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 UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF *AMICUS CURIAE* FAMM IN SUPPORT OF NEITHER PARTY

JOSHUA MATZ
Counsel of Record
TRISHA ANDERSON
TAISA M. GOODNATURE
HECKER FINK LLP
1050 K Street NW,
10th Floor
Washington, DC 20001
(212) 763-0883
jmatz@heckerfink.com

GEORGE CARPENTER
HECKER FINK LLP
350 Fifth Avenue,
63rd Floor
New York, NY 10118

Counsel for Amicus Curiae

394371

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INTEREST OF *AMICUS CURIAE*

FAMM is a national, nonprofit, nonpartisan organization whose primary mission is to promote fair and rational sentencing policies, and to challenge mandatory sentencing laws and their ensuing inflexible and excessive penalties. Founded in 1991 as Families Against Mandatory Minimums, FAMM currently has 75,000 members nationwide. It pursues a broad mission of creating a more fair and effective justice system that respects American values of individual accountability and dignity while keeping communities safe. By mobilizing incarcerated persons and their families adversely affected by unjust sentences, FAMM illuminates the human face of sentencing as it advocates for state and federal sentencing reform. FAMM advances its charitable purposes in part through education of the general public and through selected amicus filings in important cases.[1]

SUMMARY OF ARGUMENT

In addressing the question presented by this case, the Court should reaffirm the unique characteristics of the United States Sentencing Commission, which differentiate it from Executive Branch administrative agencies. The Court should also dispel confusion among other federal judges by confirming that the rule of lenity properly applies when they interpret the Guidelines and associated commentary.

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1. Pursuant to Rule 37.6, FAMM states that no counsel for a party authored this brief in whole or in part, and that no person or entity other than FAMM, its members, or its counsel made a monetary contribution to fund its preparation and submission.

I. Over three decades ago, the Court relied on an "analogy," which was concededly "not precise," to describe the deference that courts should afford to Sentencing Commission "commentary." *Stinson v. United States*, 508 U.S. 36, 44 (1993). Specifically, the Court analogized such commentary to an agency's interpretation of its own rules, and it held that a legal standard borrowed from *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), would be the governing test. *See* 508 U.S. at 44–45. This analysis raised a question that the parties now ask the Court to resolve in light of *Kisor v. Wilkie*, 588 U.S. 558 (2019): namely, whether *Stinson* held that sentencing courts should apply *Seminole Rock* as that deference doctrine continues to be elaborated by this Court (the dynamic view), or whether *Stinson* instead issued a freestanding test for commentary that borrowed a formulation from *Seminole Rock* as it was then understood without also incorporating all subsequent evolutions in that jurisprudence (the static view).

FAMM does not take a position on that question. But however the Court resolves this case, it should do so in a manner that clearly recognizes the substantial differences between Executive Branch administrative agencies and the Sentencing Commission. As Chief Judge Pryor has emphasized, the Commission "does not always operate in the same manner as an executive agency," and "[f]ederal judges, above all officials, should not assume that it does." *United States v. Dupree*, 57 F.4th 1269, 1282 (11th Cir. 2023) (Pryor, C.J., concurring). Characterizing the Commission as though it were the same as any run-of-the-mill executive agency would risk "needless uncertainty." *Id.* Such uncertainty would be particularly concerning when it comes to the Commission's advisory (not regulatory) role in the process of depriving individuals of their liberty. In this context, an overly simplistic comparison to executive agencies would overlook the special nature and functions of the Commission, separation of powers principles, and the rationales that support distinct levels of judicial deference in distinct institutional settings.

We therefore highlight five principal distinctions between the Commission and executive agencies that demarcate respects in which the analogy deployed by *Stinson* is (to reprise *Stinson*'s own caveat) "not precise." 508 U.S. at 44. *First*, the Commission is fundamentally judicial in character, rendering inapposite any concerns about reflexive deference to the Executive. *Second*, Congress maintains a far more active supervisory role over the Guidelines (and related commentary) than it does over any potentially analogous executive agency actions or interpretations. *Third*, the Commission offers only nonbinding guidance to courts in the exercise of their sentencing power, unlike executive agencies that regulate the primary conduct of private actors. *Fourth*, the unique statutory structure and composition of the Commission afford comparative insulation from the risk of arbitrarily political legal interpretations. *Finally*, the Commission is intended to maintain a more dynamic and mutually engaged relationship with courts, and in some cases may even overrule judicial interpretations of its handiwork, which executive agencies cannot do.

These distinctions should be crucial to the Court's analysis in this case. Consistent with that understanding, many judges drawn to the static view have emphasized these points, which (in their view) explain why *Kisor* did not disturb *Stinson* and militate as a matter of first principles against applying *Kisor* here. *See*, *e.g.*, *United States v. Vargas*, 74 F.4th 673, 682–83 (5th Cir. 2023) (en banc); *United States v. Maloid*, 71 F.4th 795, 808–13 (10th Cir. 2023); *Dupree*, 57 F.4th at 1284–85 (Grant, J., concurring in the judgment). Unfortunately, however, these differences have often been minimized or ignored by judges who think the dynamic view more naturally follows from *Stinson*'s reasoning. *See*, *e.g.*, *United States v. Mitchell*, 120 F.4th 1233, 1239–40 (4th Cir. 2024); *United States v. Castillo*, 69 F.4th 648, 656 (9th Cir. 2023); *United States v. Nasir*, 17 F.4th 459, 471 (3d Cir. 2021) (en banc).

The latter tendency is mistaken. Any fair resolution of this case—whether under the static view or the dynamic view or some new standard—should recognize the meaningful differences between the Commission and executive agencies. Those differences may be taken as support for adhering to *Stinson*'s original statement of the legal standard under the static view. Or they may be taken as a reason to clarify and nuance how *Kisor*'s rendition of the *Seminole Rock* standard should apply in this setting under the dynamic view. Either way, to prevent confusion and doctrinal incoherence, the Court should not treat the Commission as broadly equivalent to executive agencies, and it should forthrightly identify how the unique character of the Commission does (or does not) affect the legal standard.

II. Similarly, and again without regard to which deference rule it articulates, the Court should affirm the importance of the rule of lenity in interpreting the Guidelines and commentary.

This Court has long recognized the importance of lenity in interpreting statutes that govern the imposition of criminal penalties. To date, however, it has not addressed how lenity applies to ambiguities in the wording of the United States Sentencing Guidelines. When the Guidelines were mandatory, most courts expressly respected the "time-honored interpretive" principle of lenity. *Liparota v. United States*, 471 U.S. 419, 427 (1985). Following *United States v. Booker*, 543 U.S. 220 (2005), though, some lower courts have erroneously wavered from this principle in light of the now-advisory status of the Guidelines.

The Court should correct that error. The core principles that underlie the rule of lenity—fair notice to the defendant, preservation of the separation of powers, and protection of individual liberty—remain squarely applicable in this setting. Even though the Guidelines are not binding, they continue to exert a "gravitational pull" on criminal sentencing. *See Nasir*, 17 F.4th at 474 (Bibas, J., concurring). As a result, without the compass that lenity offers, the interpretation and application of the Guidelines and commentary threaten to skew sentences in a harsher direction than the Guidelines clearly warrant. Moreover, applying lenity respects Congress's ongoing role in shaping the Guidelines and defining proper levels of criminal punishment. And recognition of the rule of lenity continues to ensure fair notice about potential sentencing outcomes for crimes, while resolving ambiguities against the deprivation of personal liberty.

The status of the rule of lenity may well be implicated here. The relevant Guideline does not clearly classify a 17-round magazine as a "large capacity magazine," but the commentary does so. *See* U.S. Sent'g Guidelines Manual § 2K2.1 (U.S. Sent'g Comm'n 2025); *id.* cmt. n.2. The rule of lenity would likely be relevant to an assessment of whether this commentary squares with the Guideline under any standard the Court articulates.

Accordingly, in describing how courts should interpret the Guidelines and commentary, and without regard to what level of deference the Court applies to commentary, the Court should expressly recognize the value of the rule of lenity in this context. More specifically, the Court should confirm that lenity may serve as a tool of construction to be applied prior to considering the commentary, or can instead apply at the end of the interpretive process if ambiguity persists once all texts (including the relevant Guidelines provisions and commentary) are fully considered.

ARGUMENT

I. The Court Should Recognize and Reaffirm the Unique Nature of the Sentencing Commission

In articulating the appropriate legal standard for assessing commentary to the Guidelines—whether under *Stinson* or *Kisor* or some new test—this Court should again expressly recognize the uniqueness of the Sentencing Commission, which is unlike any Executive Branch administrative agency. That approach is most faithful to precedent, respectful of the Commission's role and authority, and sensitive to the separation of powers.

Nor would it break new ground. This Court "has not been silent about the distinctions between the sentencing commission and administrative agencies." *United States v. Dupree*, 57 F.4th 1269, 1293 (11th Cir. 2023) (Luck, J., dissenting); *see also*, *e.g.*, *United States v. Vargas*, 74 F.4th 673, 682 (5th Cir. 2023) (en banc) ("[T]he Sentencing Commission and administrative agencies are different animals."). Indeed, *Mistretta v. United States* confirmed in the clearest of terms that "[t]he Sentencing Commission unquestionably is a peculiar institution within the framework of our Government." 488 U.S. 361, 384 (1989). As discussed below, that peculiarity encompasses the Commission's "unusual hybrid in structure and authority," *id.* at 412, as well as its "unique" statutory "composition and responsibilities," *id.* at 384.

By virtue of the Commission's unique qualities, this Court has generally avoided treating the Commission as equivalent to an Article II administrative agency when assessing how judges should evaluate (or defer to) the Commission's handiwork in the sentencing context. *See*, *e.g.*, *id.* at 380–411; *United States v. LaBonte*, 520 U.S. 751, 760 (1997); *Beckles v. United States*, 580 U.S. 256, 271 (2017) (Ginsburg, J., concurring).

The Court gave its closest consideration to that issue in *Stinson v. United States*, 508 U.S. 36 (1993). In articulating "the standard that governs the decision whether particular interpretive or explanatory commentary is binding," the Court did not wholesale apply Article II administrative law principles to the Commission or pursue a reductionist analysis that pictured the Commission as equivalent to executive agencies. *Id.* at 43. Rather, the Court reasoned by analogy. *See id.* ("Different analogies have been suggested as helpful characterization of the legal force of commentary."). And even then, it adopted a standard based on an analogy to executive agencies that was "not precise" given Congress's role in promulgating the Guidelines. *Id.* at 44.

Regardless of whether the Court concludes that the legal standard adopted in *Stinson* was static or dynamic (or that some other standard should apply), *Stinson*'s methodology—reasoning by self-consciously imperfect analogy to executive agencies—remains sound. To properly apply that methodology here, and to assess how *Stinson* should be understood following *Kisor* (and also following *United States v. Booker*, 543 U.S. 220 (2005)), the Court should approach this case with clear-eyed sensitivity to the many respects in which the Commission differs from executive agencies. We will highlight five such notable considerations.

First and foremost, whereas "the role of other federal agencies is typically executive," the Commission is "judicial in nature." *United States v. Moses*, 23 F.4th 347, 355 (4th Cir. 2022). Under the Sentencing Reform Act, the Commission is "an independent commission in the judicial branch of the United States." 28 U.S.C. § 991(a). Thus, although "the Commission is not a court, does not exercise judicial power, and is not controlled by or accountable to members of the Judicial Branch," it is properly judicial in character. *Mistretta*, 488 U.S. at 393. Concerns about "reflexive deference to the executive branch"—some of which animated the decision in *Kisor*—are therefore not well placed here. *See United States v. Maloid*, 71 F.4th 795, 808–11 (10th Cir. 2023); *see also id.* at 811 ("[*Kisor*'s] limitations on *Seminole Rock* deference ensure that the Executive does not merge executive and legislative functions or aggrandize its own authority. But those limits make less sense for the Commission.").[2]

Second, as *Stinson* emphasized, Congress plays a more active supervisory role concerning the Sentencing Commission than it does with respect to executive agencies. "[U]nlike an agency's gloss on its regulations, the Commission's role in promulgating and interpreting guidelines is sanctioned by statute." *Vargas*, 74 F.4th at 682. Under the Sentencing Reform Act, moreover, Congress can "revoke or amend any or all of the Guidelines as it sees fit . . . at any time." *Mistretta*, 488 U.S. at 393–94. And before a guideline amendment can take effect, the Commission must submit it to Congress for review and potential disapproval. *See* 28 U.S.C. § 994(p), (x). That review process is not a formality: between 1987 and 2004, for instance, Congress directed the Commission to alter the Guidelines Manual more than 80 times. *See Maloid*, 71 F.4th at 811 n.19. Although the Commission is not statutorily obliged to submit commentary for congressional review, it does so in most cases. *See Dupree*, 57 F.4th at 1280 (Pryor, C.J., concurring) ("Guidelines commentary ordinarily goes through the same notice-and-comment and congressional review procedures as substantive guideline revisions."); John S. Acton, Note, *The Future of Judicial Deference to the Commentary of the United States Sentencing Guidelines*, 45 Harv. J. L.

2. In the same vein, Section 706 of the Administrative Procedure Act—which underwrote aspects of *Kisor*'s reasoning about judicial deference to executive agencies—does not apply to the Guidelines or the commentary. *See Maloid*, 71 F.4th at 810.

& Pub. Pol'y 349, 357 (2022).[3] Here, too, the Commission's practice is not a formality: "History reflects that Congress has actively overseen the substance of the commentary to the Guidelines." *United States v. Rivera*, 76 F.4th 1085, 1090 (8th Cir. 2023) (citing examples). Because "Congress retains the ultimate authority over sentencing practices," and because it "serves as a check on too much deference," the Commission is differently situated in salient respects from executive agencies. *Maloid*, 71 F.4th at 812.[4]

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3. The Sentencing Reform Act authorized and directed the Commission to develop and promulgate two forms of guidance for courts: "guidelines" and "policy statements." *See* 28 U.S.C. § 994 (a)(1), (a)(2). Interpretive "commentary" on the Guidelines, as such, is not mentioned. In the Guidelines Manual, the Commission placed definitions of terms used in a Guideline in the Application Notes, labeled as a form of "Commentary" to that Guideline (or if used more pervasively, in USSG § 1B1.1, note 1), plainly not intending those definitions to serve as mere "general policy statements." It is therefore appropriate and unsurprising that when submitting the text of a new or amended Guideline to Congress under 28 U.S.C. § 994(p), the Commission also regularly submits the associated Commentary, including the Application Notes.

4. As the Fourth Circuit has recognized, these differences are sharpened by a comparison of the processes by which the Commission and executive agencies issue interpretations: "Unlike the formally published Guidelines Manual that includes not only Guidelines and policy statements but also official commentary, all three of which were, in practice, generally promulgated by the notice-and-comment and congressional-submission procedure and which operate together as a reticulated whole, executive agency interpretations have been made more casually and broadly through, for example, the issuance of letters, opinions, press releases, and legal briefs. . . ." *Moses*, 23 F.4th at 355.

Third, unlike executive agencies, the Commission does not "regulate the broad range of people covered by the particular agency's jurisdiction." *Moses*, 23 F.4th at 355. Put differently, the Commission lacks "enforcement or investigative authority" and does not regulate the primary conduct of private actors. *Maloid*, 71 F.4th at 807. Rather, the Commission acts only to assist courts—and to advance statutorily specified sentencing goals—by providing "guidance to district judges tasked with the duty of imposing an individualized sentence on a criminal defendant." *Moses*, 23 F.4th at 355; *see also Maloid*, 71 F.4th at 807 ("[W]hen the Commission speaks, it speaks as an agent of the Judiciary to help judges properly sentence defendants."). And even in this comparatively limited function, the Commission's guidance does not bind the Judiciary. *See Booker*, 543 U.S. at 245. As Judge Grant has remarked, these distinctions between guidelines and ordinary administrative rules are truly "fundamental" when it comes to assessing deference. *Dupree*, 57 F.4th at 1284 (Grant, J., concurring in the judgment).[5]

Fourth, whereas executive agencies may base their legal interpretations on "policy concerns" as agents of the President, *Kisor v. Wilkie*, 588 U.S. 558, 570 (2019) (plurality opinion), the structure of the Sentencing Commission avoids such dependence on the shifting policy

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5. In addition, because the Commission at most structures the discretion of district judges, it lacks "incentive to promulgate imprecise guideline provisions and commentary that leave defendants and judges unsure of how the Guidelines work." *Maloid*, 71 F.4th at 813. "That's different from executive agencies that can enact vague regulations and wait for later adjudications or litigations to clarify those regulations' meanings." *Id.*

preferences of a single official. Unlike executive agencies, whose leadership is ordinarily appointed by the President and subject to diverse means of presidential control, the Commission has a bespoke structure. *Compare, e.g.*, *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197 (2020), *with Mistretta*, 488 U.S. at 397–408. By statute, the Commission is composed of seven voting members, who are appointed by the President and confirmed by the Senate, and one nonvoting member. 28 U.S.C. § 991(a). At least three Commissioners must be federal judges. *Id.* No more than four may be members of the same political party. *Id.* And commissioners may be removed by the President "only for neglect of duty or malfeasance in office or for other good cause shown." *Id.* These features of the Commission provide a measure of insularity from the political or policy-driven decisions that may occur at executive agencies.[6]

Finally, Congress and this Court have recognized that the Commission may review the work of federal courts and issue amendments that effectively overrule judicial interpretations of the Guidelines. *See*, *e.g.*, *Stinson*, 508 U.S. at 46. "In fact, [*Stinson*] explicitly endorsed using amendments to the commentary to effect a change in interpretation of the overall Guidelines." *Dupree*, 57 F.4th at 1285 (Grant, J., concurring in the judgment) (emphasis omitted). *Stinson* thus "embraced a world in which the Commission (not the judiciary) would authoritatively resolve disputes about the Guidelines and the commentary—and could even reject judicial

6. When there is evidence of distorted decisionmaking at the Commission, moreover, this Court has not hesitated to act. *See*, *e.g.*, *Kimbrough v. United States*, 552 U.S. 85 (2007).

interpretations of the Guidelines by amending the commentary." *Id.* That understanding of the role and authority of the Commission further separates it from most executive agencies and highlights that the dynamic between the Commission and the courts is materially different in character.

In resolving this case and clarifying the proper application of *Stinson*—whether under the dynamic view or the static view or a new test—the Court should explicitly recognize and account for these vital distinctions between the Commission and executive agencies. *See Dupree*, 57 F.4th at 1282 (Pryor, C.J., concurring). Some of these distinctions were not yet knowable or appreciated when *Stinson* itself was decided just a few years after Congress created the Commission (*e.g.*, it was not yet known that the Guidelines would subsequently be rendered advisory, or that the Commission would make a common practice of submitting proposed commentary to Congress for review). Others may now loom larger in importance under recent decisions—like *Kisor*—clarifying the basis and limits of judicial deference to executive agencies. And still others lurked beneath the surface in *Stinson* and may now warrant closer scrutiny as the Court revisits and unpacks *Stinson*'s analogy to *Seminole Rock* principles.

Regardless of how the Court resolves this case, doing so with express attention to the many differences between executive agencies and the Commission will avoid confusion in sentencing law, honor precedent, respect separation of powers principles, and promote coherence in administrative law. It will also support the important role played by the Commission in ensuring that federal sentences, both as suggested in the Guidelines Manual and as imposed by individual judges, are never "greater than necessary" to achieve the multiple purposes of punishment. 18 U.S.C. § 3553(a). For all those reasons, the Court should exercise due care in how it describes and deploys the "not precise" analogy that animated *Stinson*.

II. The Court Should Recognize the Role of Lenity in Interpreting the Guidelines and Commentary

In addition to reaffirming the Commission's unique status, and regardless of the deference standard it adopts, the Court should take the opportunity in this case to clarify the role that lenity plays with respect to the Guidelines and their interpretive commentary. Such clarification would be highly valuable to sentencing judges in properly interpreting the Guidelines and commentary while engaging in any version of the deference analysis at issue here.

The rule of lenity holds 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 applies whenever, after applying the standard techniques of textual construction, "a reasonable doubt persists about a statute's intended scope." *Moskal v. United States*, 498 U.S. 103, 108 (1990); *see also Harrison v. Vose*, 50 U.S. (9 How.) 372, 378 (1850) ("In the construction of a penal statute, it is well settled, also, that all reasonable doubts concerning its meaning ought to operate in favor of the respondent."). This Court has long recognized that 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). For good reason: the principles that animate the rule of lenity apply with no less force when a defendant is sentenced than they do when a jury assesses guilt.

In the pre-*Booker* era of mandatory Guidelines, most courts held that the rule of lenity applied to ambiguous provisions of the Guidelines. *See United States v. Wright*, 607 F.3d 708, 718 (11th Cir. 2010) (Pryor, J., concurring) (collecting cases). Following *Booker*, most courts continue to accept that position—implicitly recognizing that the advisory status of the Guidelines does not disturb the continued role of lenity in sentencing law. *See, e.g.*, *United States v. Mitchell*, 120 F.4th 1233, 1240 (4th Cir. 2024) ("An ambiguous Guideline is also subject to the rule of lenity."); *United States v. Canelas-Amador*, 837 F.3d 668, 674 (6th Cir. 2016) ("[W]e may apply the rule of lenity to matters relating to the Sentencing Guidelines." (internal quotation marks omitted)). Some courts, however, have rejected lenity's application based on the advisory nature of the Guidelines. *See, e.g.*, *United States v. Smith*, 977 F.3d 431, 435 (5th Cir. 2020) ("[I]t appears the rule of lenity no longer applies to the purely advisory Guidelines."); *Wright*, 607 F.3d at 719 (Pryor, J., concurring) ("[I]t is doubtful that the judicial interpretation of advisory Sentencing Guidelines promulgated by an independent commission implicates either of the twin concerns that motivate the rule of lenity.").

This case affords a natural opportunity to resolve that debate. Under any deference standard that the Court adopts, judges will be required to properly interpret the Guidelines and associated commentary and to examine the relationship between them. To do so, judges need guidance on the role that lenity should play in such interpretations.

And there is a clear answer: the rule of lenity should guide a court's interpretation of the Guidelines just as it does for associated penalty statutes. The advisory nature of the Guidelines does not dispel the need to apply lenity to ensure adherence to the foundational constitutional principles that this "time-honored interpretive guideline" was designed to reinforce. *Liparota v. United States*, 471 U.S. 419, 427 (1985).[7]

A. The Principles Underlying the Rule of Lenity Are Applicable to the Guidelines

The rule of lenity reflects three fundamental principles of our constitutional system: fair notice to the defendant; protecting the separation of powers; and safeguarding individual liberty. *See United States v. Nasir*, 17 F.4th 459, 473 (3d Cir. 2021) (en banc) (Bibas, J., concurring); *see also United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820). *First*, construing ambiguous statutory texts narrowly protects due process by "ensur[ing] that criminal statutes will provide fair warning concerning conduct rendered illegal." *Liparota*, 471 U.S. at 427. The animating concern is straightforward: no person should face criminal punishment—or an enhancement in criminal punishment—based on statutory language whose meaning cannot reasonably be discerned. *See Bifulco*, 447 U.S. at 387. *Second*, the rule preserves the separation of powers by ensuring that courts do not expand liability beyond what Congress has clearly prescribed. By requiring courts to construe ambiguous language against the government, lenity prevents courts from assuming a legislative role

7. *See also* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 297 (2012).

in determining punishment and "strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability." *Liparota*, 471 U.S. at 427. *Third* and finally, the rule of lenity safeguards individual liberty. It "serves our nation's strong preference for liberty" and effectuates "our 'instinctive distaste against [people] languishing in prison unless the lawmaker has clearly said they should.'" *Nasir*, 17 F.4th at 473 (Bibas, J., concurring) (quoting Henry J. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, *in* Benchmarks 196, 209 (1967)); *see Wiltberger*, 18 U.S. (5 Wheat.) at 95 (lenity is "founded on the tenderness of the law for the rights of individuals").

Each of these principles applies in this setting and supports applying lenity principles to the post-*Booker* Guidelines scheme.

Fair Notice. No less than for penalty assessments found in statute, criminal defendants have a substantial notice interest in predictable sentencing range calculations under the Guidelines. Even following *Booker*, the Guidelines remain the starting point and lodestar for federal sentencing. *See Peugh v. United States*, 569 U.S. 530, 541 (2013). In practice, they often "exert a law-like gravitational pull on sentences." *Nasir*, 17 F.4th at 474 (Bibas, J., concurring). The data bears out this gravitational effect: The Sentencing Commission reported in 2019 that 75% of defendants received sentences that were either within the Guidelines range or justified by a Guidelines ground for departure. *Id.* (citing U.S. Sent'g Comm'n, *2019 Annual Report and Sourcebook of Federal Sentencing Statistics* 8). By placing a thumb on the scale for leniency when Guidelines provisions are ambiguous, the rule of lenity protects defendants' interests in fair notice and predictability of the penalty that applies to their conduct.

Separation of Powers. The rule of lenity also serves an important structural function in the context of the Guidelines. Although the Commission, not Congress, promulgates the Guidelines, Congress maintains significant authority to shape and control the Guidelines and commentary. *See supra* at 9–10. The application of lenity principles to resolve any ambiguities in the Guidelines thus respects the text that Congress considered and avoids the risk that a sentencing decision will be influenced by a Guidelines range that is higher than Congress in fact desired.

Liberty Interest. When a Guidelines provision is ambiguous, the rule of lenity protects the defendant's liberty interest by requiring the court to adopt the more lenient plausible reading. Irrespective of the Guidelines' nature, this "presumption of liberty remains crucial to guarding against overpunishment." *Nasir*, 17 F.4th at 474 (Bibas, J., concurring). That is particularly true given the continued force and influence of the Guidelines—and given the risk that an ambiguous Guideline or commentary may drastically increase sentencing ranges. *See, e.g.*, *United States v. Abreu*, 32 F.4th 271, 273–74 (3d Cir. 2022) (explaining that applying commentary treating conspiracy as a "crime of violence" would have raised the defendant's advisory Guidelines range from 27–33 months to 51–63 months). The application of lenity to the Guidelines protects individual liberty by ensuring that unclear Guidelines provisions do not increase the level of punishment unless the harsher reading is clearly authorized.

B. Lenity Principles Should Apply Regardless of the Standard for Deference to Commentary

These weighty reasons for applying the rule of lenity to resolve ambiguities in the Guidelines do not turn on whether the Court adopts the dynamic or the static view of *Stinson* (or instead fashions a new legal standard). Regardless of the deference owed to the commentary, lenity should play a role in interpreting and resolving ambiguities in the Guidelines and commentary.

There are two distinct ways in which the rule of lenity may operate here. *First*, lenity can apply to the initial interpretation of the Guidelines before deference to the commentary comes into play. If a Guideline itself does not clearly reach certain conduct, the commentary should not be allowed to expand the Guideline to cover that conduct unless the Guideline can fairly bear that reading in the first place. In the parlance of *Stinson*, commentary that resolves ambiguities in the Guidelines against, rather than in favor of, the defendant would be "inconsistent with . . . [the relevant] guideline." 508 U.S. at 38. Or, to use the language of *Kisor*, lenity is one of the "traditional tools of construction" that courts must exhaust before deferring to the commentary. 588 U.S. at 575 (cleaned up). On either view, if lenity resolves the ambiguity in favor of the defendant, deference to harsher commentary is not warranted. *See United States v. Chandler*, 104 F.4th 445, 464 (3d Cir. 2024) (Bibas, J., dissenting).

Second, the rule of lenity could inform a court's resolution of a sentencing question if ambiguity remains even after it considers the Guidelines and relevant commentary. In such instances, the tie should go to the defendant to honor principles of fair notice and individual liberty. *See United States v. Tony*, 121 F.4th 56, 70 (10th Cir. 2024) (invoking lenity and finding in favor of the defendant after "[h]aving exhausted all sources from which interpretive guidance may be derived," including commentary).

These applications of lenity retain a vital role for commentary that is sufficiently consistent with the Guidelines and that does not freelance in favor of harsher punishments than plainly prescribed by the Guidelines. Put differently, lenity does not "displace[] neutral or defendant-friendly commentary." *Chandler*, 104 F.4th at 464 (Bibas, J., dissenting). Instead, it acts only to dull the harsh edges of atextual commentary that threatens individual liberty, denies fair notice, and undermines the separation of powers.

To afford sentencing judges clarity about the nature of their interpretive endeavor—with respect to both the Guidelines and the commentary and the relation between them—this Court should thus clarify that the panoply of interpretive principles to be deployed in this context includes the traditional rule of lenity.

CONCLUSION

For the reasons given above, the Court should reaffirm and recognize the uniqueness of the Sentencing Commission, which is fundamentally unlike executive agencies, and should confirm that the rule of lenity applies when judges interpret the Guidelines and their associated interpretive commentary.

Respectfully submitted,

George Carpenter
Hecker Fink LLP
350 Fifth Avenue,
63rd Floor
New York, NY 10118

Joshua Matz
Counsel of Record
Trisha Anderson
Taisa M. Goodnature
Hecker Fink LLP
1050 K Street NW,
10th Floor
Washington, DC 20001
(212) 763-0883
jmatz@heckerfink.com

Counsel for Amicus Curiae