No. 21-4067

IN THE
United States Court of Appeals
for the Fourth Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

LENAIR MOSES, A/K/A BONES,
Defendant-Appellant.

On Appeal from the United States District Court
for the Eastern District of North Carolina, No. 5:19-cr-00339-FL
Before the Honorable Louise W. Flanagan

BRIEF OF THE NEW CIVIL LIBERTIES ALLIANCE AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT'S PETITION FOR REHEARING EN BANC

NEW CIVIL LIBERTIES ALLIANCE

JOHN J. VECCHIONE
1225 19th St. NW, Suite 450
Washington, DC 20036
(202) 869-5210
John.Vecchione@NCLA.legal
Counsel for amicus curiae
The New Civil Liberties Alliance

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 issues inherent in federal courts' deference to the United States Sentencing Commission, as discussed more fully in the attached motion for leave to file.

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

NCLA is a nonpartisan, nonprofit civil-rights organization devoted to defending constitutional freedoms from administrative power. As further elaborated in the Motion for Leave to File, NCLA challenges constitutional defects in the modern administrative state through original litigation and *amicus curiae* briefs, because nothing else denies more rights to more Americans.

NCLA is particularly disturbed by the widespread practice of extending judicial "deference" to the United States Sentencing Commission's commentary on the Sentencing Guidelines. This deference regime raises grave constitutional concerns that the Supreme Court never considered in *Stinson v. U.S.*, 508 U.S. 36 (1993)—and has not discussed since. As set out below, several constitutional problems arise when Article III judges abandon their duty of independent judgment and "defer" to others' views about how to interpret criminal laws.

SUMMARY OF ARGUMENT

This Court's correct decision in *U.S. v. Campbell*, 22 F.4th 438 (4th Cir. 2022), conflicts directly with the panel's decision in this case, as Judge King acknowledged in dissent. Creating an intra-circuit split, the panel also split from the Third and Sixth Circuits, which have correctly recognized that *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), necessarily limited deference to genuinely ambiguous rules and

regulations in *all* applications of *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945).

The panel's decision that this Circuit should defer reflexively to the commentary of the Sentencing Commission—even absent ambiguity—endangers individual liberty and distorts the independent judicial office enshrined in Article III of the Constitution.

ARGUMENT

I. *KISOR* MODIFIED ALL FORMS OF *SEMINOLE ROCK* DEFERENCE

In *Stinson*, the Supreme Court extended *Seminole Rock* deference to the Sentencing Commission's commentary interpreting the Guidelines and requiring courts to defer unless the commentary "run[s] afoul of the Constitution or a federal statute" or is "plainly erroneous or inconsistent" with the Guidelines. 508 U.S. 36, 47 (quoting *Seminole Rock*, 325 U.S. at 414). Decisions like *Stinson* "[we]re legion" for 60 years, as courts applied *Seminole Rock* deference (eventually known as *Auer* deference) to various circumstances often without considering whether the challenged regulation was ambiguous. *See Kisor*, 139 S. Ct. at 2414 & n.3.

Every Justice in *Kisor* agreed that the Court needed 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. at 2408, 2415; *id.* at 2424 (Roberts, C.J., concurring); *id.* at 2448 (Gorsuch, J., concurring in judgment); *id.* at 2448-49 (Kavanaugh, J.,

concurring in judgment). The Court "cabined *Auer*'s scope in varied and critical ways" to "maintain[] a strong judicial role in interpreting rules." *Id.* at 2418. Following *Kisor*, courts may defer to an agency's interpretation of its own regulation *only* by (1) exhausting interpretive toolkits and concluding the text is "genuinely ambiguous"; (2) determining that the agency interpretation is "reasonable"; and (3) conducting an "independent inquiry" confirming that "the character and context of the agency interpretation entitles it to controlling weight." *Id.* at 2415-16.

Kisor's refinement to the *Seminole Rock/Auer* framework requires courts to "turn to the 'traditional tools' of statutory construction to determine if [a Guideline] is 'genuinely ambiguous'" *before* deferring to Commission commentary. *Campbell*, 22 F.4th at 445; *see also U.S. v. Nasir*, 17 F.4th 459, 469-72 (3d Cir. 2021) (en banc); *U.S. v. Riccardi*, 989 F.3d 476, 484-86 (6th Cir. 2021).

The panel ruled that *Kisor*'s refinement of *Seminole Rock/Auer* deference is irrelevant because *Stinson* adopted *Seminole Rock* deference by analogy only and its imperfect fit to the Commission's unique position in our constitutional system means that courts must apply *Stinson* reflexively, despite *Kisor*. A17. But the Commission's "unusual … structure and authority," *Mistretta v. U.S.*, 488 U.S. 361, 412 (1989), make deference *less* appropriate—not more so. As *Campbell* recognizes, the concerns that *Kisor* identified "are even more acute in the context of the Sentencing Guidelines, where individual liberty is at stake." 22 F.4th at 446.

The Commission and its Guidelines are constitutional only because: (1) the Commission promulgates them and any amendments thereto through notice-and-comment rulemaking; and (2) Congress reviews every Guideline before it takes effect. *Mistretta*, 488 U.S. at 393-94. By contrast, the Sentencing Reform Act permits Commission commentary by implication only, and it is not subject to congressional review or notice and comment. *See Stinson*, 508 U.S. at 41. The majority downplayed these legal distinctions based on Commission assurances that its "practice" is to "generally" put commentary through "the notice-and-comment and congressional-submission procedure." A15. But neither the Commission's intentions nor its procedures elevate commentary to Guideline status as a matter of law. This Court recognized as much in *Campbell*, warning that "the Commission acts unilaterally" when it issues commentary, "without that continuing congressional role so vital to the Sentencing Guidelines' constitutionality." 22 F.4th at 446. "Thus, a holding" like that of the panel here "would 'allow circumvention of the checks Congress put on the Sentencing Commission[.]'" *Id.* (citation omitted).

The panel based its decision on its own unsupported policy ideas about implementing the Guidelines' purpose and determining that it is prudent for courts to allow the Commission's commentary to increase the criminal sentences established by unambiguous, congressionally-approved Guidelines because a contrary ruling "would negate much of the Commission's efforts in providing commentary" and would leave

"district judges unable to consult it[.]". A19. These policy rationales undermine the judiciary's constitutional role in criminal sentencing and will inevitably deprive countless criminal defendants of their liberty.

II. INCREASING CRIMINAL SENTENCES BASED ON DEFERENCE IS UNCONSTITUTIONAL

The panel's ruling also warrants reconsideration because it violates the Constitution. *Stinson* does not apply when deference to commentary would "run afoul of the Constitution." 508 U.S. at 47. Increasing unambiguous criminal sentences based on deference is unconstitutional. The rule of lenity, principles of due process, and the independence of the judicial office all require courts to interpret the Guidelines for themselves, without deference to the Commission's interpretation.

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

Unlike in *Stinson*, where the commentary at issue favored a more lenient sentence, 508 U.S. at 47-48, deference here resulted in a stricter sentence, so "alarm bells should be going off." *U.S. v. Havis*, 907 F.3d 439, 450 (6th Cir. 2018) (Thapar, J., concurring). "[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 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*, 17 F.4th at 473 (Bibas, J., concurring).

The rule of lenity dictates that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Skilling v. U.S.*, 561 U.S. 358, 410 (2010). This concept is not new; few interpretive tools boast lenity's pedigree. *See U.S. v. Wiltberger*, 18 U.S. 76, 95 (1820); *see also Bray v. Atalanta*, 4 F. Cas. 37, 38 (D.S.C. 1794) ("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. U.S.*, 447 U.S. 381, 387 (1980). It requires courts to resolve ambiguous Guidelines—which "exert a law-like gravitational pull on sentences"—in a defendant's favor. *Nasir*, 17 F.4th at 474.

Any increase in criminal sentencing 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." *U.S. v. Faison*, 2020 WL 815699, *1 (D. Md. Feb, 18, 2020). "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.").

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*, 17 F.4th at 473 (Bibas, J.). By construing ambiguities in the defendant's favor, lenity precludes criminal punishment without a fair warning through clear statutory language. *See McBoyle v. U.S.*, 283 U.S. 25, 27 (1931) (due process requires the law to draw as clear a line as possible). Lenity also promotes 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. *U.S. 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. U.S.*, 471 U.S. 419, 427 (1985). Finally, and "perhaps most importantly," "'lenity expresses our instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should.'" *Nasir*, 17 F.4th at 473 (Bibas, J.) (citation omitted).

B. Deference to Commentary of Unambiguous Guidelines Violates Judicial Independence and Denies Due Process

1. Deference Undermines Article III Judicial Independence

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).

The American Declaration of Independence objected to judges "dependent on [King George III's] will alone." The Declaration of Independence para. 3 (U.S. 1776). 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).

No branch is more vital to protecting liberty than the judiciary. 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 office independently. *See* Hamburger, *supra* at 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); 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); *The Julia*, 14 F. Cas. 27, 33 (C.C.D. Mass. 1813) (Story, J.); *U.S. v. Burr*, 25 F. Cas. 2, 15 (C.C.D. Va. 1807) (Marshall, J.).

The principle of judicial independence is so axiomatic that it seldom appears in legal argument; the mere suggestion that a judge might breach the duty of independent judgment is scandalous. But that is exactly what the panel's decision requires: judicial dependence on a non-judicial entity's interpretation of the law.[1]

[1] Judges serving on the Commission are not acting as judges but as part-time Commissioners. *See Havis*, 907 F.3d at 451 (Thapar, J.).

The panel's decision would require 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"). The panel's rule diminishes the judicial office and, with it, a key structural safeguard the Framers erected against tyranny. *Cf. Miller v. Johnson*, 515 U.S. 900, 922-23 (1995) (holding that deferring to an agency's statutory interpretation impermissibly "surrender[s] to the Executive Branch [the Court's] role in enforcing the constitutional limits [at issue]").

Rehearing is necessary because the panel's decision "w[ill] effectively empower the Commission unilaterally to set—not just interpret—the rules for the 'application of the ultimate governmental power, short of capital punishment,' without congressional involvement." *Campbell*, 22 F.4th at 446 (citation omitted). Especially when "a sentence enhancement potentially translates to additional years or decades in federal prison, we cannot forget that '[t]he structural principles secured by the separation of powers protect the individual as well.'" *Id.* (quoting *Bond v. U.S.*, 564 U.S. 211, 222 (2011)). "In such circumstances, 'a court has no business deferring to any other reading, no matter how much the [Government]"—or the panel—"insists it would make more sense." *Id.* (quoting *Kisor*, 139 S. Ct. at 2415).

2. Deference Violates Due Process by Institutionalizing Judicial Bias

Reflexive deference jeopardizes judicial impartiality. *Com. Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 150 (1968) (judicial bodies "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) (the Constitution forbids proceedings "infected by … bias").

Judicial bias need not be personal bias to violate due process—it can also be institutional. 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. Recusal is equally appropriate when deference regimes institutionalize bias by requiring 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 weigh the scales of justice equally between contending parties").

The panel's decision institutionalizes bias by requiring courts to "defer" to the government's legal interpretation in violation of a defendant's right to due process.

[2] *Cf. Am. Inst. for Int'l Steel, Inc. v. U.S.*, 376 F. Supp. 3d 1335, 1345 (Ct. Int'l Trade 2019) (Katzmann, J., *dubitante*) (collecting *dubitante* opinions).

Cf. Philip Hamburger, Chevron *Bias*, 84 Geo. Wash. L. Rev. 1187 (2016). Rather than exercise their own judgment about what the law is, the panel's decision requires judges to defer to the judgment of the government litigant, so long as the commentary "is not plainly erroneous or inconsistent with" the Guidelines. *Stinson*, 508 U.S. at 47 (cleaned up). 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.

No rationale can defend a practice that thus weights the scales in favor of a *government* litigant—the most powerful of parties—and commands systematic bias in favor of the government's preferred interpretations of the Guidelines. Government-litigant bias doctrines, like *Stinson*, deny due process by favoring the government's litigating position. *Tumey v. Ohio*, 273 U.S. 510, 532 (1927).

CONCLUSION

This Court should grant Moses's petition for en banc review and adopt the position of the panel in *Campbell*.

February 9, 2022

Respectfully,

/s/ John J. Vecchione
JOHN J. VECCHIONE
NEW CIVIL LIBERTIES ALLIANCE
1225 19th St. NW, Suite 450
Washington, DC 20036

(202) 869-5210
John.Vecchione@NCLA.legal
Counsel for amicus curiae
The New Civil Liberties Alliance

CERTIFICATE OF COMPLIANCE

I certify that this *Amicus Curiae* brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(iii) because this brief contains 2,595 words, excluding those portions of the brief exempted by Rule 32(f)(a)(7)(B)(iii).

This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared using a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.

February 9, 2022

Respectfully,

/s/ John J. Vecchione
JOHN J. VECCHIONE

CERTIFICATE OF SERVICE

I hereby certify that on February 9, 2022, I electronically filed this *Amicus Curiae* brief with the Clerk of this Court using the CM/ECF system, which will send notice of such filing to all counsel of record.

February 9, 2022

Respectfully,

/s/ John J. Vecchione
JOHN J. VECCHIONE