No. 25-227

IN THE

Supreme Court of the United States

RAYMOND POORE,
Petitioner,
v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Seventh Circuit

AMICUS CURIAE BRIEF OF THE NEW CIVIL LIBERTIES ALLIANCE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The New Civil Liberties Alliance ("NCLA") is a nonpartisan, nonprofit civil rights organization and public-interest law firm. Professor Philip Hamburger founded NCLA to challenge multiple constitutional defects in the modern administrative state through original litigation, *amicus curiae* briefs, and other forms of advocacy.

The "civil liberties" of the organization's name include rights at least as old as the U.S. Constitution itself, such as due process of law and the right to be tried in front of impartial judges who provide their independent judgments on the meaning of the law. Yet these selfsame civil rights are also very contemporary—and in dire need of renewed vindication—precisely because Congress, executive branch officials, administrative agencies, and even the courts have neglected them for so long.

NCLA aims to defend civil liberties—primarily by asserting constitutional constraints on the modern administrative state. Although Americans still enjoy

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[1] No party's counsel authored any portion of this brief, and no party, party counsel, or person other than *amicus curiae* made a monetary contribution intended to fund this brief's preparation or submission. All parties received timely notice of intent to file this brief.

a shell of their Republic, a very different sort of government has developed within it—a type that the Constitution was designed to prevent. This unconstitutional state within the Constitution's United States is the focus of NCLA's concern.

NCLA is deeply disturbed by the widespread practice of extending judicial "deference" to the United States Sentencing Commission's commentary to the U.S. Sentencing Guidelines. This deference regime—now entrenched in half the circuits—raises grave constitutional problems that this Court never confronted in *Stinson v. United States*, 508 U.S. 36 (1993), and that it has not expressly addressed since. However, in *Kisor* and, most recently, in *Loper Bright Enterprises v. Raimondo* and *Relentless v. Department of Commerce*, 603 U.S. 369, 413 (2024) (*Loper Bright/Relentless*), this Court made unmistakably clear Article III judges may not abdicate their duty of independent judgment by reflexively deferring to another branch's interpretation of binding law. Deference doctrines that require courts to enforce an agency's view of its own rule—even when the text of the rule itself is unambiguous and even when the agency's interpretation is not the best reading—violate the Constitution's separation of powers, deny defendants the due process protections owed in criminal cases, and erode the Judiciary's exclusive

responsibility "to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

SUMMARY OF ARGUMENT

In 1993, the Court ruled in *Stinson v. United States* that Article III courts must defer to the United States Sentencing Commission's commentary to its own Sentencing Guidelines unless that commentary "is inconsistent with, or a plainly erroneous reading of, that guideline." 508 U.S. at 38. *Stinson* reasoned that the Sentencing Commission's Guidelines "are the equivalent of legislative rules adopted by federal agencies," and thus that the Commission's commentary interpreting those Guidelines warrants the same controlling weight as an agency's interpretation of its own regulation (thereby adopting what would later come to be known as *Auer* deference).[2] *Id.* at 45. That reasoning has not withstood this Court's subsequent decisions in *Kisor* and *Loper Bright/Relentless*, which have hollowed out the doctrinal underpinnings of both *Auer* and *Stinson* deference, reducing it to "the role of a tin god—officious, but ultimately powerless." *See Kisor v.*

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[2] The doctrine of judicial deference to an agency's construction of its own regulations has borne different titles over time—*Seminole Rock* deference, *Auer* deference and, most recently, *Kisor* deference. For purposes of clarity, *amicus* refers to it as *Auer* deference.

Wilkie, 588 U.S. 558, 631 (2019) (Gorsuch, J., concurring).

In *Kisor*, although a plurality opinion, every Justice agreed that it was necessary to "reinforce" and "further develop" the limitations on the deference that courts purportedly owe to an agency's interpretation of its own rules. *Id.* at 563, 574-75; *id.* at 591 (Roberts, C.J., concurring); *id.* at 631 (Gorsuch, J., concurring in judgment); *id.* at 631-32 (Kavanaugh, J., concurring in judgment). Writing for the plurality, Justice Kagan conceded that the Court had in the past applied *Auer* deference "without significant analysis of the underlying regulation," characterizing the Court's former approach as a "reflexive" "caricature" of the doctrine. *Id.* at 574. Rejecting this reflexive form of deference, *Kisor* instructed that courts must first exhaust all the traditional tools of construction to determine whether a rule is "genuinely ambiguous" before even *considering* whether deference is warranted. *Id.*

That same principle—that courts must exercise their independent judgment, rather than automatically defer to agency interpretations—animated this Court's decision in *Loper Bright/Relentless*. Overruling *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Court held that courts must exercise independent judgment to identify the "single, best

meaning" of the law, regardless of agency involvement. 603 U.S. at 400. Those holdings leave no room for *Stinson*'s command that judges reflexively yield to Sentencing Commission commentary, including when the plain text of the Guidelines is unambiguous.

The continued application of *Stinson* deference is not only doctrinally unsound—it is constitutionally indefensible. Unlike the Sentencing Guidelines themselves, which must undergo notice-and-comment rulemaking and congressional review, the Sentencing Commission's commentary is subject to no such requirements. Yet courts still afford these informal interpretations controlling weight, effectively allowing the Commission to raise penalties by agency fiat. This judicial abdication offends the rule of lenity, principles of due process, and the independence of the judicial office. And in the criminal sphere, deference is doubly perverse: the rule of lenity requires that ambiguities in penal laws be resolved "against the government," yet reflexive deference to agency interpretations inverts that principle, permitting the government "to penalize conduct Congress never clearly proscribed." *Loper Bright/Relentless*, 603 U.S. at 434-35 (Gorsuch, J., concurring).

These concerns strike with particular force in the Sentencing Guidelines context. Treating the Sentencing Commission's commentary as the

controlling interpretation of the Guidelines does more than call for deference to expertise—it "replac[es] the doctrine of lenity with a doctrine of severity." *Whitman v. United States*, 574 U.S. 1003, 1005 (2014) (Scalia, J., respecting the denial of certiorari). Such deference diminishes the judicial office and with it, a key structural safeguard that the Framers erected as a bulwark against tyranny.

Mr. Poore's petition presents the Court with a critical opportunity to resolve once and for all that courts do not owe deference to Commission commentary that expands the Sentencing Guidelines and/or harshens sentences. Each passing Term, district courts in half the circuits across the country invoke *Stinson* deference to increase criminal sentences beyond what Congress ever reviewed and authorized, systematically depriving criminal defendants of due process of law. Reflexive deference in the criminal context—especially where no genuine ambiguity exists—erodes the separation of powers, gravely endangers the individual liberty of American citizens, and distorts the independent judicial office enshrined in Article III of the Constitution. Liberty and the guarantees of our Constitution suffer when courts reflexively defer to agency interpretations of the law. They will suffer still more if this Court continues to defer answering the persistent question of *Stinson* deference.

ARGUMENT

I. *KISOR* AND *LOPER BRIGHT/RELENTLESS* RENDER *STINSON* DEFERENCE A "DOCTRINAL DINOSAUR" THAT MUST BE OVERRULED

Stinson deference's foundation is built on the deference doctrine first announced in *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), and later reaffirmed in *Auer v. Robbins*, 519 U.S. 452 (1997)—but that foundation has crumbled. In *Kisor*, this Court made clear that *Auer* deference is not reflexive: a court must first deploy all the traditional tools of construction—and only if "genuine ambiguity" remains may the court even *consider* whether deference is warranted. 588 U.S. at 574-75. Even then, an agency's interpretation must still be "reasonable," and its "character and context" must show that it is entitled to "controlling weight." *Id*. at 575-76. *Kisor* thus reaffirmed that Article III courts bear the constitutional duty to interpret the law independently. *See id*. at 632 (Kavanaugh, J., concurring) ("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," and thus "courts will have no reason or basis to put a thumb on the scale in favor of an agency when courts interpret agency regulations.").

That same principle—that courts must exercise their independent judgment, rather than automatically defer to agency interpretations—animated this Court's decision in *Loper Bright/Relentless*. Overruling *Chevron* deference, the Court held that courts must exercise independent judgment to identify the "single, best meaning" of the law—regardless of agency involvement. *Loper Bright/Relentless*, 603 U.S. at 400 ("[T]here is a best reading [of the law] all the time—the reading the court would have reached if no agency were involved."); *see also id.* ("It … makes no sense to speak of [an agency's] 'permissible' interpretation that is not the one the court, after applying all relevant interpretive tools, concludes is best.").

Rejecting the dissent's suggestion that courts should defer to agencies because "judges are not experts in the field," Chief Justice Roberts, writing for the majority, clarified the error in that premise: "That depends, of course, on what the 'field' is. If it is legal interpretation, that has been, 'emphatically,' 'the province and duty of the judicial department' for at least 221 years." *Id.* at 412 (quoting *Marbury*, 5 U.S. at 177). Roberts emphasized that "[j]udges have always been expected to apply their 'judgment' *independent* of the political branches when interpreting the laws those branches enact." *Id.* As Justice Gorsuch emphasized in his concurrence,

"agencies cannot invoke a judge-made fiction [*Chevron* deference] to unsettle our Nation's promise to individuals that they are entitled to make their arguments about the law's demands on them in a fair hearing, one in which they stand on equal footing with the government before an independent judge." *Id.* at 441 (Gorsuch, J., concurring).

Taken together, *Kisor* and *Loper Bright/ Relentless* do not merely trim the edges of *Auer* deference—they expose it as doctrinally unsound and constitutionally indefensible. And *Stinson* deference only magnifies those grave infirmities, extending them to criminal sentencing where deference to the Sentencing Commission's interpretation of its own Guidelines can mean more years of an individual's life spent behind bars. Fortunately, *Kisor* and *Loper Bright* make clear that deference requiring Article III courts to abdicate their constitutional duty to decide *all* questions of law cannot stand. As a result, *Stinson* deference has been reduced to little more than a "doctrinal dinosaur," which belongs not in our courts, but in the fossil record of overruled precedent. *See Kisor*, 588 U.S. at 588; *id.* at 592 (post-*Kisor*, *Auer* deference is "maimed and enfeebled—in truth, zombified") (Gorsuch, J., concurring).

A. *KISOR* PUSHED *AUER* DEFERENCE TO THE BRINK OF EXTINCTION

In *Stinson*, this Court extended *Seminole Rock* deference to the Sentencing Commission's commentary to the Sentencing Guidelines, requiring courts to treat the Commission's interpretations as controlling—unless "plainly erroneous or inconsistent" with the Guidelines. 508 U.S. at 45 (quoting *Seminole Rock*, 325 U.S. at 414). The *Stinson* court further held that courts must give the Commission's commentary binding effect even in cases where the underlying text of a Guideline is clear. *See id.* at 44 (Unlike "an agency's legislative rule," which "must yield to the clear meaning of a statute," the Sentencing Commission's commentary need not yield even to "unambiguous guidelines"). Courts, including the Seventh Circuit, have long recognized that § 4B1.2 of the Guidelines—the provision at issue in Mr. Poore's case—is unambiguous. *See* Cert. Pet. 29-30. Yet in six circuits, courts would nevertheless defer under *Stinson* to any Commission commentary purporting to "interpret" even an unambiguous Guideline such as § 4B1.2. *See id.* at 16-19. That is even so where the Commission's "interpretation" would effectively expand the provision, resulting in a harsher sentence (as was the case for Mr. Poore), so long as the agency's interpretation is not "plainly erroneous or inconsistent" with the text. *Stinson*, 508 U.S. at 45.

That approach to ambiguity is irreconcilable with *Kisor*, let alone *Loper Bright*. Although a plurality opinion, every Justice agreed that it was necessary to "reinforce" and "further develop" the limitations on the deference that courts purportedly owe to an agency's interpretation of its own rules. *Kisor*, 588 U.S. at 563, 574-75; *id.* at 591 (Roberts, C.J., concurring); *id.* at 631 (Gorsuch, J., concurring in judgment); *id.* at 631-32 (Kavanaugh, J., concurring in judgment). Writing for the plurality, Justice Kagan candidly acknowledged that the Court had in the past applied *Auer* deference "without significant analysis of the underlying regulation," characterizing the Court's former approach as a "reflexive" "caricature" of the doctrine. *Id.* at 574. That reflexive caricature is precisely how half the circuits still apply *Stinson* deference today—on the theory that *Kisor* had no bearing on *Stinson*.

That theory is wrong. *Kisor* made three critical changes that cannot be squared with any doctrine requiring courts to defer reflexively to an agency's interpretation of its own rules. First, courts must exhaust "all the 'traditional tools'" of construction before concluding that a rule is "genuinely ambiguous." *Id.* at 575. As the plurality opinion emphasized, courts "cannot wave the ambiguity flag just because they found [a rule] impenetrable on first read." *Id.* Rather, courts must carefully consider the text, structure, history and purpose "as if [they] had

no agency to fall back on." *Id*. If the rule is not genuinely ambiguous, "then a court has no business deferring to any other reading, no matter how much the agency insists it would make more sense." *Id*. Deference under such circumstances would "permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation." *Id*. Second, even "[i]f genuine ambiguity remains," any agency interpretation "must still be 'reasonable.'" *Id*. And third, even an agency's reasonable reading of a genuinely ambiguous rule does not automatically control: courts must still independently examine whether the "character and context" of the agency's interpretation entitles it to deference. *Id.* at 576.

Kisor's constraints apply equally to *Stinson*, which, like *Auer*, requires courts to defer to an agency's interpretation of its own rules—but, unlike *Auer*, in the criminal context where deference can dictate the number of years an individual spends behind bars. As the Eleventh Circuit explained in *United States v. Dupree*, "the only way to harmonize [*Stinson* and *Kisor*] is to conclude that *Kisor*'s gloss on *Auer* and *Seminole Rock* applies to *Stinson*." 57 F.4th 1269, 1275 (11th Cir. 2023) (en banc). In *Kisor*, the plurality opinion sharply criticized the "most classic formulation of [*Auer* deference]"—which requires courts to defer to an agency's interpretation of its own rule unless "the agency's construction is 'plainly erroneous or inconsistent

with the regulation'"—dismissing that formulation as a "reflexive" "caricature of the doctrine." *Kisor*, 588 U.S. at 574. The true formulation of the doctrine, *Kisor* clarified, *prohibits* deference to an agency's interpretation "unless the regulation is genuinely ambiguous." *Id.* Indeed, "[i]f uncertainty does not exist, there is no plausible reason for deference. The regulation then just means what it means—and the court must give it effect, as the court would any law." *Id.* at 574-75.

Kisor's reasoning leaves no room for reflexive deference to agency commentary—let alone commentary that rewrites an unambiguous Guideline. After all, the reflexive "caricature" of deference that *Kisor* rejected outright is the very formulation that *Stinson* adopted, word for word. *See* 508 U.S. at 45. *Stinson* reasoned that the Sentencing Commission's Guidelines "are the equivalent of legislative rules adopted by federal agencies," and thus that the commentary interpreting those Guidelines warrants the same controlling weight as an agency's interpretation of its own regulation. *Id.* at 45. But that is precisely the formulation of deference *Kisor* dismantled. So, if commentary is to be treated with the same deference accorded agency interpretations, then it necessarily follows that *Kisor*'s limits apply in full measure: no deference unless genuine ambiguity remains after rigorous judicial analysis, and never where commentary expands the plain text beyond what the Guideline itself clearly provides.

In the ruling below, the Seventh Circuit nonetheless refused to apply *Kisor* to *Stinson*, asserting that this Court has been silent on the question. *United States v. Poore*, 2025 WL 1201946, at *3 (7th Cir. Apr. 25, 2025). But this Court has not been silent. On the contrary, "[i]t has spoken directly to the issue of whether the Guidelines and its commentary, on the one hand, and an agency's rules and its interpretation of those rules, on the other hand, should be treated differently, and concluded they should be treated the same." *Dupree*, 57 F.4th at 1276-77 ("Our conclusion today flows not from the Supreme Court's silence, but from its affirmation that the commentary should be treated the same as the agencies' interpretations that were at issue in *Seminole Rock*, and now *Auer* and *Kisor*."). There is no principled or constitutionally grounded reason for courts to afford reflexive, controlling weight to the Sentencing Commission's interpretation of its own Guidelines. To hold otherwise would invert separation-of-powers principles by granting an independent agency greater authority to bind courts in criminal cases than the Constitution allows the Executive to wield in civil or regulatory matters, all while depriving defendants of the due-process guarantee of clear notice before being stripped of their liberty.

Nor can *Stinson* be reconciled with the constitutional underpinnings of *Mistretta v. United States*, 488 U.S. 361 (1989). *Mistretta* upheld the

Guidelines regime only because (1) the Commission promulgates Guidelines through notice-and-comment rulemaking, and (2) Congress reviews them before they take effect. *Id.* at 393-94. Guidelines commentary, however, enjoys neither safeguard. Accordingly, the Commission may issue its interpretations of the Guidelines unilaterally, without congressional review or APA process. To require courts to treat the commentary as binding thus plainly "circumvent[s] … the checks Congress put on the Sentencing Commission." *United States v. Campbell*, 22 F.4th 438, 446 (4th Cir. 2022).

Put simply, *Stinson* embraced word for word the very deference formulation that *Kisor* has since repudiated. Mechanical adherence to *Stinson* not only contradicts *Kisor*, but it also abdicates the judiciary's constitutional role in criminal sentencing and deprives defendants of due process of law. Article III judges may not cede their duty to "say what the law is" to agency commentary that expands criminal punishment. *Marbury*, 5 U.S. at 177. As this Court has emphasized, "criminal laws are for courts, not for the Government, to construe." *Abramski v. United States*, 573 U.S. 169, 191 (2014).

B. *Loper Bright/Relentless*'s Reasoning Compels the Overruling of *Stinson*

In *Loper Bright/Relentless*, this Court unequivocally overruled *Chevron* deference, decisively

repudiating the notion that judges must—or even may—substitute deference to an agency's view for their own independent judgment in interpreting statutes. *See* 603 U.S. at 412-13. This Court held that *Chevron* is irreconcilable with the APA's mandate that a reviewing court *must* "decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706; *Loper Bright/Relentless*, 603 U.S. at 391-94. And as Justice Thomas observed in his concurring opinion: "Because the judicial power requires judges to exercise their independent judgment, the deference that *Chevron* requires contravenes Article III's mandate." *Loper Bright/Relentless*, 603 U.S. at 415 (Thomas, J., concurring). Nor can such deference "'be salvaged' by recasting it as deference to an agency's 'formulation of policy,'" Justice Thomas explained. *Id.* (citation omitted). For "[i]f that were true, [it] would mean that 'agencies are unconstitutionally exercising "legislative Powers" vested in Congress,'" because "giv[ing] the force of law to agency pronouncements on matters of private conduct as to which Congress" never spoke "permit[s] a body other than Congress to perform a function that requires an exercise of legislative power." *Id.*

Those same constitutional infirmities are present—indeed, magnified—in the criminal context of *Stinson* deference. If *Chevron* could not survive in the regulatory sphere, deference in criminal sentencing—where the consequences are measured in years of imprisonment—cannot possibly be justified. *Stinson* deference vests both the making and the interpretation of law in the Commission's hands and permits the agency to expand and rewrite its own Guidelines through "interpretive" commentary, rather than through the formal rulemaking process and congressional review that the APA requires.[3] *See Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 112 (2015) (Scalia, J., concurring in the judgment) ("[T]here are weighty reasons to deny a lawgiver the power to write ambiguous laws and then be the judge of what the ambiguity means.").

Justice Gorsuch's concurring opinion in *Loper Bright/Relentless* underscores the constitutional defects in *Chevron* deference that pervade *Stinson* deference to an even greater degree. He warned that

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[3] Although the Sentencing Commission's Guidelines, themselves, are subject to the APA's notice-and-comment requirements, the commentary to the Guidelines is not subject to any notice-and-comment requirements, nor "any other mandated safeguards to cabin the Sentencing Commission's broad authority." *United States v. Castillo*, 69 F.4th 648, 663 (9th Cir. 2023).

deference doctrines like *Chevron* "guarantee[] 'systematic bias'" by "requir[ing] courts to 'place a finger on the scales of justice in favor of the most powerful of litigants, the federal government.'" 603 U.S. at 433 (Gorsuch, J., concurring). Rather than impartially resolving questions of law, courts instead must "resort to a far cruder heuristic: 'The reasonable bureaucrat always wins.'" *Id.* at 434. Indeed, deference in the criminal sphere is doubly perverse: the rule of lenity requires that ambiguities in penal laws be resolved in favor of the defendant, yet *Stinson* deference inverts that rule, compelling courts to resolve doubts in favor of harsher readings of the law advanced by the government. *Id.* ("The ancient rule of lenity is still another of *Chevron*'s victims.").

These concerns strike with particular force in the Sentencing Guidelines context. Treating the Commission's commentary as binding does more than call for deference to expertise—it "replac[es] the doctrine of lenity with a doctrine of severity." *Whitman*, 574 U.S. at 1005 (Scalia, J., respecting the denial of certiorari). *Stinson* deference ensures that the government's harsher construction of the Sentencing Guidelines will prevail so long as it is not "plainly erroneous or inconsistent with" the Guidelines, while a defendant's equally—or even more—plausible reading will be categorically rejected. That inversion of lenity not only strips defendants of

the constitutional presumption of liberty, but it also transforms Article III judges from neutral guardians of the law into instruments of the federal prosecution.

In short, *Stinson* deference not only embodies, but *amplifies* the constitutional defects of *Chevron* deference that *Loper Bright/Relentless* condemned. It strips judges of their constitutional role as independent interpreters of the law, places a prosecutorial thumb on the scales, and flips the rule of lenity on its head. A doctrine that systemically biases criminal adjudication in favor of the government cannot be squared with Article III, due process of law, or this Court's repeated admonition that individual liberty may be curtailed only by clear law duly enacted by Congress—not by agency commentary. *Stinson* is not merely obsolete; it is gravely unconstitutional. The Court should grant certiorari and lay it to rest.

II. INCREASING CRIMINAL SENTENCES BASED ON DEFERENCE IS UNCONSTITUTIONAL

The rule of lenity, principles of due process, and the independence of the judicial office all require courts to interpret the Guidelines for themselves, without deference to the Commission's commentary. As the *Stinson* court, itself, acknowledged, courts may not afford deference to Guidelines commentary if it

would "run afoul of the Constitution." *Stinson*, 508 U.S. at 47.

The lower courts are openly divided on whether, and to what degree, *Kisor* constrains *Stinson*, and how rigorously judges must analyze the Guidelines' text before deferring to commentary. Such a disparity in how judges interpret text would be unacceptable for any federal rules that require uniformity, but it is singularly inexcusable in the case of criminal sentencing, where liberty is at stake.

A. *Stinson*'s Particular Outcome Did Not Implicate the Rule of Lenity

In contrast to *Stinson*, where the commentary at issue happened to favor a more lenient sentence, 508 U.S. at 47-48, deference to the Commission in this case required the court to impose a stricter sentence on Mr. Poore, so "alarm bells should be going off." *United States v. Havis*, 907 F.3d 439, 450 (6th Cir. 2018) (Thapar, J., concurring). "[W]hen liberty is at stake," deference "has no role to play." *Guedes v. ATF*, 140 S. Ct. 789, 790 (2020) (Gorsuch, J., respecting the denial of certiorari). As six Third Circuit judges recognized, "[p]enal laws pose the most severe threats to life and liberty, as the Government seeks to brand people as criminals and lock them away." *United States v. Nasir*, 17 F.4th 459, 473 (3d Cir. 2021) (Bibas, J., concurring). The Court in *Stinson* had no occasion

to consider what role lenity would play in its deference regime, so it did not grapple with the constitutional issues inherent when *Stinson* deference applies to *increase* a criminal penalty.

The rule of lenity dictates that any "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Skilling v. United States*, 561 U.S. 358, 410 (2010). This is not a novel concept. Rather, the rule of lenity is one of the original tools of statutory construction. *See United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820). Early fifteenth century jurist William Paston abided by the maxim that "a penalty should not be increased by interpretation." *A Discourse upon the Exposicion & Understandinge of Statutes*, at 154-55 (Samuel E. Thorne ed. 1942).

Lenity "applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose." *Bifulco v. United States*, 447 U.S. 381, 387 (1980). In fact, lenity "first arose to mitigate draconian sentences." *Nasir*, 17 F.4th at 473 (Bibas, J., concurring) (citing Livingston Hall, *Strict or Liberal Construction of Penal Statutes*, 48 HARV. L. REV. 748, 749-51 (1935)).

Lenity applies with equal force to the Guidelines. *See United States v. Chandler*, 104 F.4th 445, 464 (3d Cir. 2024) (Bibas, J., dissenting) ("[T]here is

no compelling reason to defer to a Guidelines comment that is harsher than the text."). Indeed, "it is crucial that judges give careful consideration to *every minute* that is added to a defendant's sentence." *United States v. Faison*, 2020 WL 815699, at *1 (D. Md. Feb, 18, 2020). For a defendant, "every day, month and year that was added to the ultimate sentence will matter. … [T]he difference between probation and fifteen days may determine whether the defendant is able to maintain his employment and support his family." *Id.*; *see also Abramski*, 573 U.S. at 191 ("[W]e have never held that the Government's reading of a criminal statute is entitled to any deference.").

Three "core values of the Republic" compel the rule of lenity: (1) due process of law; (2) the separation of governmental powers; and (3) "our nation's strong preference for liberty." *Nasir*, 17 F.4th at 473 (Bibas, J., concurring). Due process of law 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." *McBoyle v. United States*, 283 U.S. 25, 27 (1931). By construing ambiguities in the defendant's favor, lenity precludes criminal punishment when Congress did not provide a fair warning through clear statutory language. *See id.* Lenity also preserves the separation of powers: the legislature criminalizes conduct and sets statutory penalties, the executive prosecutes crimes and can

recommend a sentence, and the judiciary imposes sentences within the applicable statutory framework. *United States v. Bass*, 404 U.S. 336, 348 (1971). In this way, 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 expresses our instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should." *Nasir*, 17 F.4th at 473 (Bibas, J., concurring) (citation omitted). Indeed, by promoting liberty, the rule of lenity "fits with one of the core purposes of our Constitution, to 'secure the Blessings of Liberty' for all[.]" *Id.* (quoting U.S. Const. pmbl.).

However, when courts are precluded from exercising their judicial power "to say what the law is," they are forced to "abandon the best reading of the law in favor of views of those presently holding the reins" of government, rendering the rule of lenity yet another victim of unconstitutional agency deference. *Loper Bright/Relentless*, 603 U.S. at 433 (Gorsuch, J., concurring). Rather than resolving ambiguities in the law in favor of liberty, *Stinson* deference channels uncertainty into harsher punishment, resulting in criminal sentences that are lengthened not by the clear voice of Congress, but by agency commentary.

B. Deference to the Commentary to Unambiguous Guidelines Violates Judicial Independence and Due Process

1. Deference Undermines Article III Judicial Independence

Judicial independence has been a touchstone of legitimate governance at least since English judges resisted King James I's insistence that "[t]he King being the author of the Lawe is the interpreter of the Lawe." *See* Philip Hamburger, *Law and Judicial Duty*, 149-50, 223 (2008). The judges insisted that, although they exercised the judicial power in the name of the monarch, the power rested solely with them. *Prohibition del Roy* (1608) 77 Eng. Rep. 1342, 1343; 12 Co. Rep. 64, 65.

During the uprising against tyranny, the American Declaration of Independence objected to judges "dependent on [King George III's] will alone." The Declaration of Independence para. 3 (U.S. 1776). The Founders then cast their first substantive vote at the Constitutional Convention of 1787 to create a government that separated power among three co-equal branches. *See* 1 *Records of the Federal Convention of 1787*, 30-31 (Max Farrand ed., Yale Univ. Press 1911). The separation of governmental powers preserves liberty, in part, because each branch

jealously checks the other branches' attempts to shift the constitutional balance of power.

No branch is more vital to protecting liberty than the judiciary. An independent judiciary serves as our constitutional backstop and ensures that the political branches cannot diminish constitutional protections. Article III adopted the common-law tradition of an independent judicial office, secured by life tenure and undiminished salary. U.S. Const. art. III, § 1. To hold this office, an Article III judge swears an oath to the Constitution and is duty-bound to exercise his office independently. *See* Hamburger, *supra*, at 507-12.

Judicial office includes a duty of independent judgment. *See* James Iredell, To the Public, *N.C. Gazette* (Aug. 17, 1786). Through the independent judicial office, the Founders ensured that judges would not administer justice based on someone else's interpretation of the law. *See* 2 *Records of the Federal Convention of 1787* 79 (Nathaniel Gorham ed.); THE FEDERALIST No. 78, at 525 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) ("The interpretation of laws is the proper and peculiar province of the courts."). This obligation of independence is reflected in the opinions of the founding era's finest jurists. *See, e.g.*, *State of Georgia v. Brailsford*, 2 U.S. (2 Dall.) 415, 416 (1793) (Iredell, J., dissenting) ("It is my misfortune to dissent … but I am bound to decide, according to the

dictates of my own judgment."); *The Julia*, 14 F. Cas. 27, 33 (C.C.D. Mass. 1813) (No. 7,575) (Story, J.) ("[M]y duty requires that whatsoever may be its imperfections, my own judgment should be pronounced to the parties."); *United States v. Burr*, 25 F. Cas. 2, 15 (C.C.D. Va. 1807) (No. 14,692) (Marshall, J.) ("[W]hether [the point] be conceded by others or not, it is the dictate of my own judgment, and in the performance of my duty I can know no other guide.").

Judicial independence, as a duty and an obligation, persists today. This principle is so axiomatic, in fact, that it seldom appears in legal argument; the mere suggestion that a judge might breach his or her duty of independent judgment is a scandalous insinuation. But that is exactly what deference regimes like *Stinson* require: judicial dependence on a non-judicial entity's interpretation of the law. That is also exactly what *Loper Bright/Relentless* unequivocally repudiated just last year.

Just as *Chevron* deference required that "courts mechanically afford *binding* deference to agency interpretations," *Loper Bright/Relentless*, 603 U.S. at 399, so too faithful application of *Stinson* deference requires judges to abdicate the duty of their office by forgoing their independent judgment in favor of the Sentencing Commission's legal interpretation of its own rules—which play a substantial role in determining a criminal defendant's sentence. *See*

Gall v. United States, 552 U.S. 38, 50 n.6 (2007). Such deference diminishes the judicial office and, with it, a key structural safeguard that the Framers erected as a bulwark against tyranny. This is especially true when "a sentence enhancement potentially translates to additional years or decades in federal prison." *Campbell*, 22 F.4th at 446-47 (quoting *Bond v. United States*, 564 U.S. 211, 222 (2011)). "In such circumstances, 'a court has no business deferring to any other reading, no matter how much the [Government] insists it would make more sense.'" *Id.* at 447 (quoting *Kisor*, 588 U.S. at 575).

Even when Congress has tasked an agency with promulgating binding rules or guidelines, it remains the judiciary's role to "say what the law is" in any case or controversy about the meaning and application of those agency-made provisions. *Marbury*, 5 U.S. at 177. The duty of independent judgment is the very office of an Article III judge; *Stinson* cannot lawfully require judges to abdicate that duty. The Commission's opinion of how to best interpret its Guidelines deserves no more weight than the heft of its persuasiveness.

2. *Stinson* Deference Violates Due Process by Institutionalizing Judicial Bias

Reflexive deference to Commission commentary also jeopardizes judicial impartiality.

Com. Coatings Corp. v. Cont'l Cas. Co., 393 U.S. 145, 150 (1968) (judicial bodies "not only must be unbiased but also must avoid even the appearance of bias"); *Masterpiece Cake Shop, Ltd. v. Colo. C.R. Comm'n*, 584 U.S. 617, 643 (2018) (Kagan, J., concurring) (the Constitution forbids proceedings "infected by … bias").

Judicial bias need not exist at a personal level to violate due process—it can be institutional. In fact, institutionalized judicial bias is more pervasive, as it systematically infects the fairness of the legal system, not just an individual party before a particular judge. *Stinson* deference institutionalizes bias by requiring courts to "defer" to the government's interpretation in violation of a defendant's right to due process of law. *Cf.* Philip Hamburger, Chevron *Bias*, 84 GEO. WASH. L. REV. 1187 (2016). Rather than exercise their own judgment about what the law is, judges under *Stinson* defer as a matter of course to the judgment of one of the litigants before them: the federal government. The government litigant wins merely by showing that its preferred interpretation of the commentary "is not plainly erroneous or inconsistent with" the Guidelines. *Stinson*, 508 U.S. at 47 (cleaned up). A judge cannot simply find the defendant's reading more plausible or think the government's reading is wrong—the government must be *plainly* wrong.

Most judges recognize that personal bias requires recusal. It is equally inappropriate for a judge to decide a case based on a deference regime that institutionalizes bias by requiring judges to favor the legal position of one of the litigating parties: again, the federal government. Doctrines that call for government-litigant bias, such as *Stinson* deference, patently deny due process of law to criminal defendants by favoring the government prosecutor's position. *Tumey v. Ohio*, 273 U.S. 510, 532 (1927).

This Court should reconsider *Stinson*, reject the deference doctrine that compromises the judiciary while depriving countless criminal defendants of their constitutional rights, and thereby allow conscientious judges to uphold their constitutional oath. Deference has no proper role in criminal sentencing, where the government may deprive a defendant of liberty only if all three branches agree—separately and independently—that the sanction is justified.

CONCLUSION

For the foregoing reasons, we respectfully urge the Court to grant Mr. Poore's petition.

Respectfully submitted,

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