

No. 25-5343

In the Supreme Court of the United States

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KENDRICK JARRELL BEAIRD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

**BRIEF OF *AMICUS CURIAE*
STATE OF WEST VIRGINIA
IN SUPPORT OF NEITHER PARTY**

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TABLE OF CONTENTS

Introduction and Interests of <i>Amici Curiae</i>	1
Summary of Argument	3
Argument	4
I. When it comes to criminal statutes, regulations, and guidelines, lenity should displace deference	4
II. Lenity aside, the Court should not embrace any administrative deference in this context	10
Conclusion	18

II

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>The Adventure</i> , 1 F. Cas. 202 (CC Va. 1812)	6
<i>Am. Fed'n of Lab. & Cong. of Indus. Orgs.</i> <i>v. Fed. Election Comm'n</i> , 333 F.3d 168 (D.C. Cir. 2003)	4
<i>Aposhian v. Wilkinson</i> , 989 F.3d 890 (10th Cir. 2021).....	7
<i>Apprendi v. New Jersey</i> , 530 U.S. 466 (2000)	10, 17
<i>Bifulco v. United States</i> , 447 U.S. 381 (1980)	5
<i>Bryan v. United States</i> , 524 U.S. 184 (1998)	6
<i>City of Arlington v. FCC</i> , 569 U.S. 290 (2013)	7
<i>Crowell v. Benson</i> , 285 U.S. 22 (1932)	7
<i>Decker v. Nw. Env't Def. Ctr.</i> , 568 U.S. 597 (2013)	16
<i>Dixson v. United States</i> , 465 U.S. 482 (1984)	5
<i>Dolfi v. Pontesso</i> , 156 F.3d 696 (6th Cir. 1998).....	9, 14
<i>Dunn v. United States</i> , 442 U.S. 100 (1979)	7

III

<i>Epic Sys. Corp. v. Lewis</i> , 584 U.S. 497 (2018)	4
<i>Esteras v. United States</i> , 606 U.S. 185 (2025)	10
<i>Gall v. United States</i> , 552 U.S. 38 (2007)	8, 11, 16
<i>Gun Owners of Am., Inc. v. Garland</i> , 19 F.4th 890 (6th Cir. 2021)	4
<i>Hill v. United States ex rel. Wampler</i> , 298 U.S. 460 (1936)	10
<i>Hughes v. United States</i> , 584 U.S. 675 (2018)	11
<i>Jean v. Nelson</i> , 472 U.S. 846 (1985)	16
<i>Kahler v. Kansas</i> , 589 U.S. 271 (2020)	14
<i>Kisor v. Wilkie</i> , 588 U.S. 558 (2019)	1, 2, 3, 4, 7, 8, 9, 10, 11, 12, 14, 17, 18
<i>Liparota v. United States</i> , 471 U.S. 419 (1985)	9
<i>Loper Bright Enters. v. Raimondo</i> , 603 U.S. 369 (2024)	2, 7, 12, 16, 18
<i>McBoyle v. United States</i> , 283 U.S. 25 (1931)	7
<i>Mistretta v. United States</i> , 488 U.S. 361 (1989)	9
<i>Molina-Martinez v. United States</i> , 578 U.S. 189 (2016)	11

IV

<i>Moskal v. United States</i> , 498 U.S. 103 (1990)	5
<i>OfficeMax, Inc. v. United States</i> , 428 F.3d 583 (6th Cir. 2005).....	4
<i>Pension Benefit Guar. Corp. v. LTV Corp.</i> , 496 U.S. 633 (1990)	14
<i>Pepper v. United States</i> , 562 U.S. 476 (2011)	16
<i>Perez v. Mortg. Bankers Ass’n</i> , 575 U.S. 92 (2015)	12, 13
<i>Peugh v. United States</i> , 569 U.S. 530 (2013)	11
<i>Rita v. United States</i> , 551 U.S. 338 (2007)	16
<i>Rosales-Mireles v. United States</i> , 585 U.S. 129 (2018)	11
<i>Skidmore v. Swift & Co.</i> , 323 U.S. 134 (1944)	7, 18
<i>Stinson v. United States</i> , 508 U.S. 36 (1993)	1, 3, 4, 17
<i>Talk Am., Inc. v. Mich. Bell Tel. Co.</i> , 564 U.S. 50 (2011)	17
<i>Taylor v. United States</i> , 495 U.S. 575 (1990) (.....	6
<i>Thomas Jefferson Univ. v. Shalala</i> , 512 U.S. 504 (1994)	12
<i>Touby v. United States</i> , 500 U.S. 160 (1991)	13

<i>United States v. Bass</i> , 404 U.S. 336 (1971)	9
<i>United States v. Boler</i> , 115 F.4th 316 (4th Cir. 2024)	2
<i>United States v. Campbell</i> , 22 F.4th 438 (4th Cir. 2022)	8
<i>United States v. Campos-Serrano</i> , 404 U.S. 293 (1971)	5
<i>United States v. Chandler</i> , 104 F.4th 445 (3d Cir. 2024).....	5
<i>United States v. Davis</i> , 588 U.S. 445 (2019)	5
<i>United States v. Dubois</i> , 164 F.4th 418 (5th Cir. 2026)	10
<i>United States v. Dupree</i> , 57 F.4th 1269 (11th Cir. 2023)	1, 8
<i>United States v. Havis</i> , 907 F.3d 439 (6th Cir. 2018).....	9
<i>United States v. Hayes</i> , 555 U.S. 415 (2009)	5
<i>United States v. Holman</i> , 171 F.4th 303 (4th Cir. 2026)	10
<i>United States v. Kozminski</i> , 487 U.S. 931 (1988)	8
<i>United States v. Lanier</i> , 520 U.S. 259 (1997)	5
<i>United States v. Nasir</i> , 17 F.4th 459 (3d Cir. 2021).....	5

VI

<i>United States v. Riccardi</i> , 989 F.3d 476 (6th Cir. 2021).....	1
<i>United States v. Trumbull</i> , 114 F.4th 1114 (9th Cir. 2024)	12
<i>United States v. Vargas</i> , 74 F.4th 673 (5th Cir. 2023)	8
<i>United States v. Wiltberger</i> , 18 U.S. (5 Wheat.) 76 (1820)	6
<i>United States v. Winstead</i> , 890 F.3d 1082 (D.C. Cir. 2018)	2
<i>United Student Aid Funds, Inc. v. Bible</i> , 136 S. Ct. 1607 (2016)	18
<i>VF Jeanswear LP v. EEOC</i> , 589 U.S. 1312 (2020)	18
<i>West Virginia v. EPA</i> , 597 U.S. 697 (2022)	15
<i>Whalen v. United States</i> , 445 U.S. 684 (1980)	9
<i>Whitman v. United States</i> , 574 U.S. 1003 (2014)	15
<i>Williams v. People of State of N.Y.</i> , 337 U.S. 241 (1949)	16
<i>Zuni Pub. Sch. 20 Dist. No. 89 v. Dep’t of Educ.</i> , 550 U.S. 81 (2007)	14

Constitutional Provisions

U.S. CONST. amend. V	7
U.S. CONST. amend. XIV	7

VII

Statutes

18 U.S.C. § 3553	10, 13
28 U.S.C. § 991	15
28 U.S.C. § 994	8, 13

Other Authorities

Amy Coney Barrett, <i>Substantive Canons and Faithful Agency</i> , 90 B.U. L. REV. 109 (2010)	6
Brett M. Kavanaugh, <i>Fixing Statutory Interpretation</i> , 129 HARV. L. REV. 2118 (2016)	12
Cass R. Sunstein, <i>Chevron Step Zero</i> , 92 VA. L. REV. 187 (2006)	14
Douglas H. Ginsburg & Steven Menashi, <i>Our Illiberal Administrative Law</i> , 10 N.Y.U. J.L. & LIBERTY 475 (2016)	17
Elena Kagan, <i>Presidential Administration</i> , 114 HARV. L. REV. 2245 (2001)	15
Evan J. Criddle, <i>Chevron’s Consensus</i> , 88 B.U. L. REV. 1271 (2008)	15
THE FEDERALIST No. 47	17
HENRY FRIENDLY, <i>BENCHMARKS</i> (1967)	6

VIII

Jeremy D. Rozansky, <i>Waiving Chevron</i> , 85 U. CHI. L. REV. 1927 (2018)	16
John F. Manning, <i>Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules</i> , 96 COLUM. L. REV. 612 (1996)	17
John S. Acton, <i>The Future of Judicial Deference to the Commentary of the United States Sentencing Guidelines</i> , 45 HARV. J.L. & PUB. POL'Y 349 (2022)	2
Kristin E. Hickman, <i>The Need for Mead: Rejecting Tax Exceptionalism in Judicial Deference</i> , 90 MINN. L. REV. 1537 (2006)	14
Lisa Schultz Bressman, <i>Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State</i> , 78 N.Y.U. L. REV. 461 (2003)	13
Thomas Z. Horton, <i>Lenity Before Kisor: Due Process, Agency Deference, and the Interpretation of Ambiguous Penal Regulations</i> , 54 COLUM. J.L. & SOC. PROBS. 629 (2021)	5
U.S. SENT'G GUIDELINES MANUAL (U.S. SENT'G COMM'N 2025)	13

INTRODUCTION AND INTERESTS OF *AMICI CURIAE*

It's unusual to see the Government and a criminal defendant agree (at least in part) on how to answer an important criminal-sentencing question before this Court. It's stranger still to see them agree on the *wrong* answer—with a court-appointed amicus pressing yet another answer that's no better. All three parties make the same underlying mistake: they entertain the notion—albeit to varying degrees—that courts could owe some duty of deference to the Sentencing Commission's commentary on the Sentencing Guidelines in at least some circumstances. As it turns out, courts owe no such duty at all.

To be sure, both the Government and Petitioner are right that an overly rigid reading of *Stinson v. United States*, 508 U.S. 36 (1993), can't supply the relevant rule anymore. “*Stinson* adopted word for word the test” that this Court has since labeled a “caricature” of administrative deference. *United States v. Dupree*, 57 F.4th 1269, 1275 (11th Cir. 2023) (citing *Kisor v. Wilkie*, 588 U.S. 558 (2019)). Under *Stinson*, which demanded near automatic deference to the Sentencing Commission's commentary, the Commission could have “adopt[ed] a new legislative rule under the guise of reinterpreting an old one”—all without going through any of the normal process needed for such adoption. *United States v. Riccardi*, 989 F.3d 476, 485 (6th Cir. 2021). That freewheeling approach confuses administrative authority with something more like legislative power.

But merely disclaiming a strict view of *Stinson* (of the sort applied by the lower court here) and then defaulting to *Kisor* doesn't go far enough—even as a fallback

position, as Petitioner presents it. Rather, “the Court can and should return to first principles rather than reflexively extend *Kisor*.” John S. Acton, *The Future of Judicial Deference to the Commentary of the United States Sentencing Guidelines*, 45 HARV. J.L. & PUB. POL’Y 349, 406 (2022). For one, *Kisor* does not expressly account for the unique considerations that apply in the criminal context—considerations like the rule of lenity. That rule says that an ambiguous criminal provision must be read to favor the defendant, not the administrative entity purporting to apply it. Cf. *United States v. Winstead*, 890 F.3d 1082, 1092 n.14 (D.C. Cir. 2018) (noting that it was “not obvious how the rule of lenity is squared with *Stinson*’s description of the commentary’s authority to interpret guidelines,” but confirming lenity still “has some force”). For another, *Kisor* rests on increasingly shaky footing, so it seems odd to extend it to new contexts like this one. *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), of course, put *Chevron* deference to rest, and that decision’s logic in turn “calls into question the viability of [*Kisor*]/*Auer* deference.” *United States v. Boler*, 115 F.4th 316, 322 n.4 (4th Cir. 2024). For several good reasons—some tied to *Loper Bright* and some not—the Court should bury *Kisor*, not reinvigorate it.

Recently, this Court and others have often been called on to reaffirm the unobjectionable notion that judges—not administrators (or commissioners)—should apply and construe legal language. The Court should do so again here. The Court should hold that Sentencing Guidelines commentary is entitled to consideration only to the extent it tends to persuade. Otherwise, courts need not defer to that commentary at all.

SUMMARY OF ARGUMENT

I. *Stinson* should no longer be the rule; instead, lenity should decide how the Guideline here applies. *Kisor* (which construes the doctrines underlying *Stinson*) forecloses administrative deference until a court has exhausted the traditional tools of construction. Lenity—a substantive canon much older than administrative deference—is one of those tools. Deference to the Commission, on the other hand, is not. Lenity thus applies first: where a Sentencing Guideline remains genuinely ambiguous after the canons are applied, the tie goes to the defendant, not to the agency that drafted the gloss. That ordering is compelled not only by lenity’s pedigree but also by the values it secures—fair warning and due process, protection against arbitrary enforcement, and a separation of powers. The doctrine rightly keeps the Commission from harshening criminal penalties without notice-and-comment or congressional review.

II. If lenity does not resolve this case, administrative deference should not, either. Sentencing is a judicial function. Commanding district courts to defer to the Commission’s commentary displaces district courts’ traditional work. It turns sentencing away from the considered judgment of judges and toward informal glosses from a body that neither wrote the governing statutes nor answers, in any direct way, to those who did. Interpretive commentary would become binding law in all but name. And none of the usual justifications—expertise, uniformity, and similar considerations—support deference here. Instead, courts can appropriately consider the Commission’s views without disrupting the separation of powers by merely affording it the weight that its persuasiveness demands.

ARGUMENT

I. When it comes to criminal statutes, regulations, and guidelines, lenity should displace deference.

Both Petitioner and the Government assume that, if *Stinson* falls away, then a lower court would defer to any reasonable Sentencing Commission commentary when a Sentencing Guideline is ambiguous. In that reading, the Commission’s choice to define a large-capacity magazine as anything larger than 15 rounds will prevail unless it’s deemed “unreasonable” in some subjective sense. But that’s not right. Lenity, not deference to commentary, should be the ultimate tiebreaker when a court faces an otherwise ambiguous Sentencing Guideline.

“[B]efore concluding that a rule is genuinely ambiguous, a court must exhaust all the traditional tools of construction.” *Kisor*, 588 U.S. at 575 (cleaned up); accord *OfficeMax, Inc. v. United States*, 428 F.3d 583, 592 (6th Cir. 2005) (Sutton, J.) (“[T]he question whether a statute is ambiguous arises after, not before, a court applies traditional canons of interpretation.”). In other words, when “the canons supply an answer, [administrative deference] leaves the stage.” *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 521 (2018) (cleaned up). And “[a] finding of ambiguity can occur only at the end of [the] usual interpretive process.” *Gun Owners of Am., Inc. v. Garland*, 19 F.4th 890, 926 (6th Cir. 2021) (Murphy, J., dissenting).

“Among the traditional tools of statutory construction the court must first exhaust ... are the linguistic and substantive canons of interpretation.” *Am. Fed’n of Lab. & Cong. of Indus. Orgs. v. Fed. Election Comm’n*, 333 F.3d 168, 183 (D.C. Cir. 2003) (Henderson, J., concurring) (cleaned up). Lenity is one such canon of construction.

See *United States v. Lanier*, 520 U.S. 259, 266 (1997); *Dixson v. United States*, 465 U.S. 482, 500 n.19 (1984); *United States v. Campos-Serrano*, 404 U.S. 293, 298 (1971). It says that “ambiguities about the breadth of a criminal statute should be resolved in the defendant’s favor.” *United States v. Davis*, 588 U.S. 445, 464 (2019). The rule of 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).

So “[r]ather than defer to the commentary, [courts] should use lenity to interpret ambiguous Guidelines.” *United States v. Nasir*, 17 F.4th 459, 474 (3d Cir. 2021) (Bibas, J., concurring). Courts have sometimes called lenity a rule of last resort—but that’s not to say that it must be considered only after every other possible option under the sun has been exhausted. Rather, the rule applies “when, after consulting *traditional canons of statutory construction*,” the ambiguity remains. *United States v. Hayes*, 555 U.S. 415, 429 (2009) (emphasis added) (cleaned up); see also *Moskal v. United States*, 498 U.S. 103, 108 (1990) (explaining how courts should first look to “language and structure, legislative history, and motivating policies” (cleaned up)). But “deference to the Sentencing Commission is not a traditional interpretative tool. Lenity is. So it must come before deference.” *United States v. Chandler*, 104 F.4th 445, 464 (3d Cir. 2024) (Bibas, J., dissenting); see also generally, *e.g.*, Thomas Z. Horton, *Lenity Before Kisor: Due Process, Agency Deference, and the Interpretation of Ambiguous Penal Regulations*, 54 COLUM. J.L. & SOC. PROBS. 629 (2021) (explaining why, in order of priority, lenity is applied before administrative deference). After all, commentary may or may not purport to offer insight into the original intent and meaning of the Guideline to which

it's attached; thus, deference to that commentary may not be interpretive at all.

Thus, the ordering of lenity over deference follows from what each doctrine does. Deference asks who decides what an ambiguous text means, while lenity helps decide whether the text is ambiguous at all, and against whom any residual doubt cuts. A canon that resolves ambiguity cannot wait in line behind a doctrine that presupposes it. Were it otherwise, the Commission could manufacture the ambiguity that triggers deference and then capture its benefit—an inversion this Court has refused to tolerate in cognate settings.

And the Court need not fear a little lenity, as the concept has a substantial history. It is the modern label for one of the common law's oldest ideas—that “penal laws should be construed strictly.” *The Adventure*, 1 F. Cas. 202, 204 (CC Va. 1812) (No. 93) (Marshall, C.J.). Our country's courts have long felt an “instinctive distaste against men languishing in prison unless the lawmaker has clearly said that they should.” HENRY FRIENDLY, *BENCHMARKS* 209 (1967). In fact, Chief Justice Marshall once observed that this distaste is “perhaps not much less old than construction itself.” *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820). Likewise, Justice Scalia lauded lenity as a “venerable” and “ancient canon.” See *Bryan v. United States*, 524 U.S. 184, 205 (1998) (Scalia, J., dissenting); *Taylor v. United States*, 495 U.S. 575, 603 (1990) (Scalia, J., concurring in part and concurring in the judgment). Lenity, then, holds an established place in American jurisprudence. See Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 128 (2010) (recognizing lenity as one of “the oldest canons of interpretation”).

In contrast, administrative deference has a far more “recent provenance.” *Aposhian v. Wilkinson*, 989 F.3d 890, 899 (10th Cir. 2021) (Tymkovich, J., dissenting). Less than a century ago, the Court was still wrestling over whether agencies could decide questions of fact, never mind law. *Crowell v. Benson*, 285 U.S. 22 (1932). Before *Chevron* came along about 40 years ago, the best deference agencies received was only proportional to the persuasiveness of their argument. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). And unlike lenity—which has remained largely stable over the years—administrative deference continues to shift and change. *Chevron* deference has come and gone—its demise hastened in part because of confusion over its application in the criminal space. *Loper Bright*, 603 U.S. at 405. And what’s now come to be known as *Kisor* deference has been in a constant state of flux for a few decades now, too. The Court would thus be ill-advised to weaken a doctrine tracing its roots to Blackstone for the sake of a doctrine drawing from a “dramatic shift in power over the last 50 years.” *City of Arlington v. FCC*, 569 U.S. 290, 327 (2013) (Roberts, C.J., dissenting).

But applying lenity isn’t just “oldest doctrine wins.” Putting lenity at the forefront advances some of our nation’s most important values. Three come immediately to mind.

First, lenity is “not merely a convenient maxim”; “it is rooted in fundamental principles of due process.” *Dunn v. United States*, 442 U.S. 100, 112 (1979). The doctrine ensures that we know what specific conduct is criminal and what punishment will follow from it. See U.S. CONST. amends. V, XIV. Citizens deserve “fair warning” of what might be criminal in “language that the common world will understand.” *McBoyle v. United States*, 283 U.S. 25, 27

(1931). Clear laws and penalties promote a stable society. The Sentencing Guidelines are already murky enough; layering on an additional level of commentary will only worsen the “clarity” problem inherent in the system. See *United States v. Campbell*, 22 F.4th 438, 446 (4th Cir. 2022) (stressing the “individual liberty” interests at stake and, relying in part on lenity, declining to defer to Guidelines commentary). But commentary should not be permitted to enlarge the conduct that triggers a higher sentence without clear notice.

Second, lenity promotes the rule of law. It helps “minimize the risk of selective or arbitrary enforcement.” *United States v. Kozminski*, 487 U.S. 931, 952 (1988). In contrast, allowing *Kisor* to supersede lenity commands the opposite result, with the Sentencing Commission able to change the penalties for crimes without the notice-and-comment, cleaner vote counts, and congressional review that the statute expects. See 28 U.S.C. § 994(a)(1), (p). Years-long variations in recommended sentences shouldn’t develop on the fly. See *United States v. Vargas*, 74 F.4th 673, 709 (5th Cir. 2023) (Elrod, J., dissenting in part) (citing similar considerations as a reason to apply lenity to Sentencing Guidelines commentary). And given how the Guidelines serve as “the starting point and the initial benchmark” of every sentencing proceeding, they are simply too important for *ad hoc* administration. *Gall v. United States*, 552 U.S. 38, 49 (2007). Indeed, even *Kisor* recognizes agency constructions must be “authoritative” before deference could enter the picture, and it’s debatable whether commentary truly is. *Dupree*, 57 F.4th at 1280 (Pryor, C.J., concurring).

And third, lenity serves important separation of powers purposes. “Application of the rule of 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). Separation is important because of the different competencies of the relevant players. Congress holds “the power to define criminal offenses and ... prescribe the punishments to be imposed upon those found guilty of them.” *Whalen v. United States*, 445 U.S. 684, 689 (1980). That’s so because “criminal punishment usually represents the moral condemnation of the community,” and the democratically accountable legislature has a better sense of those feelings. *United States v. Bass*, 404 U.S. 336, 348 (1971). Meanwhile, “criminal law and the interpretation of criminal statutes [and guidelines] is the bread and butter of the work of federal courts.” *Dolfi v. Pontesso*, 156 F.3d 696, 700 (6th Cir. 1998). And “sentencing has been and should remain primarily a judicial function.” *Mistretta v. United States*, 488 U.S. 361, 390 (1989) (cleaned up). So courts are better positioned to wrestle down messy draftsmanship in the Guidelines. Thus, lenity avoids a situation where these three distinct functions—promulgation, construction, and execution—collapse into one. That avoidance is key when it comes to commentary, as the Sentencing Commission is not subject to traditional executive-branch supervision or directly answerable to Congress or the Judiciary. It acts all on its own.

In short, applying *Kisor* deference to a circumstance like this one not only “threatens the separation of powers but also endangers fundamental legal precepts”—lenity included. *United States v. Havis*, 907 F.3d 439, 451 (6th Cir. 2018) (Thapar, J., concurring), vacated on reh’g en banc, 927 F.3d 382 (6th Cir. 2019). The Court should avoid that result by applying lenity to favor Petitioner’s reading of this “genuinely ambiguous” Guidelines provision.

United States v. Holman, 171 F.4th 303, 314 (4th Cir. 2026).

II. Lenity aside, the Court should not embrace any administrative deference in this context.

Administrative deference shouldn't play any role in this case even if one doesn't think lenity wins the day. Four justices asked years back whether "anyone would really think" that a judge complied with federal sentencing statutes "[i]f the judge said he was sending a defendant to prison for longer than he believed appropriate only in deference to the government's 'reasonable' sentencing recommendation." *Kisor*, 588 U.S. at 606 (Gorsuch, J., concurring in judgment). The question back then was meant to be rhetorical, but the parties have now answered it with a collective "Yes." That's wrong.

At least outside mandatory sentencing statutes, the district court is the one that's supposed to pick a "sentence sufficient, but not greater than necessary, to comply with" Congress's identified purposes. 18 U.S.C. § 3553(a). "The choice of pains and penalties, when choice is committed to the discretion of the court, is part of the judicial function." *Hill v. United States ex rel. Wampler*, 298 U.S. 460, 464 (1936). So a district court "generally enjoy[s] discretion over sentencing," *Esteras v. United States*, 606 U.S. 185, 198 (2025), only "constrained at its outer limits by the facts alleged in the indictment and found by the jury," *Apprendi v. New Jersey*, 530 U.S. 466, 483 n.10 (2000). "The Constitution requires that the terms of a defendant's sentence be decided by an Article III court in part out of solicitude for the liberty interests of the defendant." *United States v. Dubois*, 164 F.4th 418, 425 (5th Cir. 2026) (cleaned up).

But the Guidelines effectively impose their own constraint on that discretionary work, as district courts “*must* begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process.” *Peugh v. United States*, 569 U.S. 530, 541 (2013) (cleaned up). Not only must they properly calculate the Guidelines ranges, but district judges must also provide special justification when a sentence falls outside them. *Gall*, 552 U.S. at 47. In that way, though the Guidelines have been advisory for a couple decades now, the Guidelines continue to “serve as a meaningful benchmark” that guides the sentencing process. *Rosales-Mireles v. United States*, 585 U.S. 129, 133 (2018) (cleaned up). Even that description might really be an understatement; their anchoring effect means they work more as a “lodestone” or “foundation” in federal sentencing. *Hughes v. United States*, 584 U.S. 675, 685 (2018) (cleaned up); see also, *e.g.*, *Molina-Martinez v. United States*, 578 U.S. 189, 199 (2016). And that’s not even to mention the effect that Guidelines calculations have on plea agreements and the like—where defendants need to know what exposure is realistically on the table. So what the Guidelines say and mean drives a lot of the daily sentencing work that’s done in federal courts—one could say they “form[] the basis for an enforcement action.” *Kisor*, 588 U.S. at 584 (cleaned up).

Yet if district courts are meant to defer to even the *commentary* on those Guidelines, then federal sentences become less and less about the conclusions of judges and legislators and more and more about the informal insights offered by a select commission. District court judges will spend more time parsing the words of administrators and less time considering the specific facts and circumstances that might drive an appropriate sentence in a given case—the classic work of sentencing. Interpretive provisions become de facto binding law, whatever disclaimer might

be offered saying otherwise. For “if an interpretive rule gets deference, the people are bound to obey it on pain of sanction, no less surely than they are bound to obey substantive rules.” *Perez v. Mortg. Bankers Ass’n*, 575 U.S. 92, 110 (2015) (Scalia, J., concurring in the judgment). And as a result, district courts abdicate essential functions of interpreting and sentencing.

As *Loper Bright* explained, this whole exercise that district courts would be asked to undertake under *Kisor*—searching for just enough “ambiguity” and then evaluating “reasonableness”—also might be something of a farce. See *United States v. Trumbull*, 114 F.4th 1114, 1126 (9th Cir. 2024) (Bea, J., concurring in the judgment). “Determining the level of ambiguity in a given piece of statutory [or regulatory] language is often not possible in any rational way.” Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2137 (2016). “Such an impressionistic and malleable concept cannot stand as an every-day test for allocating interpretive authority.” *Loper Bright*, 603 U.S. at 375 (cleaned up). And finding a reading “permissible” or “reasonable” even if not aligned with the text’s “single, best meaning” doesn’t make much sense, either. *Id.* at 400.

Better to have district courts take the Guidelines on their own terms, using the same “interpretive tools” that this Court said were good enough in *Loper Bright*. That approach would also encourage the Commission to be “clear and definite so that affected parties will have adequate notice concerning the [Commission]’s understanding of the law.” *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 525 (1994) (Thomas, J., dissenting).

There’s also the problem of delegation and authority. At least with the Guidelines, more direct congressional oversight and clearer congressional commands make the

focus on the Guidelines an arguable extension of congressional will. But that argument holds less water when it comes to commentary—which is *not* directly supervised and not even directly mentioned in the Commission’s enabling statute. See 28 U.S.C. § 994; cf. *Perez*, 575 U.S. at 111 (Scalia, J., concurring in the judgment) (“[G]iving [an agency] deference allows the agency to control the extent of its notice-and-comment-free domain.”); see also, *e.g.*, Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 552 (2003). Certainly Congress didn’t expressly instruct that the Commission should be given deference; in the one relevant instance when it mentioned commentary, it says only that district courts can “consider” commentary in deciding whether a given Guideline accounted for a particular circumstance present in a specific case. 18 U.S.C. § 3553(b)(1). In fact, not even the Guidelines themselves contemplate deference for the commentary. U.S. SENT’G GUIDELINES MANUAL § 1B1.7 (U.S. SENT’G COMM’N 2025). And certainly no implied delegation to the Commission can be found in an ambiguity of the Commission’s own making. Nor can one find congressional directives as to what commentary should look like. Contrast with *Touby v. United States*, 500 U.S. 160, 167 (1991) (upholding the Attorney General’s scheduling power where the statute contained “multiple specific restrictions on the Attorney General’s discretion to define criminal conduct”). In other words, nothing signals that Congress intended that the Commission, rather than a court, should function as the primary interpreter of a particular Guideline.

“[P]ractical agency expertise” has also been offered as a “principal justification[]” behind administrative deference in other cases, but it does not support deference

here. *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 651-52 (1990); see also *Kisor*, 588 U.S. at 571. “Unlike environmental regulation or occupational safety, criminal law ... is the bread and butter of the work of federal courts.” *Dolfi*, 156 F.3d at 700. Determining what acts call for greater sanction is not a judgment requiring technical analysis or skill in the usual sense. See also Kristin E. Hickman, *The Need for Mead: Rejecting Tax Exceptionalism in Judicial Deference*, 90 MINN. L. REV. 1537, 1599 (2006). “[S]aid a bit differently,” applying criminal laws and sentences “involves balancing and rebalancing over time complex and oft-competing ideas about social policy and moral culpability—about the criminal law’s practical effectiveness and its ethical foundations.” *Kahler v. Kansas*, 589 U.S. 271, 280 (2020) (cleaned up). Although the members of the Commission are no doubt learned and respected, the President and Congress who appointed and confirmed each district court judge have recognized those judges’ expertise, too. And though the Commission may know more about its own intent behind a Guideline, that intent is beside the point. The question at sentencing is what the Guideline *says*, not what its drafters privately meant—for “[c]itizens arrange their affairs not on the basis of their legislators’ unexpressed intent, but on the basis of the law as it is written and promulgated.” *Zuni Pub. Sch. 20 Dist. No. 89 v. Dep’t of Educ.*, 550 U.S. 81, 119 (2007) (Scalia, J., dissenting).

Likewise, deference to agencies has been pushed by those who think executive administrators are more politically accountable to Congress and the broader electorate. And admittedly, courts lack “electoral legitimacy” in interpreting laws and regulations. Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 196-97 (2006). But it’s tough to argue that the Sentencing

Commission is much better, seeing as how they sit distantly from the President who appointed them—especially those members who are judges—and are ostensibly shielded by for-cause removal protections. See 28 U.S.C. § 991(a); cf. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2377 (2001) (noting that less deference may be appropriate for so-called independent agencies). And anyway, “[d]irect presidential policymaking in agency statutory administration is exceptional,” and “the degree to which any single agency statutory interpretation impacts the President’s approval rating may be negligible.” Evan J. Criddle, *Chevron’s Consensus*, 88 B.U. L. REV. 1271, 1289-90 (2008).

And really, accountability is the wrong thing to think about when wrestling with questions of sentencing. The Constitution did not entrust an individual defendant’s liberty to whichever body best tracks majority sentiment. Yes, at the macro level, the Constitution granted the power to fix crimes to Congress. *Whitman v. United States*, 574 U.S. 1003, 1005 (2014) (Scalia, J., opinion respecting the denial of certiorari) (“[O]nly the *legislature* may define crimes and fix punishments.”). But at the micro level (in an individual case), it entrusted a defendant’s liberty to a court precisely because a court dispassionately answers to the law. “Political accountability” seems a feeble benefit when liberty is at risk; trading the latter for the former could lead to mob or “minister[ial]” rule over a criminalized minority. *West Virginia v. EPA*, 597 U.S. 697, 737 (2022) (Gorsuch, J., concurring) (quoting THE FEDERALIST NO. 11, at 85 (A. Hamilton) (C. Rossiter ed. 1961)). And crimes and sentences should not be subject to the ever-shifting political prerogatives of one administration versus another, as the Court has recognized “the importance of a

consistent interpretation of criminal statutes.” *Jean v. Nelson*, 472 U.S. 846, 856 n.3 (1985). For another, “[t]he most visible agency actors and agency actions are the most accountable to the electorate and to Congress.” Jeremy D. Rozansky, *Waiving Chevron*, 85 U. CHI. L. REV. 1927, 1963 (2018). The Commission’s decisions are unlikely to garner much attention. Political accountability, then, is a challenging justification for deference to the Commission here.

The need for uniformity is also no real justification here, as *Loper Bright* rightly saw no value in “uniformity for uniformity’s sake over the correct interpretation.” *Loper Bright*, 603 U.S. at 403. Strict uniformity is a bad fit for criminal sentencing in general, seeing as how a sentencing judge “must make an individualized assessment based on the facts presented.” *Gall*, 552 U.S. at 50; see also *Rita v. United States*, 551 U.S. 338, 348 (2007) (distinguishing between the “retail” and “wholesale” objectives of district courts and the Commission, respectively). “The belief no longer prevails that every offense in a like legal category calls for an identical punishment.” *Williams v. People of State of N.Y.*, 337 U.S. 241, 247 (1949). The Commission cannot lock every district court in on every fine point; a little disuniformity must be tolerated to respect the “traditional discretion of sentencing courts” that Congress “expressly preserved.” *Pepper v. United States*, 562 U.S. 476, 489 (2011).

But maybe most importantly, by giving “controlling weight” to Commission commentary, courts would also “violate a fundamental principle of separation of powers—that the power to write a law and the power to interpret it cannot rest in the same hands.” *Decker v. Nw. Env’t Def. Ctr.*, 568 U.S. 597, 619 (2013) (Scalia, J., concurring in part

and dissenting in part); see also THE FEDERALIST No. 47, at 301 (J. Madison) (C. Rossiter ed. 1961) (“The accumulation of all powers, legislative, executive, and judiciary, in the same hands ... may justly be pronounced the very definition of tyranny.”). And this deference “to an agency’s interpretation of its own rule encourages the agency to enact vague rules which give it the power, in future adjudications, to do what it pleases.” *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 69 (2011) (Scalia, J., concurring). Thus, a clear separation of powers begins to break down. See, e.g., Douglas H. Ginsburg & Steven Menashi, *Our Illiberal Administrative Law*, 10 N.Y.U. J.L. & LIBERTY 475, 513 (2016) (“Because interpretation may work a significant change, the agency’s power to interpret—subject only to deferential review—is akin to the power to rewrite the rule. This [is a] violation of the separation between lawmaking and law elaboration.”); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 638 (1996) (identifying the “separation of lawmaking from law-exposition” as a “crucial constitutional commitment” that this kind of deference contradicts).

The careful reader might object that many of these things were said ahead of *Kisor*—yet *Kisor* declined to overturn this brand of deference all the same. But *Kisor* had to confront the doctrine of stare decisis, which proved decisive. *Kisor*, 588 U.S. at 586-87; see also *id.* at 590-91 (Roberts, C.J., concurring in part) (noting agreement because “overruling those precedents is not warranted”). Stare decisis plays no role here—at least when it comes to *Kisor*, apart from *Stinson*—as the parties are asking the Court to choose a *new* rule. So the Court is free to choose the better rule. And the landscape has changed since *Kisor* came down. *Kisor* itself narrowed this deference

doctrine to near vanishing. Since then, decisions like *Loper Bright* and *West Virginia* have only further undermined the idea that agencies can wield broad power ungrounded in any specific congressional delegation. Unsurprisingly, then, “[t]his doctrine,” too, “has rightly fallen out of favor in recent years, as it directly conflicts with the constitutional duty of a judge to faithfully and independently interpret the law.” *VF Jeanswear LP v. EEOC*, 589 U.S. 1312, 1316 (2020) (Thomas, J., dissenting from denial of certiorari). So when it comes to *Kisor*, “[a]ny reader of this Court’s opinions should think that the doctrine is on its last gasp.” *United Student Aid Funds, Inc. v. Bible*, 136 S. Ct. 1607, 1608 (2016) (Thomas, J., dissenting from denial of certiorari).

And that’s not to say that courts should just ignore the Commission’s commentary entirely. “[T]he ... interpretations and opinions of [the Commission], while not controlling upon the courts by reason of their authority, do constitute a body of evidence and informed judgement to which courts and litigants may properly resort for guidance.” *Skidmore*, 323 U.S. at 140. But that evidence should only be given the “weight” that its reasoning deserves. *Id.* In other words, a district court should construe a Guideline as it construes any other legal text: it should exhaust the ordinary tools of interpretation and credit the Commission’s commentary only so far as its reasoning persuades. The answer shouldn’t be automatic.

CONCLUSION

The Court should vacate and remand with instructions to apply the Sentencing Guidelines without giving deference to the Sentencing Commission’s commentary.

Respectfully submitted.

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