No. 25-227

IN THE
Supreme Court of the United States

RAYMOND POORE,
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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

Loper Bright Enterprises v. *Raimondo*, 603 U.S. 369 (2024), reversed decades of precedent authorizing blind deference to agency determinations. As the Court reaffirmed, it is "emphatically the province and duty of the judicial department to say what the law is." *Id.* at 385 (citation omitted). And yet, in half of the country, automatic deference is still permissible in criminal cases, where liberty interests are at their apex and judicial judgment matters most. That is judicial review "upside down." *Id.* at 399.

The Government does not dispute that the circuits are deeply split over the level of deference owed to the Guidelines commentary. Nor does the Government dispute that the Seventh Circuit's decision below is on the wrong side of that split. Indeed, the Government acknowledges (at 17) that "deference to the Commission's commentary must be applied in a manner consistent with this Court's decision in *Kisor*." Faced with a decision it acknowledges was wrong on an issue affecting the liberty of thousands of criminal defendants and on which the circuits are deeply divided, the Government nevertheless claims this case does not warrant review. Each of the Government's arguments against certiorari fails.

The Government attempts to minimize the importance of the split and the question presented by recasting Mr. Poore's petition as a narrow challenge to the Guidelines' definition of a "crime of violence," which the Sentencing Commission has amended. But Mr. Poore raises a methodological question about whether the Commission has special competence to interpret the Guidelines in the first place and whether courts should reflexively defer to the commentary. That question pervades the Guidelines and will recur until this Court resolves it. Nor can the Commission decide for itself how much deference federal courts

should give it. Only this Court can determine the weight accorded to agency interpretations of the law.

The Government's other attacks on the petition are also meritless. To begin, this case is not moot. Mr. Poore is currently serving a three-year term of supervised release that the sentencing judge can shorten on remand if Mr. Poore prevails in this Court. That gives Mr. Poore "a concrete interest * * * in the outcome of the litigation." *Knox* v. *Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 307-308 (2012) (citation omitted). Every circuit to consider the issue has recognized that a sentencing challenge is not moot while the defendant continues to serve a term of supervised release. The Government's three citations—all to habeas cases—do not suggest otherwise.

The Government's fixation on Section 2K2.1(a)(4)(A) is a red herring. The panel found that Mr. Poore committed a "crime of violence" by reflexively deferring to Application Note 1 under *Stinson*, not because of anything in Section 2K2.1(a)(4)(A). In any event, Mr. Poore raises a methodological question that applies to Section 2K2.1(a)(4)(A) as much as to Section 4B1.2(a). And the Government is quite wrong that Mr. Poore's prior conviction was a "crime of violence" as defined in Section 4B1.2(a) itself at the time of Mr. Poore's sentencing. His conviction was for aiding and abetting, and courts of appeals agree that the term "crime of violence" unambiguously excludes aiding-and-abetting offenses.

The question presented is exceptionally consequential. A rule of mandatory deference affects every criminal defendant in the six circuits that continue to cling to *Stinson*. It is time for the Court to hold that reflexive deference has no place in criminal cases.

ARGUMENT

I. THE GOVERNMENT DOES NOT DISPUTE THAT THE CIRCUITS ARE SPLIT, THAT THE DECISION BELOW IS WRONG, OR THAT BLIND DEFERENCE TO THE COMMENTARY VIOLATES FUNDAMENTAL CONSTITUTIONAL RIGHTS.

The Government does not dispute that there is a deep split over whether *Kisor* and *Loper Bright* constrain the deference courts accord to the Guidelines commentary. Nor could it. Every court of appeals that hears criminal cases has weighed in, and the circuits are split six-six. The Third, Fourth, Sixth, Ninth, Eleventh, and D.C. Circuits hold that deference is warranted (if at all) only where the relevant Guideline is genuinely ambiguous. Pet. 12-16. The First, Second, Fifth, Seventh, Eighth, and Tenth Circuits hold the opposite: They maintain that neither *Kisor* nor *Loper Bright* says anything about the Guidelines, and that courts must continue to treat the commentary as binding. Pet. 16-19. The Petition addressed this split in detail, but the Government offers no response.

Nor does the Government contend the split will resolve without the Court's intervention. The Fifth Circuit decisively held en banc that *Kisor* had no effect on *Stinson*. *United States* v. *Vargas*, 74 F.4th 673, 678 (5th Cir. 2023) (en banc). And other courts of appeals have repeatedly declined to depart from circuit precedent deferring to the commentary, even after *Loper Bright*, and have refused to take the issue en banc. Pet. 26-27. As the panel put it below, the split is so "entrenched" and "closely balanced" that it is "best to leave well enough alone" and "continue to follow *Stinson*" until this Court weighs in. Pet. App. 7a-8a (quotation marks and citation omitted).

The Government "agrees," too (at 17), that the Seventh Circuit is on the wrong end of the split. As the Government explains (at 17), *Kisor* "clarified that *Seminole Rock* deference (also called *Auer* deference) applies, among other

things, only where a federal regulation is 'genuinely ambiguous,' " and thus *Kisor* "sets the standard for determining whether particular guideline commentary is entitled to deference." *Loper Bright* makes that conclusion even more straightforward—it holds that courts, not agencies, must "decide legal questions by applying their own judgment." 603 U.S. at 391-392. How to interpret the Sentencing Guidelines is, of course, a legal determination only a "court" can make. 18 U.S.C. § 3553(a); *see, e.g.*, *United States* v. *Trumbull*, 114 F.4th 1114, 1126-27 (9th Cir. 2024) (Bea, J., concurring in the judgment) (deference to the Guidelines commentary cannot be reconciled with *Loper Bright*).

Blindly deferring to the commentary does not merely undermine *Kisor* and *Loper Bright*—it flouts the common-law rule of lenity. The rule of lenity teaches that when "liberty is at stake," deference should have "no role to play." *Guedes* v. *Bureau of Alcohol, Tobacco, Firearms & Explosives*, 140 S. Ct. 789, 790 (2020) (mem.) (Gorsuch, J., respecting denial of certiorari); *see* Pet. 24-26. But, in six circuits, it is permissible to double or triple a defendant's punishment solely because the Commission says so. That result is particularly troubling given that in every other context today, federal law *forbids* courts from deferring to agency interpretations at all (*Loper Bright*) or at least until after concluding that the underlying provision is genuinely ambiguous (*Kisor*). But, in half of the country, reflexive deference remains permissible in criminal sentencing, where deference can mean years or decades longer in prison for defendants like Mr. Poore.

II. THE METHODOLOGICAL QUESTION IS EXTREMELY IMPORTANT, AND ONLY THIS COURT CAN RESOLVE IT.

The Government's attempts to downplay the importance of the question presented are not persuasive. The Government claims (at 19-20) that Mr. Poore's

petition is of "limited and diminishing" importance because the Commission has recently amended Section 4B1.2 to include aiding-and-abetting offenses. But this case is not about the definition of one term in one Guideline. This case is about the predicate question: How much deference should the Guidelines commentary receive to begin with?

The Commission cannot resolve for itself how much deference courts should give it because agencies cannot compel Article III courts to defer to their interpretations of the law. It is the Judiciary's responsibility independently to analyze "whether the character and context of the agency interpretation entitles it to controlling weight." *Kisor* v. *Wilkie*, 588 U.S. 558, 576 (2019); *see Loper Bright*, 603 U.S. at 400.

Nor can the Commission resolve the issue by waiting for a circuit split to emerge regarding particular Guidelines and then issuing a reactive amendment to address it. *See* Pet. 28-29. The Guidelines commentary will continue to interpret the Guidelines expansively. *See United States* v. *Josey*, 155 F.4th 234, 240-243 (3d Cir. 2025) (confronting another Guideline that the Commission has sought to expand in the commentary under the guise of interpretation). Courts will accordingly continue to face the question whether to interpret the Guidelines "based on their independent judgment" or instead to defer to the commentary. *Kisor*, 588 U.S. at 630 (Gorsuch, J., concurring in the judgment). Even if the Sentencing Commission clarifies the Guideline after the fact, untold numbers of defendants will have been sentenced in the meantime in a regime that violated "our Nation's promise" that individuals "are entitled to make their arguments about the law's demands" "on equal footing with the government before an independent judge." *Loper Bright*, 603 U.S. at 441 (Gorsuch, J., concurring).

The question presented here is thus "capable of repetition," presenting a "classic case" for certiorari. *See U.S. Steel Corp.* v. *EPA*, 444 U.S. 1035, 1038 (1980) (Rehnquist, White, & Powell, JJ., dissenting from denial of certiorari) (quotation marks and citation omitted). Unsurprisingly, circuit judges have consistently called for the Court's guidance on this "weighty" issue. *United States* v. *Kirilyuk*, 29 F.4th 1128, 1149 (9th Cir. 2022) (Bress, J., dissenting); *see* Pet. App. 7a-8a; *United States* v. *Moses*, No. 21-4067, 2022 U.S. App. LEXIS 7694, at *6 (4th Cir. Mar. 23, 2022) (Niemeyer, J., supporting the denial of rehearing en banc).

The Government observes (at 10 & n.3) that the Court has recently denied several similar petitions. But those cases were poor vehicles to take up this question. *Cook* and *Trumbull*, for example, considered Section 2K2.1's definition of a "large capacity magazine," which courts of appeals have uniformly held is indeed genuinely "ambiguous." *Trumbull*, 114 F.4th at 1119 (quotation marks omitted). Deference to the commentary therefore was at least arguably appropriate under *Kisor*. *Id. Zheng* had a similar problem: it involved the "loss" guideline, which implicated a circuit split over whether the term "loss" unambiguously includes "intended loss." *Contrast United States* v. *Yafa*, 136 F.4th 1194, 1197-98 (9th Cir. 2025), *with United States* v. *Banks*, 55 F.4th 246, 257-258 (3d Cir. 2022). And the petitioner in *Munoz* did not even raise the *Stinson* question in the lower courts. *See United States* v. *Munoz*, 134 F.4th 539, 544 (8th Cir. 2025) (resolving the Guidelines question without deference). None of those denials call into question the importance of the question presented. And the need for review has grown even more pressing after *Loper Bright*, which leaves criminal sentencing as the only context where reflexive deference to administrative agencies remains permissible.

III. THIS CASE IS AN IDEAL VEHICLE TO RESOLVE THIS IMPORTANT QUESTION.

This case is an excellent vehicle. Mr. Poore argued in the lower courts that automatic deference to the commentary is no longer appropriate after *Kisor* and *Loper Bright*. The panel rejected that argument solely because circuit precedent directed it to "apply *Stinson*." Pet. App. 7a. And the panel did not dispute that Mr. Poore's aiding-and-abetting offense would not have been classified as a "crime of violence" but for the commentary. *See* Pet. App. 3a-8a. The methodological question is thus outcome-determinative and squarely presented for this Court's review. None of the Government's contrary arguments suggests otherwise.

1. This case is not moot. Although Mr. Poore has recently completed his term of imprisonment, he has only just begun serving his three-year term of supervised release. Pet. App. 28a. Supervised release is as much a "part of [a defendant's] sentence" as a term of imprisonment. *Mont* v. *United States*, 587 U.S. 514, 523 (2019). The district court on remand therefore "*could* grant relief to [Mr. Poore] in the form of a shorter period of supervised release" if he prevails in this Court. *United States* v. *Ketter*, 908 F.3d 61, 66 (4th Cir. 2018); *see* 18 U.S.C. § 3583(e)(1). Every circuit to have addressed the issue agrees that a sentencing challenge is not moot if the defendant is still serving a term of supervised release. *E.g.*, *United States* v. *Albaadani*, 863 F.3d 496, 502-503 (6th Cir. 2017) (case not moot because district court could "reduce or eliminate" supervised release term); *United States* v. *Jackson*, 523 F.3d 234, 241 (3d Cir. 2008) (similar); *United States* v. *Larson*, 417 F.3d 741, 747 (7th Cir. 2005) (similar); *United States* v. *Vera-Flores*, 496 F.3d 1177, 1180 (10th Cir. 2007) (similar).

The Government ignores this wall of authority and cites instead (at 11, 13) three habeas decisions, none of which

applies here. In *Spencer* v. *Kemna*, 523 U.S. 1 (1998), this Court held that a prisoner's habeas petition was moot because the petition challenged the revocation of parole only, and the prisoner had already "completed the entire term of imprisonment underlying the parole revocation." *Id.* at 3, 18. Thus, unlike here, the prisoner had no "continuing injury." *Id.* at 7. In *Burkey* v. *Marberry*, 556 F.3d 142 (3d Cir. 2009), a prisoner sued the Bureau of Prisons for denying him early release, but "[t]hat relief was afforded him" after he filed suit, thus undisputedly mooting the case. *Id.* at 147. As to *Rhodes* v. *Judiscak*, 676 F.3d 931 (10th Cir. 2012), it confirmed that "a defendant who has served his term of imprisonment but is still serving a term of supervised release *may challenge his sentence*." *Id.* at 933 (emphasis added; citation omitted). The problem in that case was that the defendant petitioned for habeas review instead of directly appealing his sentence. As the court explained, "Supreme Court precedent * * * clearly prohibits habeas courts * * * from modifying a supervised release term." *Id.* (citation omitted). In other cases the Government neglects to cite, the Tenth and Third Circuits have made clear that a defendant's release from custody does not moot a sentencing challenge where, as here, the defendant is still serving a term of supervised release. *See Jackson*, 523 F.3d at 241; *Vera-Flores*, 496 F.3d at 1180.

The Government speculates (at 12-13) that the district court is *unlikely* to reduce Mr. Poore's sentence. But that is not the test: "a case becomes moot only when it is *impossible* for a court to grant any effectual relief whatever to the prevailing party." *Chafin* v. *Chafin*, 568 U.S. 165, 172 (2013) (emphasis added; quotation marks and citation omitted). The district court could grant Mr. Poore effectual relief, and his case is not moot.

2. The Government claims (at 14-15) that the question presented was not implicated below because Mr. Poore

was sentenced under Section 2K2.1(a)(4)(A), and commentary to Section 2K2.1 directs the courts to consider the meaning given to the term "crime of violence" "in § 4B1.2(a) *and* Application Note 1." U.S.S.G. § 2K2.1 cmt. n.1 (emphasis added). The short answer is that this is simply not how the panel approached the case. The panel explained that Mr. Poore's offense of being a party to a battery qualified as a crime of violence because the "Guidelines defined a 'crime of violence' in § 4B1.2(a), and Application Note 1 stated that a 'crime of violence' included 'aiding and abetting, conspiring, and attempting to commit such offenses.' " Pet. App. 3a. Absolutely nothing in the panel's decision turned on Section 2K2.1(a)(4)(A). Thus, if the Court holds that the panel erred in considering Application Note 1, the Court will need to vacate the decision below, affording Mr. Poore the relief he seeks.

There is a more fundamental problem with the Government's argument. Section 2K2.1(a)(4)(A) provides that the Base Offense Level of 20 will apply if "the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of * * * a crime of violence." Just like Section 4B1.2(a), then, Section 2K2.1(a)(4)(A) does not define "a crime of violence"—it is *the commentary to* Section 2K2.1 that directs courts to consider Section 4B1.2 and Application Note 1. *See* U.S.S.G. § 2K2.1 cmt. n.1. The same principles that should have barred the panel from deferring to the commentary to Section 4B1.2 also would bar the panel from deferring to the commentary to Section 2K2.1. The Government continues to miss the key point: The methodological question is not about any one Guideline, but rather about deference to the commentary more broadly. It makes no difference whether the panel relied on the commentary to Section 2K2.1 or 4B1.2—both would be improper.

3. The Government claims (at 15-16) that Mr. Poore's prior conviction for battery satisfies the definition of a "crime of violence" in Section 4B1.2(a) itself, without reference to Application Note 1. That is baffling. Section 4B1.2(a)(1) defines a "crime of violence" as an offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another." As every court to have considered this question has held, that definition unambiguously excludes aiding-and-abetting offenses. Pet. 29-30. Mr. Poore was convicted as a party to a battery—an aiding-and-abetting offense. Opp. 7; *see* Wis. Stat. § 939.05(2)(b) (a person is guilty of being party to a crime if he "aids and abets the commission of" the offense). The Government insists (at 16) that Section 939.05 "requires an affirmative showing that the substantive crime * * * was actually consummated." But that crime was consummated by someone other than Mr. Poore—that is why he was charged as an aider and abettor.

4. The Government claims (at 19) that review is unwarranted because this case "involves the continuing vitality of" Seventh Circuit precedent "rather than an application of deference in the first instance." It should go without saying that a panel's reliance on circuit precedent does not insulate the panel's decision from review. The Court regularly grants certiorari to reverse a circuit's decision to follow established precedent. *E.g.*, *Feliciano* v. *Dep't of Transp.*, 605 U.S. 38 (2025) (reversing four-year-old circuit precedent); *Harrow* v. *Dep't of Def.*, 601 U.S. 480 (2024) (six-year-old circuit precedent); *Wilkinson* v. *Garland*, 601 U.S. 209 (2024) (similar). The Seventh Circuit's adherence to pre-*Kisor*, pre-*Loper Bright* decisions only underscores the need for the Court's intervention.

CONCLUSION

For the foregoing reasons, and those in the petition, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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