No. 25-5343

IN THE

Supreme Court of the United States

KENDRICK JARRELL BEAIRD,
Petitioner,

v.

UNITED STATES,
Respondent.

On Writ of Certiorari to the U.S. Court of Appeals for the Fifth 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 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

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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.

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 it unmistakably clear that Article III judges may not abdicate their duty of independent judgment by reflexively deferring to another branch's interpretation of the 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 of law 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

This Court should repudiate *Stinson* deference, especially where it increases the length of criminal sentences, and reiterate that courts must exercise their independent judgment in criminal sentencing,

rather than reflexively deferring to the Federal Sentencing Guidelines commentary.

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." *Kisor v. 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,

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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.

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 contrary 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 Guidelines commentary is subject to no such requirements. Yet courts still afford these informal interpretations controlling weight, effectively empowering the Commission to increase criminal punishment by agency fiat. This judicial abdication offends the rule of lenity, principles of due process of law, 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." *Id*. 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. Beaird's case gives this Court a critical opportunity to resolve once and for all that *Stinson* deference has no place in criminal sentencing. The Commission's commentary to the Guidelines may help inform judicial interpretation, but it may not displace it. So long as *Stinson* remains in force, defendants across the country will face criminal punishment shaped not by

a court's independent interpretation of the Guidelines, but by reflexive deference to commentary that Congress never reviewed and that the Commission never subjected to the safeguards required for the Guidelines themselves (and amendments to them). Whatever interest the Guidelines serve in promoting sentencing uniformity, that interest cannot justify binding Article III courts to the Commission's informal commentary—particularly commentary that purports to "interpret" a Guideline but in fact defines or expands the Guideline's operative reach, increasing punishment beyond what the Guideline's text provides.

Uniformity purchased at the price of judicial abdication in criminal sentencing is not a form of uniformity that the Constitution permits. The lodestar of judicial interpretation must remain the text of the law itself—not an agency's commentary to it. *See United States v. Nasir*, 17 F.4th 459, 472 (3d Cir. 2021) (Bibas, J., concurring). *Stinson* deference 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. It is high time that this Court put it to rest.

ARGUMENT

I. *STINSON* DEFERENCE IS 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 same—the reading the court would have reached if no agency were involved." (citation omitted)); *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."). To be sure, *Stinson* deference does not arise under the APA in the same way that *Chevron* deference did, but the absence of an APA-based cause of action does not license courts to abandon their fundamental duty—rooted in Article III and reaffirmed in *Loper Bright/Relentless*—to independently interpret the law. As this Court explained, the APA simply "codifies for agency cases the unremarkable, yet elemental proposition reflected by judicial practice dating back to *Marbury*: that courts decide legal questions by applying their own judgment." *Id.* at 391–92. The APA did not create that duty. Rather, it confirmed a "traditional conception of the judicial function" that long predated the statute. *Id.* at 393; *see also Kisor*, 588 U.S. at 582 (same). That principle applies with special force in criminal sentencing where the stakes are not limited to regulatory burdens or economic consequences but include the loss of liberty itself.

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." 603 U.S. 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 *Auer*'s 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/Relentless* 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"). In six circuits, including the Fifth Circuit, courts continue to reflexively defer to any Commission commentary purporting to "interpret" a Guideline. *See, e.g.*, *United States v. Martin*, 119 F.4th 410, 414 (5th Cir. 2024) (citing *United States v. Vargas*, 74 F.4th 673, 683 (5th Cir. 2023) (en banc)), *cert. denied*, 145 S. Ct. 1454 (2025). That is so even where the Commission's "interpretation" would effectively define and/or expand the provision, resulting in a harsher sentence (as was the case for Mr. Beaird), so long as its interpretation is not "plainly erroneous or inconsistent" with the text. *Stinson*, 508 U.S. at 45; *see also Vargas*, 74 F.4th at 684 (requiring strict application of *Stinson* deference unless there is "flat inconsistency" or "irreconcilable variance" between commentary and Guideline).

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. The same judicial duty of independent interpretation that *Kisor* held incompatible with reflexive *Auer* deference is equally incompatible with reflexive *Stinson* deference. *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.* (citation omitted). 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 (citation omitted). The true formulation of the doctrine, *Kisor* clarified, *prohibits* deference to an agency's interpretation "unless the regulation is genuinely ambiguous." *Id.* "If 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. *But see Martin*, 119 F.4th at 414 (quoting *Vargas*, 74 F.4th at 684) (describing Fifth Circuit's deference to commentary so long as there is no "flat inconsistency" with Guidelines).

Kisor's reasoning leaves no room for reflexive deference to agency commentary. After all, the reflexive "caricature" of deference that *Kisor* rejected outright is the very formulation that *Stinson* adopted, practically 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*. But that is precisely the formulation of deference that *Kisor* dismantled. So, if commentary is to be treated with the same deference now accorded administrative 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 its ruling below, the lower court nonetheless refused to apply *Kisor* to *Stinson*. *United States v. Beaird*, No. 24-10764, 2025 WL 1410410, at *1 (5th Cir. May 15, 2025), *cert. granted in part*, No. 25-5343, 2026 WL 1052007 (Apr. 20, 2026). That refusal rests on the Fifth Circuit's contention that *Stinson* remains controlling because this Court has yet to address whether lower courts must approach interpretation of the Guidelines and their commentary the same way that they approach the interpretation of agency regulations. *See Vargas*, 74 F.4th at 680-83, *cert. denied*, 144 S. Ct. 828 (2024). Not so. In *Stinson* itself, this Court spoke "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 interpretations 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). The Commission's "unusual … structure and authority," *id.* at 412, render deference less appropriate—not more so. *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. Thus, to require courts to treat the commentary as binding plainly "circumvent[s] … the checks Congress put on the Sentencing Commission." *United States v. Campbell*, 22

F.4th 438, 446 (4th Cir. 2022) (citation omitted). And the concerns that *Kisor* identified "are even more acute in the context of the Sentencing Guidelines, where individual liberty is at stake." *Id.*

Deference to the Commission's commentary "both transfer[s] the judiciary's power to say what the law is to the Commission and deprive[s] the judiciary of its ability to check the Commission's exercise of power." *United States v. Havis*, 907 F.3d 439, 450-51 (6th Cir. 2018) (Thapar, J., concurring). *Stinson* also allows the Commission to make and interpret the Guidelines. But "just as a pitcher cannot call his own balls and strikes, an agency cannot trespass upon the court's province to 'say what the law is.'" *Id.* at 450 (quoting *Marbury*, 5 U.S. at 177). "Such deference is found nowhere in the Constitution—the document to which judges take an oath." *Id.* at 451-52.

Put simply, *Stinson* embraced 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. *See infra* at Section II.B. 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*

Going further than *Kisor v. Wilkie*, 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. While *Stinson* deference does not arise under the APA as *Chevron* deference did, the absence of an APA-based cause of action does not license courts to abandon their core duty—rooted in Article III and reaffirmed in *Loper Bright/Relentless*—to interpret the law independently. As *Loper Bright/Relentless* makes clear, reflexive deference imperils the separation of powers and compromises the judicial independence that Article III requires—risks that are especially grave in the criminal context where individual liberty is at stake.

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

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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).

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 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. 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) (citation omitted). *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 glaring constitutional defects of *Chevron* deference that *Loper Bright/Relentless* identified and 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. *See infra* Part II. 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 the obsolete refuse of a bygone era; it is gravely unconstitutional. This Court should 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 circuit 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 rules that require national uniformity, but it is singularly inexcusable in the case of criminal sentencing, where liberty is at stake. How much liberty a defendant loses should not depend on the accident of which federal circuit's law governs his sentencing.

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

In contrast to *Stinson* itself, wherein 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. Beaird, so "alarm bells should be going off." *Havis*, 907 F.3d at 450 (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." *Nasir*, 17 F.4th at 473 (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—nor has any subsequent Supreme Court ruling.[4]

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) (quoting *Cleveland v. United States*, 531 U.S. 12, 25 (2000)). 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

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[4] In dictum, the Supreme Court once stated that, although it had applied lenity to "specific factual dispute[s]" regarding "a statute that contains criminal sanctions," the Court had "never suggested that the rule of lenity should provide the standard for reviewing facial challenges to administrative regulations whenever the governing statute authorizes criminal enforcement." *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 704 n.18 (1995). Justice Scalia, joined by Justice Thomas, later described Babbitt's footnote as a "drive-by ruling" that "deserves little weight" because it "contradicts the many cases before and since holding that, if a law has both criminal and civil applications, the rule of lenity governs its interpretation in both settings." *Whitman v. United States*, 574 U.S. 1003, 1005 (2014) (Scalia, J., respecting the denial of certiorari) (citing *Leocal v. Ashcroft*, 543 U.S. 1, 11-12 n.8 (2004); *United States v. Thompson/Ctr. Arms Co.*, 504 U.S. 505, 518 n.10 (1992) (plurality opinion)). At least twice since *Babbitt*, the Court has treated the tension between agency deference and lenity as an open question. *See Esquivel-Quintana v. Sessions*, 581 U.S. 385, 397-98 (2017) (declining to "resolve whether the rule of lenity or *Chevron* receives priority" because the statute at issue was unambiguous); *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 & n.8 (2001) (declining to consider the rule of lenity's application to the Clean Water Act because the regulation at issue exceeded the agency's statutory authority).

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*, No. 8:19-cr-00027, 2020 WL 815699, at *1 (D. Md. Feb. 18, 2020) (emphasis added). 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."). If the Government's gloss on a criminal statute receives no deference, neither should its interpretation of a corresponding sentence.

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.

Lenity also preserves the separation of powers: the legislature criminalizes conduct and sets statutory penalties, the executive decides which criminal charges to prosecute 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). This separation also ensures that all three branches must concur before taking away someone's liberty. 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) (citing *Bass*, 404 U.S. at 348).

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.).

Stinson deference rests on no comparable constitutional foundation. *Havis*, 907 F.3d at 451 (Thapar, J., concurring) ("Such deference is found nowhere in the Constitution—the document to which judges take an oath."). Agency deference is instead "rooted in a presumption about congressional intent," and even then, that presumption is "always rebuttable." *Kisor*, 588 U.S. at 569-70. And whatever force that presumption may have in ordinary civil regulatory cases, it cannot overcome the constitutional values served by lenity in criminal sentencing. When an interpretation increases criminal punishment, the relevant presumption runs the other way: penal laws must be construed strictly, and ambiguity must be resolved in favor of the defendant. *See Wiltberger*, 18 U.S. (5 Wheat.) at 95; *Bass*, 404 U.S. at 348. To prioritize *Stinson* deference over lenity would turn due process of law on its head, allowing criminal punishment to turn not on clear law enacted by Congress and independently interpreted by courts, but on an agency's preferred construction of ambiguity of its own making. Where liberty is at stake and the law remains ambiguous after all interpretive tools have been exhausted, lenity—not deference—must control.

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. 11 (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, *Law and Judicial Duty*, *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 (Max Farrand ed., Yale Univ. Press 1911); *The Federalist* No. 78, at 525 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) ("The interpretation of the 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, C.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 two years ago.

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," as "we cannot forget that '[t]he structural principles secured by the separation of powers protect the individual as well.'" *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.* (quoting *Kisor*, 588 U.S. at 574-576).

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 commentary on how to best interpret its Guidelines deserves no more weight than the persuasiveness of its opinion.[5]

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[5] While three of the seven Commissioners must be active federal judges, they do not serve as judges, but as part-time Commissioners when serving on the Sentencing Commission. *See* 28 U.S.C. § 991. In any event, mandating deference to the Commission—the majority of whom are not federal judges—creates a structure where only certain judges' interpretations are authoritative with respect to the Sentencing Guidelines, and only in a context wholly separate from the normal judicial order.

2. *Stinson* Deference Violates Due Process of Law by Institutionalizing 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"). By ensuring a neutral arbiter, due process "helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980). Moreover, due process of law requires more than procedural fairness. The government must act "through judges whose office require[s] them to exercise independent judgment in accord with the law." Philip Hamburger, *Is Administrative Law Unlawful?* 173 (2014). Through the Due Process Clause, the Constitution incorporates the common-law maxim that "[n]o man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity." *The Federalist* No. 10 (James Madison) (Cooke ed. 1961).

Judicial bias need not exist at a personal level to violate due process of law—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 45. 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. This rubric tips the scales for the government.

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 oaths. 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 this Court to repudiate *Stinson* deference and reiterate the principle that criminal sentencing must rest on courts' independent interpretation of the Guidelines—not on reflexive deference to agency commentary.

Respectfully submitted,

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