No. 23-310

In the Supreme Court of the United States

CORY RATZLOFF,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

In *Kisor v. Wilkie*, this Court clarified that courts may defer to an agency's interpretation of its own regulations only when that regulation is "genuinely ambiguous, even after a court has resorted to all the standard tools of interpretation." 139 S. Ct. 2400, 2414 (2019). Yet when considering the commentary to the U.S. Sentencing Commission's Sentencing Guidelines, six Circuit courts continue to practice a heightened level of deference to the commentary, relying on *Stinson v. United States*, 508 U.S. 36 (1993). Meanwhile, six other Circuit courts follow the rules limiting deference articulated in *Kisor*.

The question presented is whether the limits to agency deference articulated in *Kisor* apply when courts consider the commentary to the U.S. Sentencing Guidelines.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

INTEREST OF *AMICUS CURIAE*[1]

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

This case interests Cato because it involves courts giving away their power to other branches, sometimes costing people years of freedom.

[1] Rule 37 statement: All parties were timely notified of the filing of this brief. No party's counsel authored this brief in any part and *amicus* alone funded its preparation and submission.

SUMMARY OF ARGUMENT

In *Kisor v. Wilkie*, 39 S. Ct. 2400, 2414 (2019), this Court preserved some form of judicial deference to administrative agencies' interpretations of their own regulations, as previously recognized in *Auer v. Robbins*, 519 U.S. 452 (1997), *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), and importantly here, *Stinson v. United States*, 508 U.S. 36 (1993). Yet in doing so, the Court placed restraints on so-called *Auer* deference by making clear the limited circumstances in which deference is warranted and explaining the steps courts *must* take before applying it. *Kisor*, 139 S. Ct. at 2420.

In *Kisor*, this Court instructed lower courts to withhold deference to an agency's interpretation of its own regulations unless the regulation is "genuinely ambiguous" after exhausting all "traditional tools of construction." *Id.* at 2415. But that rule is incompatible with continued rigid adherence to the 1993 decision in *Stinson*, which *required* deference to the Sentencing Commission's commentary to its Sentencing Guidelines—even when the Guidelines were unambiguous. As a result of *Stinson*, lower courts were put into a "slumber of reflexive deference" to the commentary. *United States v. Malik Nasir*, 17 F.4th 459, 472 (3d Cir. 2021) (en banc) (Bibas, J., concurring). The present case is the latest clash among the courts of appeals who are all trying to answer the same question: whether *Kisor*'s limitations on *Auer* deference supersede the strong level of deference called for in *Stinson*.

This case presents the best opportunity yet for the Court to provide much-needed guidance to the lower

courts on that divisive question. The Tenth Circuit affirmed a substantial increase in Cory Ratzloff's sentencing range solely because the court believed itself bound by *Stinson* to give deference to the Guidelines commentary. In doing so, the panel held that *Kisor*'s updated approach to agency deference had no effect at all on *Stinson*. Yet six other circuit courts disagree. Twelve courts of appeals have now waded into that doctrinal debate, and this case presents the Court with the cleanest opportunity yet to address it.

The petition also presents the opportunity for this Court to resolve another problem that has plagued courts trying to make sense of deference doctrines. In criminal cases, should courts apply the rule of lenity when interpreting ambiguous statutes or regulations? Or should courts first give deference to agencies' interpretations of those provisions, and only apply lenity afterwards if any ambiguity remains? The Court's command to exhaust all "traditional tools of construction" before granting deference to an agency's interpretation would seem to preclude deference when the rule of lenity is otherwise applicable—the rule of lenity is, after all, a longstanding tool of construction. *Kisor*, 139 S. Ct. at 2415. Unfortunately, lower courts remain divided on this crucial question as well.

This case provides the Court with an opportunity to clarify its holding in *Kisor* and to affirm what justice demands: courts must apply the rule of lenity *before* they defer to agencies' interpretations of their ambiguous regulations in criminal cases.

ARGUMENT

This Court in *Stinson* held that the Commentary to the Sentencing Guidelines was due the same level

of deference as an agency's interpretations of its own regulations. *Stinson*, 508 U.S. at 45. As the Court noted, at the time, that was *Seminole Rock* deference: "provided an agency's interpretation of its own regulations does not violate the Constitution or a federal statute, it must be given 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" *Id.* at 45 (quoting *Seminole Rock & Sand Co.*, 325 U.S. at 414). This high level of deference would eventually come to be known as *Auer* deference. *See generally Auer,* 519 U.S. 452.

But in *Kisor*, this Court clarified when agency interpretations are due *Auer* deference. "First and foremost, a court should not afford *Auer* deference unless the regulation is genuinely ambiguous." *Kisor*, 139 S. Ct. at 2415. "And before concluding that a rule is genuinely ambiguous, a court must exhaust all the 'traditional tools' of construction." This includes the rule of lenity. *See United States v. Davis*, 139 S. Ct. 2319, 2333 (2019). Furthermore, the agency's interpretation must be "reasonable." *Kisor*, 139 S.Ct. at 2415. The interpretation must also be one "actually made by the agency[,]" "in some way implicate its substantive expertise[,]" and reflect a "fair and considered judgment." *Id.* at 2416–17. But the courts of appeals have split on whether these qualifications apply to deference under *Stinson*. This split can only be resolved by this Court, and Cory Ratzloff's case presents the best opportunity to date.

Cory Ratzloff broke the window of a gun store, entered the store, and stole firearms from a display case. *United States v. Ratzloff*, No. 22-3128, 2023 U.S. App. LEXIS 25765, at *1 (10th Cir. June 27, 2023). He pled guilty to the federal crime of stealing firearms from a

federally licensed firearms dealer. *Id.* at *2. Ratzloff's sentence hinges on whether he "used or possessed any firearm . . . in connection with another felony offense[,]" namely, the state law crime of burglary. *Id.* If the answer is yes, a four-level sentencing enhancement applies. *Id.*

Ratzloff argues that he did not use or possess a firearm "in connection with" the burglary because the firearms he stole were simply the *object* of that burglary. *Id.* Common sense suggests that stealing a gun is not the same as carrying a gun as a weapon of violence or intimidation to facilitate a theft. Nothing in the Sentencing Guidelines themselves precludes Ratzloff's argument. Indeed, it is hard to locate ambiguity in the text of the Guideline to suggest his interpretation is wrong.

Yet Application Note 14(B) of the commentary to the Sentencing Guidelines states that the sentencing enhancement applies "in a case in which a defendant who, during the course of a burglary, finds and takes a firearm, even if the defendant did not engage in any other conduct with that firearm during the course of the burglary." *Id.* at *3. The Tenth Circuit deferred to the commentary and gave Ratzloff the enhancement. But the result would be different if *Kisor* applied. Whether *Kisor* applies is a question for this Court to decide.

I. THIS CASE IS AN IDEAL VEHICLE TO CLARIFY THE EFFECT OF *KISOR* ON THE SENTENCING GUIDELINES COMMENTARY.

This case presents the best opportunity to date for this Court to explain how its decision in *Kisor* affects

the deference owed to the U.S. Sentencing Commission's commentary on the Sentencing Guidelines. The question of whether *Kisor* updated the deferential rule in *Stinson* was essential to the Tenth Circuit's holding. The Tenth Circuit reasoned that while *Kisor* "narrowed *Auer*/*Seminole Rock* deference[,]" the *Kisor* opinion "did not address its impact on *Stinson*[.]" *Ratzloff*, 2023 U.S. App. LEXIS 25765, at *4. Absent direction from this Court, the Tenth Circuit felt bound to follow its own precedent and to ignore *Kisor*. *Id*. at *4–*5.

Every regional circuit has addressed this question since *Kisor*.[2] But many of those cases suffered from significant vehicle issues, and thus did not present this Court the same opportunity to resolve the matter as this case does. It was sometimes unclear whether this Court would need to resolve the doctrinal debate to resolve those cases. By contrast, the deference question is squarely presented here. This Court should take the opportunity to address it.

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[2] *See United States v. Castillo*, 69 F.4th 648 (9th Cir. 2023); *United States v. Dupree*, 57 F4th. 1269 (11th Cir. 2023) (en banc); *Malik Nasir*, 17 F.4th at 459 (en banc); *United States v. Riccardi*, 989 F.3d 476 (6th Cir. 2019); *United States v. Jenkins*, 50 F4th 1185 (D.C. Cir. 2022); *United States v. Campbell*, 22 F.4th 438 (4th Cir. 2022); *United States v. Moses*, 23 F.4th 347 (4th Cir. 2022); *United States v. Maloid*, 71 F.4th 795 (10th Cir. 2023); *United States v. Vargas*, 74 F.4th 673 (5th Cir. 2023); *United States v. Rivera*, 76 F.4th 1085 (8th Cir. 2023); *United States v. Smith*, 989 F.3d 575 (7th Cir. 2021); *United States v. Richardson*, 958 F.3d 151 (2d Cir. 2020); *United States v. Lewis*, 963 F.3d 16 (1st Cir. 2020).

A. The Tenth Circuit's Holding Rests Solely on *Kisor*'s Effect.

The Tenth Circuit could not have been clearer that its decision stands or falls on the question of whether *Kisor* applies to *Stinson*. "*Kisor* did not address its impact on *Stinson* . . . [t]he courts of appeals are divided on whether *Kisor* changed how courts should apply *Stinson*." *Id.* at *4. Because "*Kisor* did not address *Stinson*," the Tenth Circuit believed that it was "bound to follow on-point precedent until the Supreme Court . . . overrules it." *Id.* at *5. And under the Tenth Circuit's precedent, "we must evaluate Guidelines commentary under *Stinson*'s deferential standard." *Id.* "Thus, we must defer to Application Note 14(B) unless it fails the *Stinson* test—that is, unless 14(B) 'violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, the relevant Guideline.'" *Id.* *6 (quoting *Stinson*, 508 U.S. at 38) (alterations accepted). Finding that 14(B) passed this highly deferential test, the Tenth Circuit upheld the enhancement. *Id.*

Importantly, the supposed inapplicability of *Kisor* to *Stinson* was not merely the principal basis for the Tenth Circuit's decision—it was the *sole* basis for its holding. The panel never suggested that the commentary merely states what the Guidelines unambiguously require. Nor did the panel hint at any other basis for affirming Ratzloff's sentencing enhancement. It did not need to, because its conclusion was simply that *Stinson* continues to have the same effect today as it did in 1993.

The Tenth Circuit's holding provides this Court with a clean opportunity to address *Kisor*'s implications for correctly interpreting and applying the Sentencing Guidelines. Indeed, the Tenth Circuit plainly indicated as much, stating it "may overrule" the Tenth Circuit's precedent giving deference to the Sentencing Guidelines commentary—"as Mr. Ratzloff asks us to do—only if a 'subsequent Supreme Court decision *contradicts* or *invalidates* our prior analysis." *Id.* (quoting *United States v. Brooks*, 751 F.3d 1204, 1210 (10th Cir. 2014)).

The Tenth Circuit seeks guidance. This Court should provide it.

B. Few Decisions From Lower Courts Have So Squarely Raised the *Kisor-Stinson* Issue.

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

Sometimes, no deference is due under any theory. For instance, in *United States v. Riccardi*, the relevant commentary, Application Note 3(F)(i) to U.S.S.G. § 2B1.1(b)(1)(L), requires sentencing courts to increase a defendant's guidelines range for specified offenses based on the amount of "loss." 989 F.3d 476, 483–86 (6th Cir. 2021); *id.* at 490–93 (Nalbandian, J., concurring in part and concurring in the judgment); *see also United States v. Kirilyuk*, 29 F.4th 1128, 1133–39 (9th Cir. 2022). The commentary instructs courts to treat the theft of an access device as

causing a loss of at least $500. *Riccardi*, 989 F.3d at 481. Both cases discuss the *Kisor-Stinson* issue, but it is far from clear that courts need to resolve the larger doctrinal debate because this is plainly not a valid interpretation of "loss." *See Riccardi*, 989 F.3d at 483–84; *Kirilyuk*, 29 F.4th at 1136–38.

This same doctrinal discussion has emerged in a variety of other settings as well—but usually without straightforwardly presenting the issue for the Court's consideration as this case does. Lower courts sometimes acknowledge the issue while finding no party has challenged the application of the commentary. *See e.g.*, *United States v. Owen*, 940 F.3d 308, 314 (6th Cir. 2019). Other times, the courts construe the commentary in such a way as to avoid potential conflict with the Guidelines. *See e.g.*, *United States v. Perez*, 5 F.4th 390, 396–97 (3d Cir. 2021). And on several occasions, courts have affirmed defendants' sentences by averring that the sentences are appropriate regardless of *Kisor*'s applicability—either because the district court had an alternative basis for the sentence, or because they determined that the commentary merely described "what the Guidelines' text and structure would unambiguously require even in its absence." *See e.g.*, *United States v. Cordova-Lopez*, 34 F.4th 442, 444 (5th Cir. 2022) (commentary merely describes what the Guidelines unambiguously require); *United States v. Adair*, 38 F.4th 341, 349–50 (3d Cir. 2022) (same); *United States v. Tate*, 999 F.3d 374, 380–83 (6th Cir. 2021) (same); *United States v. Ruffin*, 978 F.3d 1000, 1007–08 (6th Cir. 2020) (alternative basis for sentence). But in this case, none of these complicating factors apply.

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

C. A Six-Six Circuit Split Exists Among the Federal Courts of Appeals and Courts Are Requesting Guidance.

Since *Kisor*, a deep circuit split as to the level of deference owed to the Guidelines commentary has developed. It has reached the point where all the regional federal courts of appeals have weighed in. Most recently, the Ninth Circuit held that "The more demanding deference standard articulated in *Kisor* applies to the Guidelines' commentary." *United States v. Castillo*¸ 69 F.4th 648, 655 (9th Cir. 2023). Furthermore, continued deference to the Guidelines' commentary, the Ninth Circuit found, "raises grave constitutional concerns." *Id.* at 663.

The dispute is fully developed, and little to nothing of value would be gained by permitting the controversy to continue to percolate. Indeed, the lower courts and their judges have already requested definitive guidance on how to resolve this issue on multiple occasions.

In an en banc opinion earlier this year, the Eleventh Circuit held that "continued mechanical application of [the *Stinson*] test would conflict directly with *Kisor*." *Dupree*, 57 F.4th at 1275. Indeed, the extreme level of deference called for in *Stinson* resembled the "caricature" of *Auer* deference the Supreme Court repudiated in *Kisor*. *Id.* Applying *Kisor* to *Stinson*, the Eleventh Circuit concluded, avoided propping up that

caricature and was consistent with "*Stinson*'s instruction to treat the commentary like an agency's interpretation of its own rule." *Id*. at 1275–76. In a dissenting opinion, Judges Luck and Branch called for the Supreme Court to decide the issue. *Id*. at 1290 (Luck, J., dissenting).

The en banc Third Circuit has also applied *Kisor*'s limiting principles to the Sentencing Guidelines commentary. In the Third Circuit's view, "after the Supreme Court's recent decision in [*Kisor*], it is clear that [applying the standard set forth in *Auer*] is not warranted." *Malik Nasir*, 17 F.4th at 471.

The Sixth Circuit has also found that *Kisor* applies to the Sentencing Guidelines commentary. Like the Ninth Circuit, the Sixth Circuit found that because *Stinson* "told courts to follow basic administrative-law concepts," *Kisor*'s instruction regarding when to defer to an agency's interpretation of its own regulations "applies just as much" to the Sentencing Guidelines commentary. *Riccardi*, 989 F.3d at 485. In a concurring opinion, Judge Nalbandian declined to apply *Kisor* to *Stinson*, but invited the Supreme Court "to expand its own precedent." *Id*. at 492 (Nalbandian, J., concurring in part and concurring in the judgment). "Perhaps, in the end, the Supreme Court will vindicate the thoughtful and well-reasoned majority opinion." *Id*.

The D.C. Circuit has long been reluctant to give *Auer*/*Seminole Rock* deference to the Sentencing Guidelines commentary, even before *Kisor*. *See United States v. Winstead*, 890 F.3d 1082, 1091 (D.C. Cir. 2018). In more recent cases, the D.C. Circuit has stated its belief that *Kisor* applies to *Stinson*, citing

both cases in the same sentence in a recent case. *Jenkins*, 50 F.4th at 1197.

The Fourth Circuit has issued contradictory rulings on the *Kisor* issue within two weeks of each other. In *United States v. Campbell*, the Fourth Circuit applied *Kisor* to the Guidelines commentary. 22 F.4th at 445. Twelve days later, a different panel of judges on the Fourth Circuit held that *Stinson* is "unaltered by *Kisor*." *Moses*, 23 F.4th at 349. In a dissenting opinion, Judge King pointed out that under Fourth Circuit precedent, "no panel of this Court is entitled to circumscribe or undermine an earlier panel decision" absent an en banc opinion or a ruling by the Supreme Court. *Id.* at 359 (King, J., dissenting). Concurring with the Fourth Circuit's denial rehearing en banc, Judge Niemeyer (the author of the *Moses* opinion) stated that "we would welcome the Supreme Court's advice on whether *Stinson* or *Kisor* controls the enforceability of and weight to be given Guidelines commentary[.]" *United States v. Moses*, No. 21-4067, 2022 U.S. App. LEXIS 7694 , at *6 (4th Cir. Mar. 23, 2022) (Niemeyer, J., supporting denial of rehearing en banc).

In contrast, the First, Second, Fifth, Seventh, Eighth, and Tenth Circuits continue to apply the highly deferential standard set forth in *Stinson*, chiefly because they feel bound to follow precedent. *See* Pet. App. 15–18. Here too, the lower courts appear to be calling for guidance. "We will not extend *Kisor* to the Commission's commentary absent clear direction from the Court." *Maloid*, 71 F.4th at 798. "Our job, as an inferior court, is to adhere strictly to Supreme Court precedent, whether or not we think a precedent's best days are behind it." *Vargas*, 74 F.4th

at 683. "Until the Supreme Court overrules *Stinson*, we are bound to follow it." *Id.* at 701 (Oldham, J., concurring).

Six circuit courts have lined up on one side of the issue, and six circuit courts on the other. Judges taking both positions have expressly stated that they are looking to the Supreme Court to resolve the issue. The issue cries out for the resolution only this Court can provide. When the correct interpretation of the Sentencing Guidelines is in dispute, whether a defendant spends additional years in prison should not be determined by an accident of geography. This Court should give a definitive answer, and this case provides the opportunity to do so.

II. THIS CASE IS AN EXCELLENT VEHICLE FOR ASSESSING THE ROLE OF LENITY POST-*KISOR*.

The rule of lenity provides "that ambiguities about the breadth of a criminal statute should be resolved in the defendant's favor." *Davis*, 139 S. Ct. at 2333. Prior to *Kisor*, however, the heightened deference that was owed to the commentary arguably precluded the use of the rule of lenity when the Guidelines were ambiguous but the commentary was on point.[3] *See*

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

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

Unfortunately, the Court's treatment of lenity together with deference to agency interpretations has resulted in conflicts among the lower courts. This case is an opportunity to make clear that the rule of lenity kicks in before deference does.

A. The Rule of Lenity Should Apply to Interpretations of The Sentencing Guidelines Before Any Deference is Applied.

The rule of lenity is a longstanding rule of construction grounded in the "instinctive distaste against [individuals] languishing in prison unless the lawmaker has clearly said they should[.]" *United States v. R. L. C.*, 503 U.S. 291, 305 (1992) (cleaned up). The rule originated "in 16th-century England," and gained "broad acceptance" in the 17th century as a tool to

mitigate Parliament's multiplication of capital offenses. *Johnson v. United States*, 576 U.S. 591, 613–14 (2015) (Thomas, J., concurring in the judgment). Today, that rule still "serves our nation's strong preference for liberty." *Malik Nasir*, 17 F.4th at 473 (Bibas, J., concurring). And it does so not only by resolving "issues about the substantive scope of criminal statutes, but [also by answering] questions about the severity of sentencing." *R. L. C.*, 503 U.S. at 305 (cleaned up).

When "applying *Auer* would extend [a defendant's] time in prison, alarm bells should be going off." *United States v. Havis*, 907 F.3d 439, 450 (6th Cir. 2018) (Thapar, J., concurring). The rule of lenity requires courts "to favor a more lenient interpretation of a criminal statute [or regulation]." *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 16 (2011). Using *Auer*/*Stinson* deference to increase a defendant's punishment turns that "normal construction of criminal statutes [and regulations] upside-down, replacing the doctrine of lenity with a doctrine of severity." *Cf. Crandon v. United States*, 494 U.S. 152, 178 (1990) (Scalia, J., concurring in the judgment).

While the *Auer*/*Stinson* doctrine is relatively new and rooted largely in policy views regarding agency expertise, the rule of lenity is older and embodies fundamental common law and constitutional concerns. *Kisor*, 139 S. Ct. at 2413 (noting some policy objectives of *Auer* deference); *Aposhian v. Wilkinson*, 989 F.3d 890, 899 (10th Cir. 2021) (en banc) (Tymkovich, J., dissenting) (noting the constitutional purposes of the rule of lenity). The rule of lenity exists to promote "fair notice to those subject to the criminal laws, to

minimize the risk of selective or arbitrary enforcement, and to maintain the proper balance between Congress, prosecutors, and courts." *United States v. Kozminski*, 487 U.S. 931, 952 (1988). Those objectives are advanced when the rule of lenity applies to the Guidelines before giving *Auer*/*Stinson* deference to the commentary.

First, the rule of lenity furthers the due process requirement that laws be written to give "fair warning" to the "common world" of their implications. *United States v. Lanier*, 520 U.S. 259, 265–66 (1997). It would require "an uncommon level of acuity from average citizens to know that they must" look not just to the statutory language and Sentencing Guidelines to know the consequences of their actions, but also "to the interpretive gap-filling of" the commentary "which may or may not be upheld" as consistent with the statute and Guidelines by the court. *Cf. Aposhian*, 989 F.3d at 899–900 (en banc) (Tymkovich, J., dissenting); *accord Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 140 S. Ct. 789, 790 (2020) (Gorsuch, J., statement regarding denial of certiorari). Requiring the Sentencing Commission to make rules imposing harsher sentences clear in the Guidelines themselves gives individuals much greater notice and better preserves due process. *See The Enterprise*, 8 F. Cas. 732, 734 (C.C.D.N.Y. 1810) (No. 4499) (Livingston, J.) ("If it be the duty of a jury to acquit where [reasonable] doubts exist concerning a fact, it is equally incumbent on a judge not to apply the law to a case where he labours under the same uncertainty as to the meaning of the legislature.").

Second, applying the rule of lenity to the Guidelines bolsters the separation of powers. *See Kozminski*, 487 U.S. at 952; *United States v. Wiltberger*, 18 U.S. (5 Wheat) 76, 95 (1820). Because criminal penalties, like the criminalization of certain acts, "represent[] the moral condemnation of the community," Congress generally should define both criminal activities *and* penalties. *See United States v. Bass*, 404 U.S. 336, 348 (1971). True, the Court has held that by promulgating guidelines, the Sentencing Commission does not violate the intricate balance of power created by Constitution. *Mistretta v. United States*, 488 U.S. 361, 393 (1989). Nevertheless, the legislative (or at least quasi-legislative) power that the Sentencing Commission wields is no small thing. *See generally id.* at 413–27 (Scalia, J., dissenting). And it can only constitutionally issue these Guidelines "because they must pass two checks: congressional review and the notice and comment requirements of the Administrative Procedure Act." *Lewis*, 963 F.3d at 27–28 (Torruella and Thompson, JJ., concurring) (internal quotation marks omitted). While the Sentencing Commission may often follow a similar process in adopting the commentary, app. at 13a, the Commission nonetheless still can promulgate and amend official commentary without congressional review or administrative rulemaking. United States Sentencing Commission, Rules of Practice and Procedure 6–7 (as amended Aug. 18, 2016). *Lewis*, 963 F.3d at 27–28. When the rule of lenity comes before *Auer*/*Stinson* deference to the commentary in interpreting the Guidelines, the concerns surrounding the Sentencing Commission's lawmaking authority are less apparent.

The rule of lenity is a "venerable" rule of construction that reflects important common-law values. *R. L. C.*, 503 U.S. at 305; *Wiltberger*, 18 U.S. (5 Wheat) at 95. Importantly, it also protects and enhances constitutional guarantees to defendants. *Auer*/*Stinson* deference, while it may serve valuable goals in the right contexts, may also imperil these core constitutional guarantees if it is applied too broadly.

B. This Court Has Provided Conflicting Guidance on Lenity's Interactions with Deference.

Although this Court has not explicitly discussed the rule of lenity's function in the context of *Auer* deference, several of its decisions—usually in the context of the parallel doctrine of *Chevron* deference—have provided conflicting guidance for lower courts. The Court's approach has tended to favor the rule of lenity over deference to agency interpretations. Criminal laws, the Court has emphasized, "are for courts, not for the Government, to construe." *Abramski v. United States*, 573 U.S. 169, 191 (2014). Thus, even when the basic requirements for an agency to receive deference appear to be satisfied (e.g., a statute or regulation is ambiguous and the agency's formal interpretation is "reasonable"), this Court has still "never held that the Government's reading of a criminal statute [or regulation] is entitled to any deference." *United States v. Apel*, 571 U.S. 359, 360 (2014). Rather, when a criminal statute or regulation is ambiguous, members of this Court have taken the position that the rule of lenity should prevail over deference doctrines. *See Whitman v. United States*, 574 U.S. 1003, 1003–04 (2014) (Scalia, J., statement respecting denial of certiorari);

Guedes, 140 S. Ct. at 790 (Gorsuch, J., statement respecting denial of certiorari); *see also Leocal v. Ashcroft*, 543 U.S. 1, 3–4, 11 n.8 (2004) (noting, in a context where *Chevron* deference was arguably applicable, that the rule of lenity would buttress the Court's interpretation of the statute *if* it were ambiguous).

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

Further compounding the uncertainty, on at least two occasions this Court has suggested that deference to agency interpretations supersedes the rule of lenity. *See Ehlert v. United States*, 402 U.S. 99, 104–05 (1971) (appearing to uphold the defendant's conviction based on an agency's "reasonable" interpretation of an ambiguous regulation); *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 703–04, 704 n.18 (1995) (suggesting in a footnote that even in criminal cases *Chevron* deference can displace the rule of lenity). But again, the binding nature of these decisions on lower courts is debatable. In *Ehlert*, neither party even raised the rule of lenity, meaning this Court didn't have the opportunity to determine whether it would overcome (what is now) *Auer* deference. *See United States v. Phifer*, 909 F.3d 372, 384

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

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

quire courts to withhold *Auer* deference until after applying lenity criminal cases. *See Kisor*, 139 S. Ct. at 2415.

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

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

C. The Federal Circuit Courts of Appeal Are Divided.

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

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

By contrast, the First, Sixth, and Tenth Circuits hold that the rule of lenity has no place whenever the standard prerequisites for *Auer* or *Chevron* deference are met. *De Lima v. Sessions*, 867 F.3d 260, 264–65 (1st Cir. 2017); *Esquivel-Quintana*, 810 F.3d at 1023–24; *Aposhian v. Barr*, 958 F.3d 969, 982–84 (10th Cir. 2020), *vacated for rehearing*, 973 F.3d 1151 (10th Cir. 2020) (en banc), *reinstated*, *Aposhian v. Wilkinson*, 989 F.3d 890 (10th Cir. 2021) (en banc). But even within those courts, there is disagreement among judges about giving deference to agency interpretations in criminal contexts. *See Lewis*, 963 F.3d at 27–28 (Torruella and Thompson, J.J., concurring); *Esquivel-Quintana*, 810 F.3d at 1027–32 (Sutton, J., concurring in part and dissenting in part); *Havis*, 907 F.3d at 451–52 (Thapar, J., concurring), *vacated for rehearing en banc*, 927 F.3d 382, 386–87 (6th Cir. 2019) (en banc); *Aposhian*, 958 F.3d at 998–99 (Carson, J., dissenting); *Aposhian*, 989 F.3d at 898–902 (en banc) (Tymkovich, J., dissenting) (joined by the four other dissenting judges); *id.* at 904–06 (Eid, J., dissenting) (same).

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

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

CONCLUSION

For the foregoing reasons, and those described by the Petitioner, the Court should grant the petition.

Respectfully submitted,

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