NO.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2023

JACOB VANDYKE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

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 of the Sentencing Guidelines 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. VanDyke's guideline range was enhanced as if he possessed 600 or more images even though he only possessed fewer than 100 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 Corporation v. Holowecki*, 552 U.S. 389, 128 S. Ct. 1147, 170 L. Ed. 2d 10 (2008), and *Kisor v. Wilkie*, 588 U.S. 558, 139 S. Ct. 2400, 204 L. Ed. 2d 841 (2019)?

INTERESTED PARTIES

Pursuant to Sup. Ct. R. 14.1(b)(i), Mr. VanDyke 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. VanDyke, 22-CR-80127-DMM (S.D. Fla.), *aff'd*, *United States v. VanDyke*, 2024 WL 505080 (11th Cir. Feb. 9, 2024).

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PETITION FOR WRIT OF CERTIORARI

Jacob VanDyke 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 23-11268-H and 23-11794-H, in that court on February 9, 2024. *See United States v. VanDyke*, 2024 WL 505080 (11th Cir. 2024).

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 February 9, 2024. *See United States v.VanDyke*, 2024 WL 505080 (11th Cir. 2024). This petition is timely filed pursuant to SUP. CT. R. 13.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

Trafficking in Material Involving the Sexual Exploitation of a Minor; Receving, Transporting, Shipping, Soliciting, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involvoing the Sexual Exploitation of a Minor with Intent to Traffic; Possessing Material Involvoign the Sexual Exploitation of a Minor

(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

Mr. VanDyke was charged by indictment with one count of conspiracy to distribute child pornography and four counts of distribution of child pornography based on his participation in a group chat. Mr. VanDyke entered an open guilty plea to the second superseding indictment, and a Presentence Investigation Report ("PSI") was prepared. According to his PSI, there were approximately 63 video images and 8 still images distributed in the group chat during the span of days when Mr. VanDyke was involved with the group chat, but he only distributed 8 video images and 2 still images and commented on 1 video image. The PSI included a five level enhancement pursuant to § 2G2.2(b)(7), for an offense involving 600 or more images. Mr. VanDyke had zero criminal history points. Based on the PSI, Mr. VanDyke's advisory sentencing range was 210 to 262 months.

Mr. VanDyke raised objections to the PSI, including, as is relevant to this appeal, the five level enhancement for an offense involving 600 or more images. If the District Court had sustained Mr. VanDyke's objection to the offense involving 600 or more images, his guideline range would have been 151 to 188 months. The District Court sentenced Mr. VanDyke to 160 months imprisonment followed by 15 years supervised release.

Mr. VanDyke timely appealed. His sentence was affirmed on appeal. *United States v. Vandyke*, 2024 WL 505080 (11th Cir. 2024). Regarding the enhancement based on the number of images, the Eleventh Circuit held that the term "images" in

the guideline is genuinely ambiguous and rejected Mr. VanDyke's argument that each video should be counted as one image. *Id*. at *3-4.

REASONS FOR GRANTING THE PETITION

I. The Circuits are Deeply Divided in the Level of Deference Afforded to the Commentary to the Sentencing Guidelines, and even though the Eleventh Circuit has Purported to Apply *Kisor*, it has Erred in Deferring to the Commentary's Attempt to Equate 1 Video with 75 Images

The sentencing guidelines play a central role in sentencing. *Molina-Martinez v. United States*, 578 U.S. 189, 191, 136 S. Ct. 1338, 1341, 194 L. Ed. 2d 444 (2016). As this Court explained in *Rita*, a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range. *Rita v. United States*, 551 U.S. 338, 347-348, 127 S. Ct. 2456, 168 L. Ed. 2d 203 (2007). "As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark." *Gall v. United States*, 552 U.S. 38, 49, 128 S. Ct. 586, 169 L. Ed. 2d 445 (2007). "[T]he Guidelines are not only the starting point for most federal sentencing proceedings but also the lodestar." *Molina-Martinez*, 578 U.S. at 200.

However, recent developments have deeply divided the Circuits' interpretations of the Guidelines. These differences in interpretation have resulted in fractured sentencing practices across the nation. *Compare United States v. Banks*, 55 F. 4th 246 (3rd Cir. 2022) (applying *Kisor* and refusing to defer to the commentary's expansion of loss to include intended loss), *with United States v. Limbaugh*, 2023 WL 119577 (4th Cir. 2023) (on plain error review, refusing to disturb the district court's deference to the commentary's inclusion of intended loss). This means that similarly situated defendants may receive substantially different

sentences depending on the jurisdiction in which they are sentenced. The Sentencing Commission cannot resolve this split, because it lacks the power to tell courts when they must accord deference to the Commission's commentary. Review by this Court is necessary to ensure that the sentencing Guidelines are applied fairly and uniformly.

The United States Sentencing Commission is a federal agency that issues the Sentencing Guidelines for sentencing courts to use in determining the sentence to be imposed in a criminal case. 28 U.S.C. § 994(a)(1). The Commission must periodically review and revise the Guidelines, and submit proposed Guideline amendments to Congress, which has six months to review them before they take effect. 28 U.S.C. § 994(o)-(p). Proposed amendments must comply with the notice-and-comment requirements of the Administrative Procedure Act. 28 U.S.C. § 994(x). Additionally, the Commission also produces commentary to its guidelines, but the commentary is not subject to the mandatory Congressional review and notice-and-comment procedures that apply to the Guidelines themselves.

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, 65 S. Ct. 1215, 89 L. Ed. 1700 (1945). That deference has come to be known as *Auer* deference after *Auer v. Robbins*, 519 U.S. 452, 117 S. Ct. 905, 137 L. Ed. 2d 79 (1997). This Court analyzes guideline commentary with the same type of *Auer* deference. *Stinson v. United States*, 508 U.S. 36, 45, 113 S. Ct. 1913, 123 L. Ed. 2d 598 (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*, 588 U.S. 558, 139 S. Ct. 2400, 204 L. Ed. 2d 841 (2019). "Deference without genuine ambiguity would permit the agency, under the guise of interpreting a regulation, to create de facto a new regulation." *Kisor*, 588 U.S. at 575 (internal quotations omitted).

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. 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.

However, the Circuits are deeply divided over the level of deference to afford to guideline commentary. Consistent with *Kisor*, four Circuits refuse to defer to commentary if the guideline text is unambiguous. *United States v. Nasir*, 17 F. 4th 459 (3rd Cir. 2021) (*en banc*); *United States v. Riccardi*, 989 F.3d 476, 486 (6th Cir.

2021); *United States v. Castillo*, 69 F. 4th 648, 658 (9th Cir. 2023); *United States v. Dupree*, 57 F. 4th 1269, 1276-77 (11th Cir. 2023) (*en banc*). However, another five Circuits have refused to revisit their decisions applying *Stinson* and have continued to defer to commentary so long as it does not violate the Constitution or a federal statute and unless it is plainly erroneous or inconsistent with the Guidelines. *United States v. Lewis*, 963 F.3d 16 (1st Cir. 2020); *United States v. Vargas*, 74 F. 4th 673, 680-681 (5th Cir. 2023) (*en banc*); *United States v. White*, 97 F. 4th 532, 539 (7th Cir. 2024); *United States v. Rivera*, 76 F. 4th 1085, 1091 (8th Cir. 2023) (refusing to reconsider precedent applying *Stinson*-deference, because it had not been overruled by that Circuit sitting *en banc*); *United States v. Maloid*, 71 F. 4th 795 (10th Cir. 2023). One Circuit has developed an intra-circuit split sometimes extending Kisor to the guidelines and other times refusing to do so. *Compare United States v. Campbell*, 22 F. 4th 438 (4th Cir. 2022) (refusing to defer to the commentary's inclusion of attempted offenses in the definition of a controlled substance offense), *with United States v. Moses*, 23 F. 4th 347 (4th Cir. 2022) (finding that *Kisor* did not overrule *Stinson*'s standard for the deference owed to Guidelines commentary). This has resulted in several Circuit splits over particular Guidelines and commentary. *Compare United States v. Castillo*, 69 F. 4th 648 (9th Cir. 2023) (applying *Kisor* and invalidating guideline commentary's inclusion of inchoate offenses in the definition of a controlled substance offense), *and United States v. Dupree*, 57 F. 4th 1269 (11th Cir. 2023) (*en banc*) (same), *with United States v. Lewis*, 963 F.3d 16 (1st Cir. 2020) (continuing to defer to the commentary's inclusion of aiding and abetting, conspiring,

and attempting to commit such offenses in the definitions of both crimes of violence and controlled substance offenses), *and United States v. Vargas*, 74 F. 4th 673 (5th Cir. 2023) (*en banc*) (deferring to the commentary's inclusion of inchoate offenses in the definition of a controlled substance offense). Even where the Circuits have applied *Kisor*'s framework to the Guidelines, they have reached different results on the same Guidelines issue. *Compare United States v. Banks*, 55 F. 4th 246 (3rd Cir. 2022) (applying *Kisor* and refusing to defer to the commentary's expansion of loss to include intended loss), *with United States v. You*, 74 F. 4th 378 (6th Cir. 2023) (finding ambiguity exists and deferring to the commentary's inclusion of intended loss).

In this case, even though the Eleventh Circuit recognized *Kisor*'s controlling nature, the court still granted deference to the commentary's 1 to 75 ratio for videos. *United States v. Vandyke*, 2024 WL 505080, *3 (11th Cir. 2024). Because it is inconsistent with and adds to the Guideline text, this commentary violates *Stinson*, but it also violates *Kisor*. Section 2G2.2 of the Sentencing Guidelines 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; it does not hint at weighting videos differently from still

photographs. Note 6(B)(ii) of the commentary, therefore, is an illegal expansion of the § 2G2.2 guideline.

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, 203 L. Ed. 2d 453 (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.

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. 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.

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 May 7, 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*. 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 *Federal Express Corporation v. Holowecki*, 552 U.S. 389, 128 S. Ct. 1147, 170 L. Ed. 2d 10 (2008), in this case. Instead, the court too easily deferred to the commentary's equating 1 video to 75 images. After *Kisor*, this commentary is not entitled to deference. Many Circuits continue to afford the Guideline commentary too much deference. This Court should

grant review in this case to bring the sentencing Guidelines into alignment with this Court's precedents.

This Court is currently reviewing the doctrine of *Chevron* deference required by *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), which is implicated 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. Vandyke*, 2024 WL 505080 (11th Cir. 2024). 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 application of *Chevron* deference, this Court should hold this case while *Loper Bright Enterprises, et al., v. Raimondo*, No. 22-451, and *Relentless, Inc. v. Department of Commerce*, No. 22-1219 remain pending before this Court.

CONCLUSION

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

Respectfully submitted,

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