No. 22-163

IN THE
# Supreme Court of the United States

LENAIR MOSES,
*Petitioner,*

v.

UNITED STATES,
*Respondent,*

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

## MOTION FOR LEAVE TO FILE AND BRIEF OF *AMICUS CURIAE* CATO INSTITUTE SUPPORTING PETITIONER

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September 19, 2022

## MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Supreme Court Rule 37.2(b), the Cato Institute respectfully move for leave to file the attached brief as *amicus curiae* supporting Petitioner. All parties were provided with timely notice of amicus's intent to file as required under Rule 37.2(a). Petitioner's counsel consented to this filing. The United States did not respond to the request for consent.

*Amicus* interest arises from its mission to advance and support the rights that the Constitution guarantees to all citizens.

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato conducts conferences, publishes books and studies, and produces the annual *Cato Supreme Court Review*.

*Amicus* has extensive experience filing briefs in criminal and administrative law cases in this Court and lower courts across the country. This case concerns *amicus* because the extent to which *Auer* deference applies in the criminal setting will have broad implications for the liberty of many defendants.

*Amicus* have no direct interest, financial or otherwise, in the outcome of this case, which concerns them only because it implicates constitutional protections

for individual liberty. For the foregoing reasons, *amicus* respectfully request that they be allowed to file the attached brief as *amicus curiae*.

Respectfully submitted,
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## QUESTION PRESENTED

Whether the limits on agency deference announced in *Kisor* constrain the deference that courts may accord to the commentary to the Sentencing Guidelines.

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## INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute, founded in 1977, is a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual *Cato Supreme Court Review*, and files *amicus* briefs.

This case is of central concern to Cato because it involves an extra-legislative power to make law-like interpretations that can cost people years of freedom.

## SUMMARY OF ARGUMENT

In *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), this Court preserved some form of judicial deference to administrative agencies' interpretations of their own regulations, as previously recognized in *Auer v. Robbins*, 519 U.S. 452 (1997), *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), and, importantly here, *Stinson v. United States*, 508 U.S. 36 (1993). The Court placed restraints on so-called *Auer* deference by making clear the limited circumstances in which deference is warranted and explaining the steps courts must take before applying it. *Kisor*, 139 S. Ct. at 2420. The lower courts' application of these doctrinal changes would reveal whether the *Kisor* majority was correct that the doctrine simply needed tightening or

[1] Rule 37 statement: No party's counsel authored this brief in any part and *amicus* alone funded its preparation and submission.

was instead completely beyond repair as the dissent maintained.

In *Kisor*, this Court instructed lower courts to withhold deference to an agency's interpretation of its own regulations unless the regulation is "genuinely ambiguous" after exhausting all "traditional tools of construction." *Kisor*, 139 S. Ct. at 2415. But that rule is incompatible with this Court's 1993 decision in *Stinson*, which required deference to the Sentencing Commission's commentary to its Sentencing Guidelines even when the Guidelines were unambiguous. The result of that decision was largely to put lower courts in a "slumber of reflexive deference" to the commentary. *United States v. Nasir*, 17 F.4th 459, 472 (3d Cir. 2021) (en banc) (Bibas, J., concurring). The present case is part of an ongoing discussion and debate among the courts of appeals since *Kisor* regarding a key question: whether *Kisor*'s limitations on *Auer* deference apply to the strong level of deference called for in *Stinson*.

This case presents a prime opportunity for the Court to provide much-needed guidance to the lower courts on that divisive question. The Fourth Circuit affirmed a substantial increase in Lenair Moses's sentencing range solely because the court believed it was bound by *Stinson* to give deference to the Guidelines commentary. In doing so, the panel held—incorrectly, as Moses contends—that *Kisor's* updated approach to agency deference had no effect on *Stinson*. While many courts of appeals have waded into that doctrinal debate, few have presented this Court with such a clean opportunity to address it.

Moreover, the petition presents the opportunity for this Court to resolve a larger problem that has plagued doctrines of deference to agency interpretations of law more generally: namely, whether in criminal cases courts should apply the rule of lenity to otherwise ambiguous statutes or regulations or instead give deference to agencies' interpretations of such provisions. The Court's command to exhaust all "traditional tools of construction" before granting deference to an agency's interpretation would seem to preclude deference to an agency when the rule of lenity is otherwise applicable—the rule of lenity is, after all, a longstanding tool of construction. *Kisor*, 139 S. Ct. at 2415. Unfortunately, lower courts remain divided on that important question, and this case provides the Court with an opportunity to expand upon its rationale in *Kisor* and clarify that lenity should come before deference to agencies' interpretations of their regulations in the criminal setting.

## ARGUMENT

### I. THIS CASE IS AN UNUSUALLY GOOD VEHICLE FOR THE COURT TO FURTHER CLARIFY THE IMPLICATIONS OF *KISOR*

This case presents perhaps the best opportunity to date for this Court to explain how its decision in *Kisor* affects the level of deference owed to the Sentencing Commission's commentary on the Sentencing Guidelines. Here, the question whether *Kisor* updated the deference-favoring rule in *Stinson* was essential to the Fourth Circuit's holding. *Stinson* deference, the Fourth Circuit held, while analogous to *Auer* deference, is an entirely separate deference regime from what the Court established in *Auer*. Without explicit

contradictory direction from the Court, lower courts must use the *Stinson* decision only, and not *Kisor*, to evaluate the Guideline commentary.

Following *Kisor*, many federal courts of appeals have addressed this same question. But nearly all those cases suffered from significant vehicle issues, and thus did not present nearly as good an opportunity for the Court to weigh in as this case does. In most cases, were this Court to hear them, it is unclear whether this Court would need to resolve the doctrinal debate to resolve the cases. By contrast, the deference question is squarely presented here. This Court should take the opportunity to address it.

### A. The Level of Deference Owed to the Sentencing Guidelines Commentary Was Determinative for the Fourth Circuit's Holding

The lower court's rationale in this case was crystal clear: the panel affirmed the fivefold plus increase in Lenair Moses's sentence range *because* it believed that this Court's 2019 decision in *Kisor* had no effect on the Court's 1993 decision in *Stinson*. *United States v. Moses*, 23 F.4th 347, 348–50 (4th Cir. 2021), *rehearing en banc denied*, No. 21-4067, 2022 U.S. App. LEXIS 7694 (4th Cir. Mar. 23, 2022); App. at 2a–6a. Indeed, the court began its opinion by stating: "In this appeal, we determine the enforceability of and the weight to be given the official commentary of the Sentencing Guidelines." App. at 2a.

Moses's sentence range more than quintupled from 21–27 months to 151–188 months because of his purported career-offender status under U.S.S.G. § 4B1.1. *Id.* at 6a, 9a. But the propriety of classifying

Moses as a career offender turned on whether one of the two identified predicate offenses "was actually part of the same course of conduct as his current offenses and therefore [whether it] should have been considered 'relevant conduct' under § 1B1.3, rather than as part of his criminal history[.]" *Id.* at 3a, 9a. Everyone agreed that, if Application Note 5(C) to § 1B1.3 controlled, then it was proper to characterize the conduct at issue as "part of his criminal history," making Moses a "career offender." *Id.* at 3a–4a, 9a. But a finding that the relevant conduct was instead properly viewed as "part of the same course of conduct" would have resulted in "a substantially lower sentencing Guidelines range." *Id.*

Correctly understanding the effect of this Court's holding in *Kisor* upon its decision in *Stinson* was critical to calculating the correct guidelines range. As the Fourth Circuit recognized, if *Kisor* controlled, then Application Note 5(C) to § 1B1.3 would be authoritative only if (at a minimum) Sections 1B1.3 and 4B1.1 are "'*genuinely ambiguous*.'" *Id.* at 2a–3a, 10a (quoting *Kisor*, 139 S. Ct. at 2415) (emphasis original). But if *Kisor* didn't modify the *Stinson* approach, then the Guidelines commentary might still have been binding even if the contrary language of the Guidelines was itself unambiguous. *Id.* (citing *Stinson*, 508 U.S. at 38, 43–44).

The Fourth Circuit held that *Kisor* could not have overruled or modified *Stinson* because *Stinson* was always an entirely separate deference regime from *Auer* deference. *Id.* at 4a. The panel advanced three reasons to support that conclusion: First, the Guidelines and its commentary both address and resolve a unique problem. *Id.* at 11a–16a, 20a–21a. Second, the

Court in *Stinson* itself often referred to *Seminole Rock* (and by extension *Auer*) deference as "analogous," rather than being directly on point. *Id.* at 19a–20a. And third, *Kisor* did not explicitly purport to overrule *Stinson*. *Id.* at 22a. Accordingly, the Fourth Circuit concluded that the "Guidelines commentary is authoritative and binding, regardless of whether the relevant Guideline is ambiguous, except when the commentary 'violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of,' the Guideline." *Id.*

Importantly, the putative inapplicability of *Kisor* to *Stinson* was not just the principal basis for the Fourth Circuit's decision but it was instead the *sole* basis for its holding. The panel never suggests that the commentary merely state what the Guidelines unambiguously require. Nor did the panel hint at any other basis for affirming that Moses qualifies as a career offender. *See generally id.* at 11a–23a. Of course, it did not need to any such thing because its conclusion was simply that *Stinson* remained as it was in 1993.

The Fourth Circuit has provided this Court with a clean opportunity to expand upon *Kisor*'s implications for correctly interpreting and applying the Sentencing Guidelines, and indeed one judge expressly "welcome[d] the Court's advice." *Id.* at 52a (Niemeyer, J., supporting denial of rehearing en banc). This is an opportune time to accede to that request.

### B. Few Decisions from the Federal Courts of Appeals Have so Squarely Raised *Kisor-Stinson* Issue Presented by This Case

Since *Kisor*, the Federal Courts of Appeals have had many occasions to consider the level of deference owed to the Guidelines commentary. And while many of those cases addressed the question of *Kisor*'s applicability to *Stinson*, few have so perfectly teed up the issue for this Court.

One of the most common challenges to the commentary's authority has arisen in the context of whether inchoate drug offenses are qualifying predicate crimes for classifying a defendant as a career-offender under U.S.S.G. §§ 2K2.1, 4B1.1, 4B1.2. On its face, the Guidelines do not include them. *See* U.S.S.G. § 4B1.2. But Application Note 1 of the commentary states that many inchoate drug offenses are in fact qualifying predicate offenses. U.S.S.G. § 4B1.2 cmt. n.1. Thus, whether Application Note 1 of the commentary is binding on courts is a clear-cut question that courts have to address regularly.

In just the three years since *Kisor*, the First, Second, Third, Fourth, Fifth, Seventh, Ninth, and Eleventh Circuits have all addressed that question with varying levels of specificity.[2] But in terms of presenting this Court with the opportunity to evaluate *Kisor*'s

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[2] *United States v. Lewis*, 963 F.3d 16, 23–24 (1st Cir. 2020); *United States v. Tabb*, 949 F.3d 81, 87 (2d Cir. 2020); *United States v. Nasir*, 17 F.4th 459, 469–71 (3d Cir. 2021) (en banc); *United States v. Campbell*, 22 F.4th 438, 440, 444–45 (2022); *United States v. Goodin*, No. 19-30923, 2021 U.S. App. LEXIS

force in the context of the Guidelines commentary, they all suffer from at least two critical vehicle issues. First, although the process has been stalled for several years, the Sentencing Commission has proposed an amendment to the Guidelines that would include inchoate drug offenses as qualifying predicate offenses for a career-offender status. *Adams*, 934 F.3d at 729; Pet. Br. at 34. Presumably, the Court would be inclined to see whether the Sentencing Commission adopts that amendment before addressing the issue.

Second, it is not at all clear that the commentary's addition of inchoate offenses to the career-offender Guideline would pass muster even under the more lenient deference standard of *Stinson*. In *Stinson*, the Court held that the commentary in the Guidelines was not authoritative if it "is inconsistent with, or a plainly erroneous reading of, that guideline." *Stinson*, 508 U.S. at 38. And, as both the D.C. and Sixth Circuits determined prior to *Kisor*, by "purporting to add attempted offenses to the clear textual definition—rather than interpret or explain the ones already there"—the commentary in Application Note 1 fails even *Stinson*'s minimal requirements for receiving

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3881, at *781–82 (5th Cir. Feb. 10, 2021); *United States v. Vargas*, 35 F.4th 936, 939–40 (5th Cir. 2022), *vacated for rehearing en banc*, No. 21-20140, 2022 U.S. App. LEXIS 23751 (5th Cir. Aug. 24, 2022) (en banc); *United States v. Adams*, 934 F.3d 720, 727–29 (7th Cir. 2019); *United States v. Crum*, 934 F.3d 963, 966–67 (9th Cir. 2019); *United States v. Dupree*, No. 19-13776, 2021 U.S. App. LEXIS 17617, at *912 (11th Cir. June 14, 2021), *vacated for rehearing en banc*, 25 F.4th 1341 (11th Cir. 2022) (en banc).

deference. *See United States v. Winstead*, 890 F.3d 1082, 1091–92 (D.C. Cir. 2018); *accord United States v. Havis*, 927 F.3d 382, 386–87 (6th Cir. 2019) (en banc). As a result, it might well be unnecessary for this Court to expand upon *Kisor* were it to hear cases regarding Application Note 1 to § 4B1.2.

This same problem—where the Guideline commentary might fail even *Stinson*'s requirements regardless of *Kisor*—has manifested in other contexts that the courts of appeals have confronted as well. For example, it has arisen in Application Note 3(F)(i) to U.S.S.G. § 2B1.1(b)(1)(L), which requires sentencing courts for specified offenses to increase a defendant's guidelines range based on the amount of "loss." *United States v. Riccardi*, 989 F.3d 476, 483–86 (6th Cir. 2021); *id.* at 490–93 (Nalbandian, J., concurring in part and concurring in the judgment); *United States v. Kirilyuk*, 29 F.4th 1128, 1133–39 (9th Cir. 2022). In both *Riccardi* and *Kirilyuk*, the effect that *Kisor* had on *Stinson* is discussed; and, in *Riccardi*, the court provides what it believes is the answer. However, as the panel in *Kirilyuk* and Judge Nalbandian in *Riccardi* observe, it is far from clear that courts need to resolve the larger doctrinal debate in light of the particular facts of those cases.

This same doctrinal discussion has emerged in a variety of other settings as well—but usually without unambiguously presenting the issue for the Court's consideration the way this case does. Lower courts sometimes acknowledge the issue while finding no party has challenged the validity of the commentary. *See e.g.*, *United States v. Owen*, 940 F.3d 308, 314 (6th Cir. 2019). Other times, the courts construe the commentary in such a way as to avoid potential conflict

with the Guidelines. *See e.g.*, *United States v. Perez*, 5 F.4th 390, 396–97 (3d Cir. 2021). And on several occasions, courts have affirmed defendants' sentences by averring that the sentences are appropriate regardless of *Kisor*'s applicability—either because the district court had an alternative basis for the sentence, or because they determined that the commentary merely described "what the Guidelines' text and structure would unambiguously require even in its absence." *See e.g.*, *United States v. Cordova-Lopez*, 34 F.4th 442, 444 (5th Cir. 2022) (commentary merely describes what the Guidelines unambiguously require); *United States v. Adair*, 38 F.4th 341, 349–50 (3d Cir. 2022) (same); *United States v. Tate*, 999 F.3d 374, 380–83 (6th Cir. 2021) (same); *United States v. Ruffin*, 978 F.3d 1000, 1007–08 (6th Cir. 2020) (alternative basis for sentence).

Thus, while many cases touch on *Kisor*'s applicability to *Stinson*, it is rare for a lower-court decision to squarely present the issue the way the Fourth Circuit has done here.

## II. THIS IS A PRIME OPPORTUNITY FOR THE COURT TO PROVIDE GUIDANCE ON THE RULE OF LENITY'S PLACE IN THE POST-*KISOR* FRAMEWORK

The rule of lenity provides "that ambiguities about the breadth of a criminal statute should be resolved in the defendant's favor." *United States v. Davis*, 139 S. Ct. 2319, 2333 (2019). Between the rulings in *Stinson* and *Kisor*, however, the heightened deference that was owed to the Guidelines commentary *arguably* precluded the use of the rule of lenity when the Guidelines were ambiguous but the commentary was

on point.[3] *See Stinson*, 508 U.S. at 38. But now that an agency's interpretation of its own regulations can only receive deference after a court has made an independent determination that the regulation is still "genuinely ambiguous" even *after* exhausting "*all* the 'traditional tools' of construction," the rule of lenity—which is certainly an historical tool of construction—should apply to ambiguous Sentencing Guidelines before giving deference to the agency commentary. *See Kisor*, 139 S. Ct. at 2415; *id.* at 2448 (Gorsuch, J., concurring in the judgment) (noting that the tools of construction "include all sorts of tie-breaking rules for resolving ambiguity even in the closest cases"); *id.* at 2448 (Kavanaugh, J., concurring in the judgment) ("If a reviewing court employs all of the traditional tools of construction, the court will almost always reach a conclusion about the best interpretation of the regulation at issue.").

Unfortunately, the Court's treatment of lenity and how it interacts with the doctrine of deference to agency interpretations generally has engendered disagreement among the lower courts, which are in conflict about how to apply the rule of lenity when agencies are interpreting statutes or their own regula-

[3] By itself, *Stinson* does not necessarily preclude application of lenity. In *Stinson*, the commentary at issue favored the defendant, which means deference to the commentary and the rule of lenity were not in conflict. However, this Court's phrasing of the rule of deference was not limited to situations in which the commentary's interpretation benefited the defendant. As such, in *Stinson*, this Court left open the question whether deference or lenity would take precedence when the commentary was unfavorable to the defendant.

tions. This case presents a timely opportunity to resolve that confusion by making clear that genuinely ambiguous Guidelines questions should be resolved in a defendant's favor.

### A. This Court Has Provided Conflicting Guidance for the Interaction of the Rule of Lenity with Deference to Agency Interpretations

Although this Court has not explicitly discussed the rule of lenity's function in the context of *Auer* deference, several of its decisions—usually in the context of the parallel doctrine of *Chevron* deference—have provided conflicting guidance for lower courts. Lately, the Court's approach has tended to favor the rule of lenity over deference to agency interpretations. Criminal laws, the Court has emphasized, "are for courts, not for the Government, to construe." *Abramski v. United States*, 573 U.S. 169, 191 (2014). Thus, even when the basic requirements for an agency to receive deference appear to be satisfied (e.g., a statute or regulation is ambiguous and the agency's formal interpretation is "reasonable"), this Court has still "never *held* that the Government's reading of a criminal statute [or regulation] is entitled to any deference." *United States v. Apel*, 571 U.S. 359, 360 (2014) (emphasis added). Rather, when a criminal statute or regulation is ambiguous, members of this Court have taken the position that the rule of lenity should prevail over deference doctrines. *See Leocal v. Ashcroft*, 543 U.S. 1, 3–4, 11 n.8 (2004) (noting, in a context where *Chevron* deference was arguably applicable, that the rule of lenity would buttress the Court's interpretation of the statute *if* it were ambiguous); *see also Whitman v. United States*, 574 U.S. 1003, 1003–

04 (2014) (Scalia, J., statement respecting denial of certiorari); *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 140 S. Ct. 789, 790 (2020) (Gorsuch, J., statement respecting denial of certiorari).

Unfortunately, despite the persuasive value of these observations, none of them is technically binding on the lower courts. The statements in *Abramski*, *Apel*, and *Leocal* were all arguably "made outside the context" of a deference-eligible interpretation. *See Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 920 F.3d 1, 25 (D.C. Cir. 2019). In *Abramski* and *Apel*, the agency interpretations at issue may not have been promulgated "with the force of law." *Id.* And in *Leocal*, this Court interpreted the statute without reference to *Chevron* deference at all. *See Gallardo v. Barr*, 968 F.3d 1053, 1060 (9th Cir. 2020). The controlling nature of these statements is therefore debatable.

Further compounding the uncertainty, on at least two occasions in the past, statements or decisions of this Court have suggested that deference to agency interpretations supersedes the rule of lenity. *See Ehlert v. United States*, 402 U.S. 99, 104–05 (1971) (appearing to uphold the defendant's conviction based on an agency's "reasonable" interpretation of an ambiguous regulation); *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 703–04, 704 n.18 (1995) (suggesting in a footnote that even in criminal cases *Chevron* deference can displace the rule of lenity). But again, the binding nature of these decisions on lower courts is debatable. In *Ehlert*, because neither party even raised the rule of lenity, this Court didn't have the opportunity to determine whether it

would overcome (what is now) *Auer* deference. *See United States v. Phifer*, 909 F.3d 372, 384 (11th Cir. 2018). And as for *Babbitt*, the Court simply "brushed the rule of lenity aside in a footnote," "with scarcely any explanation" in what Justice Scalia described as a "drive-by ruling." *Whitman*, 574 U.S. at 1005 (Scalia, J., statement respecting denial of certiorari). It is doubtful whether *Babbitt*'s footnote should receive substantial weight. *Id.*; *Esquivel-Quintana v. Lynch*, 810 F.3d 1019, 1030–31 (6th Cir. 2016) (Sutton, J., concurring in part and dissenting in part).

The confusion is exacerbated by this Court's shifting takes on the canonical status of lenity. On the one hand (and most consistent with common law), this Court has characterized the rule of lenity as a "traditional rule of construction." *See e.g.*, *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 985 (2005) (implying that the *Brand X* rule *might* be inapposite when a court uses the rule of lenity to construe an otherwise ambiguous statute before an agency promulgates a contrary regulation); *Davis*, 139 S. Ct. at 2333 (suggesting that the canon of constitutional avoidance must be employed in a manner consistent with the rule of lenity); *United States v. R. L. C.*, 503 U.S. 291, 307 (1992) (Scalia, J., concurring in part and concurring in the judgment) ("[I]t is not consistent with the rule of lenity to construe a textually ambiguous penal statute against a criminal defendant on the basis of legislative history."). In fact, this Court once described the rule of lenity as "perhaps not much less old than construction itself." *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820). Viewed in this way, the Court's command in *Kisor* to grant *Auer* deference only after exhausting

"all the 'traditional tools' of construction" would seem to entail that courts withhold *Auer* deference when an agency's interpretation of an ambiguous regulation in a criminal case was unfavorable to a defendant. *See Kisor*, 139 S. Ct. at 2415.

That said, some members of this Court have described the rule of lenity as a somehow lesser rule of construction: start with the text; then apply all other methods of interpretation (maybe deference doctrines?); and if the statute or regulation is still "grievously ambiguous," then apply the rule of lenity. Under such a rubric, "the rule of lenity rarely comes into play." *Shular v. United States*, 140 S. Ct. 779, 787–89 (2020) (Kavanaugh, J., concurring). And if this methodology is rigidly employed, it is not difficult to see why some courts would assume that *Chevron* or *Auer* deference supersedes the rule of lenity.

Given these variegated statements regarding the rule of lenity, lower courts need clear guidance from this Court that the rule of lenity should take precedence over doctrines of deference to agency interpretations.

### B. The Lower Courts Are Similarly Divided on the Application of Lenity

Not surprisingly, there is disagreement among lower courts about whether the rule of lenity trumps deference to agency interpretations of ambiguous criminal statutes or regulations. The Third, Fifth, and Eleventh Circuits have all held or suggested that the rule of lenity overrides deference to agency interpretations. *Nasir*, 17 F.4th at 472–74 (Bibas, J., concurring) (joined by five judges of the en banc court to ex-

toll the importance of the rule of lenity over the commentary when interpreting the Sentencing Guidelines); *Diamond Roofing Co. v. Occupational Safety & Health Rev. Comm'n*, 528 F.2d 645, 649 (5th Cir. 1976) ("If a violation of a regulation subjects private parties to criminal or civil sanctions, a regulation cannot be construed to mean what an agency intended but did not adequately express."); *United States v. Moss*, 872 F.3d 304, 314–15 (5th Cir. 2015) (appearing to reaffirm *Diamond Roofing*'s holding regarding *Auer* deference in the criminal context); *Phifer*, 909 F.3d at 384–85 (holding that the rule of lenity can be invoked to "defeat *Auer* deference whenever a defendant faces civil or criminal penalties").

By contrast, the First, Sixth, and Tenth Circuits consider that the rule of lenity has no place whenever the standard prerequisites for *Auer* or *Chevron* deference are met. *De Lima v. Sessions*, 867 F.3d 260, 264–65 (1st Cir. 2017); *Esquivel-Quintana v. Lynch*, 810 F.3d 1019, 1023–24 (6th Cir. 2016); *Aposhian v. Barr*, 958 F.3d 969, 982–84 (10th Cir. 2020), *vacated for rehearing*, 973 F.3d 1151 (10th Cir. 2020) (en banc), *reinstated*, *Aposhian v. Wilkinson*, 989 F.3d 890 (10th Cir. 2021) (en banc). But even among those courts, there is disagreement among judges about giving deference to agency interpretations in criminal contexts. *See Lewis*, 963 F.3d at 27–28 (Torruella and Thompson, JJ., concurring); *Esquivel-Quintana*, 810 F.3d at 1027–32 (Sutton, J., concurring in part and dissenting in part); *United States v. Havis*, 907 F.3d 439, 451–52 (6th Cir. 2018) (Thapar, J., concurring), *vacated for rehearing en banc*, 927 F.3d 382, 386–87 (6th Cir. 2019) (en banc); *Aposhian*, 958 F.3d at 998–99 (Carson, J., dissenting); *Aposhian*, 989 F.3d at 898–902

(en banc) (Tymkovich, J., dissenting) (joined by the four other dissenting judges); *id.* at 904–06 (Eid, J., dissenting) (same).

Finally, the D.C. and Fourth Circuits have panel decisions ruling in both directions. *Campbell*, 22 F.4th at 446 (suggesting that the rule of lenity should apply instead of *Auer* deference); *Winstead*, 890 F.3d at 1092 n.14 (same); *but see Yi v. Fed. Bureau of Prisons*, 412 F.3d 526, 535 (4th Cir. 2005) (holding that *Chevron* applies instead of lenity); *United States v. Kanchanalak*, 192 F.3d 1037, 1050 n.23 (D.C. Cir. 1999) (same); *Guedes*, 920 F.3d at 23–28 (same).

The time is ripe to harmonize the lower courts by holding by making clear that *Kisor* requires the rule of lenity, as a traditional tool of statutory construction, to apply before *Stinson*/*Auer* deference.

### C. The Rule of Lenity Should Apply to Interpretations of the Sentencing Guidelines

The rule of lenity is a longstanding rule of construction grounded in the "instinctive distaste against [individuals] languishing in prison unless the lawmaker has clearly said they should[.]" *R. L. C.*, 503 U.S. at 305 (cleaned up). The rule originated "in 16th-century England," and gained "broad acceptance" in the 17th century as a tool to mitigate Parliament's multiplication of capital offenses. *Johnson v. United States*, 576 U.S. 591, 613–14 (2015) (Thomas, J., concurring in the judgment). Today, that rule still "serves our nation's strong preference for liberty." *Nasir*, 17 F.4th at 473 (Bibas, J., concurring). And it does so not only by resolving "issues about the substantive scope of criminal statutes, but [also by answering] questions

about the severity of sentencing." *R. L. C.*, 503 U.S. at 305 (cleaned up).

When "applying *Auer* would extend [a defendant's] time in prison, alarm bells should be going off." *Havis*, 907 F.3d at 450 (Thapar, J., concurring). The rule of lenity requires courts "to favor a more lenient interpretation of a criminal statute [or regulation]." *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 16 (2011). Using *Auer*/*Stinson* deference to increase a defendant's punishment turns that "normal construction of criminal statutes [and regulations] upside-down, replacing the doctrine of lenity with a doctrine of severity." *Cf. Crandon v. United States*, 494 U.S. 152, 178 (1990) (Scalia, J., concurring in the judgment).

While the *Auer*/*Stinson* doctrine is relatively new and rooted largely in policy views regarding things like agency expertise, the rule of lenity embodies more profound common law and constitutional concerns. *Kisor*, 139 S. Ct. at 2413 (noting some policy objectives of *Auer* deference); *Aposhian*, 989 F.3d at 899 (en banc) (Tymkovich, J., dissenting) (noting the constitutional purposes of the rule of lenity). The rule of lenity exists to promote "fair notice to those subject to the criminal laws, to minimize the risk of selective or arbitrary enforcement, and to maintain the proper balance between Congress, prosecutors, and courts." *United States v. Kozminski*, 487 U.S. 931, 952 (1988). Those objectives are advanced when the rule of lenity applies to the Guidelines before giving *Auer*/*Stinson* deference to the commentary.

First, the rule of lenity is designed to further the requirement of due process that laws are written so

as to give "fair warning" to the "common world" of their implications. *United States v. Lanier*, 520 U.S. 259, 265–66 (1997). It would require "an uncommon level of acuity from average citizens to know that they must" look not just to the statutory language and Sentencing Guidelines to know the consequences of their actions, but also "to the interpretive gap-filling of" the commentary "which may or may not be upheld" as consistent with the statute and Guidelines by the court. *Cf. Aposhian*, 989 F.3d at 899–900 (en banc) (Tymkovich, J., dissenting); *accord Guedes*, 140 S. Ct. at 790 (Gorsuch, J., statement regarding denial of certiorari). A requirement that the Sentencing Commission make the rules clear in the Guidelines themselves if it wants deference when imposing harsher sentences gives individuals much greater notice and better preserves due process. *See The Enterprise*, 8 F. Cas. 732, 734 (C.C.D.N.Y. 1810) (No. 4499) (Justice Livingston) ("If it be the duty of a jury to acquit where [reasonable] doubts exist concerning a fact, it is equally incumbent on a judge not to apply the law to a case where he labours under the same uncertainty as to the meaning of the legislature.").

Second, applying the rule of lenity to the Guidelines also protects separation of powers interests. *See Kozminski*, 487 U.S. at 952; *Wiltberger*, 18 U.S. at 95. Because criminal penalties, like the criminalizing of certain acts, "represents the moral condemnation of the community," Congress generally should define both criminal activities and penalties. *See United States v. Bass*, 404 U.S. 336, 348 (1971). It is true, the Court has held that the Sentencing Commission promulgating its Guidelines does not violate the intri-

cate balance of power created by Constitution. *Mistretta v. United States*, 488 U.S. 361, 393 (1989). Nevertheless, the legislative (or at least quasi-legislative) power that the Sentencing Commission wields is no small thing. *See generally id.* at 413–27 (Scalia, J., dissenting). And it can only constitutionally promulgate these Guidelines "because they must pass two checks: congressional review and the notice and comment requirements of the Administrative Procedure Act." *Lewis*, 963 F.3d at 27–28 (Torruella and Thompson, JJ., concurring) (internal quotation marks omitted). While the Sentencing Commission may often follow a similar process in adopting the commentary, app. at 13a, the Commission nonetheless still holds that it can promulgate and amend official commentary without congressional review or administrative rulemaking. United States Sentencing Commission, Rules of Practice and Procedure 6–7 (as amended Aug. 18, 2016). *Lewis*, 963 F.3d at 27–28. When the rule lenity comes before *Auer*/*Stinson* deference to the commentary in interpreting the Guidelines, the concerns surrounding Sentencing Commission's lawmaking authority are better assuaged.

The rule of lenity is a "venerable" rule of construction that reflects important common-law values. *R. L. C.*, 503 U.S. at 305; *Wiltberger*, 18 U.S. at 95. Importantly, it also protects and enhances constitutional guarantees to defendants. *Auer*/*Stinson* deference, while it may serve valuable goals, can often frustrate those constitutional guarantees. The petition should be granted so this Court can clarify that its instruction in *Kisor* to apply the tools of statutory interpre-

tation before a court gives deference to an agency interpretation of its own regulations applies to the Sentencing Guidelines.

## CONCLUSION

For all the foregoing reasons, we urge the Court to grant the petition.

Respectfully submitted,

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September 19, 2022