No. 18-2888

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA,
Appellee

v.

MALIK NASIR,
Appellant.

Appeal from Criminal Case No. 16-cr-00015 in
The United States District Court for the District of Delaware
The Honorable Leonard P. Stark

AMICUS CURIAE BRIEF OF THE NEW CIVIL LIBERTIES ALLIANCE IN SUPPORT OF MALIK NASIR

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CORPORATE DISCLOSURE STATEMENT

The New Civil Liberties Alliance is a nonpartisan, nonprofit corporation organized under the laws of the District of Columbia. It has no parent corporation, and no publicly held corporation owns 10 percent or more of its stock.

STATEMENT REGARDING CONSENT TO FILE AND SEPARATE BRIEFING

Pursuant to Fed. R. App. P. 29, NCLA respectfully files this amicus curiae brief with the consent of all parties. NCLA certifies that a separate brief is necessary because it intends to address the due-process and separation-of-powers issues inherent in federal courts' deference to the United States Sentencing Commission.

No party's counsel authored the brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting the brief. No person other than the Amicus, its members, and counsel contributed money that was intended to fund preparing or submitting this brief.

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INTEREST OF *AMICUS CURIAE*

The New Civil Liberties Alliance ("NCLA") is a nonpartisan, nonprofit civil-rights organization devoted to defending constitutional freedoms from violations by the administrative state. NCLA was founded to challenge multiple constitutional defects in the modern administrative state through original litigation, *amicus curiae* briefs, and other means of advocacy. NCLA views the administrative state as an especially serious threat to civil liberties. No other current legal development denies more rights to more Americans. Although we still enjoy the shell of our Republic, a very different sort of government has developed within it—a type, in fact, that our Constitution was designed to prevent.

NCLA is particularly disturbed by the widespread practice of extending judicial "deference" to the commentary of the United States Sentencing Commission. Although NCLA acknowledges that the Supreme Court has instructed courts to defer to this commentary when interpreting the text of the federal Sentencing Guidelines, this deference regime raises grave constitutional concerns that the Supreme Court has never considered nor discussed. *See Stinson v. United States*, 508 U.S. 36 (1993). As set out below, several constitutional problems arise when Article III judges abandon their duty of independent judgment and "defer" to someone else's views about how the criminal laws should be interpreted.

STATEMENT OF SUBJECT-MATTER AND APPELLATE JURISDICTION

The United States Court of Appeals for the Third Circuit has appellate jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742. The District Court had subject-matter jurisdiction pursuant to 18 U.S.C. § 3231.

QUESTION PRESENTED

This Court, in an order issued March 4, 2020, requested supplemental briefing on two questions. The New Civil Liberties Alliance will address the first issue in its amicus brief:

1. Whether the Court should uphold its precedent in *United States v. Hightower*, 25 F.3d 182 (3d Cir. 1994), deferring to Application Note 1's interpretation of "controlled substance offense" as including inchoate offenses in the Career Offender Guideline?

STANDARD OF REVIEW

This Court exercises "plenary review over a District Court's determination that an offense constituted a controlled substance offense for purposes of determining career offender status." *U.S. v. Shabazz*, 233 F.3d 730, 731 (3d Cir. 2000).

SUMMARY OF ARGUMENT

Deference to the legal interpretations of the United States Sentencing Commission (the "Commission") violates Malik Nasir's right to due process of law by exhibiting bias in favor of one of the parties in front of the court. In addition, Article III of the United States Constitution obligates federal judges to consider, independently, the meaning of laws and other legal texts. By deferring to an outside body, such as the Commission, Article III judges violate their constitutional oath and the duty of their judicial office.

While the consequences of agency deference are grave enough in a civil case, deference in criminal cases is particularly injurious to a defendant and to the Constitution itself. Deference regimes, like the one adopted in *Stinson v. United States*, 508 U.S. 36 (1993), run counter to the venerable rule of lenity by requiring courts to construe ambiguous penal provisions in favor of the government rather than a defendant.

Whether the rule of lenity deserves priority over *Stinson* deference is an open question in the Third Circuit. This Court should overrule *United States v. Hightower*, 25 F.3d 182 (1994), because the panel in that case deferred reflexively to the Commission's commentary without exercising its independent judgment and without considering the rule of lenity.

ARGUMENT

I. INTERPRETIVE DEFERENCE IS UNCONSTITUTIONAL

A. The Judicial Office Is One of Independent Judgment

Article III of the Constitution vests "the judicial power of the United States" in the courts and creates the judicial office held by "[t]he judges, both of the Supreme Court and inferior courts." U.S. Const., art. III, § 1. The judicial power includes the authority to decide cases and controversies; a judge's office includes a duty to exercise independent judgment in the interpretation and application of law in each case. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the duty of the Judicial Department to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret the rule."). The independence of the Judicial Branch and its judges is vital to sustaining liberty.

Judicial independence has been a touchstone of legitimate governance at least since English judges resisted King James I's insistence that "[t]he King being the author of the Lawe is the interpreter of the Lawe." *See* Philip Hamburger, Law and Judicial Duty 149-50, 223 (2008). The judges maintained that, although all judicial power was exercised in the name of the monarch, the power rested solely in the judges. *Prohibition del Roy*, 12 Co. Rep. 63, 65 (1608).

The American colonists carried the principle of judicial independence with them across the Atlantic. *See* The Declaration of Independence, ¶ 3 (objecting to judges "dependent on [King George III's] will alone"). After revolting against tyranny, the

Founders cast their first substantive vote at the Constitutional Convention of 1787 to create a government that separated power among three co-equal branches. *See* 1 Records of the Federal Convention of 1787 30-31 (Max Farrand ed., Yale Univ. Press 1911). Separating governmental power preserves liberty, in part, because each branch jealously checks any attempt by the other branches to shift the power balance set by the Constitution.

Arguably no branch is more vital to protecting liberty from factious politics than the judiciary. Our constitutional backstop, the independent judiciary ensures that the political branches cannot encroach on or diminish constitutional liberties. To do so effectively, the judiciary—and its independent judges—must guard the judicial role against political encroachment and be wary of ceding judicial power to the other branches. For instance, although Congress can limit the courts' jurisdiction, the legislature cannot direct the manner in which the court exercises the judicial power. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 329 (1816) ("If, then, it is the duty of [C]ongress to vest the judicial power of the United States, it is a duty to vest *the whole judicial power*."); *see also Yakus v. U.S.*, 312 U.S. 414, 468 (1944) (Rutledge, J., dissenting) (Congress cannot "direct that [jurisdiction] be exercised in a manner inconsistent with constitutional requirements or, what in some instances may be the same thing, without regard to them."). Nor can the Executive Branch share in the judicial power. *U.S. v. Nixon*, 418 U.S. 683, 704 (1974). It is vital to our constitutional structure that the courts remain free from outside influence.

Article III guards the judiciary's independence by adopting the common-law tradition of an independent judicial office and by protecting that office through life tenure and undiminished salary. U.S. Const., art. III, § 1. The judicial office carries with it a duty of independent judgment. *See* James Iredell, To the Public, *N.C. Gazette* (Aug. 17, 1786) (describing the Article III duty of judges as "[t]he duty of the power"). Each judge who holds the judicial office under Article III swears an oath to the Constitution and is duty-bound to exercise his or her own office independently. *See* Law and Judicial Duty 507-12 (discussing judges' internal duty of independent judgment).

Through the independent judicial office, the Founders sought to ensure that judges would not administer justice based on someone else's interpretation of the law. *See* 2 Records of the Federal Convention of 1787, 79 (Nathaniel Gorham explaining that "the Judges ought to carry into the exposition of the laws no prepossessions with regard to them"); The Federalist No. 78 (Alexander Hamilton) ("The interpretation of laws is the proper and peculiar province of the courts."). This obligation of independence is reflected in the opinions of the founding era's finest jurists. *See, e.g.*, *Georgia v. Brailsford*, 2 U.S. 415, 416 (1793) (Iredell, J., dissenting) ("It is my misfortune to dissent … but I am bound to decide, according to the dictates of my own judgment."); *The Julia*, 14 F. Cas. 27, 33 (C.C.D. Mass. 1813) (Story, J.) ("[M]y duty requires that whatsoever may be its imperfections, my own judgment should be pronounced to the parties."); *U.S. v. Burr*, 25 F. Cas. 2, 15 (C.C.D. Va. 1807) (Marshall,

J.) ("[W]hether [the point] be conceded by others or not, it is the dictate of my own judgment, and in the performance of my duty I can know no other guide.").

Judicial independence, as a duty and obligation, persists today. This principle is so axiomatic, in fact, that it seldom appears in legal argument; the mere suggestion that a judge might breach his or her duty of independent judgment is a scandalous insinuation. But that is exactly what *Stinson* and its ilk require: judicial dependence on a non-judicial entity's interpretation of the law.[1]

B. Deference Regimes Are Inconsistent with Judicial Independence

1. *Stinson* Requires Abdication of the Article III Judicial Office

Obligatory deference regimes, like the one adopted in *Stinson*, are antithetical to the independent judgment that Article III enshrines, and they violate the Fifth Amendment's Due Process Clause by requiring bias toward one party in the case.

Faithful application of *Stinson* requires judges to abdicate the duty of their judicial office by forgoing their independent judgment in favor of an agency's legal interpretation. *See Perez v. Mortgage Bankers Ass'n*, 572 U.S. 92, 110 (2015) (Scalia, J., concurring in judgment) (deference requires courts "to 'decide' that the text means what the agency says"). This diminishes the judicial office and, with it, the structural safeguards the Framers erected as a bulwark against tyranny. *Cf. Miller v. Johnson*, 515

[1] Those judges who serve on the Commission are not acting as judges but as part-time Commissioners, even if their expertise as judges informs their decisions.

U.S. 900, 922-23 (1995) (holding that deference to the Department of Justice's statutory interpretation would impermissibly "surrender[] to the Executive Branch [the Court's] role in enforcing the constitutional limits [at issue]").

Even when Congress has tasked an agency with promulgating binding rules or guidelines, it remains the judiciary's role to "say what the law is" in any case or controversy about the meaning and application of those agency-made provisions. *Marbury*, 5 U.S. at 177. The duty of independent judgment is the very office of an Article III judge; *Stinson* cannot lawfully require judges to abdicate this duty. *Cf. Yarborough v. Alvarado*, 541 U.S. 652, 663-64 (2004) (discussing the "substantial element of judgment" that federal judges must exercise "when applying a broadly written rule to a specific case"). The Commission's opinion of how to best interpret its guidelines deserves no more weight than the heft of its persuasiveness. *See, e.g.*, 18 U.S.C. § 3553(b) (allowing but not requiring courts to "consider" the "official commentary of the Sentencing Commission" when deciding whether to depart from a guidelines range); *cf. TetraTech, Inc. v. Wisc. Dep't of Revenue*, 914 N.W.2d 21, 53 (Wisc. 2018) (""Due weight' is a matter of persuasion, not deference.").

2. *Stinson* Violates Due Process by Institutionalizing Judicial Bias

Reflexive deference also jeopardizes judicial impartiality, "the *sine qua non* of the American legal system." *Haines v. Liggett Group*, 975 F.2d 81, 98 (3d Cir. 1992); *see also Com. Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 149 (1968) (holding that judicial

bodies "not only must be unbiased but also must avoid even the appearance of bias."). A neutral judiciary "safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decisionmaking process." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980). By ensuring a neutral arbiter, due process "helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law." *Id.*

Moreover, due process requires more than procedural fairness. The government must act "through judges whose office require[s] them to exercise independent judgment in accord with the law." Philip Hamburger, Is Administrative Law Unlawful? 173 (2014). Through the Due Process Clause, the Constitution incorporates the common-law maxim that "[n]o man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity." The Federalist No. 10 (James Madison).

Judicial bias need not be personal bias to violate due process—it can also be institutional. In fact, institutionalized judicial bias is more pervasive, as it systematically subjects parties across the entire judiciary to bias rather than only a party before a particular judge. Most judges recognize that personal bias requires recusal. *See Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 872 (2009) (basing recusal on "all the circumstances of this case"). Recusal is equally appropriate when deference regimes institutionalize bias by purporting to require judges to favor the government's position

in cases in which the government is a party.[2] *See In re Murchison*, 349 U.S. 133, 136 (1955) (reasoning that the "stringent" due-process requirement of impartiality may require recusal by "judges who have no actual bias and who would do their very best to weight the scales of justice equally between contending parties").

As a matter of course, *Stinson* institutionalizes bias by requiring courts to "defer" to the government's legal interpretation in violation of a defendant's right to due process. *Cf.* Philip Hamburger, Chevron *Bias*, 84 GEO. WASH. L. REV. 1187 (2016). Rather than exercise their own judgment about what the law is, judges under *Stinson* defer systematically to the judgment of one of the litigants before them. The government litigant wins simply by showing that its preferred interpretation of the commentary "is not plainly erroneous or inconsistent with" the Guidelines. *Stinson*, 508 U.S. at 47. The court cannot simply prefer the defendant's reading or think the government's reading is wrong—the government must be *plainly* wrong.

No rationale can defend a practice that weights the scales in favor of a *government* litigant—the most powerful of parties—and that commands systematic bias in favor of the government's preferred interpretations of the Sentencing Guidelines. Government-litigant bias doctrines, like *Stinson* deference, deny due process by favoring the

[2] If a judge is unwilling to recuse himself or herself, another option would be to write an opinion *dubitante*, in which the judge explains that the judgment follows Supreme Court precedent but explains why that precedent is unconstitutional and must be abandoned by the higher court. *See* Jason J. Czarnezki, *The* Dubitante *Opinion*, 39 AKRON L. REV. 1 (2006).

government's litigation position. *Masterpiece Cake Shop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1734 (2018) (Kagan, J., concurring) (agreeing that the Constitution forbids adjudicatory proceedings that are "infected by … bias"); *Tumey v. Ohio*, 273 U.S. 510, 532 (1927) ("Every procedure" that might lead a judge "not to hold the balance nice, clear, and true between the State and the accused denies the latter due process of law.").

Typically, intermediate appellate judges are bound by decisions of the Supreme Court. But a judge's oath is to the Constitution, not the Supreme Court. When a Supreme Court decision would compel judges on inferior courts to abandon their very office as a judge, our Republic depends on judges who will exercise their own, independent judgment and prioritize the Constitution over decisional law. It is long past time for conscientious judges to uphold their constitutional oath and reject the "deference" that compromises the judiciary.

II. DEFERENCE IS INAPPROPRIATE IN ANY CASE WITH CRIMINAL PENALTIES

Applying *Stinson* to this case raises other constitutional issues beyond those inherent every time a court defers to outside influence. *Stinson* often—as it does here—requires the judiciary to construe ambiguities in criminal laws *against* the accused. This runs counter to the rule of lenity and violates the due process of law.

A. Lenity Requires Courts to Construe Ambiguity in Favor of Defendants

Lenity is a rule of construction "perhaps not much less old than construction itself,"[3] *U.S. v. Wiltberger*, 18 U.S. (1 Wheat.) 76, 95 (1820); *see also Bray v. Atalanta*, 4 F. Cas. 37, 38 (D.S.C. 1794) (ruling that "a penal law [] must be construed strictly"). In simple terms, the rule of lenity dictates that "[a]ny ambiguity in the language of a criminal statute should be resolved in favor of the defendant." *U.S. v. Vitillo*, 490 F.3d 314, 321 (3d Cir. 2007). "The critical point is that criminal laws are for courts, not for the Government, to construe." *Abramski v. U.S.*, 573 U.S. 169, 191 (2014) ("[W]e have never held that the Government's reading of a criminal statute is entitled to any deference.")). Accordingly, courts must construe strictly all laws that carry criminal consequences. *Wiltberger*, 18 U.S. at 95; *see also U.S. v. Thompson/Ctr. Arms Co.*, 504 U.S. 505, 518 & n.10 (1992) (plurality) (reasoning that lenity applies to a tax statute with criminal applications because "we know of no other basis for determining when the essential nature of a statute is 'criminal'").

Two constitutional principles underlie the rule of lenity: due process and the separation of governmental powers. Due process requires that "a fair warning should be given to the world in language that the common world will understand, of what the

[3] One of the first written English law reports, an early-16th Century "Year Book," attributed to 15th Century jurist William Paston a Latin maxim that translates loosely to mean, "the penalties ought not to by increased by interpretation." *See A Discourse Upon the Exposicion & Understandinge of Statutes*, Thomas Egerton Additions 155 (Samuel E. Thorne ed. 1942) ("[W]hen the law is penall, for in those it is true that Paston saiethe, *Poenas interpretation augeri non debere*[.]").

law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear." *McBoyle v. U.S.*, 283 U.S. 25, 27 (1931). By construing ambiguities in the defendant's favor, lenity prohibits criminal consequences when Congress did not provide a fair warning through clear statutory language. Lenity also promotes liberty by ensuring the separation of powers: the legislature criminalizes conduct and sets statutory penalties, and the judiciary sentences defendants within the applicable statutory framework. *U.S. v. Bass*, 404 U.S. 336, 348 (1971). Lenity "strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability." *Liparota v. U.S.*, 471 U.S. 419, 427 (1985).

Overall, lenity "embodies 'the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should.'" *Bass*, 404 U.S. at 347 (citation omitted). As such, lenity applies with equal force to increases in punishment, not merely to whether the defendant's conduct is criminal in the first place. *See U.S. v. Diaz*, 592 F.3d 467, 474-75 (3d Cir. 2010); *see also Bifulco v. U.S.*, 447 U.S. 381, 387 (1980) ("[T]he Court has made it clear that [lenity] applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose."); *but see Sash v. Zenk*, 428 F.3d 132, 134 (2d Cir. 2005) (Sotomayor, J.) (holding that a statute setting the terms by which federal prisoners accrue good behavior was not a criminal statute for the purposes of lenity).

Like deference, however, lenity applies only when Congress' intent is not "already clear based on an analysis of the plain meaning of a statute." *U.S. v. Brown*, 740

F.3d 145, 150-51 (3d Cir. 2014) (cleaned up). This creates an apparent tension between lenity and the deference regimes. *See U.S. v. Havis*, 907 F.3d 439, 441 (6th Cir. 2018) (panel opinion) (Thapar, J., concurring) ("[A]s this is a criminal case, and applying *Auer* would extend Havis's time in prison, alarm bells should be going off."). If a statute is ambiguous, lenity requires construction in favor of the defendant; deference would require construction in the agency's favor. Chief Justice John Roberts has observed as much: Deference and the rule of lenity "each point in the opposite direction based on the same predicate, which is a degree of ambiguity in the statute." Transcript of Oral Argument at 12, *Equivel-Quintana v. Sessions*, 137 S. Ct. 1562 (2017); *see id.* at 1572 (declining to "resolve whether the rule of lenity or *Chevron* receives priority" because the statute at issue was unambiguous). But due process pulls in only one direction: the rule of lenity forecloses agency deference.

There are two main reasons that lenity receives "priority" over agency deference. *First*, lenity allows courts to avoid the constitutional concerns inherent in applying an ambiguous statute against a criminal defendant. When "an otherwise acceptable construction of a statute would raise serious constitutional problems," courts "will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *see also Parsons v. Bedford, Breedlove & Robeson*, 28 U.S. (1 Pet.) 433, 448-49 (1830) (Story, J.) ("No court ought, unless the terms of an act rendered it unavoidable, to give a construction to it which should involve a violation,

however unintentional, of the constitution."); *Murray v. Schooner Charming Betsy*, 6 U.S. (1 Cranch) 64, 118 (1804) (Marshall, C.J.) (same).

Lenity and constitutional avoidance operate symbiotically when a criminal statute is ambiguous. *See U.S. v. Davis*, 139 S. Ct. 2319, 2333 (2019) (describing the two doctrines as "traditionally sympathetic" to one another). Just as lenity avoids construing ambiguity against a criminal defendant in violation of due process and the separation of powers, so too does the constitutional-avoidance doctrine. *See id.* ("Applying constitutional avoidance to narrow a criminal statute, as the Court has historically done, accords with the rule of lenity.").

No similar constitutional concerns necessitate the application of deference doctrines, which lack any constitutional underpinning. *See Havis*, 907 F.3d at 451 (Tharpar, J., concurring) ("Such deference is found nowhere in the Constitution—the document to which judges take an oath."). Rather than the Constitution, agency deference is "rooted in a presumption about congressional intent"; though, the presumption is "always rebuttable." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2412 (2019). This presumption, in the criminal context, must give way to a strict reading of the statute. *Wiltberger*, 18 U.S. at 95. Prioritizing deference over lenity offends due process and, once again, violates the judicial oath to uphold the Constitution. *DeBartolo Corp.*, 485 U.S. at 575 (construing ambiguity to avoid constitutional infirmity because "Congress, like this Court, is bound by and swears and oath to uphold the Constitution").

Second, as a matter of statutory interpretation, a court cannot defer to an agency until after it empties its "legal toolkit" of "all the 'traditional tools' of construction." *Kisor*, 139 S. Ct. at 2418. The rule of lenity is a traditional "rule of statutory construction" in this Court's toolkit. *Thompson/Ctr. Arms Co.*, 504 U.S. at 518 (cleaned up). So, lenity, like other "presumptions, substantive canons and clear-statement rules" must "take precedence over conflicting agency views." *Carter*, 736 F.3d at 731 (Sutton, J., concurring) (collecting precedents that prioritize various interpretive tools over deference). Agency deference must come last because "[r]ules of interpretation bind all interpreters, administrative agencies included." *Id.* "That means an agency, no less than a court, must interpret a doubtful criminal statute in favor of the defendant." *Id.*

The Fifth and Eleventh Circuits have already held that *Auer* and its progeny do not apply in criminal cases. *See U.S. v. Phifer*, 909 F.3d 372, 383 (11th Cir. 2018); *U.S. v. Moss*, 872 F.3d 304, 308, 314 (5th Cir. 2017). In *Phifer*, the Eleventh Circuit detailed how the two principles underlying lenity—due process and separation of powers—are the same principles that make *Auer*'s application untenable in a criminal case. 909 F.3d at 384-85. The Court enunciated that, in criminal cases, courts "must look solely to the language of the regulatory provision at issue to determine whether it unambiguously prohibits the act charged." *Id.* at 385; *see also U.S. v. Winstead*, 890 F.3d 1082, 1092 n.14 (D.C. Cir. 2018) ("[I]t is not obvious how the rule of lenity is squared with *Stinson*'s description of the commentary's authority to interpret guidelines. We are inclined to believe that the rule of lenity still has some force."); *M. Kraus & Bros. v. U.S.*, 327 U.S.

614, 621-22 (1946) (plurality) (holding, one year after *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945), that when an agency's rules carry criminal sanctions, "to these provisions must be applied the same strict rule of construction that is applied to statutes defining criminal action").

When a statute with criminal penalties is ambiguous, "doubts are resolved in favor of the defendant." *Bass*, 404 U.S. at 347. There is no room for deference.

B. No Precedent Binds this Court's Application of the Rule of Lenity

No binding precedent requires this Court to discard the rule of lenity in favor of deference to the Sentencing Commission. *Stinson* never addressed the constitutional objections to its deference regime—and neither has any subsequent Supreme Court decision. *Cf. Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 140 S. Ct. 789, 790 (2020) (Gorsuch, J., statement regarding denial of certiorari) (arguing that deference "has no role to play when liberty is at stake" and announcing that the Court's waiting to consider a case "afflicted with the same problems ... should not be mistaken for lack of concern").[4] It cannot be said, therefore, that precedent requires this Court to apply

[4] In dictum, the Supreme Court has stated once that, although it had applied lenity to "specific factual disputes" regarding "a statute that contains criminal sanctions," the Court had "never suggested that the rule of lenity should provide the standard for reviewing facial challenges to administrative regulations whenever the governing statute authorizes criminal enforcement." *Babbitt v. Sweet Home Chapter of Cmts. for a Great Ore.*, 515 U.S. 687, 704 n.18 (1995). Justice Scalia, joined by Justice Thomas, later described *Babbitt*'s footnote as a "drive-by ruling" that "deserves little weight" because it "contradicts the many cases before and since holding that, if a law has both criminal and civil applications, the rule of lenity governs its interpretation in

Stinson in contravention of the rule of lenity and the constitutional rights that rule protects. *See Waters v. Churchill*, 511 U.S. 661, 678 (1994) (plurality) ("[C]ases cannot be read as foreclosing an argument that they never dealt with."); *Webster v. Fall*, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not considered as having been so decided as to constitute precedents.").

both settings." *Whitman v. U.S.*, 574 U.S. 1003 (2014) (Scalia, J., statement respecting denial of certiorari) (citing *Leocal v. Ashcroft*, 543 U.S. 1, 11-12 n.8 (2004); *Thompson/Ctr. Arms*, 504 U.S. at 518 n.10). At least twice since *Babbitt*, the Court has treated the tension between agency deference and lenity as an open question. *See Equivel-Quintana*, 137 S. Ct. at 1572 (declining to "resolve whether the rule of lenity or *Chevron* receives priority" because the statute at issue was unambiguous); *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 n.8 (2001) (declining to consider the rule of lenity's application to the Clean Water Act because the regulation at issue exceeded the agency's statutory authority).

Regardless of footnote 18's viability in the context of facial regulatory challenges, it is inapposite to the Commission's commentary. For one, *Babbitt* explicitly limited its reasoning to facial challenges and acknowledged that lenity applies to non-facial challenges to criminal sanctions. 515 U.S. at 704 n.18. The footnote asserted that a regulation supplies the fair notice lacking in an ambiguous statute, but it did not consider whether an agency's interpretation of an ambiguous regulation also satisfies fair notice. Further, footnote 18 did not address the separation-of-powers issues when a non-legislative body promulgates criminal penalties and a non-judicial body interprets the law. Nor did the regulation at issue in *Babbitt* implicate the separation-of-powers specific to the Commission, the structure of which depends on notice-and-comment rulemaking and legislative review. *See infra* Section III.A. Deferring to the commentary would allow the Commission to change the class of defendants who are subject to sentence enhancements, then change it back again, and again, all without notice and comment or congressional review. *See Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 735 (6th Cir. 2013) (Sutton, J., concurring).

As explained in Section II.A, lenity receives priority over *Stinson* deference because lenity protects against constitutional concerns and because *Kisor* requires courts to exhaust all rules of interpretation (including lenity) before deferring to an agency.

Indeed, *Stinson* had no reason to consider lenity because the Commission's interpretation in that case resolved ambiguity in the criminal defendant's favor. 508 U.S. at 47. Ruling that the district court sentenced Stinson improperly as a career offender, the Court vacated his sentence and remanded the case for a re-sentencing. *Id.* at 48. Given that the commentary at issue in *Stinson* militated in favor of a more lenient sentence, lenity was not at issue.

Nor was lenity at issue in *Hightower*, 25 F.3d 182. And even if it had been, this Court should have no trouble departing from *Hightower*—to the extent that decision survived *Kisor*, 139 S. Ct. 2400. In *Kisor*, the Court "cabined *Auer*'s scope in varied and critical ways" to "maintain[] a strong judicial role in interpreting rules." *Id.* at 2418. Now, *Kisor* (née *Auer*) deference applies only after a court empties its "legal toolkit" of "all the 'traditional tools' of construction" to "'carefully consider[]' the text, structure, history, and purpose of a regulation, in all the ways it would if it had no agency to fall back on." *Id.* at 2415. *Kisor* deference is proper (if ever) only "[i]f genuine ambiguity" remains after this exhaustive interpretive inquiry; "a court cannot wave the ambiguity flag just because it found the regulation impenetrable on the first read." *Id.*

In *Hightower*, the panel did not so much as open its legal toolkit; instead, the court reflexively adopted the Commission's interpretation. *See* 25 F.3d at 185. Acknowledging that the commentary to § 4b1.2 expanded Guidelines, the panel reasoned that Congress intended for the Commission "to assure that certain offenders receive maximum or near-maximum terms of imprisonment." *Id.* at 184-85. The panel

treated the statute defining "controlled substance offense" "as a floor for the career offender category, not as a ceiling," and reasoned that the Commission could "expand the scope of crimes of violence beyond the original congressional definition" and "includ[e] additional predicate offenses within the guideline definition of crimes of violence." *Id.* at 185 (citations omitted). In other words, *Hightower* is premised on the notion that Congress passed the Sentencing Reform Act of 1984 to sentence people as harshly as possible, so courts should defer to Commission commentary that furthers Congress' goal of increasing incarceration. Not only is the panel's decision a direct affront to the rule of lenity—which *Hightower* did not consider—but *Hightower*'s haste to reach *Seminole Rock* with no exacting inquiry is counter to *Kisor*'s cabining of that deference regime. *See* 139 S. Ct. at 2415. Put simply, *Hightower* has not withstood the test of time, and the full Court should have no trouble casting aside that decision's lingering remnants.

III. COMMISSION COMMENTARY EXPANDING THE GUIDELINES IS NOT ENTITLED TO ANY DEFERENCE

Keeping in mind that reflexive agency deference is never appropriate, and is particularly injurious in cases with criminal consequences, there is yet another reason the Commission's commentary does not deserve deference in this case: The Commission cannot expand the Guidelines through commentary rather than amendment.

A. The Separation of Powers Prohibits Commentary that Expands the Guidelines

To understand why the Commission's commentary cannot expand the scope of Guidelines, it is important to consider the structure of the Commission and the authority that Congress has granted it. The Commission is a creature of the Sentencing Reform Act, which charged the Commission to "establish sentencing policies and practices for the Federal Criminal justice system." 28 U.S.C. § 991(a), (b)(1). Section 994(a) of the Act directs the Commission to promulgate two types of text: (1) the Guidelines and (2) "general policy statements regarding application of the guidelines or any other aspect of sentencing or sentence implementation." The Commission must promulgate its Guidelines pursuant to notice-and-comment rulemaking. *Id.* at § 994(x). And the Commission must submit any amendments or modifications pursuant to § 994(a) to Congress for a mandatory review period of at least 6 months, during which Congress may modify or reject the Commission's amendments or modifications. *Id.* at § 994(p).

There is, however, a third category of text. The Act—by implication rather than express mandate—permits the Commission to publish commentary. *See Stinson*, 508 U.S. at 41 (citing 18 U.S.C. § 3553(b)). According to the Commission, the purpose of its commentary is to (1) explain or interpret the guidelines; (2) suggest circumstances when courts should depart from the guidelines; and (3) provide background information, such as what factors the Commission considered. U.S.S.G. § 1B1.7. The

Commission characterizes its commentary as having the same legal "force of policy statements" and warns that a court's failure to follow the commentary "could constitute an incorrect application of the guidelines, subjecting the sentence to possible reversal on appeal." U.S.S.G. § 1B1.7 & comment.

Importantly, the commentary—unlike the Guidelines—is not expressly authorized by statute, not issued following notice-and-comment rulemaking, and not subject to congressional review. These distinctions matter both because they illustrate Congress' intent and because they inform the weight of the commentary within our constitutional structure. *Havis*, 907 F.3d at 441. Seated nominally in the Judicial Branch while exercising quasi-legislative power, the Commission is "an unusual hybrid in structure and authority." *Mistretta v. U.S.*, 488 U.S. 361, 412 (1989). Despite its anomalous presence in our constitutional system, the Supreme Court upheld the Commission's continued existence based on two limitations on the Commission's power: (1) Congress reviews amendments to the Guidelines before they take effect and (2) the Commission must promulgate its amendments through notice-and-comment rulemaking. *Id.* at 393-94. According to the Court, these limits prevented the Commission from exercising "the power of judging joined with the legislative." *Id.* at 394 (quoting The Federalist No. 47 (James Madison)).

Courts cannot, therefore, write off the Commission's attempts to expand its Guidelines through commentary as a matter convenience or expediency. By *Mistretta*'s reasoning, any text the Commission issues without notice-and-comment rulemaking or

congressional review cannot bind the Judiciary without offending the separation of powers.

B. Courts Are Beginning to Reject Unconstitutional Deference to Commission Commentary

Although many federal courts of appeal, following *Mistretta* and *Stinson*, began deferring reflexively to the Commission's commentary, *see, e.g.*, *Hightower*, 25 F.3d 182, many judges now are beginning to uphold their duty and fulfill the judicial office, subjecting the Commission's use of commentary to the scrutiny it deserves. *See, e.g.*, *Winstead*, 890 F.3d at 1092; *U.S. v. Havis*, 927 F.3d 382, 386 (2019) (*en banc*); *cf. Crum v. U.S.*, 934 F.3d 963, 966 (9th Cir. 2019) ("If we were [not bound by Circuit precedent], we would follow the Sixth and D.C. Circuits' lead."); *U.S. v. Rollins*, 836 F.3d 737, 742 (7th Cir. 2016) ("[T]he application notes are *interpretations of*, not *additions to*, the Guidelines themselves; an application note has no *independent force*.").

First, the D.C. Circuit rejected Commission commentary that expanded the Guidelines' definition of "controlled substance offense" to include inchoate offenses, when such offenses do not show up in the "very detailed 'definition' of controlled substance offense." *Winstead*, 890 F.3d at 1091. The Court admonished: "[S]urely *Seminole Rock* deference does not extend so far as to allow [the Commission] to invoke its general interpretive authority via commentary … to impose such a massive impact on a defendant with no grounding in the guidelines themselves." *Id.* at 1092. To include

attempts in the definition of controlled substance offense, the Commission must amend the Guidelines and seek congressional review. *Id.*

The next year, the Sixth Circuit followed suit. Like this Circuit, the Sixth Circuit had precedent deferring reflexively to the Commission's commentary. *See U.S. v. Evans*, 699 F.3d 858 (6th Cir. 2012) (adopting U.S.S.G. § 4B1.2, Application Note 1, without any scrutiny). The initial panel in the Sixth Circuit, bound by precedent, issued four separate opinions, including one by Judge Thapar concurring with his own majority opinion. *Havis*, 904 F.3d 439. The panel highlighted that the Commission "possess[es] a great deal more legislative power than *Mistretta* envisioned" if "the Commission can add to or amend the Guidelines solely through commentary." *Id.* at 443. In the panel's view, "in order to keep the Sentencing Commission in its proper constitutional position—whatever that is exactly—courts must keep Guidelines text and Guidelines commentary, which are two different vehicles, in their respective lanes." *Id.* Judge Stranch wrote separately to emphasize that deference doctrines cannot extend the scope of authority that Congress has granted. *Id.* at 448 (Stranch, J., concurring). Judge Thapar went a step further in his concurrence. He argued that deference to the Commission's commentary "would both transfer the judiciary's power to say what the law is to the Commission and deprive the judiciary of its ability to check the Commission's exercise of power." *Id.* at 450-51 (Thapar, J., concurring). Judge Thapar cautioned judges not to accept the government's requests for agency deference:

> [J]udges should be faulted for accepting the government's argument. How is it fair in a court of justice for judges to defer to one of the litigants? In essence, the argument boils down to this—the government is populated by experts and when they speak we should tip the scales of justice in their favor. **Such deference is found nowhere in the Constitution—the document to which judges take an oath.** And allowing such deference would allow the same agency to make the rules and interpret the rules.

Id. at 451-52 (emphasis added). Concluding his entreaty for *en banc* review, Judge Thapar warned, "if the judiciary checks out, so to speak, then the system the founders envisioned crumbles." *Id.* at 452. Finally, Judge Daughtrey dissented, arguing that Sixth Circuit precedent did not bind the panel because the court's prior decision had not addressed "whether *Stinson* or separation-of-powers principles would allow commentary to expand the class of crimes deemed 'controlled substance offenses.'" *Id.* at 453 (Daughtrey, J., dissenting).

The *en banc* Sixth Circuit reversed in a concise *per curium* opinion, ruling: "The Commission's use of commentary to add attempt crimes to the definition of 'controlled substance offense' deserves no deference." 927 F.3d at 387. Like the *Havis* panel had, the *en banc* court underlined the fact that "commentary to the Guidelines never passes through the gauntlets of congressional review or notice and comment." *Id.* at 386. Given this distinction, the Sixth Circuit concluded that commentary may not "replace or modify" the Guidelines. *Id.*

Since *Havis*, several federal district court judges have adopted the rationale of *Winstead* and *Havis*. *See, e.g.*, *U.S. v. Carter*, --- F. Supp. 3d ---, 2020 WL 907884 (S.D. W.Va. Feb. 25, 2020) (Goodwin, J.); *U.S. v. Faison*, --- F. Supp. 3d ---, 2020 WL 815699

(D. Md. 2020) (Hazel, J.); *U.S. v. Bond*, 418 F. Supp. 3d 121, 123 (S.D. W.Va. 2019) (Chambers, J.); *U.S. v. Gibbs*, No. 2:18-cr-89-1 (S.D. W.Va. July 31, 2019) (Copenhaver, J.). And the Second and Tenth Circuits have ordered the government to respond to petitions for rehearing *en banc* that raise the issue. *See* Order, *Lovato v. U.S.*, No. 18-1468 (10th Cir. April 15, 2020); Order, *U.S. v. Tabb*, No. 18-338 (2d Cir. Feb. 21, 2020).

In refusing to defer to the Commission's attempts to use commentary to increase a sentence beyond the range set by the Guidelines' text, many judges have emphasized the magnitude of the sentence enhancement. *See, e.g.*, *Winstead*, 890 F.3d at 1089 ("over ten years"); *Bond*, 418 F. Supp. 3d at 123 ("drastic enhancement" "from 30-37 month to 210-262 months"). But due process does not demand less when the government wants to increase incarceration by a term that may seem less significant on paper. There is no greater liberty interest in life than to be free from a cage. *See Faison*, 2020 WL 815699, at *1 ("Liberty is the norm; every moment of incarceration should be justified."). For a defendant, "every day, month, and year that was added to the ultimate sentence will matter. … [T]he difference between probation and fifteen days may determine whether the defendant is able to maintain his employment and support his family." *Id.* *Any* increase in a criminal sentence must comport with due process. "[I]t is crucial that judges give careful consideration to every minute that is added to a defendant's sentence." *Id.*

The Commission's attempts to increase criminal penalties through commentary violate the due process of law and the separation of powers. They deserve no deference.

CONCLUSION

This Court should reject *Stinson* deference and remand the case for the district court to exercise its judgment independently.

April 22, 2020

Respectfully,

/s/ Jared McClain

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CERTIFICATE OF BAR MEMBERSHIP

I, Jared McClain, certify that I am a member of the bar for the United States Court of Appeals for the Third Circuit.

Respectfully,

/s/ Jared McClain
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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it has been prepared in 14-point, plain, roman-style font. This brief also complies with the type-volume limitations set out in this Court's Order on March 13, 2020, which limited Amicus Curiae Briefs to 6,500 words. This brief contains 6,447 words.

I further certify that the electronic version of this brief was scanned with Trend Micro Antivirus. It contains no known viruses. Any paper copies of this brief that this Court might order New Civil Liberties Alliance to file will be identical to the electronic version.

Respectfully,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed this Amicus Curiae Brief with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system on April 22, 2020. Until further notice from this Court, NCLA has deferred filing paper copies of the brief based on the Court's March 17 Notice addressing the COVID-19 pandemic. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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