No. 22-163

IN THE

Supreme Court of the United States

LENAIR MOSES,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Fourth Circuit

AMICUS CURIAE BRIEF OF THE NEW CIVIL LIBERTIES ALLIANCE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

In *Stinson v. United States*, 508 U.S. 36 (1993), this Court held that *Seminole Rock* deference, now generally known as *Auer* deference, applies to interpretive or explanatory commentary in the U.S. Sentencing Guidelines Manual. *Id.* at 38. In *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), this Court clarified the limits on such deference, so that courts may extend *Auer* or *Seminole Rock* deference only where the law remains "genuinely ambiguous" after the court has "exhausted all the traditional tools of construction." *Id.* at 2415 (quotation marks omitted). The circuits are deeply divided over whether *Kisor*'s holding applies to commentary to the U.S. Sentencing Guidelines.

The questions presented are:

1. Whether the limits on agency deference announced in *Kisor* constrain the deference that courts may accord to the commentary to the Sentencing Guidelines.

2. Whether deference to the Guidelines commentary is impermissible in any form.

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INTEREST OF AMICUS 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 forms of advocacy.

The "civil liberties" of the organization's name include rights at least as old as the U.S. Constitution itself, such as due process of law and the right to be tried in front of impartial judges who provide their independent judgments on the meaning of the law. Yet these selfsame civil rights are also very contemporary—and in dire need of renewed vindication—precisely because executive agencies and even the courts have neglected them for so long.

NCLA aims to defend civil liberties—primarily by asserting constitutional constraints on the modern administrative state. Although Americans still enjoy a shell of their Republic, a very different sort of government has developed within it—a type, in fact, that the Constitution was designed to prevent. This unconstitutional state within the Constitution's United States is the focus of NCLA's concern.

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[1] Pursuant to Supreme Court Rule 37.6, both parties consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no person or entity, other than NCLA and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief.

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

SUMMARY OF ARGUMENT

When this Court decided *Kisor v. Wilkie*, all nine Justices agreed on the need to "reinforce" and "further develop" the limitations on the deference that courts owe to an administrative 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 courts may defer to an agency's interpretation *only* if a regulation proves "genuinely ambiguous" after a court has "exhaust[ed] all the 'traditional tools of construction.'" *Id.* at 2415.

Prior to *Kisor*, courts had been deferring "reflexive[ly]" to agencies' regulatory interpretations, without first conducting their own exhaustive textual analysis like the Constitution requires. *See ibid.* As the Court acknowledged in *Kisor*, this reflexive deference was likely the result of the "mixed messages" that the Court has sent in cases where it

has "applied *Auer* deference without significant analysis of the underlying regulation[,]" or where the Court has "given *Auer* deference without careful attention to the nature and context of the interpretation." *Id.* at 2414.

Of all the mixed messages this Court has sent about the appropriate role of agency deference, the 1993 decision in *Stinson* has been among the most damaging given its application during criminal sentencing. 508 U.S. at 38. In *Stinson*, the Court ruled that courts must 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.* *Stinson* held that such deference was appropriate even if the interpretation "may not be compelled by the guideline text." *Id.* at 47.

Following *Stinson*, the courts of appeal began to give "nearly dispositive weight" to the Commission's commentary over "the Guidelines' plain text." *United States v. Nasir*, 982 F.3d 144, 177 (3d Cir. 2020) (en banc) (Bibas, J., concurring in part), *cert. granted and remanded*, 142 S. Ct. 56 (2021) (mem.); *see also United States v. Mendoza-Figueroa*, 65 F.3d 691, 692-63 (8th Cir. 1995) (en banc) ("Every court has agreed that the Commission's extensive statutory authority to fashion appropriate sentencing guidelines includes the discretion to include drug conspiracy offenses in the category of offenses that warrant increased prison terms for career offenders.").

It is no coincidence that several courts of appeals read *Stinson* as requiring reflexive

deference—they have relied on the explicit language in *Stinson*. Take the Eleventh Circuit for example. To this day, the Eleventh Circuit 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) (quoting *Stinson*, 508 U.S. at 38), *cert. denied*, 141 S. Ct. 835 (2020). Commission commentary loses its "authoritative … status" in the Eleventh Circuit *only* "if it is 'inconsistent with, or a plainly erroneous reading of, that guideline.'" *Ibid.* (quoting *Stinson*, 508 U.S. at 38). With no inquiry at all concerning a Guideline's ambiguity, *Stinson* deference is reflexive by its very terms.

To their credit, the Third, Sixth, and D.C. Circuits have recognized that a strict reading of *Stinson* is inconsistent with this Court's modern administrative-law jurisprudence, the Sentencing Commission's legal authority, and the Constitution. The majority of the other circuits, however, adhere to the outdated language in *Stinson* and refuse to reconsider their circuit precedent in light of *Kisor*. *But see United States v. Vargas*, 45 F.4th 1083 (5th Cir. 2022) (ordering rehearing en banc in a *Stinson* deference case). Further percolation will not resolve a dispute that stems from this Court's own mixed signals.

Moreover, this Court's guidance is needed to resolve the "broader problem" that arises once the other circuits awake "from [their] slumber of reflexive deference." *United States v. Nasir*, 17 F.4th 459, 472 (3d Cir. 2021) (en banc) (Bibas, J., concurring). *Kisor* made

clear that courts must exhaust the "traditional tools of construction" before deferring to an agency. 139 S. Ct. at 2415. The rule of 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. 76, 95 (1820). The courts of appeals, however, are starkly divided on whether lenity applies before deference, or whether it even applies at all. *Compare Nasir*, 17 F.4th at 474 (Bibas, J., concurring) ("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).

Again, this circuit split is a result of the Court's lack of clarity on the issue. *See, e.g.*, *Whitman v. United States*, 574 U.S. 1003 (2014) (Scalia, J., joined by Thomas, J., statement respecting denial of certiorari) (collecting cases to demonstrate 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. Moses' petition presents the Court with a critical opportunity to clarify once and for all that courts do not owe deference to Commission commentary that expands the Sentencing Guidelines and/or makes sentences harsher. Each passing Term, district courts in circuits across the country systematically violate the due-process rights of criminal defendants by applying *Stinson* deference to increase the Sentencing Guideline range approved by Congress. Even absent ambiguity, the application of reflexive deference in criminal cases, in particular, deprives criminal

defendants of due process, gravely endangers the individual liberty of American citizens, and distorts the independent judicial office enshrined in Article III of the Constitution. With the liberty of so many at stake, there is no excuse to wait.

ARGUMENT

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

In *Stinson*, the Supreme Court extended *Seminole Rock* deference to the U.S. Sentencing Commission's commentary interpreting the U.S. Sentencing Guidelines, thus 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. at 47 (quoting *Bowles v. Seminole Rock*, 325 U.S. 410, 414 (1945)). 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. *Id.* 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 their interpretive toolkit and concluding that 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 of 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. *United States v. Campbell*, 22 F.4th 438, 445 (4th Cir. 2022); *see also Nasir*, 17 F.4th at 469-72; *United States v. Riccardi*, 989 F.3d 476, 484-86 (6th Cir. 2021).

In the decision below, the divided Fourth Circuit 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 scheme means that courts must apply *Stinson* reflexively, despite *Kisor*. Pet. App. 18a. But the Commission's "unusual … structure and authority," *Mistretta v. United States*, 488 U.S. 361, 412 (1989), render deference *less* appropriate—not more so. Indeed, a separate Fourth Circuit panel recognized as much in its unanimous decision in *Campbell*—issued 12 days before the *Moses* panel majority filed a directly conflicting ruling—which explicitly concluded that the framework articulated in *Kisor* applies to the Commission's commentary to the Sentencing Guidelines. 22 F.4th at 444-45 (stating that *Kisor* "renders [the

Court's] conclusion indisputable"); *see also* Pet. App. 25a (King, J., dissenting in part and concurring in the judgment) ("I am entirely persuaded of the correctness of the analysis set forth by Judge Motz in the *Campbell* decision"). And, as the *Campbell* panel recognized, 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. Some courts that have declined to apply *Kisor* to the Guidelines commentary downplay these legal distinctions based on Commission assurances that its "practice" is to "generally" put commentary through "the notice-and-comment and congressional-submission procedure." Pet. App. 16a. But neither the Commission's intentions nor its procedures elevate commentary to Guidelines status as a matter of law. Rather, "the Commission acts unilaterally" when it issues commentary, "without that continuing congressional role so vital to the Sentencing Guidelines' constitutionality." *Campbell*, 22 F.4th at 446. Hence, holdings that increase the scope of the Guidelines "would [impermissibly] 'allow circumvention of the checks Congress put on the Sentencing Commission[.]'" *Id.* (citation omitted).

Continued reliance on *Stinson*'s requirement of mandatory deference to Guidelines commentary without consideration of *Kisor*'s refinements undermines the judiciary's crucial constitutional role in criminal sentencing. Not only that, but it will also inevitably deprive countless criminal defendants of their liberty and right to due process. "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).

II. INCREASING CRIMINAL SENTENCES BASED ON DEFERENCE IS UNCONSTITUTIONAL

It is plainly unconstitutional to require courts to increase unambiguous criminal sentences on the basis of deference to the Commission's commentary. *Stinson* does not—and cannot—apply when deference to commentary would "run afoul of the Constitution." *Stinson*, 508 U.S. at 47. 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.

Lower-court judges are openly divided about how *Kisor* limited *Stinson* and how rigorously judges must analyze the Guidelines' text before deferring to commentary. Such a disparity in how judges interpret text would be unacceptable for any federal rules that require uniformity, but it is singularly inexcusable in the case of criminal sentencing, when liberty is at stake. The very purpose of the Guidelines is to promote uniformity in sentencing. And the Constitution requires that judges uniformly interpret

any ambiguity in the Guidelines in the defendant's favor.

A. *Stinson*'s Particular Outcome Did Not Implicate the Rule of Lenity

In contrast to *Stinson*, where the commentary at issue favored a more lenient sentence, 508 U.S. at 47-48, deference to the Commission in this case required the court to impose a stricter sentence on Mr. Moses, so "alarm bells should be going off." *United States 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 Court in *Stinson*, however, had no occasion to consider what role lenity would play in its deference regime and, thus, did not grapple with the constitutional issues inherent when *Stinson* deference applies to *increase* a criminal penalty.

The rule of lenity dictates that any "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Skilling v. United States*, 561 U.S. 358, 410 (2010). This concept is not new. Rather, the rule of lenity is one of the original tools of statutory construction. *See Wiltberger*, 18 U.S. at 95; *see also Bray v. Atalanta*, 4 F. Cas. 37, 38 (D.S.C. 1794) (No. 1,819) ("a penal law [] must be construed

strictly"). Early fifteenth 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*[.]"). In simple terms, "[t]he rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them." *United States v. Santos*, 553 U.S. 507, 514 (2008).

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). In fact, lenity "first arose to mitigate draconian sentences." *Nasir*, 17 F.4th at 473 (Bibas, J., concurring) (citing Livingston Hall, *Strict or Liberal Construction of Penal Statutes*, 48 HARV. L. REV. 748, 749-51 (1935)).

Lenity applies with equal force to the Guidelines—which "exert a law-like gravitational pull on sentences"—requiring that courts resolve any ambiguities in a defendant's favor. *Nasir*, 17 F.4th at 474 (Bibas, J., concurring). Moreover, *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." *United States v. Faison*, 2020 WL 815699, *1 (D. Md. Feb, 18, 2020). Indeed, 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." *Ibid*. In any event, "the presumption of liberty remains crucial to guarding against overpunishment." *Nasir*, 17 F.4th at 474 (Bibas, J., concurring). For this reason, among others, courts must vigilantly attend to the rule of lenity and its animating principles. *Id.*; *see also Abramski*, 573 U.S. at 191 ("[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., concurring). 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 precludes criminal punishment when Congress did not provide a fair warning through clear statutory language. *See id. at* 27 (due process requires the law to draw as clear a line as possible). Lenity also preserves the separation of powers: the legislature criminalizes conduct and sets statutory penalties, the executive prosecutes crimes and can recommend a sentence, and the judiciary imposes sentences within the applicable statutory framework. *United States v. Bass*, 404 U.S. 336, 348 (1971). In this way, lenity "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," "'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., concurring) (citation omitted). Indeed, by promoting liberty, the rule of 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.).

B. Deference to Commentary of Unambiguous Guidelines Violates Judicial Independence and 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 with them. *Prohibition del Roy*, 12 Co. Rep. 63, 65 (1608).

During the uprising against tyranny, 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). The separation of governmental powers preserves liberty, in part, because each branch jealously checks the other branches' attempts to shift the constitutional balance of power.

No branch is more vital to protecting liberty than the judiciary. An independent judiciary serves as our constitutional backstop and ensures that the political branches cannot diminish constitutional protections. Article III adopted the common-law tradition of an independent judicial office, secured by life tenure and undiminished salary. U.S. Const., art. III, § 1. To hold this 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."). 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. (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) (No. 7,575) (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) (No. 14,692) (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 deference regimes like *Stinson* require: judicial dependence on a non-judicial entity's interpretation of the law.[2]

Faithful application of *Stinson* deference requires judges to abdicate the duty of their 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, a key structural safeguard that the Framers erected as aa bulwark against tyranny. *Cf. Miller v. Johnson*, 515 U.S. 900, 922-23 (1995) (holding that deferring to an

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[2] 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.).

agency's statutory interpretation impermissibly "surrender[s] to the Executive Branch [the Court's] role in enforcing the constitutional limits [at issue]"). This is especially true when "a sentence enhancement potentially translates to additional years or decades in federal prison," as "we cannot forget that '[t]he structural principles secured by the separation of powers protect the individual as well.'" *Campbell*, 22 F.4th at 446-47 (quoting *Bond v. United States*, 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] insists it would make more sense.'" *Id.* (quoting *Kisor*, 139 S. Ct. at 2415).

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 v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). 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* Deference Violates Due Process by Institutionalizing Judicial Bias

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

Judicial bias need not exist at a personal level to violate due process—it can also be institutional. In fact, institutionalized judicial bias is more pervasive, as it systematically infects the fairness of the legal system as a whole rather than just an individual party before a particular judge. *Stinson* deference 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 (cleaned up); *see also United States v. Martinez*, 602 F.3d 1166, 1174

(10th Cir. 2010) (deferring so long as the 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 position of one of the litigating parties: the government. *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").

Reliance on *Stinson* institutionalizes bias by continuing to "defer" to the government's legal interpretation in violation of a defendant's right to due process. *Cf.* Hamburger, Chevron *Bias*, *supra*. In short, rather than exercising their own judgment about the law, *Kisor* 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).

No rationale can defend a practice that thus weights the scales in favor of the most powerful of parties—a *government* litigant——and commands systematic bias in favor of the government's preferred interpretations of the Sentencing Guidelines.

Doctrines that call for government-litigant bias, such as *Stinson* deference, thus patently deny due process to criminal defendants by favoring the government prosecutor's position. *Tumey v. Ohio*, 273 U.S. 510, 532 (1927).

It is time for this Court to reconsider *Stinson*, reject the "deference" doctrine that continues to compromise the judiciary while depriving countless criminal defendants of their constitutional rights, and allow conscientious judges to uphold their constitutional oath. Deference has no role in criminal sentencing, where the government may deprive a defendant of liberty only if all three branches agree separately and independently that the sanction is justified.

CONCLUSION

For the foregoing reasons, we respectfully urge the Court to grant Mr. Moses's petition.

Respectfully,

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