No. _____

IN THE

Supreme Court of the United States

DAJUAN MARTIN,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Is the lifetime ban on possession of firearms by all felons, codified at 18 U.S.C. § 922(g)(1), plainly unconstitutional on its face because it is permanent, has no exceptions, and applies to all persons convicted of felonies, even those who are not violent?

(2) Are the lower courts uniformly in error, under *Stinson* and *Kisor*, in holding that a firearm magazine with an industry-standard capacity—for example, 16 or 17 rounds of ammunition—is a "large capacity magazine" under the Sentencing Guidelines?

RELATED PROCEEDINGS

The following proceedings are directly related to this case:

- *United States v. Martin*, No. 23-cr-219-1, U.S. District Court for the Eastern District of Louisiana. Judgment entered December 19, 2023.
- *United States v. Martin*, No. 23-30917, U.S. Court of Appeals for the Fifth Circuit. Judgment entered October 15, 2024.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Dajuan Martin respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Alternatively, Mr. Martin notes that numerous petitions raising the same Second Amendment issue raised herein are now or will shortly be filed in this Court. Specifically, a petition arising out of the lead post-*Rahimi* case in the Fifth Circuit—*United States v. Diaz*, 116 F.4th 458 (5th Cir. 2024)—is also due to be filed this month. *See* No. 24A611. Accordingly, Mr. Martin requests that his petition be held pending that and/or other petitions if this Court anticipates that it may grant a writ of certiorari on the issues raised herein.

JUDGMENT AT ISSUE

The opinion of the United States Court of Appeals for the Fifth Circuit is attached as Pet. App. 1.

JURISDICTION

On October 15, 2024, the Fifth Circuit affirmed the district court's judgment and sentence. No petition for rehearing was filed. Mr. Martin filed a timely Application for Extension of Time to File a Petition for Writ of Certiorari. Justice Alito granted that application, extending the time in which to file to February 12, 2025. Thus, this petition for a writ of certiorari is timely filed pursuant to Supreme Court Rule 13. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND SENTENCING GUIDELINES PROVISIONS INVOLVED

The Second Amendment to the U.S. Constitution provides:

> A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

* * *

18 U.S.C. § 922(g)(1) states:

> (g) It shall be unlawful for any person—
>
> > (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
> >
> > . . .
> >
> > to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

* * *

United States Sentencing Guideline (U.S.S.G.) § 2K2.1 provides, in relevant part:

> **(a) Base Offense Level** (Apply the Greatest):
>
> . . .
>
> **(4)** 20, if-- **(B)** the . . . offense involved a . . . semiautomatic firearm that is capable of accepting a large capacity magazine; . . . and . . . defendant . . . was a prohibited person at the time the defendant committed the instant offense[.]

* * *

Application Note 2 in the Commentary to U.S.S.G. § 2K2.1 states:

> **2. Semiautomatic Firearm That Is Capable of Accepting a Large Capacity Magazine**.--For purposes of subsections (a)(1), (a)(3), and (a)(4), a "semiautomatic firearm that is capable of accepting a large capacity magazine" means a semiautomatic firearm that has the ability to fire many rounds without reloading because at the time of the offense (A) the firearm had attached to it a magazine or similar device that could accept more than 15 rounds of ammunition; or (B) a magazine or similar device that could accept more than 15 rounds of ammunition was in close proximity to the firearm.

INTRODUCTION

This case raises two important questions at the intersection of federal criminal law and firearms. First, whether 18 U.S.C. § 922(g)(1)—the federal felon-in-possession statute—is constitutional under the Second Amendment. Second, whether under the United States Sentencing Guidelines (U.S.S.G.) a person can have his sentence enhanced under U.S.S.G. § 2K2.1 for possessing a so-called "large capacity magazine" when, in fact, he simply possesses a magazine with an industry-standard capacity—for example, 16 or 17 rounds of ammunition. *See Duncan v. Becerra*, 970 F.3d 1133, 1142 (9th Cir. 2020) ("For example, several variants of the Glock pistol—dubbed 'America's gun' due to its popularity—come standard with a seventeen-round magazine.").

The answer to both questions is no. Moreover, both issues can only be resolved by this Court. First, the lower courts are deeply divided not only on the constitutionality of § 922(g)(1), but also on the antecedent question of the appropriate legal framework for resolving that fundamental issue. Thus, only this Court can resolve the widespread analytical confusion and provide uniform guidance on the proper application of Second Amendment precedent.

Second, under both the *Stinson* and *Kiser* frameworks for interpreting the Guidelines (which is itself currently the subject of an entrenched circuit split), the lower courts have consistently erred by refusing to follow the plain text of the § 2K2.1 Guideline in favor of deferring to the Commentary, in defiance of this Court's precedents. The Guideline provides for an enhanced base offense level if a defendant

possesses a "large capacity magazine." The plain and ordinary meaning of these words is a magazine that has a capacity that is relatively greater than the norm, *i.e.*, the standard magazine. Yet, the Commentary purports to define "large capacity magazine" as any magazine that holds "more than 15 rounds of ammunition," even though 16 or 17 round magazines are industry-standard and therefore not "large capacity" as commonly understood. Thus, reliance on the Commentary to apply the enhancement is contrary to the plain meaning of the Guideline text. Because the lower courts are erring under both the *Stinson* and *Kisor* frameworks, their unanimous rejection of a textual-first approach to Guidelines' interpretation can only be corrected by this Court.

STATEMENT OF THE CASE

On September 30, 2022, Petitioner Dajuan Martin was charged in a single-count indictment with possessing a firearm after being convicted of a felony offense, in violation of 18 U.S.C. § 922(g)(1). He pleaded guilty without the benefit of a plea agreement. In the factual basis submitted in support of his plea, Mr. Martin admitted to facts establishing that he knowingly possessed a firearm on June 13, 2022, knowing that he previously had been convicted of a felony offense. He also admitted that the firearm was "loaded with 16 live rounds of ammunition."

Prior to sentencing, U.S. Probation prepared a Presentence Investigation Report (PSR).[1] Four days before sentencing, the government filed an objection, asserting that Mr. Martin's base offense level should be 20 pursuant to § 2K2.1(a)(4)(B) because he "possessed a firearm loaded with a magazine that could accept more than fifteen (15) rounds of ammunition," *i.e.*, a "large capacity magazine." Mr. Martin responded that application of the § 2K2.1(a)(4)(B) enhanced base offense level was improper because the facts did not establish that he had a "large capacity magazine." Rather, the government's objection rested solely on U.S.S.G. § 2K2.1 Commentary Note 2's purported definition of "large capacity magazine" to mean "a

[1] Probation initially calculated Mr. Martin's Guidelines range as 21 to 27 months, based on a total offense level of 12 and a criminal history category of IV. The draft PSR included a base offense level of 14 pursuant to U.S.S.G. § 2K2.1(a)(6) because Mr. Martin was a "prohibited person" at the time of the instant offense due to his prior felony conviction. Neither party filed objections to the draft PSR, and the final PSR included the same § 2K2.1(a)(6) base offense level and Guideline rages of 21 to 27 months. Two days later, Probation issued an addendum to correct an error in Mr. Martin's criminal history category calculation, and, as a result, recalculated Mr. Martin's Guideline range as 15 to 21 months based on a total offense level of 12 and a criminal history category of III.

magazine . . . that could accept more than 15 rounds of ammunition." But, as Mr. Martin explained, the Commentary was not entitled to deference under this Court's *Stinson* framework because it is inconsistent with, and a plainly erroneous reading of, the Guideline itself. *See Stinson v. United States*, 508 U.S 36, 38 (1993).

Specifically, Mr. Martin argued that Commentary Note 2 flunked the *Stinson* test because the plain and ordinary meaning of the word "large" connotes relative size and "more than 15 rounds" is not a relatively great magazine capacity. "For example, several variants of the Glock pistol—dubbed 'America's gun' due to its popularity—come standard with a seventeen-round magazine." *Duncan*, 970 F.3d at 1142. "Another popular handgun used for self-defense is the Beretta Model 92, which entered the market in 1976 and comes standard with a sixteen-round magazine. Indeed, many popular handguns commonly used for self-defense are typically sold with [so-called 'large capacity magazines']." *Id.* & n.4 (listing other popular handgun models sold with 17-round standard magazines); *see also* Larosiere, M., "Losing Count: The Empty Case for 'High-Capacity' Magazine Restrictions," Legal Policy Bulletin, Cato Institute Center for Constitutional Studies, July 17, 2018 (No. 3) at 3, n. 12 (listing numerous best-selling handguns that come with standard magazines that hold more than 15 rounds).

Therefore, under *Stinson*, Mr. Martin urged the district court to disregard Commentary Note 2 because it was inconsistent with, and a plainly erroneous reading of the text of the Guideline itself, and to not apply the § 2K2.1(a)(4)(B)

enhancement absent sufficient evidence that Mr. Martin in fact had a "large capacity magazine" as that phrase is commonly understood.

Further, Mr. Martin argued that the same result would have obtained under this Court's *Kisor* framework (a claim currently foreclosed in the Fifth Circuit, which continues to apply *Stinson* to Guideline challenges, even as half of the Circuits apply *Kisor*). *See Kisor v. Wilkie*, 139 S. Ct. 2400 (2019); *United States v. Vargas*, 74 F.4th 673, 678-79 & n.2-3 (5th Cir. 2023) (en banc).[2]

The day before sentencing, Probation adopted the government's position, applied the § 2K2.1(a)(4)(B) enhanced base offense level of 20, and recalculated Mr. Martin's Guideline range as 30 to 37 months. At sentencing, the district court agreed and sentenced Mr. Martin to 33 months, the middle of the range.

On appeal, Mr. Martin pressed his *Stinson*/*Kisor* challenge to the sentencing enhancement. Mr. Martin also argued that his § 922(g)(1) conviction must be reversed because the statute violates the Second Amendment according to the framework established in *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1

[2] The Circuits are deeply divided over whether *Kisor* or *Stinson* applies when interpreting Guidelines and Commentary. The Third, Sixth, Ninth, and Eleventh Circuits apply *Kisor*. *See United States v. Nasir*, 17 F.4th 459 (3d Cir. 2021); *United States v. Riccardi*, 989 F.3d 476 (6th Cir. 2021); *United States v. Castillo*, 69 F.4th 648 (9th Cir. 2023); *United States v. Dupree*, 57 F.4th 1269 (11th Cir. 2023). The First, Second, Fifth, Seventh, and Tenth Circuits continue to apply *Stinson*. *See United States v. Lewis*, 963 F.3d 16 (1st Cir. 2020); *United States v. Tabb*, 949 F.3d 81 (2d Cir. 2020); *United States v. Vargas*, 74 F.4th 673 (5th Cir. 2023), *cert. denied*, 144 S. Ct. 828 (2024); *United States v. White*, 97 F.4th 532 (7th Cir. 2024); *United States v. Maloid*, 71 F.4th 795 (10th Cir. 2023), *cert. denied*, 144 S. Ct. 1035 (2024). The position of the Fourth Circuit is unclear, as different panels of that court have arguably conflicted and seemingly applied both approaches. *See United States v. Campbell*, 22 F.4th 438 (4th Cir. 2022) *(*applying *Kisor*); *United States v. Moses*, 23 F.4th 347 (4th Cir. 2022), *cert. denied*, 143 S. Ct. 640 (2023) (applying *Stinson*).

(2022). In doing so, Mr. Martin noted that his sole qualifying conviction was for illegal carrying of weapons. Mr. Martin also conceded that his trial counsel had failed to raise the issue and that his claim was therefore subject to plain-error review.

In a published opinion issued without oral argument, the Fifth Circuit affirmed. *See United States v. Martin*, 119 F.4th 410 (5th Cir. 2024). The court stated that "[t]he Guidelines do not define 'large capacity,' but the commentary does." *Id.* at 414. The court then rejected Mr. Martin's *Stinson* argument by adopting the Ninth Circuit's reasoning "that '[s]omething can be both popular and large, and 'the popularity of that firearm does not mean that a magazine that can accept more than fifteen rounds is not also a "large capacity magazine."'" *Id.* (quoting *United States v. Trumbull*, 114 F.4th 1114, 1119 (9th Cir. 2024)); *see id.* ("In other words, if something can come in small, medium, large, and even extra-large sizes, nothing about those options indicates what is the usual size. Small and medium sizes may rarely be utilized, but that fact does not transform the large size into nonlarge.").

The court concluded that Commentary Note 2 did not violate the Guideline and was authoritative under *Stinson*, and it affirmed Mr. Martin's sentence. *Id.* at 414-15. The Fifth Circuit also affirmed Mr. Martin's conviction, relying on its first post-*Rahimi* case, *United States v. Diaz*, which upheld the constitutionality of § 922(g)(1). *Id.* at 417 (citing 116 F.4th at 471–72).

REASONS FOR GRANTING THE PETITION

This Court should grant a writ of certiorari in Mr. Martin's case, or, alternatively, grant certiorari in another case raising the same issues and then hold Mr. Martin's petition pending a resolution of these important questions.

1. In *Bruen*, this Court established a new framework for determining whether a firearm regulation is constitutional under the Second Amendment Under *Bruen*, for a law to survive a Second Amendment challenge, the government must "identify an American tradition" justifying the law's existence. 597 U.S. at 70. Thus, the government must prove that § 922(g)(1) is consistent with this Nation's historical tradition of firearm regulation. But it plainly cannot do so here because there is no relevantly similar historical analogue to a lifetime ban on possession of firearms. As one Justice has noted, no historical tradition of prohibiting felons from possessing firearms for life exists. *Kanter v. Barr*, 919 F.3d 437, 458 (7th Cir. 2019) (Barrett, J., dissenting), *abrogated by Bruen*. Thus, § 922(g)(1) is unconstitutional on its face. And that is clearly and obviously dictated by simple application of *Bruen*. The Fifth Circuit was wrong to hold that *Bruen* does not compel this straightforward result. Mr. Martin's conviction under § 922(g)(1) should be reversed.

2. In both *Stinson* and *Kisor*, this Court made clear that courts should not defer to Guidelines' Commentary in all instances. Rather, , courts must begin by giving plain meaning to the text of the Guideline itself. The Fifth Circuit, applying *Stinson*, failed to follow that textual approach. It gave no meaning at all to the Guideline and instead reflexively deferred to the Commentary, and therefore erred in determining

that Mr. Martin possessed a "large capacity magazine" when he in fact possessed a standard-capacity magazine. Other Circuits, under *Kisor,* have made the same type of error. This Court's intervention is needed to correct the Circuits' uniform aversion to interpreting the text and to prevent the Sentencing Commission from legislating under the guise of interpreting as a result of the courts' failure to hold the line between Guideline text and Commentary.

I. Simple application of *Bruen*'s historical-tradition test makes clear that a blanket, lifetime ban on possession of firearms for all felons cannot withstand constitutional scrutiny.

A. The constitutionality of § 922(g)(1) is an important question, and the Courts of Appeals are hopelessly divided.

This petition raises a critical Second Amendment issue that has continued to percolate in the federal courts. Since this Court's decision in *Bruen*, the courts of appeal have been wrestling with challenges to the constitutionality of 18 U.S.C. § 922(g)(1). Some courts have rejected all challenges, relying on dicta in *Bruen* and *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008), that bans on possession of firearms by felons are "presumptively lawful." *See, e.g.*, *United States v. Dubois*, 94 F.4th 1284, 1292 (11th Cir. 2024); *Vincent v. Garland*, 80 F.4th 1197, 1201 (10th Cir. 2023), *cert. granted*, *judgment vacated*, 144 S. Ct. 2708 (2024). Some have rejected facial challenges but entertained as-applied challenges. *See, e.g.*, *Range v. Att'y. Gen.*, 69 F.4th 96, 106 (3d. Cir. 2023) (en banc), *cert. granted*, *judgment vacated*, 144 S. Ct. 2706 (2024); *United States v. Duarte*, 101 F.4th 657, *vacated and en banc granted*, 108 F.4th 786 (9th Cir. 2024); *Diaz*, 116 F.4th 458.

Last term's opinion in *United States v. Rahimi*, 144 S. Ct. 1189 (2024), did not alter the state of disarray. Lower courts continue to be divided on whether *Bruen* meaningfully altered the test to be applied to bans on possession of firearms by convicted felons. *Compare United States v. Williams*, 113 F.4th 637, 662-63 (6th Cir. 2024) (rejecting as applied challenge by "dangerous person" but indicating persons with other categories of non-dangerous felonies might be successful), *with Diaz*, 116 F.4th at 469-70 (finding felon dispossession consistent with the historical tradition)

and United States v. Jackson, 110 F.4th 1120, 1128-29 (8th Cir. 2024) (same, relying on Congress's judgment of what categories of persons are dangerous).

Further, this is an important question: 8,040 cases were prosecuted in FY2023 under 18 U.S.C. § 922(g) in federal courts nationwide, the vast majority of which are § 922(g)(1). U.S. Sentencing Comm'n, "Quick Facts – 18 U.S.C. § 922(g) Offenses" (June 2024). And thousands more are prosecuted under similar state statutes each year. Indeed, the Department of Justice agreed to certiorari in several cases last term, but none were granted argument. *See, e.g.*, *Duarte*, 108 F.4th at 787 (dissenting from grant of en banc rehearing). But the question will not go away, and a clear circuit split has continued. "[P]erhaps no single Second Amendment issue has divided the lower courts more than the constitutionality of the 18 U.S.C. § 922(g)(1) felon-disarmament's rule's application to certain nonviolent felons." *Id*. In sum, the circuits "require clearer instruction from the Supreme Court" regarding the constitutionality of 18 U.S.C. § 922(g)(1) after *Bruen* and *Rahimi*. *Dubois*, 94 F.4th at 1293. Because these critical issues remain unresolved and the circuits remain split as a result, scores of cases soon will return to this Court.

B. Bruen represented a fundamental shift in Second Amendment analysis.

The Second Amendment to the U.S. Constitution mandates that a "well-regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed." U.S. Const. amend. II. In *Heller*, this Court held that the Second Amendment codifies an individual right to possess and carry weapons, explaining that the inherent right of self-defense is central to its protections. 554 U.S. at 628; *see also McDonald v. City of Chicago*, 561 U.S. 742, 767

(2010) (holding "that individual self-defense is the central component of the Second Amendment right").

Following *Heller* (but before *Bruen*), the Fifth Circuit and others "adopted a two-step inquiry for analyzing laws that might impact the Second Amendment." *Hollis v. Lynch*, 827 F.3d 436, 446 (5th Cir. 2016). First, courts asked "whether the challenged law impinge[d] upon a right protected by the Second Amendment—that is, whether the law regulate[d] conduct that falls within the scope of the Second Amendment's guarantee." *Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms & Explosives [NRA]*, 700 F.3d 185, 194 (5th Cir. 2012). To make that determination, courts "look[ed] to whether the law harmonize[d] with the historical traditions associated with the Second Amendment guarantee." *NRA*, 700 F.3d at 194. If the regulated conduct fell outside the scope of the Second Amendment's protection under that framework, then the law was deemed constitutional without further analysis. *United States v. McGinnis*, 956 F.3d 747, 754 (5th Cir. 2020).

However, if the regulated conduct fell within the protective scope of the Second Amendment, courts proceeded to step two: determining and applying "the appropriate level of means-end scrutiny—either strict or intermediate." *Id*. (internal quotation marks and citation omitted). "[T]he appropriate level of scrutiny 'depend[ed] on the nature of the conduct being regulated and the degree to which the challenged law burden[ed] the right." *NRA*, 700 F.3d at 195 (quoting *United States v. Chester,* 628 F.3d 673, 682 (5th Cir. 2010)). Under that framework, "a 'regulation that threaten[ed] a right at the core of the Second Amendment'—i.e., the right to possess

a firearm for self-defense in the home—'trigger[ed] strict scrutiny,' while 'a regulation that does not encroach on the core of the Second Amendment' [was] evaluated under intermediate scrutiny." *McGinnis*, 956 F.3d at 754 (quoting *NRA*, 700 F.3d at 194).

In *Bruen*, this Court expressly abrogated the two-step inquiry adopted by the Fifth Circuit and others and announced a new framework for analyzing Second Amendment claims. The Court reasoned that "[s]tep one of the predominant framework is broadly consistent with *Heller*, which demands a test rooted in the Second Amendment's text, as informed by history." 597 U.S. at 19. However, *Bruen* rejected the practice of applying "means-end scrutiny" to conduct deemed protected, explaining that "*Heller* and *McDonald* do not support applying means-end scrutiny in the Second Amendment context." *Id.* Under *Bruen*'s framework, "when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct." *Id.* at 17, 24. And, upon such a finding, "[t]he government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Id.* at 24. Only upon the government making such a showing may a court "conclude that the individual's conduct falls outside of the Second Amendment's 'unqualified command.'" *Id.* (citation omitted). In other words, for a firearm regulation to pass constitutional muster, "the government must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." *Id.* at 19.

C. *Under the new framework, § 922(g)(1) violates the Second Amendment because firearm possession is protected by the Amendment's plain text, and the government cannot show a historical tradition of categorically disarming felons.*

Straightforward application of *Bruen* and *Rahimi*'s test makes clear that § 922(g)(1) cannot survive constitutional scrutiny, and the Fifth Circuit was wrong to hold otherwise.

1. The text of the Second Amendment covers Mr. Martin's conduct, and he is among "the people" the Amendment protects.

The plain text of the Second Amendment protects the right to possess and carry weapons for self-defense. *See Heller*, 554 U.S. at 583-92. And *Bruen* clarified that this right extends outside of the home. 597 U.S. at 9-11. Section 922(g)(1) is a permanent and complete ban on any firearm possession by felons in any context. Thus, the statute regulates (indeed, fully prohibits) conduct that is presumptively protected under the plain text of the Second Amendment. As a result, the statute is presumptively unconstitutional under *Bruen*. *Id.* at 24.

In an attempt to sidestep this straightforward conclusion, the government has adopted a novel argument that a person's status as a "felon" excludes that person from the Second Amendment's protections. But the plain text of the Second Amendment and this Court's precedent hold otherwise. In *Heller*, this Court rejected the theory that "the people" protected by the Second Amendment was limited to a specific subset—*i.e.*, those in a militia. 554 U.S. at 579-81, 592-600. The Court explained that when the Constitution refers to "'the people,' the term unambiguously refers to all members of the political community, not an unspecified subset," and there

is thus a "strong presumption that the Second Amendment right is exercised individually and belongs to *all Americans*." *Id.* at 580-81 (emphasis added).

Comparison to other constitutional amendments confirms this view. As *Heller* explained, "the people" is a "term of art employed in select parts of the Constitution," including "the Fourth Amendment, . . . the First and Second Amendments, and . . . the Ninth and Tenth Amendments." *Id.* (quoting *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990)). It is beyond challenge that felons are among "the people" who enjoy Fourth Amendment protection. U.S. Const. Amend. IV; *see United States v. Lara*, 815 F.3d 605 (9th Cir. 2016). And felons likewise enjoy "the right of the people" to "petition the government for redress of grievances." U.S. Const. Amend. I; *see Entler v. Gregoire*, 872 F.3d 1031, 1039 (9th Cir. 2017). If a person with a felony conviction is one of "the people" protected by the First and Fourth Amendments, *Heller* teaches that he is one of "the people" protected by the Second Amendment, too.

This view was confirmed when this Court addressed a challenge to a different subsection of § 922(g) last term in *Rahimi*. The Court analyzed historical laws dealing with dangerous persons to find that § 922(g)(8) was consistent with historical tradition. 144 S. Ct. at 1899-1900. But the Court never suggested that Mr. Rahimi was not one of "the people" protected by the Second Amendment. Accordingly, Mr. Martin is among "the people" to whom the Second Amendment applies.

2. <u>There is no relevantly similar historical regulation that bans firearm possession for life.</u>

Bruen provided guidance on conducting historical analysis in the hunt for relevantly similar regulations. The Court can consider "whether 'historical precedent'

from before, during, and even after the founding evinces a comparable tradition of regulation." *Bruen*, 597 U.S. at 27. But *Bruen* reminded that "not all history is created equal." *Id.* at 34. That is because "[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them." *Id.* (quotations omitted). Because the Second Amendment was adopted in 1791, earlier historical evidence "may not illuminate the scope of the right if linguistic or legal conventions changed in the intervening years." *Id.* Similarly, post-ratification laws that "are inconsistent with the original meaning of the constitutional text obviously cannot overcome or alter that text." *Id.* at 36 (quotations and emphasis omitted).

Bruen—and, later, *Rahimi*—also offered analytical guidance for evaluating historical clues. As this Court explained in *Rahimi*: "A court must ascertain whether the new law is 'relevantly similar' to laws that our tradition is understood to permit, 'apply[ing] faithfully the balance struck by the founding generation to modern circumstances.'" *Rahimi*, 144 S. Ct. at 1898 (quoting *Bruen*, 597 U.S. at 29). In doing so, "[w]hy and how the regulation burdens the right are central to this inquiry." *Id.* Thus, "if laws at the founding regulated firearm use to address particular problems, that will be a strong indicator that contemporary laws imposing similar restrictions for similar reasons fall within a permissible category of regulations." *Id.* Importantly, though, "[e]ven when a law regulates arms-bearing for a permissible reason, . . . it may not be compatible with the right if it does so to an extent beyond what was done at the founding." *Id.* And this Court made clear that the burden falls squarely on the government to "affirmatively prove that its firearms regulation is

part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." *Bruen*, 597 U.S. at 19. If the government cannot do so, the infringement on the right cannot survive.

The government cannot meet its burden to establish § 922(g)(1)'s historical pedigree for a simple reason: neither the federal government nor a single state barred all people convicted of felonies from possessing firearms until the 20th century. *See, e.g.*, Adam Winkler, *Heller's Catch-22*, 56 U.C.L.A. L. Rev. 1551, 1563 (2009). The modern version of § 922(g)(1) was adopted 177 years after the Second Amendment. *Bruen*, 597 U.S. at 66 n.28 ("[L]ate-19th-century evidence" and any "20th-century evidence . . . does not provide insight into the meaning of the Second Amendment when it contradicts earlier evidence."). Section 922(g)(1) very much contradicts earlier evidence from the relevant historical periods: "(1) . . . early modern England; (2) the American Colonies and the early Republic; (3) antebellum America; [and] (4) Reconstruction." *Id.* at 34. Those periods lack evidence of any analogue to § 922(g)(1).

The government may argue that, historically, *some* jurisdictions *sometimes* regulated firearm use by those considered *presently* violent. But not *all* people with a felony conviction are presently violent. Moreover, the historical regulations required an individualized assessment of a person's threat to society. And finally, the historical regulations almost always allowed people deemed violent to still possess weapons for self-defense and provided the opportunity for people to regain their full rights. Thus, even those convicted of serious crimes—including rebellion—remained entitled to protect themselves in a dangerous world, with firearms if necessary. Those laws'

targeted nature makes them a far cry from declaring that any person, convicted of any felony, can *never* possess "the most popular weapon chosen by Americans for self-defense in the home." *Heller*, 554 U.S. at 629.

England, before the founding, did not ban felons from ever again possessing a firearm. *See Kanter*, 919 F.3d at 457 (Barrett, J., dissenting); C. Kevin Marshall, *Why Can't Martha Stewart Have A Gun?*, 32 Harv. J.L. & Pub. Policy 695, 717 (2009); Joseph G.S. Greenlee, *The Historical Justification for Prohibiting Dangerous Persons from Possessing Arms*, 20 Wyo. L. Rev. 249, 260 (2020). To the extent that England sought to disarm individuals, those regulations usually required a more culpable mental state and made exceptions for self-defense, both features absent from § 922(g)(1). *Rahimi* discusses at length the surety laws and laws against affray or going armed against the king's subjects. 144 S. Ct. at 1899-1902.

To the extent that England tried to disarm whole classes of subjects, it did so on discriminatory grounds that would be unconstitutional today—and yet still permitted those targeted to keep arms for self-defense. For example, in the age of William and Mary (both Protestants), Catholics were presumed loyal to James II (a Catholic trying to retake the throne) and treasonous. Thus, Catholics could keep "Arms, Weapons, Gunpowder, [and] Ammunition," only if they declared allegiance to the crown and renounced key parts of their faith. *See Bruen*, 597 U.S. at 45 n.12 (quoting 1 Wm. & Mary c. 15, § 4, in 3 Eng. Stat. at Large 399 (1688)). In short, the English never tried to disarm all felons. Rather, they tried to limit the use of firearms by those individuals found to be violent and rebellious. And even those individuals

could keep arms for self-defense. A "relevantly similar" historical regulation that is not. *Id.* at 29.

"[T]here is little evidence of an early American practice of," forever barring all people convicted of a felony from ever again possessing a firearm. *Id.* at 46. The early United States accepted that those who committed crimes—even serious ones—retained a right to defend themselves. That can be seen in the colonies' and states' statutes, early American practice, and rejected proposals from state constitutional conventions. *See Kanter*, 919 F.3d at 454 (Barrett, J., dissenting); *Folajtar v. Att'y Gen. of the United States,* 980 F.3d 897, 915 (3d Cir. 2020) (Bibas, J., dissenting); *Chester*, 628 F.3d at 679; *Binderup v. Att'y Gen. of the U.S.*, 836 F.3d 336, 368 (3d Cir. 2016) (en banc) (Hardiman, J., concurring).

To the extent that the new nation sought to disarm people, the regulatory approach was much more limited than § 922(g)(1). For example, the Virginia colony disarmed Catholics, still viewed as traitors to the crown. Robert H. Churchill, *Gun Regulation, the Police Power, and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment*, 25 Law & Hist. Rev. 139, 157 (2007) (citation omitted). But there was an exception for weapons allowed by a justice of the peace "for the defense of his house and person." *Id.* And following the Declaration of Independence, Pennsylvania ordered that those who did not pledge allegiance to the Commonwealth and renounce British authority be disarmed. *Id.* at 159. Thus, to the extent that either regulation would comply with the Second Amendment, as understood today, they required a specific finding that a specific person posed a risk

of violence to the state.

Colonial and Founding-era practice also suggests that committing a serious crime did not result in a permanent disarmament. For example, leaders of the seminal Massachusetts Bay colony once disarmed supporters of a banished seditionist. Greenlee, *supra*, at 263 (citations omitted). Nevertheless, "[s]ome supporters who confessed their sins were welcomed back into the community and able to retain their arms." *Id.* And in 1787, after the participants in Shay's Rebellion attacked courthouses, a federal arsenal, and the Massachusetts militia, they were barred from bearing arms, for three years, not life. *Id.* at 268-67. In fact, Massachusetts law required the Commonwealth to hold *and then return* the rebels' arms after that period. Sec'y of the Commonwealth, *Acts and Resolves of Massachusetts 1786–87*, at 178 (1893).

American practice and laws during the Nineteenth Century—before and after the Civil War—also confirm that § 922(g)(1) does not comport with the "Nation's historical tradition of firearm regulation." *Bruen*, 597 U.S. at 34. The United States continued to regulate—but not ban—firearm possession by those feared to be violent. *See id.* at 55 (holding that 19th century surety laws allowed people likely to breach the peace to still keep guns for self-defense or if they posted a bond). But, as discussed above, that is not similar to § 922(g)(1). There is no evidence of a precursor to § 922(g)(1)'s broad, categorical ban.

In fact, there are at least two documented instances where attempts to disarm a class of offenders was rejected as inconsistent with the right to bear arms. First, as

with Shay's Rebellion, Congress declined to disarm southerners who fought against the Union in the Civil War. Steven G. Bradbury, et al., *Whether the Second Amendment Secures an Individual Right*, 28 OP. O.L.C. 126, 226 (2004). The reason: some northern and Republican senators feared that doing so "would violate the Second Amendment." *Id.* Second, when a Texas law ordered that people convicted of unlawfully using a pistol be disarmed, it was struck down as unconstitutional under the Texas constitution. *Jennings v. State*, 5 Tex. Ct. App. 298, 298 (1878).

In sum, the 19th century history provides clear evidence that categorical and permanent disarmament for people convicted of an offense is unconstitutional. Not only was there a consistent practice of allowing people who broke the law to keep weapons for self-defense—at least one state appellate court and Congress agreed that disarming lawbreakers was unconstitutional. As *Bruen* teaches: "[I]f some jurisdictions actually attempted to enact analogous regulations during this timeframe, but those proposals were rejected on constitutional grounds, that rejection surely would provide some probative evidence of unconstitutionality." 597 U.S. at 27.

Rahimi did not affect this analysis—and, in fact, made all the clearer § 922(g)(1)'s lack of constitutional backing. The prohibition there passed constitutional muster because there were historical analogues *temporarily* disarming those proven to be presently violent. 144 S. Ct. 1898-99. The restraining order subsection of § 922(g)(8) passed constitutional muster because there is an individualized finding of dangerousness, after notice and an opportunity to be heard, and the restriction lasts only as long as the restraining order does. *Id.* at 1895-96.

Again, "[w]hy and how the regulation burdens the right are central to the inquiry." *Id*. at 1898. Section 922(g)(1) contains a lifetime prohibition on possession of firearms by all convicted felons, without an individualized determination of ongoing dangerousness. It therefore violates the Second Amendment on its face, and Mr. Martin's conviction under § 922(g)(1) must be vacated.

D. Alternatively, this Court should hold Mr. Martin's petition pending consideration of one of the many other petitions that will place the same Second Amendment issues before this Court.

Numerous petitions raising the same issues are now, or will shortly be, filed in this Court, including a petition arising out of the lead post-*Rahimi* case on this issue in the Fifth Circuit: *United States v. Diaz*. *See* No. 24A611. Accordingly, Mr. Martin requests that his petition either be granted or held pending *Diaz* and/or other petitions if this Court anticipates that it may grant a writ of certiorari on the issues raised herein.

II. Under both *Stinson* and *Kisor*, the Courts of Appeals are disregarding the plain meaning of the text to conclude that an industry-standard firearm magazine warrants the Guidelines' "large capacity magazine" sentencing enhancement.

A. Applying the rules of statutory interpretation to the Guideline, a standard-capacity magazine is not a "large capacity magazine."

"[T]he Sentencing Guidelines must be interpreted as if they were a statute or a court rule." *United States v. Goldbaum*, 879 F.2d 811, 813 (10th Cir. 1989) (citing *Mistretta v. United States*, 488 U.S. 361, 389-393 (1989)); *see also, e.g.*, *United States v. Jenkins*, 275 F.3d 283, 287 (3d Cir. 2001) (We interpret United States Sentencing Guidelines the same way we interpret statutes[.]"); *United States v. Ward*, 972 F.3d 364, 369 (4th Cir. 2020) ("We interpret the Sentencing Guidelines using our ordinary tools of statutory construction."); *United States v. Carbajal*, 290 F.3d 277, 283 (5th Cir. 2002) ("It is well established that our interpretation of the Sentencing Guidelines is subject to the ordinary rules of statutory construction."); *United States v. Foster*, 902 F.3d 654, 657 (7th Cir. 2018) ("We approach an interpretation of the Sentencing Guidelines as we would a question of statutory interpretation—by starting with the text of the guidelines.").

And statutory interpretation starts with applying a plain-meaning approach to the text. *See, e.g.*, *United States v. Loney*, 219 F.3d 281, 284 (3d Cir. 2000) (explaining that courts "interpret undefined terms in the guidelines, as in statutes, using the terms' meaning in ordinary usage"); *Ward*, 972 F.3d at 369 ("As in all statutory construction cases, we start with the plain text of the Guidelines and assume that the ordinary meaning of the statutory language controls.") (cleaned up); *United States v. Mendez-Villa*, 346 F.3d 568, 570 (5th Cir. 2003) ("The text of the

guideline is the starting point in the analysis," and courts are to "use 'a plain-meaning approach' in [the] interpretation of the Sentencing Guidelines."); *Carbajal*, 290 F.3d at 283 ("If the language of the guideline is unambiguous, our inquiry begins and ends with an analysis of the plain meaning of that language."); *see also Smith v. United States*, 508 U.S. 223, 228 (1993) ("When a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning.")

Application of these basic rules leads to the straightforward conclusion that "large capacity magazine" does not encompass magazines with 16 or 17-round capacities. U.S.S.G. § 2K2.1 (a)(4)(B) prescribes a base offense level of 20 if a defendant is a "prohibited person" and possesses a "semiautomatic firearm that is capable of accepting a large capacity magazine." The guideline commentary purports to define the phrase "large capacity magazine" to mean "a magazine or similar device that could accept more than 15 rounds of ammunition." U.S.S.G. § 2K2.1, cmt. n.2. The problem with that purported definition is that magazines that hold "more than 15 rounds of ammunition" are standard in the firearm industry. In other words, such magazines are the norm. "Large," by contrast, is a word of relative size, *i.e.*, relatively greater than normal or standard size. Thus, as a matter of plain language and logic, it is erroneous to define "large capacity magazine" as a magazine that holds "more than 15 rounds of ammunition."

To determine a word's ordinary meaning, courts' common practice is to consult dictionary definitions. *See, e.g.*, *United States v. Perez*, 585 F.3d 880, 884 (5th Cir. 2009). The Oxford English Dictionary defines "large" as:

- "Great in size, amount or degree; big." Oxford English Dictionary, s.v. "large, adj., sense II," https://doi.org/10.1093/OED/1020644093;

- "Of extensive capacity, space, or volume; having or allowing plenty of room; capacious, spacious." *Id.* at sense II.3.a;

- "Of considerable size or extent; great, big." *Id.* at sense II.5; and

- "Designating a quantity, amount, measure, etc., of relatively great magnitude or extent." *Id.* at sense II.5.a.

These definitions make clear that "large" is a relative measure of size. *See, e.g. id*. at sense II.5.a ("relatively").[3] Thus, a "large capacity magazine" is a magazine of relatively great capacity compared to other magazines. In other words, a magazine that has a capacity that is standard, regular, or average is not a "large capacity magazine."

A firearm magazine with a capacity of "more than 15 rounds of ammunition" is not automatically a magazine of "relatively great" capacity. "Notably, [so-called 'large capacity magazines'] are commonly used in many handguns, which the Supreme Court has recognized as the 'quintessential self-defense weapon.'" *Duncan*, 970 F.3d at 1142 (quoting *Heller*, 554 U.S. at 629). "Indeed, many popular handguns commonly used for self-defense are typically sold with ['large capacity magazines']." *Id.*; *see also* Larosiere, M., "Losing Count: The Empty Case for 'High-Capacity' Magazine Restrictions," Legal Policy Bulletin, Cato Institute Center for

[3] *See also id.* at sense II.5.3.i ("greater than average"); *id.* at sense II.5.e.ii ("in respect of"); *id.* at sense II.5.e.iii ("in the comparative"); *id.* at sense II.5.f ("of a great (or greater than usual)"); *id.* at sense II.5.h ("relatively"); *id.* at sense II.5.j.i ("of a greater size than others of the same kind or group; that is the biggest comparatively"); *id.* at sense II.5.j.ii ("distinguished by their greater size from similar or related ones"); *id.* at sense II.5.j.iii ("of a size greater than those items designated small, medium, regular, etc."); *id.* at sense II.9 ("expressing relative size").

Constitutional Studies, July 17, 2018 (No. 3) at 3, n. 12. "For example, several variants of the Glock pistol—dubbed 'America's gun' due to its popularity—come standard with a seventeen-round magazine." *Duncan*, 970 F.3d at 1142.

In short, taking a plain meaning approach to the Guideline (as required by the rules of statutory interpretation), a magazine with a 16-round capacity—like the magazine possessed by Mr. Martin—does not trigger the "large capacity magazine" sentencing enhancement. The Fifth Circuit legally erred in concluding otherwise by relying on Commentary that is not binding under this Court's precedents.

B. The "large capacity magazine" Commentary runs afoul of both the Stinson *and* Kisor *frameworks.*

In *Stinson v. United States*, this Court held that "commentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline." 508 U.S. at 38. Only "[c]ommentary meeting those conditions is 'binding' and 'control[ling]' on courts." *Vargas*, 74 F.4th at 680 (citing *Stinson*, 508 U.S. at 42). Indeed, *Stinson* itself declared that "[i]t does not follow that commentary is binding in all instances." 508 U.S. at 43. Rather, the key is whether "the guideline which the commentary interprets will bear the construction." *Id.* at 46.

Stinson analogized guidelines commentary as "akin to an agency's interpretation of its own legislative rules," which typically "must be given 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" *Id.* at 45 (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)). "The

functional purpose of commentary (of the kind at issue here) is to assist in the interpretation and application of those rules," *i.e.*, the Guidelines, which "[t]he Sentencing Commission promulgates . . . by virtue of an express congressional delegation of authority for rulemaking, and through the informal rulemaking procedures" of the Administrative Procedures Act. *Id.* at 44-45 (citations omitted).

Thus, under *Stinson*, commentary "is controlling when it functions to interpret a guideline or explain how it is to be applied." *United States v. Radziercz*, 7 F.3d 1193, 1195 (5th Cir. 1993) (citing *Stinson*, 508 U.S. at 42-44). But a court errs if it follows the commentary when the "commentary and the guideline it interprets are inconsistent in that following one will result in violating the dictates of the other." *Stinson,* 508 U.S. at 43. When faced with an inconsistency "the Sentencing Reform Act itself commands compliance with the guideline" itself. *Id.* Thus, if commentary does not interpret or explain a guideline but is instead inconsistent with the guideline or a plainly erroneous reading of it, a court must not hesitate to disregard the commentary and to faithfully follow the text of the guideline itself, as *Stinson's* requirements "are not toothless commands." *United States v. Riccardi*, 989 F.3d 476, 493 (6th Cir. 2021) (Nalbandian, J., concurring).

As explained above, Commentary Note 2's definition of "large capacity magazine" encompasses standard or average-sized magazines and is therefore "inconsistent with, or a plainly erroneous reading of," the § 2K2.1 Guideline itself, which by the plain meaning of its text only applies to "large capacity magazine[s]." *Stinson*, 508 U.S. at 38. The Guideline cannot bear the Commentary's purported

interpretation because defining "large capacity magazine" to mean a magazine with a capacity of "more than 15 rounds of ammunition" would render the word "large" in the Guideline itself meaningless. *See id.* at 46. When faced with such a conflict, the Guideline controls. *See id.* at 43. Thus, the Commentary is not entitled to *Stinson* deference and should be disregarded.

Twenty-six years after *Stinson*, this Court decided *Kisor v. Wilkie*, 139 S. Ct. 2400. *Kisor* similarly held that an agency interpretation of its own rules is not entitled to deference unless the regulation itself is "genuinely ambiguous." *Id.* at 2415. Moreover, *Kisor* explained that before concluding that a rule is genuinely ambiguous a reviewing court must first exhaust <u>*all*</u> the traditional tools of statutory construction—text, structure, history, and purpose. *Id.* Only if a rule is genuinely ambiguous should a court then defer to an agency interpretation and, further, only if that interpretation is "reasonable." *Id.* at 2145-46. But not every "reasonable" interpretation is entitled to deference; rather, the "court must make an independent inquiry into whether the character and context of the agency interpretation entitles it to controlling weight" by considering whether the interpretation (1) is "the agency's 'authoritative' or 'official position,' rather than any more *ad hoc* statement"; (2) implicates the agency's "substantive expertise"; and (3) reflects a "fair and considered judgment." *Id.* at 2146-47.

Commentary Note 2 also fails the *Kisor* analysis because, applying *all* the tools of statutory construction, the word "large" in the § 2K2.1 Guideline is not "genuinely ambiguous." As explained above, the plain meaning of "large capacity magazine"

excludes industry-standard capacity magazines. And this understanding is further confirmed by the Guideline's structure, which equates a "large capacity magazine" with a "firearm that is described in 26 U.S.C. § 5845(a)" for purposes of assigning a higher base offense level. Section 5845(a) describes atypical, unusual, and/or exceptionally dangerous firearms like sawed-off shotguns, machineguns, and destructive devices (for example, grenades, *see* § 5845(f)(1)(B)). An industry-standard magazine is obviously not analogous to a machinegun or a grenade; thus, "large capacity magazine" is intended to apply only to magazines that are atypical, unusual, and/or unusually dangerous in the same manner as sawed-off shotguns and machineguns. Relatedly, applying the enhanced offense level to industry-standard magazines frustrates the Guideline's purpose, which is to punish offenders who possess unusual or exceptionally dangerous weapons via an enhanced base offense level.[4] Applying the tools of statutory construction thus leaves no ambiguity in the Guideline itself, and therefore certainly provides no reason to defer to Commentary that contradicts the Guideline's plain text.

C. Under both analytical frameworks, courts are disregarding the cardinal rule that interpreting the Guidelines must begin with analyzing the plain meaning of the text—not simply deferring to the Commentary.

The Circuits are deeply divided as to whether *Stinson* or *Kisor* governs challenges to the Guidelines and Commentary. *See supra,* at n.2. Mr. Martin's case,

[4] Alternatively, even if the term "large" were genuinely ambiguous, the commentary's definition of "large capacity magazine" is not a "reasonable" one because it sweeps too broadly by defining a wide-range of industry-standard magazines as "large." Furthermore, the commentary is not of a "character and context" that entitles it to deference, because the commentary's choice of a 15-capacity threshold is wholly arbitrary and without support or explanation.

however, implicates an overarching problem that is uniformly present in courts' current application of both frameworks—at least when it comes to firearm magazines. Under both *Stinson* and *Kisor*, courts are shirking their obligation to start with interpreting the text of the § 2K2.1(a)(4)(B) Guideline and are instead reflexively deferring to the Commentary's purported definition of "large capacity magazine"—even though the Guideline itself is not "genuinely ambiguous" and the Commentary's definition is inconsistent with the plain meaning of the Guideline's text. The Circuits' analysis is in blatant violation of not only *Stinson* and *Kisor*, but the ordinary rules of statutory construction. This error can only be corrected by this Court given the uniformity of the error in the lower courts, under both analytical frameworks.

In Mr. Martin's case, the Fifth Circuit erred from the outset of its analysis by concluding that "[t]he Guidelines do not define 'large capacity,' but the commentary does[.]" *Martin*, 119 F.4th at 414. In doing so, the Fifth Circuit failed to start as it should have, by giving the text of the guideline itself its plain meaning. "Just because a word in a guideline does not come with its own guideline definition does not leave us at sea about its meaning or give the Commission license to define the term however it likes in the commentary." *Riccardi*, 989 F.3d at 488. Rather, "[c]ourts presume that an undefined word comes with its ordinary meaning, not an unusual one." *Id.*

Once the Fifth Circuit erroneously concluded that the Guideline "d[oes] not define 'large capacity'" by failing to give the words their plain and ordinary meaning, its holding that Commentary Note 2 was binding under *Stinson* was all but a foregone conclusion. Indeed, under the Fifth Circuit's text-last approach—i.e., its

unwillingness to give the Guideline text its plain meaning (or any meaning at all)—the Commentary could define "large capacity" to mean anything—even "more than one bullet"—without violating *Stinson*.

In reaching its holding, the Fifth Circuit relied on the reasoning of the Ninth Circuit in *United States v. Trumbull*, 114 F.4th 1114, 1119 (9th Cir. 2024). Unlike the Fifth Circuit, the Ninth Circuit applies *Kisor,* not *Stinson*, to Guideline commentary challenges—yet it reached the same result. Subsequently, the Third Circuit, which applies *Kisor*, also followed the Ninth Circuit's *Trumbull* decision and deferred to the Commentary. *See United States v. McIntosh*, 124 F.4th 199 (3d Cir. 2024).

The Ninth Circuit in *Trumbull* and the Third Circuit in *McIntosh*, though applying a different framework than the Fifth Circuit in *Martin*, made a similar analytical error: Rather than exhaust the tools of statutory construction to interpret the words "large capacity magazine," the Ninth and Third Circuits prematurely determined that the word "large" was "genuinely ambiguous" and then deferred to the Commentary. *Trumbull*, 114 F.4th at 1118; *McIntosh*, 124 F.4th at 206-07. Just last year, in *Loper Bright*, this Court decried "throw up their hands" analysis in the analogous context of resolving purported statutory ambiguities. *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 400 (2024). That admonition applies with equal force here, given that the rules of statutory interpretation apply to Guidelines interpretation.

Further, the Circuits' contrary approach inverts the appropriate balance of power between the Guidelines and the Commentary. "Commentary may only

interpret the guideline." *Riccardi*, 989 F.3d at 483 (emphasis added). It cannot provide the substance in the first instance. If commentary does not interpret, "it is a substantive legislative rule that belongs in the guideline itself to have force." *Id.* "In other words, the step before applying deference is asking, 'Is this really an "interpretation" at all?'" *Id.* at 492 (Nalbandian, J., concurring) (cleaned up).

At base, Commentary Note 2 is not an interpretation of the "large capacity magazine" Guideline at all. Rather, it is an addition to the Guideline that clearly expands its reach. Thus, "it is a substantive legislative rule that belongs in the guideline itself to have force." *Id.* at 483. By failing to prioritize the plain meaning of the text by exhausting all the tools of statutory interpretation, the Courts of Appeals are abdicating their judicial role to interpret the Guidelines and, in the process, allowing the Sentencing Commission to impermissible legislate under the guise of interpretation. Because this fundamental error is occurring in Circuits nationwide, under both the *Stinson* and *Kisor* frameworks, this Court's correction is warranted.

CONCLUSION

For the foregoing reasons, this Court should grant Mr. Martin's petition for writ of certiorari. Alternatively, Mr. Martin requests that his petition be held pending resolution of other pending or anticipated petitions raising the same issues, including the anticipated petition in *Diaz*, 116 F.4th 458.

Respectfully submitted,

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FEBRUARY 2025