A NEW SPLIT IN THE *ROCK*: REFLEXIVE DEFERENCE UNDER *STINSON* OR CABINED DEFERENCE UNDER *KISOR*?

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In 2019, the Supreme Court of the United States reexamined the Seminole Rock *deference doctrine in* Kisor v. Wilkie. *The venerable doctrine requires federal courts to defer to an administrative agency's interpretation of its own regulation unless the interpretation "is plainly erroneous or inconsistent with the regulation." Yet despite its profound significance in our administrative state, the doctrine had escaped judicial and scholarly examination for over seventy years.*

In my 2014 article on the Seminole Rock *doctrine, I exposed widespread inconsistences among the courts of appeals on many aspects of the doctrine, including the relevant factors to be weighed when applying the doctrine, as well more fundamental questions concerning its scope and applicability. Unsurprisingly, this analysis also revealed that this confusion resulted in numerous circuit splits such that it was just a matter of time before the Court reevaluated the doctrine.*

In Kisor, *in the narrowest of margins, the Court preserved the doctrine despite vociferous calls for its retirement. But in saving the doctrine, the Court also "cabined" its application by constructing a multi-factor framework to help guide the lower courts. As is typical after the Supreme Court introduces a decision, many questions have been left to the lower courts to answer. Although the percolation of such issues by the lower courts generally takes many years, one question has already surfaced in an extremely important area of law: criminal sentencing.*

More specifically, a new Seminole Rock *circuit split has quickly emerged on whether* Kisor*'s newly minted test applies to when courts determine whether to defer to the Commentary that accompanies the U.S. Sentencing Commission Guidelines. In 2021, the Sixth Circuit and the Third Circuit (sitting en banc) held that* Kisor*'s revised framework now governed their analysis. This meant that* Kisor *implicitly overruled the Supreme Court's 1993 decision in* Stinson v. United States. *Under* Stinson, *courts are "reflexively" required to give the Commentary (which is akin to*

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an agency interpretation) controlling deference—even when the underlying Guideline is unambiguous. Then, in January of 2022, the Fourth Circuit found, in contrast to the Sixth and Third Circuits, that Stinson *still controls and the Court's deference analysis of whether to defer to the Commentary was therefore unaffected by* Kisor.

With this new circuit split now realized, this Article analyzes the key cases including Bowles v. Seminole Rock & Sand Co., Kisor v. Wilkie, Stinson v. United States, *and the conflicting decisions by the courts of appeals. While trying not to prejudge the split on the merits, it also provides additional insight on both legal and policy issues that animate these conflicting decisions. This will be especially helpful as courts apply the* Kisor *framework in related and overlapping areas. The Article concludes that, especially due to the paramount liberty interests involved in criminal sentencing, the Supreme Court should once again revisit the doctrine to bring clarity to this important area of federal law.*

INTRODUCTION

In 1945, the United States Supreme Court in *Bowles v. Seminole Rock & Sand Co.*[1] held that federal courts are required to defer to an administrative agency's interpretation of its own regulation unless the interpretation "is plainly erroneous

1. 325 U.S. 410 (1945).

or inconsistent with the regulation."[2] The *Seminole Rock* deference doctrine, which has more recently been referred to as "*Auer* deference,"[3] has become an increasingly pivotal doctrine in our administrative state because agency regulations—rather than statutes—are now the primary method by which the rights and obligations of private parties are established today.[4]

Critics to *Seminole Rock*'s "controlling" deference standard[5] challenge this level of deference for several reasons. One argument is that *Seminole Rock* deference can cause an agency "to promulgate excessively vague legislative rules" and "leave the more difficult task of specification to the more flexible and unaccountable process of later 'interpreting' these open-ended regulations."[6] More simply put, if an agency believes that its interpretation of its vague regulation will likely receive deference during judicial review in the future, the agency has little incentive to confine itself to one interpretation or position when it initially promulgates the regulation. Instead, the opportunistic agency can simply interpret the vague regulation to its liking through informal procedures or through adjudication, thereby avoiding the notice-and-comment procedures of the Administrative Procedure Act.[7]

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2. *Id.* at 414. For a detailed review of the Supreme Court's early interpretation and application of the *Seminole Rock* doctrine, see Kevin O. Leske, *Between* Seminole Rock *and a Hard Place: A New Approach to Agency Deference*, 46 CONN. L. REV. 227, 249–53 (2013) [hereinafter Leske, *Between* Seminole Rock]. For Pre-*Kisor* circuit splits, see Kevin O. Leske, *Splits in the Rock: The Conflicting Interpretations of the* Seminole Rock *Deference Doctrine by the U.S. Courts of Appeals*, 66 ADMIN. L. REV. 787 (2014) [hereinafter Leske, *Splits in the Rock*].

3. Auer v. Robbins, 519 U.S. 452, 461 (1997). The precise reason why the legal community now refers to it as *Auer* deference, instead of *Seminole Rock* deference, is unknown. *See* William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1088–89, 1089 n.26 (2008) (noting Justice Scalia's use of the term "*Auer* deference" in his dissent in Gonzales v. Oregon, 546 U.S. 243, 277 (2006) (Scalia, J., dissenting)).

4. John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 614–15 (1996) [hereinafter Manning, *Constitutional Structure*] (noting that agency rules impact the public's legal rights and obligations more directly than statutes).

5. *See, e.g.*, Leske, *Between* Seminole Rock, *supra* note 2, at 230 n.5 (referring to *Seminole Rock* deference as "controlling" deference because it is consistent with the Court's view that the agency's "administrative interpretation[] . . . becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Seminole Rock*, 325 U.S. at 414).

6. Lars Noah, *Divining Regulatory Intent: The Place for a "Legislative History" of Agency Rules*, 51 HASTINGS L.J. 255, 290 (2000); *see also* Robert A. Anthony & Michael Asimow, *The Court's Deferences – A Foolish Inconsistency*, 26 ADMIN. & REG. L. NEWS 1, 10–11 (2000) (suggesting that if an agency believes it will receive deference for its interpretation, it creates "a powerful incentive for agencies to issue vague regulations, with the thought of creating the operative regulatory substance later through informal interpretations").

7. Administrative Procedure Act, 5 U.S.C. § 552; *see* Thomas Jefferson Univ. v. Shalala,

Furthermore, as argued by Professor John F. Manning in 1996, the current *Seminole Rock* standard also raises separation of powers concerns.[8] When a court defers to an administrative agency under *Seminole Rock*, the agency has, in a sense, both made the law via the promulgation of its regulation and interpreted that law by receiving controlling deference for its interpretation. This power of "self-interpretation"[9] thus "contradicts a major premise of our constitutional scheme and of contemporary separation of powers case law—that a fusion of lawmaking and law-exposition is especially dangerous to our liberties."[10]

But supporters of *Seminole Rock* are equally vocal. For example, Professors Cass R. Sunstein and Adrian Vermeule challenge some of these criticisms as "rest[ing] on fragile foundations, including an anachronistic understanding of the nature of interpretation, an overheated argument about the separation of powers, and an empirically unfounded and logically weak argument about agency incentives."[11]

In response to separation of power arguments, Vermeule and Sunstein maintain that, if agencies "act within and under a legislative grant of statutory authority, everything they do amounts to an exercise of 'executive' power, including both the making and interpreting of rules."[12] When this occurs, agencies are not comingling constitutional powers in contravention to the separation of powers doctrine.[13]

With respect to the "agency incentives" argument, supporters of *Seminole Rock* counter that while "intuitively appealing," its validity is not grounded empirically in practice and fails to account for both external pressures, like regulated industry, and internal pressures, like those within government, that favor clarity over ambiguity in regulations.[14]

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512 U.S. 504, 525 (1994) (Thomas, J., dissenting) ("It is perfectly understandable, of course, for an agency to issue vague regulations, because to do so maximizes agency power and allows the agency greater latitude to make law through adjudication rather than through the more cumbersome rulemaking process.").

8. Manning, *Constitutional Structure*, *supra* note 4, at 638–39, 654, 696 (discussing the relationship between *Chevron* and *Seminole Rock* and the "separation of lawmaking from law-exposition," and applying a separation of powers analysis to the *Seminole Rock* decision).

9. *See id.* at 655 ("The right of self-interpretation under *Seminole Rock* removes an important affirmative reason for the agency to express itself clearly; since the agency can say what its own regulations mean (unless the agency's view is plainly erroneous), the agency bears little, if any, risk of its own opacity or imprecision.").

10. *Id.* at 617.

11. Cass R. Sunstein & Adrian Vermeule, *The Unbearable Rightness of* Auer, 84 U. CHI. L. REV. 297, 297 (2017).

12. *Id.* at 299.

13. *Id.* at 299–300.

14. *Id.* at 297, 299–300, 308–09.

This debate was largely academic until the Supreme Court reexamined the *Seminole Rock* doctrine in 2019 in *Kisor v. Wilkie*.[15] The Court accepted the case to determine whether to retire the *Seminole Rock* doctrine from the legal landscape.[16] In a 5–4 decision, the Court upheld the *Seminole Rock* doctrine as a controlling deference standard, but it also "cabined . . . its scope."[17] The divided *Kisor* Court devised a new framework for courts to apply when determining whether to defer to an agency's interpretation of its regulation.[18]

Unsurprisingly, in the wake of *Kisor*, many questions have been left for the lower courts to answer. Although the percolation of such issues by the lower courts generally takes many years, one question has already surfaced in an extremely important area of law: criminal sentencing. A new *Seminole Rock* circuit split has emerged on whether *Kisor*'s analysis applies when courts determine whether to defer to the official commentary (Commentary) that accompanies the United States Sentencing Commission Guidelines (Guidelines).[19]

In 2021, the Sixth Circuit and the Third Circuit (sitting en banc) held that *Kisor*'s revised "cabined" framework now governed their analysis.[20] This meant that *Kisor* implicitly overruled the Supreme Court's 1993 decision in *Stinson v. United States*.[21] Under *Stinson*, courts are "reflexively" required to give the Commentary (which is akin to an agency interpretation) controlling deference—even when the underlying Guideline is unambiguous.[22] Then, in January 2022, the Fourth Circuit found, in contrast to the Sixth and Third Circuits, that *Stinson* still controls and the Court's analysis was unaffected by *Kisor*'s reevaluation of the *Seminole Rock* doctrine.[23]

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15. Kisor v. Wilkie, 139 S. Ct. 2400, 2418 (2019).

16. *Id.* at 2410–18.

17. *Id.* at 2408.

18. *Id.*

19. *Compare* United States v. Riccardi, 989 F.3d 476, 484 (6th Cir. 2021) (holding that courts should not defer to the Commentary that accompanies the United States Sentencing Commission Guidelines), *with* United States v. Moses, 23 F.4th 347, 349 (4th Cir. 2022) (holding that courts must defer to the Commentary that accompanies the Guidelines) *petition for cert. filed*, (Aug. 19, 2022) (No. 22-163). When referring to the collective components of the United States Sentencing Commission Guidelines Manual, this Article will simply call it the "Manual." When referring specifically to the United States Sentencing Commission Guidelines themselves, this Article will use the term, "Guidelines." Likewise, when discussing the official commentary to the United States Sentencing Commission Guidelines, this Article will use the term, "Commentary."

20. *See Riccardi*, 989 F.3d at 484; United States v. Nasir, 17 F.4th 459, 471 (3rd Cir. 2021) (en banc); *see also Kisor*, 139 S. Ct. at 2408 (stating that the court has "cabined" the *Auer* framework).

21. 508 U.S. 36 (1993).

22. *Id.* at 38.

23. *See Moses*, 23 F.4th at 347. *See generally Riccardi*, 989 F.3d at 485; *Nasir*, 17 F.4th at 472–73.

The importance of this issue cannot be understated. The Guidelines, which are promulgated by the United States Sentencing Commission (Commission), affect significant liberty interests because they are used when courts determine the length of a criminal defendant's prison term.[24] And although the Guidelines have been advisory since the Court's decision in *United States v. Booker*,[25] courts still "must use them as the initial benchmark for a proper sentence."[26]

To examine this issue, Part I of this Article begins by briefly reviewing the *Seminole Rock* doctrine and the Supreme Court's recent decision in *Kisor*, where the Court reevaluated the doctrine. In Part II, the Article examines the Sentencing Reform Act of 1984, the Commission, and its Guidelines and Commentary. It also analyzes the Supreme Court's seminal decision in *Stinson*, which addressed the weight to be accorded to the Commentary.

Finally, Part III analyzes this "new split in the *Rock*" by analyzing the three key court of appeals cases entangled in this conflict. While trying not to prejudge the split on the merits, it also analyzes the legal arguments on both sides of these conflicting decisions. Given the likelihood that the Supreme Court will grant certiorari to reevaluate the *Seminole Rock* doctrine and to resolve whether *Kisor*'s cabined deference or *Stinson*'s reflexive deference applies, Part III facilitates the Court's consideration by providing insight on some of these legal and policy issues.

I. THE *SEMINOLE ROCK* DEFERENCE DOCTRINE

The Supreme Court in *Seminole Rock* presented a new standard for courts to apply when reviewing an agency's interpretation of its own regulation.[27] Under *Seminole Rock*, courts must defer to an agency's interpretation of its regulation unless it "is plainly erroneous or inconsistent with the regulation."[28] This standard has become critically important in administrative law given the importance that agency regulations have in our current administrative state.[29] Moreover, because courts are often called upon to review agency interpretations of regulations, questions involving *Seminole Rock* "arise as a matter of course on a regular basis."[30]

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24. *Riccardi*, 989 F.3d at 484 (citing 18 U.S.C. § 3553(b)(1)); United States v. Havis, 927 F.3d 382, 385 (6th Cir. 2019) (en banc) (per curiam).

25. 543 U.S. 220 (2005).

26. *Riccardi*, 989 F.3d at 484 (citing *Havis*, 927 F.3d at 385).

27. 325 U.S. 410, 412–14, 418 (1945).

28. *See* Leske, *Splits in the Rock*, *supra* note 2, at 793–95 (explaining *Seminole Rock*).

29. *See* Leske; *Splits in the Rock*, *supra* note 2, at 789 (noting how agency regulations rather than statutes are the primary way in which the rights and obligations of private parties are established today).

30. *Id.* (quoting Decker v. Nw. Env't Def. Ctr., 568 U.S. 597, 616 (2013) (Roberts,

Before analyzing the new split that has emerged with respect to the *Seminole Rock* standard, this Part discusses the Court's opinion in *Seminole Rock*. Then Part III analyzes the Court's recent decision in *Kisor* to set up the analysis of the circuit split with respect to the deference owed to the Commentary.

A. Bowles v. Seminole Rock & Sand Co.

The *Seminole Rock* standard, under which a court must defer to an agency's interpretation of its regulation unless the interpretation "is plainly erroneous or inconsistent with the regulation," was announced in the midst of World War II.[31] The case involved the Emergency Price Control Act of 1942, which sought to curb wartime inflation.[32] In *Seminole Rock*, the Court was required to interpret and apply provisions of Maximum Price Regulation No. 188, which was part of a regime that brought price controls to nearly the entire American economy.[33]

A central requirement of the regulation at issue was that "each seller shall charge no more than the prices [that] he charged during the selected base period of March 1 to 31, 1942."[34] The controversy in the case involved three parties: Seaboard Air Line Railway (Seaboard), V.P. Loftis, Co., and Seminole Rock & Sand.[35] In October 1941, Seaboard had entered into a contract with Seminole Rock & Sand to purchase crushed stone "when called for" at a price of $0.60 per ton, which Seminole Rock & Sand subsequently delivered to Seaboard in March 1942.[36] In January 1942, Seminole Rock & Sand entered into a contract with V.P. Loftis Co. to sell crushed stone at a price of $1.50 per ton, as needed.[37] V.P. Loftis Co., however, had been unable to use or store the stone until August of that year.[38]

Later, after Seminole Rock & Sand began to negotiate additional contracts for crushed stone with Seaboard for $0.85 and $1.00 per ton, Chester Bowles, the Administrator of the Office of Price Administration, sought to enjoin Seminole Rock & Sand from selling at a price higher than $0.60 per ton because there had been an actual delivery in March 1942 at

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C.J., concurring)).

31. Bowles v. Seminole Rock, 325 U.S. 410, 411, 413–14 (1945).

32. *Id. See generally* Leske; *Splits in the Rock*, *supra* note 2 at 793–95 (presenting an explanation of *Seminole Rock*).

33. *Seminole Rock*, 325 U.S. at 411, 413.

34. *Id.*

35. *Id.* at 412.

36. *Id.*

37. *Id.*

38. *Id.*

that price.[39] Seminole Rock & Sand argued that there must have been both a charge and a delivery at that price to fix the ceiling price at $0.60 per ton.[40] Further, because the contract with Seaboard occurred in October 1941, the outstanding January 1942 contract with V.P. Loftis Co. calling for a $1.50 per ton should be considered the ceiling price.[41] The district court ruled that Seminole Rock & Sand had not violated the Maximum Price Regulation because it agreed that $1.50 per ton was the highest price Seminole Rock & Sand had charged during the selected base period established by the January 1942 contract.[42] On appeal, the Fifth Circuit affirmed.[43]

The principal question for the Supreme Court was, therefore, whether Seminole Rock & Sand charged prices exceeding the regulatory maximum during the period in question.[44] Before it looked to the Administrator's interpretation of the regulation, the Court found that the interpretation would only be probative if the regulatory language was ambiguous.[45] If there was an ambiguity, the Court ruled that "a court must necessarily look to the administrative construction of the regulation . . . ."[46] And, when a court determines the definition of the regulation, the Court held that "the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation."[47]

The Court then reviewed the regulation's language and considered the "administrative construction" of the regulation found in a bulletin issued at the time the Maximum Price Regulation was issued.[48] In light of the ambiguous phrases "highest price charged during March, 1942" and "the consistent administrative interpretation" set forth in the bulletin interpreting that phrase, the Court found that the highest price of an *actual* delivery during March 1942 established the price ceiling.[49] Thus, "the Court found that both the district court and circuit court had erred in finding that $1.50 per ton, rather than 60 cents—which Seminole Rock & Sand had charged for the actual delivery of stone to Seaboard in March 1942—was the 'highest price charged during

39. *Id.* at 412, 415.
40. *Id.* at 415.
41. *Id.*
42. *Id.* at 412–13.
43. *Id.* at 413.
44. *Id.*
45. *Id.* at 414.
46. *Id.*
47. *Id.*
48. *Id.* at 417.
49. *Id.* at 415, 418. The Court also seemed to place significant weight on the fact that the public had been placed on notice of this consistent interpretation. *Id.* at 417–18.

March, 1942.'"[50] Accordingly, the Court deferred to the agency's interpretation, reversing the judgment of the court of the appeals.[51]

B. The Supreme Court's Decision in Kisor v. Wilkie

In 2019, the Supreme Court in *Kisor v. Wilkie* reevaluated the *Seminole Rock* doctrine to determine whether to discard the deference *Seminole Rock* and its progeny gives to agencies.[52] Recognizing the "important role" that *Seminole Rock* deference plays when construing agency regulations, the Court in a 5–4 decision upheld the doctrine, while at the same time kept the doctrine "cabined in its scope."[53]

Although the Court began its opinion "by summarizing how petitioner James Kisor's case made its way to [the] Court," it conceded that the facts presented in the case, indeed in any case implicating the doctrine, had little bearing on its decision.[54] For this reason, only the barest details are likewise necessary here.

Kisor, a Vietnam War veteran, sought disability benefits from the U.S. Department of Veterans Affairs (VA) based on his development of post-traumatic stress disorder (PTSD) as a result of his service.[55] After the VA first denied him benefits in 1983 because they did not agree that he had PTSD, Kisor reopened his claim in 2006.[56] This time, the VA agreed on his PTSD diagnosis, but only granted him benefits from 2006, when he moved to reopen his claim, as opposed to his initial application date in 1982.[57] Kisor appealed.[58]

The Board of Veterans' Appeals (Board) affirmed the determination on the timing of benefits based on its interpretation of a VA regulation.[59] Although the agency could have given Kisor the retroactive benefits if it found that there were "relevant official service department records" that had not been initially considered, the VA found that the two new records that Kisor had provided were not "relevant" because they did not bear on the

50. Leske, *Splits in the Rock*, *supra* note 2, at 795 (citing *Seminole Rock*, 325 U.S. at 418).

51. *Id.*

52. Kisor v. Wilkie, 139 S. Ct. 2400, 2408 (2019). For a discussion on the naming of the doctrine see *supra* note 3.

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

54. *Id.* at 2408–09.

55. *Id.* at 2409.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

initial decision that "a diagnosis of PTSD was not warranted."[60] The Court of Appeals for Veterans Affairs subsequently affirmed for the same reason.[61]

The Court of Appeals for the Federal Circuit also affirmed but relied on deference to the Board's interpretation of the VA regulation as the basis for its decision.[62] The court deferred to the Board under *Seminole Rock*, finding the regulation ambiguous regarding what exactly "relevant" means in this context.[63] It therefore rejected Kisor's appeal for retroactive benefits.[64]

As noted above, the Supreme Court accepted the case to determine whether to jettison the *Seminole Rock* standard. Although its ultimate disposition of the case was to vacate the judgment below and remand the case for further proceedings, its discussion of the *Seminole Rock* standard and the new limits on the application of the standard are the focal point here.[65]

The Court's new framework for *Seminole Rock* now starts with determining whether the regulation in question is "genuinely ambiguous."[66] To ascertain whether a regulation truly qualifies as ambiguous, courts must first exhaust the "traditional tools" of construction.[67] This responsibility includes careful consideration of "the text, structure, history, and purpose of a regulation, in all the ways it would if it had no agency to fall back on."[68] In the Court's view, this effort "will resolve many seeming ambiguities out of the box," so that courts will not need to apply *Seminole Rock* deference.[69]

But even if courts were to determine that regulatory language is, in fact, ambiguous, the Court imposed further restraints before deferring. For instance, the agency interpretation being proffered must be "reasonable."[70] To determine whether the interpretation is reasonable, the Court explained that "it must come within the zone of ambiguity the court has identified after employing all its interpretive tools" by once again looking to the text, history, and structure of the regulatory scheme.[71]

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60. *Id.* at 2408–10 (quoting 38 C.F.R. § 3.156(c)(1) (2013)).

61. *Id.* at 2409.

62. *Id.* (citing Kisor v. Shulkin, 869 F.3d 1360, 1368 (2017)).

63. *Id.* (citing *Shulkin*, 869 F.3d at 1368).

64. *Id.*

65. *Id.* at 2424.

66. *Id.* at 2414.

67. *Id.* at 2415 (citing Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984)).

68. *Id.* (citing Pauley v. BethEnergy Mines, Inc., 501 U.S. 680, 707 (1991) (Scalia, J., dissenting)).

69. *Id.*

70. *Id.* (citing Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 515 (1994)).

71. *Id.* at 2416.

And even if a court concludes at this juncture that the agency has set forth a reasonable interpretation of an ambiguous rule, it must still make an "independent inquiry into whether the character and context of the agency interpretation entitles it to controlling weight."[72] While the Court cautioned that this inquiry could not be reduced to a single test, it provided "some especially important markers" to determine when deference was (or was not) appropriate.[73]

For example, only agency interpretations that represent the "authoritative" or "official position" of the agency qualify for deference.[74] This requirement flows from one of the doctrinal underpinnings of *Seminole Rock*, namely, Congress's delegation of rulemaking power belongs to the agency alone.[75]

Another consideration for courts is whether the relevant agency interpretation connects to the agency's substantive expertise. The Court recognized that "the basis for deference ebbs" where the agency is weighing in on a matter that is beyond its normal duties or experience.[76] This, too, is consistent with the notion that "[a]dministrative knowledge and experience largely 'account [for] the presumption that Congress delegates interpretive lawmaking power to the agency.'"[77]

Finally, courts must ensure that the agency interpretation reflects the agency's "fair and considered judgment" to be entitled to *Seminole Rock* deference.[78] This determination requires an analysis of whether the interpretation represents a "convenient litigating position" or "post hoc rationalizatio[n] advanced" to "defend past agency action against attack."[79] The Court also warned that deference would not be due to a "new interpretation, whether or not introduced in litigation, that creates 'unfair surprise' to regulated parties."[80] Similarly, deference is rarely appropriate where an interpretation conflicted with a prior interpretation.[81]

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72. *Id.* (citing Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 155 (2012)).

73. *Id.*

74. *Id.* (citing United States v. Mead Corp., 533 U.S. 218, 257–59, 258 n.6 (2001) (Scalia J., dissenting)).

75. *Id.* (citing *Mead*, 533 U.S. at 257–59, 258 n.6 (Scalia J., dissenting)).

76. *Id.* at 2417 (referencing City of Arlington v. FCC, 569 U.S. 290, 309 (2013) (Breyer, J., concurring)). The Court also noted that "[f]or a similar reason, [it] has denied [*Seminole Rock*] deference when an agency interprets a rule that parrots the statutory text." *Id.* at 2417 n.5 (citing Gonzales v. Oregon, 546 U.S. 243, 257 (2006)).

77. *Id.* at 2417 (citing Martin v. Occupational Safety & Health Rev. Bd., 499 U.S. 144, 153 (1991)).

78. *Id.* (citing Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 155 (2012)).

79. *Id.* (alteration in original) (quoting *Christopher*, 567 U.S. at 155).

80. *Id.* at 2417–18 (citing Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 170–71 (2007)).

81. *Id.* at 2418 (citing Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 515 (1994)).

All told, the new *Seminole Rock* framework set forth in *Kisor* has, in the Court's words, "cabined [its] scope in varied and critical ways," which ensures "a strong judicial role in interpreting rules."[82] Gone are the days of "reflexive" deference.[83] Yet, the new framework still affords an agency the power to explain what its regulations mean, thereby maintaining Congress's delegation to the agency the discretion to shape the regulatory scheme under its responsibility.[84]

II. THE SENTENCING REFORM ACT OF 1984

Before delving into the conflicting decisions among the courts of appeals on whether to apply *Kisor*'s new framework for *Seminole Rock* to deference questions involving the Commentary to the Guidelines, this Part examines the Sentencing Reform Act of 1984, the Commission, and its Guidelines and Commentary. It also analyzes the Supreme Court's seminal decision in *Stinson* on the weight to be accorded to the Commentary.

A. United States Sentencing Commission

The key statute involved in this new *Seminole Rock* split is the Sentencing Reform Act of 1984.[85] As the Supreme Court observed in *Mistretta v. United States*,[86] the Act was intended to make "all sentences basically determinate," thereby replacing "a system of indeterminate sentencing."[87] As part of the effort to reform criminal sentencing, Congress created the Commission and tasked it with "establish[ing] sentencing policies and practices for the Federal criminal justice system."[88]

Contrary to typical executive agencies, the Commission was "established as an independent commission in the [J]udicial [B]ranch of the United States."[89] It is composed of "seven voting members, at least three of whom must be federal judges, appointed by the President with the advice and consent of the Senate," rendering it "unquestionably . . . a peculiar institution within the framework of our Government."[90] It is this uniqueness that gave rise to the circuit split as to whether the *Seminole Rock* doctrine should apply to interpretations put forth by the Commission.

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82. *Id.*

83. *Id.* at 2415.

84. *Id.* at 2418.

85. 18 U.S.C. §§ 3551–59, 3561–66, 3571–74, 3581–86; 28 U.S.C. §§ 991–98.

86. 488 U.S. 361 (1989).

87. *Id.* at 363, 367; United States v. Moses, 23 F.4th 347, 352 (4th Cir. 2022) *petition for cert. filed*, (Aug. 19, 2022) (No. 22-163).

88. 28 U.S.C. § 991(b)(1); *Moses*, 23 F.4th at 352.

89. § 991(a); *Moses*, 23 F.4th at 352.

90. *Moses*, 23 F.4th at 352 (citing § 991(a)); Mistretta v. United States, 488 U.S. 361, 384 (1989).

1. The United States Sentencing Commission Guidelines

As part of its goal to establish determinate sentences, Congress directed the Commission to promulgate guidelines to be used by sentencing courts when imposing a criminal sentence.[91] These guidelines provide a range of sentences depending on the category of offense and the category of defendant.[92]

Relatedly, Congress made the Commission responsible for instituting sentencing policies and practices that "provide certainty and fairness . . . [and] avoid[] unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct,"[93] as well as to "promulgate and distribute to all courts of the United States . . . general policy statements regarding application of the guidelines."[94] These statutory mandates led the Commission to develop the United States Sentencing Commission Guidelines Manual (Manual).[95]

As the Supreme Court has explained, the Manual "contains text of three varieties."[96] First, the Manual contains a guideline provision "for use of a sentencing court in determining the sentence to be imposed in a criminal case."[97] Thus, the Guidelines supply the district courts "direction as to the appropriate type of punishment—probation, fine, or term of imprisonment—and the extent of the punishment imposed."[98] Second, the Sentencing Reform Act authorized the Commission to promulgate "general policy statements regarding application of the guidelines" or other aspects of sentencing that would further the purposes of the Act.[99] Third, the Manual contains the Commentary, which is at issue in this newfound *Seminole Rock* circuit split.[100]

Clearly, the Guidelines themselves had a significant effect on individual liberty interests because Congress initially required the district courts to adhere to them during sentencing.[101] Accordingly, Congress built safeguards

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91. § 994(a)(1); *Moses*, 23 F.4th at 352.

92. § 994(b)(1); *Moses*, 23 F.4th at 352.

93. *Moses*, 23 F.4th at 352–53 (alteration in original) (citing § 991(b)(1)(B)).

94. *See id.* (citing § 994(a)(2)).

95. *See id.* at 353 (stating that the first version of the Manual went into effect on November 1, 1987).

96. Stinson v. United States, 508 U.S. 36, 41 (1993).

97. *Id.* (quoting § 994(a)(1)).

98. *Id.* (citing § 994(a)(1)(A)–(B)).

99. *Id.* (citing § 994(a)(2)).

100. *See id.*

101. United States v. Riccardi, 989 F.3d 476, 483 (6th Cir. 2021) (citing 18 U.S.C. § 3553(b)(1)); *see also* United States v. Havis, 927 F.3d 382, 385–86 (6th Cir. 2019) (en banc) (per curiam). Although the Guidelines are now only advisory because of the Supreme Court's

into the Sentencing Reform Act to ensure oversight of the Guidelines, such as requiring the Commission to provide the Guidelines for congressional review and allowing Congress six months to review all subsequent amendments.[102] It also required the Guidelines and amendments to go through notice-and-comment rulemaking.[103] Accordingly, in 1987, a proposed Manual, which was first published in the Federal Register, underwent a public comment period and was sent to Congress for review.[104]

But with respect to creating or amending policy statements and the Commentary, the Commission believes that it does not need to follow the same notice-and-comment procedure; nor does the Commission think that it is required to submit such materials to Congress for review.[105] However, the Commission tries to offer, "to the extent practicable, comparable opportunities for public input on proposed policy statements and commentary considered in conjunction with guideline amendments," and it also "endeavor[s] to include amendments to policy statements and commentary in any submission of guideline amendments to Congress."[106]

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decision in United States v. Booker, 543 U.S. 220 (2005), they "still significantly affect individual liberty because a court must use them as the initial benchmark for a proper sentence." *Riccardi*, 989 F.3d at 483 (citing *Havis*, 927 F.3d at 385).

102. *Riccardi*, 989 F.3d at 483–84 (citing Sentencing Reform Act, Pub. L. No. 98-473, § 235(a)(1), 98 Stat. 1837, 2031–32 (1984); 28 U.S.C. § 994(p)).

103. *Id.* (citing 28 U.S.C. § 994(x)).

104. *See* United States v. Moses, 23 F.4th 347, 353 (4th Cir. 2022) (first citing Notice of Sentencing Guidelines and Policy Statements for the United States Courts as submitted to Congress, together with Certain Technical, Conforming, and Clarifying Amendments, Sentencing Guidelines for United States Courts, 52 Fed. Reg. 18,046, 18,046 (May 13, 1987); then citing 28 U.S.C. § 994(x) (requiring the Commission to follow the notice-and-comment procedures of 5 U.S.C. § 553 with respect to "the promulgation of guidelines"), and then citing 28 U.S.C. § 994(p) (requiring the Commission to submit "amendments to the guidelines" to Congress)) *petition for cert. filed*, (Aug. 19, 2022) (No. 22-163).

105. *See Moses*, 23 F.4th at 353.

106. *Id.*

2. The United States Sentencing Commission Commentary to the Guidelines

In the Manual, the Guidelines and policy statements "are accompanied by extensive commentary," which the Sentencing Reform Act did not expressly authorize.[107] Nonetheless, ever since the first promulgation of Guidelines, the Commission has indeed provided these "application notes" in "commentary" in the Guidelines.[108]

Included in an original Guideline, the Commission explained in a section titled, the "Significance of Commentary," that the accompanied guideline sections can serve three functions:

> First, it may interpret the guideline or explain how it is to be applied. Failure to follow such commentary could constitute an incorrect application of the guidelines, subjecting the sentence to possible reversal on appeal. Second, the commentary may suggest circumstances which, in the view of the Commission, may warrant departure from the guidelines. Such commentary is to be treated as the legal equivalent of a policy statement. Finally, the commentary may provide background information, including factors considered in promulgating the guideline or reasons underlying promulgation of the guideline. As with a policy statement, such commentary may provide guidance in assessing the reasonableness of any departure from the guidelines.[109]

B. The Supreme Court Decision in Stinson v. United States

Unsurprisingly, as courts started applying sentences according to the Guidelines, policy statements, and Commentary, criminal defendants challenged the legal weight and force that the Guidelines, policy statements, and Commentary should carry.[110] The Supreme Court addressed these questions in various cases including in *Williams v. United States*,[111] where it held that "[w]here . . . a policy statement prohibits a district court from taking a specified action, the statement is an authoritative guide to the meaning of the applicable Guideline."[112] And in *Mistretta*, the Court held "the Guidelines

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107. Stinson v. United States, 508 U.S. 36, 41 (1993). There are other parts of the Act that refer to the Commentary. *Id.* (citing 18 U.S.C. § 3553(b)) ("[I]n determining whether to depart from a guidelines range, 'the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission'").

108. United States v. Riccardi, 989 F.3d 476, 484 (6th Cir. 2021) (citing U.S. SENT'G GUIDELINES MANUAL § 2B1.1 cmt. nn.1–8 (U.S. SENT'G COMM'N 2018)); *see also Moses*, 23 F.4th at 353 (citing Notice of Sentencing Guidelines and Policy Statements for the United States Courts as submitted to Congress, together with Certain Technical, Conforming, and Clarifying Amendments, 52 Fed. Reg. 18,046, 18,110 (May 13, 1987)).

109. *See Moses*, 23 F.4th at 353 (quoting § 1B1.7 (citation omitted)).

110. *Id.* at 354 (citing 28 U.S.C. § 994(a)(1)–(2), (c), (d)).

111. 503 U.S. 193 (1992)

112. *See Moses*, 23 F.4th at 354 (emphasis omitted) (citing Williams v. United States, 503

bind judges and courts in the exercise of their uncontested responsibility to pass sentence in criminal cases."[113]

Some courts of appeals, however, determined that these cases and the deferential principles set forth in some of the Court's cases on the Manual did not apply to the Commentary.[114] Noting that the courts of appeals had "taken conflicting positions on the authoritative weight to be accorded to the commentary to the Sentencing Guidelines," the Supreme Court addressed this question in *Stinson*.[115]

The Court approached the issue with an administrative law lens. It found that the Guidelines were the "equivalent of legislative rules adopted by federal agencies."[116] With respect to the Commentary, it extended its analogy by holding that it was "akin to an agency's interpretation of its own legislative rules."[117] Although it admitted that "the analogy is not precise because Congress has a role in promulgating the guidelines," it found that the "functional purpose of commentary (of the kind at issue here) is to assist in the interpretation and application of those rules, which are within the Commission's particular area of concern and expertise and which the Commission itself has the first responsibility to formulate and announce."[118]

Citing *Seminole Rock*, the Court held that "provided an agency's interpretation of its own regulations does not violate the Constitution or a federal statute, [the Commentary] must be given 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.'"[119] Thus, *Stinson* stands for the proposition that the Commentary is binding on courts "even when the related Guideline is unambiguous," so long as at the Commentary is not "inconsistent with law or the Guideline itself."[120]

U.S. 193, 201 (1992)); Mistretta v. United States, 488 U.S. 361, 391 (1989). *See also* Burns v. United States, 501 U.S. 129, 133 (1991) (explaining that a district court must follow the Guidelines absent aggravating or mitigating circumstances).

113. *See Moses*, 23 F.4th at 354 (citing *Williams*, 503 U.S. at 201). *See Mistretta*, 488 U.S. at 391; *see also Burns*, 501 U.S. at 133.

114. Stinson v. United States, 508 U.S. 36, 42 (1993).

115. *Id.* at 40.

116. *Id.* at 45.

117. *Id.*

118. *Id.* at 44–45.

119. *Id.* at 45 (quoting Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945)).

120. United States v. Moses, 23 F.4th 347, 348 (4th Cir. 2022) (citing *Stinson*, 508 U.S. at 38, 43–44) *petition for cert. filed,* (Aug. 19, 2022) (No. 22-163).

III. A NEW SPLIT IN THE *ROCK*

A. The Split

While it is no surprise that the lower courts have been wrestling with their newfound task of interpreting the Supreme Court's decision in *Kisor*, it is surprising that a clear circuit split has emerged so quickly. That said, perhaps it is understandable because this split is rooted in a long-standing controversy as to how the Guidelines and its related Commentary are to be applied and interpreted.

Compounding this issue is the difficult question of how the Court's deference doctrines in general are to be applied in the area of criminal law, which intersects with principles of fairness, retribution, and accountability, as well as implicating liberty interests and related constitutional protections. And this exercise becomes even more difficult when reconciling how courts are to apply other tools of statutory and regulatory construction, as required by the Court in *Kisor*.

At present, the *Seminole Rock* circuit split involves three circuits: the Third, Fourth, and Sixth Circuits. Each court (with the Third Circuit sitting en banc) were, at bottom, called upon to "determine the enforceability of and the weight to be given the official commentary of the Sentencing Guidelines."[121] This required the *Moses* court to determine whether the Supreme Court's 1993 holding set forth in *Stinson* continues to apply or whether *Stinson*'s framework was overruled by the Supreme Court's 2019 decision in *Kisor*.[122] This Section analyzes the cases in each of these circuits.

With respect to whether the *Seminole Rock* doctrine, as elucidated by *Kisor*, applies to the Commentary, several key observations can be made. First, a conflict exists among the circuits as to whether *Stinson* remains good law or whether *Kisor*'s new limitations on *Seminole Rock* now apply as to whether courts should defer to the Commentary. Second, in resolving this split, the Court may need to revisit whether *Seminole Rock* should apply to the deference question presented in cases involving the Commentary. Resolution of this split, therefore, will likely require the Court to determine whether to explicitly overrule *Stinson*. Third, based on the conflict over the application of the *Seminole Rock* doctrine in cases involving deference to the Commentary, Supreme Court review is unquestionably warranted to examine the applicability of the doctrine in this context, particularly given the liberty interests presented in these cases.

121. *Id.*

122. Kisor v. Wilkie, 139 S. Ct. 2400 (2019); *Moses*, 23 F.4th at 348.

In light of the *Kisor* Court's understandable failure to address and reconcile its decision with *Stinson* (and more broadly reconcile deference issues in the criminal law context), this Section seeks to explain the split by analyzing the three key courts of appeals cases entangled in this conflict. It also analyzes the legal arguments on both sides of these conflicting decisions in an effort to preview the Court's future reevaluation of the doctrine as it applies to the Commentary.

1. The Sixth Circuit's decision in United States v. Riccardi

In *United States v. Riccardi*,[123] U.S. Postal Service employee, Jennifer Riccardi, plead guilty to stealing about 1,500 gift cards from the mail, which had a total value of approximately $47,000.[124] Following the Guidelines, the district court increased Riccardi's sentencing range based on the amount of the "loss" that resulted from the crime.[125] The Court set a minimum loss of $500 for each gift card—irrespective of its actual value—which brought Riccardi's "loss" amount to $752,500.[126]

Unsurprisingly, on appeal, Riccardi challenged the lower court's $500 minimum loss amount.[127] The lower court justified $500 as the minimum loss amount based on the Commentary, as opposed to the applicable Guideline.[128] For unknown reasons, the $500 minimum loss requirement appears only in the Commentary and not in the actual Guideline.[129] Based on this omission, Riccardi argued that the $500 minimum "conflict[ed]" with the Guideline.[130] The Sixth Circuit agreed, stating that the Commentary must only interpret the Guideline and a $500 mandatory minimum is not an interpretation of the word "loss."[131] It found that the $500 minimum was more properly regarded as a substantive legislative rule, which was required to be in the Guideline in order to carry the force of law.[132]

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123. 989 F.3d 476 (6th Cir. 2021).

124. United States v. Riccardi, 989 F.3d 476, 479 (6th Cir. 2021).

125. *Id.* (citing U.S. SENT'G GUIDELINES MANUAL § 2B1.1(b)(1) (U.S. SENT'G COMM'N 2018)). The Guidelines do not define the word "loss."

126. *Riccardi*, 989 F.3d at 479; see *id.* ("Most of these gift cards had an average value of about $35.").

127. *Riccardi*, 989 F.3d at 479.

128. *Id.* at 483 (citing § 2B1.1 cmt.).

129. *Id.* (citing § 2B1.1 cmt.). As way of background, the court noted that "[t]he guideline for theft offenses—[U.S. SENT'G GUIDELINES MANUAL] § 2B1.1—starts with a base offense level of 6" and "courts must 'increase the offense level'" in incremental amounts based on the "loss" from the offense. *Id.* at 481 (citing § 2B1.1(a)(2), (b)(1)).

130. *Riccardi*, 989 F.3d at 483.

131. *Id.*

132. *Id.*

In reaching this conclusion, the court found that the Supreme Court's decision in *Kisor* squarely affected its analysis. As explained above, the Supreme Court in *Stinson* found that the *Seminole Rock*'s standard applied such that the Commentary's interpretation of a Guideline "must be given 'controlling weight unless it is plainly erroneous or inconsistent with the' guideline."[133] Moreover, the Sixth Circuit acknowledged that the *Stinson* Court specifically permitted the Commission to, in essence, amend a Guideline by amending the accompanying Commentary so long as "the guideline [that] the commentary interprets will bear the [amended] construction."[134] Under this direction, the *Riccardi* court observed that courts had been unsurprisingly swift to defer without much analysis.[135]

But in the wake of *Kisor*, the court noted, that the *Seminole Rock* analysis had changed: no longer should a court "reflexively defer to an agency's interpretation."[136] For example, before deferring, a court must conclude that a regulation (in this case, the Guideline) is "'genuinely ambiguous, even after [the] court has resorted to all the standard tools of interpretation' to eliminate that ambiguity."[137] Similarly, the agency's interpretation (in this case, the Commentary) "must come within the zone of ambiguity the court has identified after employing all its interpretive tools."[138]

To answer the question whether *Kisor*'s new framework now applied to its analysis on whether to defer to the Commentary, the Sixth Circuit relied principally on the fact that the *Stinson* Court itself drew an analogy between an agency interpretation of a regulation and the Commentary to the Guidelines.[139] Thus, *Kisor*'s reexamination of the *Seminole Rock* standard applies to (and correspondingly alters) *Stinson*'s holding with respect to the Commission's Guidelines.[140] The court reinforced its view by noting that the Court in *Kisor* had cited *Stinson* as a pre-*Auer v. Robbins*[141] decision that had applied the *Seminole Rock* standard.[142]

133. *Id.* at 484 (first citing Stinson v. United States, 508 U.S. 36, 36–37 (1993), and then quoting Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945)).

134. *Id.* (quoting *Stinson*, 508 U.S. at 46).

135. *Id.*

136. *Id.* at 485 (referring to Kisor v. Wilkie, 139 S. Ct. 2400, 2415 (2019)).

137. *Id.* (quoting *Kisor*, 139 S. Ct. at 2414).

138. *Id.* (quoting *Kisor*, 139 S. Ct. at 2416).

139. *Id.* (quoting *Stinson*, 508 U.S. at 45).

140. *Id.*

141. 519 U.S. 452 (1997).

142. *Riccardi*, 989 F.3d at 485 (citing *Kisor*, 139 S. Ct. at 2411 n.3).

The Sixth Circuit was also persuaded that its conclusion was consistent with a key safeguard that *Kisor*'s factors sought to graft to the *Seminole Rock* standard.[143] Critics of *Seminole Rock* had long asserted that this controlling deference standard granted an agency the "power to adopt a new legislative rule under the guise of reinterpreting an old one."[144] Because the Guidelines go through notice-and-comment rulemaking, but the Commentary does not, the Commission can essentially amend the Guidelines by amending the Commentary, yet evade the notice-and-comment requirements.[145] Applying *Kisor*'s framework, the court reasoned, would therefore curb the Commission's ability to essentially change the Guidelines without adhering to procedural requirements.[146]

Having decided not to apply *Stinson*'s instruction to defer unless the Commentary "violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline," the court went on to determine that the Guideline was "genuinely ambiguous."[147] Next, it concluded "[n]o matter the word's meaning, the commentary's $500 minimum loss amount for gift cards does not fall 'within the zone of [any] ambiguity' in this guideline."[148] The court reversed *Riccardi*'s sentence and remanded the case for resentencing without the application of the Commentary's "automatic $500 minimum loss amount for every gift card."[149]

2. The Third Circuit's en banc decision in United States v. Nasir

In *United States v. Nasir*,[150] the Third Circuit, sitting en banc, heard the appeal of Malik Nasir, who had been convicted of two drug offenses and a firearm offense.[151] During his sentencing, the district court applied a career offender enhancement pursuant to the Guidelines.[152] Pertinent to the *Seminole Rock* issue, Nasir argued it was an error for the career offender enhancement to have been considered in his sentencing because one of

143. *Id.*

144. *Id.*

145. *Id.* (citing 28 U.S.C. § 994(x)).

146. *Id.*

147. Stinson v. United States, 508 U.S. 36, 38 (1993); *Riccardi*, 989 F.3d at 486 (citing *Kisor*, 139 S. Ct. at 2416).

148. *Riccardi*, 989 F.3d at 486 (citing *Kisor*, 139 S. Ct. at 2416); *Stinson*, 508 U.S. at 38.

149. *Riccardi*, 989 F.3d at 480.

150. 17 F.4th 459 (3rd Cir. 2021).

151. *Id.* The United States District Court for the District of Delaware convicted Nasir in 2020, but one of the issues was subject to review by the Supreme Court. After the United States sought a writ of certiorari, the Supreme Court granted the government's petition, vacated the judgment, and remanded for further consideration. *Id.* at 462 n.1.

152. *Id.* at 462.

his prior felony convictions did not qualify as a "controlled substance offense," as that term is defined in the Guidelines.[153] He asserted that his prior inchoate drug offense does not qualify as a predicate offense under the plain language of the Guidelines.[154]

Under the Guidelines, a defendant is a career offender if "the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and . . . the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense."[155] The district court found that one of Nasir's three convictions in the case qualified as a controlled substance offense, as did prior convictions in 2000 for an attempt to possess with an intent to distribute cocaine and a 2001 conviction for possession of marijuana and cocaine with intent to distribute.[156] Based on the two prior controlled substance offenses serving as predicate offenses, Nasir was sentenced as a career offender.[157]

The Guidelines define the term "controlled substance offense," as follows:

> [A]n offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.[158]

This definition, Nasir asserted, does not include "attempt" crimes, and therefore his prior conviction for his attempt to possess with an intent to distribute cocaine should not serve as a predicate offense for the career offender enhancement.[159] The Commentary, however, seemed to more broadly define "'controlled substance offense' [to] include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses."[160] In this instance, the Commentary was neither plainly erroneous nor inconsistent with the Guidelines; coupled with the Court's holding in *Stinson*, the district court gave the Commentary controlling weight under *Seminole Rock*.[161]

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153. *Id.* at 472.

154. *Id.* at 468.

155. *Id.* (citing U.S. SENT'G GUIDELINES MANUAL § 4B1.1(a) (U.S. SENT'G COMM'N 2018)).

156. *Id.* at 469.

157. *Id.*

158. *Id.* (citing § 4B1.2(b)).

159. *Id.*

160. *Id.* (citing § 4B1.2 cmt. n.1).

161. *Id.* at 470. *See* Leske, *Between* Seminole Rock, *supra* note 2, at 230 n.5 (noting that *Seminole Rock* deference is "controlling" because it is consistent with the Court's view that the agency's "administrative interpretation[] . . . becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.").

Sitting en banc, the Third Circuit, like the Sixth Circuit, declined to give the Commentary deference, especially in consideration of the *Kisor* decision.[162] It found that "[t]he extent to which the guidelines' commentary controls our interpretation of the guidelines themselves is informed by principles of administrative law."[163] The court recognized its past precedents that enforced *Stinson*'s holding that *Seminole Rock* deference was owed to the Commentary and, furthermore, that "if the guideline which the commentary interprets will bear the construction," it is permissible that the Commentary expands the Guidelines, "particularly when the commentary is 'interpretive and explanatory.'"[164]

But the en banc court found that its precedents in this area had been "informed by the then-prevailing understanding of the deference that should be given to agency interpretations of their own regulations."[165] *Kisor* represented the Supreme Court's prevailing understanding having "cut back on what had been understood to be uncritical and broad deference to agency interpretations of regulations . . . ."[166]

This cabining included the direction to courts that they should only apply *Seminole Rock* deference when the regulation (in this case, the Guideline) is ambiguous. Moreover, courts "must carefully consider the text, structure, history, and purpose of a regulation, in all the ways [they] would if it had no agency to fall back on," which "will resolve many seeming ambiguities out of the box."[167] Thus, prior to finding that a regulation is "genuinely ambiguous, a court must exhaust all the traditional tools of construction."[168]

Based on *Kisor*'s new command to courts on how to determine whether to defer under *Seminole Rock*, the Third Circuit found that inchoate crimes are not included in the definition of "controlled substance offenses" and therefore Nasir must be resentenced without being considered a career offender.[169] Additionally, the court more broadly held that the previous *Stinson* standard was no longer applicable.[170]

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162. United States v. Nasir, 17 F.4th 459, 471 (3rd Cir. 2021).

163. *Id.* at 469.

164. *Id.* at 470 (quoting Stinson v. United States, 508 U.S. 36, 46–47 (1993)).

165. *Id.* (discussing the Court's previous interpretations of the Commentary for the definition of inchoate crimes).

166. *Id.* at 471 (citing Kisor v. Wilkie, 139 S. Ct. 2400, 2415–16 (2019)).

167. *Id.* (quoting *Kisor*, 139 S. Ct. at 2415).

168. *Id.* (quoting *Kisor*, 139 S. Ct. at 2415).

169. *Id.* at 472.

170. *See id.* at 471 (noting that the court "may have gone too far" in giving the Commentary deference under *Stinson*).

3. The Fourth Circuit's Decision in United States v. Moses

In the wake of *Nasir* and *Riccardi*, the Fourth Circuit addressed the issue head-on in *United States v. Moses*.[171] Judge Niemeyer began his majority opinion by identifying that the panel was called upon to "determine the enforceability of and the weight to be given the official commentary of the Sentencing Guidelines."[172] To do this, he wrote, the court needed to determine "whether we are required to continue to apply the rules set forth in *Stinson* . . . or whether *Stinson* was overruled by the Supreme Court's recent decision in *Kisor* . . . ."[173]

In other words, *Stinson* held that the Commentary was binding on courts "even when the related [Sentencing] Guideline is unambiguous," so long as the Commentary is not "inconsistent with law or the Guideline itself."[174] Therefore, "under *Stinson*, [the] . . . commentary would be authoritative and binding regardless of whether the Guideline to which it is attached is ambiguous."[175]

Kisor, on the other hand, held that granting *Seminole Rock* deference to an agency's interpretation was only appropriate where "the regulation [in this case, the underlying Guideline at issue] is genuinely ambiguous."[176] Thus, the Commentary would be granted *Seminole Rock* deference only when the underlying Guideline is "genuinely ambiguous."[177]

The facts in *Moses* are straightforward. In the span of six days, Lenair Moses sold $20 of crack cocaine to a confidential informant in the Raleigh, North Carolina area.[178] These crack cocaine sales totaled 0.49 grams.[179] After being arrested, Moses pleaded guilty to two counts of distribution of a quantity of cocaine base in violation of 21 U.S.C. § 841(a)(1).[180]

Following his conviction for these two counts of drug trafficking, Moses was sentenced as a career offender under the Guidelines based on two prior drug-trafficking convictions.[181] He argued that the conduct that resulted in one of his prior convictions, which his career offender status was predicated

171. United States v. Moses, 23 F.4th 347 (4th Cir. 2022) *petition for cert. filed*, (Aug. 19, 2022) (No. 22-163).

172. *Id.* at 348.

173. *Id.* (citing Kisor v. Wilkie, 139 S. Ct. 2400 (2019)).

174. *Id.* (citing Stinson v. United States, 508 U.S. 36, 38, 43, 44 (1993)).

175. *Id.*

176. *See id.* (quoting *Kisor*, 139 S. Ct. at 2415).

177. *Id.*

178. *Id.* at 349.

179. *Id.*

180. *Id.*

181. *Id.* at 348 (citing U.S. SENT'G GUIDELINES MANUAL§ 4B1.1 (U.S. SENT'G COMM'N 2018)).

on, was, in actuality, part of the same course of conduct he was just convicted of.[182] If this were the case, his prior conviction should not have been considered a predicate conviction for being classified a career offender but rather should have been treated as "relevant conduct" under the Guidelines, which would have resulted in a significantly lower sentencing range.[183] The district court rejected his arguments and he appealed.[184]

The Fourth Circuit looked at "relevant conduct" in the Commentary to determine whether Moses's conduct that led to his prior conviction should be regarded as "conduct constituting a prior conviction" or "conduct relevant to the current offense."[185] The court observed that the Commentary states that "'offense conduct associated *with a sentence that was imposed prior to the acts or* omissions constituting the instant federal offense (the offense of conviction) is not considered as' relevant conduct."[186]

The critical question that faced the court was whether the Commentary was binding on the district court. If it were authoritative (which it would be under *Stinson*), there was no dispute that Moses should be considered a career offender.[187] But if *Kisor* applied, which Moses argued "chang[ed] the analysis that *Stinson* once gave us with respect to Guidelines commentary," making the Commentary nonbinding, then Moses's sentence should be vacated and his case returned to the lower court to determine (without deferring to the Guideline) whether his prior conduct qualifies as "relevant conduct."[188]

The Fourth Circuit concluded that "even though the two cases addressed analogous circumstances, *Stinson* nonetheless continues to apply when courts are addressing [the] . . . commentary, while *Kisor* applies when courts are addressing executive agency interpretations of legislative rules."[189] This conclusion came after reviewing the history and statutory structure of the Sentencing Reform Act, its Guidelines and Commentary, as well as the "distinct contexts and actual holdings of *Stinson* and *Kisor*."[190] It found especially noteworthy that the Court in "*Kisor* did not purport to overrule

182. *Id.*

183. *Id.* at 348–49 (citing § 1B1.3). The court noted that "the probation officer determined that, based on the quantity of drugs distributed, Moses's base offense level was 12." *Id.* But due to the conclusion that Moses should be considered as a career offender under section 4B1.1(a), the probation officer raised his offense level from twelve to thirty-two. *Id.*

184. *Id.* at 351.

185. *Id.* (quoting Application Note 5(C) to section 1B1.3).

186. *Id.*

187. *Id.*

188. *Id.* (citing § 1B1.3(a)(2)).

189. *Id.* at 352.

190. *Id.* at 351–59.

Stinson" and recognized that it was not its role to make that determination.[191]

In sum, unlike courts in the Sixth and Third Circuits, courts in the Fourth Circuit are required to find the Commentary "authoritative and binding, regardless of whether the relevant Guideline is ambiguous."[192] Consistent with *Seminole Rock*'s own limitation, the only instance where this does not apply is where the Commentary "'violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of,' the Guideline."[193] The court then went on to conclude that the Commentary at issue qualified for deference and rejected Moses's argument that his conduct in his prior conviction should be considered "relevant conduct," rather than a predicate offence for purposes of determining whether he should be classified as a career offender.[194]

B. Next Steps

A circuit split exists with respect to whether courts should grant "reflexive" deference under *Stinson* or apply the "cabined" approach under *Kisor*. The fundamental question with respect to the split is whether *Kisor* should be read to implicitly overrule (or, at the very least, modify) *Stinson*. As an initial matter, it is fascinating to note that *none* of the parties' initial appellate briefs in *any* of the three cases briefed this precise question.[195] Parties in each case did not zero in on this question until they filed petitions for rehearing en banc.[196]

But simply answering the circuit split question does not resolve the issue. Even assuming that the Fourth Circuit in *Moses* was correct to "stay the course" and apply *Stinson* undisturbed by *Kisor*, if and when the Court grants certiorari, the Court will likely revisit its own understanding of the relationship of *Stinson* and *Seminole Rock* (as refined by *Kisor*). Accordingly, this Section not only weighs in on the proper resolution of the circuit split, but also briefly previews this merits question.

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191. *Id.* at 357 (citing State Oil Co. v. Khan, 522 U.S. 3, 20 (1997)).

192. *Id.*

193. *Id.*

194. *Id.* at 357–58.

195. *See* Brief for Appellant at 2, 14–20, United States v. Riccardi, 989 F.3d 476 (6th Cir. 2021) (No. 19-4232); Brief for Appellee at 2, 16–23, *Riccardi*, 989 F.3d 476 (No. 19-4232); Brief for Appellant at 43–48, United States v. Nasir, 17 F.4th 459 (3d Cir. 2021) (No. 18-2888); Brief for Appellee, United States of America at 52–58, *Nasir*, 17 F.4th 459 (No. 18-2888); Opening Brief for Appellant at 24–27, *Moses*, 23 F.4th 347 (No. 21-4067); Response Brief of the United States at 13–19, *Moses*, 23 F.4th 347 (No. 21-4067).

196. Reply Brief for Appellant at 1–12, *Nasir*, 17 F.4th 459 (No. 18-2888); Reply Brief of Appellee at 2, 8, *Nasir*, 17 F.4th 459 (No. 18-2888).

1. Reflexive Deference?

On one hand, proponents of the view that *Stinson*'s holding still applies in full force, have simple—yet powerful—related arguments. The first argument is that these types of Commentary deference cases do not really involve *Seminole rock* deference at all. Thus, *Kisor* and its holding, which cabined the doctrine, simply do not apply. A careful reading of *Stinson* reveals that the Court did not direct the lower courts to apply the *Seminole Rock* standard to the Commentary. If this were the case, there certainly would be a stronger argument that as the *Seminole Rock* doctrine evolved so too did *Stinson*'s holding.[197] Rather, a better reading of *Stinson* is that the Court set forth a "free-standing deference standard that it analogized to *Seminole Rock* deference."[198]

Indeed, the *Stinson* Court explicitly suggested as much in its decision. It found that the Guidelines are like federal agency legislative rules and that the Commentary "is akin to an agency's interpretation of its own legislative rules."[199] But the Court clarified that "the analogy is not precise."[200] Based on this comparison, the Court looked to *Seminole Rock*'s standard as the basis for *Stinson*'s holding that deference to the Commentary is required so long as the interpretation "does not violate the Constitution or a federal statute" and is not "plainly erroneous or inconsistent with" the Guidelines.[201] But as the Court's language above makes clear, the relationship between *Stinson* and *Seminole Rock* was not based on equivalency.[202] In other words, the Court simply used the existing *Seminole Rock* standard to establish the standard in *Stinson*. Under this logic, *Stinson* therefore remains unaffected by *Kisor*.

A related argument is that, even on its own terms, *Kisor* "merely restated the limitations on applying deference to interpretations by an agency."[203] It did not address *Stinson* or the related case law with respect to the binding nature of the Commentary established in *Stinson*. And, more specifically, "*Kisor* did not purport to overrule *Stinson*."[204] In situations where the Supreme Court has not expressed its view on whether it reversed one of its prior decisions, courts of appeals cannot hold that the Supreme Court overruled an earlier Supreme Court's opinion. In other words, the Court

197. *Riccardi*, 989 F.3d at 490 (Nalbandian, J., concurring in part and in the judgment). This view was endorsed by Judge Nalbandian in his concurrence in *Riccardi*. *Id.*

198. *Id.* at 490.

199. Stinson v. United States, 508 U.S. 36, 45 (1993) (citing Brief for United States 13–16).

200. *Id.* at 44 (citing Brief for United States 13–16).

201. *Id.*

202. *Id.* at 45 (citing Brief for United States 13–16).

203. United States v. Cruz-Flores, 799 F. App'x 245, 246 (5th Cir. 2020).

204. United States v. Moses, 23 F.4th 347, 357 (4th Cir. 2022) (citing State Oil Co. v. Khan, 522 U.S. 3, 20 (1997)) *petition for cert. filed*, (Aug. 19, 2022) (No. 22-163).

has made clear, "it is this Court's prerogative alone to overrule one of its precedents."[205] Following this directive, it was somewhat unsurprising that the Fourth Circuit in *Moses* (as well as a concurring opinion in *Riccardi*) felt compelled, as matter of law, to leave *Stinson* undisturbed at this time.[206]

There are also sound policy reasons for continuing the deference afforded to the Commentary under *Stinson*. First, as stated above, a holding that *Kisor* implicitly overruled *Stinson* would go against the caution by the Court that lower courts should not lightly conclude that new precedent by the Supreme Court overturns directly controlling and binding precedent.[207] This point is underscored by the reasoning for *Seminole Rock*'s survival. *Seminole Rock* survived due to reliance interest and because "abandoning [*Seminole Rock*] deference would cast doubt on many settled constructions of rules."[208] As the *Kisor* Court succinctly noted, "[o]verruling precedent is never a small matter."[209] Therefore, it would be audacious for a lower court to conclude that, in the face of the *Kisor* Court's reasoning, the Court would have intended to overrule *Stinson*, which would then cast into doubt every prior decision relying on *Stinson* to uphold the Commentary.

Next, although the *Stinson* Court had "analogized to agency interpretations of regulations when adopting *Seminole Rock*'s plain-error test for the commentary," there are significant differences between "typical" agencies and the Commission, as well as differences between "typical" agency interpretations of regulations and the Commentary (which have been compared to agency interpretations of regulations).[210]

For instance, as the Fourth Circuit pointed out, "while both the Sentencing Commission and an executive agency are in a broad sense agencies, their purposes and roles are quite distinct."[211] On one hand the Commission is "judicial in nature" and the Guidelines "provid[e] guidance to district judges tasked with the duty of imposing an individualized sentence

205. State Oil Co. v. Khan, 522 U.S. 3, 20 (1997); *see also* Payne v. Taslimi, 998 F.3d 648, 654 (4th Cir. 2021) ("It is beyond our power to disregard a Supreme Court decision, even if we are sure the Supreme Court is soon to overrule it.").

206. *Moses*, 23 F.4th at 351–52; United States v. Riccardi, 989 F.3d 476, 492 (6th Cir. 2021) (Nalbandian, J., concurring in part and in the judgment) ("Perhaps, in the end, the Supreme Court will vindicate the thoughtful and well-reasoned majority opinion. But for now, I would leave it to the Supreme Court to expand its own precedent especially because, I believe, the result is the same in this case.").

207. *See* Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989).

208. Kisor v. Wilkie, 139 S. Ct. 2400, 2422 (2019).

209. *Id.* (citing Kimble v. Marvel Ent., LLC, 135 S. Ct. 2401, 2409 (2015)).

210. *Riccardi*, 989 F.3d at 485 (quoting Stinson v. United States, 508 U.S. 36, 45 (1993)).

211. *Moses*, 23 F.4th at 355.

on a criminal defendant."[212] On the other hand, other federal agencies typically serve executive functions and thus their "interpretations seek not just to inform and guide but also to regulate the broad range of people covered by the particular agency's jurisdiction, and they do so without the express authorization of Congress."[213]

Based on the differences between an agency interpretation of one of its regulation, unlike an agency promulgating a regulation, the Commission structured the Manual "with interrelated layers of explanation consisting of Guidelines, policy statements, and official commentary."[214] As the Supreme Court recognized, the Guidelines themselves "provide[] for the use of commentary and delineate[] the distinct 'functions' that 'commentary may serve,' which includes "explain[ing] the guidelines and provid[ing] concrete guidance as to how even unambiguous guidelines are to be applied in practice."[215] Therefore, especially due to the "multifarious circumstances that can be relevant to each individual defendant," the Commentary (and policy statements) help elucidate the Guidelines even if the particular Guideline is unambiguous.[216]

Thus, these structural and functional differences support a distinct (and independent) approach in the deference to be accorded to each respective agency and whether a change in the deference regime to one should naturally follow to the other.

2. Cabined Deference?

On the other hand, there is a logical argument for grafting *Kisor*'s new framework to *Stinson*'s holding (and thereby overruling *Stinson* to the extent that it applies to unambiguous Guidelines). Afterall, the Court in *Stinson* directed that courts "follow basic [administrative law] concepts."[217] And as mentioned above, because the *Stinson* Court itself had "analogized to agency interpretations of regulations when adopting *Seminole Rock's* plain-error test for the commentary," there is a plausible argument that *Kisor*'s clarification on how to apply *Seminole Rock* can also apply to analyses covered by *Stinson*, including whether to defer to the Commentary.[218]

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212. *Id.* (citing United States v. Booker, 543 U.S. 220, 245 (2005)).

213. *Id.*

214. *Id.* at 354.

215. *Id.* (citing *Stinson*, 508 U.S. at 44).

216. *Id.*

217. United States v. Riccardi, 989 F.3d 476, 485 (6th Cir. 2021) (citing Mistretta v. United States, 488 U.S. 361, 384–85 (1989)).

218. *Id.* (citing *Stinson*, 508 U.S. at 45).

In other words, to the extent that the *Kisor* Court took the "opportunity to restate, and somewhat expand on" the *Seminole Rock* doctrine, the Court's new view should apply moving forward when courts perform the analysis under *Stinson*.[219] The analyses by the lower courts (as noted by the Third Circuit sitting en banc in *Nasir*) had previously been "informed by the then-prevailing understanding of the deference that should be given to agency interpretations of their own regulations."[220] With *Kisor* now representing the Supreme Court's understanding that deference should be "cut back [from] what had been understood to be uncritical and broad deference to agency interpretations of regulations," that view should logically apply to *Stinson*, as well.[221]

The import of the Court's revaluation in these cases is clear. The *Kisor* Court noted that "the possibility of deference can arise only if a regulation is genuinely ambiguous."[222] So, "[i]f uncertainty does not exist, there is no plausible reason for deference."[223] Here, challenges to the Commentary involve Guidelines that are unambiguous with respect to the interpretive questions. Thus, a rote application of *Stinson*'s command to defer irrespective of whether the applicable Guideline contains ambiguity squarely conflicts.

There are also strong policy reasons why adhering to *Stinson*'s "reflexive deference" in these situations would be problematic. The *Kisor* Court cautioned that our current administrative state supports "the far-reaching influence of agencies and the opportunities such power carries for abuse."[224] This potential for abuse is "even more acute in the context of the Sentencing Guidelines, where individual liberty is at stake."[225] In fact, there is tension when applying *Seminole Rock* in criminal sentencing because "defining crimes and fixing penalties are legislative, not judicial, functions."[226]

The Guidelines themselves only survived constitutional muster because of the various "checks" on the Commission's authority.[227] For example, when designing the Guidelines, "the Commission is fully accountable to

219. Kisor v. Wilkie, 139 S. Ct. 2400, 2414–15 (2019).

220. United States v. Nasir, 17 F.4th 459, 470–71 (3rd Cir. 2021) (citing *Stinson*, 508 U.S. at 45).

221. *Id.* at 471 (citing *Kisor*, 139 S. Ct. at 2414–15).

222. *Kisor*, 139 S. Ct. at 2414.

223. *Id.* at 2415.

224. *Id.* at 2423. As a newer member of the Court also observed "[w]hen liberty is at stake," deference "has no role to play." Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 140 S. Ct. 789, 790 (2020) (Gorsuch, J., statement regarding denial of certiorari).

225. United States v. Campbell, 22 F.4th 438, 446 (2022).

226. United States v. Evans, 333 U.S. 483, 486 (1948).

227. *See* United States v. Mistretta, 488 U.S. 361, 393 (1989) ("Whatever constitutional problems might arise if the powers of the Commission were vested [solely in the Judiciary], the Commission is not a court . . . and is not controlled by or accountable to members of the Judicial Branch."). *See Campbell*, 22 F.4th at 446.

Congress, which can revoke or amend any or all of the Guidelines as it sees fit," and the Guidelines' promulgation is subject to notice-and-comment rulemaking.[228] But the Commentary is left to the unilateral discretion of the Commission, which in some circumstances can "allow circumvention of the checks Congress put on the Sentencing Commission, a body that exercises considerable authority in setting rules that can deprive citizens of their liberty."[229] Therefore, applying *Stinson*'s controlling deference standard to the Commentary "would effectively empower the Commission unilaterally to set—not just interpret—the rules for the 'application of the ultimate governmental power, short of capital punishment,' without congressional involvement."[230]

Thus, interpreting *Kisor* to allow a fluid interpretation of *Stinson* would be consistent with upholding a key safeguard that *Kisor*'s factors sought to graft to the *Seminole Rock* standard.[231] As a general matter, the *Kisor* Court recognized that critics of *Seminole Rock* had long asserted that this controlling deference standard granted an agency the "power to adopt a new legislative rule under the guise of reinterpreting an old one."[232] Because the Guidelines go through notice-and-comment rulemaking but the Commentary does not, the Commission can essentially amend the Guidelines by amending the Commentary thereby evading the notice-and-comment requirements.[233] Applying *Kisor*'s framework to *Stinson* would therefore curb the Commission's ability to do this.[234]

Another strong consideration that especially favors applying *Kisor* in criminal cases involves the rule of lenity. In *Kisor*, the Court directed lower courts to "exhaust the 'traditional tools' of construction" when determining whether the regulation in question is "genuinely ambiguous."[235] As a tool of construction, the rule of lenity requires that "[a]ny ambiguity in the language of a criminal statute should be resolved in favor of the defendant."[236] And

228. *Campbell*, 22 F.4th at 446 (quoting *Mistretta*, 488 U.S. at 393–94). *See supra* note 103 and accompanying text.

229. United States v. Nasir, 17 F.4th 459. *See also* United States v. Havis, 927 F.3d 382, 385–86 (6th Cir. 2019) (warning against "uniting legislative and judicial authority [in the Commission] in violation of the separation of powers.").

230. *Campbell*, 22 F.4th at 446 (citing United States v. Winstead, 890 F.3d 1082, 1092 (D.C. Cir. 2018) (quoting *Mistretta*, 488 U.S. at 413, 109 S. Ct. 647 (Scalia, J., dissenting))).

231. *See* United States v. Riccardi, 989 F.3d 476, 485 (6th Cir. 2021).

232. *Id.*

233. *Id.* (citing 28 U.S.C. § 994(x)).

234. *Id.*

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

236. United States v. Vitillo, 490 F.3d 314, 321 (3d Cir. 2007); United States v. Wiltberger, 18 U.S. (1 Wheat.) 76, 95 (1820); *see* Brief for New Civil Liberties Alliance as Amicus Curiae Supporting Malik Nasir, United States v. Nasir, 17 F.4th 459 (2021) (No. 18-

because "criminal laws are for courts, not for the Government, to construe," courts do not defer to the Government's reading of a criminal statute.[237]

With the *Kisor* Court making it unmistakably clear that courts must exhaust their legal toolkits first, the application of the rule of lenity supports rejecting *Stinson*'s reflexive deference regime. Indeed, even before *Kisor*, courts noted that "it is not obvious how the rule of lenity is squared with *Stinson*'s description of the commentary's authority to interpret guidelines."[238]

In sum, while this Article is not exhaustive, there are strong legal and policy justifications for reading *Kisor* to have modified—if not outright overruled—the *Stinson* analysis. While it is unclear whether the Court would fully endorse jettisoning *Stinson*, a revaluation seems certainly necessary to recalibrate the contours of deference in this area.

2888), 2020 WL 1983525, at *10 [hereinafter Amicus Curiae Brief].

237. *See* Amicus Curiae Brief, *supra* note 236, at *10 (quoting Abramski v. United States, 573 U.S. 169, 191 (2014)).

238. *See id.* at *14 (quoting United States v. Winstead, 890 F.3d 1082, 1092 n.14 (D.C. Cir. 2018)).