No. 25-5343

In the
Supreme Court of the United States

KENDRICK JARRELL BEAIRD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

AMICUS BRIEF ON BEHALF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

Founded in 1958, the National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crimes or misconduct. It has a nationwide membership of many thousands of direct members, up to 40,000 with affiliate members. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files many amicus briefs each year in this Court, and other federal and state courts, seeking to provide amicus assistance in cases presenting issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system.[1]

NACDL's interest in this case concerns the relationship between Guideline text and commentary. Commentary that expands a Guideline beyond its plain text erodes three institutional roles Congress assigned. It displaces courts, limits advocates' ability to contest how the text applies, and shifts policymaking from the Guideline text to commentary.

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[1] No persons or entities other than amicus, their members, or their counsel authored this brief, in whole or in part, or made a monetary contribution to this brief's preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

Every federal sentencing begins the same way—a court calculates the advisory Guidelines range, and that range becomes "the starting point and the initial benchmark" for the sentence that follows. *Gall v. United States*, 552 U.S. 38, 49 (2007). This case asks a straightforward question: when the meaning of a Guideline is in question, must a court determine what the text means by applying the traditional tools of statutory construction before deferring to commentary?

The answer is yes. In *Stinson v. United States*, 508 U.S. 36 (1993), this Court adopted the agency-deference rule in *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), and held that commentary is "authoritative" unless plainly erroneous or inconsistent with the Guideline. *Id.* at 38. That formulation, presented in isolation, invited courts to bypass the interpretive inquiry that courts regularly perform when reading statutory text.

Kisor v. Wilkie, 588 U.S. 558 (2019), recalibrated that calculus. *Stinson* borrowed its deference rule from *Seminole Rock*. *Kisor* sharply confined *Seminole Rock*. Once this Court narrowed the doctrine on which *Stinson* relied, it logically narrowed the deference *Stinson* authorized. The consequence is not a diminished role for the Sentencing Commission's commentary, but a restored role for the judiciary in determining what Guideline text means in the first instance.

Thus, this case is not about dismantling the Guidelines. It is about restoring the interpretive inquiry that courts regularly conduct in their Article III role. Before asking whether commentary warrants deference, a court must first determine what the Guideline means. That is what *Kisor* requires. It is what federal judges routinely do when interpreting statutes, rules, and regulations. And it produces a sentencing system that is more stable, more uniform, and more firmly anchored to text.

NACDL writes from decades of federal sentencing practice, where commentary often displaces the Guideline text itself, supplying numbers, definitions, and categorical proxies with no anchor in the text, no place within its zone of ambiguity, and no grounding in the Commission's substantive expertise. Those distortions persist, but *Stinson*'s reflexive-deference formulation no longer accurately states the law.

Section I of this brief traces the doctrinal path to that conclusion. *Stinson* rested on *Seminole Rock*, and *Kisor* has cabined *Seminole Rock*. Courts therefore must apply the ordinary tools of interpretation before any question of deference arises. *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), reinforces the same principle from a different direction. And the structural features that justified the Commission's institutional design in *Mistretta v. United States*, 488 U.S. 361 (1989)—notice-and-comment rulemaking and congressional review—attach to Guideline amendments, not commentary.

Section II shows that this framework works in practice. Nearly half the country already applies

Kisor's limits to commentary, and federal sentencing continues to function. The Guidelines Manual's commentary generally falls into three categories: operational, illustrative, and interpretive. Operational and illustrative commentary remain unaffected because neither depends on deference for its force. The real disputes involve interpretive commentary that assigns substantive meaning to Guideline terms. There, the same principle applies that governs interpretation everywhere else: Traditional interpretive tools constrain language to its ordinary reach; they rarely stretch it beyond that reach. As a result, interpretive commentary that narrows or reasonably explains a Guideline's scope will usually align with the result when traditional tools are applied. What changes is commentary that expands a Guideline beyond its text. The Commission remains free to adopt any binding rule through the amendment process Congress prescribed, and recent amendments demonstrate that it regularly does so.

Section III explains why the rule of lenity independently leads to the same result. In ordinary administrative law, the costs of deference are regulatory. In sentencing, they are measured in years of imprisonment. That distinction makes this context different from any other area of agency interpretation. When ambiguity remains after rigorous textual analysis, lenity resolves it in favor of liberty.

The question presented is ultimately methodological. Judges engage in this kind of interpretive work every day when applying the Guidelines. When the text is plain, it controls. Where commentary faithfully interprets ambiguous text, it

remains a valuable aid. But commentary that expands, adds to, or departs from the text cannot bind. And if a rule is important enough to bind, it belongs in the Guideline text.

ARGUMENT

I. *Stinson*'s Reflexive-Deference Formulation Cannot Be Reconciled with *Kisor*, *Loper Bright*, or the Structure Congress Created.

A. *Stinson* Built Its Deference Rule on *Seminole Rock*, and *Kisor* Now Controls.

Stinson rested on a simple premise: the Sentencing Commission's commentary should be treated like an agency's interpretation of its own legislative rules and should therefore receive the same deference. *See* 508 U.S. at 44–45.

Stinson expressly borrowed the then-existing *Seminole Rock* deference framework and applied it to the Guidelines and commentary. Quoting *Seminole Rock* verbatim, the Court held that commentary interpreting or explaining a Guideline should receive "controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Stinson*, 508 U.S. at 45 (quoting *Seminole Rock*, 325 U.S. at 414). *Stinson*'s account of commentary therefore rises or falls with the scope of *Seminole Rock* deference itself. And *Kisor* substantially narrowed that doctrine.

Kisor rejected the "classic formulation" of *Auer v. Robbins*, 519 U.S. 452 (1997), and *Seminole Rock* deference. 588 U.S. at 574. Read in isolation, the Court explained, the traditional statement that an

agency interpretation controls unless "plainly erroneous or inconsistent with the regulation" risks creating "a caricature of the doctrine, in which deference is reflexive." *Id.* Rather than permit automatic acceptance of agency interpretations, *Kisor* required courts to perform their own interpretive work first. A court "should not afford *Auer* deference unless the regulation is genuinely ambiguous," and before reaching that conclusion, a court must "exhaust all the 'traditional tools' of construction." *Id.* at 575. If those tools resolve the meaning of the text, then deference is unwarranted. *See id.*

That framework cannot be reconciled with *Stinson*'s oft-quoted statement that commentary is "authoritative" unless plainly erroneous or inconsistent with the Guideline. 508 U.S. at 38. Standing alone, that formulation mirrors the very "classic formulation" *Kisor* warned could suggest reflexive deference. 588 U.S. at 574. Under *Kisor*, courts may not begin with the commentary and ask only whether it is plainly erroneous. They must first determine the meaning of the Guideline through ordinary interpretive methods, and may consider commentary only if genuine ambiguity remains.

Reading *Stinson* as a whole confirms that *Kisor*'s gloss on *Seminole Rock* applies. The Court explained that commentary "provides concrete guidance as to how even unambiguous guidelines are to be applied in practice." 508 U.S. at 44. Guidance, not authority. Commentary may illuminate how an unambiguous Guideline applies to particular facts. It may not supply substantive content the text does not contain. That distinction between explaining how a text

applies and adding to what it means is precisely the distinction *Kisor* restored.

Kisor identified *Stinson* as one of this Court's applications of *Seminole Rock* deference. *See* 588 U.S. at 568 n.3 (plurality op.). Applying *Kisor* to *Stinson* gives effect to *Stinson*'s own instruction to treat commentary "as an agency's interpretation of its own legislative rule." 508 U.S. at 44. A doctrine built on *Seminole Rock* must be read in light of what *Seminole Rock* now means. And the principle animating *Kisor* confirms the point. Deference cannot permit an agency to adopt new law "under the guise of interpreting" existing text. 588 U.S. at 575 (quoting *Christensen v. Harris County*, 529 U.S. 576, 588 (2000)). Treating commentary as binding whenever it is not plainly erroneous would permit precisely that.

This Court, then, need not overrule *Stinson* to bring it into line with *Kisor*. *Kisor* itself declined to overrule *Auer*. The Court preserved *Auer*'s core and clarified the limits already inherent in the doctrine, requiring genuine ambiguity, full use of the traditional tools, and an interpretation within the remaining zone of ambiguity. *See* 588 U.S. at 575.

Nor does *stare decisis* require this Court to ignore what *Kisor* said about the doctrine on which *Stinson* rests. *See Kisor*, 588 U.S. at 566–79 (retooling *Auer* and *Seminole Rock* deference while adhering to *stare decisis* considerations). The Court can also hold that prior decisions that applied *Stinson* deference under conditions that would satisfy *Kisor* retain their force to the extent that they adhere to the updated framework. The key insight is that a precedent built

on *Seminole Rock* cannot stand frozen against this Court's later narrowing of *Seminole Rock*.

Thus, the Court here can describe the result either way. It can place real limits on *Stinson* deference, requiring genuine ambiguity after applying the traditional tools of construction, a reasonable interpretation within the remaining zone, and an independent inquiry into whether the character and context of the commentary warrant controlling weight. Or it can apply *Stinson* through the lens of *Kisor*. Either approach leads to the same destination. Commentary often functions as an authoritative interpretive aid where ambiguity persists and the Guideline will bear its construction. That rule is faithful to *Stinson* and required by *Kisor*.

B. First Principles Confirm that the *Kisor* Framework Controls.

The structure Congress designed confirms the same conclusion. The Sentencing Reform Act does not authorize binding commentary or instruct courts to defer to it. *Stinson* itself acknowledged that the statute "does not in express terms authorize" commentary. 508 U.S. at 41–42. The deference *Stinson* extended was a judge-made graft from administrative law, not a command of the statute Congress wrote. Like any judge-made graft, it must answer to the administrative-law doctrines that gave rise to it. Those doctrines now point firmly toward the courts' duty to interpret the Guideline text.

Loper Bright reinforces this conclusion. The Court reaffirmed that interpreting legal texts is "the proper and peculiar province of the courts," 603 U.S. at 385

(quoting The Federalist No. 78, at 525 (Hamilton)), and held that because a legal text "must have a single, best meaning," it "makes no sense to speak of a 'permissible' interpretation that is not the one the court, after applying all relevant interpretive tools, concludes is best," *id.* at 400. Those principles apply with particular force in criminal sentencing, where the "particular sentence to be imposed" is a determination Congress assigned to the sentencing court. 18 U.S.C. § 3553(a); *see Crandon v. United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring in the judgment) ("[A] criminal statute is not administered by any agency but by the courts."). Whatever expertise the Commission possesses, it "does not exercise judicial power." *Mistretta*, 488 U.S. at 393. Courts retain the duty to say what the Guidelines mean.

That duty fits the structure Congress designed. Congress established the Commission as "an independent commission in the judicial branch," 28 U.S.C. § 991(a), and allowed it to promulgate binding Guidelines and policy statements, § 994(a). Congress also built in serious procedural safeguards. Notice-and-comment rulemaking is required under § 994(x). Congressional review is required before amendments take effect under § 994(p). As *Stinson* itself recognized, those procedures make the Guidelines analogous to legislative rules adopted by federal agencies. 508 U.S. at 44–45.

Commentary travels a different path. The Sentencing Reform Act does not expressly authorize it. *See id.* at 41. Commentary is not subject to notice-and-comment procedures. § 994(x). It need not

undergo the congressional-review process Congress prescribed for amendments. § 994(p). The Commission's own rules confirm the point, providing that commentary may be promulgated "without regard to the provisions of 28 U.S.C. § 994(x)." U.S.S.C. Rules of Practice and Procedure 4.3. Commentary, thus, may never pass "through the gauntlets of congressional review or notice and comment." *United States v. Havis*, 927 F.3d 382, 386 (6th Cir. 2019) (en banc).

Those safeguards were central to this Court's conclusion in *Mistretta* that the Commission's unusual institutional structure comports with separation-of-powers principles. *Mistretta*, 488 U.S. at 393–94. The Commission is "fully accountable to Congress," which retains authority to modify or revoke the Guidelines. *Id.* at 394. Accountability of that kind attaches to Guideline amendments. Commentary, which Congress does not regulate, carries no such pedigree. When commentary expands a Guideline's substantive reach, the operative rule often arrives without notice, without comment, and without congressional review. *Kisor* foreclosed precisely that route. 588 U.S. at 575.

To be sure, *Stinson* was decided when the Guidelines were mandatory. But *United States v. Booker*, 543 U.S. 220 (2005), did not strip the Guidelines of legal force, and it did not weaken the need for disciplined interpretation. Every federal sentencing must "begin" with the Guidelines, *Gall*, 552 U.S. at 49, and the court must "remain cognizant of them throughout the sentencing process," *id.* at 50 n.6. The Guidelines exert "binding legal effect"

through "procedural rules and standards for appellate review that, in combination, encourag[e] district courts to sentence within the guidelines." *Peugh v. United States*, 569 U.S. 530, 547 (2013). The Guidelines remain the "lodestone" of federal sentencing, *id.* at 544, and the "framework" that "anchor[s] ... the district court's discretion," *id.* at 541, 542.[2]

When commentary expands a Guideline beyond its plain text, the resulting calculation distorts that anchor. The interpretive displacement *Kisor* identified does not become tolerable because the Guidelines now advise rather than command. It still reaches every sentence in which the calculated range matters, which is every federal sentencing.

II. The *Kisor* Framework Is Workable, and the Commission's Own Practices Confirm It.

A framework is only as useful as its ability to guide decision making in actual cases. Applying *Kisor*'s framework to the Guidelines does not require a fundamental restructuring of federal sentencing. Most commentary would continue to operate exactly as it does today because it helps courts apply Guideline text rather than expands it. The cases that have divided the circuits involve a narrower category

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[2] On appeal, the Guidelines remain a critical anchor. A miscalculation is significant procedural error that ordinarily requires correction, even when unobjected to in the district court. *Molina-Martinez v. United States*, 578 U.S. 189, 198–200 (2016); *Rosales-Mireles v. United States*, 585 U.S. 129, 142–47 (2018).

of commentary that supplies substantive content the Guideline itself does not contain.

A. Sorting Commentary by Function Makes the Framework Administrable.

Federal judges interpret legal texts every day. They apply ordinary meaning, structural analysis, consistent-usage principles, the rule against surplusage, terms of art, and other traditional tools to statutes, rules, and regulations without administrative chaos. *Stinson* and *Seminole Rock* skipped that foundational step, but *Kisor* restored it. The framework proposed here asks courts to do with Guideline text what they already do with every other legal text. Read it, apply the tools, and determine what it means before consulting an outside interpretation.

Under *Kisor*, commentary binds only when three conditions are met. The Guideline must be genuinely ambiguous after a court applies the traditional tools. The commentary's reading must be a reasonable one within the remaining zone of ambiguity—in other words, it must be a reading that the Guideline text will bear. And the character and context of the commentary must demonstrate that it is entitled to controlling weight. *See Kisor*, 588 U.S. at 574–79.

Commentary that expands a Guideline beyond its plain text satisfies none of these conditions.

Stinson described the Manual as containing "text of three varieties." 508 U.S. at 41. Those varieties identify the layers of the Manual itself, not subdivisions of commentary. The first is the Guideline provision, expressly authorized by Congress and

subjected to notice-and-comment procedures under § 994(x) and congressional review under § 994(p). The second is the policy statement. *Id.* (citing § 994(a)(2)). The third is commentary, a category the Sentencing Reform Act "does not in express terms authorize." *Id.* at 41–42. The "functional purpose of commentary," the Court explained, "is to assist in the interpretation and application of" the Guidelines. *Id.* at 45. Commentary serves the text; it does not replace it. Where commentary and Guideline conflict, "the Sentencing Reform Act itself commands compliance with the guideline." *Id.* at 43.

The Manual itself enumerates the purposes commentary may serve. Section 1B1.7 provides that commentary may "interpret the guideline or explain how it is to be applied"; or it "may provide background information, including factors considered in promulgating the guideline or reasons underlying promulgation of the guideline." U.S.S.G. § 1B1.7.

The three labels used below—operational, illustrative, and interpretive—are descriptive rather than doctrinal. They do not displace *Stinson*'s three varieties of Manual text or § 1B1.7's enumeration of commentary purposes. They observe how commentary actually functions across the Manual, organized to clarify where the *Kisor* framework changes the analysis and, just as importantly, where it does not.

Operational commentary explains how the Manual itself works. Chapter One is its richest source. Section 1B1.1 sets out the sequence every sentencing court must follow: base offense level, specific offense characteristics, adjustments, criminal history, and

the sentencing table. Other operational commentary tells courts how cross-references shift the analysis from one Guideline to another, how the multi-count rules combine offenses, and how to incorporate statutory mandatory minimums into the calculated range. *See* U.S.S.G. §§ 1B1.5, 3D1.1–3D1.5, 5G1.1. None of this was at issue in *Stinson*, and none is disturbed by the *Kisor* framework proposed here. Operational commentary describes the machinery the text already supplies. Courts follow it because it accurately tracks what the Guidelines require, and the Commission's specialized familiarity with that machinery is precisely the kind of agency expertise *Kisor* leaves room for. *See* 588 U.S. at 568–70.

Illustrative commentary identifies recurring fact patterns, supplies examples, and explains the policy considerations behind a provision. Section 1B1.7 expressly contemplates this role, authorizing commentary that provides "background information, including factors considered in promulgating the guideline." § 1B1.7. The examples the Commission supplies illuminate how a Guideline operates in common situations and reflect the Commission's intent about how the provision should apply.

Illustrative commentary stands outside the *Kisor* framework because it does not purport to resolve the meaning of Guideline text. *Kisor* addresses commentary that supplies substantive content to a Guideline term by identifying what the text means. Illustrative commentary serves a different function. It offers examples, factors, and common applications that help courts apply a Guideline once its meaning is established. A court consulting an example asks

whether the case before it resembles the example; a court considering a factor asks whether the factor is present and what weight it deserves. Neither inquiry concerns the meaning of the Guideline itself.

That distinction is critical. Interpretation determines the content of a legal rule; application determines how that rule operates in particular circumstances. Illustrative commentary assists with the latter, not the former. It may therefore be persuasive in showing how the Commission expected a Guideline to function, but it cannot independently bind courts. Otherwise, examples and factors would cease to be illustrations and instead become freestanding rules governing cases beyond the text they purport to explain.[3]

But even if a court were to treat illustrative commentary as subject to *Kisor*, the framework would leave examples and factors largely untouched. The informational work this commentary does is most often called for when the text is genuinely ambiguous, which is also the threshold for *Kisor* deference. And where an example or factor aligns with the construction the traditional tools support, both *Skidmore*-style persuasion grounded in expertise and *Kisor*-style deference within the zone of ambiguity

[3] To be fair, some illustrative or factor-based commentary could be viewed as providing substantive content to a Guideline term rather than guiding discretion or illustrating application. Where factors operate that way, they function as interpretive commentary and bind only when the Guideline is ambiguous and the text will bear the construction. Factors that push a term past what its words will bear do not. *See* Sec. II.B, *infra*.

yield the same answer. *See Kisor*, 588 U.S. at 591 (Roberts, C.J., concurring in part); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). The framework asks only that courts independently determine what the Guideline text permits, using the traditional tools, with the Commission's examples and factors informing the application where they help.

Interpretive commentary occupies the third category. It gives substantive content to terms appearing in the Guideline text. This is the province of courts. Federal judges interpret statutory terms every day. They apply ordinary meaning, structural analysis, the rule against surplusage, the canons of construction, terms of art, and the other traditional tools to fix what legal text means. The Guidelines should be no different. If the Commission wants a binding definition, it can place that definition in the Guideline itself, where the procedural safeguards Congress prescribed will test it.

The Manual does use technical terms of art, and many Guideline terms are in some sense vague, though not in the constitutional sense. *See Beckles v. United States*, 580 U.S. 256 (2017). But when a court applies all the traditional tools to a contested term, the court will almost always reach a conclusion about the best interpretation. *See Kisor*, 588 U.S. at 631–32 (Kavanaugh, J., concurring in the judgment). The resort to deference therefore arises far less often than reflexive application of *Stinson* would suggest.

The interpretive context is also limiting by nature. The traditional contextual canons, such as *noscitur a sociis*, *ejusdem generis*, the rule against surplusage,

the presumption of consistent usage, and the ordinary-meaning canon, often confine language at or below its maximum reach.[4] By contrast, those canons rarely allow a reading that pushes text past that reach.

The Guidelines are no different. Commentary cannot expand the interpretation of unambiguous Sentencing Guidelines. *See United States v. Dupree*, 57 F.4th 1269, 1276 (11th Cir. 2023) (en banc).

The framework therefore applies a single principle across every Guideline. The same canons that test a

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[4] *See, e.g.*, *Thompson v. United States*, 604 U.S. 408, 411–14 (2025) (holding that 18 U.S.C. § 1014 criminalizes only false statements, not misleading ones); *Fischer v. United States*, 603 U.S. 480, 496–97 (2024) (declining to read 18 U.S.C. § 1512(c)(2) to "criminalize a broad swath of prosaic conduct"); *Snyder v. United States*, 603 U.S. 1, 10 (2024) (narrowing 18 U.S.C. § 666 to bribery, not gratuities); *Dubin v. United States*, 599 U.S. 110, 117–18 (2023) (selecting the "more targeted reading" over the government's "near limitless" one); *Marinello v. United States*, 584 U.S. 1, 9–10 (2018) (requiring a direct nexus between obstructive acts and a specific IRS proceeding); *Maslenjak v. United States*, 582 U.S. 335, 343–46 (2017) (requiring proof that false statements materially affected the grant of citizenship); *McDonnell v. United States*, 579 U.S. 550, 566–67 (2016) (narrowing "official acts" to avoid criminalizing routine political interactions); *Yates v. United States*, 574 U.S. 528, 542–46 (2015) (plurality op.) (employing *noscitur a sociis* and *ejusdem generis* to confine "tangible object" to information-storage items); *Bond v. United States*, 572 U.S. 844, 860–66 (2014) (declining to read the Chemical Weapons Convention Implementation Act to reach a "purely local crime").

narrowing construction test an expansive one. An expansive construction fails when it pushes the text past what its words will bear.

Stinson itself illustrates the point. The application note at issue excluded felon-in-possession offenses from the definition of "crime of violence" because, in the Commission's judgment, simple felon-in-possession does not "involve[] conduct that presents a serious potential risk of physical injury to another." 508 U.S. at 38–40. Fair enough, the Court acknowledged that this narrowing "may not be compelled by the guideline text." *Id.* at 47. But particularly when "crime of violence" is viewed as a term of art, the traditional tools naturally point toward the narrower reading the commentary reflects.

Chapter Four provides a clean contrast. Commentary excluding certain felon-in-possession offenses from "crime of violence" under § 4B1.2(a) narrows a defined term, and the canons sustain that narrowing. Commentary purporting to add inchoate offenses to "controlled substance offense" under § 4B1.2(b) asks the canons for something different. It has no source from which to generate the additions. Multiple circuits have rejected it. *See, e.g.*, *United States v. Nasir*, 17 F.4th 459, 472 (3d Cir. 2021) (en banc); *Dupree*, 57 F.4th at 1275–76; *Havis*, 927 F.3d at 386.

When commentary supplies substantive content that the Guideline does not contain, the traditional tools reveal the gap. Ordinary meaning does not yield the added number. Structural analysis does not yield

the added offense. The Commission's deliberate use of different language elsewhere often cuts against the proposed construction. *See Russello v. United States*, 464 U.S. 16, 23 (1983). At that point, *Stinson*'s uncaricatured principle should control. Commentary may not add to, subtract from, or alter the Guidelines, and it binds only if the Guideline—after the court performs its interpretive duty—"will bear the construction." 508 U.S. at 38, 46.

Application notes are "interpretations of, not additions to, the Guidelines themselves." *United States v. Rollins*, 836 F.3d 737, 742 (7th Cir. 2016) (en banc); *accord Havis*, 927 F.3d at 386. Were the rule otherwise, commentary could become a "Trojan horse for rulemaking." *United States v. Lewis*, 963 F.3d 16, 28 (1st Cir. 2020) (Torruella & Thompson, JJ., concurring). And the limit is not merely textual. It is structural. Again, Guideline amendments must proceed through notice-and-comment rulemaking under § 994(x) and submission to Congress under § 994(p). Commentary requires neither process. *See* U.S.S.C. Rules of Practice and Procedure 4.3. When commentary expands a Guideline's reach, the operative rule derives from a process that lacks both public participation and political accountability.

If a substantive rule is important enough to bind sentencing courts nationwide, the Commission remains free to place it in the Guideline itself. That conclusion does not diminish the Commission's authority. It places that authority where Congress put it: in the Guideline text. And it leaves untouched the vast majority of commentary, which continues to operate as before. Operational and illustrative

commentary inform. And interpretive commentary binds when it reflects a construction an ambiguous Guideline will bear.

B. No Deference Is Due When Commentary Adds to or Expands Guideline Text.

Expansive interpretive commentary in the Sentencing Guidelines often follows a recurring pattern. The Guideline asks a contextual, relational, or factual question, one the text assigns to the sentencing court to answer on the facts before it. The commentary replaces that question with a categorical proxy: a bright-line rule, numerical threshold, or definitional substitute that resolves the inquiry the same way in every case, without regard to context. The proxy has no anchor in the text, no place within any zone of ambiguity the text might leave open, and no grounding in the Commission's substantive expertise.

Petitioner's case illustrates the pattern. Section 2K2.1 enhances a defendant's base offense level when the offense involves a "semiautomatic firearm that is capable of accepting a large capacity magazine." U.S.S.G. § 2K2.1(a)(1), (3), (4)(B). The Guideline never defines "large capacity magazine." Application Note 2 supplies a numerical threshold the text does not contain, providing that a magazine is "large" if it can accept "more than 15 rounds of ammunition." U.S.S.G. § 2K2.1 cmt. n.2. The sentencing court no

longer asks whether the magazine is "large." It asks whether the number exceeds fifteen.[5]

The number fifteen entered the commentary in 2006, after the federal Assault Weapons Ban sunset. *See* U.S.S.G. App. C, amend. 691 (Nov. 1, 2006). The expired statute had defined a "large capacity ammunition feeding device" as one accepting more than ten rounds. Pub. L. No. 103-322, § 110103, 108 Stat. 1796, 1998–99 (1994). That ten-round threshold lapsed with the ban, and the Commission did not return to it. Instead, it replaced the lapsed statutory definition with the undefined term "large" in the Guideline text, then supplied a new fifteen-round threshold through commentary alone. The Department of Justice opposed the change "in light of the fact that possession of such firearms [is] no longer illegal per se." Statement of Richard A. Hertling, Acting Asst. Att'y Gen., before the U.S. Sent'g Comm'n 11 (Mar. 15, 2006). The Federal Defenders submitted empirical comments explaining that a fifteen-round threshold would sweep in ordinary firearms commonly possessed for lawful purposes. The Commission adopted the number anyway, citing only its receipt of "information regarding inconsistent

[5] Critically, the note is not structured as an illustration, which would identify paradigm cases on each side and leave the line between them open to contextual judgment by the sentencing court. Rather, note 2 draws the line itself. A magazine accepting sixteen rounds qualifies as "large"; a magazine accepting fifteen does not, regardless of the firearm involved or the magazine's place in the contemporary market.

application" of the prior provisions. U.S.S.G. App. C, amend. 691.

That history undercuts the case for deference twice over. Under *Kisor*, deference requires both a "fair and considered judgment" and the exercise of the agency's "substantive expertise." 588 U.S. at 578–80. The Commission's 2006 process produced neither. It selected fifteen without engaging the DOJ's contrary recommendation or the Federal Defenders' empirical evidence, and it pegged the threshold not to data about firearm dangerousness but to administrative convenience.

The text, meanwhile, asks only whether the magazine is "large." That is a relational term, "subject to various interpretations" depending on context. *United States v. McIntosh*, 124 F.4th 199, 207 (3d Cir. 2024). A grapefruit is large next to a strawberry. The same grapefruit is small next to a watermelon. The grapefruit has not changed. The reference point has. Whether a particular magazine is "large" likewise depends on comparison, and the Guideline leaves that comparison to the sentencing court.

A seventeen-round magazine is factory standard for the Glock 17, one of the most commonly owned handguns in the United States. The AR-15 platform, the country's most common rifle, typically ships with a thirty-round magazine. And by 2000, roughly fifty million large-capacity magazines were lawfully in circulation. *See N.Y. State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 256 (2d Cir. 2015). Against that backdrop, the traditional tools will not produce the number fifteen. As Judge Matey observed in a passage

the *McIntosh* majority itself quoted, "[t]here simply is no such thing as a 'large capacity magazine.' It is a regulatory term created by the State, meaning no more than the maximum amount of ammunition the State has decided may be loaded into any firearm at one time. Sixteen rounds was large yesterday, eleven rounds is large today." *McIntosh*, 124 F.4th at 207 (quoting *Ass'n of N.J. Rifle & Pistol Clubs Inc. v. Att'y Gen.*, No. 19-3142, 2022 WL 22860232, at *4 (3d Cir. Aug. 25, 2022) (Matey, J., dissenting)).

McIntosh applied *Kisor* and ultimately deferred to the fifteen-round threshold. But *McIntosh* did not examine whether the Commission's 2006 process produced the "fair and considered judgment" *Kisor* requires before deference is appropriate. 588 U.S. at 579–80. The history recounted above demonstrates that it did not.[6]

Independent interpretation would let the sentencing court answer the question the Guideline actually asks: Is a particular magazine "large" considering contemporary norms and the firearm's design? It would also restore the role advocates play at sentencing. Petitioner should be free to argue that a seventeen-round Glock magazine, factory-standard

[6] The affirmative congressional signal also points the other way. The 1994 ban contained a sunset that took effect in 2004. *See* Pub. L. No. 103-322, § 110105, 108 Stat. at 2000. Congress allowed the ban to lapse, "having found it unnecessary." *United States v. Serna*, 435 F.3d 1046, 1049 (9th Cir. 2006). That is the operative congressional position. The Commission's 2006 decision to retain and expand the enhancement through commentary moved in the opposite direction.

equipment on one of the country's most common handguns, is not "large" in any sense the text contemplates. The Guideline invites that contextual argument. Commentary should not foreclose it by substituting a categorical number for the relational judgment the text assigns to the sentencing court.

The magazine commentary is not unique. Similar disputes arise across the Guidelines when commentary replaces the contextual inquiry the Guideline requires with a categorical proxy of its own creation. Section 2K2.1(b)(7), for example, enhances the offense level when a firearm is possessed "in connection with" another felony offense. The text asks whether the firearm and felony are meaningfully related. Application Note 14 answers a different question. In drug-trafficking cases, the enhancement applies whenever a firearm is found in "close proximity to drugs, drug-manufacturing materials, or drug paraphernalia." § 2K2.1 cmt. n.14(B).

"Under the plain text, the defendant's gun possession must be involved with and related to the other felony. Yet the Note extends well beyond a causal or logical link to a crime. It authorizes the enhancement whenever the gun is found near drugs. But under the Guideline's text, just being nearby is not enough." *United States v. Perez*, 5 F.4th 390, 404 (3d Cir. 2021) (Bibas, J., concurring in the judgment).

The resulting disagreement is unsurprising. Some circuits treat proximity as effectively dispositive.

Others apply rebuttable presumptions or limiting constructions.[7]

The point is not whether proximity is a sensible policy choice. It may well be. The point is that the policy choice appears in commentary rather than in the Guideline itself. If the Commission wishes proximity alone to trigger the enhancement nationwide, it remains free to place that rule in the Guideline text through the amendment process Congress prescribed.

Take another Guideline. Section 2B1.1 measures "loss." Where counterfeit or unauthorized access devices are involved, commentary converts that inquiry into a $500 minimum loss amount for each device regardless of actual value. The circuits have divided over whether the word "loss" can bear that

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[7] *See, e.g.*, *United States v. Blankenship*, 552 F.3d 703, 705 (8th Cir. 2009) ("[Then-] Note 14(B) mandates application of the adjustment if guns and drugs are in the same location."); *United States v. Jeffries*, 587 F.3d 690, 692–93 (5th Cir. 2009); *United States v. Paneto*, 661 F.3d 709, 718 (1st Cir. 2011). Others have grafted a "fortress theory" onto the commentary, applying the enhancement on the rationale that any nearby firearm "emboldens" the holder to possess drugs. *See United States v. Coleman*, 627 F.3d 205, 212 (6th Cir. 2010). Still others, applying *Kisor*, have read [then-] Note 14(B) as only a rebuttable presumption that the defendant may overcome by showing the firearm's presence was accidental. *See Perez*, 5 F.4th at 400. And the Fifth Circuit has cabined the proximity rule to drug-trafficking offenses, declining to extend its presumption to other contexts. *See United States v. Henry*, 119 F.4th 429, 436 (5th Cir. 2024).

construction. *Compare United States v. Riccardi*, 989 F.3d 476, 484 (6th Cir. 2021), *with United States v. Johnson*, 104 F.4th 662, 668–70 (7th Cir. 2024). Again, the question is not whether the Commission's policy judgment is reasonable. It is whether the Guideline text supports it.

These examples reflect a common pattern. The Guideline asks a contextual question. Commentary supplies a categorical answer. Sometimes that answer may reflect sound policy. But when commentary substitutes a proxy for the inquiry the text assigns to the sentencing court, the Guidelines range risks becoming disconnected from the conduct before the court.

Thus, restoring independent interpretation does not eliminate those policy choices. It relocates them. The Commission remains free to adopt bright-line rules governing magazine capacity, firearm proximity, loss calculations, or any other sentencing question. It need only place those rules in the Guideline text, where notice-and-comment procedures, congressional review, and judicial interpretation can perform the functions Congress assigned them.

C. The Commission's Own Practices Confirm the *Kisor* Framework's Workability.

The Commission's practices confirm the distinction between interpretation and legislation. Historically, when the Commission wants a substantive rule to control sentencing outcomes, it places that rule in the Guideline text. For instance, drug-quantity tables drive sentences in drug cases in § 2D1.1, and firearm

counts determine base offense levels under § 2K2.1(a) based on the offense, the firearm, the defendant's status, and certain qualifying prior convictions.

Recent amendment history underscores the point. After multiple circuits concluded that commentary could not add inchoate offenses to the definition of "controlled substance offense" in § 4B1.2(b), the Commission moved the substantive rule into the Guideline itself. U.S.S.G. App. C, amend. 822 (Nov. 1, 2023). After the Third Circuit in *Banks* held that the ordinary meaning of "loss" in § 2B1.1 did not extend to intended loss, the Commission moved the loss definition into the Guideline text. *See United States v. Banks*, 55 F.4th 246, 258 (3d Cir. 2022); U.S.S.G. App. C, amend. 827 (Nov. 1, 2024); *see also United States v. Horn*, 129 F.4th 1275, 1301 (11th Cir. 2025) (describing Amendment 827 as clarifying). After the circuits divided over whether a partially defaced serial number triggered the enhancement in § 2K2.1(b)(4)(B), the Commission added the "unaided eye" standard directly to the operative text. U.S.S.G. App. C, amend. 828 (Nov. 1, 2024).

Each episode followed the same path. The Commission proposed a rule. Stakeholders commented. The Commission weighed competing views and empirical evidence. Congress retained the opportunity to review the amendment before it took effect. The system functioned as Congress designed it. The procedure may be more involved, but that is because Congress intended the Guideline text to bind.

The Commission therefore does not need expansive commentary to accomplish its policy objectives. When

it concludes that a numerical threshold or bright-line rule should govern sentencing nationwide, it has ample authority to adopt that rule through the amendment process. The question is not whether the Commission may make such policy judgments. The question is whether those judgments must proceed through the procedures Congress prescribed. The Sentencing Reform Act answers yes.

Reflexive deference can also produce the very disparity it is invoked to prevent. The physical-restraint enhancement is a useful example. Until the most recent Guideline amendments, § 2B3.1(b)(4)(B) increased the offense level when any person was "physically restrained." Commentary defined the term with examples of actual restraint, such as "being tied, bound, or locked up." § 1B1.1 cmt. n.1(L). Yet courts divided sharply over whether merely pointing a firearm at a victim satisfies the enhancement. *Compare United States v. Anglin*, 169 F.3d 154, 164 (2d Cir. 1999), *with United States v. Deleon*, 116 F.4th 1260, 1268–69 (11th Cir. 2024). Deference did not prevent the disagreement. It relocated the interpretive question from the text to the commentary's scope. Independent interpretation does not create interpretive disputes. It directs them to a more stable source of authority, the Guideline itself.

Aligning *Stinson* with *Kisor* and *Loper Bright* will not disrupt federal sentencing. The federal system has absorbed far more significant transitions. *Booker* transformed the Guidelines from mandatory to advisory. *Johnson v. United States*, 576 U.S. 591 (2015), invalidated the Armed Career Criminal Act's residual clause. *United States v. Davis*, 588 U.S. 445

(2019), struck 18 U.S.C. § 924(c)'s residual clause. *Kisor* itself recalibrated *Auer* deference across the administrative state. The system has adapted each time. The adjustment here is more modest than any of those transitions. Operational and illustrative commentary continue to provide important guidance. Courts apply the traditional tools to the Guidelines, just as they regularly do when construing statutes. When those tools reveal a genuinely ambiguous Guideline, interpretive commentary that reflects a construction the text can bear may bind. Interpretive commentary that supplies substantive content the text cannot bear may not. The Commission remains free to adopt any binding rule through the amendment process Congress prescribed. That conclusion does not diminish the Commission's authority. It places that authority where Congress put it: in the Guideline text.

III. The Rule of Lenity Independently Forecloses Deference to Commentary That Expands Punishment.

The rule of lenity provides an independent basis to reach the same result and supplies a principled reason to distinguish the sentencing context from other questions of agency interpretation. In ordinary administrative law, the consequences of deference are regulatory. In sentencing, the consequences are measured in years of imprisonment. That distinction counsels in favor of lenity when ambiguity persists and liberty is at stake.

Lenity applies not only to criminal prohibitions but also to "the penalties they impose." *Bifulco v. United States*, 447 U.S. 381, 387 (1980). It serves

"distinctively American functions—a means for upholding the Constitution's commitments to due process and the separation of powers." *Wooden v. United States*, 595 U.S. 360, 388–89 (2022) (Gorsuch, J., concurring in the judgment). When ambiguity persists after the ordinary tools of interpretation have been exhausted, "the law gives way to liberty." *Id.* at 382.

That principle has particular force in federal sentencing. Even after *Booker*, the Guidelines remain the "lodestone" of federal sentencing, *Peugh*, 569 U.S. at 544, exerting what Judge Bibas described as a "law-like gravitational pull on sentences." *Nasir*, 17 F.4th at 474 (Bibas, J., concurring). Every sentencing begins with the correct calculation of the advisory range, which serves as "the starting point and the initial benchmark." *Gall*, 552 U.S. at 49. The range anchors the entire proceeding. Some circuits apply a presumption of reasonableness to within-Guidelines sentences. *See Rita v. United States*, 551 U.S. 338, 347 (2007). A miscalculation constitutes significant procedural error and ordinarily requires correction on appeal. *Gall*, 552 U.S. at 51; *Molina-Martinez v. United States*, 578 U.S. 189, 198–200 (2016); *Rosales-Mireles v. United States*, 585 U.S. 129, 142–47 (2018).

True enough, the Guidelines do not regulate private conduct or direct agency enforcement priorities. But they anchor how long real people spend in federal prison. *See* Sec. I.B, *supra*. Thus, liberty is at stake every time a court calculates a Guidelines range. When the legal instrument that shapes punishment is genuinely ambiguous, the risk of uncertainty should fall on the government, not the defendant.

Deference has little place where ambiguity affects punishment. As Justice Gorsuch observed in a related context, "whatever else one thinks about *Chevron*, it has no role to play when liberty is at stake." *Guedes v. ATF*, 140 S. Ct. 789, 790 (2020) (statement respecting denial of certiorari). Justice Scalia made the same point, explaining that deference to an interpretation that expands punishment "repla[ces] the doctrine of lenity with a doctrine of severity." *Whitman v. United States*, 574 U.S. 1003, 1003 (2014) (statement respecting denial of certiorari) (quoting *Crandon*).

Lenity therefore plays two roles in the framework described above. First, *Kisor* requires courts to "exhaust all the 'traditional tools' of construction" before concluding that a text is genuinely ambiguous. 588 U.S. at 575. Lenity is one of those tools. *See id.* at 631 (Gorsuch, J., concurring in the judgment). In that role, it informs whether a Guideline is genuinely ambiguous in the first place.

Second, lenity operates as a tiebreaker. Once a court has exhausted the traditional tools of construction and ambiguity persists, lenity supplies the rule of decision. Commentary that points toward the more lenient interpretation binds. Commentary that pushes toward a harsher reading does not bind because lenity should displace it. *See Nasir*, 17 F.4th at 474 (Bibas, J., concurring).

Applied to the taxonomy in Section II, lenity preserves what should be preserved and displaces what should not. Operational commentary continues to apply because it tracks the calculations the text already requires. Illustrative commentary survives

because its force derives from the text it illuminates. And narrowing interpretive commentary often survives because the traditional tools, including lenity, frequently point toward the narrower construction the commentary reflects. *Stinson*'s own application note provides the paradigm. 508 U.S. at 39–40; *see also* Sec. II.B, *supra*.

Expansive interpretive commentary presents the opposite situation. When commentary adds offenses, supplies numerical thresholds, or substitutes categorical proxies for factual inquiries, the *Kisor* framework and lenity converge on the same question: does the text support the expansion? If the traditional tools yield a single best reading that does, the commentary will often prevail because the text prevails. When the text will not bear the expansion at all, the commentary fails under *Stinson* and *Kisor* without need to reach lenity. And where the traditional tools leave the text genuinely ambiguous, capable of supporting both the expansion and a narrower reading, lenity breaks the tie for the narrower reading. The defendant receives the benefit of the doubt whenever residual ambiguity remains.

Petitioner's case illustrates the convergence. A court applying the traditional tools may conclude that "large" is genuinely ambiguous, a relational term with varying state-law thresholds and an amendment history that raises questions about whether the fifteen-round threshold reflects a fair and considered judgment. *See McIntosh*, 124 F.4th at 207. Both analytical paths then lead to the same destination. The *Kisor* framework asks whether the Guideline will bear the Commission's construction. Lenity asks

whether residual ambiguity should be resolved in favor of the harsher or more lenient interpretation. The answer is the same. The commentary does not bind, and Petitioner remains free to argue what the text asks: whether a seventeen-round Glock magazine is "large" relative to contemporary norms.

Beckles, which held that the advisory Guidelines are not subject to constitutional vagueness challenges, does not foreclose the application of lenity. *See* 580 U.S. at 266. To be sure, lenity and vagueness share common ground. Both protect against punishment imposed under uncertain rules, and both speak to fair notice. *See Snyder v. United States*, 603 U.S. 1, 20–21 (2024) (Gorsuch, J., concurring).

But the doctrines diverge at their deeper roots. Vagueness asks whether a legal rule that regulates conduct is so indeterminate that it fails to give those it governs fair notice of what is prohibited. *See Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926).

Lenity, however, is among the oldest canons of interpretation. *See* Amy Coney Barrett, Substantive Canons and Faithful Agency, 90 B.U. L. Rev. 109, 128 (2010). And beyond fair notice, it also rests on the separation-of-powers principle that "the power of punishment is vested in the legislative, not in the judicial department." *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820) (Marshall, C.J.); *see also Wooden*, 595 U.S. at 388–89 (Gorsuch, J., concurring in the judgment) (quoting *McBoyle v. United States*, 283 U.S. 25, 27 (1931)).

Lenity thus fundamentally asks who may impose punishment, and through what process. *Beckles* did not engage that question.

Even on its own terms, *Beckles*'s reasoning presupposes rather than eliminates the interpretive task. The Court underscored that the Guidelines remain the "starting point and the initial benchmark" for sentencing and the "framework for sentencing." 580 U.S. at 265. What changed after *Booker* was not their centrality but their legal effect. That conclusion answers the vagueness question. It does not answer the interpretive one.

Where interpretation leaves genuine uncertainty, the longstanding rule remains. Ambiguity concerning punishment is resolved in favor of liberty, even where the rule advises rather than commands. If the Commission wants its policy choice to bind, it can place that choice in the Guideline text. Commentary cannot do that work.

CONCLUSION

Amicus urges this Court to rule in Petitioner's favor.

Respectfully submitted,

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