

No. 24-604

IN THE
Supreme Court of the United States

XIAOQING ZHENG,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit**

REPLY TO BRIEF IN OPPOSITION

Bradley L. Henry
Counsel of Record
Blank Rome
1271 Avenue of the Americas
15th Fl.
New York, NY 10020
(212) 885-5121
bradley.henry@blankrome.com

Counsel for Petitioner

TABLE OF CONTENTS

	Page
ARGUMENT	1
I. THE COURTS OF APPEALS ARE DEEPLY DIVIDED.....	1
II. ONLY THIS COURT CAN ANSWER THIS IMPORTANT QUESTION.....	3
III. THIS CASE IS AN IDEAL VEHICLE.....	5
CONCLUSION	7

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Loper Bright Enterprises v. Raimondo</i> , 144 S. Ct. 2244, 219 L. Ed. 2d 832 (2024)	2, 3
<i>U.S. v. Boler</i> , 115 F.4th 316 (4th Cir. 2024)	2
<i>U.S. v. Chandler</i> , 114 F.4th 240 (3d Cir. 2024)	3
<i>U.S. v. Charles</i> , No. 22-5424, 2024 WL 4554806 (6th Cir. Oct. 23, 2024) (unpublished)	3
<i>U.S. v. Rutherford</i> , 120 F.4th 360 (3rd Cir. 2024)	3
<i>United States v. Banks</i> , 55 F.4th 246 (3d Cir. 2022)	2
<i>United States v. Dupree</i> , 57 F.4th 1269 (11th Cir. 2023) (<i>en banc</i>)	1, 4
<i>United States v. Lewis</i> , 963 F.3d 16 (1st Cir. 2020)	5
<i>United States v. Moses</i> , 23 F.4th 347 (4th Cir. 2022), No. 21-4067	1
<i>United States v. Nasir</i> , 17 F.4th 459 (3d Cir. 2021) (<i>en banc</i>)	6

ARGUMENT

I. THE COURTS OF APPEALS ARE DEEPLY DIVIDED.

The Government does not dispute that the circuits are deeply divided about whether courts should apply *Stinson* or *Kisor*, while also agreeing that the limits on deference in *Kisor* apply to the Sentencing Commission’s commentary on the Sentencing Guidelines, leaving no compelling reason for *Stinson* to stand. *See* Pet. 11–17 (discussing circuit split); *see also* BIO 17. The split among circuits has been continually recognized by Courts of Appeals across the country, many of whom have called out for clarification. *See, e.g.*, Pet. 17-18; *See* Order, *United States v. Moses*, 23 F.4th 347 (4th Cir. 2022), No. 21-4067, at 3 (Niemeyer, J., supporting denial of rehearing *en banc*) (“[U]nder *Stinson*, Guidelines commentary would be authoritative and binding regardless of whether the Guideline to which it is attached is ambiguous, whereas under *Kisor*, Guidelines commentary would receive such deference only if the Guideline were ‘genuinely ambiguous.’ ”); *id.* (the court “would welcome the Supreme Court’s advice on” this issue); *United States v. Dupree*, 57 F.4th 1269, 1283 n. 1 (11th Cir. 2023) (*en banc*) (applying *Kisor*) (Grant, J., concurring in the judgment) (“One source of confusion in this area may be a tension within *Kisor* between stare decisis and the articulation of new limits on *Seminole Rock*.”). That split exists across circuits and—in some instances like the 4th Circuit—within circuits. *See* Pet. 12. The Government does little to address the myriad, multi-guideline split being faced by sentencing courts around the country.

Importantly, there is also a clear split with respect to the specific guideline at issue where in *Banks*, the Third Circuit split from other courts as to whether the application note defining “loss” to include intended loss should continue to receive deference. Compare e.g. *United States v. Banks*, 55 F.4th 246, 258 (3d Cir. 2022) (“[T]he ordinary meaning of the word ‘loss’ is the loss the victim actually suffered. ... Because the commentary expands the definition of ‘loss’ by explaining that generally ‘loss is the greater of actual loss or intended loss,’ we accord the commentary no weight.”), with *You*, 74 F.4th at 397 (“Applying *Kisor*’s framework, we defer to the Sentencing Commission’s interpretation of ‘loss.’”). The fact that the Sentencing Commission recognized the issue here and amended the Guidelines to include the definition of intended loss within the Guideline itself should not dissuade this Court from addressing this issue. On the contrary, the Sentencing Commission recognized that there was a fundamental flaw and creates an even more perfect vehicle for review of the Question Presented.

The Government also wholly fails to grapple with the implications of *Loper Bright* on *Kisor*’s interplay with the Guidelines and lower court ruling calling into question *Auer* deference. See *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244, 219 L. Ed. 2d 832 (2024). Indeed, in describing its application of *Auer* deference to the guidelines, the U.S. Court of Appeals for the Fourth Circuit’s decision in *U.S. v. Boler* recognized that *Loper Bright* “calls into question the viability of *Auer* deference.” *U.S. v. Boler*, 115 F.4th 316 (4th Cir. 2024). Other courts have also begun to recognize the potential impact of *Loper Bright* on the Guidelines commentary. In two other

decisions, the Third and Sixth Circuits have acknowledged *Loper Bright* in the context of the guidelines. *U.S. v. Rutherford*, 120 F.4th 360, 379 (3rd Cir. 2024) (citing *Loper Bright* as “instructive” when interpreting guidelines policy statements); *U.S. v. Charles*, No. 22-5424, 2024 WL 4554806, at *13 (6th Cir. Oct. 23, 2024) (unpublished) (assuming *Loper Bright* does not alter deference to guidelines commentary under *Kisor*). *Loper Bright* “cast[s] doubt” on continued “strong deference” to the guidelines commentary and is further reason to review this case now. *See U.S. v. Chandler*, 114 F.4th 240, 241 (3d Cir. 2024) (Bibas, J., dissenting from denial of rehearing *en banc*).

More specifically, this issue raises questions about the viability of the Second Circuit’s *Rainford* opinion that was based *Auer* deference, on which the Government relies and under which the Second Circuit decided this case. *See* BIO 17. Additionally, the Government’s argument that on remand the district court would affirm Petitioner’s sentence because Application Note 3(A) warrants deference even under *Kisor* (BIO 17) is merely an alternative argument on remand and should not impede the Court’s review of the Question Presented. Here, the Second Circuit upheld the Petitioner’s sentence based on *Stinson*, with the viability of *Rainford*’s reasoning—which expressly acknowledges contrary rulings from other circuits—called into question by *Loper Bright*. *See* PetApp. 39a—41a.

II. ONLY THIS COURT CAN ANSWER THIS IMPORTANT QUESTION.

The Government does not confront significant issues raised by Petitioner in this case. For example,

the Government does not deny, or even address, arguments, that the Question Presented arises frequently, is outcome determinative in this and in many cases, nor that the degree of deference owed to the Sentencing Commission's commentary implicates important issues of agency power, individual liberty, and uniformity in sentencing. *See* Pet. 18—22. The Government also does not argue that the split will resolve on its own and does not deny that there is a significant split. *See id.* At 19.

The Government's final argument (BIO 20) that the Sentencing Commission is best positioned to resolve this issue is meritless. Federal district courts must interpret and apply the Sentencing Guidelines every time they sentence a criminal defendant. *See Booker*, 543 U.S. at 264; *Rita*, 551 U.S. at 351; *Gall*, 552 U.S. at 49. The Government's argument does nothing to promote and resolve conflict when exercising judicial deference by amending the guidelines *ex post facto*. A defendant is entitled to nothing less than a court's "best independent judgment of the law's meaning." *Kisor*, 139 S. Ct. at 2426 (Gorsuch, J., concurring in the judgment) (emphasis added). In other words, an agency cannot solve the issue of judicial deference by declaring its own regulations to be binding on courts.

Just as only this Court could determine what deference courts owe to an agency's interpretation of its own regulations, *see Kisor*, 139 S. Ct. 2400, so, too, must it determine the degree of deference courts owe to Guidelines commentary. *See United States v. Dupree*, 57 F.4th 1269, 1289 n.6 (11th Cir. 2023) (en banc) (Grant, J., concurring in the judgment) ("[T]he Commission cannot, on its own, resolve the dispute about what deference courts should give to the

commentary. Given the burgeoning circuit split, it appears that only the Supreme Court will be able to answer that question.”).

III. THIS CASE IS AN IDEAL VEHICLE.

This case is the ideal case to determine what level of deference courts owe to Guidelines commentary. The split is now fully developed—on both the issue of *Kisor* versus *Stinson* and also as to the loss Guideline—so there is no reason to further delay. The Question Presented was raised below. And the Second Circuit relied on *Stinson* deference to affirm Petitioner’s sentence. *See* Pet.App. 39a–41a.

This decision, unlike in prior Petitions, directly impacts the Petitioners sentence—a difference of potentially no time in jail versus 24 months. The Sentencing Commissions correction to the Guideline bringing the application of intended loss into the Guidelines language itself is recognition that this issue is meritorious and further warrants review now. It is not cause to avoid the issue, especially as it applies to Petitioner in this case.

“The same principles that require courts to ensure that agencies do not amend unambiguous regulations in the guise of ‘interpretation’ (‘without ever paying the procedural cost’), apply with equal (if not more) force to the Sentencing Guidelines and their commentary.” *United States v. Lewis*, 963 F.3d 16, 28 (1st Cir. 2020) (Torruella and Thompson, JJ., concurring). “If it were otherwise, the Sentencing Commission would be empowered to use its commentary as a Trojan horse for rulemaking. This it is surely not meant to do, especially when the consequence is the deprivation of individual liberty.”

Id. (cleaned up). *Cf. Kisor*, 139 S. Ct. at 2440-41 (Gorsuch, J., concurring) (under *Auer* and *Stinson* deference, “there is no fair hearing and no need for the agency to amend the regulation through notice and comment . . . the agency’s failure to write a clear regulation winds up increasing its power, allowing it to both write and interpret rules that bear the force of law—in the process uniting powers the Constitution deliberately separated and denying the people their right to an independent judicial determination of the law’s meaning”).

Disputes about the proper interpretation of the Guidelines can spell the difference between freedom and imprisonment over extended periods of time. As Judge Bibas put it, “[w]hatever the virtues of giving experts flexibility to adapt rules to changing circumstances in civil cases, in criminal justice those virtues cannot outweigh life and liberty.” *United States v. Nasir*, 17 F.4th 459 (3d Cir. 2021) (*en banc*) (Bibas, J., concurring).

CONCLUSION

The petition for a writ of certiorari should be granted.

March 18, 2025

Respectfully submitted,

Bradley L. Henry

Counsel of Record

BLANK ROME

1271 Ave. of the Americas

New York, NY 10020

(212) 885-5121

bradley.henry@blank rome.com

Counsel for Petitioner