

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

United States of America,	:	
	:	No. 18-338-cr
	:	
Plaintiff-Appellee,	:	
	:	
v.	:	
	:	
Zimmian Tabb,	:	
	:	
	:	
Defendant-Appellant.	:	

**Motion for Leave to File *Amicus Curiae* Brief in Support of Appellant’s
Petition for Panel Rehearing and Rehearing *En Banc***

Proposed *amicus curiae*, the New Civil Liberties Alliance (“NCLA”) respectfully moves for leave to file an out-of-time *amicus* brief in support of Defendant-Appellant Zimmian Tabb’s Petition for Panel Rehearing and Rehearing *En Banc* in *United States v. Zimmian Tabb*, No. 18-338. Both parties to this appeal, through their respective counsel, have consented to NCLA’s filing of an *amicus* brief.

I. INTRODUCTION

In response to this Court’s February 21 Order, the government filed its opposition to Mr. Tabb’s rehearing petition on March 9, 2020. But then on April 29, 2020, the government, with Mr. Tabb’s consent, moved to correct its opposition brief “to better align the Government’s arguments with the Department of Justice’s position regarding *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019).” Mot. to Correct, ¶ 8 (Dkt. No. 182).

The government’s corrected position is, essentially, the Supreme Court’s decision in *Kisor* “did not overrule *Stinson* [*v. United States*, 508 U.S. 36 (1993)],” nor did it call into question this Court’s decision in *United States v. Jackson*, 60 F.3d 128 (2d Cir. 1995), or the panel’s opinion in this case. Gov.’s Corrected Br. in Opp. at 6-7 (Dkt. No. 182). Further, the government argues, “there is a ‘genuine ambiguity’” in the Guidelines, “and Application Note 1 is a reasonable reading that comes within the zone of that ambiguity.” *Id.* at 6 (cleaned up).

Based on the government’s corrected brief, NCLA now seeks leave of court to file the attached *amicus* brief to explain why the government’s arguments, and the panel’s opinion, create profound constitutional problems.

II. INTEREST OF *AMICUS CURIAE*

NCLA is a nonpartisan, nonprofit civil-rights organization devoted to defending constitutional freedoms from administrative power. NCLA was founded to challenge multiple constitutional defects in the modern administrative state through original litigation, *amicus curiae* briefs, and other means of advocacy. NCLA views the administrative state as an especially serious threat to civil liberties. Nothing else denies more rights to more Americans. Although we still enjoy the shell of our Republic, a very different sort of government has developed within it—a type, in fact, that our Constitution was designed to prevent.

NCLA is particularly disturbed by the widespread practice of extending judicial “deference” to the Commission’s commentary on the United States Sentencing Guidelines. Although NCLA acknowledges that the Supreme Court has instructed courts to defer to this commentary when interpreting the text of the federal Sentencing Guidelines, this deference regime raises grave constitutional concerns that the Supreme Court has never considered nor discussed. *See Stinson*, 508 U.S. 36. As set out in NCLA’s proposed *amicus* brief, several constitutional problems arise when Article III judges abandon their duty of independent judgment and “defer” to someone else’s views about how the criminal laws should be interpreted.

Several of this Court’s sister circuits have reconsidered, or are reconsidering, the judiciary’s deference to the Sentencing Commission’s official commentary on the Guidelines. *See U.S. v. Winstead*, 890 F.3d 1082 (D.C. Cir. 2018); *Havis*, 927 F.3d 382 (6th Cir. 2019) (*en banc*); Order, *U.S. v. Nasir*, No. 18-2888 (3d Cir. March 4, 2020); Order, *Lovato v. U.S.*, No. 18-1468 (10th Cir. April 15, 2020). NCLA has filed *amicus* briefs on this issue in *Havis*, *Nasir*, and *Lovato* in the Sixth, Third, and Tenth Circuits, respectively. Given the relevancy of NCLA’s interest and the arguments it seeks to present, granting this motion for leave comports with the fundamental purpose of Fed. R. App. P. 29.

III. Good Cause

Good cause exists to permit NCLA to file this out-of-time *amicus* brief. Although Rule 29 states that “an *amicus curiae* must file its brief ... no later than 7 days after the principal brief of the party being supports is filed[,]” this Court possesses the authority to grant leave to file for “good cause” shown. Fed. R. App. P. 29(6) (Committee Notes on Rules – 1998 Amendment). As then-Judge Samuel Alito explained for the Third Circuit, courts should exercise their authority freely. *See Neonatology Assocs., P.A. v. Comm’r*, 293 F.3d 128, 133 (3d Cir 2002) (Alito, J.) (“[O]ur court would be well advised to grant motions for leave to file amicus briefs unless it is obvious that the proposed briefs do not meet Rule 29’s criteria as broadly interpreted.”). This Court has adopted this liberal approach to granting *amici* leave to file. *See, e.g., CSX Corp. v. Children’s Inv. Fund Mgmt. (UK) LLP*, 654 F.d3 276 (2d Cir. 2011).

Good cause exists in this instance because the parties’ initial briefs did not fully engage with the issues that principally concern NCLA: (1) whether deference to the Sentencing Commission’s interpretation of ambiguous Guidelines is unconstitutional; and (2) whether the rule of lenity prohibits deference to ambiguous sentencing guidelines. Since the time the parties filed their initial briefs, Mr. Tabb has secured new counsel, and the government has corrected its arguments in opposition.

Accordingly, NCLA moves this Court for permission to file its *amicus* brief within seven days of the government’s corrected opposition, which first asserted that the Guidelines were ambiguous and *Kisor* deference should apply. Rigid adherence to Rule

29 would subvert the spirit and the purpose of that rule, which is to provide the courts with arguments that are “relevant” and “desirable” to a case’s disposition. Further, such a technical reading is even more undesirable when, as here, both parties have consented to the filing and no party will be prejudiced.

Respectfully, this Court should grant leave for NCLA to file the attached brief.

May 5, 2020

Respectfully Submitted,

/s/ Jared McClain

JARED MCCLAIN

Staff Counsel

KARA ROLLINS

Litigation Counsel

New Civil Liberties Alliance

1225 19th St. NW, Suite 450

Washington, DC 20036

(202) 869-5210

Jared.McClain@NCLA.legal

Counsel for the New Civil Liberties Alliance

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed this Motion for Leave to File an *Amicus Curiae* Brief out-of-time with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the CM/ECF system on May 5, 2020. I also certify that the foregoing document is being served on all counsel of record in this appeal via CM/ECF pursuant to Local Rule 25.1(h)(1) & (2).

May 5, 2020

Respectfully,

/s/ Jared McClain
JARED MCCLAIN

No. 18-338

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellee

v.

ZIMMIAN TABB,
Appellant.

Appeal from the United States District Court
For the Southern District of New York
The Honorable Alvin K. Hellerstein

**AMICUS CURIAE BRIEF OF THE
NEW CIVIL LIBERTIES ALLIANCE
IN SUPPORT OF ZIMMIAN TABB'S PETITION FOR REHEARING**

NEW CIVIL LIBERTIES ALLIANCE
KARA ROLLINS
Litigation Counsel
JARED MCCLAIN
Staff Counsel
1225 19th St. NW, Suite 450
Washington, DC 20036
(202) 869-5210
Jared.McClain@NCLA.legal
Counsel for the New Civil Liberties Alliance

CORPORATE DISCLOSURE STATEMENT

The New Civil Liberties Alliance is a nonpartisan, nonprofit corporation organized under the laws of the District of Columbia. It has no parent corporation, and no publicly held corporation owns 10 percent or more of its stock.

STATEMENT REGARDING CONSENT TO FILE AND SEPARATE BRIEFING

Pursuant to Fed. R. App. P. 29, NCLA respectfully files this *amicus curiae* brief with the consent of all parties. NCLA certifies that a separate brief is necessary because it intends to address the due-process issues inherent in federal courts' deference to the United States Sentencing Commission, as discussed more fully in the attached motion for leave to file.

No party's counsel authored the brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting the brief. No person other than the *Amicus*, its members, and counsel contributed money that was intended to fund preparing or submitting this brief.

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SUMMARY OF ARGUMENT

This Court should overrule *United States v. Jackson*, 60 F.3d 128 (2d Cir. 1995). The panel in that case deferred reflexively to the commentary of the United States Sentencing Commission without considering the rule of lenity and without exercising its independent judgment as required by Article III of the United States Constitution.

ARGUMENT

I. INTERPRETIVE DEFERENCE IS UNCONSTITUTIONAL

A. The Judicial Office Is One of Independent Judgment

Article III vests “the judicial power of the United States” in the courts and creates the judicial office held by “[t]he judges, both of the Supreme Court and inferior courts.” U.S. CONST., ART. III, § 1. The judicial power includes the authority to decide cases and controversies; a judge’s office includes the duty to exercise independent judgment in the interpretation and application of law in each case. *See Marbury v. Madison*, 5 U.S. 137, 177 (1803).

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 maintained that, although all judicial power was exercised in the name of the monarch, the power rested solely in the judges. *Prohibition del Roy*, 12 Co. Rep. 63, 65 (1608).

Revolting against tyranny, the American Declaration of Independence objected to judges “dependent on [King George III’s] will alone.” The Declaration of Independence, ¶ 3. 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). Separating governmental power preserves liberty, in part, because each branch jealously checks the other branches’ attempts to shift the constitutional balance of power.

Arguably no branch is more vital to protecting liberty from factious politics than the judiciary. As our constitutional backstop, the independent judiciary ensures that the political branches cannot encroach upon or diminish constitutional liberties. Article III guards the judiciary’s independence by adopting the common-law tradition of an independent judicial office and by granting life tenure and undiminished salary. U.S. CONST., ART. III, § 1. To hold the judicial office under Article III, a judge swears an oath to the Constitution and is duty-bound to exercise his or her own office independently. *See* Law and Judicial Duty 507-12.

The judicial office carries with it 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

explaining that “the Judges ought to carry into the exposition of the laws no prepossessions with regard to them”); THE FEDERALIST No. 78 (Alexander Hamilton) (“The interpretation of laws is the proper and peculiar province of the courts.”). This obligation of independence is reflected in the opinions of the founding era’s finest jurists. *See, e.g., The Julia*, 14 F. Cas. 27, 33 (C.C.D. Mass. 1813) (Story, J.) (“[M]y duty requires that whatsoever may be its imperfections, my own judgment should be pronounced to the parties.”); *U.S. v. Burr*, 25 F. Cas. 2, 15 (C.C.D. Va. 1807) (Marshall, J.) (“[W]hether [the point] be conceded by others or not, it is the dictate of my own judgment, and in the performance of my duty I can know no other guide.”).

Judicial independence, as a duty and obligation, persists today. This principle is so axiomatic, in fact, that it seldom appears in legal argument; the mere suggestion that a judge might breach his or her duty of independent judgment is a scandalous insinuation. But that is exactly what deference regimes, like that adopted in *Stinson v. United States*, 508 U.S. 36 (1993), require: judicial dependence on a non-judicial entity’s interpretation of the law.

B. Deference Is Inconsistent with Judicial Independence

1. *Stinson* Requires Abdication of the Judicial Office

Obligatory deference regimes are antithetical to the independent judgment that Article III enshrines, and they violate the Fifth Amendment’s Due Process Clause by institutionalizing judicial bias toward one party—the government.

Faithful application of *Stinson* requires judges to abdicate the duty of their judicial office by forgoing their independent judgment in favor of an agency’s legal interpretation. See *Perez v. Mortgage Bankers Ass’n*, 575 U.S. 92, 110 (2015) (Scalia, J., concurring in judgment) (deference requires courts “to ‘decide’ that the text means what the agency says”). This diminishes the judicial office and, with it, the structural safeguards the Framers erected as a bulwark against tyranny. Cf. *Miller v. Johnson*, 515 U.S. 900, 922-23 (1995) (deference to DOJ would “surrender[] to the Executive Branch [the Court’s] role in enforcing [] constitutional limits”).

Even when Congress has tasked an agency with promulgating binding rules or guidelines, it remains the judiciary’s role to “say what the law is” in any case or controversy about the meaning and application of those agency-made provisions. *Marbury*, 5 U.S. at 177. The Commission’s opinion of how best to interpret its guidelines deserves no more weight than the heft of its persuasiveness. Cf. *TetraTech, Inc. v. Wisc. Dep’t of Revenue*, 914 N.W.2d 21, 53 (Wisc. 2018) (“‘Due weight’ is a matter of persuasion, not deference.”).

2. *Stinson* Violates Due Process by Institutionalizing Judicial Bias

Reflexive deference also jeopardizes the judicial impartiality that due process requires. Cf. *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980); *Com. Coatings Corp. v. Cont’l Cas. Co.*, 393 U.S. 145, 149 (1968) (judicial bodies “not only must be unbiased but also 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) (agreeing the Constitution forbids adjudicatory proceedings that are “infected by ... bias”).

Judicial bias need not be personal bias to violate due process—it can also be institutional. In fact, institutionalized judicial bias is more pervasive, as it systematically subjects parties across the entire judiciary to bias rather than only a party before a particular judge. Most judges recognize that personal bias requires recusal. Recusal is equally appropriate when deference regimes institutionalize bias by purporting to require judges to favor the government’s position in cases in which the government is a party.¹ 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”).

Stinson institutionalizes bias by requiring courts to “defer” to the government’s legal interpretation in violation of a defendant’s right to due process of law. Cf. Philip Hamburger, *Chevron Bias*, 84 GEO. WASH. L. REV. 1187 (2016). Rather than exercise their own judgment about what the law is, judges under *Stinson* defer as a matter of course to the judgment of one of the litigants before them. The government litigant wins merely by showing that its preferred interpretation of the commentary “is not

¹ A judge unwilling to recuse himself or herself could also write a *dubitante* opinion. *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).

plainly erroneous or inconsistent with” the Guidelines. *Stinson*, 508 U.S. at 47. A judge cannot simply find the defendant’s reading more plausible or think the government’s reading is wrong—the government must be *plainly* wrong.

No rationale can defend a practice that weights the scales in favor of a *government* litigant—the most powerful of parties—and commands systematic bias in favor of the government’s preferred interpretations of the Sentencing Guidelines. Government-litigant bias doctrines, like *Stinson*, deny due process by favoring the government’s litigating position. *Tumey v. Ohio*, 273 U.S. 510, 532 (1927) (“Every procedure” that might lead a judge “not to hold the balance nice, clear, and true between the state and the accused denies the latter due process of law.”).

It is long past time for conscientious judges to uphold their constitutional oath and reject the “deference” that compromises the judiciary.

II. DEFERENCE IS INAPPROPRIATE IN ANY CASE WITH CRIMINAL PENALTIES

Applying *Stinson* to this case requires the judiciary to construe ambiguities in criminal laws *against* the accused. This runs counter to the rule of lenity and violates the due process of law.

A. Lenity Resolves Ambiguity in the Defendant’s Favor

Lenity is a rule of construction that dates back at least to the 15th Century and jurist William Paston’s pronouncement that penalties should not increase through interpretation. See *A Discourse Upon the Exposition & Understandinge of Statutes*, Thomas

Egerton Additions 155 (Samuel E. Thorne ed. 1942) (“[W]hen the law is penall, for in those it is true that Paston saiethe, *Poenas interpretation auferi non debere*[.]”). In simple terms, lenity “obligate[s]” courts “to construe criminal statutes narrowly[.]” *U.S. v. Valle*, 807 F.3d 508, 528 (2d Cir. 2015) (cleaned up).

Two constitutional principles underlie lenity: due process and the separation of powers. Lenity safeguards due process by “ensur[ing] that criminal statutes will provide fair warning of what constitutes criminal conduct” and by “minimiz[ing] the risk of selective or arbitrary enforcement[.]” *Id.* at 523. Lenity also promotes liberty by ensuring the separation of powers: the legislature criminalizes conduct and sets statutory penalties, and the judiciary sentences defendants within the applicable statutory framework. *U.S. v. Bass*, 404 U.S. 336, 348 (1971). Lenity “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).

Overall, lenity “embodies ‘the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should.’” *Bass*, 404 U.S. at 347. As such, lenity applies with equal force “to the Sentencing Guidelines.” *U.S. v. Parkins*, 935 F.3d 63, 66 (2d Cir. 2019); *Bifulco v. U.S.*, 447 U.S. 381, 387 (1980) (“[T]he Court has made it clear that [lenity] applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose.”).

Like deference, lenity applies only when Congress’ intent remains ambiguous after exhausting other modes of interpretation. *Valle*, 807 F.3d at 523. But lenity takes

“priority” over agency deference for two main reasons. *First*, lenity allows courts to avoid constitutional concerns inherent in applying ambiguous statutes against a criminal defendant. In this way, lenity and constitutional avoidance operate symbiotically when criminal statutes are ambiguous. *See U.S. v. Davis*, 139 S.Ct. 2319, 2333 (2019) (describing the doctrines as “traditionally sympathetic” to one another). Both doctrines avoid construing ambiguity against criminal defendants in violation of due process and the separation of powers. *Id.* (“Applying constitutional avoidance to narrow a criminal statute, as the Court has historically done, accords with the rule of lenity.”).

No similar constitutional concerns necessitate deference doctrines, which lack any constitutional underpinning and are rooted instead in a rebuttable presumption concerning Congress’ intent. *See Kisor v. Wilkie*, 139 S.Ct. 2400, 2412 (2019). This presumption, in the criminal context, must give way to a strict reading of the statute. *U.S. v. Wiltberger*, 18 U.S. 76, 95 (1820); *see also M. Kraus & Bros. v. U.S.*, 327 U.S. 614, 621-22 (1946) (plurality) (holding, one year after deciding *Seminole Rock*, that “the same strict rule of construction that is applied to statutes defining criminal action” must apply to agency’s rules with criminal sanctions); *U.S. v. Phifer*, 909 F.3d 372, 383 (11th Cir. 2018) (holding that *Auer v. Robbins*, 519 U.S. 452 (1997), and its progeny do not apply in criminal cases); *U.S. v. Moss*, 872 F.3d 304, 308, 314 (5th Cir. 2017) (same). Again, Congress must state its intent clearly if it wishes to criminalize conduct. “[C]riminal 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.”).

Second, as a matter of statutory interpretation, a court cannot defer to an agency until after it empties its “legal toolkit” of “all the ‘traditional tools’ of construction.” *Kisor*, 139 S.Ct. at 2418. Lenity is a traditional rule of statutory construction in this Court’s toolkit. *U.S. v. Thompson/Ctr. Arms Co.*, 504 U.S. 505, 518 (1992). So, like other “presumptions, substantive canons and clear-statement rules,” lenity must “take precedence over conflicting agency views.” *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 731 (6th Cir. 2013) (Sutton, J., concurring) (collecting precedents that prioritize various interpretive tools over deference). Agency deference must come last—if it plays any role at all—because “an agency, no less than a court, must interpret a doubtful criminal statute in favor of the defendant.” *Id.*

When a statute with criminal penalties is ambiguous, “doubts are resolved in favor of the defendant.” *Bass*, 404 U.S. at 347. There is no room for deference.

B. No Precedent Binds this Court

No binding precedent requires this Court to discard lenity in favor of deference. *Stinson* never addressed the constitutional objections to its deference regime—and neither has any subsequent Supreme Court decision. *Cf. Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 140 S.Ct. 789, 790 (2020) (Gorsuch, J., statement regarding denial of certiorari) (arguing that deference “has no role to play when liberty

is at stake” and announcing that the Court’s waiting to consider a case “afflicted with the same problems ... should not be mistaken for lack of concern”). *Stinson* cannot, therefore, require this Court to flout lenity and the constitutional rights that rule protects.

Indeed, the *Stinson* Court had no reason to consider lenity because the Commission’s interpretation in that case resolved ambiguity in the defendant’s favor. 508 U.S. at 47. Ruling that the district court sentenced *Stinson* improperly as a career offender, the Court remanded the case for a re-sentencing. *Id.* at 48. Given that the commentary at issue in *Stinson* militated in favor of a more lenient sentence, lenity was not at issue.

Nor was lenity considered in *Jackson*, 60 F.3d 128. And even if it had been, this Court should have no trouble departing from *Jackson*—to the extent that decision survived *Kisor*, 139 S.Ct. 2400. In *Kisor*, the Court “cabined *Auer*’s scope in varied and critical ways” to “maintain[] a strong judicial role in interpreting rules.” *Id.* at 2418. Now, *Kisor* (née *Auer*) deference applies only after a court employs “all the ‘traditional tools’ of construction” to “‘carefully consider[]’ the text, structure, history, and purpose of a regulation, in all the ways it would if it had no agency to fall back on.” *Id.* at 2415.

The panel in *Jackson* deferred reflexively to the Commission without even opening its interpretive toolkit. *See* 60 F.3d at 131. Yet, the government insists *Jackson* was right to defer to the Commission’s use of commentary to expand the Guidelines because Congress “inten[ded]” that “the Commission impose significant prison terms.”

Corrected Br. in Opposition, at 6. Not only is this rationale a direct affront to the rule of lenity—which *Jackson* did not consider—but *Jackson*'s haste to reach *Stinson* with no exacting inquiry is counter to *Kisor*'s cabining of that deference regime. *Jackson* has not withstood the test of time.

CONCLUSION

This Court should grant Tabb's petition for *en banc* review and cast aside *Jackson*'s lingering remnants.

May 5, 2020

Respectfully,

/s/Jared McClain

NEW CIVIL LIBERTIES ALLIANCE
JARED MCCLAIN
Staff Counsel
KARA ROLLINS
Litigation Counsel
1225 19th St. NW, Suite 450
Washington, DC 20036
(202) 869-5210
Jared.McClain@NCLA.legal
Counsel for the New Civil Liberties Alliance

CERTIFICATE OF COMPLIANCE

I certify that this *Amicus Curiae* brief complies with the type-volume limitations of Rule 32(a)(7)(B) and Rule 29(a)(5) of the Federal Rules of Appellate Procedure, as modified by Local Rules 32.1(a)(4)(A) and 29.1(c), respectively, because it contains 2,569 words, excluding those portions of the brief exempted by Rule 32(f).

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 14-point font in a plain, roman style, and is double-spaced.

May 5, 2020

Respectfully,

/s/ Jared McClain

Jared McClain

New Civil Liberties Alliance

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed this *Amicus Curiae* brief with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the CM/ECF system on May 5, 2020. I also certify that the foregoing document is being served on all counsel of record in this appeal via CM/ECF pursuant to Local Rule 25.1(h)(1) & (2).

May 5, 2020

Respectfully,

/s/ Jared McClain
JARED MCCLAIN