No. 23-0211

IN THE

United States Court of Appeals

For the Ames Circuit

UNITED STATES OF AMERICA,

Appellee,

v.

GERMANY VANCE,

Defendant–Appellant

ON APPEAL FROM A FINAL JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF AMES

BRIEF FOR APPELLEE

The Honorable Secretary Madeleine Albright Memorial Team

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Oral Argument

MARCH 6, 2024,
6:30 P.M.
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QUESTIONS PRESENTED

1. Supreme Court precedent requires appellate courts to afford deference to the factual inferences of district courts and police officers. Most circuit courts apply this precedent by reviewing evidence in the light most favorable to the prevailing party.

A. Should this Court review evidence in a suppression hearing in the light most favorable to the prevailing party—here, the government?

B. Did the district court correctly find police had reasonable suspicion to conduct a protective sweep of a vehicle where officers perceived the defendant make unusual and furtive movements during a late-night traffic stop in a high-crime neighborhood?

2. Supreme Court precedent dictates that district courts must defer to the Sentencing Commission's commentary interpreting the Sentencing Guidelines, with few exceptions. The district court deferred to commentary interpreting Guideline 2K2.1(b)(6)(B) and applied the enhancement when calculating the defendant's sentencing range. The Guideline requires an enhancement if a defendant used or possessed a firearm in connection with another felony offense. Did the district court correctly defer to the commentary when the defendant burglarized a licensed firearms dealer and stole eleven firearms?

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OPINIONS AND ORDERS

The district court's order denying Germany Vance's motion to suppress appears on page 6 of the Joint Appendix. The district court's final judgment and sentence appear on pages 7–8 of the Joint Appendix. The procedural order from this Court certifying Vance's appeal appears on page 10 of the Joint Appendix.

STATEMENT OF JURISDICTION

The district court had subject-matter jurisdiction under 18 U.S.C. § 3231 because Vance was charged under federal criminal statutes 18 U.S.C. §§ 922(u) and 924(i)(1). JA-3–4. Vance was convicted and timely appealed from final judgment. JA-7–9. Hence, this Court has jurisdiction under 28 U.S.C. § 1291. Additionally, this Court has jurisdiction to review Vance's sentence under 18 U.S.C. § 3742.

RELEVANT PROVISIONS

This case involves the Fourth Amendment to the United States Constitution; 18 U.S.C. §§ 922(u) and 924(i)(1); and United States Sentencing Guideline § 2K2.1(b)(6)(B) and Application Note 14(B)(i). The relevant sections of each provision are reproduced in the Appendix.

STATEMENT OF CASE

Different governmental actors perform distinct roles according to their varied expertise. Nevertheless, they are partners in the administration of justice. Law enforcement officers identify criminal activity. District courts assess complex evidentiary issues. And the Sentencing Commission guides nationwide uniformity in sentencing. Our judicial system depends on the symbiotic relationship between these actors. To preserve this balance, the Supreme Court has long safeguarded each actor's latitude to exercise their respective expertise. Officers Roberto Cruz and Cristina Tran recognized criminal activity. District Judge Henry Thomas credited their account. And he issued a sentence according to the Sentencing Commission's guidance. The government urges this Court to uphold the established principle of institutional collaboration and affirm the judgment below.

1. Arrest and Indictment

On July 11, 2022, Germany Vance—the defendant—broke into Freddy's Firearms, a nationally licensed firearms store. JA-2, 3. Vance then stole eleven firearms and "possess[ed]" the firearms while remaining in the store. JA-2, 3, 8. With the eleven firearms hidden under the front seats of his vehicle, JA-12, Vance drove through a high-crime area—commonly known as the "Combat Zone" due to its concentration of drug deals and firearms. JA-11. Around 11:00 P.M.,

while in the Combat Zone, Vance committed a civil infraction by failing to use his turn signal. JA-2, 11.

Ames City Police Department Officers Roberto Cruz and Cristina Tran were patrolling the Combat Zone that night. JA-11. Upon witnessing Vance's traffic violation, Officer Tran turned on the police cruiser's sirens, signaling Vance to pull over. JA-11. As soon as Officer Tran "hit [her] lights, [Vance] hit his," JA-13, reaching for his vehicle's dome light and turning it on before starting to slow down, JA-11. A few moments later, Vance began slowly decelerating for "ten or so seconds." *Id.* While slowing down, Vance proceeded to reach for his sun visor, flipping it down and up. *Id.* Officer Cruz perceived these movements as odd—after all, it was nighttime, and "[i]t's not like it was sunny outside." JA-12. Vance's movements "heightened" Officer Cruz's concerns because "[i]t's not how most of the traffic stops [he'd] been involved with have gone down." JA-11. These "unusual" movements made Officer Cruz "nervous," "a little suspicious," and "antsy." *Id.* He told Officer Tran that, based on his decade of experience patrolling the Combat Zone, *id.*, he was "concerned for his safety" because of what they had observed, JA-14.

Vance then pulled to the curb, eventually coming to a stop. JA-11. As the officers approached, Vance continued glancing at his sun visor. JA-12. The officers safely and cooperatively removed Vance from the

vehicle. *Id.* While Officer Tran monitored Vance, Officer Cruz conducted a protective sweep of the vehicle to ensure the officers' safety. *Id.* This sweep revealed the eleven firearms stashed under Vance's seats. *Id.* The officers arrested him and seized the firearms. *Id.*

Law enforcement then reviewed security footage showing Vance breaking into Freddy's Firearms and stealing the same eleven firearms that were recovered from his vehicle. JA-3. Accordingly, the government indicted Vance under 18 U.S.C. § 922(u) for theft from a licensed firearms dealer and 18 U.S.C. § 924(i)(1) for a knowing violation of § 922(u). *Id.*

2. District Court Proceedings

Vance moved to suppress the evidence of the eleven firearms found during Officers Cruz and Tran's protective sweep. JA-5. The district court denied his motion because the protective sweep was "justified, lawful, and did not violate the Fourth Amendment." JA-6. Vance then conditionally pleaded guilty, preserving his right to appeal both the denial of his suppression motion and his sentence. JA-7.

The Presentencing Investigation Report recommended a four-level enhancement to Vance's offense level based on Sentencing Guideline § 2K2.1(b)(6)(B) ("Guideline 2K2.1"). *Id.* The Guideline applies to defendants who "'used or possessed [a] firearm . . . in connection with another felony offense' (here, Ames's statute

criminalizing burglary with intent to steal a firearm)." *Id.* (quoting U.S. Sent'g Guidelines Manual § 2K2.1(b)(6)(B) (U.S. Sent'g Comm'n 2023) [hereinafter USSG § 2K2.1]). The Guideline's commentary, Application Note 14(B)(i), interprets the Guideline to apply to defendants who "during the course of a burglary, find[] and take[] a firearm, even if the defendant[s] did not engage in any other conduct with that firearm during the course of the burglary." USSG § 2K2.1 cmt. n.14(B)(i). Vance objected to the enhancement. JA-7. Following *Stinson v. United States*, the district court, deferring to the Sentencing Commission's "learned judgment," found Note 14(B)(i) authoritative. JA-7–8.

After calculating the advisory sentencing range, the district court sentenced Vance to twenty months of imprisonment, followed by two years of supervised release. JA-8. Vance timely appealed the denial of his suppression motion and the sentencing enhancement. JA-9.

SUMMARY OF ARGUMENT

I. The district court correctly denied the motion to suppress evidence of firearms discovered during the officers' protective sweep of Vance's vehicle. In *Ornelas v. United States*, the Supreme Court directed appellate courts to "give due weight" to the inferences of law enforcement officers and judges when reviewing suppression-hearing evidence. Accordingly, this Court should review this evidence in the light most favorable to the government for three reasons: First, the

"light most favorable" standard operationalizes *Ornelas*'s "deference" to judges and police officers in reviewing evidence. Second, the circuits overwhelmingly embrace this standard. And third, this standard reflects district courts' comparative institutional advantage for assessing evidence. Properly reviewed, Vance's behavior—anomalous, furtive movements in a high-crime area—more than sufficiently supported law enforcement's reasonable suspicion of danger. Accordingly, their protective sweep was constitutionally justified under *Michigan v. Long*.

II. The district court correctly applied the four-level enhancement under Guideline 2K2.1. Following the Supreme Court's command in *United States v. Stinson*, the district court deferred to the Sentencing Commission's commentary, which interprets Guideline 2K2.1 to apply to defendants who steal firearms during the course of a burglary. The *Stinson* Court articulated a unique standard that requires courts to defer to the Sentencing Commission's commentary regardless of the Guidelines' ambiguity. To quote the Fifth Circuit sitting en banc: "As night follows day, this Court is bound by *Stinson*." Separately, *Kisor v. Wilkie* circumscribed deference to a typical agency's interpretation of its own ambiguous rule. But the Sentencing Commission is not typical, and the deference doctrines are distinct by their own terms. Thus, *Kisor* does not reach *Stinson*. However, even if this Court disagrees, the

outcome remains the same under *Kisor*: The Commission's commentary interpreting ambiguous Guideline 2K2.1 warrants deference.

STANDARD OF REVIEW

When evaluating the denial of a motion to suppress, appellate courts review the district court's ultimate legal determination de novo and the district court's findings of historical fact for clear error. *Ornelas v. United States*, 517 U.S. 690, 699 (1996). Appellate courts review the evidence in a suppression-hearing record in the light most favorable to the prevailing party. *See infra* Part I.A.

Appellate courts review district court interpretations of the Sentencing Guidelines de novo. *See, e.g.*, *United States v. Maloid*, 71 F.4th 795, 800 (10th Cir. 2023).

ARGUMENT

I. THE DISTRICT COURT CORRECTLY DENIED VANCE'S MOTION TO SUPPRESS.

This Court should affirm the district court's denial of Vance's motion to suppress. First, this Court should review the suppression-hearing evidence in the light most favorable to the prevailing party—here, the government. Second, law enforcement conducted a constitutional protective sweep of Vance's vehicle.

A. This Court should review the suppression-hearing evidence in the light most favorable to the government.

The "light most favorable" standard applies here for three reasons. First, it operationalizes the Supreme Court's directive in

Ornelas v. United States to "give due weight" to the inferences of law enforcement officers and judges. 517 U.S. 690, 699 (1996). Second, the standard predominates across the vast majority of circuits. Third, the standard honors district courts' institutional competence.

1. The "light most favorable" standard operationalizes the "due weight" standard articulated in *Ornelas v. United States*.

The "light most favorable" standard implements the doctrinal framework in *Ornelas*. The *Ornelas* Court identified two elements of a district court's suppression-hearing decision: (1) the district court's ultimate legal conclusion and (2) the evidence supporting that conclusion. 517 U.S. at 699.

Ornelas prescribed a separate standard of review for each element. *Id.* First, a district court's "ultimate determination[] of reasonable suspicion" receives de novo review on appeal. *Id.* at 697. Second, the evidence—namely, the historical facts and inferences by which the district court arrives at its determination—"deserve[s] deference." *Id.* at 699. For instance, "findings of historical fact" are reviewed for "clear error." *Id.* Additionally, the *Ornelas* Court required appellate courts to "give due weight" to "inferences drawn from those [historical] facts by resident judges and local law enforcement." *Id.*

The instant case illustrates this review process. Here, the record states the historical fact that Vance decelerated for "about ten or so seconds." JA-11. Per *Ornelas*, this Court reviews this fact for clear error.

517 U.S. at 699. From this fact, Officer Cruz derived two inferences based on his decade of experience conducting traffic stops. JA-11. First, he interpreted Vance as moving unusually "slowly." *Id.* Second, this atypical slowdown "heightened [Officer Cruz's] concerns," making him "antsy" and "nervous." *Id. Ornelas* requires this Court to afford these inferences "due weight." 517 U.S. at 699. After evaluating this evidence, the district court concluded that the officers had reasonable suspicion—the legal question that *Ornelas* instructs this Court to review de novo. *Id.*

Vance contravenes *Ornelas* by subsuming "due weight" into de novo review. *See* Appellant's Br. 15–16. The *Ornelas* Court painstakingly disaggregated "due weight," which applies to factual inferences, and de novo review, which applies to legal conclusions. 517 U.S. at 699. After clarifying that the legal conclusion—reasonable suspicion—is reviewed de novo, the Court "hasten[ed] to point out that a reviewing court should take care . . . to give due weight to inferences drawn from those facts by resident judges and local law enforcement." *Id.* Moreover, contra Vance's assertion that "*Ornelas* requires appellate courts to apply de novo review to determine when 'weight' is 'due,'" Appellant's Br. 15–16, *Ornelas* establishes that "due weight" necessitates "deference" to judicial and law enforcement expertise, 517 U.S. at 699. For instance, in considering officer testimony regarding a

loose panel in the defendant's car, the *Ornelas* Court noted that "[t]o a layman," a loose panel inside a car "may suggest only wear and tear," but to an experienced police officer, it "suggested that drugs may be secreted inside the panel." *Id.* at 700. Therefore, the Court concluded that an appeals court "should give due weight to a trial court's finding that the officer was credible and the inference was reasonable." *Id.*

Accordingly, *Ornelas* demonstrates that "weight" denotes deference and "due" represents the rationale for deference: judicial and law enforcement expertise. Far from undercutting appellate courts' "constitutional responsibility," *see* Appellant's Br. 15 (quoting *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 501 (1984)), affording "deference" actualizes appellate courts' most elemental obligation: fidelity to Supreme Court precedent, *see Ornelas*, 517 U.S. at 699.

Courts operationalize *Ornelas*'s "due weight" standard by reviewing evidence in the "light most favorable" to the prevailing party. In its own application of the "due weight" standard, the *Ornelas* Court deferred to both components of the trial court's finding: (a) that the officer's representation of the historical fact—that the panel was loose—was credible, and (b) that the officer's inference based on that fact—that drugs may be secreted inside the panel—was reasonable. *Id.* at 700. Although de novo review applies to the ultimate legal question of

reasonable suspicion, *Ornelas*'s holding is unambiguous: Trial court judges' inferences "deserve deference," particularly where those inferences involve a district court's assessment of an officer's testimony. *Id.* at 699.

Consequently, courts apply the "light most favorable" standard by reviewing evidence in the "light most favorable to the party that prevailed in the district court." *United States v. Nelson*, 990 F.3d 947, 952 (5th Cir. 2021). The standard does not unduly favor either side, and courts have refused to apply it in a way that would. *United States v. Bershchansky*, 788 F.3d 102, 109 (2d Cir. 2015) (rejecting argument that "light most favorable" applies to the government when the government did not prevail in district court). After all, the phrase "prevailing party" reflects that the district court—the institution best equipped for interrogating factual questions—found that party's arguments credible. Appellate courts defer to this finding by construing a judge's factual inferences in the most favorable light. The "light most favorable" standard thus concretizes the concept of deference, or "due weight," owed to trial courts' assessment of evidence under *Ornelas*. 517 U.S. at 699; *see also United States v. Torres*, 987 F.3d 893, 900–01 (10th Cir. 2021) (stating that "the *Ornelas* Court's reasoning is consistent with our circuit precedent [light most favorable]").

In addition to capturing *Ornelas*'s deference to the district court, the "light most favorable" standard embodies the Court's directive to afford "due weight" to the inferences of experienced law enforcement officers. As the *Ornelas* Court explained, trial judges and police officers are particularly well-suited to draw inferences from the facts of a case. 517 U.S. at 699. Whereas trial judges are best positioned to "view[] the facts . . . in light of the distinctive features and events of the community," police officers are able to "view[] the facts through the lens of [their] police experience and expertise," which "yield inferences that deserve deference." *Id.*; *see also United States v. Santos*, 403 F.3d 1120, 1124 (10th Cir. 2005) (Under *Ornelas*, "[r]eviewing courts must also defer to the 'ability of a trained law enforcement officer to distinguish between innocent and suspicious actions.'" (quoting *United States v. McRae*, 81 F.3d 1528, 1534 (10th Cir. 1996))). In other words, courts' application of the "light most favorable" standard correctly recognizes that law enforcement and district courts are experienced in making and assessing factual inferences. Therefore, reviewing courts should consider such inferences in the most favorable light to avoid evidentiary distortion.

Furthermore, Vance's argument that the Supreme Court categorically rejected the "light most favorable" standard in all constitutional contexts does not withstand scrutiny. Appellant's Br. 12,

13 (citing *Harte-Hanks Commc'ns v. Connaughton*, 491 U.S. 657, 688–90 (1989)). *Connaughton* did not reject the "light most favorable" standard. In fact, the words "light most favorable" appear nowhere in the majority opinion. Nor was its holding broadly applicable across constitutional silos. Instead, *Connaughton* narrowly held that "whether the evidence in the record in a defamation case is sufficient to support a finding of actual malice is a question of law." 491 U.S. at 685. Indeed, the Supreme Court employs the "light most favorable" standard in subsequent First Amendment libel and defamation cases. *See, e.g.*, *Masson v. New Yorker Mag., Inc.*, 501 U.S. 496, 521 (1991); *Air Wisconsin Airlines Corp. v. Hoeper*, 571 U.S. 237, 239, 257 (2014). Therefore, contrary to Vance's contention, *see* Appellant's Br. 12–13, the "light most favorable" standard is consistent with not only *Ornelas*'s "due weight" standard, but also the broader landscape of constitutional law.

Nor does the "light most favorable" standard "deny litigants the ability to contest the inferential leaps of the officers and the district court." Appellant's Br. 13. Appellate courts applying the standard may—and do—prod, contextualize, and even reverse district courts' findings where they determine that such actions are warranted under *Ornelas*. When appellate courts use the "light most favorable" standard, they remain receptive to "evidence to the contrary" when considering

whether the "suspicion generated by the facts is reasonable." *United States v. Fagan*, 71 F.4th 12, 19, 20 (1st Cir. 2023). In *Fagan*, the First Circuit applied the "light most favorable" standard but still went to great lengths to verify the district court's factual conclusion. *Id.* at 19–22. Furthermore, appellate courts applying the "light most favorable" standard in situations where the government prevailed have exercised their discretion under the standard to reverse district courts' suppression rulings. *See, e.g.*, *United States v. Leon*, 80 F.4th 1160, 1170 (10th Cir. 2023).

2. Circuits overwhelmingly review suppression-hearing evidence in the light most favorable to the prevailing party.

The First, Third, Fourth, Fifth, Sixth, Ninth, Tenth, and Eleventh circuits consistently review motions to suppress under the "light most favorable" standard. The Seventh, Eighth, and D.C. Circuits do not explicitly name the "light most favorable" standard but nonetheless afford comparable deference to a district court's evidentiary assessments under *Ornelas*. Only one circuit—the Second Circuit—has criticized the "light most favorable" standard. And even that circuit has subsequently applied it. The "light most favorable" standard has been applied in name or principle by every regional circuit. It is not "circuit-specific," Appellant's Br. 14; it is a circuit staple.

When reviewing suppression rulings, the First, Third, Fourth, Fifth, Sixth, Ninth, Tenth and Eleventh Circuits consistently evaluate

evidence in the light most favorable to the prevailing party. In accordance with *Ornelas*, they review (1) the evidence on which the district court based its factual findings in the light most favorable to the prevailing party, (2) the factual findings based on that evidence for clear error, and (3) the legal conclusions based on those findings de novo. *United States v. Sykes*, 65 F.4th 867, 876 (6th Cir. 2023), *cert. denied*, No. 23-5429, 2024 WL 72077 (U.S. Jan. 8, 2024) ("When reviewing the denial of a suppression motion, we review the district court's factual findings for clear error, reviewing the evidence in the light most favorable to the government, and its conclusions of law de novo."); *United States v. Owens*, 167 F.3d 739, 743 (1st Cir. 1999) (same); *United States v. Myers*, 308 F.3d 251, 255 (3d Cir. 2002) (same); *United States v. Treisman*, 71 F.4th 225, 233 (4th Cir. 2023) (same); *United States v. Jefferson*, 89 F.4th 494, 502 (5th Cir. 2023) (same); *United States v. Brown*, 996 F.3d 998, 1002 n. 1 (9th Cir. 2021) (same); *United States v. Anderson*, 62 F.4th 1260, 1265 (10th Cir. 2023) (same); *United States v. Stowers*, 32 F.4th 1054, 1062–63 (11th Cir. 2022) (same).

While the Seventh, Eighth, and D.C. Circuits do not explicitly state that they are using the "light most favorable" standard, their applications of *Ornelas* reflect similar deference to the district court's evidentiary assessments. *See, e.g.*, *United States v. Sholola*, 124 F.3d 803, 811 (7th Cir. 1997) (emphasizing how *Ornelas* comported with the

familiar circuit practice of "giv[ing] special deference to the district court that heard the testimony and observed the witnesses at the suppression hearing" (quoting *United States v. Stribling*, 94 F.3d 321, 323 (7th Cir. 1996))); *United States v. Richmond*, 924 F.3d 404, 410–11 (7th Cir. 2019) (same); *United States v. Ball*, 90 F.3d 260, 262 (8th Cir. 1996) (same); *United States v. Cunningham*, 133 F.3d 1070, 1072 (8th Cir. 1998) (same); *United States v. Hart*, 324 F.3d 740, 747 (D.C. Cir. 2003) (same); *United States v. Broadie*, 452 F.3d 875, 880 (D.C. Cir. 2006) (same). Through their applications of *Ornelas*, the Seventh, Eighth, and D.C. Circuits employ the functional equivalent of the "light most favorable" standard—deference to a district court's assessment of the evidence on which factual conclusions are based and reviewed for clear error. These circuits demonstrate that the "light most favorable" standard actualizes *Ornelas*'s directive—even where courts do not explicitly credit the standard as guiding their analyses.[1]

Moreover, although the Second Circuit declined to use the "light most favorable" standard in *United States v. Pabon*, 871 F.3d 164, 173–74 (2d Cir. 2017), it nonetheless applied the standard in subsequent suppression motion cases. *See, e.g.*, *United States v. O'Brien*, 926 F.3d

[1] Vance attempts to enlist the Seventh, Eighth, Ninth, and D.C. Circuits in support of his assertion that multiple circuits explicitly "reject" the light most favorable standard. Appellant's Br. 14. None of these circuits, however, have done so.

57, 73 (2d Cir. 2019) ("In reviewing the denial of a defendant's motion to suppress, we view the record in the light most favorable to the government."); *United States v. Zeng*, 804 F. App'x 18, 20 (2d Cir. 2020) (same). Unsurprisingly, the Second Circuit has expressed uncertainty over which interpretation controls. *See, e.g.*, *United States v. Hagood*, 78 F.4th 570, 576 n.8 (2d Cir. 2023) (recognizing inconsistent circuit precedent on whether to apply "light most favorable" but declining to address the issue); *United States v. Rodriguez*, 727 F. App'x 725, 728 (2d Cir. 2018) (same). The "light most favorable" standard is thus neither "outdated" nor "circuit-specific." Appellant's Br. 14. On the contrary, circuits overwhelmingly embrace it.

3. The "light most favorable" standard reflects district courts' institutional competence in assessing evidence.

The "light most favorable" standard recognizes a district court's comparative institutional advantage for assessing evidence. The Supreme Court explicitly predicates appellate standards of review upon policy considerations. *See U.S. Bank Nat. Ass'n ex rel. CWCapital Asset Mgmt. LLC v. Vill. at Lakeridge, LLC*, 583 U.S. 387, 395 (2018) (stating that "standard[s] of review . . . depend[] on" the "nature" of the question involved and "which kind of court . . . is better suited to resolve it."). The "light most favorable" standard reflects the axiom that district courts are best situated to resolve disputed evidentiary issues.

District courts "develop expertise at making inferences from testimony and evidence because it is a function they perform all the time." Kelly Kunsch, *Standard of Review (State and Federal): A Primer*, 18 Seattle U. L. Rev. 11, 20 (1994). Moreover, trial judges possess the unique ability to assess a key witness's credibility by accounting for the witness's "verbal and nonverbal behavior . . . facial expressions, attitudes, tone of voice, eye contact, posture, and body movements." *United States v. Eddy*, 8 F.3d 577, 582 (7th Cir. 1993) (quoting *United States v. Tolson*, 988 F.2d 1494, 1497 (7th Cir. 1993)); *see also Anderson v. City of Bessemer City, North Carolina*, 470 U.S. 564, 575 (1985). Based on an evaluation of these factors, the trial judge's determination establishes the credibility not only of the witness herself, but also of her perception of the events at issue—assessments that are impossible to glean from the "cold pages of an appellate record." *Eddy*, 8 F.3d at 582–83.

The "light most favorable" standard leads to the most equitable outcomes because it allows appellate and district courts to perform the work for which they are best equipped. Certainly, mixed questions of law and fact—like the one before this Court—receive de novo review. *See* Appellant's Br. 11. And when an appellate court gives weight to a district court's assessment of a witness' *factual* inferences, that appellate court may more capably execute its "primary function as an

expositor of law" and come to its *legal* conclusions with the aid of a thoroughly-examined record. *Ornelas*, 517 U.S. at 697 (quoting *Miller v. Fenton*, 474 U.S. 104, 114 (1985)). The "light most favorable" standard operationalizes the fact-finder's determinations that a witness and her testimony are credible. Because district courts are best situated to appraise witness testimony and are experienced at drawing evidentiary inferences from that testimony, those inferences warrant deferential review.

4. This Court should give deference to the district court's and law enforcement's inferences.

This Court should review the district court's and law enforcement's factual inferences in the "light most favorable" to the government—operationalizing *Ornelas*'s "due weight" standard. The district court credited the factual inferences Officers Cruz and Tran made based on Vance's behavior and concluded that the officers met the requisite test for lawful searches under the Fourth Amendment. JA-6.

However, even if—like the Seventh, Eighth, and D.C. Circuits, and occasionally the Second Circuit—this Court does not invoke the "light most favorable" standard, it must nonetheless adhere to governing Supreme Court precedent and apply *Ornelas*'s "deference" to judicial and law enforcement inferences. 517 U.S. at 699. Per *Ornelas*, "weight" is "due" to these inferences based on "experience and expertise." *Id.*

Here, far from applying "generic" police experience, Appellant's Br. 19, Officer Cruz predicated his factual inferences on his decade of patrol experience in the Combat Zone, JA-11. This experience sufficiently foregrounds his inferences. For instance, in *United States v. Tucker*, the D.C. Circuit credited the factual inferences of an officer due to his four years of experience. Transcript of Motion Hearing Proceedings at 5–6, *Tucker*, 12 F.4th 804, 814 (D.C. Cir. 2021) (No. 246). Ten years of experience with Combat Zone traffic stops is specific to those traffic stops—not generic.

Ultimately, the "light most favorable" standard effectuates *Ornelas*'s deferential approach. This Court should review the suppression-hearing evidence in the light most favorable to the government, the party that prevailed in the district court.

B. Officers Cruz and Tran had reasonable suspicion to conduct a protective sweep of Vance's vehicle.

When reviewed under the "light most favorable" standard and *Ornelas*, the protective sweep of Vance's vehicle complied with the Fourth Amendment. Although the Fourth Amendment generally requires police to secure a warrant prior to conducting a search, *Terry v. Ohio* allows officers to briefly detain individuals without a warrant based on reasonable suspicion of criminal activity. *See* 392 U.S. 1, 27 (1968). Applying *Terry*, *Michigan v. Long* establishes a test for when

officers can conduct a protective sweep of a vehicle. 463 U.S. 1032, 1049 (1983).

Long permits protective sweeps of vehicles during traffic stops where police officers "possess[] a reasonable belief based on 'specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant' the officers in believing that the suspect [1] is dangerous and [2] may gain immediate control of weapons." *Id.* (quoting *Terry*, 392 U.S. at 21). Because both prongs are met here, this Court should affirm the district court's decision that the totality of the circumstances justified Officers Cruz and Tran's protective search. *See* JA-6.

1. Vance's unusual actions reasonably warranted Officers Cruz and Tran's belief that Vance was dangerous under the circumstances.

Officers Cruz and Tran reasonably believed Vance was dangerous—satisfying *Long*'s first prong. When assessing "dangerousness," courts consider whether officers' suspicions were based on "reasonable, articulable" grounds. *United States v. Arnott*, 758 F.3d 40, 43 (1st Cir. 2014). This standard is "protean and case-specific," as reasonable suspicion demands "more than a naked hunch" but less certainty than probable cause. *Id.* at 44; *see also United States v.*

Sokolow, 490 U.S. 1, 7 (1989).[2] The court's assessment must account for the "totality of the circumstances," which includes "various objective observations . . . and consideration of the modes or patterns of operation of certain kinds of lawbreakers." *United States v. Cortez*, 449 U.S. 411, 417–18 (1981). Totality of the circumstances means the whole is greater than the sum of its parts: No individual factor need connote criminality to sustain an overall finding of reasonable suspicion. Even where "each of the[] factors alone is susceptible of innocent explanation," when "[t]aken together," the factors may "suffice[] to form a particularized and objective basis for . . . stopping the vehicle." *United States v. Arvizu*, 534 U.S. 266, 277 (2002); *see also Santos*, 403 F.3d at 1125 (observing that the Supreme Court consistently affirms findings of reasonable suspicion "even when every single factor identified by the officers involved as suspicious was either innocuous or susceptible of an innocent explanation").

Assessing "dangerousness" is a holistic inquiry. *See Kansas v. Glover*, 140 S. Ct. 1183, 1190 (2020) ("[W]e have stated that reasonable suspicion is an 'abstract' concept that cannot be reduced to 'a neat set of legal rules.'" (quoting *Arvizu*, 534 U.S. at 274)). Officers must have latitude to make individualized determinations based on their

[2] Despite Officer Cruz's colloquial reference to a "hunch" about Vance glancing at the visor, JA-13, the totality of the circumstances sustains reasonable suspicion.

experience that "might well elude an untrained person." *Arvizu*, 534 U.S. at 273 (quoting *Cortez*, 449 U.S. at 418). This is paramount because "roadside encounters between police and suspects are especially hazardous." *Long*, 463 U.S. at 1049. As demonstrated below, courts have found that reasonable danger exists where traffic stops occur (a) under circumstances that pose heightened risk to police, and (b) where a driver acts unusually. Here, the stop's inherently dangerous conditions—combined with Vance's unusual movements—reasonably supported Officers Cruz and Tran's belief that Vance was dangerous.

a. The traffic stop occurred at night in a high-crime area, increasing danger to law enforcement.

The location, timing, and nature of the traffic stop contributed to Officers Cruz and Tran's reasonable suspicion of danger. Although the location "standing alone" cannot support a finding of reasonable suspicion, *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000); *see also* Appellant's Br. 21–22, a high-crime area is a "relevant contextual consideration[]" when analyzing the constitutionality of traffic stops, *Wardlow*, 528 U.S. at 124; *see also United States v. DeJear*, 552 F.3d 1196, 1201 (10th Cir. 2009) ("The fact that conduct occurs in an area known for criminal activity [is an] appropriate factor[] to consider in determining whether reasonable suspicion exists."). Here, Officers Cruz and Tran stopped Vance in a high-crime neighborhood known as the "Combat Zone" because of the frequent drug deals and concentration of

firearms in the area. JA-2, 11. The stop also occurred at night "around 11:00 p.m." JA-11. Courts have likewise found that this factor increases the danger of traffic stops. *See, e.g.*, *United States v. Shareef*, 100 F.3d 1491, 1506 (10th Cir. 1996) (finding police officers' suspicion of danger reasonable where the officers "confronted the defendants in their cars, at night . . . [and] could not tell whether the defendants had weapons on their persons or within reach").

Additionally, traffic stops are inherently dangerous for law enforcement officers. *Long*, 463 U.S. at 1047–48; *see also Pennsylvania v. Mimms*, 434 U.S. 106, 110 (1977) (recognizing the "inordinate risk[s]" involved when an officer approaches a vehicle); *United States v. Robinson*, 414 U.S. 218, 234, n.5 (1973) (noting that "a significant percentage of murders of police officers occur[] . . . [during] traffic stops"). During cross-examination, Officer Tran underscored officers' constant awareness of such risks. When asked if she was fearful for her safety during the stop, Officer Tran replied: "I mean, during any traffic stop in the Combat Zone at night, I am—we are—always on alert." JA-14.

b. Vance's slow stop and furtive movements contributed to the officers' concern for their safety.

When a police officer perceives a defendant's actions as "unusual" based on the officer's "familiarity with the customs of the area[]," this contributes to that officer's reasonable suspicion of danger. *Arvizu*, 534

U.S. at 276. Vance's unusual actions—his slow roll and furtive movements—justified Officer Cruz's concern that Vance was dangerous. *See United States v. Canada*, 76 F.4th 1304, 1308 (10th Cir. 2023), *cert. denied*, No. 23-327, 2024 WL 71952 (U.S. Jan. 8, 2024) (finding that this same combination satisfied reasonable suspicion of danger).

First, regarding Vance's unusually slow stop, courts have affirmed that a "slow roll"—while not dispositive—"contributes to the totality of the circumstances." *Id.* at 1308; *see also Arvizu*, 534 U.S. at 275–76 (finding that "slowing down" is one factor that adds to reasonable suspicion). Here, Officer Cruz testified that Vance took "ten or so seconds" to slow down, which was "more slowly than usual," and "something to raise an eyebrow over." JA-11–12. Vance's unusually slow stop contributed to the officer's conclusion that Vance posed a danger.

Second, Vance's furtive movements added to the officers' reasonable suspicion. When a defendant's actions are "furtive and suspicious," they "may suggest that the suspect is armed" or otherwise dangerous, therefore "provid[ing] ample ground to conduct" a protective sweep. *United States v. Williams*, 822 F.2d 1174, 1179 n.62 (D.C. Cir. 1987). While case law "has not precisely defined [furtive] movements," *State v. Weyand*, 188 Wash.2d 804, 815 (2017), courts have described the following movements as "furtive": "moving or leaning toward the right side of the truck," *United States v. Denney*, 771 F.2d 318, 322 (7th Cir.

1985); reaching "toward the floor," *United States v. Graham*, 483 F.3d 431, 439 (6th Cir. 2007); "reaching his right arm under the rear of his seat," *Canada*, 76 F.4th at 1306. Courts found that each of these movements contributed to reasonable suspicion of danger.

Here, Vance engaged in similar movements when he turned on his dome light and reached for his sun visor. Vance's turning on his light could indicate that he was looking for something—potentially a weapon (or the eleven weapons)—in his vehicle. The "objectively reasonable police officer," *Ornelas*, 517 U.S. at 696, would be justified in coming to this commonsense conclusion, *see Glover*, 140 S. Ct. at 1189–90 (affirming that police officers may "draw[] factual inferences" based on "common sense" and "commonly held knowledge"). After turning on the light, Vance "flip[ped] the driver's [sun] visor down and then up." JA-11. Officer Cruz deemed this particularly strange because "[i]t's not like it was sunny outside." JA-12. In his words, the experience was "not how most of the traffic stops I've been involved with have gone down." JA-11.

That Vance reached for the sun visor and not a compartment more conducive to hiding a firearm does not undermine Officer Cruz's reasonable suspicion. While he recognized that one cannot "easily hide" a firearm on top of a visor, JA-12–13, defendants have stored weapons there, *see, e.g.*, *State v. Banner*, No. IN-87-09-1241, 1989 WL 70972, at *1 (Del. Super. Ct. May 30, 1989) (denying defendant's motion to

suppress when a police officer "testified that she checks sun visors for weapons because she has previously found razors and knives hidden in them"); *United States v. Olguin*, No. CR-12-1163, 2012 WL 13070091, at *5 (D.N.M. Dec. 6, 2012), *aff'd*, 610 F. App'x 795 (10th Cir. 2015) (finding that officers' protective sweep was reasonable when both saw "at least one knife protruding from the passenger side visor"). Vance's turning on the light and reaching for his visor thus contributed to the officers' reasonable belief that he was dangerous.

The officers need not explicate the reasons they found Vance's furtive movements suspicious for the court to agree that such movements were suspicious. In *United States v. Weaver*, the en banc Second Circuit deemed a protective search constitutional based on law enforcement inferences that mirrored Officer Cruz's. 9 F.4th 129, 153 (2d Cir. 2021). The police officer in *Weaver* merely testified that he "was concerned" because the defendant's movements—"pushing" and "squirming kinda in the seat left and right"—were "abnormal." *Id.* at 135. Accounting for the officer's six years of experience, *id.* at 150, the Second Circuit extrapolated how a reasonable officer would infer danger from these observations: "slouching in his seat (suggesting that he was trying to minimize his visibility as the officer approached), squirming and pushing down on his pelvis (suggesting that he was trying to hide something in his pants)," *id.* at 148.

Just so here. Officer Cruz need not theorize why Vance's anomalously slow stop and furtive movements, including reaching for the dome light and visor, appeared dangerous for the district court to have found reasonable suspicion. Officer Cruz's testimony sufficiently establishes a "rational connection," *contra* Appellant's Br. 18, between his reasonable suspicion of danger and his inferences regarding Vance's otherwise mundane actions.

Moreover, Vance's cooperation does not undermine a finding of "reasonable suspicion." *See Navarette v. California*, 572 U.S. 393, 403 (2014) ("[W]e have consistently recognized that reasonable suspicion 'need not rule out the possibility of innocent conduct.'" (quoting *Arvizu*, 534 U.S. at 277)). For instance, in *United States v. Dennison*, the defendant "cooperat[ed] with officers:" he "presented identification" and "remained non-confrontational . . . even after he was removed from his truck." 410 F.3d 1203, 1212 (10th Cir. 2005). Nevertheless, the court concluded that the defendant posed a "threat to officer safety" sufficient to "justify the protective sweep." *Id.* Similarly, in *Weaver*, the defendant's compliance did not negate the officers' suspicion. 9 F.4th at 153. So too here. Just because Vance was cooperative one moment does not mean he would remain so the next.

Ultimately, the totality of circumstances—Vance's slow roll and furtive movements during a late-night traffic stop in the Combat Zone—collectively satisfies the "dangerousness" prong of the *Long* test.

2. Vance's ability to access potential weapons satisfies *Long*'s "immediate control" prong.

Officers Cruz and Tran's protective sweep comports with the second *Long* requirement because Vance could have "gain[ed] immediate control of weapons" during the stop. 463 U.S. at 1049. The Court defined the domain of "immediate control" as "the area from within which he might gain possession of a weapon." *Id.* at 1048 (quoting *Chimel v. California*, 395 U.S. 752, 763 (1969)). After all, officers "remain[] particularly vulnerable in part *because* a full custodial arrest has not been effected, and the officer[s] must make a 'quick decision as to how to protect [themselves] and others from possible danger.'" *Id.* at 1052 (quoting *Terry*, 392 U.S. at 28). Accordingly, the *Long* Court found that a defendant might gain immediate control of a weapon in his vehicle by (a) "break[ing] away from police control" or (b) being "permitted to reenter" when not placed under arrest. *Id.* at 1051–52.

This stop implicates both scenarios. The officers' behavior here parallels *Long*: Officers Cruz and Tran ordered Vance to exit the vehicle, and Officer Tran monitored Vance sitting on the curb while Officer Cruz performed the protective sweep of Vance's vehicle. JA-12, 14. Accordingly, Vance remained fully mobile—indeed, he was not even

handcuffed. JA-12. As such, like the officers in *Long*, Officers Cruz and Tran reasonably believed that Vance remained capable of "gain[ing] immediate control of weapons," satisfying *Long*'s second prong. 463 U.S. at 1049.

Although Vance claims otherwise, Appellant's Br. 25, not handcuffing him during the stop does not undermine the officers' concern that he was dangerous. Indeed, the *Weaver* court held that just because an officer allows a defendant to move freely does not mean that the officer "fe[els] safe." 9 F.4th at 136 n.3. Here, Officer Cruz remained "concerned and nervous," while Officer Tran felt "fearful" and "alert." JA-14.

Ultimately, when properly reviewed in the light most favorable to the government, Vance's unusual and furtive movements—coupled with the circumstances surrounding the traffic stop—justified Officers Cruz and Tran's reasonable suspicion that Vance was dangerous and may have had immediate access to a weapon. This reasonable suspicion satisfied the *Long* test, sufficiently justifying a protective sweep. Thus, this Court should affirm the district court's denial of Vance's motion to suppress.

II. THE DISTRICT COURT CORRECTLY DEFERRED TO THE SENTENCING COMMISSION'S COMMENTARY WHEN INTERPRETING GUIDELINE 2K2.1.

The district court correctly deferred to the Sentencing Commission's commentary—Application Note 14(B)(i)—and applied a

four-level enhancement to Vance's sentence under Guideline 2K2.1. JA-8. In *Stinson v. United States*, the Supreme Court held that commentary that interprets or explains a guideline is authoritative—the very question Vance seeks to relitigate here. 508 U.S. 36, 38 (1993). The *Stinson* Court spoke with a clarion voice: The Commission's commentary warrants deference.

Separately, in *Kisor v. Wilkie*, the Court refined *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), a case which granted deference to an agency's interpretation of its own ambiguous regulations. 139 S. Ct. 2400, 2414 (2019). But *Kisor* is irrelevant here. *Stinson* deference stands apart from *Seminole Rock* deference, unfettered by *Kisor*'s amendments. Unlike *Seminole Rock* deference, *Stinson* deference embraces commentary interpreting even unambiguous Guidelines and empowers the Commission to interpret Guidelines in ways that conflict with prior judicial interpretations. The two doctrines were distinct from the beginning. They remain so today.

Under *Stinson*, deference is due unless the commentary "violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline." 508 U.S. at 38. Because none of these narrow exceptions apply here, the district court correctly deferred to the Commission's commentary. This deference is appropriate even under *Kisor*, as the Guideline is (1) "genuinely ambiguous;" the

Commission's interpretation (2) is "reasonable;" (3) is its "official position;" (4) "implicate[s] [the Commission's] substantive expertise;" and (5) reflects "fair and considered judgment." 139 S. Ct. at 2415–17. Under either *Stinson* or *Kisor*, the district court's deference to the commentary is appropriate and should be affirmed.

A. *Kisor* does not apply and *Stinson* is binding on this Court.

The Supreme Court has spoken: "[C]ommentary in the Guidelines Manual that interprets or explains a guideline" binds federal courts, with few exceptions. *Stinson*, 508 U.S. at 38. This fulfills Congress's vision. Congress established the Sentencing Commission as an entity distinct from executive agencies. Recognizing this distinction, the *Stinson* Court created a standalone deference doctrine for the Commission's interpretative commentary of the Sentencing Guidelines. *Stinson*'s deference is separate from *Seminole Rock*'s deference to agencies' interpretations of their own regulations. *Stinson* remains good law. Although *Kisor* reinforced *Seminole Rock*'s limits and *Stinson* imperfectly analogized to *Seminole Rock*, the Commission's commentary—regardless of ambiguity—controls the calculation of a defendant's sentencing range.

1. The Sentencing Commission is functionally distinct from executive agencies.

The Sentencing Commission meaningfully differs from executive agencies. *See Stinson*, 508 U.S. at 44 (explaining that its "analogy" to

executive agency regulations is "not precise"). This accords with its congressional design. Honoring Congress's scheme, the Supreme Court deemed the Commission a "unique" entity. *Mistretta v. United States*, 488 U.S. 361, 384 (1989). Congress and the Court's congruent approach forecloses subjecting the Commission to *Kisor*—a case that "had everything to say about executive agencies and precious little about the Sentencing Commission." *Maloid*, 71 F.4th at 806.

Congress established the Sentencing Commission to "provide certainty and fairness" and "avoid[] unwarranted sentencing disparities." Sentencing Reform Act of 1984, 28 U.S.C. § 991(b)(1)(B). Located "in the judicial branch," § 991(a), the Commission creates, monitors, and revises a uniform sentencing scheme—the Guidelines Manual, § 994(o) and (w)(1). The Guidelines Manual is composed of three interrelated directives: the Guidelines, commentary, and policy statements. *See* 18 U.S.C. § 3553(b)(1). To avoid returning to "a system of indeterminate sentencing," *Mistretta,* 488 U.S. at 363, Congress empowered the Commission to guide judges through sentencing decisions.

The Commission differs from garden-variety executive agencies. Most importantly, unlike executive agencies, the Commission "do[es] not bind or regulate the primary conduct of the public." *Id.* at 396. Rather, the Manual "is directed at providing guidance to district judges"

when calculating an advisory sentencing range. *United States v. Moses*, 23 F.4th 347, 355 (4th Cir. 2022). The Commission's purpose is not to "regulate the public" as an agent of the President, but to "speak[] as an agent of the Judiciary." *Maloid*, 71 F.4th at 806–07.

Vance's own description of *Kisor* illustrates this key distinction. *See* Appellant's Br. 30. In *Kisor*, the Department of Veterans Affairs (VA) interpreted its rule in a manner that denied a veteran retroactive benefits. 139 S. Ct. at 2409. Unlike the VA, the Commission does not regulate segments of the public as a final authority. The Commission speaks to judges, who have discretion to deviate from the Commission's sentencing guidance. In *United States v. Booker*, the Court held that a judge must follow the Manual when calculating a sentencing range but is no longer required to impose a sentence dictated by that calculation. 543 U.S. 220, 264–65 (2005). *Booker* "ma[de] the Guidelines system advisory," but nevertheless the Guidelines "remain[] consistent with Congress' initial and basic sentencing intent." *Id.* at 246, 264. The principles of "uniformity" and "proportionality" remain intact while simultaneously giving judges the flexibility to deviate when needed. *Id.* at 264. Unlike the Manual, executive agency regulations—like those the VA promulgated—have the "force and effect of law." *Chrysler Corp. v. Brown*, 441 U.S. 281, 295 (1979). Accordingly, "deferring to the

commentary doesn't bind the courts in the same way deferring to interpretive rules binds the public." *Maloid*, 71 F.4th at 811.

Moreover, Vance claims that the Commission, a body that includes federal judges, 28 U.S.C. § 991(a), may skirt accountability when amending the Guidelines, Appellant's Br. 31. But Congress designed the Commission with ample procedural protections. To amend the Guidelines, the Commission must submit a proposal to Congress that is then subject to a 180-day review period. § 994(p). Consequently, "the Commission is fully accountable to Congress, which can revoke or amend any or all of the Guidelines." *Mistretta*, 488 U.S. at 393. In addition to congressional review, the Guidelines are subject to notice-and-comment requirements. § 994(x). The Commission adheres to those procedural protections when revising all three of their directives—the Guidelines, commentary, and policy statements. U.S. Sent'g Comm'n, R. 4.1, 4.3. Although not mandated by statute, the Commission nonetheless "endeavor[s] to provide, to the extent practicable, comparable opportunities for public input on proposed policy statements and commentary considered in conjunction with guideline amendments." *Id.* R. 4.3. Indeed, the commentary at issue here, Note 14(B)(i), went through the same procedures required to amend the Guidelines. *See* Notice of Proposed Amendments, U.S. Sent'g Comm'n, 71 Fed. Reg. 4782 (proposed Jan. 27, 2006).

The Commission's procedurally accountable approach to its commentary differs from the practices of executive agencies. Chief Judge Pryor, former Acting Chair of the Sentencing Commission, noted: "Unlike most agency interpretive rules, Guidelines commentary ordinarily goes through the same notice-and-comment and congressional review procedures as substantive guideline revisions." *United States v. Dupree*, 57 F.4th 1269, 1280 (11th Cir. 2023) (en banc) (Pryor, C.J., concurring). Executive agency interpretations, on the other hand, are "made more casually . . . without the notice-and-comment procedures of rulemaking." *Moses*, 23 F.4th at 355.

The list of differences between the Commission and executive agencies grows longer. Unlike executive agencies, the Commission lacks "enforcement or investigative authority." *Maloid*, 71 F.4th at 807. Furthermore, the Commission's rulemaking authority is tailored to its purpose—providing fair and uniform guidance to the nation's courts. *Id.* This stands in stark contrast to the discretion of executive agencies, "which can shift policies through formal and informal rulemaking." *Id.* The power that executive agencies wield is one of the reasons "why the APA limits executive agencies," but "exempt[s]" judicial agencies. *Id.*

2. The *Stinson* Court created a freestanding deference standard.

Stinson articulates a standard of deference that is doctrinally distinct from *Seminole Rock* deference. Although the *Stinson* Court

borrowed language from *Seminole Rock* in an "analogy [that] is not precise," *Stinson*, 508 U.S. at 44, it did not adopt *Seminole Roc*k's "limitations on deference," Appellant's Br. 29. The doctrines involve two irreconcilable differences. First, *Stinson* deference to the commentary is warranted regardless of whether the Guideline itself is ambiguous. Courts must defer to the commentary when determining "how even unambiguous guidelines are to be applied in practice." *Stinson*, 508 U.S. at 44. On the other hand, *Seminole Rock* deference "arise[s] only if a regulation is genuinely ambiguous." *Kisor*, 139 S. Ct. at 2414. *Seminole Rock* itself states that "a court must necessarily look to the administrative construction of the regulation *if the meaning of the words used is in doubt*." 325 U.S. at 414 (emphasis added).

Second, *Stinson* deference is owed regardless of whether a court had previously interpreted the Guideline in a conflicting way. "[P]rior judicial constructions of a particular guideline cannot prevent the Commission from adopting a conflicting interpretation." *Stinson*, 508 U.S. at 46. This differs from how courts treat executive agencies. "An agency's interpretation cannot trump a court's prior interpretation of an unambiguous statute." *United States v. Vargas*, 74 F.4th 673, 682 (5th Cir. 2023) (en banc). *Seminole Rock*'s "old soil" does not contaminate *Stinson* because these two differences are "new . . . provision[s] [that]

indicat[e] . . . departure from" *Seminole Rock*. *George v. McDonough*, 142 S. Ct. 1953, 1959 (2022).

Moreover, *Stinson* deference effectuates the Commission's purpose. The Manual—including the interpretative commentary attached to both ambiguous and unambiguous Guidelines—helps maintain nationwide sentencing uniformity. 28 U.S.C. § 991(b)(1)(B). The Commission intentionally writes the Guidelines with "a level of generality" to inform a variety of nationwide sentencing situations. *United States v. Allen*, 909 F.3d 671, 674 (4th Cir. 2018). As a result, the Guidelines depend on interrelated layers of commentary and policy statements to "put[] 'flesh on the bones' of the Guidelines." *Id.* at 674. The "interrelated layers of explanation" permit greater specificity, *Moses*, 23 F.4th at 354, to resolve fact-specific issues, including the resolution of conflicting judicial interpretations, *see* USSG supp. app. C, amend. 691 (2006) (explaining that Note 14(B) was added to "address[] a circuit conflict pertaining to the application" of Guideline 2K2.1). If *Kisor*'s "gloss," Appellant's Br. 29, were to be applied, no deference would be given to commentary that provides specificity to general and unambiguous Guidelines, crippling the Manual's goal of uniformity. Thus, *Kisor*'s application to the commentary would render the Manual's interconnected structure void.

In sum, the *Stinson* Court established an independent deference standard. Therefore, this Court is bound by commentary that interprets or explains a Guideline—including Note 14(B)(i).

3. Vertical stare decisis commands lower courts to adhere to *Stinson*.

Stinson, without *Kisor*'s "gloss," *id.*, is still good law. When a Supreme Court precedent has "direct application in a case," courts "should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson*, 490 U.S. 477, 484 (1989). Therefore, this Court is bound to follow *Stinson*—not *Kisor*—in *Stinson* cases.

Vance argues that *Kisor* does not overrule *Stinson*. *See* Appellant's Br. 31–32. Yet he urges this Court to apply *Kisor*'s reinforced limits, *id.* at 29, effectively overruling *Stinson*. Starting with *Kisor*'s first step, this Court would defer to the Commission only when the commentary interprets *ambiguous* Guidelines. 139 S. Ct. at 2414. But *Stinson* commands this Court to defer to the commentary *irrespective of ambiguity*. 508 U.S. at 44. To borrow *Stinson*'s own language, "following one will result in violating the dictates of the other." *Id.* at 43. Accordingly, *Kisor* and *Stinson* are irreconcilable.

The Supreme Court "does not normally overturn, or dramatically limit earlier authority *sub silentio*." *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000). Not once does *Kisor* mention the

Guidelines, the Commission, or the commentary. Vance claims that a string-cite footnote in *Kisor*'s plurality opinion, which mentions *Stinson* in passing, compels this Court to apply *Kisor*. Appellant's Br. 29. However, the *Kisor* Court declared that the opinion should not be interpreted so as to "relitigate[e]" the "thousands" of cases that mention *Seminole Rock*. *Kisor*, 139 S. Ct. at 2422. Consequently, it strains credulity to believe that *Kisor* commands this Court to relitigate *Stinson* merely upon the basis of *Stinson*'s imperfect analogy to *Seminole Rock*. "Surely, if the Supreme Court meant *Kisor* to reach sentencing"—and effectively overrule *Stinson* as a result—"it would have said so." *Maloid*, 71 F.4th at 809; *see also Agostini v. Felton*, 521 U.S. 203, 237 (1997) ("[W]e do not hold[] that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent.").

Seemingly certain that *Kisor* applies, Vance tilts at windmills, accusing circuit courts of misapplying stare decisis. *See* Appellant's Br. 31–33. For example, Vance claims that the Fifth Circuit did not overrule *Stinson* because *Kisor* lacked the "magic words" to do so. *Id.* at 31. In fact, the Fifth Circuit did not overrule *Stinson* because "*Stinson* sets out a deference doctrine distinct from the one refined by *Kisor*." *Vargas*, 74 F.4th at 678. Similarly, Vance states that the Tenth Circuit was bound by "circuit-specific vertical stare decisis." Appellant's Br. 33. This is not so. "Whether *Kisor* upended *Stinson* is a novel question in our

circuit . . . [we] rule that *Kisor* did not abrogate *Stinson*." *Maloid*, 71 F.4th at 805.

Ultimately, the Commission is different from executive agencies. *Stinson* deference is different from *Seminole Rock* deference. And despite *Kisor*'s reinforcement of *Seminole Rock*'s limits, *Stinson* remains good law. If *Kisor*'s "gloss" is applied, Appellant's Br. 29, then *Stinson* is effectively overruled. *Stinson* in full, not the "dramatically limit[ed]" version Vance argues for, is binding on this Court. *Shalala*, 529 U.S. at 17.

B. *Stinson* compels deference to the Sentencing Commission's commentary.

Note 14(B)(i) is an authoritative interpretation of its Guideline. Under *Stinson*, commentary "that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline." 508 U.S. at 38. In practice, courts do not treat "plainly erroneous" as a standard separate from "inconsistent with." *See, e.g.*, *United States v. Lewis*, 963 F.3d 16, 22 (1st Cir. 2020) (applying "inconsistency" alone); *United States v. Jackson*, 60 F.3d 128, 131 (2d Cir. 1995) (same). And Vance does not contend that the commentary violates the Constitution or a federal statute. *See* Appellant's Br. 42. Thus, to depart from *Stinson* deference, Note 14(B)(i) must be "inconsistent with" Guideline 2K2.1. 508 U.S. at 38.

Vance asserts that if *Kisor* is inapplicable, *Stinson*'s inconsistency standard vindicates his claim. Appellant's Br. 42. However, he does not engage with *Stinson*'s stringent definition of inconsistency, instead relying only on his *Kisor* analysis and lenity. *Id.* The *Stinson* Court "articulat[ed] the standard:" Commentary is inconsistent with its Guideline when "following one will result in violating the dictates of the other." 508 U.S. at 38, 43. Vance fails to meet this high bar. Note 14(B) is consistent with the ordinary language of Guideline 2K2.1—and numerous courts agree.

1. The commentary is consistent with its Guideline's plain text.

Guideline 2K2.1 directs judges to apply the enhancement "[i]f the defendant . . . used or possessed any firearm or ammunition in connection with another felony offense . . . ." USSG § 2K2.1. The text of Note 14(B)(i) states that the Guideline's enhancement applies in cases "in which a defendant who, during the course of a burglary, finds and takes a firearm, even if the defendant did not engage in any other conduct with that firearm during the course of the burglary." *Id.* § 2K2.1 cmt. n.14(B)(i). This is consistent with the Guideline's language. *See, e.g.*, *United States v. Morris*, 562 F.3d 1131, 1136 (10th Cir. 2009). For example, if Note 14(B)(i) applied the Guideline's enhancement to situations where a defendant "used or possessed any firearm or ammunition in connection with" a *misdemeanor*, instead of a *felony*

offense, then it would be inconsistent. Following this hypothetical mandate would violate the plain text of the Guideline. Not so here. Note 14(B)(i) clarifies—rather than contradicts—its Guideline. Because a sentencing judge may apply Note 14(B)(i) without "violating the dictates of" the Guideline, the two are "consistent" under *Stinson*. 508 U.S. at 43.

2. Courts have found Note 14(B) to be consistent with the Guideline.

Before the Commission enacted Note 14(B)(i), the Fifth Circuit had already concluded that the Guideline applies to burglaries that result in stolen guns. *E.g.*, *United States v. Armstead*, 114 F.3d 504, 512 (5th Cir. 1997). In *Armstead*, the court applied Guideline 2K2.1[3] because the defendants stole nineteen firearms. *Id.* at 513. The court found that the defendants possessed the firearms "in furtherance of 'another felony,' the state law crime of burglary." *Id.* Applying the "ordinary and natural meaning" of "in connection with," the court determined Guideline 2K2.1 to be applicable. *Id.* at 512. Like Vance, the *Armstead* defendants did not "possess[] or use[] firearms before they broke into the pawn shop," but they "certainly possessed firearms once they entered the pawn shop and picked up the guns." *Id.* Additionally, after the Commission enacted the commentary, multiple circuit courts found

[3] Before 2006, the Guideline was referred to as § 2K2.1(b)(5); it was later changed to § 2K2.1(b)(6). USSG supp. app. C, amend. 691 (2006).

Note 14(B) to be "consistent with the language of Guideline 2K2.1(b)(6)." *United States v. Hill*, 563 F.3d 572, 581 (7th Cir. 2009); *see also Morris*, 562 F.3d at 1136 (10th Cir. 2009); *United States v. Paneto*, 661 F.3d 709, 717 (1st Cir. 2011).

3. The rule of lenity does not apply to the Guidelines.

Vance argues that "clear statutory text" combined with an "agency's conflicting interpretation" can create sufficient ambiguity to trigger lenity. Appellant's Br. 43. But a statute's "grievous[] ambigu[ity]" is a precondition of lenity's application. *Id.* Because the text here is "unambiguous[]," per Vance, lenity cannot apply. *Id.* Additionally, if, as Vance asserts, the commentary is inconsistent with the Guideline, then the commentary is given no weight under *Stinson* and discarded. 508 U.S. at 38.

Vance seems unwilling to say, even in the alternative, that Guideline 2K2.1 is ambiguous. Had he done so, his lenity argument would still be inapposite. The rule of lenity is inapplicable to the Guidelines. First, lenity is animated by considerations of fair notice and due process. *See McBoyle v. United States*, 283 U.S. 25, 27 (1931). But the Guidelines are not a criminal statute that binds the public; indeed, they do not even bind a judge's sentencing decision. Second, the Supreme Court used this exact reasoning when ruling that void-for-vagueness, a doctrine that—like lenity—is grounded in due process and

notice considerations, does not apply to the Guidelines. *Beckles v. United States*, 580 U.S. 256, 265 (2017). Consequently, even for ambiguous Guidelines, like Guideline 2K2.1, lenity is inapplicable.

In sum, *Stinson* compels deference with few exceptions. None apply here. Note 14(B)(i) is consistent with the Guideline's text because it does not "violat[e] [its] dictates." *Stinson*, 508 U.S. at 43. Thus, it is authoritative. This case falls squarely within Note 14(B)(i)'s ambit. Vance stole eleven firearms, JA-3, "during the course of a burglary," USSG § 2K2.1 cmt. n.14(B)(i). He therefore "possessed" the firearms "in connection with another felony offense." *Id.* § 2K2.1. The district court correctly applied the enhancement.

C. Even under *Kisor*, the commentary warrants deference.

This Court should affirm the district court's judgment under *Stinson*. But even if it concludes that *Kisor* effectively overrules *Stinson*, it should still affirm that judgment under *Kisor* itself.[4] The outcome remains the same—the commentary requires deference. The *Kisor* Court held that an agency's interpretation of its own regulations "should receive [*Seminole Rock*] deference" when five prongs are met: (1) the

[4] Vance seeks reversal and remand because he believes that the "district court failed to open its legal toolkit." Appellant's Br. 34. This Court, however, may affirm the district court's judgment on alternative grounds—deference to the commentary under *Kisor*. *Williams v. Norris*, 25 U.S. (12 Wheat.) 117, 120 (1827) ("If the [district court's] judgment should be correct, although the reasoning . . . unsound, that judgment would certainly be affirmed in the superior Court.").

"regulation is genuinely ambiguous" based on its "text, structure, history and purpose;" (2) the "agency's reading" is "reasonable;" (3) the interpretation is the agency's "official position;" (4) the interpretation "implicate[s] [the agency's] substantive expertise;" and (5) the "agency's reading" reflects "fair and considered judgment." 139 S. Ct. at 2415–17. Here, all five prongs are met.

1. The Guideline is "genuinely ambiguous," and Note 14(B)(i) is a "reasonable" interpretation of it.

Guideline 2K2.1 is inherently ambiguous when a defendant commits burglary and takes a firearm. "[T]ext, structure, history, and purpose" cannot concretely resolve this ambiguity. *Kisor*, 139 S. Ct. at 2415. They do, however, support the conclusion that "a defendant who, during the course of a burglary, finds and takes a firearm" does so "in connection with" their burglary. USSG § 2K2.1. Because Note 14(B)(i) falls within its Guideline's "zone of ambiguity," it is a "reasonable" interpretation of a "genuinely ambiguous" Guideline. *Kisor*, 139 S. Ct. at 2416.

a. Note 14(B)(i) is a "reasonable" interpretation of the Guideline's "genuinely ambiguous" text.

The text of Guideline 2K2.1 is ambiguous because it does not settle the question of whether the object of burglary—here, eleven firearms—are possessed "in connection with" Ames's statute criminalizing burglary with intent to steal a firearm. JA-7.

At the time of Guideline 2K2.1's enactment, Black's Law Dictionary defined "connection" as "the state of being connected or joined . . . by dependence or relation." *Connection*, Black's Law Dictionary (6th ed. 1990). Accordingly, prior to Note 14(B)(i)'s promulgation, the term "in connection with" was often read as analogous to the phrase "in relation to." *See, e.g.*, *United States v. Kaiser*, 1 Fed. App'x. 219, 221 (4th Cir. 2001); *United States v. Wyatt*, 102 F.3d 241, 247 (7th Cir. 1996). In *Smith v. United States*, the Court interpreted the phrase "in relation to" in the context of firearm use during a drug-trafficking offense. 508 U.S. 223, 238 (1993). The Court found "in relation to" means that the firearm's presence is not "the result of accident or coincidence," *id.*, but instead "facilitate[es], or ha[s] the potential [to] facilitat[e]" the offense, *id.* (quoting *United States v. Stewart*, 779 F.2d 538, 539 (9th Cir. 1985)). Adhering to *Smith*'s interpretation, the Commission adopted Note 14(B) to clarify the Guideline's "in connection with" language. USSG supp. app. C, amend. 691 (2006) (citing *Smith*, 508 U.S. at 223).

Here, the firearms are not the result of some "accident or coincidence," *Smith*, 508 U.S. at 238, they are the object of the burglary itself. Contrary to Vance's reading, which renders "potential to facilitate" superfluous, *see* Appellant's Br. 36–38, the eleven firearms fit within *Smith*'s definition because the firearms had the potential to

facilitate the burglary offense. For example, the firearms could have facilitated Vance's escape if police arrived or if the shop owner fought back. *See United States v. Christianson*, No. CR-07-04, 2007 WL 9759312, at *2 (D. Mont. Nov. 13, 2007) (noting that the defendant "could have used the [stolen] firearm to scare or harm the owner"); *cf. Michigan v. Bryant*, 562 U.S. 344, 359 (2011) (recognizing the "potential threat to the responding police and the public" during an ongoing emergency).

Further, the possession of one firearm could have facilitated the burglary by emboldening Vance to remain and steal the other ten. *See United States v. Carlton*, 13 F. App'x 119, 122 (4th Cir. 2001). For instance, in *United States v. Rhind*, the court enhanced the defendants' sentences under Guideline 2K2.1 for their possession of three firearms "in connection with" another felony offense. 289 F.3d 690, 695 (11th Cir. 2002). Despite no evidence indicating actual use, the court upheld the enhancement, noting that "the mere availability and appearance of the firearms could have served to promote the defendants' prolonged criminal episode." *Id.* at 695 ("[C]riminals frequently use unloaded guns to execute crimes.").

Moreover, the Supreme Court "has often recognized that 'in connection with' can bear a 'broad interpretation.'" *Mont v. United States*, 139 S. Ct. 1826, 1832 (2019) (quoting *Merrill Lynch, Pierce,*

Fenner & Smith Inc. v. Dabit, 547 U.S. 71, 85 (2006)). Furthermore, the Court has found that "*direct*[]" ties fall within the phrase's "broad interpretation." *Id.* This form of direct relationship applies here because the firearms were the object of Vance's burglary.

Nevertheless, Vance points to one circuit case as "all but dispositive." Appellant's Br. 36–37. But like Vance, *United States v. Blount* ignores *Smith*'s "potential [to] facilitate" language. *See* 337 F.3d 404, 410–11 (4th Cir. 2003) (requiring the firearm to "have some purpose or effect" (quoting *Smith*, 508 U.S. at 238)). Additionally, the *Blount* court does not state that their definition of "in connection with" is the only appropriate one; the court explicitly labels a contrary interpretation as "subtly different," not implausible. *See id.* at 410–11 (citing *United States v. Condren*, 18 F.3d 1190, 1199–1200, 1200 n.22 (5th Cir. 1995)). In sum, it would be atextual to conclude that the Guideline categorically bars a reading that the eleven firearms were not possessed "in connection with" the burglary.

Vance further asserts that the separate state crime here is not "another felony offense." Appellant's Br. 38–40. *But see Blount*, 337 F.3d at 407 ("We hold that the burglary does qualify as 'another felony offense.'"). Yet, not only did Vance commit two separate crimes enacted by two separate sovereigns, but the Supreme Court also settled this debate in *Blockburger v. United States*, 284 U.S. 299 (1932). The

Blockburger Court held that "the test to be applied to determine whether there are two offenses or only one[] is whether each provision requires proof of a fact which the other does not." *Id.* at 304. "[A]lthough both sections were violated by the one [event], two offenses were committed." *Id.* So too here. This comports with the contemporaneous definition of "another," namely having "[a]dditional[,] [d]istinct or [d]ifferent" elements. *Another*, Black's Law Dictionary (6th ed. 1990).

Contrary to Vance's contention that "[§] 922(u) and Ames burglary appear to require the same proofs of fact," Appellant's Br. 39 n.4, the record does not state what the elements of Ames burglary are, nor the extent to which they overlap with § 922(u). *See* Semi-Final Record Responses. Under the Model Penal Code (MPC) and state statutes broadly, however, burglary requires different elements from § 922(u). *See* Model Penal Code § 221.1 ("[E]nter[ing] a building . . . with purpose commit a crime therein."); *see, e.g.*, Kan. Stat. Ann. § 21-5807 (2023) ("Burglary is, without authority, entering into or remaining within any [structure]."). Section 922(u), in contrast, does not criminalize entering or remaining within a structure with intent to steal a firearm, but rather the "steal[ing] or unlawfully tak[ing] or carry[ing] away" of firearms. 18 U.S.C. § 922(u). Assuming Ames follows the MPC and other states, Ames burglary constitutes "another felony offense" because it satisfies the *Blockburger* test. *See United States v. Keller*, 666

F.3d 103, 108 (3d Cir. 2011) (noting that "[t]he meaning of USSG § 2K2.1(b)(6) is ambiguous" and that "the rule we stated in *Fenton* . . . is no longer valid.").

Blockburger and the plain meaning of "another" lead to the same conclusion: Breaking into or unlawfully remaining in a building with criminal intent is one crime and actually taking something from that building is another. Vance seeks to graft an additional requirement onto the Guideline. But the facts are simple: he committed "'another felony offense' (here, Ames's statute criminalizing burglary with intent to steal a firearm)." JA-7 (quoting USSG § 2K2.1).

Thus, far from unambiguously dictating that the commentary falls outside the contours of the Guideline, the commentary represents a textually accurate interpretation of it. Vance "possessed [a] firearm . . . in connection with another felony offense." USSG § 2K2.1. The eleven firearms in his possession were related to the distinct crime of burglarizing Freddy's Firearms. JA-3.

b. The Guideline's structure, history, and purpose confirm Note 14(B)(i)'s interpretation.

The Guidelines' structure, history, and purpose confirm Guideline 2K2.1's ambiguity. Beginning with structure, "[i]t is a fundamental canon of statutory construction" that a Guideline's text "be read in [its] context and with a view to [its] place" in the Manual. *Roberts v. Sea-Land Services, Inc.*, 566 U.S. 93, 101 (2012). Guideline 2K2.1 sits

within Part K, "Offenses Involving Public Safety," Subpart Two, "Firearms." U.S. Sent'g Guidelines Manual ch. 2, pt. K. The Guideline's structural location reveals its focus on addressing the danger unlawful firearms pose to the public.

Accordingly, Guideline 2K2.1 imposes appropriate sentences for defendants that represent a danger to public safety due to their possession of firearms in connection with crime. *See United States v. Brake*, 904 F.3d 97, 102 (1st Cir. 2018) (finding § 2K2.1 applicable to "firearms theft[]" if the firearms "might facilitate [the burglary] or portend other, potentially more serious, crimes"). Thus, because of the dangers explored above, *see supra* II.C.1.a, Note 14(B)(i) accords with the Guidelines' structure.

Furthermore, courts consider the history and purpose of the Guideline because text "cannot be construed in a vacuum." *Davis v. Mich. Dept. of Treasury*, 489 U.S. 803, 809 (1989). The history and purpose of Guideline 2K2.1 support Note 14(B)(i)'s interpretation. The Commission added the Guideline to the Manual in 1991, USSG supp. app. C, amend. 374 (1991), in response to an ever-growing "concern about firearms, crimes of violence, and drug offenses," *Condren*, 18 F.3d at 1198. And as the Guidelines' structure contextualizes Guideline 2K2.1, so too it underscores their purpose. The Guideline—situated at the intersection of public safety and firearms—calibrates

sentencing ranges in proportion to the potential danger criminal conduct inflicts on the public.

Ultimately, text, structure, history, and purpose all support Note 14(B)(i)'s interpretation imposing an enhanced sentence when a community-endangering crime, like stealing firearms, is committed. Note 14(B)(i)'s "reasonable" interpretation demonstrates the Guideline's "genuine[] ambigu[ity]." *Kisor*, 139 S. Ct. at 2414. Thus, the Commission's interpretation of Guideline 2K2.1 satisfies *Kisor*'s first and second prongs.

2. Note 14(B)(i) implicates the Commission's "substantive expertise."

Vance posits that by creating Note 14(B)(i), the Commission "engaged in textual construction" that "rests with Article III courts." Appellant's Br. 41. Such a reading, however, would render *Kisor* deference inapplicable in all cases. Indeed, *Kisor*'s crux is that agencies often deserve deference "when they interpret their own ambiguous rules." 139 S. Ct. at 2414 (emphasis added).

The *Stinson* Court recognized that the commentary's purpose is to "assist in the interpretation and application of those rules, *which are within* the Commission's particular area of concern and *expertise*." 508 U.S. at 45 (emphasis added). Congress created the Commission to "provide certainty and fairness" in sentencing. 28 U.S.C. § 991(b)(1)(B). The Commission's expertise in collecting and analyzing "data drawn

from 10,000 presentence investigations" implicates the Commission's purpose when interpreting Guidelines—"determin[ing] which distinctions are important" in achieving "uniformity" and "proportionality." USSG § 1A1.1(3).

Finally, it would be odd that the Commission—at the time including Judges Hinojosa, Castillo, and Session III—lacked expertise based solely on the notion that "interpretive issues [fall] . . . into a judge's bailiwick." *Contra* Appellant's Br. 41 (quoting *Kisor*, 139 S. Ct. at 2417). Vance's overbroad attack would have more bite were the Commission an executive agency rather than a "judicial" one. 28 U.S.C. § 991(a).

3. Note 14(B)(i) represents the Commission's "official position" and reflects their "fair and considered judgment."

The commentary incontrovertibly represents the Commission's "official position" and "fair and considered judgment." *Kisor*, 139 S. Ct. at 2416–17. Vance does not contest this. *See* Appellant's Br. 33. Note 14(B)(i) is not an "*ad hoc*" or "*post hoc* rationalization," adopted for a convenient litigating position. *Kisor*, 139 S. Ct. at 2416. After all, the Commission enacted Note 14(B)(i) eighteen years ago after notice-and-comment and congressional review procedures, and it has remained undisturbed in the Manual ever since.

Although *Stinson* controls, even under *Kisor*'s less deferential standard, Note 14(B)'s reasonable interpretation—coupled with the Guideline's ambiguous phrasing—mandates deference. Accordingly,

regardless of whether this Court applies *Stinson* or *Kisor*, it should affirm the district court's decision to defer to the commentary and apply the enhancement.

CONCLUSION

For the foregoing reasons, the order and judgment of the district court should be affirmed.

February 19, 2024 Respectfully submitted,

The Honorable Secretary Madeleine Albright Memorial Team

/s/ Joel Erickson

/s/ Wesley Wai-Tong Hardin

/s/ Charlotte Laurence

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APPENDIX

U.S. Const. amend. IV

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

18 U.S.C. § 922(u)

> It shall be unlawful for a person to steal or unlawfully take or carry away from the person or the premises of a person who is licensed to engage in the business of importing, manufacturing, or dealing in firearms, any firearm in the licensee's business inventory that has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 924(i)(1)

> A person who knowingly violates section 922(u) shall be fined under this title, imprisoned not more than 10 years, or both.

18 U.S.C. § 3553(b)(1)

> **In General.**—Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred

to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

28 U.S.C. § 991(a)

There is established as an independent commission in the judicial branch of the United States a United States Sentencing Commission which shall consist of seven voting members and one nonvoting member. The President, after consultation with representatives of judges, prosecuting attorneys, defense

attorneys, law enforcement officials, senior citizens, victims of crime, and others interested in the criminal justice process, shall appoint the voting members of the Commission, by and with the advice and consent of the Senate, one of whom shall be appointed, by and with the advice and consent of the Senate, as the Chair and three of whom shall be designated by the President as Vice Chairs. At least 3 of the members shall be Federal judges selected after considering a list of six judges recommended to the President by the Judicial Conference of the United States. Not more than four of the members of the Commission shall be members of the same political party, and of the three Vice Chairs, no more than two shall be members of the same political party. The Attorney General, or the Attorney General's designee, shall be an ex officio, nonvoting member of the Commission. The Chair, Vice Chairs, and members of the Commission shall be subject to removal from the Commission by the President only for neglect of duty or malfeasance in office or for other good cause shown.

28 U.S.C. § 991(b)(1)(B)

The purposes of the United States Sentencing Commission are to establish sentencing policies and practices for the Federal criminal justice system that provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted

sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices.

28 U.S.C. § 994(o)

The Commission periodically shall review and revise, in consideration of comments and data coming to its attention, the guidelines promulgated pursuant to the provisions of this section. In fulfilling its duties and in exercising its powers, the Commission shall consult with authorities on, and individual and institutional representatives of, various aspects of the Federal criminal justice system. The United States Probation System, the Bureau of Prisons, the Judicial Conference of the United States, the Criminal Division of the United States Department of Justice, and a representative of the Federal Public Defenders shall submit to the Commission any observations, comments, or questions pertinent to the work of the Commission whenever they believe such communication would be useful, and shall, at least annually, submit to the Commission a written report commenting on the operation of the Commission's guidelines, suggesting changes in

the guidelines that appear to be warranted, and otherwise assessing the Commission's work.

28 U.S.C. § 994(p)

The Commission, at or after the beginning of a regular session of Congress, but not later than the first day of May, may promulgate under subsection (a) of this section and submit to Congress amendments to the guidelines and modifications to previously submitted amendments that have not taken effect, including modifications to the effective dates of such amendments. Such an amendment or modification shall be accompanied by a statement of the reasons therefor and shall take effect on a date specified by the Commission, which shall be no earlier than 180 days after being so submitted and no later than the first day of November of the calendar year in which the amendment or modification is submitted, except to the extent that the effective date is revised or the amendment is otherwise modified or disapproved by Act of Congress.

28 U.S.C. § 994(w)

The Chief Judge of each district court shall ensure that, within 30 days following entry of judgment in every criminal case, the sentencing court submits to the Commission, in a format

approved and required by the Commission, a written report of the sentence, the offense for which it is imposed, the age, race, sex of the offender, and information regarding factors made relevant by the guidelines. The report shall also include—(A) the judgment and commitment order; (B) the written statement of reasons for the sentence imposed (which shall include the reason for any departure from the otherwise applicable guideline range and which shall be stated on the written statement of reasons form issued by the Judicial Conference and approved by the United States Sentencing Commission); (C) any plea agreement; (D) the indictment or other charging document; (E) the presentence report; and (F) any other information as the Commission finds appropriate.

The information referred to in subparagraphs (A) through (F) shall be submitted by the sentencing court in a format approved and required by the Commission.

28 U.S.C. § 994(x)

The provisions of section 553 of title 5, relating to publication in the Federal Register and public hearing procedure, shall apply to the promulgation of guidelines pursuant to this section.

U.S. Sentencing Guidelines Manual § 2K2.1(b)(6)(B)

> If the defendant used or possessed any firearm or ammunition in connection with another felony offense; or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense, increase by 4 levels. If the resulting offense level is less than level 18, increase to level 18.

U.S. Sentencing Guidelines Manual § 2K2.1(b)(6)(B) cmt. n.14(B)

> **Application When Other Offense is Burglary or Drug Offense.**—Subsections (b)(6)(B) and (c)(1) apply (i) in a case in which a defendant who, during the course of a burglary, finds and takes a firearm, even if the defendant did not engage in any other conduct with that firearm during the course of the burglary; and (ii) in the case of a drug trafficking offense in which a firearm is found in close proximity to drugs, drug-manufacturing materials, or drug paraphernalia. In these cases, application of subsections (b)(6)(B) and, if the firearm was cited in the offense of conviction, (c)(1) is warranted because the presence of the firearm has the potential of facilitating another felony offense or another offense, respectively.