No. _______

In The
Supreme Court of the United States

MARCUS BROADWAY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Stinson v. United States*, this 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." 508 U.S. 36, 38 (1993). *Stinson* required such deference even if the Commission's interpretation "may not be compelled by the guideline text." *Id.* at 47.

More recently, this Court in *Kisor v. Wilkie* "reinforce[d]" and "further develop[ed]" limitations on when courts should defer to an agency's interpretation of its own rules, instructing courts to defer *only* if regulations prove "genuinely ambiguous" after a court has "exhaust[ed] all the 'traditional tools of construction.'" 139 S. Ct. 2400, 2408, 2415 (2019).

After *Kisor*, the courts of appeals are starkly and openly divided on when *Stinson* deference is appropriate. The Third, Sixth, and D.C. Circuits have all recently applied a more rigorous textual analysis rather than defer to Commission commentary that expands the scope of the Guidelines. Seven other circuits have refused to do so. Moreover, the circuits are evenly split on a question *Stinson* did not decide: does the rule of lenity apply when deference to commentary would *increase* a defendant's sentence.

Mr. Broadway thus presents the following questions:

(1) Do courts owe deference to the Sentencing Commission's commentary when it expands the scope of the Sentencing 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?

PARTIES TO THE PROCEEDING BELOW

All parties are listed on the cover page:

Petitioner is Marcus Broadway, defendant in the district court and appellant in the court of appeals.

Respondent is the United States of America, plaintiff-appellee in the court of appeals.

RELATED PROCEEDINGS

Proceedings directly related to the case are as follows:

- *United States v. Broadway*, No. 5:18-CR-50084-TLB, U.S. District Court for the Western District of Arkansas. Judgment and sentence entered August 27, 2019.

- *United States v. Broadway*, No. 19-2979, U.S. Court of Appeals for the Eighth Circuit. Panel decision issued August 5, 2020.

* At least two other petitions for certiorari pending before this Court present substantially similar issues:

- *Tabb v. United States*, No. 20-579 (Nov. 2, 2020);
- *Lovato v. United States*, No. 20-6436 (Nov. 25, 2020).

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The Eighth Circuit opinion is available at 815 Fed. App'x 836. App.1a–3a. The unreported district court opinion is reproduced at App. 4a–15a.

JURISDICTION

The Eighth Circuit issued its opinion on August 5, 2020. App.1a. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1). This petition is timely based on this Court's order of March 19, 2020, extending the filing deadline.

RELEVANT REGULATIONS

Section 4B1.2 of the 2016 U.S. Sentencing Guidelines provides:

> (b) The term "controlled substance offense" means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

Application Note 1 to § 4B1.2 states:

> 1. **Definitions.** —For purposes of this guideline— ***"Crime of violence"*** and ***"controlled substance offense"*** include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.

INTRODUCTION

The unconstitutional application of "*Stinson* deference" is set to cost Marcus Broadway up to 81 months of freedom. If Mr. Broadway lived in Tennessee, over the state line from his home in Arkansas, a district court judge within the Sixth Circuit would have read and interpreted the United States Sentencing Guidelines as the Constitution and this Court's precedent require. But Mr. Broadway resides within the Eighth Circuit, which continues to defer reflexively to the interpretive commentary of the United States Sentencing Commission. This deference led the district court to sentence Mr. Broadway as a "career offender" without regard for the Guidelines' text. The plain text of Guideline § 4B1.2 lists only completed crimes in the definition of "controlled substance offense," but the commentary to which the court deferred adds inchoate crimes to that definition.

Mr. Broadway's sentence violated the rule of lenity, the due process of law, the separation of powers, and this Court's pronouncement in *Kisor v. Wilkie* that courts should not defer to an agency's interpretation of its regulations unless, after the court has exhaustively applied all traditional tools of interpretation, the regulation proves to be "genuinely ambiguous." 139 S. Ct. 2400, 2415 (2019). And the Eighth Circuit's near-summary affirmance of Mr. Broadway's sentence—despite that court's recognition that *Kisor* was a major development in administrative law—has exacerbated an intractable split in how the circuits apply *Stinson* deference.

It is intolerably unjust that Mr. Broadway will languish in prison, away from his family and community, for over 2,000 days longer than Congress prescribed, and longer than he would have if he lived in

any of nine other states, the District of Columbia, or the Virgin Islands.

The Third, Sixth, and D.C. Circuits, and several district courts within the Fourth Circuit, have rightly refused to defer to the Commission's attempt to expand the Career Offender Guideline to inchoate offenses through interpretative commentary. But seven other circuits have expressly declined to revisit their pre-*Kisor* circuit precedent that applies *Stinson* deference reflexively to Commission commentary.

Congress created the Guidelines to promote national uniformity in the way judges calculate criminal sentences. The courts of appeals, however, cannot agree on how to interpret the Guidelines—or whether judges must cede their interpretive authority to the Sentencing Commission.

Rather than achieving uniform application of *Stinson*, this Court's clear statements in *Kisor* seem to have only exacerbated the "mixed messages" from before. *See* 139 S. Ct. at 2414. Further percolation will not resolve these disputes among the circuits. In fact, given how frequently the issue arises, nearly every circuit has already opined on the issue since 2019. The courts below are at an impasse. Only this Court can resolve the fundamental disagreement about how and when *Stinson* deference applies, or whether such deference is unconstitutional.

Each term that passes, the federal courts sentence another 75,000 defendants pursuant to the Guidelines. With the liberty of tens of thousands of Americans at stake, there is no excuse to wait.

STATEMENT OF THE CASE

A. Legal Background

1. This Court held in *Bowles v. Seminole Rock & Sand Co.* that an administrative agency's interpretation of its own regulation "becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." 325 U.S. 410, 414 (1945). The very next year, though, the Court maintained that "the same strict rule of construction that is applied to statutes defining criminal action" must apply when an agency's rules carry criminal penalties. *M. Kraus & Bros. v. United States*, 327 U.S. 614, 621-22 (1946) (plurality). Despite the unresolved tension regarding how *Kraus* might limit *Seminole Rock* in cases with criminal consequences, *Seminole Rock*'s deference to agencies' interpretations of their own regulations became the accepted judicial standard for interpreting agency regulations. *See Auer v. Robbins*, 519 U.S. 452 (1997).

Throughout the years following *Seminole Rock*, the Court sent "mixed messages" about when courts must defer to an agency's interpretation. *Kisor*, 129 S. Ct. at 2414. These mixed messages led some courts to defer reflexively to agencies, "without significant analysis of the underlying regulation." *Ibid*; *see, e.g.*, *Stinson*, 508 U.S. at 44 (noting that the Commission's commentary explains "how even unambiguous guidelines are to be applied in practice").

After several Justices began calling for the Court to reexamine *Auer* and *Seminole Rock*, the Court granted certiorari in *Kisor* to reconsider its deference regime. Although *Kisor* stopped short of overruling *Auer* entirely, all nine Justices agreed to "reinforc[e] some of the limits inherent in the *Auer* doctrine." 139

S. Ct. at 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. The foremost limitation was that "a court should not afford *Auer* deference unless the regulation is genuinely ambiguous." *Id.* at 2415. A court must first empty its "legal toolkit" of "all the 'traditional tools' of construction" to "'carefully consider[]' the text, structure, history, and purpose of a regulation, in all the ways it would if it had no agency to fall back on." *Ibid.* Deference may then be appropriate only if "genuine ambiguity" remains after this exhaustive interpretive inquiry; "a court cannot wave the ambiguity flag just because it found the regulation impenetrable on first read." *Ibid.* Moreover, a court should defer only when an agency's interpretation is "reasonable" and "come[s] within the zone of ambiguity the court has identified after employing all its interpretive tools." *Id.* at 2415-16.

2. The Sentencing Commission is a federal agency created by the Sentencing Reform Act, which charged the Commission to "establish sentencing policies and practices for the Federal Criminal justice system." 28 U.S.C. § 991(a), (b)(1).

Section 994(a) of the Act directs the Commission to promulgate two types of text: (1) the Guidelines and (2) "general policy statements regarding application of the guidelines or any other aspect of sentencing or sentence implementation." To help "achieve uniformity" in the "federal sentencing scheme," "sentencing decisions are anchored by the Guidelines," which "remain a meaningful benchmark through the process of appellate review." *Peugh v. United States*, 569

U.S. 530, 541-42 (2013). Consequently, the Guidelines play a "central role in sentencing" and are often outcome-determinative. *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1341 (2016). "[D]istrict courts must begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process"; failure to do so without "sufficiently compelling" justification is reversible error. *Gall v. United States*, 552 U.S. 38, 50 n.6 (2007).

The Commission must promulgate its Guidelines through notice-and-comment rulemaking, *id.* § 994(x), and must submit any amendments or modifications to Congress for a six-month review period, during which Congress may modify or reject the Commission's amendments or modifications. *Id.* § 994(p).

The Act—by implication only—permits the Commission to publish a third category of text: commentary. *Stinson*, 508 U.S. at 41 (citing 18 U.S.C. § 3553(b)). According to the Commission, its commentary (1) explains or interprets the guidelines; (2) suggests circumstances when courts should depart from the guidelines; and (3) provides background information, such as what factors the Commission considered. U.S.S.G. § 1B1.7. The Commission asserts that its commentary has the same legal "force of policy statements" and warns courts that their failure to follow the commentary "could constitute an incorrect application of the guidelines, subjecting the sentence to possible reversal on appeal." U.S.S.G. § 1B1.7 & cmt.

Unlike the Guidelines, however, the commentary is not expressly authorized by statute, not issued following notice-and-comment rulemaking, and not subject to congressional review. It is thus a form of regulatory guidance that ought not to be binding on

courts or criminal defendants. These distinctions illustrate Congress's purpose and inform the weight of the commentary within our constitutional structure. Seated nominally in the Judicial Branch while exercising quasi-legislative power, the Commission is "an unusual hybrid in structure and authority." *Mistretta v. United States*, 488 U.S. 361, 412 (1989). Despite its anomalous presence in our constitutional system, the Commission's existence is lawful only because: (1) Congress reviews amendments to the Guidelines before they take effect; and (2) the Commission promulgates its amendments through notice-and-comment rulemaking. *Id.* at 393-94. These limitations prevent the Commission from exercising "the power of judging joined with the legislative." *Id.* at 394 (quoting The Federalist No. 47 (James Madison)).

3. The Commission promulgated the Career Offender Guideline in 1987. U.S. Sentencing Comm'n, *Guidelines Manual* § 4B1.1 (1987). Triggered by "at least two prior felony convictions of either a crime of violence or a controlled substance offense," the Career Offender Guideline imposes a substantial increase on a defendant's sentencing range. U.S.S.G. § 4B1.1.

Section 4B1.2 tracks the language of 28 U.S.C. § 994(h) to define a "controlled substance offense" as "an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense."

Like its statutory predicate, Section 4B1.2 does not include inchoate offenses like attempts or

conspiracies to distribute a controlled substance. Despite this clear limitation, two years after promulgating the Guideline through notice-and-comment rulemaking, the Commission amended its commentary to expand a "'controlled substance offense'" to "include the offenses of aiding and abetting, conspiring or attempting to commit such offenses." *Guidelines Manual* § 4B1.2 n.1 (1989). Application Note 1 remains part of the commentary today. *Guidelines Manual* § 4B1.2 n.1 (2018).

4. In *Stinson*, the Court extended *Seminole Rock* deference to the Commission's interpretation of the Career Offender Guideline. 508 U.S. at 38-39. The district court had found that Stinson's prior conviction for being a felon in possession of a firearm qualified as a crime of violence, despite an application note opining that felon-in-possession convictions did *not* trigger the sentencing enhancement. *Id.* at 39-40. This Court reversed, holding that as long as commentary "does not violate the Constitution or a federal statute," courts must give it "'controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" *Ibid* (quoting *Seminole Rock*, 325 U.S. at 414).

5. Following *Stinson*, the *en banc* Eighth Circuit reversed a split panel decision that had rejected the Commission's attempt to "'exceed[] the statutory underpinnings of the career offender provisions' by including drug conspiracy offenses in its definition of offenses that qualify a defendant for the career offender enhancement." *United States v. Mendoza-Figueroa*, 65 F.3d 691, 692 (8th Cir. 1995) (en banc). Without *any* statutory analysis or threshold determination of ambiguity, the Eighth Circuit reasoned that the commentary was binding under *Stinson*: "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." *Id.* at 292-93. A three-judge dissent argued that lenity required the court to strictly construe the Guidelines and that the commentary expanded § 4B1.2 impermissibly. *Id.* at 696-98.

6. Since *Kisor*, some lower courts have recognized that "the winds have changed." *United States v. Nasir*, 2020 WL 7041357, at *24 (3d Cir. Dec. 1, 2020) (en banc) (Bibas, J., concurring in part). *Kisor* awoke many courts "from [their] slumber of reflexive deference." *Ibid.* These courts have begun to construe the Guidelines' text for themselves—without deference to the Commission's expansive commentary—and some judges have recognized that applying deference to increase criminal penalties implicates constitutional issues not raised or decided in *Stinson*. *See, e.g.*, *id.* at *6. Despite the changing winds, however, other courts of appeals have refused to reconcile their reflexive use of *Stinson* deference with this Court's decision in *Kisor*. *See, e.g.*, *United States v. Lovelace*, 794 Fed. App'x 793, 795 (10th Cir. 2020). Nor have those recalcitrant courts grappled with the thorny constitutional issues that arise when a court increases a criminal penalty based on a non-judicial entity's legal interpretation.

B. Proceedings Below

Petitioner Marcus Broadway pleaded guilty to one count of distribution of a controlled substance in violation of 21 U.S.C. § 841(a)(1). Mr. Broadway objected to his classification as a "career offender" under the

Guidelines, in part, because one of his predicate convictions was for *attempted* delivery of a controlled substance rather than delivery. App. 21a-27a. He argued that Application Note 1 § 4B1.2 impermissibly extends the Guidelines and that under the rule of lenity "the ambiguity as to whether attempt crimes are properly included in § 4B1.2's definition of a 'controlled substance offence' must be resolved in his favor." App. 27a. The United States countered that Application Note 1 was binding under *Stinson* and Eighth Circuit precedent.

The district court sided with the United States and deferred to the Commission's commentary. Based on Application Note 1, the court sentenced Mr. Broadway as a career offender, which substantially increased the Guideline range from 70 – 87 months to 151 – 188 months. Put differently, the Commission's commentary more than doubled the presumptive punishment that Mr. Broadway faced. The minimum end of Mr. Broadway's Guideline range increased by 81 months, or nearly seven years in prison. Recognizing that the Guidelines required an unjust result that overstated the severity of Mr. Broadway's crime, the district court granted Mr. Broadway a downward departure and imposed a sentence of 100 months—still 13 months more than the top end of the sentence he would have faced without the career-offender enhancement.

On appeal, the Eighth Circuit also rejected Mr. Broadway's pleas to have a court read and interpret the Guidelines independently of the Commission's commentary. App. 3a. Despite the panel's recognition that "there have been some major developments since 1995," including *Kisor*'s "emphasizing that *Auer*/*Seminole Rock* deference is triggered only by

'genuine[] ambigu[ity],'" the panel affirmed Mr. Broadway's sentence based on *Mendoza-Figueroa*, 65 F.3d at 693. App. 2a n.2. The court did this despite acknowledging that the commentary to which it deferred "*extends* the reach of section 4B1.2(b) to attempted distribution, even though the provision itself lists only completed acts." App. 2a (emphasis added).

REASONS FOR GRANTING THE PETITION

I. THE GROWING CIRCUIT SPLIT ON HOW *KISOR* LIMITED *STINSON* DEFERENCE HAS LED TO UNJUST NATIONWIDE INCONSISTENCIES IN SENTENCING

With each passing Term, district courts will apply the Guidelines to about 75,000 more criminal defendants. *See* U.S. Sentencing Comm'n, *Sentences Under the Guidelines Manual & Variances Over Time: Fiscal Years 2010-2019*. How courts determine a defendant's Guideline range will continue to vary widely across the circuits—as it does now—until this Court clarifies what remains of *Stinson* after *Kisor*, if anything.

Lower-court judges are divided about whether *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 interpret those Guidelines independently.

A. At Least Three Circuits Rightly Reject Deference to Application Note 1

The unanimity with which circuits applied *Stinson* began to fracture when the D.C. Circuit consciously

split with its sister circuits and refused to defer to Application Note 1 in *United States v. Winstead*, 890 F.3d 1082, 1090-91 (D.C. Cir. 2018). The court in *Winstead* applied the statutory canon *expressio unius est exclusio alterius* to determine that "Section 4B1.2(b) presents a very detailed 'definition' of controlled substance offense that clearly excludes inchoate offenses." *Id.* at 1091.

The Sixth Circuit then sat *en banc* to reconsider *Stinson*'s application to the Career Offender Guideline precedent after a three-judge panel in *Havis v. United States* produced four separate opinions on the issue. 907 F.3d 439, 459 (6th Cir. 2018); *id.* at 448 (Stranch, J., concurring); *id.* at 450 (Thapar, J., concurring); *id.* at 452 (Daughtrey, J., dissenting). In a concise *per curiam* opinion, the unanimous Sixth Circuit ruled that "[t]he Commission's use of commentary to add attempt crimes to the definition of 'controlled substance offense' deserves no deference." *Havis* 927 F.3d 382, 387 (6th Cir. 2019) (en banc). The *en banc* court underlined the fact that "commentary to the Guidelines never passes through the gauntlets of congressional review or notice and comment." *Id.* at 386. Given the separation-of-powers issues that deference would create, the Sixth Circuit concluded that the career-offender enhancement did not apply to inchoate crimes because commentary may not "replace or modify" the Guidelines. *Ibid.*

After *Kisor*, every other circuit should have followed suit. The Third Circuit recognized as much and convened *en banc* on its own initiative to reconsider its pre-*Kisor* deference to Application Note 1. *Nasir*, *Sua Sponte* Order, No. 18-2888 (3d Cir. Mar. 4, 2020). The full Third Circuit (plus two senior circuit judges) then ruled unanimously that "the plain language of

the guidelines does not include inchoate crimes[.]" *Nasir*, 2020 WL 7041357, at *6; *id.* at *33 (Porter, J., concurring in part). The court explained that its former precedent likely went "too far" based on the "then-prevailing understanding of the deference that should be given to agency interpretations of their own regulations." *Id.* at *8. Then *Kisor* made clear that the Third Circuit's prior deference to Application Note 1 was not justified. *Ibid.* As the court explained: "In *Kisor*, the Court cut back on what had been understood to be uncritical and broad deference to agency interpretations of regulations and explained that *Auer*, or *Seminole Rock*, deference should only be applied when a regulation is genuinely ambiguous." *Ibid.* "In light of *Kisor*'s limitations on deference to administrative agencies," the Third Circuit reversed its prior precedent and "conclude[d] that inchoate crimes are not included in the definition of 'controlled substance offenses' given in section 4B1.2(b) of the sentencing guidelines." *Id.* at *9.

And while the Fourth Circuit has not revisited the issue since *Kisor*, several of its district judges have done so and ruled that deference to Application Note 1 is inappropriate. *See United States v. Carter*, 2020 WL 907884 (S.D. W.Va. 2020) (noting that the Fourth Circuit had not ruled on the issue); *United States v. Faison*, 2020 WL 815699 (D. Md. 2020); *United States v. Bond*, 418 F. Supp. 3d 121, 123 (S.D. W.Va. 2019); *United States v. Gibbs*, No. 2:18-cr-89-1 (S.D. W.Va. July 31, 2019).

B. Seven Circuits Refuse to Reconsider Their Pre-*Kisor* Precedent

The Eighth Circuit is not alone in its refusal to consider how *Kisor* impacted its precedent applying

Stinson deference to Application Note 1. Decisions predating *Kisor* that extend the Career Offender Guideline to inchoate crimes without the prerequisite textual analysis still prevail in the First, Second, Seventh, Ninth, Tenth, and Eleventh Circuits. These circuits remain intransigent despite several judges in those circuits expressing their discomfort with that precedent and petitions for reconsideration *en banc* having been filed in nearly every circuit since 2019.

For instance, the First Circuit ruled explicitly that *Kisor* did not require it to reconsider its precedent. That court was unwilling to read its prior cases in a way that "suggest[ed] that they regarded *Auer* deference as limiting the rigor of their analysis of whether the guideline was ambiguous." *United States v. Lewis*, 963 F.3d 16, 24 (1st Cir. 2020). Two judges on the panel, however, wrote separately to note their "discomfort with the practical effect" of the First Circuit's precedent, which they believe "raises troubling implications for due process, checks and balances, and the rule of law." *Id.* at 27-28 (Torruella & Thompson, JJ., concurring).

The Seventh Circuit, after *Kisor*, explicitly rejected the D.C. Circuit's textual approach in *Winstead*, reasserting that its own circuit precedent that found Application Note 1 consistent with the Guideline "remains sound." *United States v. Adams*, 934 F.3d 720, 729 (7th Cir. 2019); *but see D'Antoni v. United States*, 916 F.3d 658, 665 (7th Cir. 2019) (ruling, based on a textual analysis, that conspiracy to commit murder did not trigger the career-offender enhancement).

Earlier this year, the Second Circuit reaffirmed its 1990s precedent, without textual analysis, even

though the court acknowledged that the commentary "expand[ed] the definition of a controlled substance offense." *United States v. Tabb*, 949 F.3d 81, 87 (2d Cir. 2020) (explaining that *Havis* and *Winstead* "are of no moment here, because we, acting as a three judge panel, are not at liberty to revisit [circuit precedent]"), *cert. pending*, No. 20-579 (Nov. 2, 2020); *see also United States v. Richardson*, 958 F.3d 151, 155 (2d Cir. 2020) (reasoning that the commentary's inclusion of inchoate offenses "is not inconsistent with the guideline").

The Ninth Circuit has also applied prior precedent to defer to Application Note 1; but the panel noted that, "[i]f we were free to do so, we would follow the Sixth and D.C. Circuits' lead" because "the commentary improperly expands the definition of 'controlled substance offense' to include other offenses not listed in the text of the guideline." *United States v. Crum*, 934 F.3d 963, 966 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 2629 (2020); *see also United States v. Sorenson*, 818 Fed. App'x 668, 670 (9th Cir. 2020) (Paez, J., concurring) ("I believe the commentary in Application Note 1 to § 4B1.2 impermissibly expands the scope of the Guideline's text.").

The Tenth Circuit also reaffirmed its precedent—not based on its own textual analysis, but simply because the commentary "can be reconciled with the language of guideline § 4B1.2." *United States v. Martinez*, 602 F.3d 1166, 1174 (10th Cir. 2010). Even after *Kisor*, the Court refused to revisit *Martinez*'s reflexive deference, ruling that no intervening Supreme Court decision justified doing so. *Lovelace*, 794 Fed. App'x at 795; *see also United States v. Lovato*, 950 F.3d 1337, 1347 (10th Cir. 2020), *cert. pending*, No. 20-6436 (Nov. 25, 2020).

For its part, the Eleventh Circuit has ruled since *Kisor* that it would likely defer to Application Note 1, even if it were not bound by precedent. *United States v. Cingari*, 952 F.3d 1301, 1308 (11th Cir. 2020), *cert. denied*, No. 20-5937 (Nov. 9, 2020). Under the Eleventh Circuit's approach, which disregards *Kisor* entirely, sentencing courts conduct a blended textual analysis that considers the text of the guideline in conjunction with the commentary, even if the "commentary sometimes requires interpreting a guideline in a way that 'may not be compelled by the guideline text.'" *Ibid* (quoting *Stinson*, 508 U.S. at 47). The Eleventh Circuit believes that courts, under *Stinson*, must "'seek to harmonize' a guideline's text with its commentary." *Ibid* (quoting *United States v. Genao*, 343 F.3d 578, 584 n.8 (2d Cir. 2003)).

These seven circuits have failed to adhere to *Kisor*'s clear command that judges must conduct an exhaustive textual analysis of a rule *before* applying deference to only those regulations that prove "genuinely ambiguous." 139 S. Ct. at 2408, 2415. Because the reflexive deference of the 1990s still prevails in these seven circuits, the Commission's commentary continues to receive "nearly dispositive weight" over "the Guidelines' plain text." *Nasir*, 2020 WL 7041357, at *24 (Bibas, J.).

This split does not need more time to percolate. Since *Kisor*, at least five of the seven circuits that refuse to reconsider past precedent have already denied petitions for rehearing *en banc*. *United States v. Jefferson*, No. 19-3159 (8th Cir. Oct. 28, 2020); *Lewis*, No. 18-1916 (1st Cir. Oct. 2, 2020); *Lovato*, No. 18-1468 (10th Cir. June 23, 2020); *Tabb*, No. 18-338 (2d Cir. June 1, 2020); *Crum*, No. 17-30261 (9th Cir. Oct. 29, 2019). And the Eleventh Circuit is on an island of its

own, applying a unique version of *Stinson*. Waiting for the Fourth and Fifth Circuits to weigh in is not worth the cost that defendants in the recalcitrant circuits will bear in the meantime.

Nor can the Commission resolve the split by amending its commentary. For one, the Commission has not had a quorum since 2018. Press Release, United States Sentencing Comm'n (Dec. 13, 2018). And besides, no amendment by the Commission could resolve the split in *how* courts interpret the Guidelines. *Cf. Koon v. United States*, 518 U.S. 81 (1996) (granting a petition to review the standard for reviewing departures from the Guidelines).

Without this Court's immediate intervention to clarify *Kisor*'s impact on *Stinson* deference, the circuits will continue to apply the Guidelines divergently, and defendants convicted of inchoate drug offenses will regularly receive drastically different sentences across the circuits.

II. The Circuits Are Irreconcilably Split on Whether *Stinson* Deference May Increase Criminal Penalties

The issue in this case—as in most *Stinson* cases—is not simply whether the guideline at issue is ambiguous, but whether agency deference has any role at all to play in the interpretation of criminal penalties. *See Nasir*, 2020 WL 7041357, at *24 (Bibas, J.) (observing that the "narrow scope" of the court's ruling on ambiguity "hints at a broader problem" with *Stinson*). As several judges have now recognized, the rule of lenity is a traditional tool of interpretation that resolves any ambiguity in the defendant's favor *before* the court resorts to *Stinson* deference. *See, e.g.*, *Nasir*,

2020 WL 7041357, at *24 (Bibas, J.); *United States v. Havis*, 907 F.3d at 459 (Thapar, J.).

Lower courts are evenly divided on this follow-on question of whether *Kisor* requires courts to prioritize lenity over agency deference. This Court cannot, therefore, resolve the circuit split over *Stinson* deference without clarifying the role of lenity in interpreting the Guidelines.

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

Given that the commentary challenged in *Stinson* interpreted the Guidelines in favor of a more lenient sentence, the rule of lenity was not at issue. *See* 508 U.S. at 47-48. The Court in *Stinson*, therefore, did not consider the constitutional issues inherent when its deference regime applies to *increase* a criminal sentence. No subsequent decision of this Court has done so either. *See 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 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." *Havis*, 907 F.3d at 450 (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 a tool of construction "perhaps not much less old than construction itself."[1] *United States v. Wiltberger*, 18 U.S. (1 Wheat.) 76, 95 (1820); *see also Bray v. Atalanta*, 4 F. Cas. 37, 38 (D.S.C. 1794) (ruling that "a penal law [] must be construed strictly"). In simple

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[1] One of the first written English law reports, an early-16th Century "Year Book," attributed to 15th Century-jurist William Paston a Latin maxim that translates loosely to mean, "the penalties ought not to be increased by interpretation." *A Discourse Upon the Exposicion & Understandinge of Statutes*, Thomas Egerton Additions 155 (Samuel E. Thorne ed. 1942) ("[W]hen the law is penall, for in those it is true that Paston saiethe, *Poenas interpretation augeri non debere*[.]"); *see also Prohibitions del Roy*, (1607) 77 Eng. Rep. 1342 (K.B.) (rejecting deference to the King on questions of law because not even the King was above the law).

terms, "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 during sentencing, not merely to determining 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*, 327 U.S. at 621-22 (holding that when an agency's rules carry criminal sanctions, courts must apply "the same strict rule of construction that is applied to statutes defining criminal action"). 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 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. Booker*, 543 U.S. at 258 (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 interpretation of 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. 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. This presumption, in the criminal context, must give way to a strict reading of the statute. *Wiltberger*, 18 U.S. at 95. Prioritizing deference over lenity offends due process and 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 criminal penalty 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 Split on Whether to Prioritize Lenity over *Stinson* Deference

A fundamental disagreement exists among lower-court judges about what role, if any, *Kisor* (née *Auer*)

deference plays in interpreting criminal penalties. That split extends to *Stinson* cases.

Half the circuits—the Third, Sixth, Seventh, and likely the First, Fifth, and D.C. Circuits—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 in his concurrence 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, [the commentary] 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 case applied to Mr. Broadway's sentence, the *en banc* Eighth Circuit deferred to the Commission's commentary over a dissent that called for 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 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 Circuit has precedent prioritizing deference over lenity in other contexts. *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 granted rehearing *en banc* to consider the issue. *Aposhian v. Barr*, 973 F.3d 1151, *vacating* 958 F.3d 969 (10th Cir. 2020).

This split requires this Court 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. *Compare Babbitt v. Sweet Home Chapter of Cmt. for a Great Ore.*, 515 U.S. 687, 704 n.18 (1995) (noting in dictum that 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"), *with Abramski*, 573 U.S. at 191; *Whitman v. United States*, 574 U.S. 1003 (2014) (Scalia J., joined by Thomas, J., statement respecting denial of certiorari) (characterizing *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") (collecting cases).

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).

Now is the time to finally resolve the issue; Mr. Broadway's "liberty is at stake." *Guedes*, 140 S. Ct. at 790 (Gorsuch, J., statement regarding denial of certiorari) (announcing that the Court is awaiting a case on the issue).

III. THIS COURT SHOULD GRANT CERTIORARI TO NARROW THE SCOPE OF *STINSON* OR OVERTURN IT

Review is also necessary because the lower courts' application of *Stinson* deference to Commission 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

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.

1. *Stinson* Deference Is Inconsistent with Judicial Independence & 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 colonists 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."). The opinions of the founding era's finest jurists reflect this obligation of independence. *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]

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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 judicial expertise informs their decisions. *See Havis*, 907 F.3d at 451 (Thapar, J.).

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 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 their 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

The current way in which seven circuits apply *Stinson* 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 whenever 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 (*i.e.*, guidance) 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. Absent these two features, the Commission loses its "unusual" special status in our constitutional system.

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.

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.

IV. THIS CASE PROVIDES AN ATTRACTIVE VEHICLE TO RESOLVE THE CONTINUED VIABILITY OF *STINSON*

This case is an ideal vehicle to resolve how and when *Stinson* deference is appropriate. Mr. Broadway maintained throughout the proceedings below, and now squarely presents in his petition, that the application of *Stinson* deference to punish him as a career offender under the Guidelines violated the venerable rule of lenity and this Court's precedent. Despite his articulation of these serious problems—and the Eighth Circuit's recognition that *Kisor* was a "major development" since that court last considered the

issue, App. 2a n.2—the lower courts remained entrenched in their *status quo ante*. Only this Court can restore the uniform application of the Guidelines that justice desperately demands.

CONCLUSION

This Court should grant Mr. Broadway's petition along with the petitions in *Tabb*, No. 20-579, and *Lovato*, 20-6436, which present substantially similar issues and are on a similar filing schedule. *See Tabb*, Order (Dec. 9, 2020) (extending the government's time to respond to petition until January 15, 2021). Alternatively, if the Court grants one of the other petitions, it should hold this case pending a decision on the merits.

Respectfully submitted,

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