No. 21-7391

In the Supreme Court of the United States

ISAIAH HENDERSON,

Petitioner,

v.

UNITED STATES,

Respondent.

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

BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

Daniel E. Alperstein
REED SMITH LLP
10 South Wacker Dr., 40th Floor
Chicago, IL 60606

Joshua T. Newborn
Ted A. Hages
REED SMITH LLP
225 Fifth Avenue
Pittsburgh, PA 15222

Jonathan L. Marcus
Counsel of Record
REED SMITH LLP
1301 K Street, N.W., Suite 1000
Washington, D.C. 20005
(202) 414-9200
Jonathan.Marcus@reedsmith.com

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Counsel for Amicus Curiae

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INTEREST OF AMICUS CURIAE[1]

The National Association of Criminal Defense Lawyers (NACDL) is a national organization committed to enhancing the capacity of the criminal defense bar to safeguard fundamental constitutional rights, and to advocating for policy and practice improvements in the criminal legal system. In addition to initiating litigation to preserve constitutional rights and transparency, NACDL routinely files amicus briefs in federal and state courts across the country, submits official comments on rules and regulations to various government agencies, and provides official letters and testimony to Congress on issues of importance to the criminal legal system.

NACDL writes to assist the Court by elaborating upon the reasons why the issue presented in the Petition for Writ of Certiorari is important to criminal defendants and defense attorneys nationwide, as well as the reasons why the issue is appropriate for the Court's consideration and resolution.

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[1] Pursuant to Rule 37.6, *amicus curiae* states that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission. *Amicus* timely notified the parties of its intention to file this amicus brief and all parties have given their consent.

SUMMARY OF ARGUMENT

Federal sentencing decisions affect over 50,000 defendants each year.[2] Those decisions are of enormous importance. Even the precise, narrow sentencing question presented in this case—whether "controlled substances offense[s]" include offenses criminalized only under state law—affects nearly 2,000 defendants per year. When judges make sentencing decisions, those decisions are driven by the U.S. Sentencing Guidelines, promulgated by the U.S. Sentencing Commission. *See Molina-Martinez v. United States*, 578 U.S. 189, 198 (2016) ("[T]he Guidelines are to be the sentencing court's starting point and . . . initial benchmark." (internal quotation marks omitted)).

Yet the Guidelines are not always clear. In particular, while the Guidelines provide for an increased sentence for prior "controlled substances offense[s]," they are not explicit on whether such offenses are defined solely by federal law or instead encompass offenses criminalized only by state law. The Sentencing Commission could, as it has done elsewhere, provide its view of the answer by issuing commentary to the Guidelines. But it has not done so. And because of the Commission's current status—lacking six of its seven members and a quorum for taking action—it will not do so anytime soon.

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[2] 2021 Annual Report and 2021 Sourcebook of Federal Sentencing Statistics at 8, available at https://www.ussc.gov/research/sourcebook-2021 (last accessed Mar. 23, 2022).

The lack of guidance from the Sentencing Commission has led to a lack of uniformity in the sentences handed out to criminal defendants. Nearly all of the federal circuits have weighed in on the issue, and they are almost evenly split on the answer. As a result, a defendant's sentence hinges on the location where the defendant is sentenced. That does not comport with our legal system. *See United States v. Booker*, 543 U.S. 220, 253 (2005) ("Congress' basic goal in passing the Sentencing Act was to move the sentencing system in the direction of increased uniformity," which includes "similar sentences for those convicted of violations of the same statute").

Some have requested input from the Commission on this issue, including Members of this Court. *See Guerrant v. United States*, 142 S. Ct. 640, 640-41 (2022) (Sotomayor, J., concurring in denial of certiorari). As a practical matter, because of the Commission's current status, that input will not be forthcoming, at least not anytime in the foreseeable future. But there is a more fundamental reason this Court should not wait on the Commission to resolve the issue.

The question presented here is one of textual interpretation—a pure legal question that falls naturally into the judicial realm. It is the job of the courts—and ultimately this Court—to say what the law is. *See Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."). Furthermore, even if the Commission *had* weighed in on the question, deference to that interpretation would not be warranted here. As this Court explained

in *Kisor v. Wilkie*, 139 S. Ct. 2400, 2414-17 (2019), deference to agency interpretations is inappropriate unless: (1) the court has conducted an analysis of the text, exhausting "all the standard tools of interpretation," and still concluded that the regulation is ambiguous; and (2) the question implicates the agency's "substantive expertise" and other rationales (e.g., important policy matters and the need for uniformity) supporting deference. Because neither condition is met in this case, the question is appropriate for this Court to take up and resolve now, rather than postponing it indefinitely while the circuit split becomes further entrenched and more similarly situated defendants receive disparate sentences.

ARGUMENT

I. Interpretive Deference Is Inconsistent With Judicial Independence

Over a hundred and twenty-five years ago, in *Nix v. Hedden*, 149 U.S. 304 (1893), this Court took it upon itself to answer a question so whimsical that non-lawyers still chuckle about it today: What, the Court was asked, is a tomato: a "vegetable" or a "fruit"? The Court determined that a tomato is a "vegetable." Of course, the Court did not decide this question out of mere intellectual curiosity or a penchant for abstract amusements. The issue arose from a statute related to tariffs that had a substantial impact on interstate commerce. Today, the Petition asks the Court to interpret the phrase "controlled substance offense"—an issue undoubtedly less entertaining than tomatoes, but equally deserving of this Court's attention.

This Court's role in resolving interpretive issues has been recognized since the American Founding. When the colonists created a government with divided power held in place by checks and balances, Alexander Hamilton argued in Federalist 78 that the federal courts "were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority." The Federalist No. 78 (Alexander Hamilton). Hamilton accordingly emphasized that "[t]he interpretation of laws is the proper and peculiar province of the courts." *Id.* That responsibility was not just to resolve individual cases in court, but was "a check upon the legislative body." *Id.*

When the U.S. Constitution was adopted, it provided Article III judges with life tenure and an undiminished salary to protect their independence. This Court understood its role and soon announced that "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury*, 5 U.S. at 177.

But *Marbury* was in 1803, and our country has changed since then. At the beginning, checks and balances seemed simpler. Montesquieu explained that power could be divided into legislative, executive, and judicial branches, and that this triumvirate could govern without collapsing into corruption. But today, a substantial component of constitutional law is administrative law, and courts are forced to grapple with how much emphasis they put on the formalism of the separation of powers.

Enter the Sentencing Commission. It was created by the Sentencing Reform Act of 1984 to help consolidate and harmonize the sentencing process. *See* 28 U.S.C. § 991. This statute made the Sentencing Commission's Guidelines binding on the courts. 18 U.S.C. § 3553(b).

But the actions of this new commission were soon subjected to judicial scrutiny. Initial challenges focused on the constitutionality of the Sentencing Commission based on separation-of-powers concerns. The Commission is independent, but also part of the judicial branch of the United States. Its constitutionality was accordingly upheld 8-1 in *Mistretta v. United States*, 488 U.S. 361 (1989), and it has continued to this day under the stewardship of many commissioners. But the lone dissent in *Mistretta* is notable because it was Justice Scalia dissenting on separation-of-powers grounds. He was concerned that the decision treated the Constitution "as though it were no more than a generalized prescription that the functions of the Branches should not be commingled too much—how much is too much to be determined, case-by-case, by this Court." *Id.* at 426 (Scalia, J., dissenting).

Later, in *United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court ruled that the Sentencing Reform Act could not make the Commission's guidelines binding on the courts. *Id.* at 245-46. Instead, the Guidelines could only be advisory because of criminal protections afforded to defendants under the Sixth Amendment. *Id.* To reach this conclusion, the Court engaged in extensive statutory analysis of the Sentencing Reform Act. *Id.* at 246-65. When

interpreting the Act, the Supreme Court recognized that its role was to interpret the Act independently. *Id.* at 250. Notably, the Court held that it did "not believe that we can interpret the statute's language to save its constitutionality" under the Sixth Amendment. *Id.*

This Court's holdings in *Mistretta* and *Booker* reflect a delicate balance of powers in the Sentencing Commission. Although Justice Scalia's lone dissent in *Mistretta* has not been elevated to the same heights as his lone dissent just a year earlier in *Morrison v. Olson*, 487 U.S. 654 (1988), it echoes many of the same separation-of-powers concerns. These concerns did not require jettisoning the Sentencing Commission in the minds of the other eight Justices. Nonetheless, when it comes to interpreting the statutes giving power to the Sentencing Commission, the Court was willing to engage in a thorough and unflinching review of the statutory language.

As the judiciary continues to grapple with big-picture issues about the separation of powers, the Court is free to assert itself in a non-confrontational, but still powerful, way. It can assert its judicial independence by not deferring to the Sentencing Commission when interpreting the Sentencing Guidelines. This Court has already downgraded the Sentencing Guidelines from binding to advisory, and it should continue to engage in a thorough interpretive analysis of those Guidelines.

The Petition presents this Court with an excellent opportunity to interpret a Guideline issued by the Sentencing Commission. Specifically, the Petition

asks this Court to define a "controlled substance offense," a term used in § 4B1.1 of the Sentencing Guidelines. This question presents a classic case of textual interpretation, which the Court is well-positioned to address without waiting for the Sentencing Commission to speak on the issue. If this Court was willing to vigorously assert that a tomato is a "vegetable," it can assert itself with the same vigor and independence in defining a "controlled substance offense."

II. This Court Should Interpret the Text of the Guidelines Because Deference to the Sentencing Commission Is Unwarranted

As noted above, the question raised by the Petition is one that falls easily into the judicial bailiwick in the first place. And this judicial prerogative should not be discarded in favor of deference to the Sentencing Commission for two primary reasons. First, there is no agency interpretation for this Court to defer to, and one is unlikely to emerge soon—if at all. Second, even if the Commission had issued an interpretation, it would not be entitled to deference under this Court's precedent. Accordingly, there is and should be no deference barrier to this Court's resolution of the question presented.

A. Deference is unwarranted because the Sentencing Commission has not issued an interpretation and is unlikely to do so.

As an initial matter, deference to the Sentencing Commission's interpretation of the Guideline text is unwarranted for the simple reason that no such interpretation exists or is likely to exist in the near future.

In theory, the Sentencing Commission could resolve this question by issuing commentary interpreting the text of the Guideline. But it has never done so. And it is highly unlikely to do so in the future because the Commission has not had a quorum since 2019, and currently has only one member whose term expires in six months. *See* United States Sentencing Commission, Organization, available at https://www.ussc.gov/about/who-we-are/organization (last accessed Mar. 23, 2022); United States Sentencing Commission, Q, available at https://www.ussc.gov/q (last accessed Mar. 23, 2022); *see also United States v. Crocco*, 15 F.4th 20, 26 n.4 (1st Cir. 2021) ("[T]he U.S. Sentencing Commission currently is without sufficient members to conduct business.").

It is one thing to defer in appropriate circumstances to an agency interpretation of regulatory text. It is quite another to abdicate the judicial role in textual interpretation merely on the *chance* that the agency may issue an interpretation—a chance that likely will not materialize.

For that reason, the situation the Court faces here is unlike the one presented in *Braxton v. United States*, 500 U.S. 344 (1991). In *Braxton*, this Court granted a petition for certiorari to consider the meaning of a Guideline section. *Id.* at 346-47. After the Court granted the petition—but before it decided the case—the Commission requested public comment on the "precise question" before the Court and began a statutorily authorized proceeding to consider whether to amend the Guideline. *Id.* at 348. This Court held, based on Congress's delegation to the Commission of both the duty and the "unusual explicit *power*" over Guideline revision, that it was unnecessary for the Court to address the question "because the Commission has already undertaken a proceeding that will eliminate circuit conflict over the meaning of the [Guideline]." *Id.* at 348-49 (citing 28 U.S.C. § 994(u) (emphasis in original)).[3] Here, however, the Commission has undertaken no such proceeding and is unlikely to do so. As this Court noted in *Braxton*, "[o]rdinarily . . . we regard the task [of interpretation] as initially and primarily ours." *Id.* at 348. It remains this Court's "initial[] and primar[y]" responsibility to resolve the interpretive question here.

Finally, there is no risk of this Court's decision ultimately proving unnecessary in light of a later interpretation by the Sentencing Commission. To the extent a later Sentencing Commission commentary conflicts with a decision of this Court interpreting the

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[3] This Court also noted that "the specific controversy before us can be decided on other grounds," further supporting the decision not to address the Guidelines question. *Id.* at 349.

Guideline language, the latter prevails. *See Neal v. United States*, 516 U.S. 284, 295 (1996) (stating, in the Guidelines context, that "[o]nce we have determined a statute's meaning, we adhere to our ruling under the doctrine of *stare decisis*, and we assess an agency's later interpretation of the statute against that settled law").[4]

B. Even if the Sentencing Commission had issued an interpretation, deference would be unwarranted here.

The Sentencing Commission has not issued any commentary addressing the question presented in this case. But even if it had, deference to the Commission's interpretation of the Guidelines text would not be appropriate. This Court has limited the broad original articulation of the deference due to the Commission on matters of Guideline interpretation, and the considerations this Court has laid out weigh against deference here.

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[4] In *National Cable & Telecommunications Association v. BrandX Internet Services*, the Court—in holding that the Ninth Circuit erroneously adhered to its prior interpretation of a statute over a contrary agency interpretation—explained that *Neal*'s holding applies where the statute is not ambiguous and thus deference to the agency would not be afforded anyway. 545 U.S. 967, 984 (2005). As explained in the following section, under *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), if this Court does not hold the Guideline incurably ambiguous, deference to the Commission is inappropriate. In such circumstances, *Neal* would apply, and this Court's construction would trump any later contrary interpretation of the Guideline by the Commission.

1. The broad original articulation of the deference doctrine is no longer applicable after *Kisor*.

Largely beginning with this Court's decision in *Seminole Rock*, so-called "*Auer* deference"[5] directed courts to defer to agency interpretations of their own regulations unless those interpretations were incompatible with the text of the regulations themselves. *See Auer*, 519 U.S. at 461 (instructing courts to defer to an agency's interpretation unless it is "plainly erroneous or inconsistent with the regulation"); *United States v. Larionoff*, 431 U.S. 864, 872 (1977) (explaining that the agency's interpretation is "ultimate" and is to be given "controlling weight" unless plainly erroneous or inconsistent with the regulation (quoting *Seminole Rock*, 325 U.S. at 414)). This sweeping doctrine of administrative law has been applied to numerous agencies, including the Sentencing Commission, which issues rules in the form of the Sentencing Guidelines and interpretations in the form of associated commentary. *See Dillon v. United States*, 560 U.S. 817, 820 (2010) ("The Sentencing Reform Act of 1984 . . . established the Sentencing Commission and authorized it to promulgate Sentencing Guidelines and to issue policy statements regarding the Guidelines' application."); *Stinson v. United States*, 508 U.S. 36, 44-45 (1993) (noting that the Guidelines are properly treated as agency rules and

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[5] *See Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945); *Auer v. Robbins*, 519 U.S. 452 (1997).

the Commission's commentary as its interpretation of those rules). Thus, in *Stinson*, this Court stated—in the context of Commission commentary to the Guidelines—that "provided an agency's interpretation of its own regulations does not violate the Constitution or a federal statute, it must be given 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" 508 U.S. at 45 (quoting *Seminole Rock*, 325 U.S. at 414).

Applying the *Auer* doctrine, courts have afforded deference to agency interpretations of their regulations. But the nearly "reflexive" manner in which courts deferred to agencies under this doctrine became increasingly recognized as incompatible with the proper role of the judiciary in interpreting statutory and regulatory text. *See United States v. Nasir*, 982 F.3d 144, 158 (3d Cir. 2020) (en banc), *vacated on other grounds*, *Greer v. United States*, 141 S. Ct. 2090 (2021) ("[W]e may have gone too far in affording deference to the guidelines' commentary under the standard set forth in *Stinson*."); *Decker v. Nw. Envtl. Def. Ctr. Ga.-Pac. W., Inc.*, 568 U.S. 597, 621 (2013) (Scalia, J., dissenting) (asserting that *Auer* deference "contravenes one of the great rules of separation of powers: He who writes a law must not adjudge its violation"); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612 (1996) (explaining the defects of blind deference to agency interpretations of their own rules, which may incentivize the enactment of vague rules, provide inadequate notice and encourage arbitrary enforcement of rules, and promote the influence of

interest groups in government); *see also Pereira v. Sessions*, 138 S. Ct. 2105, 2120 (2018) (Kennedy, J., concurring) (collecting cases where Members of this Court have raised concern over the "reflexive deference" in *Chevron* contexts). Thus, in *Kisor v. Wilkie*, this Court reined in the broad scope of *Auer* deference, observing that "*Auer* deference is not the answer to every question of interpreting an agency's rules. Far from it." 139 S. Ct. at 2414.

This Court explained that *Auer* deference was in fact subject to several limitations, designed to "maintain[] a strong judicial role in interpreting rules." *Id.* at 2418; *see also Braxton*, 500 U.S. at 348 ("Ordinarily . . . we regard the task [of interpretation] as initially and primarily ours."). As discussed more fully below, this Court has laid out several considerations to determine whether deference is permissible—including the requirements that the rule first be held "genuinely ambiguous" and that the interpretation implicate the agency's "substantive expertise." *Kisor*, 139 S. Ct. at 2415, 2417.

These limitations on deference apply with full force to the deference accorded the Sentencing Commission under *Stinson*. Indeed, *Stinson*'s formulation of the deference standard—deferring unless the interpretation is "plainly erroneous or inconsistent with the regulation"—was described by this Court in *Kisor* as "a caricature of the doctrine, in which deference is 'reflexive.'" *Kisor*, 139 S. Ct. at 2415 (quoting *Pereira*, 138 S. Ct. at 2120 (Kennedy, J., concurring)). Accordingly, after *Kisor*, the Commission is no longer entitled to near-automatic deference to its interpretations of the Guidelines. *See Nasir*, 982 F.3d

at 158. Rather, deference is warranted only under the particular circumstances delineated by *Kisor*. And here, it is not.

2. The factors laid out in *Kisor* demonstrate that deference would not be warranted here.

This Court in *Kisor* explained that several considerations—related to the rationales for agency deference in the first place—inform whether deference in a particular case is appropriate. *See Kisor*, 139 S. Ct. at 2414. Those considerations—genuine ambiguity, agency substantive expertise, paramount policy considerations, and uniformity—all weigh against deference to the Sentencing Commission's interpretation of the Guideline at issue here.

a. Genuine Ambiguity

First and foremost, this Court clarified in *Kisor* that deference to agency interpretations is *never* permissible unless it follows, not precedes, a court's independent legal analysis of the text. "[T]he possibility of deference can arise only if a regulation is genuinely ambiguous. And when we use that term, we mean it—genuinely ambiguous, even after a court has resorted to all the standard tools of interpretation." *Kisor*, 139 S. Ct. at 2414. Indeed, "there is no plausible reason for deference" if the meaning of the rule can be determined; if that is the case, "[t]he regulation then just means what it means—and the court must give it effect, as the court would any law." *Id.* at 2415. Deference in the absence of incurable ambiguity would

"'permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation.'" *Id.* (quoting *Christensen v. Harris County*, 529 U.S. 576, 588 (2000)).

Accordingly, a court must first find the text "genuinely ambiguous." Such a conclusion cannot be made lightly: "Agency regulations can sometimes make the eyes glaze over. But hard interpretive conundrums, even relating to complex rules, can often be solved." *Id. Kisor* instructs that the court "must exhaust all the 'traditional tools' of construction" in the "legal toolkit," carefully considering "the text, structure, history, and purpose of a regulation, in all the ways it would if it had no agency to fall back on." *Id.* And the "legal toolkit" is prodigious indeed. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* xi-xvii (2011) (listing over fifty canons of textual interpretation and construction); *Xilinx, Inc. v. Commissioner*, 598 F.3d 1191, 1196 (9th Cir. 2010) ("[A]s every judge knows, the canons of construction are many and their interaction complex."). Only after completing the full legal analysis and finding incurable ambiguity may the court consider deferring to an agency interpretation.

Here, then, any potential deference (which, again, remains speculative because the Sentencing Commission has issued no interpretation) provides no reason to decline to consider the legal issue presented—and saves no judicial resources—because resolving the question requires the court to undertake a full legal analysis anyway. *See Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 104 n.4 (2014) ("Even in

cases where an agency's interpretation receives *Auer* deference, however, it is the court that ultimately decides whether a given regulation means what the agency says."). And this Court may well conclude that the meaning of the Guideline language can be determined with the use of the "legal toolkit" alone—as did all the circuit courts comprising the circuit split in this case.

Indeed, applying *Kisor*'s genuine-ambiguity requirement, multiple circuits have concluded that deference to the Sentencing Commission on questions of Guideline interpretation is no longer appropriate. *See Nasir*, 982 F.3d at 160 (overruling prior precedent deferring to the Sentencing Commission and holding that "[i]n light of *Kisor*'s limitations on deference . . . we conclude that inchoate crimes are not included in the definition of 'controlled substance offenses' given in section 4B1.2(b) of the sentencing guidelines"); *United States v. Campbell*, No. 20-4256, 2022 U.S. App. LEXIS 566, at *10 (4th Cir. Jan. 7, 2022) (following *Nasir* and stating: "if there were any doubt that under *Stinson* the plain text requires this result, the Supreme Court's recent decision in *Kisor* . . . renders this conclusion indisputable"); *United States v. Riccardi*, 989 F.3d 476, 486 (6th Cir. 2021) (refusing deference to the Commission's commentary to U.S.S.G. § 2B1.1(b)(1), which was not a "reasonable interpretation" of the guideline under *Kisor*); *see also United States v. Havis*, 927 F.3d 382, 387 (6th Cir. 2019) (en banc) (pre-*Kisor*) ("The Commission's use of commentary to add attempt crimes to the definition of 'controlled substance offense' deserves no deference."); *United States v. Winstead*, 890 F.3d 1082, 1091-92

(D.C. Cir. 2018) (pre-*Kisor*) (declining to defer to the Commission on the meaning of Guideline text because the meaning could be determined based on interpretive canons).

Deference here would be especially troubling because the Guidelines are criminal rules. Deference is rarely afforded in the criminal context because deference to an agency interpretation that expands the reach of a criminal prohibition conflicts with the rule of lenity. The rule of lenity "is 'perhaps not much less old than' the task of statutory 'construction itself.'" *United States v. Davis*, 139 S. Ct. 2319, 2333 (2019) (quoting *United States v. Wiltberger*, 18 U.S. 76 (1820)). The rule "leads us to favor a more lenient interpretation of a criminal statute 'when, after consulting traditional canons of statutory construction, we are left with an ambiguous statute.'" *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 16 (2011) (quoting *United States* v. *Shabani*, 513 U.S. 10, 17 (1994)). Lenity is premised on two bedrock principles of American law: "due process and separation-of-powers." *Davis*, 139 S. Ct. at 2333. "First, '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.'" *United States v. Bass*, 404 U.S. 336, 348 (1971) (quoting *McBoyle v. United States*, 283 U.S. 25, 27 (1931)). Second, "because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity." *Id.* The rule of lenity applies equally

to sentencing. *Bifulco v. United States*, 447 U.S. 381, 387 (1980).

Deference runs afoul of the rule of lenity—and the principles underlying it—when it results in the adoption of a regulatory interpretation that expands a criminal prohibition or penalty. Such could be the case here. Were the Commission to adopt the interpretation favored by the Fourth, Seventh, Eighth, and Tenth Circuits—which results in a harsher sentence for defendants—then, to the extent this Court were to find the Guideline ambiguous, deference to the Commission would violate the rule of lenity. *See Davis*, 139 S. Ct. at 2333 ("Employing the [constitutional] avoidance canon to expand a criminal statute's scope . . . would also sit uneasily with the rule of lenity's teaching that ambiguities about the breadth of a criminal statute should be resolved in the defendant's favor."); *see also Guedes v. BATFE*, 140 S. Ct. 789, 790 (2020) (Gorsuch, J., statement regarding denial of certiorari) ("[W]hatever else one thinks about *Chevron* [deference], it has no role to play when liberty is at stake."); *Crandon v. United States*, 494 U.S. 152, 178 (1990) (Scalia, J., concurring) ("[T]o give persuasive effect to the Government's expansive advice-giving interpretation of § 209(a) would turn the normal construction of criminal statutes upside-down, replacing the doctrine of lenity with a doctrine of severity.").

And because the rule of lenity is a canon of construction—part of the judge's "legal toolkit"—it must apply *before* considering deference. *See Kisor*, 139 S. Ct. at 2414 (requiring application of "all the standard tools of interpretation" before considering

deference); *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 518 n.10 (1992) ("The rule of lenity . . . is a rule of statutory construction whose purpose is to help give authoritative meaning to statutory language."). Therefore, the rule of lenity provides additional reason for this Court to address the Guidelines interpretation itself rather than defer to the Commission.

b. Substantive Expertise

Kisor next explained that, to merit deference, "the agency's interpretation must in some way implicate its substantive expertise." *Kisor*, 139 S. Ct. at 2417. That is because the rationale for agency deference in the first place is largely based on "[a]dministrative knowledge and experience." *Id.*; *see Gonzales v. Oregon*, 546 U.S. 243, 255 (2006) (noting the "necessary respect for an agency's knowledge, expertise, and constitutional office"). This rationale applies especially where "the regulation concerns 'a complex and highly technical regulatory program,' in which the identification and classification of relevant 'criteria necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns.'" *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (quoting *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 697 (1991)); *see also Martin v. Occupational Safety & Health Rev. Comm'n*, 499 U.S. 144, 151 (1991) (noting that deference is appropriate where "applying an agency's regulation to complex or changing circumstances calls upon the agency's unique expertise and policymaking prerogatives").

By contrast, "[s]ome interpretive issues may fall more naturally into a judge's bailiwick"—for example, "the elucidation of a simple common-law property term." *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." *Id.*

Such is precisely the case here. The question presented is: what does the term "controlled substance offense" in Section 4B1.2 of the Sentencing Guidelines mean? In particular, do the language and structure of the Guideline support interpreting "controlled substance offense" to include only *federal* offenses, or *federal and state* offenses? That question involves nothing more or less than textual interpretation—a legal issue that falls "naturally into a judge's bailiwick." Indeed, it is hard to conceive of a more classic judicial function than interpreting the text of a statute or regulation. *See Buford v. United States*, 532 U.S. 59, 65 (2001) (noting that a "purely legal matter" includes "interpreting a set of legal words, say, those of an individual guideline").

Nor does the question implicate the Sentencing Commission's "substantive expertise," as required by *Kisor*. 139 S. Ct. at 2417. There is nothing "highly technical" about the question, *Thomas Jefferson*, 512 U.S. at 512, and there is nothing about the Commission's "significant expertise" or "exercise of judgment grounded in policy concerns" that apply here, *id.* Simply put, in this case "the agency has no comparative expertise in resolving a regulatory ambiguity" compared to the courts, and thus deference

to the Commission is inappropriate. *Kisor*, 139 S. Ct. at 2417.

c. Balancing of Policy Interests

This Court has also indicated that a rationale supporting agency deference is that agencies—unlike courts—seek input from relevant stakeholders and balance policy interests in making decisions. *See Kisor*, 139 S. Ct. at 2415 (noting that deference cannot come into play unless the court concludes that the question is "more one of policy than of law," because "the core theory of *Auer* deference is that sometimes the law runs out, and policy-laden choice is what is left over" (internal punctuation omitted)); *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 866 (1984) ("The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones . . . ."); *Anderson Bros. Ford v. Valencia*, 452 U.S. 205, 229 (1981) ("An administrative agency issues proposals to invoke public comment which the agency can evaluate and assimilate in formulating new regulations.").

"Agencies (unlike courts) can conduct factual investigations [and] can consult with affected parties." *Kisor*, 139 S. Ct. at 2413 (plurality); *see Long Island Care at Home v. Coke*, 551 U.S. 158, 168 (2007) (noting that agencies possess the "ability to consult at length with affected parties"). Indeed, the Sentencing Commission can and does pursue notice-and-comment procedures in issuing rules. *See Mistretta*, 488 U.S. at 394.

But not here. The Commission has not weighed in on this question at all, let alone done so in a manner reflecting that it has sought and considered public comment and balanced competing policy interests in coming to a decision on the matter. And—again—the question presented in this case is a purely legal question of textual interpretation, not a policy-laden decision requiring balancing of competing policy interests. Accordingly, this consideration weighs against the propriety of deference as well.

d. Uniformity

Finally, this Court has recognized that because "litigation is not always the optimal process . . . to formulate a coherent and predictable body of technical rules," Congress often has "a decided preference for resolving interpretive issues by uniform administrative decision, rather than piecemeal through litigation." *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 568 & n.12 (1980); *see Kisor*, 139 S. Ct. at 2413 (plurality) (citing *Milhollin*).

To be sure, the benefits of uniformity have been recognized in the context of the Sentencing Commission as well. *See Neal*, 516 U.S. at 290 ("Congress intended the Commission's rulemaking to respond to judicial decisions in developing a coherent sentencing regime."). But this rationale does not support deference in this case. The Commission has not issued an interpretation responsive to the question here and is unlikely to do so. Thus, this case is unlike *Braxton*, where this Court chose not to address a Guidelines question "because the Commission has already undertaken a proceeding that will eliminate

circuit conflict over the meaning." 500 U.S. at 348-49. Rather, the fear of a lack of uniformity has already been realized—as evidenced by the circuit split leading to this Petition. This Court's deferral of the issue to the Commission would perpetuate, not resolve, the lack of uniformity present here. *See Crocco*, 15 F.4th at 26 n.4 ("These issues are ones that cry out for a national solution . . . . It makes little sense for career-offender criteria to vary from circuit to circuit based on whether a federal-law or state-law approach is chosen.").

III. This Court Should Grant Certiorari To Resolve This Important Circuit Split

The time is ripe for this Court to resolve the critical and wide divide on the meaning of a "controlled substance offense" under § 4B1.2 of the Sentencing Guidelines.

This interpretive question has been well fleshed out, with nine Circuits having weighed in. *See* Petition for Certiorari at 3-4. The two opposing interpretations of the Guideline are thoroughly established after more than a decade of percolating in the lower federal courts. Such a well-developed circuit split calls for this Court's attention and resolution.

That this rift impacts the liberty interests of 1,200 to 2,000 defendants each year—3% of all federal defendants—makes the need for this Court to step in all the more pressing. *See United States v. Campbell*, No. 20-4256, 2022 U.S. App. LEXIS 566, at *13 (4th Cir. Jan. 7, 2022) ("These concerns are even more acute in the context of the Sentencing Guidelines,

where individual liberty is at stake."). Indeed, the undue variation in sentencing arising from conflicting interpretations of this Guideline has real-world consequences for countless Americans, as Petitioner's case exemplifies. The Guidelines sentence range for Petitioner is 40 to 50 months higher simply for being on the wrong side of the circuit split, and on average, the career-offender designation increases the Guidelines minimum by 84 months. Petition for Certiorari at 4; *see also Crocco*, 15 F.4th at 26 n.4 (noting that the career-offender designation raised the defendant's sentence range from 77-96 months to 210-240 months). Calls for the Sentencing Commission to consider this question should a quorum be reached (whenever that may be) do nothing to relieve this present disparity in federal sentencing law.[6] And, unlike the Commission, whose interpretation would not be binding on the Circuits, *see supra* Part II.B, this Court can fully and finally resolve the issue. This Court should not leave this fundamental unfairness and arbitrariness unresolved.

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[6] *See id.* ("A fully functioning Sentencing Commission would go a long way in assisting courts navigating these issues."); *Guerrant*, 142 S. Ct. at 641 (2022) (Sotomayor, J., concurring in denial of certiorari) ("I hope in the near future the Commission will be able to resume its important function in our criminal justice system.").

CONCLUSION

This Court should grant the Petition for a Writ of Certiorari.

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Respectfully submitted,

Jonathan L. Marcus
Counsel of Record
REED SMITH LLP
1301 K Street, N.W.,
Suite 1000
Washington, D.C. 20005
(202) 414-9200
Jonathan.Marcus@reedsmith.com

Daniel E. Alperstein
REED SMITH LLP
10 South Wacker Dr.,
40th Floor
Chicago, IL 60606

Joshua T. Newborn
Ted A. Hages
REED SMITH LLP
225 Fifth Avenue
Pittsburgh, PA 15222

Counsel for Amicus Curiae