NO.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2023

MICHAEL ADAM CARMODY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Carpenter v. United States*, 585 U.S. 296, 138 S. Ct. 2206, 201 L. Ed. 2d 507 (2018), this Court held that the government conducts a search under the Fourth Amendment when it accesses historical cell-site location records that provide a comprehensive chronicle of the user's past movements.

Here, the government accessed, without a warrant, historical records for Mr. Carmody's 1,153 IP address locations over 327 days, including 32 days where the reported IP address was Mr. Carmody's home. Like the cell phone in *Carpenter*, the historical IP addresses provided a comprehensive chronicle of Mr. Carmody's movements during this 327 day period.

Question Presented:

Whether the warrantless seizure of a person's historical IP address records, which includes their conduct within their homes, violates an individual's privacy interest in the whole of their movements or their property interests in their IP address data?

If commentary to the federal sentencing guidelines does not qualify for deference under *Auer v. Robbins*, 519 U.S. 452 (1997), it is invalid. Section 2G2.2 enhances the guideline range for possessors of child pornography based on the number of images they possess, but the guideline commentary equates 1 video with 75 still images.

Here, Mr. Carmody's guideline range was enhanced as if he possessed 600 or more images even though he possessed 414 visual depictions of child pornography.

Question Presented:

Whether the 1 to 75 ratio for videos found in the commentary to U.S.S.G. § 2G2.2 is entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984), *Federal Express Corportation v. Holowecki*, 552 U.S. 389, 128 S. Ct. 1147, 170 L. Ed. 2d 10 (2008), and *Kisor v. Wilkie*, 588 U.S. ---, 139 S. Ct. 2400, 204 L. Ed. 2d 841 (2019)?

INTERESTED PARTIES

Pursuant to Sup. Ct. R. 14.1(b)(i), Mr. Carmody submits that there are no parties to the proceeding other than those named in the caption of the case.

RELATED PROCEEDINGS

The following proceedings directly relate to the case before the Court:

United States v. Carmody, 21-cr-14018-AMC (S.D. Fla.), *aff'd*, *United States v. Carmody*, 2023 WL 7014048 (11th Cir. Oct. 25, 2023), *rehearing denied*, *United States v. Carmody*, 22-12539 (11th Cir. Dec. 22, 2023).

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Michael Adam Carmody respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case numbers 22-12539-HH and 22-13542-HH, in that court on October 25, 2023. *See United States v.*

Carmody, 2023 WL 7014048 (11th Cir. 2023), *rehearing denied*, *United States v. Carmody*, Case No. 22-12539-HH (App-DE 37-2)[1] (11th Cir. 2023).

[1] Docket entries in the appellate cases will be cited as App-DE.

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, which affirmed the judgment of the United States District Court for the Southern District of Florida, is contained in the Appendix (A-1).

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and PART III of the RULES OF THE SUPREME COURT OF THE UNITED STATES. The United States Court of Appeals had jurisdiction over this cause pursuant to 28 U.S.C. § 1291. The decision of the court of appeals was entered on October 25, 2023. *See United States v.Carmody*, 2023 WL 7014048 (11th Cir. 2023). Mr. Carmody filed a timely petition for rehearing, which was denied on December 22, 2023. *See United States v. Carmody*, Case No. 22-12539-HH (App-DEs 35 & 37) (11th Cir. 2023). This petition is timely filed pursuant to SUP. CT. R. 13.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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.

U.S. SENT'G COMM'N, GUIDELINES MANUAL § 2G2.2

(a) Base Offense Level . . .

(b) Specific Offense Characteristics . . .

(7) If the offense involved –
(A) at least 10 images, but fewer than 150, increase by 2 levels;
(B) at least 150 images, but fewer than 300, increase by 3 levels;
(C) at least 300 images, but fewer than 600, increase by 4 levels;
(D) 600 or more images, increase by 5 levels;

STATEMENT OF THE CASE

Following his arrest and indictment for offenses related to child pornography, Mr. Carmody filed a Motion to Suppress Physical Evidence, ("Motion to Suppress"), based on *Carpenter v. United States*, 585 U.S. 296, 138 S.Ct. 2206, 201 L. Ed. 2d 507 (2018) for law enforcement's warrantless seizure of 1,153 IP address locations over 327 days, including 32 days where the reported IP address was Mr. Carmody's home. After a hearing, the district court denied Mr. Carmody's Motion to Suppress. Mr. Carmody entered a conditional guilty plea to Counts One, Five, and Six, one count each of distribution, receipt, and possession of child pornography, reserving his right to appeal the denial of his Motion to Suppress.

A draft presentence investigation report ("PSI") was prepared, which included a five level enhancement for the offense involving 600 images or more. Mr. Carmody objected to this enhancement, because his offense involved 226 photo images and 188 video images. Although this totals to 414 visual depictions of child pornography, deference to and application of the commentary's 1 to 75 ratio for videos resulted in a guideline range based on 600 images or more. The district court overruled Mr. Carmody's objection and sentenced him above his guideline range to a total sentence of 25 years imprisonment.

Mr. Carmody timely appealed. In an unpublished opinion and without oral argument, the Eleventh Circuit affirmed Mr. Carmody's conviction and sentence. *United States v. Carmody*, 2023 WL 7014048 (11th Cir. 2023). Relying on the prior panel precedent rule, this Court held that *United States v. Trader*, 981 F.3d 961 (11th

Cir. 2020), foreclosed Mr. Carmody's challenge to the warrantless search of his internet protocol ("IP") address. *Carmody*, 2023 WL 7014048, *4-5. Regarding Mr. Carmody's sentence, the Eleventh Circuit held that the use of the term "image" in the text of U.S.S.G. § 2G2.2 is ambiguous, and the district court could defer to the commentary. *Id*. at *6. The Eleventh Circuit held that even without the 1 to 75 ratio for videos, Mr. Carmody's sentence would still be procedurally reasonable, because even if each video was counted as only two images, Mr. Carmody would still have been accountable for over 600 images. *Id*. at 7-8.

This is a non-production child pornography case. There was no evidence that Mr. Carmody enticed or attempted to entice a minor or a person believed to be a minor. Nor was there any evidence that he ever engaged in inappropriate communications with a minor or a person he believed to be a minor. Before this case, Mr. Carmody had never been charged with or arrested for a felony offense.

In October 2020, a cooperating witness ("CW") reported to the National Center for Missing and Exploited Children ("NCMEC") that on August 15, 2020, Kik user JackJiggity sent CW a video and still images of child pornography. Kik is an internet-based chat application used on cell phones. CW did not know the user's real name or where he or she lived. On December 4, 2020, CW submitted another tip to NCMEC reporting having received that morning another image from JackJiggity that depicted child pornography.

On December 9, 2020, CW consented to a search of her cellphone. The contents of CW's cellphone were extracted and revealed several hundred messages between

CW's Kik account and Kik user JackJiggity from approximately October 18, 2020 through December 9, 2020. During that time, user JackJiggity transmitted 5 files depicting what appeared to be child pornography to CW's account.

Law enforcement issued a subpoena to Kik for the records of the JackJiggity account from the date the account was created, April 18, 2020, through March 18, 2021. When law enforcement requested these records, they knew that they were requesting information for a person's cellphone use, because Kik cannot be used on a computer. An internet protocol ("IP") address is provided by an internet provider and assigned to the subscriber and a service address. The Kik records indicated that the JackJiggity Kik account utilized IP address 73.138.185.201 on 32 days between April 18, 2020 and March 3, 2021. Regarding the type of internet connection, those records also indicated that the 73.138.185.201 was a "WiFi" connection. The Kik records also indicated the JackJiggity account was established using the e-mail account "yikesitsmike772@outlook.com".

On March 25, 2021, law enforcement issued a subpoena to Comcast for the subscriber information pertaining to IP address 73.138.185.201. In response, Comcast provided records that listed Mr. Carmody as the subscriber and his residential address as the billing address. Based on this information, law enforcement obtained and executed a federal search warrant on Mr. Carmody's residence in Fort Pierce, Florida.

REASONS FOR GRANTING THE PETITION

I. Historical IP address records capture a person's movements and reveal conduct that occurs within their home, and a warrant must be required for the government to invade their privacy and property interests in such data

This case presents an important question of federal law warranting review. The Circuit Courts have allowed the government to trespass on our digital papers and effects without a warrant. *See United States v. Hood*, 920 F.3d 87 (1st Cir. 2019); *United States v. Rosenow*, 50 F. 4th 715 (9th Cir. 2022); *United States v. Contreras*, 905 F.3d 853 (5th Cir. 2018); *United States v. Trader*, 981 F.3d 961 (11th Cir. 2020). These decisions have applied *Carpenter* too narrowly, and have failed to address this Court's mandates from *Jones*, *Karo*, and *Kyllo*. The Circuit Court decisions reason that, under the third-party doctrine, there is no expectation of privacy in IP address data, because the user shares the information with an internet service provider. This fails to consider the traditional property based Fourth Amendment protections. It also fails to apply this Court's precedents regarding digital data.

A. The warrantless use of historical IP address records to surveil a person's movements over time violates the user's privacy interests

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const., amend. IV. "The amendment grew out of American colonial opposition to British search and seizure practices . . . ." *United States v. Wurie*, 728 F.3d 1, 3 (1st Cir. 2013). "[A] central aim of the Framers was 'to place obstacles in the way of a too

permeating police surveillance.'" *Carpenter v. United States*, 138 S. Ct. 2206, 2215 (2018) (quoting *United States v. Di Re*, 332 U.S. 581, 595 (1948)).

In our digital age, the need for such obstacles has grown significantly, because the power of the government to invade the "'privacies of life'" has increased dramatically. *Riley v. California*, 573 U.S. 373, 403 (2014) (quoting *Boyd v. United States*, 116 U.S. 616, 625 (1886)) (recognizing "a cell phone search," given the quantity and quality of information a typical user stores on the device, "would typically expose to the government far more than the most exhaustive search of a house"). Modern surveillance technology, the Court has said, may not be used to eviscerate "that degree of privacy against government that existed when the Fourth Amendment was adopted." *Id*. Accordingly, the Court has ruled that following someone's movements using modern technology "falls within the ambit of the Fourth Amendment when it reveals information that could not have been obtained through visual surveillance." *United States v. Karo*, 468 U.S. 705, 707 (1984).

In *Carpenter v. United States*, this Court recognized that new digital technologies present novel Fourth Amendment concerns, and it refused to extend the "third-party doctrine" to permit the warrantless collection of cell site location information ("CSLI"), because such digital data provides "a detailed and comprehensive record of a person's movements" and, thus, "an intimate window into a person's private life." 138 S. Ct. at 2217.

The police routinely use IP address information to pinpoint a person's online activity in his or her home, the place "'where privacy expectations are most

heightened.'" *Kyllo v. United States*, 533 U.S. 27, 33 (2001) (quoting *Dow Chem. Co. v. United States*, 476 U.S. 227, 237 n.4 (1986)). Searches and seizures inside a home without a warrant are presumptively unreasonable absent exigent circumstances. *United States v. Karo*, 468 U.S. 705, 714-15 (1984) (collecting cases). Thus, whether dealing with beepers (*Karo*), thermal imagers (*Kyllo*), or cellphones (*Carpenter*), the law must constantly assess (and re-assess) the "power of technology to shrink the realm of guaranteed privacy" in the home. *Kyllo*, 533 U.S. at 34.

Both CSLI and IP address information can establish "whether a particular article—or a person, for that matter—is in an individual's home at a particular time." *Karo*, 468 U.S. at 716. Only IP address information can also reveal what the person is doing within the premises—that is, what he or she may be reading, buying, searching for, or saying online. In other words, IP address information can be (and is) used to "reveal a critical fact about the interior of [a] premises," such as Mr. Carmody's home, that the government is extremely interested in knowing and that it could not have otherwise obtained without a warrant." *Id.* (emphasis added).

IP address information "'leave[s] behind a digital footprint of all the user's internet activity.'" A. Shelton, "A Reasonable Expectation of Privacy Online: 'Do Not Track' Legislation," 45 U. Baltimore L. Forum 39, 40 (Fall 2016); *see Weinstein v. Islamic Repub. of Iran*, 831 F.3d 470, 473 (D.C. Cir. 2016) (citing *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 409-10 (2d Cir. 2004) (explaining "[e]very end-user's computer that is connected to the internet is assigned a unique internet protocol number ("IP address") . . . that identifies its location (i.e., a particular computer-to-

network connection) and serves as the routing address for email, pictures, requests to view a web page, and other data sent across the internet from other end-users")).

> Every internet action—clicking on a website, sending an email, downloading a song, posting a photo, or instant messaging—leaves a numerical identifying mark from the computer used, allowing the user's activity to be tracked as he or she performs any online activity. Every time an individual makes an online purchase, searches for information on a personal health concern, reads a political blog, or sends an intimate message to a friend, that electronic action is identified by his or her Internet Protocol ("IP") address and a record of the activity is captured and stored by the Internet Service Provider ("ISP").

Shelton, *supra*, at 35-36; *see United States v. Tagg*, 886 F.3d 579, 583 (6th Cir. 2018). Such personal data is "all-encompassing" in that it can be "effortlessly compiled" to create a "detailed" historical log of every click on every website. *See Carpenter*, 138 S. Ct. at 2217.

Extending the "third-party doctrine" to IP address information (or other internet traffic data) allows law enforcement officials to learn, without a search warrant (or probable cause), that an individual regularly visits websites associated with a particular political party, church group, or sexual orientation, and that data would "enable the Government to ascertain, more or less at will, [a person's] political and religious beliefs, sexual habits, and so on." *United States v. Jones*, 565 U.S. 400, 416 (2012) (Sotomayor, J., concurring). As a matter of privacy, the fact that a person purchased a specific medication online (which IP address information would help to establish) is arguably more revealing than the fact that he or she drove to the pharmacy (which CSLI would show).

The Circuits have unduly restricted this Court's decision in *Carpenter*, and failed to adequately address the Fourth Amendment issues raised by law enforcement obtaining an individual's IP address history without a warrant. This is particularly true where, as here, law enforcement used this information to surveil Mr. Carmody's actions within his home, because citizens have a heightened expectation of privacy in their own homes. *See generally*, *Karo*, 468 U.S. 705 (government not free to monitor beepers in private residence without a warrant).

Yet, the Circuits fail to address this Court's relevant decisions. For instance, in *Trader*, the Eleventh Circuit refused to consider Trader's arguments based on *United States v. Jones*, 565 U.S. 400 (2012), *United States v. Karo*, 468 U.S. 705 (1984), and *Kyllo v. United States*, 533 U.S. 27 (2001), because Trader raised these arguments for the first time in his reply brief. *Trader*, 981 F.3d at 969. Despite Trader's failure to address these arguments, the panel affirmed Mr. Carmody's conviction based on the prior panel precedent rule. *United States v. Carmody*, 2023 WL 7014048, *4 (11th Cir. 2023).

B. The warrantless capture of a person's historical IP address records violates the users property interests in such data

The Circuits fail to address the property interests an individual has in their IP address information. As Justice Gorsuch discussed in his dissent in *Carpenter*, *Katz*'s reasonable expectation of privacy test "only 'supplements, rather than displaces the traditional property-based understanding of the Fourth Amendment.'" *Carpenter*, 138 S. Ct. at 2261 (J. Gorsuch, dissenting). Sharing data with a third party does not automatically eliminate an individual's rights in that data, because such sharing for

a particular purpose is a bailment. *Id*. at 2268 (J. Gorsuch, dissenting) ("A bailment is the 'delivery of personal property by one person (the bailor) to another (the bailee) who holds the property for a certain purpose."). The Fourth Amendment does not require complete ownership and exclusive control for protection under a property-based approach. So when an individual's IP address is shared with an application such as Kik, the individual's property interest in that data or the protection of that data under the Fourth Amendment is not diminished.

This Court should grant review in this case in order to correct the Circuits on this important federal issue and define the collection of an individual's historical IP addresses as a violation of the individual's expectation of privacy and a violation of their Fourth Amendment property rights.

II. The 1 to 75 ratio for videos found in the commentary to U.S.S.G. § 2G2.2 is not entitled to deference under *Kisor* and *Holowecki*

This Court is currently reviewing the doctrine of Chevron deference, which is at issue in this case. The Circuits that have addressed the federal sentencing guideline commentary's 1 to 75 ratio for videos have failed to conform to *Chevron* and *Kisor*. *See United States v. Phillips*, 54 F. 4th 374 (6th Cir. 2022); *United States v. Pratt*, 2021 WL 5918003 (9th Cir. 2021); *United States v. Carmody*, 2023 WL 7014048 (11th Cir. 2023), *rehearing denied*, *United States v. Carmody*, Case No. 22-12539-HH (App-DE 37-2)[2] (11th Cir. 2023). This case presents an importation question of federal law, and this Court should grant review in order to bring the sentencing guidelines into alignment with *Chevron* and *Kisor*. Because this case involves the

[2] Docket entries in the appellate cases will be cited as App-DE.

application of *Chevron* deference, this Court should hold this case while *Loper Bright Enterprises, et al., v. Raimondo*, No. 21-5166, and *Relentless, Inc. v. Department of Commerce*, No. 21-1886 remain pending before this Court.

After this Court's decision in *Kisor*, if commentary does not qualify for *Auer* deference under the reinvigorated criteria set forth by *Kisor*, it is invalid. *United States v. Riccardi*, 989 F.3d 476, 483-85 (6th Cir. 2021). The commentary purports to define an image as one-seventy fifth of a video. The term image is not genuinely ambiguous, and even if it were, the commentary's arbitrary instruction to treat each video as 75 images is not within the zone of ambiguity. Nor is the commentary's definition entitled to controlling weight.

Courts have long granted deference to an agency's interpretation of its own legislative rules, starting no later than in 1945 with the issuance of *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945). That deference has come to be known as *Auer* deference after *Auer v. Robbins*, 519 U.S. 452 (1997). This Court analyzes guideline commentary with the same type of *Auer* deference. *Stinson v. United States*, 508 U.S. 36, 45 (1993).

This Court clarified *Auer*'s narrow scope in the context of an agency's interpretation of its regulations when it issued *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019). *Kisor* and its reinvigorated limitations on *Auer* deference are important to federal sentencing, because the Sentencing Commission issues rules like an administrative agency. Specifically, the Commission's sentencing guidelines are the "equivalent of legislative rules adopted by federal agencies," as they can be enacted only through

essentially the same quasi-legislative process required for the enactment of legislative rules, and the Commission's commentary to those guidelines is "akin to an agency's interpretation of its own legislative rules," which cannot carry their own binding force. *Stinson v. United States*, 508 U.S. at 45; *see United States v. Havis*, 927 F.3d 382, 385-86 (6th Cir. 2019) (*en banc*). That commentary, like the interpretative statements of any agency, carries binding force only if it qualifies for *Auer* deference. *Stinson,* 508 U.S. at 38.

Thus, the limits that *Kisor* put on the granting of *Auer* deference apply equally to the deference typically given to guideline commentary. *Riccardi*, 989 F.3d 476, 485 (6th Cir. 2021); *see Kisor*, 139 S. Ct. at 2411 n.3 (indicating that *Stinson* granted *Auer* deference to guidelines commentary). After this Court's decision in *Kisor*, if commentary does not qualify for *Auer* deference under the reinvigorated criteria set forth by *Kisor*, it is invalid. *Riccardi*, 989 F.3d at 483, 485. The commentary's 1 to 75 ratio for videos does not qualify for *Auer* deference.

To qualify for *Auer* deference, an agency's allegedly interpretive statement must satisfy three requirements. *Kisor*, 139 S. Ct. at 2415-16. "First and foremost, a court should not afford *Auer* deference unless, after exhausting all the 'traditional tools' of construction, . . . the regulation is genuinely ambiguous." *Id.* at 2415; *see Riccardi*, 989 F.3d at 486 ("we first ask whether § 2B1.1 is 'genuinely ambiguous.'" (quoting *Kisor*)); *Dupree*, 57 F. 4th at 1275 (recognizing that if uncertainty does not exist in the guideline itself, there is no plausible reason for deference). Second, when a regulation is genuinely ambiguous, the agency's interpretation is invalid unless it

"come[s] within the zone of ambiguity the court has identified after employing all its interpretive tools." *Kisor*, 139 S. Ct. at 2416; *see Riccardi*, 989 F.3d at 486 (applying these same tests to commentary to the § 2B1.1 guideline which set a $500 minimum loss amount per each unauthorized access device). Finally, even when these two requirements are satisfied, the "court must make an independent inquiry into whether the character and context of the agency interpretation entitles it to controlling weight. *Kisor*, 139 S. Ct. at 2416. *See, e.g., Federal Express Corporation v. Holowecki*, 552 U.S. 389, 398-99, 128 S. Ct. 1147, 170 L. Ed. 2d 10 (2008) (refraining from applying *Auer* deference when the term being interpreted was the creation of Congress, not the agency). If the commentary's 1 to 75 ratio for video fails any one of these requirements, the rule is invalid and not entitled to deference.

To decide if the regulation, or guideline, being interpreted is "genuinely ambiguous," a court "must 'carefully consider[]' the text, structure, history, and purpose of a regulation, in all the ways it would if it had no agency to fall back on." *Kisor*, 139 S. Ct. at 2415 (quoting *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 707 (1991) (Scalia, J., dissenting)). Section 2G2.2 establishes the so-called image table, which imposes a greater offense level enhancement for greater amounts of child pornography "images" as follows:

> If the offense involved—
>
> > (A) at least 10 images, but fewer than 150, increase by 2 levels;
> > (B) at least 150 images, but fewer than 300, increase by 3 levels;
> > (C) at least 300 images, but fewer than 600, increase by 4 levels; and
> > (D) 600 or more images, increase by 5 levels.

U.S.S.G. § 2G2.2(b)(7). The text of § 2G2.2 simply instructs the court to tally the number of images and then select the corresponding enhancement from the images table. The question here is whether the term "image" in the image table, § 2G2.2(b)(7), means "photo or video," or if instead it only means "photo" while a "video" would be a conglomeration of photos. The text of § 2G2.2 does not hint at weighting videos differently from still photographs. Note 6(B)(ii), therefore, is an illegal expansion of the § 2G2.2 guideline, and thus, under *United States v. Dupree*, 57 F. 4th 1269 (11th Cir. 2023) (*en banc*), it could not be utilized to calculate the number of images under § 2G2.2(b)(7).

The commentary states that "[e]ach video, video-clip, movie, or similar visual depiction *shall be considered* to have 75 images." U.S.S.G. § 2G2.2, n.6(B)(ii) (emphasis added). "Shall be considered" is the language of a policy choice, not of interpretation. As the Second Circuit has explained, statutes use the phrase "shall be considered" to discard a term's "ordinary 'plain English' meaning" in favor of a "legal fiction" that "achiev[es] certain social policy goals." *Sarmiento v. United States*, 678 F.3d 147, 152 (2d Cir. 2012). This Court has made this same point when discussing the synonymous phrase, "shall be deemed." *See Sturgeon v. Frost*, 587 U.S. 28, 139 S. Ct. 1066, 1076 (2019). "Legislatures (and other drafters) find the word useful when it is necessary to establish a legal fiction, either by deeming something to be what it is not or by deeming something not to be what it is." *Id*. at 1081 (internal quotations omitted). The commentary was not defining the term image; it was establishing a

legal fiction to treat some visual depictions as different from others despite the fact that an image is plainly any visual depiction.

Case law under the Administrative Procedure Act distinguishes between "legislative rules," which must proceed through notice and comment rulemaking, and "interpretive rules," which need not proceed through that rulemaking. *United States v. Riccardi*, 989 F.3d at 487. In that context, setting forth a specific numeric amount will generally not qualify as mere interpretation of nonnumeric language. *Id*. (*citing Catholic Health Initiatives v. Sebelius*, 617 F.3d 490, 495 (D.C. Cir. 2010)). "[W]hen an agency wants to state a principle in numeric terms, terms that cannot be derived from a particular record, the agency is legislating and should act through rulemaking." *Id*. (internal quotations omitted). If the Commission wanted to establish a numerical rule for how to weigh video images versus still images, it needed to establish this numerical rule in the guideline itself and following the notice and comment rules for the guidelines.

In defining image, the Commission was not providing an interpretation of its own term, but was attempting to define a term that Congress had used. Congress is presumed to legislate against the backdrop of existing statutes. *See Cannon v. Univ. of Chicago*, 441 U.S. 677, 698-99 (1979). At the time Congress created the image table and told the Commission to put the table in the guideline, existing child pornography statutes already treated each visual depiction, also described as a "visual *image*," equally as long as the visual image showed the sexual exploitation of a minor, regardless whether the "visual image" was a photograph or video. 18 U.S.C. §§

2256(5)&(8). Indeed, in 2004, it was obvious to the Sentencing Commission that these statutory definitions naturally gave content to the term "image" since the Commission itself chose to define "image" as "any visual depiction, as defined in 18 U.S.C. § 2256(5), that constitutes child pornography, as defined in 18 U.S.C. § 2256(8)." U.S.S.G. § 2G2.2, comment. (n.6(A)). In light of that backdrop, the term "image" is not genuinely ambiguous: rather, it simply means anything that presents, or could present in the case of "undeveloped film and videotape," 18 U.S.C. § 2256(5), a visual depiction of a minor engaged in sexually explicit conduct, regardless of whether that thing is a photo or video, or whether that thing is a digital still image file or a digital moving image file.

The commentary regarding the 1 to 75 ratio for videos pursuant to § 2G2.2 violates *Stinson*, because it is inconsistent with and adds to the guideline text. *Stinson v. United States*, 508 U.S. 36, 113 S. Ct. 1913 (1993) (guideline commentary is invalid if it is inconsistent with or a plainly erroneous reading of the guideline text). By creating a special rule under which each video is not just one image but rather is 75 images, Note 6(B)(ii) contradicts that plain meaning of "image," which is in fact quite clear. It cannot be said that Note 6(B)(ii) interprets a genuinely ambiguous term, and hence it is invalid. The Eleventh Circuit's panel decision in this case relied on circular logic to find that the term "images" was ambiguous. *Carmody*, 2023 WL 7014048, *6-7. It reasoned that the guideline text did not distinguish between a still image and a video image comprised of a series of images, *id.*, but this assumed that a video is indeed comprised of multiple images.

Even assuming for the sake of argument that "image" is genuinely ambiguous, the Commission's putative interpretation of it—whereby it declares each video is 75 images—does not fall within the zone of ambiguity. Yet, the Eleventh Circuit did not attempt to determine whether the 1 to 75 ration fell within the zone of ambiguity. *See Carmody,* 2023 WL 7014048, *6-7. The arbitrary, numeric 1 to 75 ratio is a substantive policy decision, and no reasonable person would define "image" to mean one seventy-fifth of a video. Regardless of whether the Commission's substantive policy decision was sound, this sort of policy decision belongs in the guidelines, not in the commentary. *See, e.g., Riccardi*, 989 F.3d at 483. In order to enact such policy decisions, the Commission must amend the guideline text itself; it cannot make a new rule in the guise of interpretive commentary.

The 1 to 75 ratio does not fall within the zone of ambiguity for an additional reason: it is, in fact, arbitrary. The Commission has given no reason to make a video count the same as 75 photos, and thus it has not shown it would be reasonable to interpret "image" in that way. The DOJ brought up the fact that videos are typically composed of 24 frames per second, but the DOJ did not propose interpreting "image" to mean that a video counts as 24 images for each second in length. DOJ Letter of Mar. 1, 2004, at 5, available at https://www.ussc.gov/policymaking/public-comment/comment-march-2004 (included within parts five through six) (last visited Mar. 20, 2024). Instead, the DOJ proposed an additional 2-level guideline enhancement for one single video, even if just one second long. *Id*. Similarly, the Commission brought up the fact that some videos, like some photos, include more

than one scene of sexual exploitation, but the 1 to 75 ratio is not based on some empirical study showing the typical child pornography video has 75 scenes of sexual exploitation. Rather, the 1 to 75 ratio sprung into being without rhyme or reason, which is an additional reason to conclude it falls outside the zone of ambiguity.

The character and context of the Commission's interpretation do not entitle it to controlling weight. Courts should refrain from *Auer* deference when the term being interpreted was the creation of Congress, and not of the agency. *Holowecki*, 552 U.S. at 398 (refraining from grating Auer deference to the Equal Employment Opportunity Commission's ("EEOC") interpretation of "charge," because the term was not a construct of the EEOC, and instead had been used by Congress in the underlying statute). "An agency does not acquire special authority to interpret its own words when, instead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase the statutory language." *Gonzales v. Oregon,* 546 U.S. 243, 257 (2006). The same is true for the Commission's guideline commentary.

The image table, and use of the term "image," was the creation of Congress, not the Sentencing Commission. Pub. L. 108-21, Title IV, § 401 (Apr. 30, 2003), 117 Stat. 650, 672-73, available at https://www.govinfo.gov/features/PROTECT-act#:~:text=%22PROTECT%22%20is%20a%20backronym%20which,investigate%2C%20prosecute%20and%20punish%20violent (last visited Mar. 20, 2024). In the text of §2G2.2, the term "image" is a term chosen unilaterally by Congress. It was not previously in use by the guidelines or by the Commission. Nor did the Commission use its expertise and experience to formulate the image table. The Commission simply

put the image table into the guidelines because Congress commanded as much. Because Congress chose the term "image" and created the image table, the Commission, whatever its expertise in the field of federal sentencing, had no insight into its meaning. *See generally Kisor*, 139 S. Ct. at 2412 (plurality op. of Kagan, J.) ("Want to know what a rule means? Ask its author."). Consequently, the Commission's putative interpretation of the image table does not support *Auer* deference. *Holowecki*, 128 S. Ct. at 155-56.

Therefore, the table has to be read in the context of Congress's meaning, not a subsequent gloss that the commentary attempted to add in. Notably, when Congress dictates such an amendment, it deprives the Commission of its role as a quasi-judicial, quasi-legislative body that independently uses expertise to devise appropriate sentencing guidelines. *See United States v. Mistretta,* 488 U.S. 361 (1989) (describing that role). Pursuant to *Holowecki*, the Sentencing Commission's "interpretation" of this term is not entitled to deference.

When issuing this new 1 to 75 ratio for videos, the Commission gave no explanation for issuing it. U.S.S.G. App. C, amend. 664 (Nov. 1, 2004), available at https://www.ussc.gov/guidelines/amendment/664 (last visited Mar. 20, 2024). It simply stated it was "provid[ing] an instruction regarding how to apply the specific offense characteristic [in other words, the image table,] to videotapes." *Id.* It did not claim that courts, since the advent of the image table months ago, had struggled trying to decide how to count videos or how to interpret "image." It did not discuss, or even mention, the DOJ's frames-per-second rationale. *Id*. It did not claim videos were

inherently more serious than photos. *Id*. It did not pretend to claim that any given video would probably have 75 separate scenes of sexual exploitation, whereas a photo would probably have just one. *Id*. Nor did it acknowledge that its own definition of "images"—which relied on the longstanding provisions at 18 U.S.C. §§ 2256(5) and (8)—was in tension with its new 1 to 75 ratio for videos since those statutory sections indicated photos and videos were equally "visual depictions" or "visual images." *Id*. In short, without offering any explanation or justification, the Commission issued a substantive new rule for videos in the guise of interpretive commentary.

The Eleventh Circuit failed to appropriately apply *Kisor* and *Holowecki*, and this Court should grant review to bring the sentencing guidelines into alignment with this Court's precedents. Because this case involves the application of *Chevron* deference, this Court should hold this case while *Loper Bright Enterprises, et al., v. Raimondo*, No. 21-5166, and *Relentless, Inc. v. Department of Commerce*, No. 21-1886 remain pending before this Court.

CONCLUSION

Based on the foregoing, the petition should be granted. Mr. Carmody respectfully asks this Court to grant review.

Respectfully submitted,

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