No. 20-836

IN THE
Supreme Court of the United States

MARCUS BROADWAY,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eight Circuit

BRIEF OF THE DUE PROCESS INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*[1]

Due Process Institute ("DPI") 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). DPI has also filed *amicus* briefs in support of two petitions this Term that present substantially similar questions: *Tabb* v. *United States*, No. 20-579 (Nov. 2, 2020) & *Lovato* v. *United States*, No. 20-6436 (Nov. 25, 2020). The issues raised in this brief are essential to protecting principles of due process and fundamental fairness in America's federal sentencing regime.

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[1] The parties were given timely notice of the filing of this brief and have consented to its filing. No counsel for a party authored this brief in whole or in part, and no counsel or party other than *amicus* or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

In *Kisor* v. *Wilkie*, 139 S. Ct. 2400 (2019), this Court reinforced and further developed important limits on when courts may afford agencies *Auer* deference for interpretations of their own regulations. *First*, the Court explained that agencies may not receive deference unless a regulation is "genuinely ambiguous" after "exhaust[ing] all the 'traditional tools' of construction." *Kisor*, 139 S. Ct. at 2415 (citation omitted). *Second*, an agency's reading of a genuinely ambiguous regulation "must still be 'reasonable.'" *Id.* (citation omitted). *Third*, the "character and context of the agency interpretation" must "entitle[] it to controlling weight." *Id.* at 2416 (citation omitted).

Petitioner seeks this Court's review of an Eighth Circuit decision that misapplied *Kisor*'s three-part test to defer to the United States Sentencing Commission's ("Commission") commentary interpreting the U.S. Sentencing Guidelines ("Guidelines"). In this case, the Commission promulgated through notice-and-comment rulemaking a Guideline containing a detailed definition of the term "controlled substance offense." U.S.S.G. § 4B1.2(b). This definition does not include inchoate crimes, but application note 1 to § 4B1.2 states that "'controlled substance offense' includes the offenses of . . . attempting to commit such offenses." Application note 1 is not part of the Guidelines and

was not promulgated through notice-and-comment rulemaking. Rather, as part of the commentary to the Guidelines, it is "an agency's interpretation of its own regulations[.]" *Stinson* v. *United States*, 508 U.S. 36, 45 (1993). As such, the Eighth Circuit was required to apply the limits on *Auer* deference restated and reinforced in *Kisor*. It did not.

The Eighth Circuit failed to perform the first step of the *Kisor* analysis and ask whether the regulation is "genuinely ambiguous." It is not. Section 4B1.2(b) makes no mention of inchoate crimes, while 4B1.2(a)—the immediately preceding provision—explicitly includes offenses that "ha[ve] as an element the . . . *attempted* use" of force. U.S.S.G. § 4B1.2(a)(1) (emphasis added). The plain text of the Guideline thus forecloses any ambiguity as to whether "controlled substance offenses" includes attempted crimes, precluding deference to the Commission's contrary interpretation. See *Christensen* v. *Harris Cty.*, 529 U.S. 576, 588 (2000) ("To defer to the agency's position would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation.")

Even were there textual ambiguity—and there is not—deference would still be lacking under *Kisor* step one after exhausting "*all* the 'traditional tools' of construction." *Kisor*, 139 S. Ct. at 2415 (citation omitted) (emphasis added). Two such tools would resolve the ambiguity. *First*, "[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) (citations omitted). Thus, to the extent the Eighth Circuit found any ambiguity in the text of § 4B1.2, it should have resolved it through lenity, not deference. See*, e.g.*, *United States* v. *Apel*, 571 U.S. 359, 369 (2014) ("[W]e have never held that the Government's reading of a criminal statute is entitled to any deference.").

Second, the constitutional avoidance doctrine instructs courts to construe ambiguous texts to avoid grave constitutional doubts where possible. See *Edward J. DeBartolo Corp.* v. *Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). Here, adopting an interpretation that adds over 2,000 days to a defendant's sentence raises grave due process and separation of powers concerns—indeed, the precise concerns that animate the rule of lenity. See *United States* v. *Davis*, 139 S. Ct. 2319, 2333 (2019) (explaining that lenity stems from the "rights of individuals to fair notice of the law and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department." (citations and quotations omitted)).

The Eighth Circuit also failed to perform *Kisor* step three. Under this step, "a court must make an independent inquiry into whether the character and context of the agency interpretation entitles it to controlling weight" because "not every reasonable

agency reading of a genuinely ambiguous rule should receive *Auer* deference." *Kisor*, 139 S. Ct. at 2416. "[W]hen the reasons for [presuming *Auer* deference] do not apply, or countervailing reasons outweigh them, courts should not give [*Auer*] deference to an agency's reading[.]" *Id.* at 2414.

The reasons that typically support affording agencies *Auer* deference have little application in the sentencing context. While deference sometimes furthers "political accountability," *id.* at 2413, that is not so for the Commission. Rather, deference to the Commission in this context would allow an independent agency to enumerate new offenses without going through notice-and-comment or the statutorily-mandated congressional review process. See *Mistretta* v. *United States*, 488 U.S. 361, 393–94 (1989). And to be sure, the Guidelines and commentary are within the Commission's substantive expertise, but that expertise is shared with district court judges who make sentencing determinations every day with the benefit of being able to consult with affected parties. See, *e.g.*, *id.* at 396 ("[S]entencing is a field in which the Judicial Branch long has exercised substantive or political judgment."). In addition, uniformity interests that often underlie deference are diminished in the field of sentencing, where this Court has long established "that the punishment should fit the offender and not merely the crime." *Pepper* v. *United States*, 562 U.S. 476, 487–88 (2011) (citations and quotations omitted).

Finally, there are significant countervailing reasons that counsel against deferring to the Commission. In particular, allowing the Commission to deprive defendants their liberty through interpretations that sidestep notice-and-comment rulemaking and congressional review calls into question the constitutionality of the Commission's actions as well as legality of the Commission itself.

These errors are widespread and worthy of this Court's review. Indeed, the Eighth Circuit's errors put it firmly on the wrong side of an entrenched circuit split. Seven circuits have continued to reflexively defer to the Commission under pre-*Kisor* precedent, and most of these circuits have already refused *en banc* review of that precedent. Pet. 13–17. Accordingly, only a minority of circuits dutifully perform a *Kisor* analysis before deferring to the Commission. This Court should thus grant certiorari to clarify the proper application of *Kisor*, resolve the divisions among the circuits, and ultimately protect the thousands of Americans at risk of being wrongfully deprived of their liberty.

ARGUMENT

I. This Court In *Kisor* Established A Three-Part Test Courts Must Perform To Determine Whether An Agency May Receive *Auer* Deference.

This Court's opinions in *Auer* v. *Robbins*, 519 U.S. 452 (1997) and *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410 (1945) established that federal courts should—in some circumstances—defer to agencies' reasonable interpretations of their own ambiguous regulations. In *Kisor* v. *Wilkie*, recognizing that these holdings had led some courts to "appl[y] *Auer* deference without significant analysis of the underlying regulation," this Court "further developed" and "reinforc[ed] some of the limits inherent in the Auer doctrine." 139 S. Ct. at 2414–15.

In so doing, this Court established a three-part test. "*First and foremost*, a court should not afford *Auer* deference unless the regulation is genuinely ambiguous." *Id.* at 2415 (emphasis added). *Second*, even "[i]f genuine ambiguity remains," "the agency's reading must still be 'reasonable.'" *Id.* *Third*—even when presented with a "reasonable agency reading of a genuinely ambiguous rule"—"a court must make an independent inquiry into whether the character and context of the agency interpretation entitles it to controlling weight." *Id.* at 2416.

Each of the three *Kisor* steps is mandatory. *See id.* at 2415 ("If uncertainty does not exist, there is no plausible reason for deference. The regulation then just means what it means—and the court *must* give it effect[.]" (emphasis added)); *id.* at 2416 ("Under *Auer*, as under *Chevron*, the agency's reading *must* fall within the bounds of reasonable interpretation[.]" (emphasis added; citations and quotations omitted)); *id.* ("We have recognized in applying *Auer* that a court *must* make an independent inquiry into whether the character and context of the agency interpretation entitles it to controlling weight.") (emphasis added; citations omitted).

Indeed, in remanding to the Federal Circuit, this Court found that "a redo [wa]s necessary" because the lower court failed to adequately perform two of the three *Kisor* steps. *See id.* at 2423–24. First, the Court explained, the Federal Circuit "jumped the gun in declaring the regulation ambiguous" by "casually remark[ing]" that the agency's interpretation did not strike it as unreasonable. *Id.* Second, the lower court "assumed too fast that *Auer* deference should apply in the event of genuine ambiguity," noting that the agency's board decisions might not "reflect[] the considered judgment of the agency as a whole." *Id.* at 2424 (quoting *United States* v. *Mead Corp.*, 533 U.S. 218, 233 (2001)).

Kisor's framework applies in the criminal sentencing context. The Commission is an

"independent agency" charged with promulgating the Guidelines through notice-and-comment rulemaking. *Mistretta*, 488 U.S. at 393–94. The Commission issues commentary, the "functional purpose" of which "is to assist in the interpretation and application of" the Guidelines. *Stinson*, 508 U.S. at 45. Recognizing that this structure mirrors the traditional agency dichotomy between legislative and interpretive rules, this Court explained that the "commentary is akin to an agency's interpretation of its own legislative rules." *Id.* The Court accordingly found that the commentary commanded *Seminole Rock* deference. See *id.* (citing *Seminole Rock*, 325 U.S. at 414). This deference is thus precisely the type *Kisor* sought to clarify and "further develop." *Kisor*, 139 S. Ct. at 2408.

II. Petitioner's Questions Regarding *Kisor* Step One Are Worthy Of This Court's Review.

Petitioner raises two questions worthy of this Court's review that fall under the rubric of *Kisor* step one: (i) whether courts owe deference to Commission commentary when it expands the scope of the Sentencing Guidelines and (ii) whether the rule of lenity and the right to due process preclude deference when commentary to a Sentencing Guideline would increase a sentence. Pet. i. Both questions bear upon the lives of thousands of criminal defendants and have resulted in an irreconcilable circuit split. It is thus crucial for the Court to clarify the proper application of *Kisor* step one.

A. The Commission is not entitled to deference when it expands the scope of the Guidelines.

In this case, Petitioner pled guilty to a non-violent drug offense. App. 4a. The District Court sentenced Petitioner as a career offender, see *id.*, purportedly pursuant to the Sentencing Guidelines. The Guidelines provide that "[a] defendant is a career offender if," *inter alia*, "the defendant has at least two prior felony convictions of . . . a controlled substance offense." U.S.S.G. § 4B1.1(a)(3).

Petitioner however did not have at least two prior felony convictions of a controlled substance offense. Rather, one of Petitioner's alleged predicate offenses was a conviction for *attempted* delivery of a controlled substance. App. 2a. The Guidelines define "controlled substance offense," and the term makes no mention of inchoate offenses. U.S.S.G. § 4B1.2(b). To be sure, the *commentary*—the Commission's interpretation of the Guidelines—includes inchoate offenses. Guidelines Manual § 4B1.2 n.1 (2018). But deferring to such an interpretation is appropriate only after applying all three steps of *Kisor*. Proper application of this test renders deference inappropriate.

Courts owe no deference here because under *Kisor* step one, the rule is not "genuinely ambiguous." *Kisor*, 139 S. Ct. at 2415. Because § 4B1.2 includes a definition that enumerates specific acts that qualify as "controlled substance offenses," the clear and

obvious implication is that unenumerated acts do not so qualify. See *POM Wonderful LLC* v. *Coca-Cola Co.*, 573 U.S. 102, 114 (2014); accord *Christensen*, 529 U.S. at 588 ("To defer to the agency's position would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation.").

This commonsense interpretation is made even more apparent by the fact that the definition of "crime of violence"—a neighboring provision in § 4B1.2(a)—*includes* inchoate offenses. See U.S.S.G. § 4B1.2(a)(1) (including offenses that "ha[ve] as an element the . . . *attempted use* . . . of physical force against the person of another" (emphasis added)). It is a basic interpretive maxim that the inclusion of a term in one section implies that its omission in another section implies "a difference in meaning." *Maine Cmty. Health Options* v. *United States*, 140 S. Ct. 1308, 1323 (2020). See also *United States* v. *Approximately 64,695 Pounds of Shark Fins*, 520 F.3d 976, 983 (9th Cir. 2008) ("Where an agency includes language in one section of the regulation and omits it in another, it is reasonable to presume that the agency acted intentionally in foregoing the language.").

Circuits that have properly conducted a *Kisor* step one analysis have reached the same conclusion. See, *e.g.*, *United States* v. *Winstead*, 890 F.3d 1082, 1091 (D.C. Cir. 2018) ("Section 4B1.2(b) presents a very detailed 'definition' of controlled substance offense that clearly excludes inchoate offenses. *Expressio*

unius est exclusio alterius."); *United States* v. *Nasir*, 982 F.3d 144, 159 (3d Cir. 2020) ("The guideline does not even mention inchoate offenses. That alone indicates it does not include them."). Thus, the Eighth Circuit's deference to the Guidelines was inappropriate under *Kisor* step one.

B. The rule of lenity and the constitutional avoidance doctrine preclude deference when commentary to a Sentencing Guideline would increase a sentence.

Even if there *was* any textual ambiguity in § 4B1.2—and to be clear, there is not—substantive canons would still render the provision unambiguous under *Kisor* step one. As *Kisor* explained, a court may conclude that a regulation is genuinely ambiguous only *after* "exhaust[ing] all the 'traditional tools' of construction[.]" *Kisor*, 139 S. Ct. at 2415 (citing *Chevron U.S.A. Inc.* v. *Nat'l Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984)). Here, two traditional tools of construction—the rule of lenity and the doctrine of constitutional avoidance—would resolve any outstanding ambiguity.

First, the rule of lenity would render the Guideline unambiguous. "The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them." *Santos*, 553 U.S. at 514 (citations omitted). Accordingly, the rule of lenity would require a court to construe § 4B1.2 in favor of the Petitioner instead of forcing him to languish in

prison for an additional 2,000 days. This analysis is supported by a legion of caselaw. See, *e.g.*, *Abramski* v. *United States*, 573 U.S. 169, 191 (2014) ("[C]riminal laws are for courts, not for the Government, to construe. We think [agency]'s old position no more relevant than its current one—which is to say, not relevant at all.") (citations omitted); *Apel*, 571 U.S. at 369 ("[W]e have never held that the Government's reading of a criminal statute is entitled to any deference."); *Guedes* v. *Bureau of Alcohol, Tobacco, Firearms & Explosives*, 140 S. Ct. 789, 790 (2020) (Gorsuch, J., statement regarding denial of certiorari) ("[W]hen liberty is at stake," deference "has no role to play."); see also *United States* v. *Phifer*, 909 F.3d 372, 385 (11th Cir. 2018) ("[W]e hold that Auer deference does not apply in criminal cases[.]").

Second, the doctrine of constitutional avoidance would render the Guideline unambiguous. Under this doctrine, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp.*, 485 U.S. at 575 (citations omitted). Here, construing ambiguity against a criminal defendant raises dire due process and separation of power concerns. See *Davis*, 139 S. Ct. at 2333 (explaining that lenity and constitutional avoidance are "traditionally sympathetic doctrines" because the former is "founded on the tenderness of the law for the

rights of individuals to fair notice of the law and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department." (citations and quotations omitted)). Constitutional avoidance requires a court to avoid these grave constitutional doubts.

The rule of lenity and the doctrine of constitutional avoidance are traditional tools of construction. See *id.* at 2333 (explaining that the rule of lenity "is 'perhaps not much less old than' the task of statutory 'construction itself.'" (quoting *United States* v. *Wiltberger*, 18 U.S. (5 Wheat.) 76, 95, 5 L.Ed. 37 (1820) (Marshall, C.J.)); see also *id.* at 2352 (Kavanaugh, J., dissenting) ("The constitutional avoidance canon is a traditional canon of statutory interpretation.");[2] Adrian Vermeule, *Saving Constructions*, 85 Geo. L.J. 1945, 1949 (1997) (arguing that "the twentieth-century case law overwhelmingly supports" the dominance of the constitutional avoidance canon). Accordingly, were there any textual ambiguity, in § 4B1.2, these tools would resolve that ambiguity in favor of Petitioner and therefore resolve the interpretation under Kisor step one.

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[2] The dissent in *Davis* took issue with the majority's application of the rule of lenity *before* constitutional avoidance. See *Davis*, 139 S. Ct. at 2352. Because both canons favor the same interpretation in this case, the outcome is the same regardless of which applies first.

III. The Circuits Are Also Split On The Proper Application of *Kisor* Step Three.

Petitioner's questions presented are alone worthy of this Court's review. They concern a significant circuit split that has implications for the liberty of tens of thousands of Americans. In addition to these questions, granting certiorari would also allow the Court to resolve the splintered approach among the circuit courts over *Kisor* step three.

A. Lower courts must perform *Kisor* step three before affording an agency *Auer* deference.

In addition to determining whether genuine ambiguity exists (*Kisor* step one) and whether the agency's interpretation is reasonable (*Kisor* step two), courts must also determine whether the "character and context of the agency interpretation entitles it to controlling weight." *Kisor*, 139 S. Ct. at 2416. This inquiry—referred to herein as *Kisor* step three[3]—is a

[3] Some commentators—seizing on the analogy to *Mead*—have referred to this inquiry as *Auer* step zero. See, *e.g.*, Gillian E. Metzger, *The Roberts Court and Administrative Law*, 2019 Sup. Ct. Rev. 1, 14 (2019) ("Indeed, in many ways *Kisor* represents the importation of *Chevron/Mead* analysis into the *Auer* context: The *Kisor* limits add a *Mead* step zero, identifying certain contexts in which *Auer* deference is not even potentially available, and also a rigorous *Chevron* step one inquiry, in which a court must determine if sufficient ambiguity exists to trigger *Auer* deference."); Eunice Lee, *Regulating the Border*, 79 Md. L.

critical piece of the *Auer* deference framework. *Auer* deference is "rooted in a presumption about congressional intent[.]" *Kisor*, 139 S. Ct. at 2412. But "the administrative realm is vast and varied, and [this Court] ha[s] understood that such a presumption cannot always hold." *Id.* at 2416 (citing *Mead*, 553 U.S. at 236). Performing *Kisor* step three—similar to "step zero" in the *Chevron* context—thus reveals when this presumption holds and, consequently, "when *Auer* deference is and is not appropriate." *Id.* at 2416; accord *id.* ("[N]ot every reasonable agency reading of a genuinely ambiguous rule should receive *Auer* deference.").

This inquiry is essential to the proper application of *Auer* deference. As *Kisor* explains, *Auer* deference is based on congressional intent, so—where Congress does not intend for deference to apply—there is no basis to defer to an agency. See *id.*; accord *Mead*, 533 U.S. at 234 (finding agency interpretation that Congress did not intend to carry the force of law to be "beyond the *Chevron* pale"). *Kisor* step three also provides guardrails to protect against other important

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Rev. 374, 385 n.76 (2020) ("The majority opinion also imposed a more searching inquiry at the outset to determine whether *Auer* should actually apply, that is, an *Auer* step zero."); Islame Hosny, *Interpretations by Treasury and the IRS: Authoritative Weight, Judicial Deference, and the Separation of Powers*, 72 Rutgers L. Rev. 281, 298 (2020). The Tenth Circuit—mirroring this Court's framing of the analytical steps—refers to the inquiry as the third step of *Kisor*. See *Reyes-Vargas* v. *Barr*, 958 F.3d 1295, 1301–02 (10th Cir. 2020). Regardless of the label, the test is the same.

concerns. For one, by "clos[ing] the loophole created by courts giving binding *Auer* deference to agency regulatory constructions regardless of the procedural formality of the interpretation," *Kisor* step three helps "neutralize the incentive for agencies to circumvent procedural rigors." See William Yeatman, *An Empirical Defense of Auer Step Zero*, 106 Geo. L.J. 515, 551 (2018). And because *Auer* deference is rooted in a presumption about congressional intent, ensuring adherence to that intent helps to alleviate the "normative and functional concerns" that arise outside of that presumption—"in particular, fairness to regulated parties, the need for a check on agency power, ensuring expert decision making, and encouraging political accountability." See Metzger, *supra*, at 16.

And while this Court explained that *Kisor* step three "does not reduce to any exhaustive test," it offered guidance based on several "especially important markers[.]" *Kisor*, 139 S. Ct. at 2416. *First*, "the regulatory interpretation must be one actually made by the agency." *Id.* at 2416–17. *Second*, the interpretation "must in some way implicate its substantive expertise." *Id.* at 2417. After all, "[w]hen the agency has no comparative expertise in resolving a regulatory ambiguity, Congress presumably would not grant it that authority." *Id.* *Third*, "an agency's reading of a rule must reflect 'fair and considered judgment' to receive *Auer* deference." *Id.* at 2417–18 (citation omitted).

In addition to these non-exhaustive markers, the Court also explained that "courts should not give deference to an agency's reading" "when the reasons for [the presumption of deference] do not apply[.]" *Id.* at 2414. It also provided three reasons for the presumption of deference. *First*, Congress is presumed to be aware of agencies' "unique expertise" and ability to "conduct factual investigations," "consult with affected parties," and "consider how their experts have handled similar issues[.]" *Id.* at 2413. *Second*, deferring to agencies may enhance "political accountability" because agencies answer to elected officials. *Id.* *Third*, deference to agency interpretations may result in "benefits of uniformity in interpreting genuinely ambiguous rules." *Id.*

In sum, *Kisor* step three amounts to a detailed test grounded on bedrock assumptions about *Auer* deference, and this Court unambiguously instructed lower courts to apply this step before affording agencies deference. The Eight Circuit did not perform this step.

B. Properly applied, *Kisor* step three counsels against deferring to the commentary.

Had the Eighth Circuit applied *Kisor* step three in this case, there are good reasons to think its conclusion would be different. To begin, one of the reasons courts presume deference—the enhanced "political accountability" of agencies—cuts *against*

presuming that Congress intended for courts to defer to the commentary.

The government itself has taken the position "that the Sentencing Commission is insulated from legislative interference[.]" *Peugh* v. *United States*, 569 U.S. 530, 545 (2013). Indeed, the Sentencing Commission is "an independent agency in every relevant sense," *Mistretta*, 488 U.S. at 393, a type of entity that has drawn this Court's scrutiny for its *lack* of political accountability. See*, e.g.*, *Seila Law LLC* v. *Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2212 (2020) (Thomas, J., concurring) ("Because independent agencies wield substantial power with no accountability to either the President or the people, they 'pose a significant threat to individual liberty and to the constitutional system of separation of powers and checks and balances.'" (quoting *PHH Corp.* v. *CFPB*, 851 F.3d 75, 165 (D.C. Cir. 2018) (Kavanaugh J., dissenting)).

To be sure, in upholding the Commission against a separation of powers argument, this Court took solace in the fact that Congress "can revoke or amend any or all of the Guidelines as it sees fit . . . within the 180-day waiting period" and that the Commission's "rulemaking is subject to the notice and comment requirements of the Administrative Procedure Act." *Mistretta*, 488 U.S. at 394–95. But allowing the Commission to add entirely new criminal offenses to the Guidelines under the guise of deference sidesteps

both notice-and-comment and congressional review, directly *undermining* political accountability.

Other assumptions that typically undergird the presumption of *Auer* deference are likewise greatly diminished. While the commentary is based upon the Commission's substantive expertise in sentencing, judges share—even eclipse—this expertise. Indeed, "sentencing is a field in which the Judicial Branch long has exercised substantive or political judgment." See *Mistretta*, 488 U.S. at 396); see also, *e.g.*, *Freeman* v. *United States*, 564 U.S. 522, 532 (2011) (plurality) ("District judges have a continuing professional commitment, based on scholarship and accumulated experience, to a consistent sentencing policy."). Moreover, judges are often in a better position to "conduct factual investigations" and "consult with affected parties" than the Commission, as they fashion sentences with particular defendants before them. See *Kisor*, 139 S. Ct. at 2413. Thus, while the Commission has *substantive* expertise, its *comparative* expertise is *de minimis*. See *Kisor*, 139 S. Ct. at 2417 ("When the agency has no *comparative* expertise in resolving a regulatory ambiguity, Congress presumably would not grant it that authority.") (emphasis added).

Similarly, the interest in "uniformity in interpreting genuinely ambiguous rules," *id.* at 2413,

is greatly diminished in this context.[4] While the interest in uniformity "may be strongest when the interpretive issue arises in the context of a 'complex and highly technical regulatory program," *id.* at 2413–14, it is at its weakest here, where the subject matter is squarely in the wheelhouse of federal judges. Moreover, sentencing is a unique context in which individualized determinations prevail over broad generalizable rules. See *e.g., Pepper*, 562 U.S. at 487–88 ("It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue. Underlying this tradition is the principle that the punishment should fit the offender and not merely the crime.") (citations and quotations omitted). And finally, consistently applying the rule of lenity to genuinely ambiguous provisions of the Guidelines would just as readily result in uniformity. Cf. Pet. 23 ("Whenever a guideline is ambiguous, the court must adopt the more lenient reading[.]").

Serious constitutional issues also counsel against applying *Auer* deference in the criminal sentencing context. In addition to the due process and separation

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[4] For purposes of this analysis, *amicus* sets aside the fact that the regulation here is not genuinely ambiguous. See *supra* section II.

of powers concerns underlying lenity, see *supra*, deference in this context would call into question the constitutionality of the Commission itself. The Commission is a unique structure because it is located in the Judicial Branch but wields rulemaking authority. *Mistretta*, 488 U.S. at 393–95. In concluding that this novel structure did not unlawfully "combin[e] legislative and judicial power within the Judicial branch," the Court expressly noted that Congress had authority to review the Guidelines during the 180-day review period and that the Commission's "rulemaking [wa]s subject to the notice and comment requirements of the [APA]." *Id.* at 393–94. Allowing the Commission to expand the scope of the Guidelines under the guise of interpretive deference subverts these crucial constitutional guardrails. Avoiding calling the constitutionality of the agency into question is a significant "countervailing reason[]" that "outweigh[s]" the greatly diminished reasons for presuming deference. See *Kisor*, 139 S. Ct. at 2414.

In addition, deference institutionalizes judicial bias in favor of the government. See generally Philip Hamburger, *Chevron Bias*, 84 Geo. Wash. L. Rev. 1187 (2016). While constitutionally suspect in the best of circumstances, bias against the criminally accused raises particularly grave due process concerns. See, *e.g.*, *Caperton* v. *A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009) ("It is axiomatic that a fair trial in a fair tribunal is a basic requirement of due

process." (alterations omitted) (citations and internal quotations omitted)); *cf.* U.S. Const. amend. VI (guaranteeing the right "[i]n all criminal prosecutions" to a "trial, by an *impartial* jury" (emphasis added)). These constitutional concerns likewise counsel against deference to the Commission.

Accordingly, in this context, the normal "reasons for [presuming *Auer* deference] do not apply," and significant "countervailing reasons outweigh them[.]" *Kisor*, 139 S. Ct. at 2414. In such a situation, "courts should not give deference to an agency's reading[.]" *Id.*

C. The recalcitrance of some courts to apply *Kisor* step three has contributed to an entrenched circuit split.

As Petitioners point out, many circuits have continued to reflexively defer to the Commission without performing the analysis required by *Kisor*, creating an intractable circuit split. Pet. 13–17. These courts often falter at *Kisor* step one, but many circuits have also failed to perform *Kisor* step three. In the instant Petition, for example, the Eighth Circuit deferred to the Commission's interpretation of the Guidelines without so much as mentioning the inquiry required by *Kisor* step three. App. 1a–3a. Indeed, its only reference to *Kisor* came in a footnote in which the court referred to *Kisor* as a "major development[]" but declined to alter its own analysis. *Id.* at 2a n.2. This omission puts the Eighth Circuit

firmly on the wrong side of an entrenched circuit split over the proper application of *Kisor*.

The First Circuit likewise declined to apply *Kisor* step three in *United States* v. *Lewis*, 963 F.3d 16 (1st Cir. 2020). There, the defendant argued that "Application Note 1 [wa]s inconsistent with the text of the career-offender guideline" and that this Court's decision in *Kisor* rendered prior First Circuit precedent inapplicable under an exception to that court's "'law of the circuit' doctrine." *Id.* at 22–23. The First Circuit disagreed, holding that nothing in those "prior opinions suggest[ed] that those panels understood themselves as straying beyond the zone of genuine ambiguity in deeming Application Note 1 consistent with §4B1.2." *Id.* at 24. Following this determination, the court did *not* examine the character and context of the interpretation under *Kisor* step three. However, the court's analysis was "not done" because "not every reasonable agency reading of a genuinely ambiguous rule should receive *Auer* deference." *Kisor*, 139 S. Ct. at 2416. The First Circuit thus erred by failing to continue its *Kisor* analysis after step two.

However, other circuits have dutifully performed the mandatory step three analysis. In *National Lifeline Association* v. *FCC*, for example, the D.C. Circuit took care to analyze whether "the character and context of [an agency]'s interpretation of its regulation . . . [was] sufficient for deference under

Kisor" *in addition to* determining whether there was "genuine ambiguity in the rules[.]" No. 20-1006, 2020 WL 7511124, at *10 (D.C. Cir. Dec. 22, 2020).

The Third Circuit has likewise explained that "an agency's interpretation of a regulation is entitled to deference under *Auer* only if five criteria are met," including that "the character and context of the agency interpretation" must entitle it "to controlling weight[.]" See *Wolfington* v. *Reconstructive Orthopaedic Assocs. II PC*, 935 F.3d 187, 204–05 (3d Cir. 2019).

IV. This Court Should Take This Opportunity To Clarify *Kisor*.

This Court issued *Kisor* for a laudable goal: to "clear up some mixed messages [it] ha[d] sent" about *Auer* deference. *Kisor*, 139 S. Ct. at 2414. Unfortunately, some lower courts have not applied *Kisor*'s teachings, particularly in the context of criminal sentencing. These courts' errors have spawned an entrenched circuit split over the proper application of *Kisor*'s three analytical steps. Plainly, confusion still exists about when courts should afford agencies *Auer* deference.

Granting certiorari here would thus allow the Court to issue much-needed clarity to the lower courts. See, *e.g.*, *City of Los Angeles* v. *Alameda Books, Inc.*, 535 U.S. 425, 433 (2002) (granting certiorari "to clarify the standard" announced by the Court in an

earlier case). Most immediately, it would resolve the error made by the Eighth Circuit in failing to perform any of *Kisor*'s three steps. See, *e.g.*, *Barker* v. *Kansas*, 503 U.S. 594, 597 (1992) ("We granted certiorari because the holding below is arguably inconsistent with our decision[.]"). But more broadly, it would resolve the division among the circuits regarding several steps in the *Kisor* analysis. See *Chiafalo* v. *Washington*, 140 S. Ct. 2316, 2323 (2020) ("We granted certiorari to resolve the [circuit] split.").

Certiorari is also warranted because proper application of *Kisor* is a far-reaching and persistent issue. See *Colorado* v. *Bertine*, 479 U.S. 367, 370 (1987) ("We granted certiorari to consider the important and recurring question of federal law[.]"). "This Court alone has applied *Auer* or *Seminole Rock* in dozens of cases, and lower courts have done so thousands of times." *Kisor*, 139 S. Ct. at 2422. As Petitioner points out, more than *75,000* defendants are sentenced pursuant to the Guidelines each year. Pet. 3. In most circuits, these defendants are at risk of being wrongfully deprived of their liberty through strained and implausible readings of the Guidelines that are reflexively accepted by federal courts. This alone is sufficient to warrant certiorari. See, *e.g.*, *Alexander* v. *Holmes Cty. Bd. of Educ.*, 396 U.S. 19, 20 (1969) (granting certiorari where "[t]he question presented [wa]s one of paramount importance, involving as it d[id] the denial of fundamental rights to many thousands").

CONCLUSION

This Court should grant the petition in this case, as well as the petitions in *Tabb*, No. 20-579, and *Lovato*, 20-6436, to clarify the proper application of *Kisor* in order to protect thousands from being wrongfully denied their fundamental right to liberty.

Respectfully submitted,

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