *United States v. Adams*, 934 F.3d 720, 729–30 (7th Cir. 2019)). Without addressing *Kisor*, the court applied *Stinson*'s rule that "courts must give application notes 'controlling weight.' " *Id.* at 584; *see also United States v. Jett*, 982 F.3d 1072, 1078 (7th Cir. 2020) (applying *Stinson*).

The Second Circuit also continues to apply *Stinson* to Guidelines commentary. *See, e.g.*, *United States v. Richardson*, 958 F.3d 151, 154 (2d Cir. 2020); *United States v. Tabb*, 949 F.3d 81, 87 (2d Cir. 2020). Indeed, the Second Circuit has adhered to *Stinson* even where "the *Kisor* argument . . . was briefed and discussed at length during oral argument." *United States v. Wynn*, 845 F. App'x 63, 66 (2d Cir. 2021).

Finally, in *United States v. Lewis*, the First Circuit refused to overrule prior precedent relying on *Stinson*. 963 F.3d 16, 24–25 (1st Cir. 2020). However, the court noted that it did not view its prior opinions as deferring to commentary beyond the zone of genuine ambiguity in the Sentencing Guidelines. *See id.*

C. The Split Is Well Developed And Entrenched.

This deep split over the amount of deference owed to the Sentencing Commission's commentary is widely acknowledged. *E.g.*, *Maloid*, 71 F.4th at 804 n.11; *Vargas*, 74 F.4th at 680 & n.11; *Lewis*, 963 F.3d at 25. Nearly every circuit has weighed in. And the judicial landscape includes several thoughtful opinions addressing both sides of the Question Presented.

Until this Court intervenes, this issue isn't going away. The disagreement among the Courts of Appeals reflects tensions in this Court's own caselaw. *See* Order, *Moses*, No. 21-4067, at 3 (Niemeyer, J.,

supporting denial of rehearing en banc) ("[U]nder *Stinson*, Guidelines commentary would be authoritative and binding regardless of whether the Guideline to which it is attached is ambiguous, whereas under *Kisor*, Guidelines commentary would receive such deference only if the Guideline were 'genuinely ambiguous.' "); *Dupree*, 57 F.4th at 1283 n.1 (Grant, J., concurring in the judgment) ("One source of confusion in this area may be a tension within *Kisor* between stare decisis and the articulation of new limits on *Seminole Rock*."). And the split has only continued to deepen and solidify over time. In 2023 alone, five significant new decisions have been published—on both sides of the split. *See Castillo*, 69 F.4th at 664 (applying *Kisor*); *Dupree*, 57 F.4th at 1276 (same); *Maloid*, 71 F.4th at 798 (applying *Stinson*); *Vargas*, 74 F.4th at 679 (same); *Rivera*, 76 F.4th at 1089 (same). And several courts have taken the issue en banc without getting any closer to cross-circuit agreement. *See Dupree*, 57 F.4th 1269; *Vargas*, 74 F.4th 673; *Nasir*, 17 F.4th 459.

Unlike most Guidelines questions, moreover, the Sentencing Commission cannot answer the Question Presented itself. Although the Court often leaves disagreements over the interpretation of particular Guidelines to the Commission, *see, e.g.*, *Guerrant v. United States*, 142 S. Ct. 640, 640–41 (2022) (statement of Sotomayor, J., joined by Barrett, J., respecting the denial of certiorari), the Commission "cannot, on its own, resolve the dispute about what deference courts should give to the commentary." *Dupree*, 57 F.4th at 1289 n.6 (Grant, J., concurring in the judgment). It is this Court's responsibility to determine whether and to what extent an agency's

interpretation of its own rules is entitled to controlling weight. *Cf. Kisor*, 139 S. Ct. at 2416.

II. THE QUESTION PRESENTED MERITS THE COURT'S ATTENTION.

The Question Presented is also profoundly important. It arises frequently. And it is potentially outcome determinative of the proper Guidelines range—and thus of the ultimate sentence imposed—in many of those cases. In addition, it implicates fundamental principles about the limits of agency power, protections for individual liberty, and the need for sentencing uniformity.

1. Federal district courts must interpret and apply the Sentencing Guidelines every time they sentence a criminal defendant. *See Booker*, 543 U.S. at 264; *Rita*, 551 U.S. at 351; *Gall*, 552 U.S. at 49. And virtually every Guideline is accompanied by commentary. *See generally* United States Sentencing Commission, *Guidelines Manual* (Nov. 2021). As a result, the question of whether and to what extent courts must defer to the Commission's commentary arises over and over.

In many of these cases, the degree of deference owed to the commentary is determinative of the applicable Guidelines range. This case is a perfect example. In the absence of Application Note 14(B) the Courts of Appeals had divided about "whether a burglary involving the theft of firearms permitted the application of [the § 2K2.1(b)(6)(B)] enhancement" even if the defendant did not use the firearm during the course of the burglary. *Johnson*, 558 F.3d at 195 (collecting cases); *see supra* pp. 6–7; *see infra* pp. 27–28. A strict *Stinson* regime, however, requires courts

to defer to the Commission's commentary—even if they think the text is unambiguous or the commentary unreasonable. In contrast, application of *Kisor* would allow courts to determine the appropriate sentence based on the Guidelines' plain text.

Cases addressing the question whether inchoate offenses can be predicate "controlled substance offenses" for purposes of § 4B1.2(b) are another good example. *See, e.g.*, *Castillo*, 69 F.4th at 658 (applying *Kisor*, rejecting commentary, and holding that USSG § 4B1.2(b) does not include inchoate offenses); *Dupree*, 57 F.4th at 1279 (same); *Nasir*, 17 F.4th at 470–72 (same); *Vargas*, 74 F.4th at 679–90 (applying *Stinson*, endorsing commentary, and holding that USSG § 4B1.2(b) includes inchoate offenses). As the Ninth Circuit explained, "[b]efore *Kisor*, when the more permissive deference standard laid out in *Stinson* was the law of the land, only the D.C. and Sixth Circuits declined to defer to Application Note 1 in defining 'controlled substance offenses.'" *Castillo*, 69 F.4th at 659. "After the Supreme Court issued its decision in *Kisor*, however, the Third, Fourth, and Eleventh Circuits joined the Sixth and D.C. Circuits" in refusing to "defer to Application Note 1 to interpret § 4B1.2(b)." *Id.* at 660.

District court cases within the internally divided Fourth Circuit grappling with the meaning of "loss" under § 2B1.1 also demonstrate the real-world impact of deference to Guidelines commentary. *See, e.g.*, *Griffin v. United States*, No. 3:14-cr-82, 2023 WL 2090287, at *9 (W.D.N.C. Feb. 17, 2023) (applying *Stinson*, adopting commentary definition, and holding that USSG § 2B1.1 measures "loss" as "the greater of actual loss or intended loss"); *United States v. Wheeler*,

No. 5:22-cr-38, 2023 WL 4408939, at *2–3 (E.D.N.C. July 6, 2023) (applying *Kisor*, rejecting commentary definition, and holding that USSG § 2B1.1 measures "loss" as "actual loss").

The degree of deference to Guidelines commentary matters even though the Guidelines themselves are advisory. As this Court has repeatedly recognized, the Guidelines have a significant anchoring effect on the sentencing process. *See Molina-Martinez*, 578 U.S. at 200 ("[T]he Guidelines are not only the starting point for most federal sentencing proceedings but also the lodestar."); *id.* at 199 (describing "the real and pervasive effect the Guidelines have on sentencing"); *Peugh*, 569 U.S. at 541 ("The post-*Booker* federal sentencing scheme aims to achieve uniformity by ensuring that sentencing decisions are anchored by the Guidelines and that they remain a meaningful benchmark through the process of appellate review."); *id.* at 544 ("[W]hen a Guidelines range moves up or down, offenders' sentences [tend to] move with it."). They also dictate the standard for appellate review. *See Molina-Martinez*, 578 U.S. at 204 ("[A] defendant sentenced under an incorrect Guidelines range should be able to rely on that fact to show a reasonable probability that the district court would have imposed a different sentence under the correct range."); *id.* at 201 ("[R]eviewing courts may presume that a sentence imposed within a properly calculated Guidelines range is reasonable" (citing *Rita*, 551 U.S. at 341)).

So in circuits that continue to strictly apply *Stinson*, a district court that declines to follow authoritative commentary must provide a persuasive reason for the departure from the range that commentary would have compelled. *See Gall*, 552 U.S. at 50 (district

courts must offer a "sufficiently compelling" "justification" for varying from a within-Guidelines sentence). But in circuits that apply *Kisor*, a sentence might be deemed within-Guidelines—and thus presumed reasonable—even if it conflicts with commentary that deserves no deference under *Kisor*.

2. The degree of deference applicable to Guidelines commentary also implicates broader principles about agency power, individual liberty, and uniformity in sentencing.

a. *Kisor* warned against judicial apathy regarding "the far-reaching influence of agencies and the opportunities such power carries for abuse." 139 S. Ct. at 2423. And as *Kisor* recognized, an agency with the power to compel deference to its interpretations that extend beyond the resolution of true textual ambiguity can effectively legislate as it sees fit without following the formal processes designed to circumscribe lawmaking by non-legislative branches. *Id.* at 2414–25; *see also id.* at 2434 (Gorsuch, J., concurring in the judgment) (treating "mere interpretations" as "controlling" "obliterates a distinction Congress thought vital and supplies agencies with a shortcut around the APA's required procedures"). That rings just as true here as it did in *Kisor*. Allowing the Commission's commentary to "add to the Sentencing Guidelines' scope would allow circumvention of the checks Congress put on the Sentencing Commission, a body that exercises considerable authority in setting rules that can deprive citizens of their liberty." *Campbell*, 22 F.4th at 446 (cleaned up).

True, the Commission may—and often does—voluntarily choose to satisfy the procedural checks

required for the Guidelines themselves when it propounds commentary. But "by placing [something] in the commentary," as opposed to the Guidelines, "the Commission has retained the power to adjust it tomorrow without satisfying the same procedural safeguards." *Riccardi*, 989 F.3d at 488–89. Moreover, allowing exceptions to *Kisor* to persist in the Guidelines context risks undermining *Kisor*'s vitality elsewhere, which could portend a slow drift back toward "reflexive" agency deference and abdication of the proper judicial role. *Kisor*, 139 S. Ct. at 2415.

b. Deference to Guidelines commentary also implicates profound liberty interests. The Guidelines prescribe the presumptively appropriate sentencing range for criminal defendants facing up to a lifetime behind bars. *See United States v. Mistretta*, 488 U.S. 361, 413 (1989) (Scalia, J., dissenting) (The Guidelines "govern[ ] application of government power against private individuals—indeed, application of the ultimate governmental power, short of capital punishment."). And disputes about the proper interpretation of those Guidelines can spell the difference between freedom and imprisonment over extended periods of time. As Judge Bibas put it, "[w]hatever the virtues of giving experts flexibility to adapt rules to changing circumstances in civil cases, in criminal justice those virtues cannot outweigh life and liberty." *Nasir*, 17 F.4th at 474 (Bibas, J., concurring).

c. Finally, "Congress enacted the sentencing statutes in major part to achieve greater uniformity in sentencing." *Booker*, 543 U.S. at 255. But as things currently stand, the Courts of Appeals take dramatically different approaches to Guidelines

commentary. *See supra* Part I.A–B. That difference in interpretive methodology virtually guarantees that sentences for the same offense will differ across the circuits. *See supra* pp. 18–20. Resolving the Question Presented will restore uniformity to how courts approach sentencing and ultimately promote uniform sentencing outcomes.

III. THE TENTH CIRCUIT'S POSITION IS WRONG.

As the Government has conceded—both below and previously before this Court—*Kisor* limits the deference courts must afford the Sentencing Commission's commentary. *See* Appellee's Br., *United States v. Ratzloff*, No. 22-3128, at 39–43 (10th Cir. July 12, 2023); Br. for the United States in Opp., *Moses v. United States*, No. 22-163 (Nov. 2022) ("Moses BIO"). That conclusion follows directly from *Stinson*'s own logic. The Tenth Circuit's contrary position—which, apart from blind adherence to *Stinson*'s bottom line, relies primarily on artificial distinctions between the Sentencing Commission and other agencies—is simply wrong.

1. In *Stinson*, this Court explained that the "Sentencing Commission promulgates the [G]uidelines by virtue of an express congressional delegation of authority for rulemaking" in much the same way executive branch agencies promulgate regulations. 508 U.S. at 44; *see also id.* at 45 ("[T]he [G]uidelines are the equivalent of legislative rules adopted by federal agencies."). It then analogized the commentary on the Guidelines to "an agency's interpretation of its own legislative rules." *Id.* at 45. "Guided by this analogy, the Court determined that the commentary should receive the same level of

deference given to an agency's interpretation of its own rules." *Dupree*, 57 F.4th at 1274. At the time, that meant that the Commission's commentary on its Guidelines, like an agency's interpretation of its legislative rules, had to "be given 'controlling weight unless it [was] plainly erroneous or inconsistent with' " the text of the Guideline. *Stinson*, 508 U.S. at 45 (quoting *Seminole Rock*, 325 U.S. at 414).

In *Kisor*, this Court "reinforced" the limits and "cabined" the scope of the deference due to an agency's interpretation of its legislative rules. 139 S. Ct. at 2408. In particular, the Court emphasized that "the possibility of deference can arise only if a regulation is genuinely ambiguous . . . even after a court has resorted to all the standard tools of interpretation." *Id.* at 2414. Even then, deference is appropriate only if the agency's interpretation is a "reasonable" one—that is, if it "come[s] within the zone of ambiguity the court has identified." *Id.* at 2415–16. The Court also specifically rejected the *Seminole Rock* formulation on which *Stinson* relied ("plainly erroneous or inconsistent with the regulation") as potentially "suggest[ing] a caricature of the doctrine, in which deference is 'reflexive.'" *Id.* at 2415. In so ruling, *Kisor* gave no indication that its analysis would exclude the Sentencing Commission. Quite the opposite. *Kisor* spoke generally to *Seminole Rock*/*Auer* deference in all of its forms. *See generally id.* at 2414–18. And the Court expressly identified *Stinson* as one of many pre-*Auer* cases applying *Seminole Rock*. *Kisor*, 139 S. Ct. at 2411 n.3.

If there were any doubt about whether *Kisor* cabins *Stinson*, *Stinson*'s own reasoning eliminates it. "Although the analogy is not precise," *Stinson*

concluded "that the commentary [should] be treated as an agency's interpretation of its own legislative rule." 508 U.S. at 44. For that reason, the Court held that the standard of deference for an agency's interpretations of its own regulations should also apply to the Commission's commentary. By that same logic, *Kisor*'s refinement of that standard should apply to the Commission's commentary, too.

2. The Tenth Circuit's contrary approach, which is consistent with that of five other Courts of Appeals, *see supra* Part I.B, is simply wrong. It misreads this Court's precedents, and it misunderstands the Sentencing Commission's role.

a. As just explained, the only way to square *Kisor* and *Stinson* is to subject *Stinson*'s deferential regime to *Kisor*'s limiting principles. *See supra* Part III.A. The Tenth Circuit's concerns about vertical stare decisis do not apply to this Court. *See Maloid*, 71 F.4th at 808. In any event, this Court need not "overrule" *Stinson* to confirm that *Kisor* applies to Guidelines commentary. *Kisor* already did the work necessary to clarify and cabin the deference owed to agencies' interpretations of their own rules. And *Stinson* makes clear that the Commission's commentary on the Guidelines should be treated the same way.

b. In *Maloid*, the Tenth Circuit also reasoned that *Kisor* may not reach the Sentencing Commission because the Commission differs from other agencies in two respects: It is located within the judicial branch, not the executive branch; and its purpose is to assist judges, not to regulate the public or make policy choices. *See* 71 F.4th at 806–07.

For starters, both points are vast oversimplifications. This Court has long recognized that "defining crimes and fixing penalties are legislative, not judicial, functions." *United States v. Evans*, 333 U.S. 483, 486 (1948). For that reason, "the Commission is fully accountable to Congress, which can revoke or amend any or all of the Guidelines as it sees fit," and the Commission's "rulemaking is subject to . . . notice and comment requirements." *Mistretta*, 488 U.S. at 393–94; *see also Campbell*, 22 F.4th at 446. Indeed, the fact that the Commission is not a purely judicial entity was crucial to this Court's conclusion that the Guidelines are consistent with the separation of powers. *See Mistretta*, 488 U.S. at 393–94 ("Whatever constitutional problems might arise if the powers of the Commission were vested [solely in the Judiciary], the Commission is not a court . . . and is not controlled by or accountable to members of the [j]udicial [b]ranch."). Moreover, when the Sentencing Commission determines a sentencing range, it necessarily makes a policy judgment with significant consequences for the general public. *Id.* at 414 (Scalia, J., dissenting) ("[T]he decisions made by the Commission are far from technical, but are heavily laden (or ought to be) with value judgments and policy assessments.").

More importantly, these supposed distinctions between the Commission and other agencies in no way justify a Commission-specific deference regime unbound by basic principles of administrative law. The reasons *Kisor* gave for circumscribing the deference afforded to agencies' interpretations of their rules—including that agencies ought not be permitted "to create *de facto* a new regulation" "in the guise of

interpreting" an old one, and that courts cannot abdicate "their reviewing and restraining functions" absent a genuine ambiguity, *id.* at 2415—apply with full force to the Sentencing Commission.

If anything, *Kisor*'s logic applies *a fortiori* to Guidelines commentary given the Commission's "unusual . . . structure and authority," *Mistretta*, 488 U.S. at 412. To take one example: Unlike many other agencies, the Commission must submit its regulations—the Guidelines—to Congress before they can go into effect. 28 U.S.C. § 994(p). Congress's imprimatur on the Guidelines cuts against deferring to the Commission when it unreasonably interprets Guidelines text. To take another: Unlike legislative rules, the Guidelines themselves are advisory. *Booker*, 543 U.S. 220. That is reason to doubt whether formal deference to commentary is warranted *at all*. *See Vargas*, 74 F.4th at 699 (Oldham, J., concurring). Most important: The Commission's judgments directly implicate individual liberty, and the concerns that *Kisor* identified regarding reflexive deference "are even more acute . . . where individual liberty is at stake." *Campbell*, 22 F.4th at 446. Where applying deference "would extend [petitioner's] time in prison, alarm bells should be going off." *United States v. Havis*, 907 F.3d 439, 450 (6th Cir. 2018) (Thapar, J., concurring).

IV. THIS CASE IS AN IDEAL VEHICLE.

This case is an ideal vehicle for this Court to decide whether *Kisor* cabins the deference previously due to the Guidelines under *Stinson*. Although this Court has denied petitions presenting this question, this case is readily distinguishable from those. And the

possibility that this Court might revise or clarify the *Chevron* standard in *Loper Bright Enterprises v. Raimondo*, No. 22-451 (cert. granted May 1, 2023), is all the more reason for this Court to resolve the split about *Kisor*'s applicability to the Guidelines now.

1. The question whether *Kisor* or *Stinson* governs Guidelines commentary is squarely presented here. That question was fully briefed below. The Tenth Circuit definitively answered it, relying on the detailed reasoning of its earlier decision in *Maloid*. Pet.App. 5a–8a. And its opinion expressly acknowledged contrary rulings from other circuits. *Id.* at 5a & n.2.

Moreover, the Tenth Circuit relied exclusively on *Stinson* in upholding Petitioner's sentence. *Id.* at 1a–8a. Under *Stinson*, the court had no choice but to defer to Application Note 14(B) "because it [does] not violate the Constitution or a federal statute and [is] not 'inconsistent with § 2K2.1(b)(6).'" *Id.* at 7a (quoting *Morris*, 562 F.3d at 1136). There is also no dispute that "Application Note 14(B) plainly describes [Petitioner's] case." *Id.* The Tenth Circuit expressly declined to decide, however, whether it would have construed § 2K2.1(b)(6)(B) to apply to Petitioner's case absent *Stinson*. *Id.* at 8a n.3.

There is good reason to believe that it would not have—and, accordingly, that the Question Presented will prove outcome determinative here. To begin, the Government forfeited the argument that Application Note 14(B) merits deference under *Kisor* by failing to raise that argument before the District Court. *See* Reply Br., *United States v. Ratzloff*, No. 22-3128, at 14 (10th Cir. Feb. 17, 2023). In any event, no deference

is warranted under *Kisor* because Application Note 14(B) reflects an unreasonable interpretation of unambiguous aspects of § 2K2.1(b)(6)(B). *Id.* at 19–34. Petitioner did not "use[] or possess[]" a firearm "*in connection* with *another* felony offense" because the firearm was merely the object of the theft for which he was convicted—not a way to facilitate that or any other offense. *See id.*; Appellant's Br., *Ratzloff*, No. 22-3128, at 16–19, 24–29; Pet.App. 1a–2a.

Indeed, in a world without Application Note 14(B), several courts held that the offense of burglary to steal firearms could *not* serve as the predicate for a § 2K2.1(b)(6)(B) enhancement. *See, e.g.*, *United States v. Fenton*, 309 F.3d 825, 827 (3d Cir. 2002) (" '[A]nother felony offense' cannot apply to the same felonious conduct for which the criminal defendant is being sentenced."); *id.* ("In this case, there was no other offense: there was no allegation that [the defendant] possessed any firearms when he entered the sporting goods store, nor was there any allegation that [he] used the stolen firearms to commit any crimes after the theft."); *United States v. Sanders*, 162 F.3d 396, 399–401 (6th Cir. 1998) ("[The defendant] burglarized the firearms . . . . The Guidelines do not authorize a major four-level increase . . . simply because the state also could have brought a prosecution for the one and the same burglary."). In *Morris*, the Tenth Circuit noted that before Application Note 14(B), the court had "upheld the application of the four-level firearm enhancement now reflected in subsection (b)(6) in situations involving contemporaneous felony offenses." 562 F.3d at 1135. But the example it relied on was a case in which the burglar carried a handgun with an illegal silencer to

facilitate a burglary—not a case in which the gun was the *object* of a burglary. *Id.* at 1135–36 (citing *United States v. Constantine*, 263 F.3d 1122, 1124–25 (10th Cir. 2001)).

2. Although this Court has denied petitions purporting to present similar questions, those petitions suffered from vehicle problems not present here and predated much of the recent percolation in the Courts of Appeals.

For example, the Court denied certiorari in *United States v. Moses*, No. 22-163 (cert. denied Jan. 9, 2023), at the beginning of this year. But that case arose out of the Fourth Circuit, which has issued conflicting panel opinions about what rule applies. *See supra* p. 13 (discussing those conflicting opinions); Moses BIO at 15 (arguing that "resolving any 'internal difficulties' between the two panel decisions is primarily a job for the court of appeals, not this Court"). The deference question appeared unlikely to be outcome determinative in that case. *See* Moses BIO at 15–16 ("This . . . is not a case in which direct application of *Stinson*, rather than *Kisor*, makes a difference to the outcome."). And the petitioner's argument was internally inconsistent. *See id.* at 16–18, 21.

Shortly thereafter, the Court denied certiorari in *Lomax v. United States*, No. 22-644 (cert. denied Feb. 21, 2023). But there, the deference question arose in the context of a distinct split over whether an inchoate offense can be a predicate offense for identifying career offenders. *See* Pet., *Lomax v. United States*, No. 22-644, at i. That is an issue this Court has repeatedly declined to review. *See, e.g.*, *Crum v. United States*, No. 19-7811 (cert. denied Mar. 30, 2020). It is also one

that the Sentencing Commission is well able to resolve itself. Here, by contrast, the Sentencing Commission cannot decide what degree of deference its own pronouncements deserve. Only this Court can do that.

Since those petitions were denied, moreover, the split has deepened and cemented at an astonishing rate. In opposing certiorari in *Moses*, for example, the Government argued that the petitioner had cited no Court of Appeals decision definitively holding that *Kisor* is inapplicable to Guidelines commentary. Moses BIO at 18. Since then, however, the Tenth, Fifth, and Eighth Circuits have all held exactly that. *See supra* pp. 14–15 (citing *Maloid*, *Vargas*, and *Rivera*). And the Ninth and Eleventh Circuits have come down firmly on the other side. *See supra* pp. 10–11 (citing *Castillo* and *Dupree*).

3. Finally, this Court's pending ruling in *Loper Bright Enterprises* in no way undermines—and, indeed, only underscores—the need for immediate intervention. As an initial matter, "[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." *Kisor*, 139 S. Ct. at 2425 (Roberts, C.J., concurring in part); *see also Stinson*, 508 U.S. at 44, (discussing *Chevron* and "find[ing] inapposite an analogy to an agency's construction of a federal statute that it administers"). In addition, the Question Presented here is fundamentally about whether the Sentencing Commission should be treated like other administrative agencies—and specifically about whether the same deference standard applies. *Loper Bright Enterprises*, a fishing case not a sentencing

case, has nothing at all to do with that question, which will remain important *even if* this Court overrules or limits *Chevron*. Indeed, overruling or limiting *Chevron* would only render *Stinson*'s continuing application to Guidelines commentary more nonsensical. The Court should grant certiorari and resolve the Question Presented now.

CONCLUSION

The petition for a writ of certiorari should be granted.

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