No. _______

IN THE

Supreme Court of the United States

JOHN FREDENBURGH,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

THOMAS W. PATTON
Federal Public Defender

COLLEEN C.M. RAMAIS
Assistant Federal Public Defender
Office of the Federal Public Defender
300 W. Main Street
Urbana, Illinois 61801
Phone: (217) 373-0666
Email: colleen_ramais@fd.org
Counsel for Petitioner

QUESTION PRESENTED

Does judicial deference to the Sentencing Commission's Commentary to the United States Sentencing Guidelines violate the principles of judicial independence as explained in *Kisor v. Wilke* and *Loper Bright Enterprises v. Raimondo*?

TABLE OF CONTENTS

QUESTION PRESENTED ii
TABLE OF CONTENTS iii
INDEX TO APPENDIX iv
TABLE OF AUTHORITIES CITED v
OPINION BELOW 1
JURISDICTION 1
STATUTORY PROVISIONS INVOLVED 1
GUIDELINES PROVISIONS INVOLVED 2
STATEMENT OF THE CASE 3
I. Legal background 3
II. Factual background 4
III. Proceedings below 4
REASONS FOR GRANTING THE PETITION 8
I. *Stinson* no longer reflects the prevailing approach to agency deference. 10
A. *Stinson*'s broad deference framework emerged from pre-*Kisor* administrative law principles. 10
B. While it preserved the core of *Auer* deference, *Kisor* explained that any deference was contingent on the reviewing court making substantial prerequisite findings. 11
C. *Loper Bright* definitively rejected agency deference for statutory interpretation under the APA. 13
II. A straightforward application of *Kisor* to the Guidelines significantly constrains *Stinson*'s broad grant of agency deference. 14
A. *Kisor* exposes the analytical gaps in *Stinson*'s deferential approach. 14

B. Reliance on the commentary implicates post-enactment concerns. 15

C. Circuit courts do not agree on *Kisor*'s impact on *Stinson*; the circuit split warrants resolution. 16

III. *Loper Bright's* statutory and constitutional mandate for judicial independence fundamentally undermines agency deference in the sentencing context. 18

A. *Loper Bright's* constitutional and statutory command for independent interpretation precludes unchecked agency deference. 19

B. The APA's notice-and-comment requirements reflect essential congressional controls that commentary-based deference circumvents 20

CONCLUSION 23

INDEX TO APPENDIX

Appendix A Decision of the U.S. Court of Appeals for the Seventh Circuit 1a

TABLE OF AUTHORITIES CITED

Cases

Arlington v. FCC, 569 U.S. 290 (2013) 11

Auer v. Robbins, 519 U.S. 452 (1997) .... passim

Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945) 8, 9, 10, 17

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 476 U.S. 837 (1984) 11, 13

Christopher v. SmithKline Beecham Corp., 567 U.S. 142 (2012) 11

Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258 (2014) 13

Hughes v. United States, 584 U.S. 675 (2018) 3

Kisor v. Wilke, 588 U.S. 558 (2019) .... passim

Loper Bright Enterprises v. Raimondo, 603 U.S. 369 (2024) .... passim

Marbury v. Madison, 2 L.Ed. 60 (1803) 18

Molina-Martinez v. United States, 578 U.S. 189 (2016) 3

Perez v. Mortg. Bankers Ass'n, 575 U.S. 92 (2015) 22

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

United States v. Castillo, 69 F.4th 648 (9th Cir. 2023) 17

United States v. Dupree, 57 F.4th 1269 (11th Cir. 2023) 17

United States v. Fredenburgh, 2024 WL 4471307 (7th Cir. 2024) 4

United States v. Maloid, 71 F.4th 795 (10th Cir. 2023) 17

United States v. Moses, 23 F.4th 347 (4th Cir. 2022) 17

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

United States v. Riccardi, 989 F.3d 476 (6th Cir. 2021) 17

United States v. Vargas, 74 F.4th 673 (5th Cir. 2023) 17

United States v. Von Loh, 417 F.3d 710 (7th Cir. 2005) 6

United States v. White, 97 F.4th 532 (7th Cir. 2024) 17

Statutes

5 U.S.C. § 553 21

5 U.S.C. § 706 .... 13, 20

18 U.S.C. § 2422 .... 1, 4, 5

18 U.S.C. § 2423 .... 1, 4

28 U.S.C. § 991(a) 16

28 U.S.C. § 994(a) 3, 4, 21, 22

28 U.S.C. § 994(q) 21

28 U.S.C. § 994(x) 21

28 U.S.C. § 1254(1) 1

Other Authorities

Liam Murphy, *What's the Deference? Interpreting the U.S. Sentencing Guidelines After Kisor*, 75 Vand. L. Rev. 957 (2022) 10

The Federalist No. 78 (A. Hamilton) 19

U.S. Sent'g Comm'n, Rules of Practice & Procedure 21

U.S.S.G. § 2G1.3 5

U.S.S.G. § 3D1.2 .... passim

U.S.S.G. § 3D1.4 3

PETITION FOR WRIT OF CERTIORARI

Petitioner John Fredenburgh respectfully prays that a writ of certiorari issue to review the unpublished decision of the United States Court of Appeals for the Seventh Circuit, issued on October 11, 2024, affirming his conviction and sentence.

OPINION BELOW

The decision of the United States Court of Appeals for the Seventh Circuit is available at 2024 WL 4471307 and appears in Appendix A to this Petition.

JURISDICTION

Petitioner seeks review of the final decision of the Court of Appeals entered on October 11, 2024. App. 1a. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant portions of the federal statutes relevant to this petition are as follows:

> **18 U.S. Code § 2422** - Coercion and enticement
>
> (b) Whoever, using the mail or any facility or means of interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years, to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title and imprisoned not less than 10 years or for life.
>
> **18 U.S. Code § 2423** - Transportation of minors:
>
> (b) Travel With Intent To Engage in Illicit Sexual Conduct
>
> A person who travels in interstate commerce or travels into the United States, or a United States citizen or an alien admitted for permanent residence in the United States who travels in foreign commerce, with intent to engage in any illicit sexual conduct with another person shall be fined under this title or imprisoned not more than 30 years, or both.

GUIDELINES PROVISIONS INVOLVED

Relevant portions of the United States Sentencing Guidelines are included below:

U.S.S.G. § 3D1.2. Groups of Closely Related Counts

All counts involving substantially the same harm shall be grouped together into a single Group. Counts involve substantially the same harm within the meaning of this rule:

(a) When counts involve the same victim and the same act or transaction.

(b) When counts involve the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan.

(c) When one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts.

(d) When the offense level is determined largely on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm, or if the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior.

U.S.S.G. § 3D1.2. Application Note 4

Subsection (b) provides that counts that are part of a single course of conduct with a single criminal objective and represent essentially one composite harm to the same victim are to be grouped together, even if they constitute legally distinct offenses occurring at different times. This provision does not authorize the grouping of offenses that cannot be considered to represent essentially one composite harm (*e.g.*, robbery of the same victim on different occasions involves multiple, separate instances of fear and risk of harm, not one composite harm).

[…]

But: (5) The defendant is convicted of two counts of rape for raping the same person on different days. The counts *are not* to be grouped together.

STATEMENT OF THE CASE

I. Legal background

The United States Sentencing Guidelines are "for use of a sentencing court in determining the sentence to be imposed in a criminal case." 28 U.S.C. § 994(a)(1). They "provide the framework for the tens of thousands of federal sentencing proceedings that occur each year." *Molina-Martinez v. United States*, 578 U.S. 189, 192 (2016). Though no longer mandatory, the Guidelines have an anchoring effect: at the outset of sentencing, "the district court must determine the applicable Guidelines range," and take them into account when choosing the appropriate sentence." *Id.* at 193. In this way, "the Guidelines remain the foundation of federal sentencing decisions," and, in the typical case, "there will be no question that [a] defendant's Guidelines range was a basis for his sentence." *Hughes v. United States*, 584 U.S. 675, 685, 686 (2018). Indeed, "the Guidelines remain a basis for almost all federal sentences." *Id.* at 688. Proper application of Guidelines provisions and, therefore, an accurate calculation of the applicable Guidelines range is critically important to federal criminal defendants. Miscalculation of the range is presumptively prejudicial to a defendant. *Molina-Martinez*, 578 U.S. at 198.

Section 3D1.2 of the United States Sentencing Guidelines establishes a framework for grouping together multiple criminal counts that involve "substantially the same harm" for sentencing purposes. When counts are *not* grouped, a multiple-count adjustment frequently increases a defendant's total offense level (and, in turn, the applicable Guidelines sentencing range). *See* U.S.S.G. § 3D1.4. Section 3D1.2 has two parts: (1) Sentencing Guidelines

(Guidelines); and (2) Commentary Application Notes (Commentary). However, the Commentary consists of "general policy statements regarding the application of the guidelines." 28 U.S.C. § 994(a)(2). Among its several purposes, the Commentary serves as a guide to help "interpret" and "explain how [the Guidelines are] to be applied." *Stinson v. United States*, 508 U.S. 36, 44 (1993).

II. Factual background

John Fredenburgh pleaded guilty to traveling in interstate commerce to engage in sexual conduct, in violation of 18 U.S.C. § 2423(b), and attempted enticement of a minor, in violation of 18 U.S.C. 2422(b). *United States v. Fredenburgh*, 2024 WL 4471307, *1 (7th Cir. 2024). These charges stemmed from a five-year sexual relationship with his stepdaughter's friend. *Id.* The relationship began when the minor was 12 years old and most of the abuse occurred at Fredenburgh's home, but also at hotels and campsites. *Id.* These trips crossed state lines, and two of the occasions gave rise to the two counts of the indictment in this case. *Id.*

III. Proceedings below

In preparation for sentencing, the Probation Office prepared a Presentence Investigation Report (PSR) that calculated Fredenburgh's guideline range without grouping the two counts of conviction, despite the fact that, under the plain reading of Section 3D1.2, the counts would group. Specifically, Mr. Fredenburgh was convicted of two discrete acts: interstate travel with the intent to engage in prohibited sexual conduct with a minor (in violation of 18 U.S.C. § 2423(b)) and the

use of a facility of interstate commerce (a computer or cell phone, in this case) in an attempt to persuade a minor to engage in prohibited sexual activity (in violation of 18 U.S.C. § 2422(b)). Though each charge relates to a different day on which Mr. Fredenburgh met the victim in a Michigan hotel for sex, the relevant conduct in his case spans at least five years and involves "countless sex acts" and communications via text message "on numerous occasions to arrange meetings for sexual encounters." PSR ¶¶ 50, 51, 58, 59. Both offenses are covered by Section 2G1.3 of the Guidelines.

Two or more counts group when they "involve the same victim and two or more acts or transactions connected by a common scheme or plan," where one count "embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable" to the other count, or where "the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior." U.S.S.G. § 3D1.2(b), (c), (d). Here, both counts involved the same victim and represent two discrete acts that formed part of a greater whole: a five-year "relationship" with the minor victim. Under subsection (b), the counts group as components of a larger scheme. U.S.S.G. § 3D1.2(b). Moreover, the conduct charged in Count 2 (using a computer to attempt to persuade, induce, or entice the minor victim to engage in unlawful sexual activity) is encompassed as an enhancement in Section 2G1.3, which adds two offense levels where the offense involved a computer to persuade, induce, or entice a minor to engage in just such conduct. *Compare* 18 U.S.C. § 2422(b) *with* U.S.S.G. § 2G1.3(b)(3)(A). This

enhancement was applied to both Counts 1 and 2. Under the plain text of Section 3D1.2(c), therefore, the counts should have grouped. Finally, because the offense behavior (and relevant conduct) spanned years of repeated encounters between Mr. Fredenburgh and the victim and the offense characteristics were applied under the guidelines based on the totality of the conduct, the counts naturally group under a plain reading of Section 3D1.2(d).

Nevertheless, consistent with Circuit precedent, the district court did not group these offenses, deferring to Section 3D1.2's commentary, which effectively creates an exception to the grouping rules for rape. Application note 4 notes that, under subsection (b), "counts that are part of a single course of conduct with a single criminal objective an represent essentially one composite harm to the same victim are to be grouped together, even if they constitute legally distinct offenses occurring at different times." U.S.S.G. § 3D1.2, n.4. Among the examples given of acts that do *not* group under subsection (b), are two instance of robbery of the same victim on different dates and two instances of "raping the same person on different days," under the rationale that each count would then represent "separate instances of fear and risk of harm, not one composite harm." *Id.* Seventh Circuit precedent squarely held that this commentary precluded grouping counts of sexual exploitation of a minor in just this type of scenario. *United States v. Von Loh*, 417 F.3d 710, 712-15 (7th Cir. 2005).

In Mr. Fredenburgh's case, deference to the commentary of the guidelines resulted in a two-level increase to the offense level, and an applicable guidelines

range of 235-293 months. Without the addition of these two points, his range would have been 188-235 months. Mr. Fredenburgh appealed, arguing that the district court misapplied the plain language of Section 3D1.2 and should not have deferred to the commentary. The Court of Appeals rejected his argument. He now seeks relief from this Court.

Reasons for Granting the Petition

Sentencing is among the most consequential acts of judicial prerogative. It affects thousands of individuals each year. The Sentencing Guidelines anchor federal sentencing practices and, in the typical case, have a significant effect on the sentence a defendant receives. In *Stinson v. United States*, this Court applied then-controlling principles of administrative law and treated the commentary as an agency's interpretation of its own legislative rule. 508 U.S. 36, 44-45 (1993). Accordingly, *Stinson* directed that the commentary must be given "controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Id.* at 45, quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). This deference to an agency's interpretation of its own rules has been referred to over the years as *Auer* or *Seminole Rock* deference. *Kisor v. Wilke*, 588 U.S. 558, 558 (2019), citing *Auer v. Robbins*, 519 U.S. 452 (1997), and *Seminole Rock*, 325 U.S. 410.

However, in *Kisor*, this Court cautioned that this deference is "cabined in its scope." *Id.* at 564. First, it underscored, "the possibility of deference can arise only if a regulation is genuinely ambiguous." *Id.* at 573. It further warned: "before concluding that rule is genuinely ambiguous, a court must exhaust all the 'traditional tools' of construction." *Id.* at 575. If genuine ambiguity persists after all said tools have been exhausted, a court must examine whether the agency's interpretation is "reasonable." *Id.* Stated otherwise, the interpretation must "come within the zone of ambiguity the court has identified after employing all its interpretive tools." *Id.* at 576. In addition to be reasonable, the interpretation must be one where the character and context of the interpretation entitles it to

controlling weight, which is a multi-factored inquiry. *Id.* at 576-80. Indeed, with all of these restrictions on deference to an agency's interpretation of its own rules, courts in many ways "exercise independent review over the meaning of agency rules." *Id.* at 581.

Given the many limitations on *Auer* or *Seminole Rock* deference described in *Kisor*, courts across the country have had occasion to revisit the continued viability of *Stinson*'s pronouncement (which was not particularly tied to any finding of ambiguity) that the commentary is a controlling interpretation of the Guidelines so long as it is not "plainly erroneous or inconsistent" with the text of the guideline. 508 U.S. at 45. As the question of agency deference has percolated through lower courts, they have weighed in on the relationship between *Kisor* and *Stinson* and the proper role of judicial deference to the Sentencing Commentary. Circuit courts are divided on this question.

Moreover, the question is important. Because each provision of the Guidelines has commentary attached, this issue has the potential to affect every federal sentencing proceeding. This Court should correct this sentencing practice with constitutional principles. This Court should grant certiorari to bring treatment of the Guidelines into conformity with all other treatment of agencies interpretations of their own rules as articulated and clarified by *Kisor*.

I. *Stinson* no longer reflects the prevailing approach to agency deference.

A. *Stinson*'s broad deference framework emerged from pre-*Kisor* administrative law principles.

As noted, *Stinson* directed courts to treat the Commission as analogous to other administrative agencies and afford the commentary *Auer* (or *Seminole Rock*) deference, purporting to treat the commentary as it would any agency's interpretation of its own regulations. 508 U.S. at 45. The Court focused on two key factors in arriving at this conclusion. First, the Court recognized the expertise of the Sentencing Commission. *Id.* ("The Commission, after all, drafts the guidelines as well as the commentary interpreting them, so we can presume that the interpretations of the guidelines contained in the commentary represent the most accurate indications of how the Commission deems that the guidelines should be applied to be consistent with the Guidelines Manual as a whole as well as the authorizing statute"); *see also* Liam Murphy, *What's the Deference? Interpreting the U.S. Sentencing Guidelines After Kisor*, 75 Vand. L. Rev. 957, 973–977 (2022). Second, the Court emphasized the Commission's ongoing statutory duty to review and revise the guidelines system. *Stinson*, 508 U.S. at 44-45.

However, *Stinson* arguably went a step further than appropriate, certainly when viewed in retrospect with the benefit of this Court's subsequent decisions explaining *Auer* deference. Indeed, in *Stinson*, the Court broadly held that the Sentencing Commentary 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. This deference does not rely on a finding of ambiguity: the "commentary explains the guidelines and provides concrete guidance as to how even *unambiguous* guidelines are to be applied in practice." *Id.* at 44 (emphasis added).

B. While it preserved the core of *Auer* deference, *Kisor* explained that any deference was contingent on the reviewing court making substantial prerequisite findings.

Nearly 30 years after *Stinson*, this Court reevaluated the role of *Auer*—addressing whether (and when) courts should continue to defer to an agency's reasonable interpretation of its own *ambiguous* regulation. *Kisor*, 588 U.S. at 563. In affirming the continuing vitality of *Auer*, the Court reaffirmed prior holdings that cabined its scope in several ways. *Id.* First, the regulation must be "genuinely ambiguous" after using *all* "standard tools of interpretation." *Id.* at 573. When a regulation is not ambiguous, an agency's interpretation still has the "power to persuade." *Id.*, quoting *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 159 (2012). Second, an agency's interpretation must be reasonable, not "plainly erroneous." *Id.* at 575-76. An interpretation is reasonable when it falls within the range of possible meanings *after* the court has employed traditional tools of construction informed by the text, history, structure and purpose of the regulation. *Id.* Notably, the Court dispelled any notion that "agency constructions of rules receive greater deference than agency constructions of statutes." *Id.* at 576. Not so, *Kisor* clarified: "Under *Auer*, as under *Chevron*, the agency's reading must fall 'within the bounds of reasonable interpretation.'" *Id.*, quoting *Arlington v. FCC*, 569 U.S. 290, 296 (2013).

Third, the interpretation must be the agency's official position. *Kisor*, 588 U.S. at 577. It must also reflect the agency's area of authoritative expertise. *Id.* at 577-78. Finally, the interpretation must reflect "fair and considered judgment" of the agency. *Id.* at 579. In this way, courts are to be mindful of an agency's reasons for promulgating the interpretation—incorporating a fairness principle. *Id.* For example, courts should not defer to an agency reading made merely as a convenient litigating position or that are post hoc rationalizations to defend the agency against attack. *Id.* Other "fairness" factors that may prevent deference include an agency's interpretations that create an "unfair surprise," conflict with prior interpretations, or upend reliance. *Id.*

Several considerations led the Court to its conclusion. First, only when the text of the regulation "runs out"—is ambiguous—should courts defer to the agency's interpretation to fill in the gap. *Id.* at 575. This is so because filling the gap will often require policy judgements. *See id.* The Court presumed that Congress would invest interpretive power in the actor best positioned to develop expertise about a given problem. *Id.* at 578. Thus, *only* when an agency's interpretation is "genuinely ambiguous," the Court presumed that Congress would desire an agency to resolve the ambiguity given their "nuanced understanding of the regulations they administer." *Id.* Second, this Court relied on principles of *stare decisis* to support the continuance of *Auer* deference. *Id.* at 586-87. Citing predictability, reliance and consistency principles, the Court held that departure from past decisions requires "special justification." *Id.*, quoting *Halliburton Co. v. Erica P. John Fund, Inc.*, 573

U.S. 258, 266 (2014). None of which were present in *Kisor*. 588 U.S. at 588. In sum, *Kisor* reaffirmed *Auer* deference but subject to strict limitations, ensuring deference only to genuine ambiguities. This balances agency expertise while preserving judicial interpretative authority.

C. *Loper Bright* definitively rejected agency deference for statutory interpretation under the APA.

Late last term, the Supreme Court overruled *Chevron*, which accorded analogous deference to agencies' interpretations of *statutes* that they administered. *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 412-13 (2024). The Court addressed the proper role for how courts ought to handle ambiguities in statutory directives to administrative agencies. *Id.* It ultimately held that the Administrative Procedure Act (APA) requires courts to determine whether an agency has acted within its statutory authority. *Id.* This Court also held that courts may not defer to an agency's interpretation of an ambiguous law. *Id.* The Court reasoned that agencies have "no competence in resolving statutory ambiguities." *Id.* at 400-01. Instead, courts remain the "final authority on issues of statutory construction." *Id.* at 401, quoting *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 476 U.S. 837, 843, and n.9 (1984). One major premise is that under the APA, courts "shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." *Id.* at 391; 5 U.S.C. § 706. While *Loper Bright* dealt specifically with statutory interpretation under *Chevron* rather than regulatory interpretation under

Auer, its emphasis on independent judicial review signals a broader shift in administrative deference doctrines.

II. A straightforward application of *Kisor* to the Guidelines significantly constrains *Stinson*'s broad grant of agency deference.

Kisor marked a shift in administrative deference jurisprudence. Instead of the almost reflexive deference seen in *Stinson*, *Kisor* made it clear that there are significant constraints on when courts may defer to agency interpretations of their own regulations. While preserving *Auer* in name, *Kisor's* stringent limitations seriously call into question *Stinson's* analytic framework. However, *Kisor's* impact on *Stinson* remains unclear for lower courts. While *Kisor's* reasoning undermines *Stinson's* holding, *Kisor* only mentions *Stinson* once in a footnote of collected cases. *Kisor*, 588 U.S. at 568 n.3. This Court should take this opportunity to help define *Stinson's* validity after *Kisor* for several reasons.

A. *Kisor* exposes the analytical gaps in *Stinson*'s deferential approach.

First, *Stinson* did not undergo the depth of analysis required by *Kisor*. Among the requirements put forth in *Kisor*, perhaps the most important is that the text be "genuinely ambiguous" after using all standard tools of interpretation. 588 U.S. at 573 ("And when we use that term, we mean it—genuinely ambiguous"). In *Stinson*, this Court instructed lower courts to defer to commentary to the guidelines as long as it did not "run afoul of the Constitution or a federal statute, and it is not plainly erroneous or inconsistent." 508 U.S. at 47. *Stinson* thus fails step one of *Kisor*'s framework: it makes no requirement the guideline provision in question be

“genuinely ambiguous” before deferring to the commentary. *See id.* Indeed, it does not use any standard interpretive tools to examine any ambiguity before deferring to the commentary. *Id.* Under *Kisor’s* framework, such cursory review cannot establish the type of genuine ambiguity necessary to warrant deference. Indeed, *Kisor* warns against waving the “ambiguity flag” because the regulation is inaccessible after an initial reading. 588 U.S. at 575. The absence of demonstrated ambiguity presents a serious challenge to *Stinson’s* continued validity as a controlling precedent in the Guidelines commentary context.

B. Reliance on the commentary implicates post-enactment concerns.

Second, Justice Gorsuch’s critique of post-enactment interpretations in *Kisor* provides a critical lens through which to evaluate *Stinson*. As Justice Gorsuch explains, there is no reason why an agency’s after-the-fact construction should receive special interpretive weight. *Kisor*, 588 U.S. at 628 (Gorsuch, J., concurring). This is especially so when an agency’s personnel changes over time, and policy preferences shift with new political appointees. *Id.* at 620. While *Stinson* relied heavily on the expertise of the Sentencing Commission in reaching its conclusion, it disregarded how changes in Commission membership could lead to evolving policy priorities and interpretive inconsistency. *See* 508 U.S. at 44-46.

Furthermore, the Commission’s unique status as a judicial branch agency does not resolve these concerns. Congress has attempted to insulate the Commission from political pressure through structural safeguards–including bipartisan membership requirements, required Federal judge membership and for-

cause removal protections. 28 U.S.C. § 991(a). Yet the fundamental problem Justice Gorsuch identified in *Kisor* persists. The Commission remains inherently political as the President nominates the members and then are confirmed by the Senate. *Id.* This political dimension makes the Commission susceptible to the concerns about post-enactment interpretation that Justice Gorsuch emphasized. *Kisor*, 588 U.S. at 621-22 (Gorsuch, J., concurring) ("[T]he real cure doesn't lie in turning judges into rubber stamps for politicians, but in redirecting the judge's interpretive task back to its roots, away from open-ended policy appeals and speculation about legislative intentions and toward the traditional tools of interpretation judges have employed for centuries to elucidate the law's original public meaning."). These concerns are particularly important in sentencing, where post-enactment interpretations directly impact the defendant's liberty interests and implicate fundamental due process protections.

C. Circuit courts do not agree on *Kisor*'s impact on *Stinson*; the circuit split warrants resolution.

Finally, the deferential framework adopted by *Stinson* and revisited in *Kisor* has led to inconsistent application of the Sentencing Guidelines across circuits. Lower courts disagree about *Kisor's* effects on *Stinson* and the degree to which the Commentary is binding. Such disparities underscore the need for this Court to resolve the conflict and provide uniform guidance on the deference owed to the Commentary.

The circuit split on this issue manifests in two competing approaches. On one side are the Fourth, Fifth, Seventh, and Tenth Circuits, which have declined to

apply *Kisor* to the Sentencing Commentary and continue to apply *Stinson*. See, e.g., *United States v. Moses*, 23 F.4th 347, 349 (4th Cir. 2022) ("[W]e conclude that *Kisor* did not overrule *Stinson's* standard for the deference owed to Guidelines commentary but instead applies in the context of an executive agency's interpretation of its own legislative rules."); *United States v. Vargas*, 74 F.4th 673 (5th Cir. 2023) (en banc); *United States v. White*, 97 F.4th 532, 539 (7th Cir. 2024); *United States v. Maloid*, 71 F.4th 795, 798 (10th Cir. 2023). Generally, these courts reason that *Stinson* specially addressed the Commentary while *Kisor* did not address this issue.

The Third, Sixth, Ninth, and Eleventh Circuits have fallen on the other side of this split, holding that *Kisor* limited *Stinson*'s applicability, and thus the standard set forth in *Kisor* is now controlling. See, e.g., *United States v. Nasir*, 17 F.4th 459, 471 (3rd Cir. 2021) (en banc); *United States v. Riccardi*, 989 F.3d 476, 484 (6th Cir. 2021); *United States v. Castillo*, 69 F.4th 648, 656 (9th Cir. 2023); *United States v. Dupree*, 57 F.4th 1269, 1274 (11th Cir. 2023). These courts generally hold that *Auer* and *Stinson* are concerned with an agency's own interpretation of their regulations, and thus, *Kisor* has altered the deference given to the commentary. For example, when confronted with this question, the Third Circuit held: "In *Kisor*, the [Supreme Court] cut back on what had been understood to be uncritical and broad deference to agency interpretations of regulations and explained that *Auer*, or *Seminole Rock*, deference should only be applied when a regulation is genuinely ambiguous." *Nasir,* 17 F.4th at 471.

Thus, there is a stark division among the lower courts. Courts following *Kisor* treat the commentary as deserving deference only when traditional tools fail to resolve "genuinely ambiguous" language in the guidelines. Those courts continuing to follow *Stinson*, however, make no such inquiry, and follow the commentary so long as it does not violate the constitution or a federal statute and does not directly contradict the text of the relevant guideline provision. Resolving the circuit split will help ensure consistency in applying the Guidelines and the interplay between *Stinson* and *Kisor*.

III. ***Loper Bright's*** **statutory and constitutional mandate for judicial independence fundamentally undermines agency deference in the sentencing context.**

This Court's decision in *Loper Bright Enterprises v. Raimondo* casts further doubt on the viability of *Stinson*. *Loper Bright* clearly holds that "it is emphatically the province and duty of the judicial department to say what the law is." 603 U.S. at 385, quoting *Marbury v. Madison*, 2 L.Ed. 60 (1803). *Stinson* suggests that it is emphatically the province and duty of the Sentencing Commission to say what the law is for sentencing criminal defendants, given the deference accorded to the commentary. See *Stinson*, 508 U.S. at 45. This Court should restore constitutional balance—one where the Sentencing Commission promulgates the guidelines (and Congress adopts them), and the courts interpret those guidelines.

A. *Loper Bright's* constitutional and statutory command for independent interpretation precludes unchecked agency deference.

This Court's decision in *Loper Bright* reaffirmed fundamental principles of judicial independence in play in both *Kisor* and *Stinson*. As the Court rightly emphasized, the Framers envisioned that "the final interpretation of the laws would be the proper and peculiar province of the courts." *Loper Bright*, 603 U.S. at 385, quoting The Federalist No. 78, p. 525 (A. Hamilton). To do this faithfully, they structured the Constitution to insulate the judiciary from political influence. *Id.* This independence is not merely a matter of institutional prerogative but a guarantee of "the study, upright and impartial administration of laws." *Id.* This constitutional design directly challenges *Stinson*'s framework of broad deference to Commission interpretations.

Further, *Loper Bright* rejected the idea that ambiguity alone can justify deference to agency interpretations. *Id.* at 400. The Court emphasized that "ambiguity [does not] necessarily reflect a congressional intent that an agency, as opposed to a court, resolve the resulting interpretive question" *Id.* at 399. This fundamentally undermines *Stinson*'s presumption that Congress intended courts to defer to the Commission's commentary whenever the Guidelines prove ambiguous. *See* 508 U.S. at 45 ("The Commission, after all, drafts the guidelines as well as the commentary interpreting them, so we can presume that the interpretations of the guidelines contained in the commentary represent the most accurate indications of how the Commission deems that the guidelines should be applied to be consistent with the Guidelines Manual as a whole as well as the authorizing statute."). What

is more, *Loper Bright's* emphasis on the APA's command that the *reviewing court* shall "decide all relevant questions of law" strikes at the heart of *Stinson*'s deference regime. *Loper Bright Enterprises*, 603 U.S. at 406-07; 5 U.S.C. § 706.

Loper Bright's treatment of agency deference in the statutory context carries implications for treatment of commentary to the guidelines. Whether statutory interpretation or an agency's own interpretation of their rules, *Loper Bright* emphasized that deference to administrative agencies is permissible only if it aligns with statutory intent and constitutional principles. The Sentencing Commission's interpretation of the guidelines surely deserves respect as "masters of the subject." *Loper Bright*, 603 U.S. at 386. Yet this Court held that even though agencies are masters of their subject, they have "no special competence in resolving statutory ambiguities." *Id.* at 400-01. In much the same way, one iteration of the Sentencing Commission has no special competence in resolving ambiguities in guidelines promulgated by previous iterations. Judges should exercise independent judgement and be free to decide all questions of law. *Id.* at 386. *Loper Bright*'s reasoning applies just as forcefully to an agency's interpretation of their own regulation—courts must ensure that deference does not undermine their constitutional and statutory role. Both *Loper Bright* and *Kisor* undermine *Stinson*'s notion that the Commission's expertise can supersede judicial judgement.

B. The APA's notice-and-comment requirements reflect essential congressional controls that commentary-based deference circumvents.

The dual nature of the Sentencing Commission's role as both promulgator and interpreter of their rules without congressional oversight creates some concern.

Changes to the Guidelines require notice and comment under the APA. See 28 U.S.C. § 994(x) (incorporating by reference 5 U.S.C. § 553). If the Commission desires to alter the Guidelines, they must submit these changes to Congress. 28 U.S.C. § 994(q); see also 28 U.S.C. § 994(a). These requirements reflect Congress's intent to maintain oversight of substantive changes to sentencing policy. This reflects what Justice Thomas identifies as Congress's fundamental design: "When the Government is called upon to perform a function that requires an exercise of legislative, executive, or judicial power, only the vested recipient of that power can perform it." *Loper Bright*, 603 U.S. at 415 (Thomas, J., concurring).

Yet no promulgation requirement is required for changes in the Commentary. U.S. Sent'g Comm'n, Rules of Practice & Procedure § 4.3. It makes little sense for Congress to have desired the Commission to submit changes in the Guidelines to Congress, yet not the Commentary—however in practice, when the Guidelines are ambiguous both have the same force of law. Justice Gorsuch warned of this in *Kisor*:

> For all practical purposes, "the new interpretation might as well be a new regulation." *Auer* thus obliterates a distinction that Congress thought was vital and supplies agencies with a shortcut around the APA's required procedures for issuing and amending substantive rules that bind the public with the full force and effect of law.

588 U.S. at 608 (Gorsuch, J., concurring). Congress did not explicitly delegate authority to make commentary binding. Thus, the Commission can override legislative oversight by making substantive changes via commentary rather than the guidelines.

Whether the Commission makes a change through notice-and-comment or commentary updates, criminal defendants will not know the difference. Both are

binding on courts, yet only one option requires their elected representative's approval. What is more, the Commission's mandate states it shall issue "general policy statements regarding application of the guidelines." 28 U.S.C. § 994(a)(2). However, the practical effect of *Stinson*'s framework is a system that potentially undermines congressional oversight. The Commission can achieve policy changes through the commentary rather than amendments to the guidelines, thereby avoiding both public participation and legislative review. Justice Scalia recognized this problem: "By deferring to interpretive rules, we have allowed agencies to make binding rules unhampered by notice-and-comment procedures." *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 111 (2015) (Scalia, J., concurring in judgement). This problem is particularly acute in criminal sentencing, where notice and predictability are essential to due process.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN FREDENBURGH, Petitioner

THOMAS W. PATTON
Federal Public Defender

s/ Colleen C.M. Ramais

COLLEEN C.M. RAMAIS
Assistant Federal Public Defender
300 W. Main Street
Urbana, Illinois 61801
Phone: (217) 373-0666
Email: colleen_ramais@fd.org

COUNSEL OF RECORD FOR PETITIONER

Dated: January 10, 2025