No. 21-5714

In the Supreme Court of the United States

JAYREN WYNN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

AMICI CURIAE BRIEF OF THE NEW CIVIL LIBERTIES ALLIANCE & DUE PROCESS INSTITUTE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

The New Civil Liberties Alliance and Due Process Institute, as *amici curiae*, address the following questions necessary to resolving the circuit splits at issue in Mr. Wynn's petition:

(1) Do courts owe deference to Commission commentary that expands the Guidelines?

(2) Do the rule of lenity and the right to due process preclude *Stinson* deference when commentary to a Sentencing Guideline would increase a sentence?

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INTEREST OF *AMICI CURIAE*[1]

The New Civil Liberties Alliance ("NCLA") is a nonpartisan, nonprofit civil rights organization and public-interest law firm. Professor Philip Hamburger founded NCLA to challenge multiple constitutional defects in the modern administrative state through original litigation, *amicus curiae* briefs, and other 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 aims to defend civil liberties—primarily by asserting constitutional constraints on the modern administrative state.

Due Process Institute is a nonprofit, bipartisan, public-interest organization that works to honor, preserve, and restore procedural fairness in the criminal legal system because due process is the guiding principle that underlies the Constitution's solemn promises to "establish justice" and to "secure the blessings of liberty." U.S. Const., pmbl. The issues raised in this brief are essential to protecting the principles of due process and fundamental fairness in America's federal sentencing regime.

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[1] Both parties consented to the filing of this brief. No one other than the *amici curiae* and their counsel authored or financed the preparation or the submission of this brief.

Amici are disturbed by the widespread judicial "deference" to the commentary of the United States Sentencing Commission. See *Stinson v. United States*, 508 U.S. 36 (1993). *Stinson* deference raises grave constitutional concerns that this Court has never considered.

STATEMENT OF THE CASE

Every Justice in *Kisor v. Wilkie* agreed on the need to "reinforce" and "further develop" the limitations on the deference that courts owe to an agency's interpretation of its own rules. 139 S. Ct. 2400, 2408, 2415 (2019); *id.* at 2424 (Roberts, C.J., concurring); *id.* at 2448 (Gorsuch, J., concurring in judgment); *id.* at 2448-49 (Kavanaugh, J., concurring in judgment). *Kisor* held that, before courts defer to an agency's interpretation, they *must* (1) exhaust their interpretive tools and conclude the text is "genuinely ambiguous"; (2) determine that the agency interpretation is "reasonable"; and (3) conduct an "independent inquiry" to confirm that "the character and context of the agency interpretation entitles it to controlling weight." *Id.* at 2415-16.

Prior to *Kisor*, courts were deferring "reflexive[ly]" to agency interpretations, without first conducting the exhaustive textual analysis that the Constitution requires. See *ibid.* This reflexive deference was likely the result of "mixed messages" this Court sent in cases that "applied *Auer* deference without significant analysis of the underlying regulation." *Id.* at 2414.

Of all this Court's mixed messages about agency deference, *Stinson* has been among the most damaging, given its application during criminal sentencing. 508 U.S. at 38. *Stinson* requires courts to defer to the United States Sentencing Commission's

commentary interpreting the Sentencing Guidelines unless that commentary "is inconsistent with, or a plainly erroneous reading of, that guideline." *Ibid.* Such deference was appropriate, according to *Stinson*, even if the interpretation "may not be compelled by the guideline text." *Id.* at 47.

Applying *Stinson*, courts have given "nearly dispositive weight" to Commission commentary over "the Guidelines' plain text." *United States v. Nasir*, 2021 WL 5173485, at *9 (3d Cir. 2021) (en banc) (Bibas, J., concurring, with Ambro, Jordan, Greenaway, Krause, Restrepo, JJ.). That these courts have deferred reflexively is no coincidence—they rely on *Stinson*'s explicit language. Take the Eleventh Circuit for example. Even after *Kisor*'s admonishment, the Eleventh Circuit still quotes *Stinson* for its rule that "the commentary for a guideline remains authoritative 'unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline.'" *United States v. Cingari*, 952 F.3d 1301, 1308 (11th Cir. 2020) (citation omitted). Commentary loses its "authoritative … status" in the Eleventh Circuit *only* "if it is 'inconsistent with, or a plainly erroneous reading of, that guideline.'" *Ibid.* There's no textual inquiry into a Guideline's ambiguity, only deference.

To their credit, the Third, Sixth, and D.C. Circuits (and several district courts in the Fourth Circuit) have recognized that strict adherence to *Stinson* is inconsistent with this Court's modern administrative-law jurisprudence, the Commission's authority, and the Constitution. The other circuits, however, perpetuate *Stinson*'s outdated language and refuse to reconsider circuit precedent that contradicts *Kisor*. More time for

percolation will not resolve this circuit split. The dispute stems from this Court's mixed signals, and the recalcitrant circuits have made clear they won't act before this Court does.

Moreover, only this Court can resolve the "broader problem" that arises once the other seven circuits awake "from [their] slumber of reflexive deference." *Nasir*, 2021 WL 5173485, at *9 (Bibas, J.). Courts must exhaust the "traditional tools of construction" before deferring to an agency. *Kisor*, 139 S. Ct. at 2415. Lenity is a traditional tool of construction "perhaps not much less old than construction itself" that protects core liberties against government intrusion. *United States v. Wiltberger*, 18 U.S. (1 Wheat.) 76, 95 (1820). The courts of appeals, however, are divided on whether lenity applies before deference or if it applies at all. *Compare Nasir*, 2021 WL 5173485, at *9 (Bibas, J.) ("A key tool in that judicial toolkit is the rule of lenity."), *with Cingari*, 952 F.3d at 1310-11 ("cast[ing] doubt" on whether lenity applies before *Stinson* deference).

Like the primary circuit split, the lower courts' confusion about how to sequence lenity stems from this Court's muddling of the issue. See, *e.g.*, *Whitman v. United States*, 574 U.S. 1003 (2014) (Scalia J., with Thomas, J., respecting denial of certiorari) (establishing that this Court's anti-lenity statements "contradict[] 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 both settings").

Mr. Wynn's petition presents a critical opportunity to clarify once and for all that courts do not owe deference to Commission commentary that expands the Guidelines. Each passing term, seven circuits

systematically violate the due-process rights of criminal defendants by applying *Stinson* deference to increase the Guideline range approved by Congress. The Career-Offender Guideline alone, which *starts* at a presumptive 15-year prison term, adds thousands of years to the sentences of almost 2,000 defendants each year.[2] With the liberty of so many at stake, there is no excuse to keep waiting.

DISCUSSION

I. *STINSON* DEFERENCE CANNOT INCREASE CRIMINAL PENALTIES

The lower courts should have applied *Kisor*'s holding to all derivatives of *Seminole Rock*/*Auer* deference. But Mr. Wynn's petition, like the similar petitions this Court denied last June, show that widespread misapplication of *Stinson* deference will persist until this Court intervenes.

Lower-court judges openly disagree about whether *Kisor* limited *Stinson* and how rigorously they must analyze a Guideline before deferring to Commission commentary. This disparity would be unacceptable for any rules that require uniformity, but it is completely inexcusable in sentencing, when liberty is at stake. See *Nasir*, 2021 WL 5173485, at *10-11 (Bibas, J.). The Constitution demands that all judges interpret ambiguous Guidelines in a defendant's favor.

A. *Stinson* Did Not Implicate the Rule of Lenity

The rule of lenity dictates that "ambiguity concerning the ambit of criminal statutes should be

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[2] *Quick Facts: Career Offenders*, U.S. Sentencing Comm'n (FY 2019), https://bit.ly/2PSzYlX.

resolved in favor of lenity." *Skilling v. United States*, 561 U.S. 358, 410 (2010).

This concept is not new; few interpretive tools have lenity's tradition. See *Wiltberger*, 18 U.S. (1 Wheat.) at 95; see also *Bray v. Atalanta*, 4 F. Cas. 37, 38 (D.S.C. 1794) (ruling that "a penal law [] must be construed strictly"). Early-15th Century jurist William Paston abided by the maxim that "a penalty should not be increased by interpretation." A DISCOURSE UPON THE EXPOSICION & UNDERSTANDINGE OF STATUTES (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*[.]").

Lenity "applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose." *Bifulco v. United States*, 447 U.S. 381, 387 (1980); *M. Kraus & Bros. v. United States*, 327 U.S. 614, 621-22 (1946) (plurality) (holding, one year after *Seminole Rock*, "the same strict rule of construction that is applied to statutes defining criminal action" must apply to agency regulations). In fact, lenity "first arose to mitigate draconian sentences." *Nasir*, 2021 WL 5173485, at *10 (Bibas, J.). The rule similarly requires courts to resolve ambiguous Guidelines—which "exert a law-like gravitational pull on sentences"—in a defendant's favor. *Id.* at *11 (citing *United States v. Booker*, 543 U.S. 220, 265 (2005) (Breyer, J., majority opinion on remedy)).

Stinson did not consider lenity's priority over deference because the commentary at issue there favored a more lenient sentence. See 508 U.S. at 47-48. The Court, therefore, did not grapple with the constitutional issues inherent when the deference it established *increases* a criminal penalty. Nor has any

subsequent decision of this Court. Cf. *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1572 (2017) (declining to "resolve whether the rule of lenity or *Chevron* receives priority"); see also *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 to be considered as having been so decided as to constitute precedents.").

Unlike in *Stinson*, deference to the Commission in this case required the court to impose a stricter sentence on Mr. Wynn, so "alarm bells should be going off." *United States v. Havis*, 907 F.3d 439, 459 (6th Cir. 2018) (Thapar, J.).

"[W]hen liberty is at stake," deference "has no role to play." *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 140 S. Ct. 789, 790 (2020) (Gorsuch, J., statement regarding denial of certiorari). As six Third Circuit judges just recognized, "[p]enal laws pose the most severe threats to life and liberty, as the Government seeks to brand people as criminals and lock them away." *Nasir*, 2021 WL 5173485, at *10 (Bibas, J.). "Liberty is the norm; every moment of incarceration should be justified." *United States v. Faison*, 2020 WL 815699, at *1 (D. Md. Feb. 18, 2020). For a defendant, "every day, month and year that was added to the ultimate sentence will matter." *Ibid.*

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." *Ibid.* "The critical point is that criminal laws are for courts, not for the Government, to construe." *Abramski v. United States*, 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.").

B. The Constitution Compels Lenity

Three "core values of the Republic" compel the rule of lenity: (1) due process; (2) the separation of governmental powers; and (3) "our nation's strong preference for liberty." *Nasir*, 2021 WL 5173485, at *10-11 (Bibas, J.). Due process requires that "a fair warning should be given to the world in language that the common world will understand, of what the 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. United States*, 283 U.S. 25, 27 (1931). By construing ambiguities in the defendant's favor, lenity prohibits criminal punishment without a fair warning through clear statutory language. Lenity also protects the separation of powers: the legislature criminalizes conduct and sets statutory penalties, the executive prosecutes crimes and can recommend a sentence, and the judiciary sentences defendants within the applicable statutory framework. *United States v. Bass*, 404 U.S. 336, 348 (1971). The rule "strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability." *Liparota v. United States*, 471 U.S. 419, 427 (1985). Finally, and "perhaps most importantly," *Nasir*, 2021 WL 5173485, at *10 (Bibas, J.), 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). This "presumption of liberty remains crucial to guarding against overpunishment." *Nasir*, 2021 WL 5173485, at *11 (Bibas, J.). By promoting liberty, lenity "fits with one of the core purposes of our Constitution, to 'secure the Blessings of Liberty' for all[.]" *Id.* (quoting U.S. Const. pmbl.).

Additionally, lenity also serves the practical purpose of "plac[ing] the weight of inertia upon the party that can best induce [law-makers] to speak more clearly[.]" *United States v. Santos*, 553 U.S. 507, 514 (2008). *Stinson* deference undermines this incentive by allowing Commission commentary to resolve ambiguous Guidelines in the government's favor.

The dispositive weight that seven circuits afford to Commission commentary—regardless of textual ambiguity—exacerbates the problems inherent in ignoring lenity. These circuits elevate the Commission's interpretation over the actual text of the Guidelines. Cf. *Booker*, 543 at 258 (striking the portion of the Sentencing Reform Act that made the Guidelines mandatory). And by doing so, these courts permit the Commission to effectively amend congressionally approved Guidelines by simply re-interpreting the Commission's own ambiguous language. See *Christensen v. Harris Cty.*, 529 U.S. 576, 588 (2000) (deferring to an agency's position on an unambiguous rule "would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation"). In this way, *Stinson* "insulate[s]" the Commission's commentary "from legislative interference," *Peugh v. United States*, 569 U.S. 530, 545 (2013), undermining the very political accountability that this Court created deference to promote.

C. Traditional Tools of Interpretation Apply Lenity *Before* Deference

Kisor reiterated that deference to an agency is inappropriate until a court empties its "legal toolkit" of "all the 'traditional tools' of construction." 139 S.

Ct. at 2418. Two such interpretative tools prioritize lenity over deference.

First, lenity itself is a traditional "rule of statutory construction" in the courts' toolkit. *United States v. Thompson/Ctr. Arms Co.*, 504 U.S. 505, 518 (1992) (cleaned up). Like other "presumptions, substantive canons and clear-statement rules," lenity must "take precedence over conflicting agency views." *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 731 (6th Cir. 2013) (Sutton, J., concurring) (collecting cases). Agency deference must come last because "[r]ules of interpretation bind all interpreters, administrative agencies included." *Ibid.* "That means an agency, no less than a court, must interpret a doubtful criminal statute in favor of the defendant." *Ibid.*; see also *De Lima v. Sessions*, 867 F.3d 260, 265 (1st Cir. 2017) ("Courts that say lenity doesn't apply until last miss the fact that agencies, like courts, are supposed to apply statutory canons of interpretation, which include lenity.").

Accordingly, "lenity takes precedence" over *Stinson* deference. *Nasir*, 2021 WL 5173485, at *11 (Bibas, J.). When a Guideline is ambiguous, the court must adopt the more lenient reading—regardless of what the commentary says. *Ibid.*

Second, lenity implicates a related tool of construction: it allows courts to avoid the constitutional concerns concomitant in construing ambiguity against a criminal defendant. When "an otherwise acceptable construction of a statute would raise serious constitutional problems," courts "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).

Lenity and constitutional avoidance operate symbiotically when interpreting an ambiguous criminal statute. See *United States v. Davis*, 139 S. Ct. 2319, 2333 (2019) (describing the doctrines as "traditionally sympathetic" to one another). Like lenity, constitutional avoidance resolves ambiguity against the government to avoid violating a defendant's due-process rights and the separation of powers. See *ibid.* ("Applying constitutional avoidance to narrow a criminal statute, as this Court has historically done, accords with the rule of lenity.").

No similar constitutional concerns necessitate the application of *Stinson* deference, which lacks any constitutional underpinning. See *Nasir*, 2021 WL 5173485, at *11 (Bibas, J.) ("There is no compelling reason to defer to a Guidelines comment that is harsher than the text."); *Havis*, 907 F.3d at 451 (Thapar, J.) ("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 [the drafter's] intent"; though, the presumption is "always rebuttable." *Kisor*, 139 S. Ct. at 2412. In the criminal context, this presumption must give way to a strict reading of the statute. *Wiltberger*, 18 U.S. at 95. Prioritizing deference over lenity offends due process and 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 an oath to uphold the Constitution"). "Whatever the virtues" of agency deference in civil

cases, "in criminal justice those virtues cannot outweigh life and liberty. Efficiency and expertise do not trump justice." *Nasir*, 2021 WL 5173485, at *11 (Bibas, J.).

When criminal penalties are ambiguous, "doubts are resolved in favor of the defendant." *Bass*, 404 U.S. at 347. Lenity leaves no room for deference.

D. Lower Courts Disagree over Lenity's Application in *Stinson* Cases

The circuit split has two dimensions: (1) whether *Kisor*'s methodology applies in *Stinson* cases and (2) whether lenity applies before deference in that analysis. This misunderstanding affects all *Stinson* cases—not just those construing the Career Offender Guideline. See, *e.g.*, *United States v. Riccardi*, 989 F.3d 476, 485, 488 (6th Cir. 2021) (rejecting the government's "attempts to distinguish" career-offender cases); *United States v. Lovato*, 950 F.3d 1337 (10th Cir. 2020) (rejecting *Kisor*-based arguments to Crime-of-Violence Guideline); *United States v. Cruz-Flores*, 799 F. App'x 245 (5th Cir. 2020) (rejecting *Kisor*-based arguments to Unlawful-Entry Guideline); *Faison*, 2020 WL 815699 (refusing to defer to commentary to the Firearms-Transactions Guideline).

The Sixth Circuit's recent decision in *Riccardi* illustrates the lower courts' disagreement. The court refused to defer to § 2B1.1's commentary on gift-card theft because "*Kisor*'s clarification of [*Auer*'s] plain-error test applies just as much to *Stinson* (and the Commission's guidelines) as it does to *Auer* (and an agency's regulations)." 989 F.3d at 485. But Judge Nalbandian wrote separately to opine that *Stinson* is "its own free-standing directive," under which courts should still defer to commentary "as long as the interpretation

does not violate the Constitution or a federal statute and is not plainly erroneous or inconsistent with the provision's text." *Id.* at 491 & n.4. He disputed that *Kisor* was "a command … to apply such deference in [*Stinson*] cases." *Ibid.* In Judge Nalbandian's view, the old *Stinson* standard should prevail, unaltered by *Kisor*'s clarifications, until this Court "expand[s] its own precedent." *Id.* at 492.

At least six Third Circuit judges disagree with Judge Nalbandian. Awakened by *Kisor* from their "slumber of reflexive deference," those judges agreed that, at step 1 of the court's analysis, the rule of lenity "displaces" deference to the Commission's commentary. *Nasir*, 2021 WL 5173485, at *11 (Bibas, J.).

Judge Thapar expressed a similar view in his *Havis* concurrence. He explained that deference has no place in construing sentencing commentary because lenity should apply when the commentary would render a sentence harsher and, even when not, deference would still "deprive the judiciary of its ability to check the Commission's exercise of power." *Havis*, 907 F.3d at 450-51 (Thapar, J.).

And the panel in *United States v. Winstead* opined that, although it was unnecessary to apply lenity because Guideline § 4B1.2 is unambiguous, "it 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." 890 F.3d 1082, 1092 n.14 (D.C. Cir. 2018) (Silberman, Garland, Edwards, JJ.).

Other courts prioritize lenity over deference in other *Auer* cases but refuse to revisit *Stinson* precedent that conflicts with *Kisor*. The Seventh

Circuit, for example, "consider[s] rule of lenity arguments when a defendant argues that a particular sentencing guideline is ambiguous." *United States v. McClain*, 23 F. App'x 544, 548 (7th Cir. 2001) (collecting cases). But that court has refused to revisit its decision to defer to Application Note 1, even though it deferred based on the Guideline's *silence* about "whether inchoate offenses are included or excluded." See *United States v. Adams*, 934 F.3d 720, 729 (7th Cir. 2019) (citation omitted).

The First Circuit has also expressly prioritized lenity over deference in *Auer* cases. *De Lima*, 867 F.3d at 265. Yet, the court still applied its pre-*Kisor* precedent over the concerns of Judges Torruella and Thompson that reflexive *Stinson* deference carries "troubling implications for due process, checks and balances, and the rule of law." *United States v. Lewis*, 963 F.3d 16, 27-28 (1st Cir. 2020) (Torruella & Thompson, JJ., concurring).

There's a similar story in the Eighth Circuit, which has held that "lenity applies when an ambiguous section of the Sentencing Guidelines may be given either of two plausible readings." *United States v. Rodriguez-Arreola*, 313 F.3d 1064, 1067 (8th Cir. 2002). But the court has denied at least five post-*Kisor* petitions to reconsider that precedent *en banc*,[3] despite recognizing that *Kisor* was a "major development since 1995" when the circuit established its *Stinson* precedent, *United States v. Broadway*, 815 Fed. App'x 95, 96 n.2 (8th Cir. 2020).

Likewise, the Fifth Circuit has held that lenity precludes *Auer* deference in criminal cases. *United*

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[3] See Reply Br. n.1, *Broadway v. United States*, Pet. No. 20-836 (collecting cases).

States v. Moss, 872 F.3d 304, 308, 314 (5th Cir. 2017); see also *United States v. Cantu*, 423 F. Supp. 3d 345, 352 (S.D. Tex. 2019) (applying lenity over Guideline § 1B1.13 cmt. n.1(D)). Yet, the court recently acknowledged the circuit split on *Stinson* deference, reasoning that it "would be inclined to agree with the Third Circuit" in *Nasir* if "not constrained by circuit precedent" and the specific facts of the defendant's case. *United States v. Goodin*, 835 Fed. App'x 771, 782 n.1 (5th Cir. 2021).

On the other side of the methodological dispute sit the Second, Fourth, Ninth, Tenth, and Eleventh Circuits.

The Second Circuit panel below explicitly rejected Mr. Wynn's arguments that *Kisor* undermined the Second Circuit's uncritical rationale in *United States v. Jackson*, 60 F.3d 128, 133 (2d Cir. 1995). App. A at 4.

The Fourth Circuit prioritizes deference over lenity in other contexts. See *Yi v. Fed. Bureau of Prisons*, 412 F.3d 526, 535 (4th Cir. 2005) ("[D]eference trumps lenity when courts are called upon to resolve disputes about ambiguous statutory language.") (citation omitted). But that court "has not yet addressed" whether to defer to Application Note 1. See *Smith v. United States*, 2020 WL 4211284, at n.3 (S.D. W.Va. June 26, 2020) (collecting district-court cases refusing deference).

For its part, the Ninth Circuit has said it "would follow the Sixth and D.C. Circuits' lead" if "free to do so." *United States v. Crum*, 934 F.3d 963, 966 (9th Cir. 2019). Although, that circuit's current approach of searching beyond the Guidelines' text to add crimes to the Career Offender Guideline is antithetical to lenity. See *ibid.*

The Tenth Circuit still adheres to pre-*Kisor* deference when commentary "can be reconciled with the language of the guideline." *United States v. Martinez*, 602 F.3d 1166, 1174 (10th Cir. 2010) (cited by *Lovato*, 950 F.3d at 1347). As for the priority of lenity, the circuit is decidedly undecided. Cf. *Aposhian v. Wilkinson*, 989 F.3d 890 (10th Cir. 2021) (en banc) (vacating as improvidently granted an *en banc* rehearing to consider the lenity/deference issue), cert. pending sub nom., *Aposhian v. Garland*, No. 21-159 (filed Aug. 2, 2021); but see *id.* at 899 (Tymkovich, C.J., dissenting, with Hartz, Holmes, Eid, and Carson, JJ.) ("I am admittedly lost as to why *Chevron* gets to cut in front of the rule of lenity in the statutory interpretation line.").

And the Eleventh Circuit has "cast doubt" on whether the rule of lenity applies to the interpretative commentary to the Guidelines. *Cingari*, 952 F.3d at 1310-11.

Given the methodological nature of the lower courts' disagreements,[4] this Court's intervention is necessary to clarify that lenity is a traditional tool of interpretation that applies before *Stinson* deference.

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[4] Whenever the Commission eventually regains a quorum, it still cannot resolve this *methodological* dispute by amending a particular Guideline. Even after how long it takes to nominate and confirm Commissioners (there are currently six vacancies and no nominations pending), an amendment cycle and congressional review takes about a year. Waiting in vain for the Commission to solve a problem that this Court created will add decades of unconstitutional prison terms to thousands of defendants.

Only this Court can resolve the issue because this Court's own statements caused the confusion. In dictum, the Court once said 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 both settings." *Whitman*, 574 U.S. 1003 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 granted a petition that raised the issue of whether lenity takes priority over deference but then disposed of the case on other grounds. See *Esquivel-Quintana*, 137 S. Ct. at 1572; *Barber v. Thomas*, 560 U.S. 474, 488 (2010); see also *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 lenity's application because the challenged regulation exceeded the agency's authority).

This Court should grant Mr. Wynn's petition and clarify the proper methodology for all *Stinson* cases. Denying yet another petition on this issue will further signal to the lower courts that they can continue to disregard *Kisor*'s edicts.

II. THIS COURT SHOULD GRANT THE PETITION TO NARROW OR OVERRULE *STINSON*

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

As Judge Thapar explained in his *Havis* concurrence, deference to the Commission's commentary "both transfer[s] the judiciary's power to say what the law is to the Commission and deprive[s] the judiciary of its ability to check the Commission's exercise of power." *Havis*, 907 F.3d at 450-51 (Thapar, J.). *Stinson* also allows the Commission to interpret its own Guidelines. But "just as a pitcher cannot call his own balls and strikes, an agency cannot trespass upon the court's province to 'say what the law is.'" *Id.* at 450 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

A. Interpretive Deference Is Unconstitutional

1. *Stinson* Deference Violates Judicial Independence and the Judicial Office

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 insisted that, although they exercised the judicial power in the name of the monarch, the power rested solely in the judges. *Prohibition del Roy*, 12 Co. Rep. 63, 65 (1608).

During the revolt against tyranny, the American Declaration of Independence objected to judges

"dependent on [King George III's] will alone." The Declaration of Independence, ¶ 3. The Founders then 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). Dividing governmental power preserves liberty, in part, because each branch jealously checks the other branches' attempts to accumulate power at the expense of the constitutional balance.

No branch is more vital to protecting liberty from factious politics than the judiciary. As our constitutional backstop, the independent judiciary ensures that the political branches cannot diminish constitutional liberties. Article III guards the judiciary's independence by adopting the common-law tradition of an independent judicial office, secured by life tenure and undiminished salary. U.S. CONST., ART. III, § 1. To hold the judicial office, an Article III judge swears an oath to the Constitution and is duty-bound to exercise his or her office independently. See Law and Judicial Duty 507-12.

The judicial office includes a duty of independent judgment. See James Iredell, To the Public, *N.C. Gazette* (Aug. 17, 1786) (describing the duty of judges as "[t]he duty of the power"). Through the independent judicial office, the Founders ensured 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) ("[T]he 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."). The opinions of the founding era's finest jurists recognize this obligation of independence. See, *e.g.*, *Georgia v. Brailsford*, 2 U.S. (2 Dall.) 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."); *United States 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 that it seldom appears in legal argument; the mere suggestion that a judge might breach his or her duty of independent judgment is scandalous. But that is exactly what deference regimes like *Stinson* require: judicial dependence on a non-judicial entity's interpretation of the law.[5]

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

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[5] 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. See *Havis*, 907 F.3d at 451 (Thapar, J.).

in judgment) (deference requires courts "to 'decide' that the text means what the agency says"). Deference diminishes the judicial office and, with it, the structural safeguards the Framers erected as a bulwark against tyranny. Cf. *Miller v. Johnson*, 515 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 that 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).

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

Deference to Commission commentary also jeopardizes the judicial impartiality that due process requires. Cf. *Marshall v. Jerrico, Inc.*, 446 U.S. 238,

242 (1980); *Com. Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 149 (1968) (explaining that judicial bodies "not only must be unbiased but also must avoid even the appearance of bias."); *Masterpiece Cake Shop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1734 (2018) (Kagan, J., concurring) (agreeing the Constitution forbids adjudicatory proceedings that are "infected by … bias").

Judicial bias need not be personal 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. *Stinson* institutionalizes bias by requiring courts to "defer" to the government's legal interpretation in violation of a defendant's right to due process of law. 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 as a matter of course to the judgment of one of the litigants before them: the federal government. The government litigant wins merely by showing that its preferred interpretation of the commentary "is not plainly erroneous or inconsistent with" the Guidelines. *Stinson*, 508 U.S. at 47; see also *Martinez*, 602 F.3d at 1173 (deferring when commentary "can be reconciled with the language of [the] guideline"). A judge cannot simply find the defendant's reading more plausible or think the government's reading is wrong—the government must be *plainly* wrong.

Most judges recognize that personal bias requires recusal. It is equally inappropriate for a judge to decide a case based on a deference regime that

institutionalizes bias by requiring judges to favor the legal interpretation of a government litigant. 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 weigh the scales of justice equally between contending parties").

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

B. Deference to Commission Commentary Is Uniquely Unlawful

Keeping in mind that reflexive agency deference is never appropriate and is particularly injurious in criminal cases, there is yet another reason that the Second Circuit's deference to Application Note 1 warrants this Court's review: Commission commentary cannot expand the Guidelines.

The Commission is constitutional *only* because (1) Congress reviews amendments to the Guidelines before they take effect and (2) the Commission must promulgate its amendments through notice-and-comment rulemaking. *Mistretta v. United States*, 488 U.S. 361, 393-94 (1989).

Convenience or expediency cannot justify the commentary's expansion of the Guidelines. Under *Mistretta*, any text the Commission issues without notice-and-comment rulemaking or congressional review cannot bind the Judiciary without offending the separation of powers. The lower courts' disregard of the strict limitations outlined in *Mistretta* undermines the Commission's "unusual" special place in our constitutional system and creates something untenable. See *ibid.*

It's time for this Court to reconsider *Stinson*, reject the "deference" that compromises the judiciary, and allow conscientious judges to uphold their constitutional oath. Deference has no role in criminal sentencing, where the government can deprive a defendant of liberty only if all three branches agree separately and independently that the sanction is justified.

CONCLUSION

This Court should grant Mr. Wynn's petition and rule that *Stinson* deference cannot increase criminal sentences, or else abandon such deference altogether.

Respectfully submitted,

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