

No. 21-5714

In The
Supreme Court of the United States

JAYREN JAKAR WYNN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

**On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit**

**BRIEF AMICUS CURIAE OF PACIFIC LEGAL
FOUNDATION IN SUPPORT OF PETITIONER**

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IDENTITY AND INTEREST OF AMICUS CURIAE¹

Founded in 1973, Pacific Legal Foundation is a nonprofit, tax-exempt, California corporation established for the purpose of litigating matters affecting the public interest. PLF provides a voice in the courts for Americans who believe in limited constitutional government, private property rights, and individual freedom.

PLF is the most experienced public-interest legal organization defending the constitutional principle of separation of powers in the arena of administrative law. PLF's attorneys have participated as lead counsel or counsel for amici in several cases involving the role of the Judicial Branch as an independent check on the Executive and Legislative branches under the Constitution's Separation of Powers. *See, e.g., Lucia v. S.E.C.*, 138 S. Ct. 2044 (2018) (SEC administrative-law judge is "officer of the United States" under the Appointments Clause); *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 570 U.S. 590, (2016) (judicial review of agency interpretation of Clean Water Act); *Sackett v. E.P.A.*, 566 U.S. 120 (2012) (same); *Rapanos v. United States*, 547 U.S. 715

¹ After timely notice was given, counsel for all parties have consented to the filing of this brief. Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

(2006) (agency regulations defining “waters of the United States”).

This case implicates significant concerns about the proper role an administrative agency may occupy in criminal sentencing. PLF, therefore, offers a discussion of the relevant constitutional principles and the dire consequences of the prevailing approach taken by the lower courts.

INTRODUCTION AND SUMMARY OF ARGUMENT

The U.S. Sentencing Commission, an administrative agency, may not create *ad hoc* sentencing enhancements outside the route specifically set out by Congress, nor may it bind federal court interpretations of existing guideline provisions merely from the force of its own will. Congress did not intend for the Commission to exert such absolute power over sentencing enhancements but instead guaranteed congressional oversight into any amendments to the guidelines. By preserving congressional control, the Sentencing Reform Act ensured that the Commission could exercise neither legislative nor judicial prerogatives over criminal sentencing decisions.

Despite these fundamental principles already set down by this Court, the lower courts have distorted the Commission’s role, relinquished judicial authority, and threatened congressional control over the guidelines. This Court should grant the petition and hold that the Commission may not enlarge or amend its guidelines through informal commentary and that its commentary serves only as the

Commission's nonbinding views of the guidelines themselves.

Petitioner, Jayren Jakar Wynn, convincingly argues that the sentencing enhancement applied to him was an incorrect reading of the guideline provision that had been approved by Congress. PLF writes separately to stress the important constitutional implications of the approach taken by the Second Circuit, and, indeed, the majority of circuits. If the Commission can bind a federal court with informal commentary, even without attempting to resolve a regulatory ambiguity, it can exercise legislative power specifically withheld from it and simultaneously intrude on the judicial prerogative to interpret the law. Instead of allowing the Commission to intrude on constitutionally separate functions of governance, principles of due process and respect for constitutional order require courts to abandon all deference to the Commission in favor of the rule of lenity.

ARGUMENT

I. REQUIRING DEFERENCE TO THE COMMISSION ABSENT AMBIGUITY VIOLATES THE SEPARATION OF POWERS

A. Congress Deliberately Limited the Commission's Authority to Amend the Guidelines, Which Avoids Separation of Powers Concerns

When Congress created the Commission, it explicitly delegated certain authority over federal sentencing. A product of the Sentencing Reform Act,

the Commission was created to “establish sentencing policies and practices for the Federal Criminal justice system.” 28 U.S.C. § 991(a), (b)(1). 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).

Section 994(a) of the Act directs the Commission to take two types of action: (1) promulgating the guidelines and (2) issuing “general policy statements regarding application of the guidelines or any other aspect of sentencing or sentence implementation.” The Commission must promulgate its guidelines pursuant to notice-and-comment rulemaking. 28 U.S.C. § 994(x). And the Commission must submit any amendments or modifications of the guidelines pursuant to § 994(a) to Congress for a mandatory review period of at least six months, during which Congress may modify or reject the Commission’s amendments or modifications. *Id.* § 994(p).

There is, however, a third category of action the Commission may take. The Act—by implication rather than express mandate—permits the Commission to publish commentary about its guidelines. *See Stinson v. United States*, 508 U.S. 36, 41 (1993) (citing 18 U.S.C. § 3553(b)). According to the Commission, the purpose of its commentary is to (1) explain or interpret the guidelines; (2) suggest circumstances when courts should depart from the guidelines; and (3) provide background information, such as what factors the Commission considered. U.S.S.G. § 1B1.7. The Commission characterizes its

commentary as having the same legal “force of policy statements” and says only that a court’s 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, comment. But the commentary—unlike the guidelines—is not expressly authorized by statute, not issued following notice-and-comment rulemaking, and not subject to congressional review.

Because of its anomalous presence in our constitutional system, the Commission has long raised concerns that it might be exercising powers held exclusively by other branches. Nevertheless, this Court upheld the Commission’s continued existence based, in part, on two limitations on the Commission’s power: (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. Because “the Commission is fully accountable to Congress,” these limits prevented the Commission from exercising “the power of judging joined with the legislative.” *Id.* at 394 (quoting *The Federalist* No. 47 (James Madison)). “These two constraints—congressional review and notice and comment—stand to safeguard the Commission from uniting legislative and judicial authority in violation of the separation of powers.” *United States v. Havis*, 927 F.3d 382, 385-86 (6th Cir. 2019) (*en banc*) (“*Havis II*”).

B. Deference to Any Agency Relies on Congressional Delegation of Legislative Power

Whereas Congress explicitly delegated authority to the Commission to issue the guidelines, administrative deference to the Commission involves a different, implicit, delegation of power. Judicial deference to administrative interpretations of regulations is “rooted in a presumption about congressional intent—a presumption that Congress would generally want the agency to play the primary role in resolving regulatory ambiguities.” *Kisor v. Wilkie*, 139 S. Ct. 2400, 2412 (2019). It survives constitutional scrutiny only because Congress has implicitly directed an agency, not the judiciary, to “fill[] regulatory gaps” left by ambiguous regulatory text. *Id.* at 2413.

This Court has also concluded that the “express congressional delegation of authority for rulemaking” that allows the Commission to “promulgate[] the guidelines” also allows it to issue binding commentary “to assist in the interpretation and application of those rules,” to which a court must defer. *Stinson*, 508 U.S. at 44-45 (citing *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)). To be sure, this Court also suggested in *Stinson* that deference to the Commission was “not the product of delegated authority for rulemaking” that would depend on an ambiguity. *Id.* at 44. But in *Kisor*, this Court repudiated the “mixed messages” found in *Stinson* and similar decisions, and stressed that “Congress intended for courts to defer to agencies when they interpret their own *ambiguous* rules.” 139 S. Ct. at 2414 (emphasis added).² “If uncertainty does not exist,

² This Court even cataloged *Stinson* as part of the “legion” deference cases issued before *Auer v. Robbins*, 519 U.S. 452

there is no plausible reason for deference. The regulation then just means what it means—and the court must give it effect, as the court would any law.” *Id.* 2415. Otherwise, deference would “permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation.” *Id.* (quotation omitted).

C. The Approach Taken by the Second Circuit, and Six Others, Violates the Separation of Powers

The panel below recognized that Application Note 1 “expand[s] the definition of ‘controlled substance offense’ to include aiding and abetting, conspiring, and attempting to commit such offenses.” *United States v. Wynn*, 845 F. App’x 63, 66 (2d Cir. 2021) (unpublished, citations omitted). This was despite the lack of any ambiguity in the guideline provision, and despite this Court’s admonitions in *Kisor*. *Id.* The lower court thus concluded that the commentary was binding on the courts, and thus the district court had been *required* to calculate Wynn’s sentence with the enhancement. *Id.*

The Second Circuit’s approach impermissibly consolidates *both* the lawmaking and judicial function in the Commission, doubly threatening the separation of powers. As the *en banc* Third Circuit recognized, courts must reform their practice of granting “uncritical and broad deference to agency interpretations” in order to “protect[] the separation of powers.” *United States v. Nasir*, 982 F.3d 144, 158-60

(1997), that had applied “reflexive” deference that was a “caricature” of the doctrine. *Id.* at 2411 n.3, 2412.

(3d Cir. 2020) (*en banc*) (“*Nasir I*”), *vacated in part on other grounds by* --- S. Ct. ---, 2021 WL 4507560 (2021), *and reinstated by* --- F.4th ---, 2021 WL 5173485, at *8 (3d Cir. Nov. 8, 2021) (*en banc*) (“*Nasir II*”). Indeed, “[i]f we accept that the commentary can do more than interpret the guidelines, that it can add to their scope, we allow circumvention of the checks Congress put on the Sentencing Commission, a body that exercises considerable authority in setting rules that can deprive citizens of their liberty.” *Nasir I*, 982 F.3d at 159. “If the Commission can add to or amend the Guidelines solely through commentary, then it possesses a great deal more legislative power than *Mistretta* envisioned. This means that in order to keep the Sentencing Commission in its proper constitutional position—whatever that is exactly—courts must keep Guidelines text and Guidelines commentary, which are two different vehicles, in their respective lanes.” *United States v. Havis*, 907 F.3d 439, 443 (6th Cir. 2018) (“*Havis I*”) (Thapar, J., concurring). Thus, only by giving commentary “no independent legal force” can a court preserve the separation of powers. *Havis II*, 927 F.3d at 386. The Second Circuit, however, has blown past all of these safeguards, and empowered the Commission to modify the guidelines and bind the courts at will.

Importantly, the Second Circuit is not alone in this unconstitutional approach. Even after *Kisor* the First, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits all read Commission commentary as binding on federal courts, even when it expands the guidelines beyond the text approved by Congress and even without textual ambiguity. *See, e.g., United States v. Lewis*, 963 F.3d 16, 24 (1st Cir. 2020); *United States v.*

Cingari, 952 F.3d 1301, 1308 (11th Cir. 2020); *United States v. Broadway*, 815 F. App'x 95, 96 (8th Cir. 2020) (unpublished); *United States v. Lovelace*, 794 F. App'x 793, 795 (10th Cir. 2020) (unpublished); *United States v. Adams*, 934 F.3d 720, 729 (7th Cir. 2019); *United States v. Crum*, 934 F.3d 963, 966 (9th Cir. 2019). This was despite the recognition by many of those courts that this approach was inconsistent with *Kisor*. See, e.g., *Lewis*, 963 F.3d at 27-28 (Torruella, J., concurring) (writing for two judges 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”); *United States v. Tabb*, 949 F.3d 81, 97 (2d Cir. 2020) (explaining that *Havis* is “of no moment here, because we, acting as a three judge panel, are not at liberty to revisit” circuit precedent); *Broadway*, 815 F. App'x at 96 n.2 (“We are not in a position to overrule [precedent], as Broadway urges us to do, even if there have been some major developments since 1995.”); *Crum*, 934 F.3d at 966 (“If 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.”). Most people facing federal sentencing therefore also find themselves before courts that have outsourced judicial independence and undermined congressional prerogatives in favor of an unlawful caricature of the Commission.

II. ALL JUDICIAL DEFERENCE TO THE COMMISSION THREATENS

CONSTITUTIONAL PROTECTIONS ENSHRINED IN THE RULE OF LENITY

Another constitutional error lurks below the surface of this case, and this Court should also grant review to finally make clear that deference to agency interpretation can *never* be acceptable when it increases criminal punishment. *See Nasir II*, 2021 WL 5173485, at *9 (Bibas, J., concurring) (observing that the “narrow scope” of the court’s ruling on ambiguity “hints at a broader problem” with *Stinson*). “[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). But the Second Circuit, along with six others, reflexively applies deference as a means of *increasing* criminal punishment. “Were this a civil case,” the separation of powers concerns discussed above “would merit close attention. But as this is a criminal case and applying *Auer* would extend [Wynn’s] time in prison, alarm bells should be going off. The whole point of separating the federal government’s powers in the first place was to protect individual liberty.” *See Havis I*, 907 F.3d at 450 (Thapar, J., concurring).

“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 II*, 2021 WL 5173485, at *10 (Bibas, J., concurring). “The Commission thus exercises a sizable piece ‘of the ultimate governmental power, short of capital punishment’—the power to take away someone’s liberty.” *Havis II*, 927 F.3d at 385 (quoting *United*

States v. Winstead, 890 F.3d 1082, 1092 (D.C. Cir. 2018)).

The rule of lenity is a vital means of limiting this “ultimate governmental power.” *Id.* The rule is a tool of construction “perhaps not much less old than construction itself.” *United States v. Wiltberger*, 18 U.S. 76, 95 (1820). In simple 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. *See 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.”). Lenity applies with equal force to the guidelines, which “exert a law-like gravitational pull on sentences.” *Nasir II*, 2021 WL 5173485, at *11 (Bibas, J., concurring) (citing *United States v. Booker*, 543 U.S. 220, 265 (2005)).

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 *10. 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,” lenity “embodies ‘the instinctive distaste[] against men languishing in prison unless the lawmaker has clearly said they should.’” *Nasir II*, 2021 WL 5173485, at *10 (Bibas, J., concurring) (quoting *Bass*, 404 U.S. at 347 (citation omitted)). By promoting liberty, lenity “fits with one of the core purposes of our Constitution, to ‘secure the Blessings of Liberty’ for all[.]” *Id.* (quoting U.S. Const. pmb.).

But deferring to the Commission and erring on the side of *more time* in prison wreaks havoc with fundamental limits on when the government can exercise its ultimate power. “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); *see also 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.”). And if a guideline enhancement is truly uncertain, then a court cannot look to the Commission for an answer—the answer lies in lenity.

The decision below, and the decisions of six other circuits, have turned this baseline constitutional value upside down.

III. ONLY THIS COURT CAN REMEDY THE GRAVE INJUSTICES PREVAILING IN SEVEN CIRCUITS

This is hardly the first petition presenting these critical issues concerning this very same guideline provision. Last term, for instance, this Court considered and ultimately denied petitions from multiple circuits raising identical concerns. *See Tabb*, 949 F.3d 81, *cert. denied* 141 S. Ct. 2793 (2021); *United States v. Lovato*, 950 F.3d 1337 (10th Cir. 2020), *cert. denied*, 141 S. Ct. 2814 (2021); *Broadway*, 815 F. App'x 95, *cert. denied*, 141 S. Ct. 2792 (2021). But far from having resolved itself through percolation in the lower courts, the problem has only festered, and countless people have been unlawfully sentenced to *years* in prison. Seven Circuits continue, almost defiantly, to insist on the supremacy of the Commission in all things. *See, e.g., Lewis*, 963 F.3d at 24; *Cingari*, 952 F.3d at 1308; *Wynn*, 845 F. App'x at 66; *Broadway*, 815 F. App'x at 96; *Lovelace*, 794 F. App'x at 795; *Adams*, 934 F.3d at 729; *Crum*, 934 F.3d at 966.

Indeed, *Wynn* is one of many who have been unlawfully punished. *Wynn's* sentence was unlawfully extended by more than two years in federal prison. *See Wynn*, 845 F. App'x at 65. But consider just three petitioners from last term—each faced years of additional prison time solely because of the Commission's commentary. *See Tabb*, 949 F.3d at 83 (118-month increase); *Lovato*, 950 F.3d at 1349 (30-

month increase); *Broadway*, 815 F. App'x at 95 (81-month increase). In 2020, moreover, nearly 65,000 people were sentenced to federal prison, with more than half facing some form of enhancement based on prior criminal convictions. See U.S. Sentencing Commission, *Overview of Federal Criminal Cases FY 2020* at 1, 7 (Apr. 2021) available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2021/FY20_Overview_Federal_Criminal_Cases.pdf. How many *decades* of time spent in prison without a lawful basis warrant this Court's intervention? Whatever the number, it surely has been surpassed.

The Commission, moreover, remains incapable of curing the constitutional defect. Now with only *one* commissioner, the Commission has sat idle since January 2019. Nate Raymond, *U.S. Sentencing Panel's Last Member Urges Biden to Revive Commission*, Reuters (Nov. 11, 2021) <https://www.reuters.com/legal/government/us-sentencing-panels-last-member-breyer-urges-biden-revive-commission-2021-11-11/>. It has no nominees for the six vacant seats, and its last remaining member's term officially expired last month. *Id.* Even if it were inclined to do so, the Commission will not wade into this crisis.

CONCLUSION

“As [this Court has] explained on many prior occasions, the separation of powers is designed to preserve the liberty of all the people.” *Collins v. Yellen*, 141 S. Ct. 1761, 1780 (2021). When power is improperly consolidated, violations of other rights

have no remedy. But Wynn and countless others have been sentenced to *years* of additional prison time through the Commission's improper arrogation of power. The lower courts that have refused to correct this injustice threaten all of our liberty and have undermined their own legitimacy. This Court should grant Wynn's petition for a writ of certiorari to correct these injustices.

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Respectfully submitted,

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