No. 21-20140

IN THE

United States Court of Appeals for the Fifth Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ANDRES VARGAS,
Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of Texas

UNOPPOSED MOTION OF THE NEW CIVIL LIBERTIES ALLIANCE TO FILE A BRIEF *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT

NEW CIVIL LIBERTIES ALLIANCE
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The New Civil Liberties Alliance (NCLA) hereby moves for leave to file a brief as amicus curiae in support of defendant-appellant. Pursuant to Fed. R. App. 29, counsel for amicus states that all parties have consented to the filing of this brief. Further, no party's counsel authored any part of this brief and no person other than amici made a monetary contribution to fund its preparation or submission.

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 advocacy.

The "civil liberties" of the organization's name include rights at least as old as the U.S. Constitution itself, such as jury trial, 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, federal administrative agencies, and even 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 the shell of their Republic, a very different sort of government has developed within it—a type, in fact, that the Constitution was designed to prevent. This unconstitutional state within the Constitution's United States is the focus of NCLA's concern.

NCLA is particularly disturbed by the widespread practice of extending judicial "deference" to the United States Sentencing Commission's commentary on the U.S. Sentencing Guidelines. This deference regime raises grave constitutional concerns that the Supreme Court never considered in *Stinson v. U.S.*, 508 U.S. 36 (1993)—and has not discussed since. Several constitutional problems arise when Article III judges abandon their duty of independent judgment and "defer" to others' views about how to interpret criminal laws.

Accordingly, NCLA respectfully requests leave to file the brief amicus curiae that accompanies this motion.

Respectfully Submitted,

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Counsel for Amicus Curiae

September 30, 2022

CERTIFICATE OF SERVICE

I hereby certify that on September 30, 2022, I electronically filed this motion for leave to file a brief *amicus curiae* with the Clerk of this Court using the CM/ECF system, which will send notice of such filing to all counsel of record.

September 30, 2022

Respectfully,

/s/ *Kara M. Rollins*
KARA M. ROLLINS

Counsel for Amicus Curiae

CERTIFICATE OF COMPLIANCE

I certify that this filed this motion for leave to file a brief *amicus curiae* complies with the type-volume limitation of Fed. R. App. P. 27 because this motion contains 333 words.

This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared using a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.

September 30, 2022

Respectfully,

/s/ *Kara M. Rollins*
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SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel for *amicus curiae* certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1, in addition to those listed in Appellant's Certificate of Interest Persons, have an interest in the outcome of the case. These representations are made so that the judges of this Court may evaluate possible disqualification or recusal.

***Amicus*:** The New Civil Liberties Alliance is a not-for-profit corporation exempt from income tax under section 501(c)(3) of the Internal Revenue Code, 26 U.S.C. § 501(c)(3). It does not have a parent corporation, and no publicly held company has a 10% or greater ownership in it.

***Counsel for Amicus*:** Kara M. Rollins and Jenin Younes, Litigation Counsel, and Mark Chenoweth, President and General Counsel of the New Civil Liberties Alliance.

/s/ *Kara M. Rollins*
KARA M. ROLLINS

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INTEREST OF AMICUS CURIAE

NCLA is a nonpartisan, nonprofit civil-rights organization devoted to defending constitutional freedoms from administrative power. As further elaborated in the Motion for Leave to File, NCLA challenges constitutional defects in the modern administrative state through original litigation and *amicus curiae* briefs, because no other entity denies more rights to more Americans.[1]

NCLA is particularly disturbed by the widespread practice of extending judicial "deference" to the United States Sentencing Commission's commentary on the U.S. Sentencing Guidelines. This deference regime raises grave constitutional concerns that the Supreme Court never considered in *Stinson v. U.S.*, 508 U.S. 36 (1993)—and has not discussed since. As set out below, several constitutional problems arise when Article III judges abandon their duty of independent judgment and "defer" to others' views about how to interpret criminal laws.

SUMMARY OF ARGUMENT

The Third, Fourth, and Sixth Circuits have correctly recognized that *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), necessarily limited deference to genuinely ambiguous rules and regulations in *all* applications of *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945).

[1] All parties consented to the filing of this brief. No counsel for a party authored any part of this brief. No one other than the amicus curiae, its members, or its counsel financed the preparation or submission of this brief.

This Circuit should rule that reflexive deference to the commentary of the Sentencing Commission—even absent ambiguity—denies due process, endangers individual liberty, and distorts the independent judicial office enshrined in Article III of the Constitution.

ARGUMENT

I. *KISOR* MODIFIED ALL FORMS OF *SEMINOLE ROCK* DEFERENCE

In *Stinson*, the Supreme Court extended *Seminole Rock* deference to the U.S. Sentencing Commission's commentary interpreting the U.S. Sentencing Guidelines and requiring courts to defer unless the commentary "run[s] afoul of the Constitution or a federal statute" or is "plainly erroneous or inconsistent" with the Guidelines. 508 U.S. 36, 47 (quoting *Seminole Rock*, 325 U.S. at 414). Decisions like *Stinson* "[we]re legion" for 60 years, as courts applied *Seminole Rock* deference (eventually known as *Auer* deference) to various circumstances, often without considering whether the challenged regulation was ambiguous. *See Kisor*, 139 S. Ct. at 2414 & n.3.

Every Justice in *Kisor* agreed that the Court needed to "reinforce" and "further develop" the limitations on the deference that courts owe to an agency's interpretation of its own rules. 139 S. Ct. at 2408, 2415; *id.* at 2424 (Roberts, C.J., concurring); *id.* at 2448 (Gorsuch, J., concurring in judgment); *id.* at 2448-49 (Kavanaugh, J., concurring in judgment). The Court "cabined *Auer*'s scope in varied and critical ways" to "maintain[] a strong judicial role in interpreting rules." *Id.* at 2418.

Following *Kisor*, courts may defer to an agency's interpretation of its own regulation *only* after (1) exhausting their interpretive toolkit and concluding the text is "genuinely ambiguous"; (2) determining that the agency interpretation is "reasonable"; and (3) conducting an "independent inquiry" confirming that "the character and context of the agency interpretation entitles it to controlling weight." *Id.* at 2415-16.

Kisor's refinement to the *Seminole Rock*/*Auer* framework requires courts to "turn to the 'traditional tools' of statutory construction to determine if [a Guideline] is 'genuinely ambiguous'" *before* deferring to Commission commentary. *U.S. v. Campbell*, 22 F.4th 438, 445 (4th Cir. 2022); *see also U.S. v. Nasir*, 17 F.4th 459, 469-72 (3d Cir. 2021) (en banc); *U.S. v. Riccardi*, 989 F.3d 476, 484-86 (6th Cir. 2021). And the panel here "might well [have] agree[d] with Vargas's argument that *Kisor* changed *Stinson*'s calculus regarding the deference owed to the Guidelines commentary" but felt bound by this Circuit's precedents. *U.S. v. Vargas*, 35 F.4th 936, 940 (5th Cir. 2022), *vacated by* 45 F.4th —, 2022 WL 3641142 (5th Cir. Aug. 24, 2022). But the Commission's "unusual … structure and authority," *Mistretta v. U.S.*, 488 U.S. 361, 412 (1989), make deference *less* appropriate—not more so. As *Campbell* recognizes, the concerns that *Kisor* identified "are even more acute in the context of the Sentencing Guidelines, where individual liberty is at stake." 22 F.4th at 446.

The Commission and its Guidelines are constitutional only because: (1) the Commission promulgates them and any amendments thereto through notice-and-

comment rulemaking; and (2) Congress reviews every Guideline before it takes effect. *Mistretta*, 488 U.S. at 393-94. By contrast, the Sentencing Reform Act permits Commission commentary by implication only, and it is not subject to congressional review or notice and comment. *See Stinson*, 508 U.S. at 41. Some courts that have continued to find *Kisor* inapplicable to the Guidelines commentary downplay these legal distinctions based on Commission assurances that its "practice" is to "generally" put commentary through "the notice-and-comment and congressional-submission procedure." *U.S. v. Moses*, 23 F.4th 347, 355 (4th Cir. 2022).[2] But neither the Commission's intentions nor its procedures elevate commentary to Guidelines status as a matter of law. The Fourth Circuit recognized as much in *Campbell*, warning that "the Commission acts unilaterally" when it issues commentary, "without that continuing congressional role so vital to the Sentencing Guidelines' constitutionality." 22 F.4th at 446. Hence, holdings that increase the scope of the Guidelines "would [impermissibly] 'allow circumvention of the checks Congress put on the Sentencing Commission[.]'" *Id.* (citation omitted).

Continued reliance on *Stinson* deference without consideration of *Kisor*'s refinements undermines the judiciary's crucial constitutional role in criminal sentencing,

[2] *Moses* was a split decision issued 15 days after *Campbell*. *See Moses*, 23 F.4th at 359 (King, J. dissenting in part and concurring in the judgment). The defendant in *Moses* filed a petition for *certiorari* on May 6, 2022. On September 20, 2022, the Supreme Court requested that the government respond to the petition. *See Moses v. U.S.*, No. 22-163 (filed May 6, 2022), Docket.

and it will inevitably deprive countless criminal defendants of their liberty. The Fifth Circuit should join its sister circuits in recognizing that *Kisor* applied to the Guidelines commentary.

II. INCREASING CRIMINAL SENTENCES BASED ON DEFERENCE IS UNCONSTITUTIONAL

Criminal sentences that are levied using deference violate the Constitution. *Stinson* does not apply when deference to commentary would "run afoul of the Constitution." 508 U.S. at 47. The panel understood this principle but failed to recognize that "[t]he missing link" it needs to "writ[e] on a blank slate"—a Constitutional violation—is present in this matter. *See Vargas*, 35 F.4th at 940 (citing *Stinson*, 508 U.S. at 47). 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 interpretation.

A. *Stinson* Did Not Implicate the Rule of Lenity

In contrast to *Stinson*, where the commentary at issue favored a more lenient sentence, 508 U.S. at 47-48, deference here resulted in a stricter sentence, so "alarm bells should be going off." *U.S. v. Havis*, 907 F.3d 439, 450 (6th Cir. 2018) (Thapar, J., concurring). "[W]hen liberty is at stake," deference "has no role to play." *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 140 S. Ct. 789, 790 (2020) (Gorsuch, J., statement regarding 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 rule of lenity dictates that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Skilling v. U.S.*, 561 U.S. 358, 410 (2010). This concept is not new; few interpretive tools boast lenity's pedigree. *See U.S. v. Wiltberger*, 18 U.S. 76, 95 (1820); *see also Bray v. Atalanta*, 4 F. Cas. 37, 38 (D.S.C. 1794) ("a penal law [] must be construed strictly"). Early fifteenth century jurist William Paston abided by the maxim that "a penalty should not be increased by interpretation." *A Discourse Upon the Exposicion & Understandinge of Statutes* (Samuel E. Thorne ed. 1942) ("[W]hen the law is penall, for in those it is true that Paston saiethe, *Poenas interpretation augeri non debere*[.]").

Lenity "applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose." *Bifulco v. U.S.*, 447 U.S. 381, 387 (1980). It requires courts to resolve ambiguous Guidelines—which "exert a law-like gravitational pull on sentences"—in a defendant's favor. *Nasir*, 17 F.4th at 474.

Any increase in criminal sentencing must comport with due process. "[I]t is crucial that judges give careful consideration to *every minute* that is added to a defendant's sentence." *U.S. v. Faison*, 2020 WL 815699, *1 (D. Md. Feb, 18, 2020).

"The critical point is that criminal laws are for courts, not for the Government, to construe." *Abramski v. U.S.*, 573 U.S. 169, 191 (2014) ("[W]e have never held that the Government's reading of a criminal statute is entitled to any deference.").

Three "core values of the Republic" compel the rule of lenity: (1) due process; (2) the separation of governmental powers; and (3) "our nation's strong preference for liberty." *Nasir*, 17 F.4th at 473 (Bibas, J.). By construing ambiguities in the defendant's favor, lenity precludes criminal punishment without a fair warning through clear statutory language. *See McBoyle v. U.S.*, 283 U.S. 25, 27 (1931) (due process requires the law to draw as clear a line as possible). Lenity also preserves the separation of powers: the legislature criminalizes conduct and sets statutory penalties; the executive prosecutes crimes and can recommend a sentence, while the judiciary imposes sentences within the applicable statutory framework. *U.S. v. Bass*, 404 U.S. 336, 348 (1971). The rule "strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability." *Liparota v. U.S.*, 471 U.S. 419, 427 (1985). Finally, and "perhaps most importantly," "'lenity expresses our instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should.'" *Nasir*, 17 F.4th at 473 (Bibas, J.) (citation omitted).

B. Deference to Commentary of 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*, 12 Co. Rep. 63, 65 (1608).

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

No branch is more vital to protecting liberty than the judiciary. An independent judiciary ensures that the political branches cannot diminish constitutional protections. Article III adopted the common-law tradition of an independent judicial office, secured by life tenure and undiminished salary. U.S. Const., art. III, § 1. To hold this office, an Article III judge swears an oath to the

Constitution and is duty-bound to exercise his office independently. *See* Hamburger, *supra* at 507-12.

The judicial office includes a duty of independent judgment. *See* James Iredell, To the Public, *N.C. Gazette* (Aug. 17, 1786) (describing the duty of judges as "[t]he duty of the power"). Through the independent judicial office, the Founders ensured that judges would not administer justice based on someone else's interpretation of the law. *See* 2 Records of the Federal Convention of 1787, 79 (Nathaniel Gorham); The Federalist No. 78 (Alexander Hamilton) ("The interpretation of laws is the proper and peculiar province of the courts."). The opinions of the founding era's finest jurists recognized this obligation of independence. *See, e.g.*, *Georgia v. Brailsford*, 2 U.S. (2 Dall.) 415, 416 (1793) (Iredell, J., dissenting); *The Julia*, 14 F. Cas. 27, 33 (C.C.D. Mass. 1813) (Story, J.); *U.S. v. Burr*, 25 F. Cas. 2, 15 (C.C.D. Va. 1807) (Marshall, J.).

The principle of judicial independence is so axiomatic that it seldom appears in legal argument; the mere suggestion that a judge might breach the duty of independent judgment is scandalous. But that is exactly what applying deference under *Stinson* requires: judicial dependence on a non-judicial entity's interpretation of the law.[3]

[3] Judges serving on the Commission are not acting as judges but as part-time Commissioners. *See Havis*, 907 F.3d at 451 (Thapar, J.).

The panel's decision would require judges to abdicate the duty of their office by forgoing their independent judgment in favor of an agency's legal interpretation. *See Perez v. Mortgage Bankers Ass'n*, 572 U.S. 92, 110 (2015) (Scalia, J., concurring in judgment) (deference requires courts "to 'decide' that the text means what the agency says"). The panel's rule diminishes the judicial office and with it, a key structural safeguard the Framers erected against tyranny. *Cf. Miller v. Johnson*, 515 U.S. 900, 922-23 (1995) (holding that deferring to an agency's statutory interpretation impermissibly "surrender[s] to the Executive Branch [the Court's] role in enforcing the constitutional limits [at issue]"). 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. U.S.*, 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*, 139 S. Ct. at 2415).

2. Deference Violates Due Process by Institutionalizing Judicial Bias

Reflexive deference jeopardizes judicial impartiality. *Com. Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 150 (1968) (judicial bodies "must avoid even the appearance of bias"); *Masterpiece Cake Shop, Ltd. v. Colo. Civil Rights Comm'n*,

138 S. Ct. 1719, 1734 (2018) (Kagan, J., concurring) (the Constitution forbids proceedings "infected by … bias").

Judicial bias need not exist at a personal level to violate due process. Such bias can also be institutional. Indeed, institutionalized judicial bias is more pervasive, as it systematically infects the fairness of the legal system as a whole rather than just an individual party before a particular judge. Most judges recognize that personal bias requires recusal. Likewise, it should be axiomatic that recusal is warranted when deference regimes require judges to favor one party's legal position—the government's.[4] *See In re Murchison*, 349 U.S. 133, 136 (1955) (reasoning that the "stringent" due-process requirement of impartiality may require recusal by "judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties").

Reliance on *Stinson* institutionalizes bias by continuing to "defer" to the government's legal interpretation in violation of a defendant's right to due process. *Cf.* Philip Hamburger, Chevron *Bias*, 84 Geo. Wash. L. Rev. 1187 (2016). Under such deference regimes, a judge cannot simply find the defendant's reading of the law more plausible or think the government's reading is wrong—the government must be *plainly* wrong. In short, instead of exercising their own judgment about the

[4] If precedent compels deference, a judge could also issue a *dubitante* opinion. *Cf. Am. Inst. for Int'l Steel, Inc. v. U.S.*, 376 F. Supp. 3d 1335, 1345 (Ct. Int'l Trade 2019) (Katzmann, J., *dubitante*) (collecting *dubitante* opinions).

law, judges are required, under *Stinson*, to defer to the judgment of the government litigant, so long as the commentary "is not plainly erroneous or inconsistent with" the Guidelines. *Stinson*, 508 U.S. at 47 (cleaned up).

No rationale can defend a practice that thus weights the scales in favor of the most powerful of parties—a *government* litigant——and commands systematic bias in favor of the government's preferred interpretations of the Guidelines. Thus, doctrines like *Stinson* deference deny due process to criminal defendants by favoring the government prosecutor's position. *Tumey v. Ohio*, 273 U.S. 510, 532 (1927).

CONCLUSION

The en banc Court should clarify that *Stinson* deference does not apply in this Circuit when it would operate to increase a criminal defendant's sentence, vacate Mr. Vargas's sentence, and remand his case for resentencing.

September 30, 2022

Respectfully,

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CERTIFICATE OF COMPLIANCE

I certify that this *Amicus Curiae* brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(iii) because this brief contains 2,696 words, excluding those portions of the brief exempted by Rule 32(f)(a)(7)(B)(iii).

This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared using a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.

September 30, 2022

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