No. 20-579

In The
Supreme Court of the United States

ZIMMIAN TABB,
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 the Due Process Institute, as *amici curiae*, will address the following questions necessary to resolving the circuit split raised in Mr. Tabb'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?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTIONAL PROVISIONS

STATUTE

RULE

SENTENCING GUIDELINES

OTHER AUTHORITIES

INTEREST OF *AMICI CURIAE*

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.[1]

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. Although Americans still enjoy the 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.

NCLA is particularly disturbed by the widespread practice of extending judicial "deference" to the commentary of the United States Sentencing Commission. *See Stinson v. United States*, 508 U.S. 36 (1993). This deference regime raises grave constitutional concerns that this Court has never considered or discussed. As set out below, several constitutional

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[1] Pursuant to Rule 37, both parties consented to the filing of this brief. No counsel for a party authored any part of this brief. No one other than the *amici curiae*, their members, or their counsel financed the preparation or submission of this brief.

problems arise when Article III judges abandon their duty of independent judgment and "defer" to someone else's views about how the criminal laws should be interpreted.

Due Process Institute is a bipartisan, non-profit, public-interest organization that works to honor, preserve, and restore principles of fairness in the criminal justice system. Formed in 2018, the Institute has participated as an *amicus curiae* before this Court in cases presenting important criminal justice issues, including *Timbs v. Indiana*, 139 S. Ct. 682 (2019); *Mitchell v. Wisconsin*, 139 S. Ct. 2525 (2019); and *United States v. Haymond*, 139 S. Ct. 2369 (2019). The issues raised in this brief are essential to protecting principles of due process and fundamental fairness in America's federal sentencing regime.

SUMMARY OF ARGUMENT

When this Court decided *Kisor v. Wilkie* two Terms ago, 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 could 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" the Court sent in cases that "applied *Auer* deference without significant analysis of the underlying regulation." *Id.* at 2414.

Of all the mixed messages this Court has sent about the appropriate role of agency deference, the 1993 decision in *Stinson v. United States* has been among the most damaging given its application during criminal sentencing. 508 U.S. 36, 38 (1993). 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*, 2020 WL 7041357, at *24 (3d Cir. Dec. 1, 2020) (en banc) (Bibas, J., concurring in part); *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*, No. 20-5937 (Nov. 9, 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. Seven other circuits, however, adhere to the outdated language in *Stinson* and refuse to reconsider their circuit precedent in light of *Kisor*. 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 seven circuits awake "from [their] slumber of reflexive deference." *Nasir*, 2020 WL 7041357, at *24 (Bibas, J.). *Kisor* made clear that courts must exhaust the "traditional tools of construction" before deferring to an angecy. 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. (1 Wheat.) 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*, 2020 WL 7041357, at *25 (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).

Again, this circuit split results from this 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. Tabb's petition, along with those pending in *Broadway v. United States*, No. 20-____ (filed Dec. 16, 2020); and *Lovato v. United States*, No. 20-6436 (Nov. 25, 2020), present this Court 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 seven circuits systematically violate the due-process rights of criminal defendants by applying *Stinson* deference to increase the Sentencing Guideline range approved by Congress. With the liberty of so many at stake, there is no excuse to wait.

DISCUSSION

I. AFTER *KISOR*, *STINSON* DEFERENCE CANNOT INCREASE CRIMINAL PENALTIES

After this Court decided *Kisor*, one might have expected the courts of appeal to take heed and apply its holding to other cases involving *Auer* deference. But Mr. Tabb's petition, along with those in *Broadway* and *Lovato*, show that widespread misapplication of that deference regime still persists and will continue to do so until this Court intervenes.

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* Did Not Involve the Rule of Lenity

The Court in *Stinson* had no occasion to consider what role lenity would play in its deference regime because the commentary at issue in that case militated in favor of a more lenient sentence for Stinson. *See* 508 U.S. at 47-48. The Court in *Stinson*, therefore, did not grapple with the constitutional issues inherent when *Stinson* deference applies to *increase* a criminal penalty. No subsequent decision of this Court has done so either. *Cf. Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1572 (2017) (declining to "resolve whether the rule of lenity or *Chevron* receives priority" because the statute at issue was unambiguous); *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*, however, deference to the Commission in this case required the court to impose a stricter sentence on Mr. Broadway, 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). "Penal laws pose the most severe threats to life and liberty, as the Government seeks to brand people as criminals and lock them away." *Nasir*, 2020 WL 7041357, at *25 (Bibas, J.). There is no greater liberty interest in life than to be free from a cage. *See Faison*, 2020 WL 815699, at *1 ("Liberty is the norm; every moment of incarceration should be justified."). For a defendant, "every day, month and year that was added to the ultimate sentence will matter. … [T]he difference between probation and fifteen days may determine whether the defendant is able to maintain his employment and support his family." *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.").

This is not a new concept. The rule of lenity is one of the original tools of statutory construction. *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"). 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). The rule also applies to guard against increases in punishment, not merely to determine whether the defendant's conduct is criminal in the first place. *Bifulco v. United States*, 447 U.S. 381, 387 (1980) ("[T]he Court has made it clear that [lenity] applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose."); *M. Kraus & Bros. v. United States*, 327 U.S. 614, 621-22 (1946) (plurality) (holding, one year after *Seminole Rock*, "to these provisions must be applied the same strict rule of construction that is applied to statutes defining criminal action"). In fact, lenity "first arose to mitigate draconian sentences." *Nasir*, 2020 WL 7041357, at *24 (Bibas, J.) (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." *Nasir*, 2020 WL 7041357, *25 (Bibas, J.) (citing *United States v. Booker*, 543 U.S. 220, 265 (2005) (Breyer, J., remedial majority opinion)).

B. Three Core Constitutional Principles Compel Lenity

Three "core values of the Republic" underlie the rule of lenity: (1) due process; (2) the separation of governmental powers; and (3) "our nation's strong preference for liberty." *Id.* at *24-25. 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 consequences when Congress did not provide 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). 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," *Nasir*, 2020 WL 7041357, at *28 (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*, 2020 WL 7041357, at *26 (Bibas, J.) (describing lenity as "a shield against excessive punishment and stigma"). By promoting liberty, lenity "fits with one of the core purposes of our Constitution, to 'secure the Blessings of Liberty' for all[.]" *Id.* at *25 (quoting U.S. Const. pmbl.).

In addition to securing these core values, the rule of lenity also serves a practical purpose. Lenity "places the weight of inertia upon the party that can best induce [law-makers] to speak more clearly[.]"

Santos, 553 U.S. at 514. *Stinson* deference undermines this incentive system and reverses the inertia in the rule-maker's favor.

Given the dispositive weight that seven circuits afford to Commission commentary, the commentary becomes almost more controlling than the text of the Guidelines themselves. *Cf. United States v. Booker*, 543 U.S. 220, 258 (2005) (striking the portion of the Sentencing Reform Act that made the Guidelines mandatory). This incongruity leaves little reason for the Commission to strive for clarity in the Sentencing Guidelines it submits to Congress when it can effectively amend those Guidelines by simply amending the commentary guidance at any time without congressional approval. *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").

C. Lenity Is a Traditional Tool of Interpretation that Applies *Before* Deference

Two principles of statutory interpretation support prioritizing lenity over deference. *First*, as this Court reiterated in *Kisor*, a court cannot defer to an agency until after it empties its "legal toolkit" of "all the 'traditional tools' of construction." 139 S. Ct. at 2418. The rule of lenity is one such traditional "rule of statutory construction" in this Court's toolkit. *United States v. Thompson/Ctr. Arms Co.*, 504 U.S. 505, 518 (1992) (cleaned up); *Nasir*, 2020 WL 7041357, at *25 (Bibas, J.) ("A key tool in that judicial toolkit is the rule of lenity."). 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, as a traditional tool of construction, "lenity takes precedence" over *Stinson* deference. *Nasir*, 2020 WL 7041357, at *26 (Bibas, J.). Whenever a guideline is ambiguous, the court must adopt the more lenient reading—regardless of what the Commission has said in its commentary. *Ibid.*

Second, lenity allows courts to avoid the constitutional concerns inherent in construing an ambiguous statute against a criminal defendant. When "an otherwise acceptable construction of a statute would raise serious constitutional problems," courts "will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *see also Parsons v. Bedford, Breedlove & Robeson*, 28 U.S. (1 Pet.) 433, 448-49 (1830) (Story, J.) ("No court ought, unless the terms of an act rendered it unavoidable, to give a construction to it which should involve a violation, however unintentional, of the constitution."); *Murray v. Schooner Charming Betsy*, 6 U.S. (1 Cranch) 64, 118 (1804) (Marshall, C.J.) (same).

Lenity and constitutional avoidance operate symbiotically when a criminal statute is ambiguous. *See United States v. Davis*, 139 S. Ct. 2319, 2333 (2019) (describing the doctrines as "traditionally sympathetic" to one another). Just as lenity avoids construing ambiguity against a criminal defendant in violation of due process and the separation of powers, so too does the constitutional-avoidance doctrine. *See 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*, 2020 WL 7041357, at *26 (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*, 2020 WL 7041357, at *26 (Bibas, J.). When a statute

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

D. Lower Courts Are Evenly Split on Whether to Prioritize Lenity over *Stinson* Deference

The circuit courts are effectively split six to six about what role, if any, *Kisor* (née *Auer*) deference plays in interpreting criminal penalties. That split extends to *Stinson* cases.

Judges within the Third, Sixth, Seventh and likely the First, Fifth, and D.C. Circuits, would apply lenity before deferring to the Commission's interpretation of its guidelines.

In his *Nasir* concurrence, Judge Bibas opined that the rule of lenity "displaces" deference to the Commission's commentary. 2020 WL 7041357, at *26. He observed, however, that deference might still be appropriate when the commentary does *not* "tilt toward harshness," as in *Stinson*. *Ibid.*

Judge Thapar expressed a similar view on lenity in his concurrence to the panel decision in *Havis*. 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.).

The Seventh Circuit "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). And the panel in *Winstead* noted its belief

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 at 1092 n.14 (Silberman, Garland, Edwards, JJ.).

As for the First Circuit, Judges Torruella and Thompson wrote separately in *Lewis* to raise their concern that reflexive *Stinson* deference carries "troubling implications for due process, checks and balances, and the rule of law." 963 F.3d at 27-28 (Torruella & Thompson, JJ., concurring). And in other *Auer* cases, the First Circuit has expressly prioritized lenity over deference. *De Lima*, 867 F.3d at 265.

So too in the Fifth Circuit. *United States v. Moss*, 872 F.3d 304, 308, 314 (5th Cir. 2017) (reaffirming circuit precedent that precludes *Auer* deference in criminal cases); *see also United States v. Cantu*, 423 F. Supp. 3d 345, 352 (S.D. Tex. 2019) ("Applying the rule of lenity, U.S.S.G. § 1B1.13 cmt. n.1(D) no longer describes an appropriate use of sentence-modification provisions and is thus not part of the applicable policy statement binding the Court.").

On the anti-lenity side of the ledger sit the Second, Eighth, and likely the Fourth, Ninth, and Eleventh Circuits.

In *Mendoza-Figueroa*, the *en banc* Eighth Circuit deferred to the Commission's commentary over a dissent that called for the rule of lenity. 65 F.3d at 692, 696-98. And the Second Circuit did the same in *Tabb*, 949 F.3d at 89 n.8.

The Eleventh Circuit has "cast doubt" on whether the rule of lenity applies to the interpretative commentary to the Guidelines. *Cingari*, 952 F.3d 1301,

1310-11 (quoting *United States v. Watts*, 896 F.3d 1245, 1255 (11th Cir. 2018)). And the Ninth Circuit's approach of searching beyond the Guidelines' text to add crimes to the Career Offender Guideline suggests an anti-lenity approach. *Crum*, 934 F.3d at 966.

The Fourth has precedent prioritizing 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).

And then there is the Tenth Circuit, which recently vacated a panel decision that refused to apply lenity before deference; the court will rehear the issue *en banc*. *Aposhian v. Barr*, 973 F.3d 1151 (10th Cir.), *vacating* 958 F.3d 969, 982-82 (10th Cir. 2020).

This Court's intervention is necessary to clarify that lenity is one of the traditional tools of interpretation that *Kisor* instructed courts to apply before concluding a rule is genuinely ambiguous such that *Stinson* deference might be appropriate.

Only this Court can resolve the issue largely because this Court's own past statements have added to the confusion. In dictum, the Court has stated once that, although it had applied lenity to "specific factual disputes" regarding "a statute that contains criminal sanctions," the Court had "never suggested that the rule of lenity should provide the standard for reviewing facial challenges to administrative regulations whenever the governing statute authorizes criminal enforcement." *Babbitt v. Sweet Home Chapter of Cmts. for a Great Ore.*, 515 U.S. 687, 704 n.18 (1995). Justice Scalia, joined by Justice Thomas, later described *Babbitt*'s footnote as a "drive-by ruling" that "deserves little weight" because it "contradicts the

many cases before and since holding that, if a law has both criminal and civil applications, the rule of lenity governs its interpretation in 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 the rule of lenity's application to the Clean Water Act because the regulation at issue exceeded the agency's statutory authority).

Now is the time to finally resolve the issue; "liberty is at stake" for Mr. Tabb, as well as Mr. Broadway and Mr. Lovato. *Guedes*, 140 S. Ct. at 790 (Gorsuch, J., statement regarding denial of certiorari) (announcing that the Court is awaiting a case on the issue). Denying these pending petitions will signal to the lower courts that they can continue to disregard the important lessons of *Kisor*.

II. THIS COURT SHOULD GRANT THE PETITION TO NARROW THE SCOPE OF *STINSON* OR OVERTURN IT

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 make and interpret the 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*, 5 U.S. at 137). "Such deference is found nowhere in the Constitution—the document to which judges take an oath." *Id.* at 451-52.

A. Interpretive Deference Is Unconstitutional

1. Stinson Deference Is Inconsistent with Judicial Independent & 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). Separating governmental power 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 from factious politics than the judiciary. Our constitutional backstop, the independent judiciary ensures that the political branches cannot encroach upon or diminish constitutional liberties. Article III guards the judiciary's independence by adopting the common-law tradition of an independent judicial office and by granting life tenure and undiminished salary. U.S. CONST., ART. III, § 1. To hold the Article III judicial office, a 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 carries with it 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 explaining that "the Judges ought to carry into the exposition of the laws no prepossessions with regard to them"); THE FEDERALIST No. 78 (Alexander Hamilton) ("The interpretation of laws is the proper and peculiar province of the courts."). This obligation of independence is reflected in the opinions of the founding era's finest jurists. *See, e.g.*, *Georgia v. Brailsford*, 2 U.S. 415, 416 (1793) (Iredell, J., dissenting) ("It is my misfortune to dissent … but I am bound to decide, according to the dictates of my own judgment."); *The Julia*, 14 F. Cas. 27, 33 (C.C.D. Mass. 1813) (Story, J.) ("[M]y duty requires that whatsoever may be its imperfections, my own judgment should be pronounced to the

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

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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.).

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

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

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 bias to violate due process—it can also be institutional. In fact, institutionalized judicial bias is more pervasive, as it

systematically subjects parties across the entire judiciary to bias rather than only a party before a particular judge. *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 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 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 of parties—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 government'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 Inappropriate

Keeping in mind that reflexive agency deference is never appropriate and is particularly injurious in cases with criminal consequences, there is yet another reason that the lower courts' deference to Application Note 1 warrants this Court's review: The Commission cannot expand the Guidelines through commentary rather than amendment.

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*, 488 U.S. at 393-94.

Courts cannot, as a matter convenience or expediency, co-sign the Commission's expansion of the Guidelines through commentary. 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.

It is 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. Tabb's petition along with the petitions in *Broadway*, No. 20-___, and *Lovato*, 20-6436, which present substantially similar issues.

Respectfully submitted,

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