

THE FUTURE OF JUDICIAL DEFERENCE TO THE COMMENTARY OF THE UNITED STATES SENTENCING GUIDELINES

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*The United States Sentencing Commission is responsible for authoring the United States Sentencing Guidelines and its commentary. Both the Guidelines and the commentary are heavily influential in the sentencing of federal criminal defendants. For nearly three decades, courts have deferred to the Commission's commentary by applying *Stinson v. United States*. *Stinson* analogized the Sentencing Commission to an administrative agency and held that the commentary to the Guidelines should receive deference akin to *Seminole Rock* deference. But the future of *Stinson* deference has grown uncertain in recent years. Changes in other areas of law have rendered much of *Stinson's* reasoning out-of-date, circuits have begun to dispute how deferential *Stinson* is on its own terms, and judges have begun to push back on deference doctrines that harm criminal defendants. The Supreme Court's decision in *Kisor v. Wilkie* complicated matters further, and there is now a burgeoning circuit split over whether *Kisor's* conditions on *Seminole Rock* deference also apply to *Stinson* deference. This Note addresses four distinct issues. First, it documents the ways in which the *Stinson* Court's reasoning is no longer tethered to current law and practice, including identifying ways in which lower courts frequently mischaracterize the contemporary practices of the Sentencing*

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Commission. Second, it documents the pre-Kisor circuit split over Stinson's scope. Third, it argues that Kisor does not modify Stinson deference, and that, for the time being, lower court judges are bound by vertical stare decisis to continue faithfully applying Stinson's deferential standard even when Kisor's preconditions for deference are not met. Fourth, it argues that, when presented with the appropriate case, the Supreme Court should overrule Stinson due to the weakness of Stinson's claim to stare decisis, the inherent problems of deference doctrines in the criminal context, and the relative lack of policy justifications for deference to the Commission as opposed to a traditional administrative agency.

INTRODUCTION

The Sentencing Reform Act of 1984¹ created the United States Sentencing Commission as “an independent commission in the judicial branch of the United States.”² Among its other responsibilities, the Commission authors the United States Sentencing Guidelines. The Guidelines help federal judges determine the length of criminal sentences for federal crimes.³ Based on factors such as the nature of a crime and a defendant's criminal history, the Guidelines suggest a range of potential sentences within which the defendant's sentence should presumptively fall. Until the early 2000s, the Guidelines range was treated as mandatory and binding on federal judges. But in *United States v. Booker*,⁴ the Supreme Court determined that binding sentencing guidelines were unconstitutional and purported to excise the portions of the Sentencing Act that made the Guidelines range mandatory.⁵ However, even in their ad-

1. Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended in scattered sections of 18 and 28 U.S.C.).

2. See 28 U.S.C.A. § 991(a) (Westlaw current through Pub. L. No. 117-39).

3. See 28 U.S.C.A. § 994(a)(1)(B) (Westlaw current through Pub. L. No. 117-39).

4. 543 U.S. 220 (2005).

5. See *id.* at 265 (“We do not doubt that Congress, when it wrote the Sentencing Act, intended to create a form of mandatory Guidelines system. But, we repeat, given to-

visory form, the Sentencing Guidelines remain an extremely important part of the federal sentencing process. Courts are required to begin sentencing by correctly calculating the range of potential sentences suggested by the Guidelines, and failure to calculate the correct range constitutes procedural error.⁶ And while courts may—based on the totality of circumstances—give a sentence outside of the correct guidelines range, courts must always explain the length of their sentences and are expected to give “more significant justification[s]” for significant departures from the guideline range.⁷ Even after *Booker*, the Supreme Court has referred to the Guidelines as “the lodestone of sentencing,”⁸ and nearly three-quarters of all federal sentences either fall within the Guidelines’ range or depart from the range in a manner justified by the Guidelines Manual.⁹

Amendments to the Guidelines thus significantly impact the length of criminal sentences. In order to amend the Guidelines, the Commission goes through a multi-step process. First, before proposing any changes to the Guidelines, the Commission consults with “authorities on . . . various aspects of the Federal criminal judicial system” including the Judicial Conference of the United States, the Criminal Division of the Department of Justice, and the

day’s constitutional holding, that is not a choice that remains open. . . . [W]e have concluded that today’s holding is fundamentally inconsistent with the judge-based sentencing system that Congress enacted into law. In our view, it is more consistent with Congress’ likely intent in enacting the Sentencing Reform Act (1) to preserve important elements of that system while severing and excising two provisions (§§ 3553(b)(1) and 3742(e)) than (2) to maintain all provisions of the Act and engraft today’s constitutional requirement onto that statutory scheme.” (internal citations omitted)). The Court had previously found that the Sentencing Commission did not violate the nondelegation doctrine or the separation of powers. *See Mistretta v. United States*, 488 U.S. 361, 412 (1989).

6. *See Gall v. United States*, 552 U.S. 38, 51 (2007).

7. *See id.* at 50, *cited in Peugh v. United States*, 569 U.S. 530, 537 (2013).

8. *Peugh*, 569 U.S. at 544.

9. *See UNITED STATES SENT’G COMM’N*, 2020 ANNUAL REPORT AND SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 7 (2020).

Federal Public Defenders.¹⁰ Then, the Commission follows the Administrative Procedure Act's notice and comment rulemaking procedures.¹¹ Finally, the Commission submits any proposed amendments to Congress between the "beginning of a regular [congressional] session" and "the first day of May."¹² The amendments may not go into effect for at least 180 days, giving Congress the opportunity to pass new legislation to stop the amendments.¹³ The Sentencing Commission also authors policy statements (a process that is explicitly authorized by statute) and commentary to the Guidelines (a process that is not explicitly authorized by statute).¹⁴ The commentary is varyingly stylized as application notes, background information, introductions, and conclusions.¹⁵ The Sentencing Commission has explicitly reserved the right to adopt new commentary without notice and comment and without submitting the proposed changes in commentary to Congress.¹⁶

Some commentary provides straightforward interpretations of the underlying guidelines, while other commentary serves a more complicated role.¹⁷ Consider, for instance, the frequently litigated

10. 28 U.S.C.A. § 994(o) (Westlaw current through Pub. L. No. 117-39).

11. See 28 U.S.C.A. § 994(x) (Westlaw current through Pub. L. No. 117-39) (referring to 5 U.S.C. § 553).

12. See 28 USC § 994(p) (Westlaw current through Pub. L. No. 117-39).

13. See *id.*

14. See 28 U.S.C.A. § 994(a)(2)–(3) (Westlaw current through Pub. L. No. 117-39); see also Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended in scattered sections of 18 and 28 U.S.C.). Courts inconsistently capitalize when discussing the "commentary" and the "guidelines." For clarity's sake, this Note capitalizes "Guidelines" when referring to either the literal Guidelines Manual or the general category of "the Guidelines," but uses lower case when referring to individual provisions within the Guidelines. This Note does not capitalize "commentary" unless quoting a source that capitalized "commentary."

15. See U.S. SENT'G COMM'N, U.S. SENT'G GUIDELINES MANUAL ii (2021).

16. See U.S. SENT'G COMM'N, RULES OF PRACTICE & PROCEDURE § 4.3 (2016) ("The Commission may promulgate commentary and policy statements, and amendments thereto, without regard to the provisions of 28 U.S.C. § 994(x)."); *id.* § 4.1 ("Amendments to . . . commentary may be promulgated and put into effect at any time.")

17. Application notes are by far the most relevant form of commentary to this Note, and they are what the reader should generally have in mind when this Note refers to "the commentary."

Application Note 1 to Section 4B1.2 of the Guidelines. Section 4B1.2 of the Guidelines is the definitions section for Section 4B1.1 of the Guidelines.¹⁸ Section 4B1.1 provides a sentencing enhancement for “career offenders” based on the defendant’s criminal history.¹⁹ Application Note 1 to Section 4B1.2 of the Guidelines is effectively a definitions section on top of a definitions section, clarifying and elaborating upon Section 4B1.2’s definitions.²⁰ While controversial, this Application Note is relatively straightforward commentary in the sense that it is a series of one-to-three-sentence definitions that explain what the Sentencing Commission believes specific phrases in Sections 4B1.1 and 4B1.2 mean.²¹

In contrast, Application Note 3 to Section 2B1.1 of the Guidelines is only interpretive in the loosest sense of the term. Section 2B1.1 of the Guidelines determines the appropriate range of sentences for various economic crimes in part based on the “loss” that the crime caused.²² Application Note 3 to Section 2B1.1 of the Guidelines is a seventeen-page-long “interpretation” of the word “loss” that is itself a complex scheme instructing courts to calculate loss differently for different types of crimes.²³ Application Note 3 may be intended to clarify the meaning of “loss,” but it is filled with its own ambiguities that have divided lower courts.²⁴

Still other commentary does not purport to interpret the Guidelines at all. For example, Application Note 1 to Section 2A1.2 of the Guidelines tells judges when *not* to follow the guidelines range. Section 2A1.2 unambiguously provides the baseline sentencing

18. See GUIDELINES, *supra* note 16, §4B1.2.

19. See *id.* § 4B1.1.

20. See *id.* § 4B1.2 cmt. n.1.

21. See *id.*

22. See *id.* § 2B1.1.

23. See *id.* § 2B1.1 cmt. n.3.

24. See *id.*; see also *e.g.*, United States v. Kozerski, 969 F.3d 310, 314–15 (6th Cir. 2020) (documenting a circuit split over whether Application Note 3 defines the “loss” for fraudulently receiving a government contract from a set-aside fund for disabled veterans as the total size of the contract or as the difference between the fraudulent winning bid and the next highest legitimate bid).

level for second degree murder,²⁵ but Application Note 1 instructs judges that an upward departure from that baseline may be appropriate if the murder was particularly heinous.²⁶

In any of these cases, whether and how the judge consults the commentary could impact the sentence ultimately given to the defendant. This gives substantial significance to the following question: When a court interprets the Guidelines, how much weight should it give to the Commission's commentary?

In 1993, a unanimous Supreme Court answered this question in *Stinson v. United States*.²⁷ The 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."²⁸ It reasoned that the commentary should be "treated as an agency's interpretation of its own legislative rule" while acknowledging that "the analogy is not precise because Congress has a role in promulgating the guidelines."²⁹ The Court quoted *Bowles v. Seminole Rock & Sand Co.*,³⁰ explaining that "[a]s we have often stated, provided an agency's interpretation of its own regulations does not violate the Constitution or a federal statute, it must be given 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.'"³¹ The Court further determined that the commentary on the specific guidelines relevant to *Stinson's* case was "a binding interpretation of the" Guidelines.³² Beyond this lone quote analogizing to *Seminole Rock*, the Court did not explain how lower

25. GUIDELINES, *supra* note 16, § 2A1.2.

26. *See id.* § 2A1.2 cmt. n.1.

27. 508 U.S. 36 (1993).

28. *Id.* at 38.

29. *Id.* at 44.

30. 325 U.S. 410 (1945).

31. *Stinson*, 508 U.S. at 45 (quoting *Seminole Rock*, 324 U.S. at 414).

32. *Id.* at 47.

courts should reconcile judicial deference to the Sentencing Guidelines commentary with *Seminole Rock* deference.³³

In recent years, four discrete issues have complicated questions over *Stinson* deference's scope. First, jurisprudential developments have undermined *Stinson*'s reasoning. The Court's doctrinal evolutions, the Sentencing Commission's self-imposed procedures for amending commentary, and congressional enactments have made the *Stinson* Court's description of the Guidelines and their relationship to legislative rules inaccurate. Second, some circuit courts have argued that *Stinson* has been illegitimately used to justify commentary that expands the scope of the Sentencing Guideline's text. These courts have primarily advanced these arguments in cases about the application notes to United States Sentencing Guidelines Sections 4B1.1 and 4B1.2, and a circuit split has arisen over these provisions. Third, after the Supreme Court's holding in *Kisor v. Wilkie* clarified the level of deference due to administrative agencies' interpretations of their own regulations, lower courts have disagreed over whether *Kisor*'s limitations on judicial deference applied to the Sentencing Commission's commentary. This has exacerbated the pre-existing divides over *Stinson* deference. Lower courts now not only disagree about how broadly *Stinson* should be read on its own terms, but also over whether a set of preconditions for applying *Stinson* deference exists at all. Fourth, some lower court judges have called for limits to deference doctrines in the criminal context, arguing that any doctrine that requires deference to the government in cases that impact individual liberty violates the rule of lenity. This debate has largely centered on *Chevron* deference, but it has clear implications for *Stinson* deference as well.

These issues raise distinct questions for lower court judges and for the Supreme Court that, this Note argues, require different an-

33. *Seminole Rock* deference is the standard by which a court defers to an administrative agency's interpretation of its own legislative rules. For a sense of how the Supreme Court has understood *Seminole Rock* deference over the years, see generally *Seminole Rock*, 325 U.S. 410; *Auer v. Robbins*, 519 U.S. 452 (1997); *Kisor v. Wilkie*, 13 S.Ct. 2400 (2019).

swers. Part I provides general background. It explains how *Stinson's* characterizations of the Guidelines and commentary amendment process are outdated and how some courts mischaracterize the contemporary procedures. Part II provides more specific background on the pre-*Kisor* disagreements over *Stinson's* scope that created a circuit split over whether courts should follow Application Note 1 to Section 4B1.2 of the Guidelines. Parts III and IV address how lower court judges and the Supreme Court, respectively, should treat *Stinson* and *Kisor*. Part III argues that lower federal courts bound by vertical *stare decisis* must continue to take a deferential approach to the commentary under *Stinson* without first considering the preconditions for *Seminole Rock* deference articulated in *Kisor*. Part IV, however, argues that Supreme Court should eliminate *Stinson* deference when presented with an appropriate case. It maintains that the case for *stare decisis* for *Stinson* deference is relatively weak. It further argues that principles of lenity and relatively weak policy justifications for deference to the commentary counsel against *Stinson*.

I. UNDERSTANDING THE OUTDATED NATURE OF STINSON'S REASONING

Stinson's reasoning is as follows: The Sentencing Commission authors both the Sentencing Guidelines and commentary to the Guidelines.³⁴ Changes to the Guidelines must be submitted to Congress for approval, but “[a]mended commentary . . . is not reviewed by Congress.”³⁵ The Guidelines and their commentary are not precisely analogous to administrative agencies’ regulations and their subsequent interpretations of those regulations because “Congress has a role in promulgating the [G]uidelines.”³⁶ Nevertheless, it is appropriate to treat the commentary “as an agency’s interpretation

34. See *Stinson*, 508 U.S. at 41.

35. See *id.* at 41, 46.

36. See *id.* at 44.

of its own legislative rule.”³⁷ As such, “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”³⁸ and “[a]mended commentary is binding on the federal courts” even in the face of contrary prior judicial constructions.³⁹

In the 28 years since *Stinson* was decided, the *Stinson* Court’s reasoning has been undermined in at least three ways: (1) most amended commentary is now reviewed by Congress and subjected to the rigors of notice and comment; (2) the Congressional Review Act⁴⁰ has obviated the only distinction the *Stinson* Court made between the Guidelines and an agency’s regulations; and (3) *United States v. Booker*’s holding that the Guidelines are not mandatory has severely undermined any sense in which the Guidelines or commentary can be thought of as truly “binding” on federal judges.

First, just like the Guidelines’ text, most amended guideline commentary now undergoes notice and comment and submission to Congress.⁴¹ Since at least 1997,⁴² the Commission’s policy has been to “endeavor to provide, to the extent practicable, comparable opportunities [to the notice and comment procedures of 28 U.S.C. § 994(x)] for public input on policy statements and commentary considered in conjunction with guideline amendments.”⁴³ It has also

37. *Id.*

38. *Id.* at 38.

39. *Id.* at 46.

40. 5 U.S.C. §§ 801–08.

41. I am grateful to Sarah Welch for calling this to my attention.

42. The United States Sentencing Commission adopted its first Rules of Practice and Procedure on July 11, 1997. See Rules of Practice and Procedure, 62 Fed. Reg. 38,598 (July 18, 1997). The relevant policies have been unchanged since 1997. Compare *id.* at 38,599, with RULES, *supra* note 17, §§ 4.1, 4.3. However, there are at least some instances of amendments to the commentary being submitted to Congress before 1997, and even before *Stinson* was decided in 1993. See, e.g., Amendments to the Sentencing Guidelines for United States Courts, 57 Fed. Reg. 20,148, 20,151 (May 11, 1992) (including amendments to the Application Notes to Section 1B1.8(b) in a submission to Congress with amendments to the text of the Guidelines).

43. RULES, *supra* note 17, § 4.3.

been the policy of the Commission “to the extent practicable” to “endeavor to include amendments to policy statements and commentary in any submission of guideline amendments to Congress and put them into effect on the same November 1 date as any guideline amendments issued in the same year.”⁴⁴

The Commission still explicitly reserves the right to change its commentary without the procedural hurdles of notice and comment and submission to Congress.⁴⁵ But, in general, the Commission submits its amendments to the Guidelines and the commentary together with the same effective date of November 1, after both have been subjected to notice and comment.⁴⁶ Even when the Commission has amended the commentary with an effective date other than November 1, it has still chosen to hold a public hearing and to submit the amendment to Congress.⁴⁷ The proceduralization of amendments to the commentary is not universal; the Commission has enacted some changes to commentary and policy statements without first submitting to Congress or conducting a public hearing. However, these instances appear to have been either for “technical and conforming” edits or where the Commission had an urgent need, such as clarifying whether a forthcoming amendment would have retroactive effect.⁴⁸ In other words, the procedures that

44. *Id.* § 4.1. Rule 4.1 also provides that, unless otherwise stated, all amendments to the Guidelines themselves shall go into effect on November 1. *See id.* This creates uniformity between the effective dates of amendments to the commentary and amendments to the Guidelines in light of the statutorily required 180-day waiting period between the Commission’s submission of the Guidelines to Congress and their effective date and the statutory requirement that the Guidelines be submitted to Congress no later than May 1.

45. *See id.* §§ 4.1, 4.3.

46. *See, e.g.*, Notice of Submission to Congress of Amendments to the Sentencing Guidelines Effective November 1, 2018, 83 Fed. Reg. 20,145, 20,145–60 (May 7, 2018) (including amendments to the commentary and the Guidelines side-by-side after describing the “public hearings” held on the amendments).

47. *See, e.g.*, Notice of Submission to Congress of Amendment to the Sentencing Guidelines Effective August 1, 2016, 81 Fed. Reg. 4,741, 4,741 (Jan. 27, 2016). This notably includes an amendment of the application notes for Sections 4B1.1 and 4B1.2. *See id.*

48. *See, e.g.*, Notice of Final Action Regarding Technical and Conforming Amendments to Federal Sentencing Guidelines Effective November 1, 2015, 80 Fed. Reg.

apply to guideline amendments usually—but not always—also apply to commentary amendments.

Lower courts have largely overlooked this change in practice and often mischaracterize the procedure that amendments to the commentary receive, citing *Stinson*'s now outdated language and the statutory text but failing to consult the Federal Register. For example, a unanimous en banc Sixth Circuit stated in 2019 that “[u]nlike the Guidelines themselves, however, commentary to the Guidelines never passes through the gauntlets of congressional review or notice and comment.”⁴⁹ The Second Circuit and an en banc Third Circuit both later uncritically quoted the Sixth Circuit’s characterization.⁵⁰ It is undoubtedly true that amendments to the commentary are not statutorily required to go through notice and comment and submission to Congress. It is also true that present-day procedures do not make *Stinson* any less binding on lower courts, and that some provisions of the Sentencing Guidelines may not have received congressional review and notice and comment. But *Havis*-style blanket statements that amendments to the commentary “never pass[] through” these procedural hurdles simply do not reflect current practice. Yet I am aware of only two judicial acknowledgments that commentary to the Guidelines typically undergoes notice and comment.⁵¹

49,312, 49,312–13 (Aug. 17, 2015); Notice of Final Action Regarding Amendment to Policy Statement § 1B1.10, Effective November 1, 2014, 79 Fed. Reg. 44,973, 44,973–74 (Aug. 1, 2014).

49. *United States v. Havis*, 927 F.3d 382, 386 (6th Cir. 2019) (en banc) (per curiam).

50. *United States v. Swinton*, 797 Fed. Appx. 589, 602 (2d Cir. 2019); *United States v. Nasir*, 982 F.3d 144, 159 (3d Cir. 2020) (en banc), *vacated on other grounds*, 142 S. Ct. 56, 56 (2021). On remand, the en banc Third Circuit reissued an opinion in *Nasir*. *United States v. Nasir*, 17 F.4th 459, 471–72 (3d Cir. 2021) (en banc). The analysis of *Stinson* was nearly identical in the new opinion, but the new version notably omitted this discussion claiming that the commentary deserved less deference because it did not undergo notice and comment. *Compare Nasir*, 982 F.3d at 159–60, *with Nasir*, 17 F.4th at 471–72.

51. *See United States v. Moses*, 23 F.4th 347, 355 (4th Cir. 2022) (“[T]he formally published Guidelines Manual . . . includes not only Guidelines and policy statements but also official commentary, all three of which were, in practice, generally promulgated by the notice-and-comment and congressional-submission procedure[.]”); *United States v. Henry*, 1 F.4th 1315, 1336 (11th Cir. 2021) (Pryor, C.J., dissenting) (“[J]ust like

Second, the only distinction that the *Stinson* Court drew between the Sentencing Guidelines and an agency's regulations no longer actually differentiates the Guidelines from an agency's regulations. Three years after *Stinson* was decided, Congress increased its role in the regulatory process through the Congressional Review Act. The *Stinson* Court determined that the Sentencing Guidelines were an imperfect analogy to an agency's regulations because "Congress has a role in promulgating the Guidelines."⁵² But the only "role" that Congress actually has in promulgating the Guidelines is a period of time in which Congress must see the Guidelines before they take effect.⁵³ If Congress wants to stop the new guidelines from taking effect, it must enact new legislation.⁵⁴ But under the Congressional Review Act, agencies also must submit their regulations to Congress and give Congress a chance to pass legislation overriding the regulations before they take effect.⁵⁵ In other words, after the Congressional Review Act, Congress's involvement in the promulgation of Sentencing Guidelines is not materially different than its role in the promulgation of agency regulations. The doctrinal distinction between the Sentencing Guidelines and agency rules upon which the *Stinson* Court actually relied is now toothless.

Third, *United States v. Booker* created a new, far more salient distinction between commentary to the Guidelines and an agency's interpretation of its own regulations. In *Booker*, the Supreme Court found that it was unconstitutional for a sentencing court to treat the Sentencing Guidelines as mandatory.⁵⁶ This fundamentally

the guidelines themselves, amendments to the commentary are ordinarily subject to notice and comment and are submitted to Congress with other guidelines amendments. See U.S. Sent'g Comm'n, R. of Prac. & Proc. 4.1, 4.3 (2016); U.S. Sent'g Comm'n, R. of Prac. & Proc. 4.1, 4.3 (2007); U.S. Sent'g Comm'n, R. of Prac. & Proc. 4.1, 4.3 (1997)."

52. *Stinson v. United States*, 508 U.S. 36, 44 (1993).

53. See 28 USC § 994(p) (Westlaw current through Pub. L. 117-41).

54. See *id.*

55. See MAEVE P. CAREY & CHRISTOPHER M. DAVIS, CONG. RSCH. SERV., R43992, THE CONGRESSIONAL RESEARCH ACT (CRA): FREQUENTLY ASKED QUESTIONS 1 (2020).

56. See *United States v. Booker*, 543 U.S. 220, 265 (2005) (Breyer, J., delivering the opinion of the Court in part).

changed the nature of the Sentencing Guidelines and, by extension, the commentary. While the Guidelines still greatly influence the sentencing process, they no longer speak with the force of law.⁵⁷ *Booker* clearly weakens *Stinson's* analogy between the Sentencing Guidelines and agency regulations. Agency regulations still have the force of law.⁵⁸ However, after *Booker*, the Sentencing Guidelines do not.⁵⁹

Booker calls into question elements of *Stinson's* reasoning—as *Booker* itself implicitly acknowledges. *Booker* cited *Stinson* for the proposition that the Court had “consistently held that the Guidelines have the force and effect of laws” before finding that giving the Guidelines the force and effect of laws violated the Sixth Amendment.⁶⁰ Still, the Court has not addressed what if any impact *Booker* should have on *Stinson's* analogy between the commentary to the Guidelines and an agency’s interpretation of its own regulations.

These three changes do not, in and of themselves, necessarily impact *Stinson's* legal force. Lower courts are bound to follow even outdated Supreme Court opinions, and, as detailed in Part IV, these developments have a mixed impact on the horizontal *stare decisis* analysis. But it is important to establish at the outset that *Stinson* does not accurately describe either the contemporary procedures through which the Guidelines and the commentary are actually

57. See *id.*; *id.* at 234 (Stevens, J., delivering the opinion of the Court in part).

58. See *Chrysler Corp. v. Brown*, 441 U.S. 281, 295–96 (1979).

59. There is admittedly some debate over exactly how sweeping *Booker's* holding is. Compare, e.g., *United States v. Henry*, 1 F.4th 1315, 1320 (11th Cir. 2021) (“*Booker* told us that all guidelines are advisory.”), with *id.* at 1331 (Pryor, C.J., dissenting) (calling the maxim “advisory guidelines” misleading and arguing that “some aspects of the Guidelines remain binding after *Booker*”). But this debate is not particularly important to *Stinson*; whatever *Booker* held, it clearly made the Guidelines range in some respect no longer “law” in the way that an agency’s regulations are “law.”

60. See *Booker*, 543 U.S. at 234 (Stevens, J., delivering the opinion of the Court in part); see also *Brown v. United States*, 139 S. Ct. 14, 14 & n.3 (2018) (Sotomayor, J., dissenting from denial of certiorari) (arguing that *Stinson's* usage of “binding” language is an example of several pre-*Booker* characterizations of the authority of the Sentencing Guidelines that cannot survive *Booker*).

amended or the contemporary similarities and differences between the Sentencing Guidelines and a traditional agency's regulations.

II. UNDERSTANDING THE PRE-*KISOR* DISAGREEMENTS OVER *STINSON* IN LOWER COURTS

Today, the most important lower court disagreement over the future of *Stinson* deference is whether courts should apply *Kisor v. Wilkie*'s threshold inquiry before consulting commentary to the Sentencing Guidelines. However, before this debate arose, lower courts were already fracturing over exactly how deferentially lower courts should treat commentary that appeared to expand the Guidelines' text. This Part provides background understanding of the pre-*Kisor* circuit split over *Stinson*'s scope.

In 2018 and 2019, a circuit split developed concerning the outer limits of *Stinson* deference. The split arose when some courts began to reject the commentary's interpretation of United States Sentencing Guidelines Sections 4B1.1 and 4B1.2. Section 4B1.1 provides for enhanced sentences for career offenders.⁶¹ Section 4B1.2 is the definitions section of Section 4B.1.⁶² Section 4B1.2 defines "crime of violence" and "controlled substance offense."⁶³ Application Note 1 to Section 4B1.2 goes one step further and clarifies that "aiding and abetting, conspiring, and attempting to commit" any offense that is defined as a "crime of violence" or "controlled substance offense" is *also* a crime of violence or controlled substance offense.⁶⁴ In *United States v. Winstead*,⁶⁵ the D.C. Circuit refused to apply Application Note 1. The court determined that Application Note 1 was "inconsistent" with the text of the Guidelines because it expanded the

61. See GUIDELINES, *supra* note 16, § 4B1.1..

62. See *id.* § 4B1.2.

63. *Id.*

64. See *id.* cmt. n.1.

65. 890 F.3d 1082 (D.C. Cir. 2018).

scope of the Guidelines to cover inchoate offenses that were not included in the Guidelines' text.⁶⁶ A unanimous en banc Sixth Circuit soon followed suit in *United States v. Havis*,⁶⁷ overruling the circuit's prior construction of Section 4B1.2. The court reasoned that because Application Note 1 added a new category of offenses to those enumerated in the text of the Guidelines, "no term in [Section] 4B1.2(b) would bear" the Sentencing Commission's interpretation and that the commentary was not "really an 'interpretation' at all."⁶⁸ Other circuits have disagreed. For instance, the Tenth Circuit held that Application Note 1 is "reconcilable" with the text of Section 4B1.2 because it can be interpreted as a definitional provision, and because the Sentencing Commission could have reasonably concluded that attempted violent crimes create a sufficient risk of violence as to be violent crimes in and of themselves.⁶⁹ The Eleventh Circuit was more blunt, concluding with limited analysis that "[Application Note 1] does not run afoul of the Constitution, or . . . a federal statute; nor is it inconsistent with, or a plainly erroneous reading of, sections 4B1.1 or 4B1.2. As a result, the commentary constitutes 'a binding interpretation' of the term 'controlled substance offense.'"⁷⁰

The pre-*Kisor* circuit split over Section 4B1.2 can be understood as a broader disagreement about exactly how much deference *Stinson* commanded lower courts to give to the commentary. Approaches like the Sixth Circuit's emphasize that the commentary must actu-

66. *See id.* at 1090–92; *see also id.* at 1091 (acknowledging that this created a circuit split with the First, Sixth, Eighth, Tenth, and Eleventh Circuits).

67. 927 F.3d 382 (6th Cir. 2019) (per curiam) (en banc).

68. *Id.* at 386. *Havis* technically dealt with an application of § 2K2.1 of the Guidelines. *Id.* at 384. But the commentary to § 2K2.1 incorporates the definitions of § 4B1.2(b) and of Application Note 1. *See* GUIDELINES, *supra* note 16, § 2K2.1 cmt. n.1.

69. *United States v. Martinez*, 602 F.3d 1166, 1173–75 (10th Cir. 2010).

70. *United States v. Smith*, 54 F.3d 690, 693 (11th Cir. 1995); *see also United States v. Lange*, 826 F.3d 1290, 1293 (11th Cir. 2017) (reaffirming *Smith* before holding that the Guidelines should be read to apply to attempted manufacture of a controlled substance).

ally interpret rather than add to the Guidelines, and that only interpretive commentary should receive deference. Meanwhile, approaches giving effect to the commentary's interpretation of Section 4B1.2 emphasize that guidelines and their commentary should be treated as a collective whole and reconciled with one another absent a clear, unavoidable conflict. For example, in a dispute over a different provision of the Guidelines, the Eleventh Circuit recently described its approach to the Guidelines by saying that:

'The guideline and the commentary must be read together,' because the commentary may 'interpret the guideline or explain how it is to be applied.' The commentary sometimes requires interpreting a guideline in a way that 'may not be compelled by the guideline text.' Yet the commentary for a guideline remains authoritative 'unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline.' Courts should thus 'seek to harmonize' a guideline's text with its commentary.⁷¹

Predictably, these debates at times intersected with the debate about the scope of *Seminole Rock* deference. For example, in the original *Havis* panel opinion, Judge Thapar separately concurred to his own majority opinion to suggest that the Supreme Court should overrule both *Stinson* and *Auer v. Robbins*⁷²—the 1997 case that reaffirmed the principle of deference to agency interpretations of their own regulations articulated in *Seminole Rock*⁷³—without any distinction between the reasons why the two deference doctrines

71. *United States v. Cingari*, 952 F.3d 1301, 1308 (11th Cir. 2020) (first quoting *United States v. Ferreira*, 275 F.3d 1020, 1029 (11th Cir. 2001); then quoting *Stinson*, 508 U.S. at 41; then quoting *Stinson*, 508 U.S. at 47; then quoting *Stinson*, 508 U.S. at 38; and then quoting *United States v. Genao*, 343 F.3d 578, 584 n.8 (2d Cir. 2003)).

72. 519 U.S. 452 (1997).

73. Some have questioned whether *Seminole Rock* and *Auer* articulated the same standard. See, e.g., Aditya Bamzai, *Delegation and Interpretive Discretion: Gundy, Kisor, and the Formation and Future of Administrative Law*, 133 HARV. L. REV. 164, 165 n.19 (2019). But the Supreme Court treats the two as interchangeable. See, e.g., *Kisor v. Wilkie*, 139 S. Ct. 2400, 2408 (2019) ("We call [the practice of deferring to agencies' reasonable interpretations of their own regulations] *Auer* deference, or sometimes *Seminole Rock* def-

should be overruled.⁷⁴ More pointedly, the D.C. Circuit's reasoning in *Winstead* completely collapsed any distinction between *Stinson* and *Seminole Rock*. Indeed, the court read *Stinson* to incorporate *Seminole Rock* deference and referred to the deference owed to the commentary as "*Seminole Rock* deference" throughout its opinion.⁷⁵ In other words, even before *Kisor v. Wilkie*, lower court arguments about *Stinson* deference were inextricably connected to debates over the future of *Seminole Rock*.

III. WHY LOWER COURTS MUST CONTINUE TO APPLY *STINSON* AND CONSULT THE COMMENTARY TO EVEN UNAMBIGUOUS GUIDELINES.

Having established this background knowledge about the Guidelines, their commentary, and pre-*Kisor* lower court disagreements about *Stinson* deference, this Note can now address how lower courts should think about *Stinson* after *Kisor*. This Part's argument is straightforward: *Kisor* does not impact *Stinson* deference. As such, lower courts must continue to apply *Stinson* faithfully unless and until the doctrine is modified by the Supreme Court.

erence, after two cases in which we employed it."). This Note uses the two terms interchangeably, preferring *Seminole Rock* unless quoting a source that described the deference as *Auer* deference.

74. *United States v. Havis*, 907 F.3d 439, 450 (6th Cir. 2018) (Thapar, J., concurring) ("If there was ever a case to question deference to administrative agencies under *Auer v. Robbins*, or more specifically to the Sentencing Commission under the *Auer*-like *Stinson v. United States*, this is it."), *vacated en banc*, 927 F.3d 382 (6th Cir. 2019) (per curiam); *id.* at 452 ("Fortunately, even under current precedent, this court is not obligated to check out of its constitutional role: the Sentencing Commission's 'interpretation' in this case is just an addition and receives no deference. But this case shows how far *Auer* and *Stinson* deference could go if left unchecked. Both precedents deserve renewed and much-needed scrutiny.").

75. *United States v. Winstead*, 890 F.3d 1082, 1090 (D.C. Cir. 2018) ("[T]he Supreme Court in *Stinson v. United States* held that the commentary should 'be treated as an agency's interpretation of its own legislative rule.' Thus, under this *Seminole Rock* deference"); *id.* at 1092 ("[S]urely *Seminole Rock* deference does not extend so far as to allow it to invoke its general interpretive authority via commentary . . . to impose such a massive impact on a defendant with no grounding in the guidelines themselves.").

A. *Understanding Kisor v. Wilkie and the stakes of the debate about whether Kisor applies to Stinson deference*

The already complex debate over the Sentencing Guidelines' scope was substantially complicated by *Kisor v. Wilkie*. The *Kisor* Court reexamined and refined *Seminole Rock* deference, and ultimately upheld *Seminole Rock* deference while "reinforc[ing] its limits."⁷⁶ In reinforcing *Seminole Rock*'s limits, the Court acknowledged that it had sent "mixed messages" on *Seminole Rock*'s scope.⁷⁷ It further conceded that, "in a vacuum," *Seminole Rock*'s requirement that courts defer to agencies' interpretations of their own guidelines unless they are "'plainly erroneous or inconsistent with the regulation,' may suggest a caricature of the doctrine, in which deference is 'reflexive.'"⁷⁸ To avoid this "reflexive" deference, the Court emphasized a variety of conditions that must be met to warrant deference to an agency's interpretation of its regulations: (1) the regulation must be "genuinely ambiguous" and the court must "exhaust all the 'traditional tools' of construction" (citing *Chevron* step-one analysis); (2) the interpretation must be the agency's "authoritative" or "official position[;]" (3) the agency's interpretation must "implicate its substantive expertise[;]" and (4) the interpretation must reflect the "fair and considered judgment" of the agency.⁷⁹ The extent to which the Court was actually "reinforcing" rather than just "creating" these preconditions for deference is controversial. In a concurrence in judgment that functions as a lead dissent, Justice Gorsuch argued that the *Kisor* majority did not just reinforce *Seminole Rock*'s limits, but rather "pretend[ed] to bow to *stare decisis*" while reshaping *Seminole Rock* in "new and experimental ways."⁸⁰ The question whether *Kisor* upheld or modified *Seminole*

76. *Kisor*, 139 S. Ct. at 2408. See also *id.* at 2415 (opinion of the Court) ("[W]e think it worth reinforcing some of the limits inherent in the *Auer* doctrine.").

77. *Id.* at 2414.

78. *Id.* at 2415 (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945) and *Pereira v. Sessions*, 138 S. Ct. 2105, 2120 (2018) (Kennedy, J., concurring)).

79. *Id.* at 2415–18.

80. *Id.* at 2443 (Gorsuch, J., concurring in the judgment).

Rock—as well as the fractured nature of the lead opinion⁸¹—makes its precise holding somewhat difficult to articulate, leaving an ambiguous opinion ripe for commentary and scholarly analysis.⁸²

On cursory review, it is not obvious whether *Kisor*'s limits apply to *Stinson* deference. On the one hand, *Kisor* does not directly address the Sentencing Guidelines. From the first sentence of the opinion on, *Kisor* purported to be about deference to agencies' "reasonable readings of genuinely ambiguous regulations."⁸³ The Guidelines are not "regulations" and *Kisor* never mentions the Sentencing Guidelines, suggesting *Kisor* has nothing to do with the Sentencing Guidelines and its commentary.⁸⁴ But on the other hand, as this Note has already established, *Stinson*'s reasoning is entirely grounded in *Seminole Rock*. *Seminole Rock* deference was explicitly impacted by *Kisor*—meaning that if nothing else *Stinson*'s reasoning is clearly impacted by *Kisor*. And some lower courts were already treating *Stinson* and *Seminole Rock* interchangeably before *Kisor* was decided.⁸⁵

Given this background, it should be unsurprising that lower courts disagree about whether *Kisor*'s limits apply to *Stinson*. The Third and Sixth Circuits and one Fourth Circuit panel have unambiguously held that *Kisor*'s preconditions for deference apply to

81. Much of the lead opinion was only for a plurality of the Court. Chief Justice Roberts only joined the overview of the opinion, the portion of the opinion articulating the limits on *Seminole Rock* deference, and the portion of the opinion discussing *stare decisis*. See *id.* at 2424 (Roberts, C.J., concurring in part).

82. See, e.g., Bamzai, *supra* note 73, at 186–98 ("Before assessing whether *Kisor* correctly retained the forms of deference announced in *Seminole Rock* and *Auer*, it is necessary to try to understand what *Kisor* actually held."); Paul. J. Larkin, Jr., *Agency Deference after Kisor v. Wilkie*, 18 GEO. J.L. & PUB. POL'Y 105, 123 (2020) ("[T]he Kagan opinion completely rewrote the *Seminole Rock* and *Auer* rule without ever once saying that those decisions were mistaken, let alone admitting that they lacked any basis for holding that an agency should be able to say what one of its rules means.").

83. *Kisor*, 139 S. Ct. at 2408.

84. See generally *Kisor*, 139 S. Ct. 2400; see also *United States v. Moses*, 23 F.4th 347, 356 (4th Cir. 2022) ("It readily appears that *Kisor*, considered on its own terms, does not apply to the Sentencing Commission's official commentary in the Guidelines Manual.").

85. See Introduction and Part II, *supra*.

Stinson, and the First Circuit has heavily implied the same. In December 2020, an en banc Third Circuit became the first appellate court to hold that *Kisor* limited *Stinson*'s scope in *United States v. Nasir*.⁸⁶ The *Nasir* court overruled a past construction of the Sentencing Guidelines as overly deferential to the Sentencing Commission's commentary.⁸⁷ Soon after, in *United States v. Riccardi*,⁸⁸ a divided Sixth Circuit panel followed the Third Circuit's lead and held that *Kisor* modified the scope of *Stinson* and required a threshold inquiry into a guideline's ambiguity before deferring to its commentary.⁸⁹ In *United States v. Campbell*,⁹⁰ a Fourth Circuit panel held that *Kisor* limited *Stinson*'s scope because "*Stinson* relied on the *Seminole Rock/Auer* doctrine, a line of cases governing this type of deference."⁹¹ And in *United States v. Lewis*,⁹² a First Circuit panel implied that *Kisor*'s limits apply to *Stinson*. It called *Seminole Rock* "the foundation" of its applications of *Stinson* deference.⁹³ It then asked whether *Kisor* would have caused past panels to change their mind in the construction of a particular provision of the Sentencing Guidelines. It concluded that the panels in that case would have ruled the same way in light of *Kisor* because those past panels did

86. 982 F.3d 144 (3d Cir. 2020) (en banc). The Third Circuit's initial en banc *Nasir* opinion was vacated on other grounds by the Supreme Court. *United States v. Nasir*, 142 S. Ct. 56, 56 (2021). Just over a month later, the en banc Third Circuit reissued its opinion on the impact of *Kisor* on the Sentencing Guidelines. *United States v. Nasir*, 17 F.4th 459 (3d Cir. 2021). The opinions were nearly identical in relevant respects, with the notable exception of the Third Circuit omitting its discussion of the lack of notice and comment procedures for amendments to the guidelines discussed *supra* at note 50. Compare 982 F.3d at 156–60, with 17 F.4th at 468–72. For clarity's sake, this Note generally cites to the 2021 opinion that is good law in the Third Circuit, but it cites to both opinions if it is relevant to understanding the timeline of when the Third Circuit first announced this view.

87. See *Nasir*, 982 F.3d 144, 156–60 (3d Cir. 2020) (en banc); see also *Nasir*, 17 F.4th at 468–72 (3d Cir. 2021) (en banc).

88. 989 F.3d 476 (6th Cir. 2021).

89. *Id.* at 485.

90. 22 F.4th 438 (4th Cir. 2022).

91. See *id.* at 444–45.

92. 963 F.3d 16 (1st Cir. 2020).

93. *Id.* at 24.

not “suggest that they regarded *Auer* deference as limiting the rigor of their analysis of whether the guideline was ambiguous.”⁹⁴ One Ninth Circuit judge has suggested that she also believes that *Kisor* applies to the Sentencing Guidelines.⁹⁵

Other courts and judges have reached the opposite conclusion. Less than two weeks after *Campbell*, a different Fourth Circuit panel held in *United States v. Moses*⁹⁶ that “*Kisor* did not overrule *Stinson*’s standard for the deference owed to Guidelines commentary but instead applies in the context of an executive agency’s interpretation of its own legislative rules. . . . *Stinson* continues to apply unaltered by *Kisor*.”⁹⁷ Similarly, unpublished opinions in the Fifth, Eighth, and Ninth Circuits dismissed with little analysis arguments that *Kisor* provided the panel with any vehicle to reexamine past circuit constructions of commentary to the Sentencing Guidelines.⁹⁸ The Sixth Circuit’s decision in *Riccardi* prompted Judge Nalbandian to write separately to argue that *Stinson* “established a free-standing

94. *Id.*

95. See *United States v. Parlor*, 2 F.4th 807, 819 n.2 (9th Cir. 2021) (Berzon, J., dissenting) (“*Stinson* treated Guidelines commentary ‘as an agency’s interpretation of its own legislative rule.’ *Kisor* recently clarified that ‘the possibility of [such] deference can arise only if a regulation is genuinely ambiguous.’” (citations omitted)).

96. 23 F.4th 347, 352 (4th Cir. 2022), *petition for reh’g en banc filed*, No. 21-4067 (4th Cir. Feb. 2, 2022). Judge Niemeyer’s opinion for the panel did not cite *Campbell*. However, Judge King dissented in relevant part, arguing that the panel was bound by the circuit precedent. See *id.* at 359 (King, J., dissenting in part and concurring in the judgment). These two published opinions straightforwardly contradict each other; *Campbell* applied *Kisor* to *Stinson*, while *Moses* claims that *Kisor* does not apply to *Stinson*. That contradiction may make *Moses* an attractive case for the Fourth Circuit to rehear en banc.

97. *Id.* at 349.

98. See *United States v. Pratt*, No. 20-10328, 2021 WL 5918003, at *2 (9th Cir. Dec. 15, 2021) (“We have continued to follow *Stinson* after *Kisor v. Wilkie*.”); *United States v. Broadway*, 815 Fed. Appx. 95, 96 n.2 (8th Cir. 2020) (acknowledging that *Kisor* was a “major development[.]” but disclaiming any authority to reexamine the circuit’s past construction of the sentencing guidelines), *cert. denied*, 141 S. Ct. 2792 (2021); *United States v. Cruz-Flores*, 799 Fed. Appx. 245, 246 (5th Cir. 2020) (emphasizing that “*Kisor* did not discuss the Sentencing Guidelines or [*Stinson*’s holding]” and that there is “currently no case law from the Supreme Court or this court addressing the effect of *Kisor* on the Sentencing Guidelines”); *United States v. Vivar-Lopez*, 788 Fed. Appx. 300, 301 (5th Cir. 2019).

deference standard” unaffected by *Kisor*.⁹⁹ And several other circuits have simply continued to apply *Stinson* deference without commenting on *Kisor* or conducting any sort of threshold analysis into whether consulting the commentary is appropriate.¹⁰⁰

The question whether *Kisor* modifies *Stinson* deference has dramatic implications for how lower courts should apply *Stinson* going forward. The pre-*Kisor* circuit split over *Stinson*'s scope was a question of degree; some circuits treated “plainly erroneous” as a more deferential standard than other circuits, but they were engaged in the same fundamental inquiry. But the difference between a *Stinson* deference that is modified by *Kisor* and a *Stinson* deference that is not modified by *Kisor* is a difference in kind. Extending *Kisor* to *Stinson* fundamentally alters the methodological framework lower courts use to determine whether to even consult the commentary at all.

A recent Third Circuit decision demonstrated just how much the pre-*Kisor* status quo changes if *Kisor* applies to *Stinson*. Prior to consulting Application Note 14(B) to Section 2K2.1(b)(6)(B) of the Guidelines, the court first extensively analyzed whether each of *Kisor*'s preconditions for deference were satisfied.¹⁰¹ Only then did the court determine that the Note was “entitled to *Auer* deference as a reasonable interpretation of an ambiguous Guideline.”¹⁰² The court's analysis in turn prompted Judge Bibas to concur in judgment and argue that Application Note 14(B) was outside of *Kisor*'s “zone of ambiguity” and should be ignored altogether.¹⁰³ This is a fundamentally different approach to the commentary than any circuit had prior to *Kisor*. Even in the Sixth Circuit under *Havis* (which was probably the least deferential pre-*Kisor* approach to *Stinson* deference), courts did not conduct this kind of threshold analysis

99. *Riccardi*, 989 F.3d at 490–93 (Nalbandian, J., concurring).

100. *See, e.g.*, *United States v. Abrego*, 997 F.3d 309, 312–13 (5th Cir. 2021); *United States v. Platero*, 996 F.3d 1060, 1063–67 (10th Cir. 2021); *United States v. Zamora*, 982 F.3d 1080, 1084–85 (7th Cir. 2020).

101. *United States v. Perez*, 5 F.4th 390, 395–400 (3d Cir. 2021).

102. *Id.* at 399.

103. *Id.* at 402–04 (Bibas, J., concurring).

prior to consulting the commentary. Instead, courts considered the commentary side-by-side with the Guidelines.¹⁰⁴ In other words, if *Kisor* applies to the Sentencing Guidelines, lower courts will apply a fundamentally different methodology when determining whether to consult the commentary.

B. Why lower courts must continue to apply Stinson without Kisor's preconditions for deference

Lower courts must determine how *Kisor* impacts *Stinson* deference. There are three possible answers to this question: (1) *Kisor* modifies *Stinson* deference by imposing new preconditions that must be met before courts may consult the commentary to the Guidelines—in which case *Kisor* changed the way in which lower courts must interpret the Sentencing Guidelines, making all pre-*Kisor* constructions of the Guidelines that relied on the commentary presumptively suspect; (2) *Kisor* merely re-articulates limits that have always been inherent in *Stinson* deference—in which case lower courts should use *Kisor's* framework when consulting the commentary going forward, but past constructions of the Guidelines and their commentary under *Stinson* should be presumed to have always contained *Kisor's* limits; or (3) *Kisor* does not impact *Stinson* at all—in which case lower courts should continue to faithfully apply *Stinson* as if *Kisor* had never been decided.

Determining which of these three approaches binds lower courts is a pure question of vertical *stare decisis* that does not involve any reasoning from first principles about deference doctrines or administrative law. Lower courts are bound to follow the decisions of the

104. *United States v. Havis*, 927 F.3d 382, 386 (6th Cir. 2019); *see also, e.g.*, *United States v. Kozerski*, 969 F.3d 310, 313 (6th Cir. 2020) (a post-*Havis* Sixth Circuit case in which the court looked to principles of both “ordinary use” and “all seventeen pages” of the commentary side-by-side to interpret the meaning of the term “loss” in the Sentencing Guidelines, but did not conduct any threshold inquiry into whether consulting the commentary was warranted).

United States Supreme Court. They must follow “[their] best understanding of governing precedent” and apply precedent “neither narrowly nor liberally—only faithfully” even at the expense of a more coherent overall body of law.¹⁰⁵ This is presumptively as true for deference doctrines that prescribe a particular methodology for how lower courts should reconcile multiple categories of legal texts (like in *Stinson*, *Seminole Rock*, and *Chevron*) as it is for opinions that provide a substantive construction of law.¹⁰⁶ And it remains true even when the reasoning for old Supreme Court decisions is undermined by a different line of cases. As the Supreme Court has made clear, “if a precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line

105. *Massachusetts v. U.S. Dep’t of Health & Human Servs.*, 682 F.3d 1, 15–16 (1st Cir. 2012); *United States v. Johnson*, 921 F.3d 991, 1001 (11th Cir. 2019) (en banc). *But see* Richard Re, *Narrowing Supreme Court Precedent from Below*, 104 GEO. L.J. 921, 936–39, 949 (2016) (arguing lower courts should narrow Supreme Court precedent, even under an “authority model” of vertical *stare decisis*). While full engagement with this debate is beyond the scope of this Note, this Note takes the view that lower courts ought to consider themselves strictly bound by all Supreme Court precedent.

106. Determining exactly why deference doctrines bind lower courts admittedly raises difficult conceptual questions about the nature of vertical *stare decisis*. But whatever the theoretical difficulties, there appears to be no practical dispute as to whether deference doctrines bind lower courts. The Supreme Court clearly views its deference doctrines as binding on lower courts. *See, e.g.*, *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019) (opinion of the Court) (“[*Seminole Rock*] gives agencies their due, while also allowing—indeed *obligating*—courts to perform their reviewing and restraining functions.”) (emphasis added). Lower courts appear to share this view, treating the Supreme Court’s deference doctrines as binding on themselves. *See, e.g.*, Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 HARV. L. REV. 1298, 1302 (2018) (noting that all surveyed judges believed they were bound to apply *Chevron* deference). It is not obvious what would happen if the Supreme Court tried to push methodological vertical *stare decisis* to its outer limits. For example, could the Supreme Court issue an opinion directly instructing all lower court judges to take a side in the textualism vs. purposivism debate that would be binding in all future statutory interpretation cases? But such questions are beyond the scope of this Note, which treats the Supreme Court’s self-asserted (and at least in practice uncontested) authority to bind lower courts to deference doctrines as valid.

of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."¹⁰⁷

The Supreme Court's clear command to lower courts to continue to apply the Court's binding precedents until directly instructed otherwise is critical to conversations about *Stinson* and *Kisor*. It does not matter that *Kisor* clearly impacts *Stinson*'s reasoning. What matters is whether, as a doctrinal matter, the Supreme Court has exercised its prerogative of modifying *Stinson*'s methodological instructions for lower courts.

On close reading, *Kisor* does not modify *Stinson*, and *Stinson*'s limits cannot be read to have always been in *Kisor* all along. As such, lower courts must continue to faithfully apply *Stinson* and consult the commentary without any threshold inquiry into whether the Guidelines are sufficiently ambiguous. The rest of this subpart will consider and rebut in turn the arguments that *Kisor* either (1) directly modified *Stinson* deference or (2) rearticulated limits that were always inherent in *Stinson*. The argument that *Kisor* directly modifies *Stinson* deference fails because the *Stinson* Court created a new deference doctrine that is analogous to, but distinct from, *Seminole Rock* deference. While *Kisor* modifies *Seminole Rock* deference, it did not purport to modify the distinct doctrine in *Stinson*. The argument that *Stinson* deference always contained *Kisor*'s preconditions for deference fails because the *Stinson* Court explicitly disavowed some of *Kisor*'s limits.

WHY KISOR DOES NOT MODIFY STINSON: *Kisor* did not modify *Stinson* directly because *Stinson* deference is a distinct doctrine from *Seminole Rock* that merely analogizes to *Seminole Rock*'s holding. This Note will now explain why some lower courts have nevertheless treated *Kisor* as modifying *Stinson* deference before explaining in more detail exactly why *Stinson* ought to be viewed as a distinct deference doctrine from *Seminole Rock* that is unaffected by *Kisor*.

107. *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 483–84 (1989).

The argument that *Kisor* modifies *Stinson* is as follows: *Stinson* stated that the Sentencing Commission's commentary should "be treated as an agency's interpretation of its own legislative rule."¹⁰⁸ It then explained what this meant by directly quoting *Seminole Rock*'s "plainly erroneous" formation.¹⁰⁹ Thus, if courts change the way that they treat "an agency's interpretation of its own legislative rule," then they should change the way that they treat the Sentencing Commission's commentary too. By this logic, it would not matter if *Kisor* had overruled *Seminole Rock*, expanded *Seminole Rock*, or limited *Seminole Rock*. All would automatically apply to *Stinson* deference because "*Seminole Rock* deference" and "*Stinson* deference" are the same doctrine.

This is the basic argument advanced by the en banc Third Circuit in *Nasir*.¹¹⁰ In *Nasir*, the Third Circuit joined the D.C. Circuit and Sixth Circuit in rejecting Application Note 1 to Section 4B1.2.¹¹¹ The court quoted *Stinson*'s statement that the commentary should "be treated as an agency's interpretation of its own legislative rule" and its invocation of *Seminole Rock* before concluding that "so-called *Seminole Rock* deference . . . governs the effect to be given to the guidelines commentary."¹¹² It then determined that the circuit's past interpretation of Sections 4B1.1 and 4B1.2—which had deferred to Application Note 1—had been "informed by the then-prevailing understanding of the deference that should be given to agency interpretations" but that this level of deference "may have gone too far in affording deference to the guidelines' commentary under the standard set forth in *Stinson*" and that "after the Supreme Court's decision last year in *Kisor v. Wilkie*, it is clear that such an

108. *Stinson v. United States*, 508 U.S. 36, 44 (1993).

109. *Id.* at 45.

110. The Third Circuit granted an en banc rehearing of the case *sua sponte* after the panel heard oral argument but before any panel decision was announced. *United States v. Nasir*, No. 18-2888 (3d Cir. Mar. 4, 2020) (order *sua sponte* granting rehearing en banc).

111. See *United States v. Nasir*, 982 F.3d 144, 157–58 (3d Cir. 2020) (en banc); see also *United States v. Nasir*, 17 F.4th 495, 468–72 (3d Cir. 2021) (en banc).

112. *Nasir*, 982 F.3d at 157 (quoting *Stinson*, 508 U.S. at 44–45) (footnote omitted); see also *Nasir*, 17 F.4th at 470 (same).

interpretation is not warranted.”¹¹³ The court then listed the limitations articulated in *Kisor* before applying them to the interpretation of the commentary to the Guidelines without providing further analysis of the limitations’ relevance to the Commission’s commentary.¹¹⁴ The Third Circuit has since doubled down on this approach and has unequivocally stated that “[t]he *Auer* deference framework applies to the Sentencing Guidelines Commentary” before applying each step of the *Kisor* framework to an interpretation of the Guidelines.¹¹⁵

The Third Circuit’s reading of *Stinson* is understandable, but incorrect. *Stinson* created a new deference doctrine independent of *Seminole Rock*. *Stinson* did not treat Sentencing Guidelines as regulations subject to principles of administrative law. Instead, *Stinson* merely analogized between the commentary to the Sentencing Guidelines and interpretations of an agency’s regulations, noting the differences between the two areas of law. Both in *Stinson* itself and in subsequent opinions, the Court has treated the Sentencing Guidelines as *sui generis* and discussed *Stinson* deference as distinct from *Seminole Rock* deference.

113. *Nasir*, 982 F.3d at 158; see also *Nasir*, 17 F.4th at 470–71 (replacing “decision last year” with “recent decision” but otherwise providing the same quote).

114. See *Nasir*, 982 F.3d at 158–160; see also *Nasir*, 17 F.4th at 471. Judge Bibas also authored a separate concurrence in part that joined this analysis but concluded that it did not go far enough. See *Nasir*, 982 F.3d at 177–79 (Bibas, J., concurring in part). He reasoned that *Kisor* “awoke us from our slumber of reflexive deference” and that “[o]ld precedents that turned to the commentary rather than the text no longer hold.” *Id.* at 177. He further reasoned that *Kisor*’s exhortation that courts must “exhaust all the ‘traditional tools’ of construction” before deferring to an agency’s commentary meant that courts must apply the rule of lenity before deferring, meaning that courts should categorically decline to defer to harsher commentary in the face of textual ambiguity in the underlying guidelines. See *id.* at 178–79 (quoting *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019)). See also *Nasir*, 17 F.4th at 472–74 (Bibas, J., concurring) (reissuing Judge Bibas’s first *Nasir* opinion). The first time Judge Bibas made this argument, he wrote alone. See *Nasir*, 982 F.3d at 177. The second time, he was joined by five of his colleagues. See *Nasir*, 17 F.4th at 472.

115. *United States v. Perez*, 5 F.4th 390, 394 (3d Cir. 2021).

The question presented in *Stinson* was “[w]hether a court’s failure to follow Sentencing Guidelines commentary that gives specific direction that the offense of unlawful possession of a firearm by a felon is not a crime of violence under USSG Section 4B1.1 constitutes an ‘incorrect application of the sentencing guidelines’ under 18 U.S.C. Section 3742(f)(1).”¹¹⁶ The first two sentences in *Stinson* are:

In this case we review a decision of the Court of Appeals for the Eleventh Circuit holding that the commentary to the Sentencing Guidelines is not binding on the federal courts. We decide 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.¹¹⁷

The Court did not mention *Seminole Rock* or deference to agency regulations in its articulation of the standard for deference to commentary of the Guidelines. It was only later in the opinion, in the Court’s *reasoning* for its holding, that the Court cited *Seminole Rock*.¹¹⁸ Even here, the Court emphasized that *Seminole Rock* was merely an analogy. The Court noted that “[d]ifferent analogies have been suggested as helpful characterizations of the legal force of commentary” and considered alternative analogies before determining that “[a]lthough the analogy is not precise because Congress has a role in promulgating the guidelines, we think the Government is correct in suggesting that the commentary be treated as an agency’s interpretation of its own legislative rule.”¹¹⁹ In other words, in the very sentence in which the Court ultimately described

116. *Stinson v. United States*, 506 U.S. 972 (1992) (citation omitted).

117. *Stinson v. United States*, 508 U.S. 36, 37–38 (1993).

118. *See id.* at 45.

119. *Id.* at 43–44.

its new standard for analyzing the commentary as “an agency’s interpretation of its own rule,” it caveated that this standard was based on an analogy, and an imprecise one at that. The Court continued to use this analogizing language, and only referenced *Seminole Rock* after explaining that the Guidelines are “the equivalent” of legislative rules and that the Sentencing Commission’s commentary is “akin” to an agency’s interpretation of its own rules because it has the same “functional purpose.”¹²⁰ When the Court quoted *Seminole Rock*, it did so only in the context of explaining what it had previously held for deference to administrative agencies’ interpretation of its own regulations; it did not reword the standard to apply directly to the Sentencing Guidelines.¹²¹ Even after quoting *Seminole Rock*, the Court went on to describe the commentary as having even more weight than had been given to agency interpretations under *Seminole Rock*, stating that they are “binding on federal courts” and that “prior judicial constructions of a particular guideline cannot prevent the Commission from adopting a conflicting interpretation.”¹²²

Stinson’s square holding that a prior judicial construction of the guideline is trumped by a new interpretation is probably the single best piece of evidence that *Stinson* created a new doctrine that was separate and distinct from the ordinary administrative law principles in *Seminole Rock*. This holding calls to mind the Court’s later decision in *National Cable & Telecommunications Association v. Brand*

120. *Id.* at 45.

121. *Id.* (“As we have often stated, provided an agency’s interpretation of its own regulations does not violate the Constitution or a federal statute, it must be given ‘controlling weight unless it is plainly erroneous or inconsistent with the regulation.’”) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 410 (1945)).

122. *Id.* at 46. As discussed in Part I of this Note, *Stinson*’s statement that the Sentencing commentary (as well as the underlying Guidelines) are “binding on federal courts” was arguably in some sense abrogated by the Court’s later determination that the mandatory provisions in the Sentencing Guidelines violated the Sixth Amendment. *See generally United States v. Booker*, 543 U.S. 220 (2005); *see also id.* at 234 (specifically citing *Stinson* in support of the provision that the Court had “consistently held that the Guidelines have the force and effect of law” before determining this to violate the Sixth Amendment).

X Internet Services,¹²³ which held that an agency's new construction of a statute trumps a court's prior construction of that statute unless the court's original construction determined that the text of the underlying statute was unambiguous.¹²⁴ *Brand X* dealt with statutes, not regulations, but some lower courts have extended *Brand X*'s reasoning to agency interpretations of their own regulations.¹²⁵ Yet, *Brand X* and its extensions have been regarded as very controversial, not as a natural extension of *Stinson*¹²⁶—indeed, *Brand X* did not even cite *Stinson* as a relevant precedent.¹²⁷ But if *Stinson* was merely applying well-settled administrative law doctrines rather than treading new ground, then one would expect *Stinson* to be core to the conversation about *Brand X*.

The Supreme Court's subsequent treatment of *Stinson* further indicates that it regards *Stinson* deference as a separate doctrine from *Seminole Rock*. In *Neal v. United States*,¹²⁸ a unanimous Supreme Court cited *Stinson* for the proposition that “[t]he commentary . . . is the authoritative construction of the Guidelines absent plain inconsistency or statutory or constitutional infirmity” without referring

123. 545 U.S. 967 (2005).

124. *Id.* at 982–86.

125. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2433 & n.51 (2019) (Gorsuch, J., concurring in judgment) (citing *In re Lovin*, 652 F.3d 1349, 1353–54 (Fed. Cir. 2011); *Levy v. Sterling Holding Co.*, 544 F.3d 493, 502–03 (3d Cir. 2008)). In *Levy*, the Third Circuit cited its willingness to change its construction of commentary to the Sentencing Guidelines and *Stinson*'s comparison of the commentary to agency's commentary on regulations as additional justification for extending *Brand X*'s reasoning to *Auer*. *Id.* at 502–03. But this is a foretaste of the Third Circuit's error in *Nasir*. *Stinson* has an explicit *Brand X*-style holding, while *Auer* and *Seminole Rock* do not, making *Stinson* an inapposite justification for resolving *Brand X*-style issues in the *Seminole Rock* context.

126. See, e.g., *Brand X*, 545 U.S. at 1005–20 (Scalia, J., dissenting) (heavily criticizing *Brand X* as unprecedented and contrary to the Article III judicial power); *Baldwin v. United States*, 140 S. Ct. 690, 690–95 (Thomas, J., dissenting from denial of certiorari) (same); *Kisor*, 139 S. Ct. at 2433 (Gorsuch, J., concurring in judgment) (criticizing the implications of *Brand X*'s extension to *Auer*, but treating it solely as an extension of *Brand X* without any mention of *Stinson*).

127. See generally *Brand X*, 545 U.S. 967. But see *Levy*, 544 F.3d at 503 (basing its rationale for extending *Brand X* to regulations in part on *Stinson*).

128. 516 U.S. 284 (1996).

to *Seminole Rock* or broader administrative law principles.¹²⁹ Similarly, in *United States v. LaBonte*,¹³⁰ the Court characterized *Stinson*'s holding as "explaining that the Guidelines commentary 'is authoritative unless it violates the Constitution or a federal statute.'" ¹³¹ Once again, the Court neither cited *Seminole Rock* (or *Auer*) nor quoted *Stinson*'s characterization of *Seminole Rock* anywhere in the opinion.¹³² It also explicitly declined to determine whether the Sentencing Commission should—like a traditional administrative agency—receive *Chevron* deference, suggesting that the Court thought of deference to the Commission and deference to administrative agencies as distinct questions.¹³³ Most other non-majority writings from Supreme Court Justices similarly treat the questions surrounding *Stinson* as distinct from *Seminole Rock*, either declining to invoke *Seminole Rock* when characterizing *Stinson*'s holding or else acknowledging *Stinson*'s status as an analogy to rather than an application of *Seminole Rock*.¹³⁴

129. *Id.* at 293.

130. 520 U.S. 751 (1997).

131. *Id.* at 757 (quoting *Stinson v. United States*, 508 U.S. 36, 38 (1993)).

132. *See id.* at 752–62.

133. *Id.* at 762 n.6. In dissent, Justice Breyer, joined by Justices Stevens and Ginsburg, argued that more general principles of administrative law, particularly *Chevron*, should apply to the Sentencing Commission. In so doing, he cited *Stinson* as an example of the court "previously impl[ying]" that the Sentencing Commission is "subject . . . to the kind of judicial supervision and review that courts would undertake were the Commission a typical administrative agency." *Id.* at 778 (Breyer, J., dissenting). This is probably best understood as an argument in favor of the Third Circuit's position that *Stinson* more broadly incorporated principles of administrative law to the Sentencing Commission. But as the rest of this paragraph and its accompanying notes show, it is outweighed by substantial additional authority, including the very majority opinion from which Justice Breyer was dissenting.

134. *See Beckles v. United States*, 137 S. Ct. 886, 897 (2017) (Ginsburg, J., concurring in the judgment) (citing *Stinson* for the proposition that commentary that is "[h]armonious with federal law and [the Guideline's text]" is "authoritative," with no invocation of *Seminole Rock*); *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 114 (2015) (Thomas, J., concurring) (stating that *Auer*'s "reasoning has . . . been extended . . . into the realm of criminal sentencing" (emphasis added) and characterizing *Stinson*'s holding as "concluding that the Sentencing Commission's commentary on its Guidelines is *analogous* to an agency interpretation of its own regulations, entitled to *Seminole Rock* deference"

The Supreme Court has treated the Guidelines differently from ordinary regulations, and it has characterized *Stinson* deference as a distinct doctrine from *Seminole Rock* deference. Because *Kisor* only purported to address *Seminole Rock* deference, *Kisor* did not directly modify *Stinson*.

WHY KISOR DID NOT REARTICULATE LIMITS ALWAYS INHERENT IN STINSON: *Stinson* has not always included *Kisor*'s preconditions for deference for an extremely straightforward reason: *Stinson* explicitly held that lower courts must consider the commentary even when the Guidelines themselves are unambiguous. That alone is dispositive. This Note will now describe how at least one lower court has nonetheless treated *Kisor*'s limits as always having been inherent in *Stinson* and explain why that is an inaccurate reading of both *Stinson* and *Kisor*.

The argument that *Kisor* reinforced limits that were always inherent in *Stinson* is as follows: *Kisor* did not change the law; it applied *stare decisis* to uphold *Seminole Rock* deference while “reinforcing” limits that were always inherent in *Seminole Rock*.¹³⁵ Thus, when *Stinson* analogized to *Seminole Rock*'s statement that an agency's interpretation of its own regulation must be given “controlling

(emphasis added)); *Freeman v. United States*, 564 U.S. 522, 529 (2011) (plurality opinion) (characterizing *Stinson* as holding that “Guidelines commentary is authoritative,” without citation to *Seminole Rock*). *Cf. also* *United States v. Riccardi*, 989 F.3d 476, 491–92 (6th Cir. 2021) (Nalbandian, J., concurring in part and in the judgment) (conducting an analogous review of Sixth Circuit cases applying *Stinson*). *But see* *Kisor v. Wilkie*, 139 S. Ct. 2400, 2411 n.3 (2019) (plurality opinion) (including *Stinson* as one of sixteen cases in a list demonstrating that the Court's “pre-*Auer* cases applying *Seminole Rock* deference are legion” (emphasis added)); *Morse v. Republican Party of Virginia*, 517 U.S. 186, 200–01 (1996) (lead opinion) (citing both *Stinson* and *Seminole Rock* without any analysis or distinction between the cases to support the statement “We are satisfied that the Department[of Justice]'s interpretation of its own regulation is correct” when discussing a preclearance regulation enforcing § 5 of the Voting Rights Act; *Labonte*, 520 U.S. at 778 (Breyer, J., dissenting) (discussed *supra* at note 133).

135. *Kisor*, 139 S. Ct. at 2415 (opinion of the Court).

weight unless it is plainly erroneous or inconsistent with the regulation,”¹³⁶ it should be understood to have been analogizing to a standard that always included *Kisor*’s limits.¹³⁷

This argument is implicit in the First Circuit’s reasoning in *Lewis*.¹³⁸ Just like *Nasir*, *Lewis* dealt with Application Note 1 to Sections 4B1.1 and 4B1.2 of the Sentencing Guidelines.¹³⁹ And just like the Third Circuit, the First Circuit had previously interpreted these provisions in light of the Sentencing Commission’s commentary.¹⁴⁰ But unlike the Third Circuit, the First Circuit found itself bound by the law of the circuit doctrine to apply its previous construction of Sections 4B1.1 and 4B1.2.¹⁴¹ The court acknowledged that *Kisor* “sought to clarify the nuances of judicial deference,” but emphasized that *Kisor* “considered, but rejected a challenge to the *Auer/Seminole Rock* doctrine” and instead aimed to “recall the limits ‘inherent’” to the doctrine.¹⁴² The court then determined that the

136. *Stinson*, 508 U.S. at 45 (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 410 (1945)).

137. *Id.*

138. This is truer of the panel’s unanimous opinion than of the two-judge concurrence. The concurring judges’ reasoning is more similar to the Third Circuit’s, arguing that *Kisor* “clarified” the appropriate standard of deference and discussing *Kisor* as if it directly applied to *Stinson* deference. See *United States v. Lewis*, 963 F.3d 16, 28–29 (1st Cir. 2020) (Torruella and Thompson, JJ., concurring). This suggests the two approaches may be less different than they initially seem, particularly if *Kisor* is framed as clarifying limits inherent in “plain error review” and *Stinson* is viewed as an application of “plain error review.”

139. *Id.* at 18.

140. *Id.* at 22 (citing *United States v. Piper*, 35 F.3d 611 (1st Cir. 1994)).

141. *Id.* at 23. At least part of the difference between the First and Third Circuit’s reasoning is due to the fact that the Third Circuit heard the case *en banc*—and was thus free to overrule its past construction of the Sentencing Guidelines with or without intervening Supreme Court authority—while the First Circuit heard the case as a panel. The First Circuit panel emphasized that it was not commenting on what holding it would make if it had “the option of an uncircumscribed review.” *Id.* at 25. And two of the three judges on the panel stated that they would have construed the Guidelines differently, in spite of the commentary, had they not felt bound by existing circuit precedent. *Id.* at 27 (Torruella and Thompson, JJ., concurring). Nevertheless, as the rest of this subsection argues, the First Circuit’s unanimous panel decision’s reasoning was still distinct from the Third Circuit’s reasoning.

142. *Id.* at 23–24.

circuit's prior application of *Stinson* deference to Application Note 1 was consistent with *Kisor*. It reasoned that "nothing" in past cases "indicate[d] that the prior panels viewed themselves as straying beyond the zone of ambiguity" and that those panels did not "suggest that they regarded *Auer* deference as limiting the rigor of their analysis of whether the guideline was ambiguous."¹⁴³ The court further stressed that *Kisor* "expressly denied any intent to 'cast doubt on many settled constructions of rules' and inject 'instability into so many areas of law.'"¹⁴⁴ Even though two members of the *Lewis* panel considered Application Note 1 to be a poor interpretation of the Sentencing Guidelines, the court declined to allow *Kisor* to unsettle its past constructions.¹⁴⁵

The key benefit to this approach is that it takes the Supreme Court's own characterization of *Kisor* seriously: *Kisor* stylizes itself as an exercise of *stare decisis*. If *Kisor* really is just an exercise of *stare decisis* that reaffirms old principles of administrative law (and not, as the Third Circuit described it, a case that "cut back on what had been understood to be uncritical and broad deference to agency interpretations of regulations"¹⁴⁶) then *Stinson's* analogy to *Seminole Rock* really would have contained *Kisor's* limitations on deference all along. In other words, under the First Circuit's approach, *Kisor* did not actually change anything about either *Seminole Rock* or *Stinson* deference; it just gave courts applying both deference doctrines clearer language for applying these longstanding doctrines.

Unfortunately, this approach pushes the legal fiction of *stare decisis* in *Kisor* beyond what either *Kisor* or *Stinson* can bear. As a wide variety of commentators argued from the moment *Kisor* was decided, *Kisor* clearly narrowed *Seminole Rock's* scope.¹⁴⁷ Even the *Kisor* Court more or less acknowledged this; it conceded that: (1) the

143. *Id.* at 24.

144. *Id.* (quoting *Kisor*, 139 S. Ct. at 2422).

145. *Id.* at 27 (Torruella and Thompson, JJ., concurring).

146. *United States v. Nasir*, 17 F.4th 459, 471 (3d Cir. 2021) (en banc).

147. See, e.g., Bamzai, *supra* note 72, at 186 (describing the "conventional" understanding of *Auer/Seminole Rock* as "allow[ing] agencies to fill in the gaps in the regulations they promulgated"); *id.* at 192 (arguing that *Kisor* articulates a form of deference

Supreme Court had previously sent “mixed messages” about how *Auer* deference should be applied, (2) the Supreme Court had in some instances too quickly deferred to an agency’s commentary without sufficiently analyzing the underlying regulation; and (3) past excesses in *Auer*’s applications gave “a bit of grist” to Kisor’s argument that “*Auer* ‘bestows on agencies expansive, unreviewable’ authority”—hence the need for new limitations on *Auer*’s scope.¹⁴⁸ The *Kisor* Court may have invoked *stare decisis* to justify its holding, but it treaded new ground. *Kisor* does not require lower courts to adopt the legal fiction that every reference to *Seminole Rock* contained *Kisor*’s limits all along.

More fundamentally, when formulating a deference framework for commentary to the Guidelines, the *Stinson* Court considered and explicitly rejected some of the preconditions for deference that ultimately became part of *Kisor*. *Kisor* cited *Chevron* to explain the

similar to *Skidmore*); Larkin, *supra* note 81, at (“The [*Kisor*] Court completely reworked its doctrine regarding the deference that an agency’s construction of one of its rules should receive.”); Christopher J. Walker, *What Kisor Means for the Future of Auer Deference: The New Five-Step Kisor Deference Doctrine*, YALE J. ON REGUL.: NOTICE & COMMENT (June 26, 2019), <https://www.yalejreg.com/nc/what-kisor-means-for-the-future-of-auer-deference-the-new-five-step-kisor-deference-doctrine/> [<https://perma.cc/T7JZ-ED9V>]; Deborah Malamud, *Seila Law and the Roberts Court*, 2020 U. CHI. REV. ONLINE i, i (2020) (quoting former DOJ official Jeff Wood as calling deference “more the exception than the rule” under *Kisor*); *A New Dawn for Challenges to FDA Actions? Kisor and the Tenuous Vitality of Administrative Deference*, ROPES & GRAY (Nov. 3, 2019), <https://www.ropesgray.com/en/newsroom/alerts/2019/11/A-New-Dawn-for-Challenges-to-FDA-Actions-Kisor-and-the-Tenuous-Vitality-of-Administrative-Deference> [<https://perma.cc/DRY2-UTV6>] (arguing that *Kisor* will lead to courts being significantly more careful than before in determining whether or not *Auer* deference will apply); *Kisor*, 139 S. Ct. at 2425 (Gorsuch, J., concurring in judgment) (describing the majority as adding “new and nebulous qualifications” to *Auer* and accusing the majority of merely “pretend[ing] to abide by *stare decisis*”); *id.* at 2448 (Kavanaugh, J., concurring in judgment) (arguing that the majority’s approach essentially adopted the Solicitor General’s request to “clarify and limit *Auer*”); *cf. id.* at 2424–25 (emphasizing that the limits articulated by the Court mean that “the cases in which *Auer* deference is warranted largely overlap with” those in which *Skidmore* deference would be persuasive). *But see id.* at 2415 n.4 (opinion of court) (“The proper understanding of the scope and limits of the *Auer* doctrine is, of course, not set out in any of the opinions that concur only in the judgment.”).

148. *Kisor*, 139 S. Ct. at 2415.

kind of exhaustive inquiry into meaning that must occur before courts consider an agency's interpretation of its own regulations.¹⁴⁹ That extension of *Chevron* step-one-style analysis to the *Seminole Rock* context is arguably the most consequential portion of *Kisor*.¹⁵⁰ But *Stinson* rejects any analogy between *Chevron* and the commentary because the "commentary explains the guidelines and provides concrete guidance as to *how even unambiguous guidelines are to be applied* in practice."¹⁵¹ This instruction makes sense because many provisions of the commentary do not purport to be interpretations of the Guidelines. Consider Section 2A1.2 of the Guidelines and its application note. The guideline straightforwardly assigns a base offense level of 38 to second degree murder and the application note instructs judges that an upward departure from the Guidelines may be appropriate if a defendant's conduct in committing second degree murder was particularly heinous.¹⁵² There is no plausible way to treat the text of the guideline as ambiguous, nor is there any plausible way to call the application note an "interpretation" of Section 2A1.2. Under *Kisor*, courts would have no business looking at the application note because there would be no ambiguity to resolve. But this is exactly the kind of note explaining "how even unambiguous guidelines are to be applied in practice" that the *Stinson* Court mandated lower courts to consider.¹⁵³

149. *Id.* (citing *Chevron U.S.A. v. National Resource Defense Council, Inc.*, 467 U.S. 837, 843 n.9 (1984)).

150. *Cf. id.* at 2448 (Kavanaugh, J., concurring in judgment) ("Importantly, the majority borrows from footnote 9 of this Court's opinion in *Chevron* to say that a reviewing court must 'exhaust all the "traditional tools" of construction' before concluding that an agency rule is ambiguous and deferring to an agency's reasonable interpretation.").

151. *Stinson v. United States*, 508 U.S. 36, 44 (1993) (emphasis added); *see also* *United States v. Moses*, 23 F.4th 347, 354–55 (4th Cir. 2022) ("Indeed, *Stinson* explicitly recognized that commentary can be useful even when a Guideline is 'unambiguous.'" (quoting *Stinson*, 508 U.S. at 44)).

152. GUIDELINES, *supra* note 16, § 2A1.2 & cmt. n.1.

153. This portion of *Stinson*'s reasoning strains the analogy between *Seminole Rock* and *Stinson*. When a Court "considers" commentary like the application note to Section 2A1.2, it is determining whether to "defer" to anything. It's merely considering whether other factors justify a departure from the Guidelines range. But the Supreme Court did not discuss this distinction.

Stinson's explicit applicability to even unambiguous guidelines is dispositive; *Stinson* did not always contain *Kisor*'s limits. *Kisor* considers agency interpretations of their own regulations to only be relevant after a threshold demonstration of ambiguity, while the *Stinson* Court considers the application notes to be more than just an "interpretation" of the text of the Guidelines and to not be dependent on any threshold ambiguity. In other words, *Stinson* squarely considered and disavowed *Kisor*'s most significant precondition for deference.¹⁵⁴

In short, *Stinson* deference is a distinct doctrine from *Seminole Rock*, the Supreme Court has not extended *Kisor*'s preconditions for deference to *Stinson*, and the standards articulated in *Kisor* were not part of *Stinson* deference all along. Accordingly, until directed otherwise by the Supreme Court, lower courts should continue to faithfully apply *Stinson* and consult the application notes to even unambiguous guidelines without a *Kisor*-style threshold analysis.

154. *Stinson*'s explicit applicability to unambiguous Guidelines is not *Stinson*'s only contradiction of *Kisor*. *Kisor* says that comments to regulations are not "binding" on anyone, because they have no impact without the underlying text of the regulation. *Kisor*, 139 S. Ct. at 2420. But *Stinson* repeatedly described the commentary to the Sentencing Guidelines as "binding" on federal courts. *Stinson*, 508 U.S. at 42–43. See also *infra* Part IV (exploring the impact of *Booker v. United States* on this holding and *Booker*'s implications for the *stare decisis* effect that should be given to *Stinson*).

IV. WHY THE SUPREME COURT SHOULD OVERRULE *STINSON*

Lower courts are bound by the Supreme Court's decisions—you could go so far as to say that vertical *stare decisis* is “an inexorable command.”¹⁵⁵ But, as controversial as horizontal *stare decisis* may be, everyone agrees that horizontal *stare decisis* is “not an inexorable command.”¹⁵⁶ The Supreme Court is well within its power to modify or overrule *Stinson*.¹⁵⁷

Regardless of one's view of the appropriate level of deference to the commentary, *Stinson* sorely needs updating and clarification. The Supreme Court, not the Courts of Appeals, has the prerogative of revising its precedents—and rightly so.¹⁵⁸ But the effectiveness of this hierarchical system depends on the Supreme Court's willingness to rectify incoherence in its decisions. The “correct” answer to the burgeoning circuit split over *Kisor*'s applicability to *Stinson*—a framework under which *Stinson* and *Kisor* are both good law and *Kisor*'s threshold inquiry is not applied to the Guidelines—is not internally coherent. It requires lower courts to simultaneously say that the commentary to the Guidelines is akin to an agency's interpretations of its own regulations even as they are subject to different methodological frameworks.

155. Cf. *Kisor*, 139 S. Ct. at 2422 (quoting *Payne v. Tennessee*, 501 U.S. 808, 828 (1991)) (emphasizing that horizontal *stare decisis* is “not an inexorable command”).

156. *Id.*

157. This Note uses “overrule *Stinson*” to refer to what it would mean for the Supreme Court to clearly indicate that courts should no longer give deference to the commentary to the Sentencing Guidelines. *Stinson* is on its own terms a methodological holding; the *Stinson* Court did not give a binding construction for any particular provision of the Guidelines, but merely vacated the judgment of the lower court and remanded for the court to reinterpret the guideline in question while giving proper weight to the commentary. See *Stinson*, 508 U.S. at 37–38, 48. The Supreme Court discusses “overruling” cases that stand for methodological principles by discussing whether those principles should be abandoned. See, e.g., *Kisor*, 139 S. Ct. at 2408 (“The only question presented here is whether we should overrule [*Seminole Rock* and *Auer*], discarding the deference they give to agencies.”).

158. *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 483–84 (1989).

There are three basic ways that the Supreme Court could modify *Stinson* in order to create a coherent overall system: (1) The Court could reaffirm the relationship between the commentary to the Guidelines and an agency's interpretation of its own regulations and extend *Kisor's* preconditions to *Stinson*. This would reaffirm *Stinson's* core analogy while repudiating some of its dicta and decreasing the actual level of deference given to the commentary. (2) The Court could reject the similarity between the commentary and an agency's interpretation of its own regulations and offer a new justification for *Stinson's* deferential approach to the commentary. This would reaffirm the deferential standard announced in *Stinson* while providing a new rationale for the deference. Or (3) the Court could repudiate both the reasoning and the holding of *Stinson*, and instead instruct lower courts to treat the actual text of the Guidelines as controlling and to give no more than *Skidmore* respect to the commentary.

Some readers may think that all deference doctrines should be overruled, and that the Supreme Court should accordingly overrule *Stinson* and *Kisor/Seminole Rock* (and probably *Chevron* for good measure). While that is an understandable position, this Part will treat *Kisor* as good law.¹⁵⁹ If the Court decides to repudiate deference doctrines more broadly, then *Stinson's* fate is obvious: it will be overturned because it is a deference doctrine, and there is nothing more to discuss. But even if the Court does not wish to revisit *Kisor* or comment more broadly on deference doctrines, lower courts still need guidance on how to treat the commentary to the Sentencing Guidelines. The Court can provide this guidance by either: (1) extending *Kisor* to *Stinson*; (2) finding a new justification

159. The arguments for and against *Seminole Rock* more broadly are well-trodden. Compare, e.g., John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612 (1996), and *Kisor*, 139 S. Ct. at 2425–48 (Gorsuch, J., concurring in the judgment), with Cass R. Sunstein & Adrian Vermeule, *The Unbearable Rightness of Auer*, 84 U. CHI. L. REV. 297 (2017), and *Kisor*, 139 S. Ct. at 2410–14, 2418–23 (plurality opinion).

for *Stinson's* deferential standard; or (3) overruling *Stinson* altogether. The question of which of these routes the Court should take, assuming it chooses *not* to revisit *Kisor*, is the focus of the remainder of this Note.

This Part argues that the Court can and should overrule *Stinson*, even while giving horizontal *stare decisis* to the holding and reasoning of *Kisor*. The case for *stare decisis* as applied to *Stinson* is far weaker than the case for *stare decisis* as applied to *Seminole Rock*. And while the developments that have weakened *Stinson's* reasoning do not unambiguously counsel against deference, they do not unambiguously counsel in favor of deference either. Given *Stinson's* weak claim to *stare decisis*, it is appropriate to ask as a matter of first principles whether deference to the Commission's commentary is justified—even assuming *arguendo* that the category of deference doctrines is legitimate. And as a matter of policy, both the principles of lenity necessarily implicated by criminal sentencing and the different policy rationales for deference to the Sentencing Commission and deference to traditional administrative agencies provide principled grounds to end deference to the Sentencing Guidelines commentary.

A. *The case for stare decisis is weaker for Stinson than it was for Seminole Rock.*

As a threshold matter, in order for the Court to justify overturning *Stinson* while treating the holding and reasoning of *Kisor* as good law, the Court must determine that *Stinson* has a weaker *stare decisis* justification than *Seminole Rock*.¹⁶⁰ If the Court overturned a

160. This Note will focus on the *stare decisis* factors proposed by the Court in *Kisor* itself. Although the three factors in *Kisor* are not a comprehensive framework for determining whether a precedent should be overturned, it is clearly relevant that a majority of the Court looked to those factors when deciding whether to abandon an analogous deference doctrine. This approach also has the advantage of not requiring a resolution to the incredibly complex and contested questions about the nature of horizontal *stare decisis* in the Supreme Court. Compare, e.g., *June Medical Services L.L.C. v. Russo*, 140 S. Ct. 2103, 2134–35 (2020) (Roberts, C.J., concurring in the judgment) (articulating a view of *stare decisis* that included an emphasis on a precedent's “administrability, its fit

deference doctrine that has an even better claim to *stare decisis* than *Seminole Rock* had, then it would be repudiating the reasoning of *Kisor*. Of course, just because a deference doctrine's claim to *stare decisis* is weaker than *Seminole Rock*'s, that does not necessarily mean that the doctrine should be overruled. But determining that *Stinson*'s case is weaker is still a necessary threshold inquiry for anyone who wishes to treat *Kisor* as fully legitimate.

The *Kisor* Court articulated three reasons for applying *stare decisis* and refusing to overturn *Seminole Rock*. First, overturning *Seminole Rock* would require rejecting a particularly long line of cases.¹⁶¹ Second, it would disrupt many settled constructions in administrative law.¹⁶² And third, *Kisor* failed to provide any “special justification” — such as demonstrated unworkability or legal developments that have made the doctrine a “doctrinal dinosaur” — and a special justification is necessary to justify overturning *Seminole Rock* because Congress could modify *Seminole Rock* deference at any time.¹⁶³

To varying degrees, all three of these reasons apply with less force to *Stinson* than they do to *Seminole Rock*. In particular, *Stinson* is filled with “doctrinal dinosaurs” that undermine its continued vitality.

with subsequent factual and legal developments, and the reliance interests that the precedent has engendered”), *with Ramos v. Louisiana*, 140 S. Ct. 1390, 1414–15 (2020) (Kavanaugh, J., concurring) (articulating a three-part test for when to overrule precedent that looks to whether a case is grievously wrong, has created real-world or jurisprudential negative effects, and would not unduly upset reliance interests); *with Gamble v. United States*, 139 S. Ct. 1960, 1984 (2019) (Thomas, J., concurring) (“When faced with a demonstrably erroneous precedent, my rule is simple: We should not follow it.”). *Stinson* could of course be analyzed differently through any one of these frameworks (or any other possible framework for horizontal *stare decisis* for methodological decisions by the Supreme Court). But applying the factors in *Kisor* cabins the inquiry of this Note to the Court's most recent stated approach to *stare decisis* for a deference doctrine. That approach is consistent with this Part's *arguendo* assumption that *Kisor* should remain good law.

161. *Kisor*, 139 S. Ct. at 2422 (opinion of the Court).

162. *Id.*

163. *Id.* at 2422–23 (quoting *Kimble v. Marvel Ent., LLC*, 135 S. Ct. 2401, 2411 (2015)).

Unlike *Seminole Rock*, *Stinson* does not have a “long line of cases” reaffirming its holding. As the *Kisor* Court emphasized, *Seminole Rock* was decided in 1945, had been explicitly reaffirmed in *Auer*, had been applied by the Supreme Court in “dozens of cases,”¹⁶⁴ and had its origins in the nineteenth century.¹⁶⁵ *Stinson*, meanwhile, was decided in 1993, has never been explicitly reaffirmed, and has seemingly never meaningfully impacted another Supreme Court decision.¹⁶⁶

The argument from upsetting settled constructions is the best *stare decisis* argument against rejecting *Stinson* deference. Rejecting *Stinson* deference would call into question any prior construction of a guideline that relies on commentary. But the potential for disruption is somewhat mitigated for two reasons. First, *Seminole Rock* is applied to a far greater body of law than *Stinson*. The complete 2018 Annotated Copy of the Sentencing Guidelines is a hefty but manageable 608 pages.¹⁶⁷ Meanwhile, the 2018 Code of Federal Regulations was a whopping 185,434 pages.¹⁶⁸ There are simply fewer provisions of the Sentencing Guidelines to be reconstrued than there are agency regulations, which could mean that upsetting past constructions would be less disruptive. Second, it is not obvious that *Kisor*’s attempt to avoid upsetting old constructions succeeded—as evidenced by the Third Circuit’s decision to reexamine its construction of Sections 4B1.1 and 4B1.2 of the Guidelines in light of *Kisor*. Accordingly, while the argument against upsetting

164. *Id.* at 2422.

165. *Id.* at 2412.

166. *Stinson* has twice been invoked in determining that a portion of the commentary was inconsistent with a statute. See *Neal v. United States*, 516 U.S. 284, 294 (1996); *United States v. Labonte*, 520 U.S. 751, 752–53 (1997). But provisions of the commentary that are inconsistent with statutory law would be invalid under any level of deference.

167. See U.S. SENT’G COMM’N, U.S. SENT’G GUIDELINES MANUAL (2018).

168. *Code of Federal Regulations*, FED. REG. (2019), <https://uploads.federalregister.gov/uploads/2020/04/01123111/cfrTotalPages2019.pdf> [https://perma.cc/5RF4-RTPP]. The 2021 Sentencing Guidelines Manual also has 608 pages, because it is almost entirely a reprint of the 2018 manual due to the Commission’s multiyear lack of quorum. See GUIDELINES, *supra* note 16. Statistics on the number of pages in the 2021 Code of Federal Regulations are not yet available.

past constructions is a reason to maintain the current, hyper-deferential *Stinson* doctrine (presumably while articulating a new rationale for why comments to the Sentencing Guidelines deserve more deference than an agency's interpretations of its own regulation), it probably is not a good reason to merely extend *Kisor*'s limits to *Stinson* rather than overrule *Stinson* altogether.

But the strongest case against giving significant *stare decisis* weight to *Stinson* comes from other developments in the doctrine. The three major changes discussed in Part I of this Note—the rise of notice and comment for commentary to the Guidelines, the enactment of the Congressional Review Act, and the non-binding nature of the Guidelines after *United States v. Booker*—mean that *Stinson*'s reasoning now relies on “doctrinal dinosaurs.” *Stinson* assumes that changes to the commentary do not receive the procedural rigor that they now receive. *Stinson*'s only distinction between the Guidelines and an agency's regulations is no longer meaningful. And *Booker* raises real questions about how analogous the Guidelines are to regulations at all.

Furthermore, *Kisor* itself broke the relationship between *Stinson*'s analysis and its holding, forcing the Supreme Court to modify its precedent to at least some extent. The Court could theoretically extend *Kisor*'s limits to *Stinson* and call it an exercise of “*stare decisis*,” but that would require ignoring *Stinson*'s straightforward disavowals of *Kisor*'s limits discussed in Part II.B of this Note. The Court must rework at least part of *Stinson*; it cannot simply “stand by things decided” even if it wants to.¹⁶⁹ This makes the *stare decisis* case for *Stinson* relatively weak.

B. The post-Stinson developments do not give the Court a clear path forward, requiring the Court to turn to at least some first principles or policy analysis.

169. Cf. *June Medical Services L.L.C. v. Russo*, 140 S. Ct. 2103, 2134 (2020) (Roberts, C.J., concurring in the judgment) (“*Stare decisis* (‘to stand by things decided’) is the legal term for fidelity to precedent.”).

When an old Supreme Court decision has been eroded by changes in other areas of the law, the natural first question is what new rule would best account for the law's development. But while doctrinal developments weaken *Stinson's* case for *stare decisis*, they do not establish what the actual level of deference to the commentary should be; the implications of the doctrinal developments cut both ways. Accordingly, the Court must turn elsewhere to determine the correct level of deference to the commentary.

At first glance, the post-*Stinson* developments in the law might seem to *bolster* the case for deference to the commentary. The enactment of the Congressional Review Act makes an analogy between the Sentencing Guidelines and an agency's regulations more apt, not less. And while *Booker* clearly makes the Guidelines less like an agency's regulations, it also makes the stakes of deference somewhat lower. One could argue that the post-*Booker* Commission simply needs to communicate its advisory view of sentencing lengths to judges, and whether the Commission does so via the Guidelines or via commentary is relatively unimportant given that neither has the force of law. And the proceduralization of amendments to the commentary creates a functionalist case for deference.

On closer examination, the first two changes do not actually meaningfully improve or undermine the case for deference to the commentary. The Congressional Review Act is only relevant insofar as it makes *Stinson's* dicta outdated; it's not actually salient to the question whether the Guidelines ought to receive deference in their own right. And *Booker* may make the Guidelines advisory, but the Sentencing Commission still has a statutory obligation to advise courts via the Guidelines and no obligation to issue any commentary whatsoever. Even after *Booker*, there is a clear legal distinction between the Guidelines and the commentary.

The implications of the Sentencing Commission's proceduralization of amendments to the commentary demand more serious analysis. Any functionalist case against deference to the commentary is severely undermined by the fact that most of the commentary goes

through the same notice and comment procedures as the Guidelines themselves. The procedural rigor of notice and comment is often used as the justification for (and a precondition of) *Chevron* deference, under the presumption that Congress is only comfortable delegating the authority to resolve ambiguities to an agency when procedural rigor exists.¹⁷⁰ And *Seminole Rock* deference is justified even without the procedural rigor of notice and comment for an agency's interpretations of its own rules.¹⁷¹ In light of this, one could easily imagine a "functionalist *Stinson*" where the commentary would receive deference commensurate with the procedure with which it was adopted.

But there are strong formalist reasons to ignore the Commission's self-imposed procedures. Once again, the commentary and the Guidelines are legally distinct. Congress commanded the Commission to promulgate the Guidelines. The Commission has voluntarily assumed the role of authoring the commentary even though it is not mentioned in the statutory text. This statutory difference is more fundamental than the real-world procedures through which the guidelines and commentary are amended.

Even focusing on the amendment procedures, amendments to the commentary do not legally receive the statutory procedures that apply to the Guidelines. The Commission *explicitly* foreswears the applicability of 28 U.S.C. § 994(x)'s notice and comment requirements to amendments to the commentary.¹⁷² Rather, the Commission endeavors only to "the extent practicable" to ensure that "comparable opportunities for public input on proposed policy statements and commentary considered in conjunction with guideline amendments."¹⁷³ The same can be said when the Commission submits amendments to the commentary to Congress. Thus, even when—as a matter of real-world practice—an amendment to the

170. See, e.g., *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001).

171. See, e.g., *Kisor*, 139 S. Ct. at 2420–21.

172. RULES, *supra* note 17, § 4.3.

173. *Id.*

commentary goes through the exact same procedures as an amendment to the underlying guidelines does, the amendment to the commentary is—as a matter of law—*not* being subjected to Section 994(x) by the Commission’s own account.

A procedure-based approach to *Stinson* deference would also raise serious practical difficulties. A functionalist case for deference based on the Commission’s procedural practices would presumably only argue for deference when the proper procedures have actually been used.¹⁷⁴ But the Commission retains flexibility to determine how much procedural rigor to give amendments to the commentary. This means that any given provision of the commentary is liable to be the product of a patchwork of procedure.

Piecing together this patchwork poses logistical and legal difficulties. For example, the much disputed Section 4B1.2 and its application notes were enacted in 1987, and they collectively have been amended thirteen times since.¹⁷⁵ Even identifying the level of procedure received for each of these thirteen amendments creates a substantial logistical burden, because the Sentencing Commission (1) does not identify the procedure with the amendment text and (2) only indicates the effective date of the amendment (rather than the date of the amendment’s promulgation or of any notice and comment proceedings).¹⁷⁶ This means that a judge or law clerk concerned with the procedure that each amendment received must find and piece together every reference to the new amendment in the Federal Register to discern whether or not the amendments were subjected to notice and comment (or some analogous public

174. Cf. Matthew C. Stephenson & Miri Pogoriler, *Seminole Rock’s Domain*, 79 GEO. WASH. L. REV. 1449, 1459–64 (2011) (describing the rise of a “pay me now or pay me later” approach to judicial deference to agencies where agencies are functionally presented with a choice between either “ex ante procedural safeguards or ex post judicial scrutiny”).

175. See GUIDELINES, *supra* note 16, § 4B1.2 hist. n.

176. See, e.g., *id.*

hearing) and submitted to Congress.¹⁷⁷ Even in the best of circumstances, that would be a time-consuming and error-prone process.

What judges would actually do with this information is even more unclear. Should the relevant question be the level of procedure given to the most recent amendment? Or the lowest level of procedure across all amendments? Or the procedure when the disputed language was entered into the commentary? What if the language received a stylistic change that may or may not have had substantive effect? A case-by-case functionalist approach to deference to the commentary raises more questions than answers.

That being said, many rhetorical attacks on *Stinson* cannot be justified in light of the real-world commentary amendment procedures. For example, Judge Thapar has argued that “[i]t is one thing to let the Commission . . . promulgate Guidelines that influence how long defendants remain in prison. It is entirely another to let the Commission interpret the Guidelines on the fly and without notice and comment.”¹⁷⁸ This argument loses its force when applied to provisions of the commentary that went through notice and comment. Those calling for *Stinson* to be overruled cannot rely solely on the salutary effects of administrative procedure.

But the rhetorical implications of the contemporary amendment procedures cut both ways. Given that the Commission already ordinarily subjects its amendments to the commentary to the same procedures as its amendments to the Guidelines, the end of *Stinson* deference would be unlikely to seriously undermine Sentencing Commission’s ability to do its job. If *Stinson* were overturned, the Sentencing Commission could simply follow 28 U.S.C. § 994’s procedures and issue a new guideline formally incorporating all existing commentary into the Guidelines themselves, either as totally

177. To its credit, the Sentencing Commission maintains a list of its Federal Register notices on its website, somewhat easing this burden. See *Federal Register Notices*, U.S. SENT’G COMM’N, <https://www.ussc.gov/amendment-process/federal-register-notices> [<https://perma.cc/X52D-93UE>]. But even this list does not go back farther than 1996, omitting over a decade of amendments.

178. *United States v. Havis*, 907 F.3d 439, 451 (6th Cir. 2018) (Thapar, J., concurring).

equal with all other guidelines or with the caveat that any portion of the Guidelines stylized as “commentary” would yield in the face of a truly irreconcilable conflict with a portion of the Guidelines not stylized as commentary. The Commission could then formally invoke Section 994’s procedures every time it amends the commentary going forward. Even under the most formalist, deference-averse model of the judicial role, a court interpreting commentary that formally had been subjected to Section 994 would need to “‘seek to harmonize’ a guideline’s text with its commentary”¹⁷⁹—i.e., the most deferential existing articulation of *Stinson* deference—under the same basic principle by which judges seek to reconcile different provisions within a statute.¹⁸⁰ In other words, with minimal effort, the Commission has the authority to establish the practical effect of the most deferential understanding of *Stinson* deference even if *Stinson* is overturned. The Commission would still be free to issue commentary without these procedures should it so choose—such commentary simply would not receive deference from courts. Overturning *Stinson* deference would thus address the formal distinction between the Guidelines and the commentary without any obvious practical limitations on the Sentencing Commission.

The Sentencing Commission’s contemporary practices undermine *Stinson*’s reasoning. Left with an outdated old precedent and no clear path forward, the Court may appropriately consider first principles and address the legal and policy arguments for varying levels of deference to the commentary. Looking to first principles, there are two additional arguments for declining to defer to the commentary that do not apply to agencies’ interpretations of their own regulations: principles of lenity and the inapplicability of *Seminole Rock*’s traditional policy rationales in the sentencing context.

179. *United States v. Cingari*, 952 F.3d 1301, 1308 (11th Cir. 2020) (quoting *United States v. Genao*, 343 F.3d 578, 584 n.8 (2d Cir. 2003)).

180. See ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 180–82 (2012).

C. Principles of lenity counsel against *Stinson* deference

Outside of broader critiques against deference doctrines, the best argument for overruling *Stinson* is likely grounded in lenity. *Stinson* deference by definition impacts the liberty of criminal defendants. Naturally, this implicates lenity, both as a substantive canon that interacts with other substantive canons and as a broader policy principle. As a substantive canon, the rule of lenity arguably trumps *Stinson* deference—as Judge Bibas has suggested.¹⁸¹ If the rule of lenity trumps *Stinson*, then *Stinson* deference does so little work that it is difficult to justify its continued existence. The relationship between the rule of lenity and deference doctrines is admittedly unclear; there are serious arguments against treating the rule of lenity as so robust as to override the Court’s deference doctrines. But the very existence of these questions raises serious policy concerns about why judges should defer to the Commission’s guidance to impose harsher penalties than the Guidelines themselves suggest. Whether as a substantive canon or as merely a point of policy, lenity counsels against *Stinson*.

Deference doctrines like *Stinson* and *Seminole Rock* can be conceived as substantive canons.¹⁸² But substantive canons can conflict, in which case there needs to be a legal rule for how to reconcile them.¹⁸³ Another substantive canon is the rule of lenity. The rule of lenity states that ambiguities in the criminal law will be resolved in the favor of criminal defendants.¹⁸⁴ Lenity is associated with principles of due process (giving defendants fair notice), the separation

181. See *United States v. Nasir*, 17 F.4th 459, 472–74 (3d Cir. 2021) (en banc) (Bibas, J., concurring).

182. Cf. JOHN F. MANNING & MATTHEW C. STEPHENSON, *LEGISLATION AND REGULATION* 1054 (3d. ed. St. Paul, MN: Foundation Press 2017) (arguing *Chevron* can be viewed as a substantive canon).

183. Cf. *id.* at 1054–87 (exploring how courts and scholars have treated conflicts between *Chevron* and substantive canons).

184. See SCALIA & GARNER, *supra* note 180, at 296. Note that Scalia and Garner more precisely define the rule of lenity as being that “[a]mbiguity in a *statute* defining a crime or imposing a penalty should be resolved in the defendant’s favor.” *Id.* (emphasis

of powers (ensuring only legislatures make conduct criminal), and a substantive preference for individuals' liberty, all of which are fundamental ideas in our legal system.¹⁸⁵ Because *Stinson* deference necessarily implicates sentencing, its interaction with the rule of lenity is particularly significant.

Several judges have forcefully argued that the rule of lenity should be understood to categorically trump all deference doctrines. As discussed, Judge Bibas has made this argument about *Stinson* deference in particular.¹⁸⁶ But other judges have made this same basic argument in the context of *Chevron*. For example, Judge Murphy—joined by seven other judges on an equally divided en banc Sixth Circuit—recently endorsed an argument long-made by Chief Judge Sutton that the rule of lenity forecloses the application of *Chevron* to statutes that contain criminal penalties. He reasoned that “*Chevron* sometimes allows agencies to interpret ambiguities in civil statutes subject to deferential judicial review. Yet an agency’s law-interpreting power should likewise fall away in criminal matters,” and that “if a canon of construction such as the rule of lenity ‘resolves a statutory doubt in one direction, an agency may not reasonably resolve it in the opposite direction.’”¹⁸⁷ Justice Scalia

added). The question whether the Guidelines are covered by the rule of lenity is contested, as discussed in more detail *infra* at notes 186–205 and accompanying text.

185. See *United States v. Nasir*, 17 F.4th 459, 472–73 (3d Cir. 2021) (Bibas, J., concurring).

186. See, e.g., *id.* at 473–74 (Bibas, J., concurring) (arguing that the rule of lenity should trump *Stinson* deference); *Gun Owners of America, Inc. v. Garland*, 992 F.3d 446, 454–68 (6th Cir. 2021) (holding that the rule of lenity trumps *Chevron* deference), *vacated by* 2 F.4th 576 (6th Cir. 2021) (granting rehearing en banc). It is perhaps notable that the two circuits where lenity-based skepticism of deference doctrines has been most clearly articulated are also the two circuits that have most explicitly extended *Kisor*’s limits to *Stinson* deference. This is not doctrinally necessary; this Note critiques *Stinson* on lenity grounds while disagreeing with the extension of *Kisor* to *Stinson*. But it may indicate that some circuits are more open to limitations of *Stinson* than others, regardless of what form those limitations take.

187. *Gun Owners of America v. Garland*, 19 F.4th 890, 922, 927 (6th Cir. 2021) (en banc) (Murphy, J., dissenting, joined by Sutton, C.J., and Batchelder, Kethledge, Thapar, Bush, Larsen, Nalbandian, JJ.) (quoting *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 733 (6th Cir. 2013) (Sutton, J., concurring)) (citations omitted).

and Justice Thomas also endorsed this approach, straightforwardly declaring that “[a] court owes no deference to the prosecution’s interpretation of a criminal law. Criminal statutes ‘are for the courts, not for the Government, to construe.’”¹⁸⁸ Still other judges have made similar arguments, with a recent uptick in arguments over the relationship between *Chevron* and the rule of lenity in litigation over the lawfulness of the federal government’s recent ban on bump stocks.¹⁸⁹

The argument that lenity trumps deference doctrines has sweeping implications, both as applied to *Stinson* and beyond. As applied to *Stinson*, it makes *Stinson* deference functionally obsolete as applied to interpretive commentary. If lenity trumps *Stinson*, then the commentary must be disregarded whenever it instructs judges to interpret ambiguous guidelines in a way that is unfavorable to the defendant. But if the commentary instructs judges to interpret a guideline in a way that is more favorable to the defendant than the alternative, then *Stinson* deference and the rule of lenity point to the same result, meaning that *Stinson* deference is doing no independent work. Only if a comment to an ambiguous regulation has “no consistent tilt” for or against defendants will it be deferred to in a way that has bite.¹⁹⁰ But given that the Guidelines exist in order to

188. *Whitman v. United States*, 574 U.S. 1003, 1003 (2014) (statement of Scalia, J., respecting the denial of certiorari, joined by Thomas, J.) (quoting *Abramski v. United States*, 573 U.S. 169, 191 (2014)).

189. *See, e.g., Aposhian v. Wilkinson*, 989 F.3d 890, 898 (10th Cir. 2021) (Tymkovich, C.J., dissenting from vacatur of order to grant rehearing en banc, joined by Hartz, Holmes, Eid, and Carson, JJ.) (“*Chevron* . . . cannot and should not jump the line when courts interpret an ambiguous statute We still have one . . . [traditional tool of interpretation] left in our toolbox: the rule of lenity.”); *Guedes v. BATFE*, 140 S.Ct. 789, 790 (2020) (Statement of Gorsuch, J., respecting the denial of certiorari) (“[W]hatever else one thinks about *Chevron*, it has no role to play when liberty is at stake.”); *Guedes v. BATFE*, 920 F.3d 1, 41 (D.C. Cir. 2019) (Henderson, J., concurring in part and dissenting in part) (“*Chevron* does not apply to a regulation enforced both civilly and criminally unless the regulation gives fair warning sufficient to avoid posing a rule of lenity problem.”).

190. *Nasir*, 17 F.4th 459, 472–73 (Bibas, J., concurring).

determine how long criminal defendants will be sentenced, relevant commentary that is neither harsh nor lenient to defendants will presumably be exceedingly rare. If the rule of lenity really trumps *Stinson*, then lenity is an exception that swallows up the rule, to the point where it is difficult to see what purpose *Stinson* serves. The only sensible paths are to either reject the idea that lenity trumps *Stinson* deference or to overrule *Stinson* deference altogether.

Two arguments against prioritizing lenity over *Stinson* deference are worth acknowledging. First, it is disputed whether the rule of lenity even applies to the Sentencing Guidelines in the first place. Some but not all of the traditional motivating principles of the rule of lenity are implicated by the Sentencing Guidelines. Two of the strongest rationales for lenity are ensuring that an individual who consults the law has fair notice of whether or not given conduct is criminal¹⁹¹ and protecting the separation of powers by ensuring that only legislatures have the power to proscribe conduct.¹⁹² But the Sentencing Guidelines do not proscribe any conduct, and because they are advisory, their interpretation does not *directly* impact anyone's liberty. Some judges have accordingly argued that the rule of lenity should not apply the Sentencing Guidelines at all.¹⁹³ That said, when a judge chooses to follow the Guidelines, words on a page determine how much time a person spends in prison. This

191. See, e.g. *McBoyle v. United States*, 283 U.S. 25, 27 (1931) (“Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear.”)

192. See, e.g., *United States v. Wiltberger*, 18 U.S. (5 Wheat) 76, 95 (1820) (“The rule that penal laws are to be construed strictly . . . is founded on . . . the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment.”)

193. See, e.g., *United States v. Wright*, 607 F.3d 708, 716–20 (11th Cir. 2010) (Pryor, J., concurring) (arguing the rule of lenity does not apply to the Sentencing Guidelines post-*Booker*, because its two key purposes—fair notice and concern for the separation of powers—do not apply when interpreting advisory Guidelines that do not proscribe conduct).

clearly implicates some *principles* of lenity, which can also be thought of as a substantive preference for freedom over incarceration.¹⁹⁴ And the practical influence of the Guidelines means there's a strong argument that they "exert a law-like gravitational pull" on defendants' sentences in spite of their advisory status.¹⁹⁵ Accordingly, other judges have argued that lenity does in fact apply to the Guidelines.¹⁹⁶ The applicability of the rule of lenity to the Sentencing Guidelines is an unsettled area of law—and probably a question that is more important than *Stinson* deference itself.

Second, recently, in *Shular v. United States*,¹⁹⁷ the Supreme Court went out of its way to emphasize that the rule of lenity should only be applied when there is still ambiguity after applying "traditional canons of statutory construction."¹⁹⁸ This is conspicuously similar to the necessary level of ambiguity prior to applying *Chevron* or *Kisor* deference.¹⁹⁹ But if the Supreme Court has indicated that both deference doctrines and lenity are canons of last resort, then it is very unclear from existing Supreme Court precedent which type of canon a lower court should apply first. Indeed, the question whether the rule of lenity or *Chevron* deference should be applied first has itself divided lower courts. As discussed above, many judges have argued that the rule of lenity trumps deference doctrines.²⁰⁰ But other judges (usually in the same cases) have argued

194. See *Nasir*, 17 F.4th at 473 (Bibas, J., concurring) (arguing that the rule of lenity does apply to the Sentencing Guidelines because the rule of lenity serves a third purpose of a substantive preference for liberty).

195. *Id.* at 174 (citing U.S. SENT'G COMM'N, 2019 Annual Report and Sourcebook of Federal Sentencing Statistics 8 (2019)).

196. See, e.g., *id.*

197. 140 S. Ct. 779 (2020).

198. *Id.* at 787 (quoting *United States v. Shabani*, 513 U.S. 10, 17 (1994)).

199. Compare *id.*, with *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019) ("And before concluding that a rule is genuinely ambiguous, a court must exhaust all the "traditional tools" of construction. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843, n. 9 . . . (1984) (adopting the same approach for ambiguous statutes). For again, only when that legal toolkit is empty and the interpretive question still has no single right answer Doing so will resolve many seeming ambiguities out of the box, without resort to *Auer* deference.").

200. See *supra* notes 173–175 and accompanying text.

the opposite, relying in part on footnote 18 in *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*,²⁰¹ which they argue prioritized *Chevron* above the rule of lenity.²⁰² All of which is to say: the broader relationship between deference doctrines and the rule of lenity is still unsettled territory, and also likely a far more significant question than *Stinson* itself. This question would not be resolved even if the Supreme Court modified *Stinson* deference to contain *Kisor*'s limits, because *Kisor* adopts *Chevron*'s step-one analysis.²⁰³

But regardless of the formal doctrinal relationship between deference doctrines and the rule of lenity in other contexts, the very existence of these difficult problems is good reason to dispense with *Stinson* altogether. So long as *Stinson* is good law, lower courts will be forced to either suspend lenity's underlying values when calculating the guidelines range or to turn *Stinson* into a husk of a doctrine that never does any substantive work. If there is "tenderness [in] the law for the rights of individuals,"²⁰⁴ then any "systematic judicial bias in favor of the federal government, the most powerful

201. 515 U.S. 687 (1995).

202. See, e.g., *Gun Owners of America v. Garland*, 19 F.4th 890, 901 (6th Cir. 2021) (en banc) (White, J., writing in support of affirming the district court judgment) ("[T]he rule of lenity does not displace *Chevron* simply because an agency has interpreted a statute carrying criminal penalties. The Supreme Court considered this very question in *Babbitt*['.]."); *Aposhian v. Barr*, 958 F.3d 969, 982–83 (10th Cir. 2020) ("*Babbitt* suggests that *Chevron*, not the rule of lenity, should apply."); *Guedes v. BATFE*, 920 F.3d 1, 24 (D.C. Cir. 2019) (per curiam) ("[T]he Court engaged with . . . [whether the rule of lenity trumps *Chevron*] in *Babbitt*['.]. . . The Court . . . [held] that, notwithstanding the statute's criminal penalties, it would defer 'to the Secretary's reasonable interpretation' under *Chevron*['.].") (quoting *Babbitt*, 515 U.S. at 704 n.18)). Of course, those arguing that the rule of lenity trumps *Chevron* read *Babbitt* more narrowly. See, e.g., *Gun Owners of America*, 19 F.4th at 924 (Murphy, J., dissenting) ("I disagree with the other circuit courts' competing interpretation of *Babbitt*['.]."); *Aposhian v. Wilkinson*, 989 F.3d 890, 901 (10th Cir. 2021) (Tymkovich, C.J., dissenting from vacatur of order to grant rehearing en banc) ("The panel majority reads the *Babbitt* footnote for more than it is worth."); *Guedes*, 920 F.3d at 41 (Henderson, J., concurring in part and dissenting in part) ("[T]he majority may misread *Babbitt*['.].").

203. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019).

204. *United States v. Wiltberger*, 18 U.S. (5 Wheat) 76, 95 (1820).

of parties, and against anyone else”²⁰⁵ is particularly hard to justify in the criminal context. And in order for *Stinson* deference to have independent bite from principles of lenity, it *must* create biases against criminal defendants in sentencing. This is sufficient reason to abandon *Stinson* deference.

D. Many of the policy arguments in favor of Seminole Rock do not apply to Stinson.

Although *Seminole Rock*'s continued existence may ultimately be a question of *stare decisis*, a plurality of the court in *Kisor* justified *Seminole Rock* on a presumption of congressional intent to delegate the ability to resolve ambiguities in an agency's regulation to the agency rather than to courts.²⁰⁶ The reasonableness or lack thereof of this presumption of congressional intent largely turns on policy grounds. And many policy rationales for *Seminole Rock* either do not apply to the Sentencing Commission or apply with significantly less force.

The policy arguments for administrative deference that are common to both *Seminole Rock* and *Chevron* can be grouped into four categories: expertise, efficiency, flexibility, and accountability.²⁰⁷ Each of these arguments is much weaker in the context of the Sentencing Commission than it is in the context of an agency. As for expertise, federal judges have as much expertise on criminal sentencing and the severity of different crimes as the Sentencing Commission does. Interpretation of the Guidelines is also highly unlikely to involve the kinds of hyper-technical questions that are often used to justify *Seminole Rock* deference.²⁰⁸ As for efficiency and

205. *Kisor*, 139 S. Ct. at 2425 (Gorsuch, J. concurring in the judgment) (quoting Paul J. Larkin & Elizabeth Slattery, *The World After Seminole Rock and Auer*, 42 HARV. J.L. & PUB. POL'Y 625, 641 (2019)).

206. *Kisor*, 139 S. Ct. at 2412 (plurality opinion).

207. Stephenson & Pogoriler, *supra* note 174, at 1459–60.

208. *See, e.g., Kisor*, 139 S. Ct. at 2410 (plurality opinion) (justifying *Seminole Rock* in part by appealing to a case where a court had to determine whether the joining of a moiety that had previously been approved by the FDA to lysine through a non-ester covalent bond was a creation of a new active moiety).

flexibility, the current proceduralization of amendments to the commentary suggests that the Sentencing Commission would in practice have just as much efficiency and flexibility without *Stinson*. Even insofar as the Sentencing Commission would lose efficiency or flexibility, a core argument for administrative efficiency flexibility comes from the fact that regulated entities will respond in unpredictable ways, and agencies need flexibility to quickly update their policies in response to unexpected behavior.²⁰⁹ But the Commission is not implementing a regulatory scheme. Accordingly, it does not have to quickly respond to the unpredictable behavior of regulated entities. The only actors are the judges, who are engaging in the relatively straightforward task (at least compared to regulatory compliance) of interpreting legal texts. Even if Commissioners are sometimes surprised at how judges interpret their guidelines, they will almost certainly be surprised less frequently than regulators in a more dynamic regulatory system. And as for the accountability, the Guidelines are promulgated by an independent commission housed within the federal judiciary.²¹⁰ The Commission's members serve staggered six-year terms.²¹¹ This is scarcely more political accountability than federal judges have.

This is not to say that *every* policy argument in favor of *Seminole Rock* does not apply to the Sentencing Commission. For instance, Justice Kagan's argument that if you "[w]ant to know what a rule means" you should "[a]sk its author" is exactly as salient in the context of an agency's regulation as it is in the context of the Commission's Guidelines²¹²—as the *Stinson* Court itself argued.²¹³ Similarly,

209. Cf. Aaron L. Nielson, *Beyond Seminole Rock*, 105 GEO. L.J. 943, 964–67 (2017) (discussing *Seminole Rock* and *Chenery II* as two means through which agencies who value flexibility are able to maintain it).

210. 28 U.S.C.A. § 991(a) (Westlaw current through Pub. L. No. 117-51).

211. 28 U.S.C.A. § 992 (Westlaw current through Pub. L. No. 117-51).

212. *Kisor*, 139 S. Ct. at 2412 (plurality opinion).

213. *Stinson v. United States*, 508 U.S. 36, 45 (1993) (“The Commission, after all, drafts the guidelines as well as the commentary interpreting them, so we can presume that the interpretations of the guidelines contained in the commentary represent the most

insofar as the goal of the Sentencing Commission is to ensure unity in federal sentencing, the commentary clearly has an advantage of giving one clear answer, while lower courts interpreting the Guidelines for themselves may disagree with each other.²¹⁴

But whatever one thinks of the remaining arguments for deferring to the Commission's commentary, they are far weaker than the arguments for deferring to administrative agencies. And given the policy arguments *against* deference—both those that exist generally for all deference doctrines and the lenity-based arguments that are particularly salient in the context of the Sentencing Commission—the overall policy case for deference to the Commission is substantially weaker than the overall policy case for deference to agencies. The Supreme Court should overrule *Stinson* deference and require the Commission to fully subject any guidance to formal requirements of Section 994 should it wish judges to be legally required to consider that guidance.

accurate indications of how the Commission deems that the guidelines should be applied to be consistent with the Guidelines Manual as a whole as well as the authorizing statute.”)

214. See *United States v. Moses*, 23 F.4th 347, 357 (4th Cir. 2022) (“[T]he application of *Kisor* to Guidelines commentary would undoubtedly lead to substantial litigation and divisions of authority regarding the extent to which each Guideline is ‘genuinely ambiguous,’ even after ‘all the traditional tools of construction’ have been ‘exhaust[ed].’ The surely resulting circuit splits would substantially increase the extent to which the advisory sentencing ranges for similarly situated offenders would be calculated differently — sometimes dramatically so — depending on the circuit in which they were convicted. Such a result would vitiate the core purpose of the Sentencing Reform Act.” (quoting *Kisor*, 139 S. Ct. at 2415 (cleaned up in original))). With or without *Stinson*, circuit splits in the Sentencing Guidelines can theoretically be resolved by the Sentencing Commission promulgating new guidelines. The Supreme Court has even suggested that it hesitates to use its certiorari power to resolve circuit splits over the Guidelines, leaving that role to the Commission. See *Braxton v. United States*, 500 U.S. 344, 348 (1991). However, in recent years, that role has been frustrated by the Sentencing Commission's lack of quorum. See, e.g., *Guerrant v. United States*, 142 S. Ct. 640, 640–41 (2022) (Sotomayor, J., statement respecting the denial of certiorari).

CONCLUSION

Stinson is outdated, and its datedness causes misunderstandings about how the Sentencing Guidelines work and divisions over how *Stinson* should be applied. A strict conception of vertical *stare decisis* does not allow lower courts to update *Stinson* deference just because it is doctrinally out-of-date. Updating out-of-date precedent is the prerogative of the Supreme Court—but our judicial system only works effectively when the Supreme Court actually exercises that prerogative. The Supreme Court should address *Stinson*'s scope. If and when the Supreme Court updates *Stinson*, the path of least resistance would probably be to extend *Kisor v. Wilkie* to *Stinson* and reunite the standards for the Sentencing Guidelines and administrative regulations. But because *Stinson*'s reasoning has not survived doctrinal developments, the Court can and should return to first principles rather than reflexively extend *Kisor*. Most notably, principles of lenity counsel against *Stinson* deference, and there are insufficient countervailing policy reasons to maintain *Stinson*. When the opportunity arises, the Supreme Court should end *Stinson* deference and instruct courts to give no more than *Skidmore* respect to the Sentencing Commission's commentary.