No. 25-5343

In the Supreme Court of the United States

KENDRICK JARRELL BEAIRD,
Petitioner,
v.
UNITED STATES
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE BUCKEYE INSTITUTE AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTIONS PRESENTED

Whether *Stinson* v. *United States*, 508 U.S. 36 (1993), still correctly states the rule for the deference that courts must give the commentary to the Sentencing Guidelines.

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INTEREST OF AMICUS CURIAE[1]

The Buckeye Institute was founded in 1989 as an independent research and educational institution—a think tank—to formulate and promote free-market policy in the states. The Buckeye Institute accomplishes its mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policies, and marketing those policy solutions for implementation in Ohio and replication across the country. The Buckeye Institute also files lawsuits and submits amicus briefs to fulfill its mission. The Buckeye Institute is a nonpartisan, nonprofit, tax-exempt organization, as defined by I.R.C. section 501(c)(3).

The Buckeye Institute works to preserve the structure and provisions of the Constitution and ensure that the judiciary fulfills its responsibility to follow the Constitution. *Stinson* deference puts a thumb on the scale of justice. Judicial deference removes the blindfold from Lady Justice and encourages her to favor the government at the expense of those the government prosecutes. The Court should do away with *Stinson* deference, which is inconsistent with our concept of ordered liberty.

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part and no entity or person, aside from amicus curiae made any monetary contribution toward the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

This case asks the Court to restore the limits Congress placed on the U.S. Sentencing Commission by eliminating the judicial doctrine of *Stinson* deference. Although Congress possesses the exclusive constitutional authority to define federal crimes and prescribe punishments, it enacted the Sentencing Reform Act of 1984 to enable the Sentencing Commission to promulgate sentencing guidelines (the Guidelines) using a carefully prescribed process that includes publication and congressional review before the Guidelines become effective. By contrast, the Act does not require the Commission's interpretive commentary[2] to undergo those same safeguards.

Stinson v. *United States*, 508 U.S. 36 (1993), improperly elevates the Commission's Commentary to the practical equivalent of binding law by requiring courts to defer to the Commission's interpretation of ambiguous Guidelines. Because Commentary can substantially affect criminal sentences—including career-offender enhancements, loss calculations, and upward departures—it often has the same real-world consequences as the Guidelines themselves, despite not satisfying the statutorily mandated approval process for guidelines. This allows the Commission to expand its authority beyond what Congress granted—undermining the constitutional separation of powers

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[2] The Commission issues "application notes, background information, introductions, and conclusions" (collectively Commentary) to interpret its own Sentencing Guidelines. *See* John S. Acton, *The Future of Judicial Deference to the Commentary of the United States Sentencing Guidelines*, 45 Harv. J.L. & Pub. Pol'y 349, 352 (2022).

and bypassing the protections Congress deliberately imposed.

Concentrated governmental power requires strict judicial policing, particularly where personal liberty is at stake. Congress intentionally required extensive review before sentencing guidelines could take effect in order to preserve democratic accountability and protect criminal defendants. *Stinson* deference circumvents separation-of-powers safeguards and diminishes Congress's exclusive legislative authority over criminal punishment. The Commission's voluntary practice of occasionally soliciting public comment on its Commentary does not justify that circumvention.

* * *

Stinson deference is simply a specialized form of *Auer* deference and, therefore, rests on the same flawed foundation as *Chevron* deference. Like *Auer*, *Stinson* transfers the judicial responsibility of interpreting legal texts to the very agency that drafted them, permitting the Commission both to promulgate ambiguous guidelines and to supply authoritative interpretations that bind Article III courts. Such an arrangement is inconsistent with the Constitution's allocation of legislative and judicial powers and erodes the judiciary's duty to exercise independent judgment.

The Court should not merely extend *Kisor's* limitations to *Stinson* but rather eliminate *Stinson* deference altogether. The Court's recent administrative-law decisions recognize that courts—not agencies—bear the ultimate responsibility for interpreting legal texts. The same principle should

govern federal sentencing. Amicus therefore asks the Court to reverse the Fifth Circuit and reaffirm that criminal sentencing authority must remain subject to the safeguards Congress established.

ARGUMENT

I. Congress carefully delineated the criminal sentencing recommendation authority it granted to the Sentencing Commission.

To the extent that the Constitution grants power to any branch of the federal government to enact criminal laws and establish punishments for those crimes, it can only be the legislative branch. See U.S. Const. art. I, § 1 and § 8, cl. 18. Congress, in turn, created the Commission to recommend sentencing guidelines to Congress for its disapproval. "It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988).

Congress created the U.S. Sentencing Commission with the specific charge to recommend sentencing Guidelines for the congressionally enacted punishment ranges. The Commission properly created those Guidelines and submitted them to Congress for disapproval. Congress allowed the Guidelines to become de facto laws. No such process, however, exists regarding the Commission's "Commentary" to the guidelines. Yet *Stinson* requires courts to defer to the Commission's Commentary.

The congressionally established procedure enacting the sentencing Guidelines is critical to the vitality and trustworthiness of the Guidelines.

Skipping that procedure for the Commentary flouts Congress's power. The Court should eliminate *Stinson* deference.

A. The Court should strictly enforce the limits of the authority granted in the Sentencing Reform Act of 1984.

When Congress enacted the Sentencing Reform Act of 1984, it created the Sentencing Commission to promulgate and revise the U.S. Sentencing Guidelines on a regular basis, rather than having Congress update the guidelines through bicameralism and presentment. See 28 U.S.C. § 994(a) and (p). The Guidelines were intended to create "certainty and fairness in meeting the purposes of sentencing," 28 U.S.C. § 991(b)(1)(B), and are "the equivalent of legislative rules adopted by federal agencies." *Stinson*, 508 U.S. at 45. However, Congress retained the power to reject any proposed Guidelines. Unlike the Commission's process, ordinary executive-agency rulemaking proceeds under the Administrative Procedure Act (APA). The APA structures the relationship between Congress and the Executive Branch by permitting flexible day-to-day administration while preserving procedural safeguards. Sidney A. Shapiro & Richard E. Levy, *Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons for Agency Decisions*, 1987 Duke L.J. 387, 393.

In comparison, Congress understood that if agencies were going to wield essentially legislative power, their procedures must "giv[e] adequate opportunity to all persons affected to present their views, the facts within their knowledge, and the

dangers and benefits of alternative courses." U.S. Att'y Gen.'s Comm. on Admin. Proc., Administrative Procedure in Government Agencies, S. Doc. No. 77-8, at 102 (1941). Public notice-and-comment was seen as "essential in order to permit administrative agencies to inform themselves and to afford adequate safeguards to private interests." *Id.* at 103. In notice-and-comment procedures, Congress sought to hold agency heads accountable to both Congress and the public.

Congress enacted a more stringent protective procedure for the Commission—the Commission's promulgated Sentencing Guidelines become effective if Congress does not vote against them within at least 180 days of their publication. 28 U.S.C. § 994(p). This is a strong guardrail to protect against Commission overreach that would vitiate congressional intention.

The Commentary is outside the statutorily authorized Sentencing Guideline. Accordingly, the Act gives no direction on how the Commission should promulgate Commentary or how courts should regard Commentary. To fill that vacuum, the Commission "explicitly reserved to itself the right to adopt new commentary without notice and comment and without submitting the proposed changes in commentary to Congress." Acton, *supra*, at 352 (citing U.S. Sent'g Comm'n, Rules of Practice & Procedure § 4.3 (2016)). Moreover, "[a]mendments to policy statements and commentary may be promulgated and put into effect at any time." U.S. Sent'g Comm'n, Rules of Practice & Procedure § 4.1 (2016). Nevertheless, "[s]ince at least 1997, the Commission's policy has been to 'endeavor to provide, to the extent practicable, comparable

opportunities [to the notice and comment procedures of 28 U.S.C. § 994(x)] for public input on policy statements and commentary considered in conjunction with guideline amendments.'" Acton, *supra*, at 357 (citing U.S. Sent'g Comm'n, Rules of Practice & Procedure § 4.3 (2016)).

The Commission's assertion of "endeavoring" to seek public input "where practicable" is interesting but gives little comfort to a criminal defendant seeking constitutional protections. The Sentencing Commission's self-imposed policy is vague. And there is no evidence that Commentary issued between the 1984 enactment of the Act and 1997 received the benefit of public—or congressional—input or approval. For example, the much-disputed Section 4B1.2 and its application notes "were enacted in 1987, and they collectively have been amended thirteen times since." Acton, *supra*, at 394.

Of course, no one should assume that the Commission's current policy will always be so. The Act was passed with good intentions, and many would argue that it has increased fairness in our criminal justice system. But Congress granted the Commission great power over criminal defendants' liberty—the power to determine incarceration terms. To prevent abuse of the Commission's power, the Act includes specific restrictions—safeguards—on how the Commission uses its power; *Stinson* deference bypasses those safeguards.

* * *

The Commentary—often in the form of "application notes"—ranges from mundane clarifications to highly consequential instructions. For example:

- Guideline Section 4B1.1 provides a sentencing enhancement for "career offenders," which in turn relies (in part) on the definition of "crime of violence" and "controlled substance offense" in Guideline 4B1.2. See U.S. Sent'g Guidelines Manual § 4B1.1(a) (U.S. Sent'g Comm'n. 2025). Those definitions will impact how long a defendant spends behind bars.
- Section 2B1.1 of the Guidelines determines the appropriate range of sentences for various economic crimes in part based on the "loss" that the crime caused. USSG § 2B1.1. Application Note 3 to Section 2B1.1 of the Guidelines is an extensive non-statutory interpretation of the word "loss." USSG § 2B1.1, comment. (n.3). For example, under the Mandatory Victims Restitution Act, the government has the burden of showing the amount of loss sustained by the victim "by the court by the preponderance of the evidence." 18 U.S.C. § 3664(e). But the sentencing judge alone "need only make a reasonable estimate of the loss." Note 3(B).
- Application Note 1G to Guideline 1B1.1 defines "firearm" more broadly than 18 U.S.C. § 921(a)(3). See USSG § 1B1.1, comment. (n.1G). Among other things, Application Note 1G includes "BB guns" whereas the U.S. Code does not. See *id.* So a defendant could receive a longer "enhancement" sentence for possessing or using a BB Gun even

though it is not a firearm under the U.S. Code. See, *e.g.,* USSG § 2D1.1(b).

- Guideline 1B1.3 addresses the impact of a conspiracy on sentencing. See USSG § 1B1.3. Application Note 3 provides extensive commentary on the elements of that term, with no reference to case law to support the note's interpretation. See USSG § 1B1.3, comment. (n.3). A defendant is entitled to an Article III judge's interpretation, not that of the Commission staff members.

No matter how mundane or consequential, the Commentary impacts the freedom, or lack thereof, of criminal defendants. And that Commentary robs criminal defendants of the constitutional benefit of the separation of powers. As Justice Scalia explained, "if an interpretive rule gets deference, the people are bound to obey it [,whether right or wrong,] on pain of sanction . . . ." *Perez* v. *Mortg. Bankers Ass'n*, 575 U.S. 92, 110 (2015) (Scalia, J., concurring in the judgment).

Stinson deference to the Commission's interpretation of its own ambiguous Guidelines undermines the Constitution's lawmaking grant of power to Congress because it enables the Commission to circumvent the Act. Considering that "[t]he reasoned explanation requirement of administrative law . . . is meant to ensure that agencies offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public," this cannot be the correct procedure, lest judicial review is to become nothing more than an "empty ritual." See *Dep't of Com.* v. *New York*, 588 U.S. 752, 785 (2019).

The *Stinson* Court recognized that "the Sentencing Reform Act does not in express terms authorize the issuance of commentary." *Stinson*, 508 U.S. at 41. The Act explained that in determining whether to depart from a statutory guidelines range, "the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission." 18 U.S.C. § 3553(b). The *Stinson* Court referenced the Commission's self-serving guideline that commentary may "'interpret [a] guideline or explain how it is to be applied,' 'suggest circumstances which . . . may warrant departure from the guidelines,' or 'provide background information, including factors considered in promulgating the guideline or reasons underlying promulgation of the guideline.'" *Stinson*, 508 U.S. at 41 (citing USSG § 1B1.7). Finally, the Court looked to the Commission's own Commentary about the effect of its Commentary—Section 1B1.7 "Significance of Commentary": "Portions of this document not labeled as guidelines or commentary also express the policy of the Commission or provide guidance as to the interpretation and application of the guidelines. These are to be construed as commentary and thus have the force of policy statements" See *id.* (citing USSG § 1B1.7, comment.). The Court concluded that its "holding in *Williams* dealing with policy statements applies with equal force to the commentary before" it. *Id.* at 43 (citing *Williams* v. *United States*, 503 U.S. 193 (1992)).

But, that is not what the Act says. The Act requires the Commission to "submit to Congress amendments to the *guidelines* and modifications to previously submitted amendments that have not taken effect." 28

U.S.C. § 994(p) (emphasis added). And such guidelines shall take effect "no earlier than 180 days after being so submitted . . . [unless] the amendment is otherwise modified or disapproved by Act of Congress." *Id*. But,

> only the words on the page constitute the law adopted by Congress and approved by the President. If judges could add to, remodel, update, or detract from old statutory terms inspired only by extratextual sources and our own imaginations, we would risk amending statutes outside the legislative process reserved for the people's representatives.

Bostock v. *Clayton Cnty., Georgia*, 590 U.S. 644, 654–55 (2020). *Stinson's* inclusion of Commentary into guidance or policy goes beyond the statute's wording. The Court should overturn *Stinson* and its deference doctrine.

B. *Stinson* deference violates the Constitution's exclusive grant of authority to Congress.

In an effort to ease concerns that the proposed national government would usurp the People's power to govern themselves, James Madison explained that "[t]he powers delegated by the proposed Constitution to the federal government are few and defined . . . [and] will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce." The Federalist No. 45, at 292 (James Madison) (Clinton Rossiter ed., 1961).

Consistent with Madison's exposition, the Constitution's grant of authority to Congress

guaranteed governance by the consent of the governed. *Stinson* deference violates that guarantee and Madison's promise. *Stinson* deference relieves Congress of the burden of the "imprecision that it has produced" by allowing the Commission to implement Commentary without the necessity of Congressional approval. See John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612, 617 (1996). The burden instead falls on criminal defendants—who are simply seeking a proper and constitutionally sound adjudication of their sentencing rights—to convince Lady Justice she is wrong after she already removed her blindfold and presumed the Commission was right before there was a full examination of the issue.

When the Commission receives deference in its interpretation of its own ambiguous sentencing guidelines, it facilitates unchecked administrative fiat. Equally troubling, it allows Congress to evade public pushback on a salient political question—sentencing of convicted criminals. If any issue deserves accountability to the public, this is it: When will criminals be released back into society? The Constitution requires that Congress be accountable for the result—not bureaucrats writing non-congressionally-approved Commentary that effectively becomes the law. See 28 U.S.C. § 994(p).

Abandoning *Stinson* will force the Commission and Congress to take greater care in lawmaking and actually consider how its actions impact those it seeks to govern. And this should not be a heavy lift. As the Eleventh Circuit explained, "[i]f, for example, the

commentary's inclusion of inchoate crimes were added—through the same process the Commission earlier employed—to the definition provided in the main text of section 4B1.2, we would be bound to respect it." *United States* v. *Dupree*, 57 F.4th 1269, 1281–82 (11th Cir. 2023). Indeed, if the Commission views any Commentary sufficiently important that it thinks Courts should use it, the Commission should issue it as Guidance and subject it to the congressional guidance review process.

II. The Court should eliminate *Stinson* deference, not give it the *Kisor* treatment.

This Court has acknowledged that *Stinson* deference is just a form of *Auer* deference. *Stinson*, 508 U.S. at 44 ("[W]e think the Government is correct in suggesting that the commentary be treated as an agency's interpretation of its own legislative rule."). And as Justice Scalia recognized, "[i]n practice, *Auer* deference is *Chevron* deference applied to regulations rather than statutes." *Decker* v. *Nw. Env't Def. Ctr.*, 568 U.S. 597, 617 (2013) (Scalia, J., concurring in part and dissenting in part) (citing *Chevron U.S.A. Inc.* v. *Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), *overruled by Loper Bright Enters.* v. *Raimondo*, 603 U.S. 369 (2024)).

In doing away with *Chevron* deference, this Court recognized that

> [t]he Framers also envisioned that the final "interpretation of the laws" would be "the proper and peculiar province of the courts." Unlike the political branches, the courts would by design

> exercise "neither Force nor Will, but merely judgment." To ensure the "steady, upright and impartial administration of the laws," the Framers structured the Constitution to allow judges to exercise that judgment independent of influence from the political branches."

Loper Bright Enters., 603 U.S. at 385 (citations omitted).

Like *Chevron* deference, *Auer* deference (and therefore, *Stinson* deference) is "constitutionally suspect." See *Garco Const., Inc.* v. *Speer*, 583 U.S. 1193 (2018) (Thomas, J., dissenting from the denial of certiorari) (citing *Perez*, 575 U.S. at 112–33). This suspicion comes from *Auer* deference assigning the primary role of interpreting ambiguous regulations to agencies rather than the judiciary.

Stinson deference is no different, only more specific. Binding Article III courts to the Commentary transfers judicial power to the Commission. This power transfer "undermines 'the judicial "check" on the political branches' by ceding the courts' authority to independently interpret and apply legal texts. And it results in an 'accumulation of governmental powers' by allowing the same agency that promulgated a regulation to 'change the meaning' of that regulation 'at [its] discretion.'" *Id.* (Thomas, J., dissenting from the denial of certiorari) (quoting *Perez*, 575 U.S. at 124, 126).

It is "contrary to fundamental principles of separation of powers to permit the person who promulgates a law to interpret it as well." *Talk Am.,*

Inc. v. *Michigan Bell Tel. Co.*, 564 U.S. 50, 68 (2011) (Scalia, J., concurring). Thus, *Stinson* deference directly contradicts the Constitution when it hands the judicial role of interpretation—whether via advocacy or Commentary—to an executive agency that itself has promulgated an ambiguous regulation.

As Justice Gorsuch's *Kisor* concurrence explained, the Court should have eliminated *Auer* deference entirely, *Kisor* v. *Wilkie*, 588 U.S. 558, 592–93 (2019) (Gorsuch, J., concurring in the judgment)—and should do the same with *Stinson* deference. Both because of *Stinson* deference's structural deficiencies and relatively limited scope, the Court should not defer another opportunity to correct its administrative jurisprudence here. *Kisor*'s problems should inform the Court's decision-making this time around.

Although *Kisor* seemingly limited *Auer* deference, it did not resolve the core problems with applying deference. As Justice Kagan noted when writing for the Court, the *Kisor* deference doctrine remained "potent in its place, but cabined in its scope." *Id.* at 563–64. In applying *Kisor*, first, "a court should not afford *Auer* deference unless the regulation is genuinely ambiguous." *Id.* at 574 (citation omitted). "And before concluding that a rule is genuinely ambiguous, a court must exhaust all the 'traditional tools' of construction." *Id.* at 575 (citing *Chevron U.S.A. Inc.*, 467 U.S. at 843, n. 9 (adopting the same approach for ambiguous statutes)).

If nothing else, *Kisor* reflects that "[g]one are the days of 'reflexive' deference." Kevin O. Leske, *A New Split in the Rock: Reflexive Deference Under Stinson or Cabined Deference Under Kisor?*, 74 Admin. L. Rev.

761, 772 (2022). But "to preserve the *Auer* doctrine in name only, [as] a zombie-like creature that inhabits a place in which it is not entirely dead but is almost completely devoid of all that once made it alive" cannot be ideal for lower courts or parties advocating before them. Ronald A. Cass, *The Umpire Strikes Back: Expanding Judicial Discretion for Review of Administrative Actions*, 73 Admin. L. Rev. 553, 568–69 (2021) (citation omitted). See also *Kisor*, 588 U.S. at 592 (Gorsuch, J., concurring in the judgment). Indeed, *Kisor*'s extensive limitations to applying *Auer* deference illustrate just how blunt a tool deference can be.

Justice Scalia acknowledged that the Court's "cases have not put forward a persuasive justification for *Auer* deference." *Decker*, 568 U.S. at 617 (Scalia, J., concurring in part and dissenting in part). While questioning his earlier support for *Auer* deference, Justice Scalia recognized that "[i]t seems contrary to fundamental principles of separation of powers to permit the person who promulgates a law to interpret it as well." *Talk Am., Inc.*, 564 U.S. at 68 (Scalia, J., concurring).

CONCLUSION

The Court should protect Americans' liberties from Commentary overreach by reversing the Fifth Circuit.

Respectfully submitted,

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