No. 20-6436

IN THE

# Supreme Court of the United States

DANIEL LOVATO,

*Petitioner*

*v.*

UNITED STATES OF AMERICA,

*Respondent.*

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

## *AMICUS CURIAE* BRIEF OF DUE PROCESS INSTITUTE & THE NEW CIVIL LIBERTIES ALLIANCE IN SUPPORT OF PETITIONER


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DECEMBER 22, 2020

## QUESTION PRESENTED

Due Process Institute and the New Civil Liberties Alliance, as *amici curiae*, will address the following question necessary to resolving the circuit split raised in Mr. Lovato's petition:

(1) Whether courts may defer to Sentencing Commission commentary without first determining that the underlying Guideline is genuinely ambiguous?

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## INTEREST OF *AMICUS CURIAE*[1]

Due Process Institute is a bipartisan, non-profit, public-interest organization that works to honor, preserve, and restore principles of fairness in the criminal justice system. Formed in 2018, the Institute has participated as an *amicus curiae* before this Court in cases presenting important criminal justice issues, including *Timbs v. Indiana*, 139 S. Ct. 682 (2019); *Mitchell v. Wisconsin*, 139 S. Ct. 2525 (2019); and *United States v. Haymond*, 139 S. Ct. 2369 (2019). The issues raised in this brief are essential to protecting principles of due process and fundamental fairness in America's federal sentencing regime.

The New Civil Liberties Alliance ("NCLA") is a nonpartisan, nonprofit civil rights organization and public-interest law firm. Professor Philip Hamburger founded NCLA to challenge multiple constitutional defects in the modern administrative state through original litigation, *amicus curiae* briefs, and other advocacy.

NCLA is particularly disturbed by the widespread practice of extending judicial "deference" to the commentary of the United States Sentencing Commission. *See Stinson v. United States*, 508 U.S. 36 (1993). This deference regime raises grave constitutional concerns that this Court has never considered or discussed.

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[1] Pursuant to Rule 37, both parties were timely notified and have 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*, their members, or their counsel financed the preparation or submission of this brief.

## SUMMARY OF ARGUMENT

The imposition of additional years of incarceration cannot be premised on resolving uncertainty in favor of the prosecution. To do so violates one of the most fundamental principles of criminal law—the rule of lenity. The Constitution abhors punishment arising only from guesswork. This Court's decision in *Stinson v. United States*, 508 U.S. 36 (1993), however, continues to be misused by multiple courts of appeals to routinely increase terms of incarceration—often dramatically—out of binding deference to the Sentencing Commission's mere commentary about unclear sentencing enhancements.

Petitioner convincingly argues that the courts of appeals' "reflexive deference" to the Sentencing Commission's commentary "fundamentally disregards this Court's clear directive in *Kisor* [*v. Wilkie*, 139 S.Ct. 2400 (2019)]." (Pet. at 17.) As the Court recognized in *Kisor*, courts must not defer "reflexive[ly]" to agencies' regulatory interpretations, without first conducting their own exhaustive textual analysis. *See ibid*. *Amici* join in the concern that the Tenth Circuit, along with others, have given "nearly dispositive weight" to the Commission's commentary over "the Guidelines' plain text" without engaging in the required ambiguity analysis. *See United States v. Nasir*, 2020 WL 7041357, at *24 (3d Cir. Dec. 1, 2020) (en banc) (Bibas, J., concurring in part); *see also United States v. Mendoza-Figueroa*, 65 F.3d 691, 692-63 (8th Cir. 1995) (en banc) ("Every court has agreed that the Commission's extensive statutory authority to fashion appropriate sentencing guidelines includes the discretion to include drug conspiracy offenses in the category of offenses that warrant increased prison terms for career offenders.").

*Amici* write separately, however, to stress the need for this Court's guidance to resolve the "broader problem" that arises once the Tenth Circuit, and six other circuits, awake "from [their] slumber of reflexive deference." *Nasir*, 2020 WL 7041357, at *24 (Bibas, J.). *Kisor* made clear that courts must exhaust the "traditional tools of construction" before deferring to an agency, and only when a true ambiguity exists. 139 S. Ct. at 2415. The rule of lenity is a traditional tool of construction "perhaps not much less old than construction itself" that protects core liberties against government intrusion when ambiguous laws are in play. *United States v. Wiltberger*, 18 U.S. (1 Wheat.) 76, 95 (1820). And the Tenth Circuit has joined its sister circuits in holding that the "rule of lenity requires courts to interpret ambiguous statutes, including the Sentencing Guidelines, in favor of criminal defendants." *United States v. Gay*, 240 F.3d 1222, 1232 (10th Cir. 2001). The courts of appeals, however, are starkly divided on what comes next—whether lenity applies before deference, or whether it even applies at all. *Compare Nasir*, 2020 WL 7041357, at *25 (Bibas, J.) ("A key tool in that judicial toolkit is the rule of lenity."), *with United States v. Cingari*, 952 F.3d 1301, 1310-11 (11th Cir. 2020) ("cast[ing] doubt" on whether lenity applies before *Stinson* deference).

This circuit split results from this Court's lack of clarity on the issue. *See, e.g.*, *Whitman v. United States*, 135 S. Ct. 352 (2014) (Scalia J., joined by Thomas, J., statement respecting denial of *certiorari*) (collecting cases to demonstrate that this Court's anti-lenity statements "contradict[] the many cases before and since holding that, if a law has both criminal and civil applications, the rule of lenity governs its interpretation in both settings").

Mr. Lovato's petition, along with those pending in *Broadway v. United States*, No. 20-____ (filed Dec. 16, 2020); and *Tabb v. United States*, No. 20-579 (filed Oct. 28, 2020), present this Court a critical opportunity to clarify once and for all that courts do not owe deference to Commission commentary that expands the Sentencing Guidelines and makes sentences harsher. Each passing Term, district courts in seven circuits systematically violate the due process rights of criminal defendants by applying *Stinson* deference to increase the Sentencing Guideline range approved by Congress. With the liberty of so many at stake, there is no excuse to wait.

## ARGUMENT

In order to reconcile *Kisor* with *Stinson*, this Court must finally resolve a long-simmering conflict between the basic premises underlying the rule of lenity and the concept of agency deference. When these concepts collide, respect for due process, the separation of powers, and our nation's long preference for liberty, compels lenity, not harshness.

### I. AFTER *KISOR*, *STINSON* DEFERENCE CAN ONLY APPLY TO AMBIGUOUS GUIDELINE PROVISIONS, IMPLICATING THE RULE OF LENITY

When this Court decided *Kisor v. Wilkie* two Terms ago, all nine Justices agreed on the need to "reinforce" and "further develop" the limitations on the deference that courts owe to an administrative agency's interpretation of its own rules. 139 S. Ct. 2400, 2408, 2415 (2019); *id.* at 2424 (Roberts, C.J., concurring); *id.* at 2448 (Gorsuch, J., concurring in judgment); *id.* at 2448-49 (Kavanaugh, J., concurring in judgment).

*Kisor* held that courts could defer to an agency's interpretation *only* if a regulation proves "genuinely ambiguous" after a court has "exhaust[ed] all the 'traditional tools of construction.'" *Id.* at 2415. "If uncertainty does not exist, there is no plausible reason for deference." *Id.*

As Petitioner notes, the Tenth Circuit skipped that critical step in the panel decision. (Pet. at 18.) So did the Second Circuit in Mr. Tabb's case, as well as the Eighth Circuit in Mr. Broadway's, both of which are also pending before this Court.

But those *same circuit courts* have all recognized that the rule of lenity applies to an ambiguous guideline provision. *See United States v. Simpson*, 319 F.3d 81, 86 (2d Cir. 2002) ("We join several of our sister circuits in applying the rule of lenity to the Guidelines."); *Gay*, 240 F.3d at 1232 ("The rule of lenity requires courts to interpret ambiguous statutes, including the Sentencing Guidelines, in favor of criminal defendants."); *United States v. Lazaro-Guadarrama*, 71 F.3d 1419, 1421 (8th Cir. 1995) (applying the rule of lenity to the Guidelines and finding that the "[t]he rule of lenity states that a court cannot interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended.") (internal quotation marks and citation omitted).

If this Court enforces *Kisor*'s mandate to grant deference only in instances of genuine ambiguity, then there necessarily arises an intractable conflict between the rule of lenity and agency deference. Deference, born of judicial respect, must give way to lenity, a rule of constitutional necessity.

## II. THE RULE OF LENITY, NOT DEFERENCE, MUST PREVAIL

### A. *Stinson* Did Not Consider the Rule of Lenity.

The Court in *Stinson* had no occasion to consider what role lenity would play in its deference regime because the commentary at issue in that case militated in favor of a more lenient sentence for Stinson. *See* 508 U.S. at 47-48. The Court in *Stinson*, therefore, did not grapple with the constitutional issues inherent when *Stinson* deference applies to *increase* a criminal penalty. No subsequent decision of this Court has done so either. *Cf. Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1572 (2017) (declining to "resolve whether the rule of lenity or *Chevron* deference receives priority" because the statute at issue was unambiguous); *see also Webster v. Fall*, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents."). Unlike in *Stinson*, however, deference to the Commission in this case required the court to impose a stricter sentence on Mr. Lovato, so "alarm bells should be going off." *United States v. Havis*, 907 F.3d 439, 450 (6th Cir. 2018) (Thapar, J., concurring).

### B. Three Core Constitutional Principles Compel Lenity.

"[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*). "Penal laws pose the most severe threats to life and liberty, as the Government seeks to brand people as criminals and lock them away." *Nasir*, 2020 WL 7041357, at *25

(Bibas, J.). There is no greater liberty interest in life than to be free from a cage. *See United States v. Faison*, 2020 WL 815699, at *1 (D. Md. Feb. 18, 2020) ("Liberty is the norm; every moment of incarceration should be justified."). For a defendant, "every day, month and year that was added to the ultimate sentence will matter. … [T]he difference between probation and fifteen days may determine whether the defendant is able to maintain his employment and support his family." *Ibid.* *Any* increase in a criminal sentence 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." *Ibid.* "The critical point is that criminal laws are for courts, not for the Government, to construe." *Abramski v. United States*, 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.").

This is not a new concept. The rule of lenity is one of the original tools of statutory construction. *See Wiltberger*, 18 U.S. (1 Wheat.) at 95; *see also Bray v. Atalanta*, 4 F. Cas. 37, 38 (D.S.C. 1794) (ruling that "a penal law [] must be construed strictly"). In simple terms, "[t]he rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them." *United States v. Santos*, 553 U.S. 507, 514 (2008). The rule also applies to guard against increases in punishment, not merely to determine whether the defendant's conduct is criminal in the first place. *Bifulco v. United States*, 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."); *M. Kraus & Bros. v. United States*, 327 U.S. 614, 621-22 (1946) (plurality)

(holding, one year after *Seminole Rock*, "to these provisions must be applied the same strict rule of construction that is applied to statutes defining criminal action"). In fact, lenity "first arose to mitigate draconian sentences." *Nasir*, 2020 WL 7041357, at *24 (Bibas, J.) (citing Livingston Hall, *Strict or Liberal Construction of Penal Statutes*, 48 HARV. L. REV. 748, 749-51 (1935)).

Lenity applies with equal force to the Guidelines, which "exert a law-like gravitational pull on sentences." *Nasir*, 2020 WL 7041357, *25 (Bibas, J.) (citing *United States v. Booker*, 543 U.S. 220, 265 (2005) (Breyer, J., remedial majority opinion)).

Three "core values of the Republic" underlie the rule of lenity: (1) due process; (2) the separation of governmental powers; and (3) "our nation's strong preference for liberty." *Id.* at *24-25. Due process requires that "a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear." *McBoyle v. United States*, 283 U.S. 25, 27 (1931). By construing ambiguities in the defendant's favor, lenity prohibits criminal consequences when Congress did not provide a fair warning through clear statutory language. Lenity also protects the separation of powers: the legislature criminalizes conduct and sets statutory penalties, the executive prosecutes crimes and can recommend a sentence, and the judiciary sentences defendants within the applicable statutory framework. *United States 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. United States*, 471 U.S. 419, 427 (1985).

Finally, and "perhaps most importantly," *Nasir*, 2020 WL 7041357, at *28 (Bibas, J.), lenity "embodies 'the instinctive distaste[] against men languishing in prison unless the lawmaker has clearly said they should.'" *Bass*, 404 U.S. at 347 (citation omitted). This "presumption of liberty remains crucial to guarding against overpunishment." *Nasir*, 2020 WL 7041357, at *26 (Bibas, J.) (describing lenity as "a shield against excessive punishment and stigma"). By promoting liberty, lenity "fits with one of the core purposes of our Constitution, to 'secure the Blessings of Liberty' for all[.]" *Id.* at *25 (quoting U.S. Const. pmbl.).

In addition to securing these core values, the rule of lenity also serves a practical purpose. Lenity "places the weight of inertia upon the party that can best induce [law-makers] to speak more clearly[.]" *Santos*, 553 U.S. at 514. *Stinson* deference undermines this incentive system and reverses the inertia in the rule-maker's favor.

Given the dispositive weight that seven circuits afford to Commission commentary, the commentary becomes almost more controlling than the text of the Guidelines themselves. *Cf. Booker*, 543 U.S. at 258 (striking the portion of the Sentencing Reform Act that made the Guidelines mandatory). This incongruity leaves little reason for the Commission to strive for clarity in the Sentencing Guidelines it submits to Congress when it can effectively amend those Guidelines by simply amending the commentary guidance at any time without congressional approval. *See Christensen v. Harris Cty.*, 529 U.S. 576, 588 (2000) (deferring to an agency's position on an unambiguous rule "would be to permit the agency, under the guise

of interpreting a regulation, to create *de facto* a new regulation").

### C. Lenity Is a Traditional Tool of Interpretation that Applies Before Deference.

Two principles of statutory interpretation support prioritizing lenity over deference. *First*, as this Court reiterated in *Kisor*, a court cannot defer to an agency until after it empties its "legal toolkit" of "all the 'traditional tools' of construction." 139 S. Ct. at 2418. The rule of lenity is one such traditional "rule[] of statutory construction" in this Court's toolkit. *United States v. Thompson/Ctr. Arms Co.*, 504 U.S. 505, 517 (1992); *Nasir*, 2020 WL 7041357, at *25 (Bibas, J.) ("A key tool in that judicial toolkit is the rule of lenity."). 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 cases). Agency deference must come last because "[r]ules of interpretation bind all interpreters, administrative agencies included." *Ibid.* "That means an agency, no less than a court, must interpret a doubtful criminal statute in favor of the defendant." *Ibid*; *see also De Lima v. Sessions*, 867 F.3d 260, 265 (1st Cir. 2017) ("Courts that say lenity doesn't apply until last miss the fact that agencies, like courts, are supposed to apply statutory canons of interpretation, which include lenity.").

Accordingly, as a traditional tool of construction, "lenity takes precedence" over *Stinson* deference. *Nasir*, 2020 WL 7041357, at *26 (Bibas, J.). Whenever a guideline is ambiguous, the court must adopt the more lenient reading—regardless of what the Commission has said in its commentary. *Ibid.*

*Second*, lenity allows courts to avoid the constitutional concerns inherent in construing an ambiguous statute against a criminal defendant. When "an otherwise acceptable construction of a statute would raise serious constitutional problems," courts "will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *see also Parsons v. Bedford, Breedlove & Robeson*, 28 U.S. (1 Pet.) 433, 448-49 (1830) (Story, J.) ("No court ought, unless the terms of an act rendered it unavoidable, to give a construction to it which should involve a violation, however unintentional, of the constitution."); *Murray v. Schooner Charming Betsy*, 6 U.S. (1 Cranch) 64, 118 (1804) (Marshall, C.J.) ("It has also been observed that an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains[.]").

Lenity and constitutional avoidance operate symbiotically when a criminal statute is ambiguous. *See United States v. Davis*, 139 S. Ct. 2319, 2333 (2019) (describing the doctrines as "traditionally sympathetic" to one another). Just as lenity avoids construing ambiguity against a criminal defendant in violation of due process and the separation of powers, so too does the constitutional-avoidance doctrine. *See ibid* ("Applying constitutional avoidance to narrow a criminal statute, as this Court has historically done, accords with the rule of lenity.").

No similar constitutional concerns necessitate the application of *Stinson* deference, which lacks any constitutional underpinning. *See Nasir*, 2020 WL 7041357, at *26 (Bibas, J.) ("There is no compelling

reason to defer to a Guidelines comment that is harsher than the text."); *Havis*, 907 F.3d at 451 (Thapar, J.) ("Such deference is found nowhere in the Constitution—the document to which judges take an oath."). Rather than the Constitution, agency deference is "rooted in a presumption about [the drafter's] intent"; though, the presumption is "always rebuttable." *Kisor*, 139 S. Ct. at 2412. In the criminal context, this presumption must give way to a strict reading of the statute. *Wiltberger*, 18 U.S. at 95. Prioritizing deference over lenity offends due process and violates the judicial oath to uphold the Constitution. *DeBartolo Corp.*, 485 U.S. at 575 (construing ambiguity to avoid constitutional infirmity because "Congress, like this Court, is bound by and swears an oath to uphold the Constitution"). "Whatever the virtues" of agency deference in civil cases, "in criminal justice those virtues cannot outweigh life and liberty. Efficiency and expertise do not trump justice." *Nasir*, 2020 WL 7041357, at *26 (Bibas, J.). When a statute with criminal penalties is ambiguous, therefore "doubts are resolved in favor of the defendant." *Bass*, 404 U.S. at 347. Lenity leaves no room for deference.

### D. Lower Courts Are Evenly Split on Whether to Prioritize Lenity over *Stinson* Deference.

The circuit courts are effectively split about what role, if any, *Kisor* (née *Auer*) deference plays in interpreting criminal penalties. That split extends to *Stinson* cases.

In his *Nasir* concurrence, Judge Bibas opined that the rule of lenity "displaces" deference to the Commission's commentary. 2020 WL 7041357, at *26. He observed, however, that deference might still be

appropriate when the commentary does *not* "tilt toward harshness," as in *Stinson*. *Ibid.*

Judge Thapar expressed a similar view on lenity in his concurrence to the panel decision in *Havis*. He explained that deference has no place in construing sentencing commentary because lenity should apply when the commentary would render a sentence harsher and, even when not, deference would still "deprive the judiciary of its ability to check the Commission's exercise of power." *Havis*, 907 F.3d at 450-51 (Thapar, J.).

The Seventh Circuit "consider[s] rule of lenity arguments when a defendant argues that a particular sentencing guideline is ambiguous." *United States v. McClain*, 23 F. App'x 544, 548 (7th Cir. 2001) (collecting cases). And the panel in *United States v. Winstead* noted its belief that, although it was unnecessary to apply lenity because Guideline § 4B1.2 is unambiguous, "it is not obvious how the rule of lenity is squared with *Stinson*'s description of the commentary's authority to interpret guidelines. We are inclined to believe that the rule of lenity still has some force." 890 F.3d 1082, 1092 n.14 (D.C. Cir. 2018) (Silberman, Garland, Edwards, JJ.).

As for the First Circuit, Judges Torruella and Thompson wrote separately in *United States v. Lewis* to raise their concern that reflexive *Stinson* deference carries "troubling implications for due process, checks and balances, and the rule of law." 963 F.3d 16, 27-28 (1st Cir. 2020) (Torruella & Thompson, JJ., concurring). And in other *Auer* cases, the First Circuit has expressly prioritized lenity over deference. *De Lima*, 867 F.3d at 265.

So too in the Fifth Circuit. *United States v. Moss*, 872 F.3d 304, 308, 314 (5th Cir. 2017) (reaffirming

circuit precedent that precludes *Auer* deference in criminal cases); *see also United States v. Cantu*, 423 F. Supp. 3d 345, 352 (S.D. Tex. 2019) ("Applying the rule of lenity, U.S.S.G. § 1B1.13 cmt. n.1(D) no longer describes an appropriate use of sentence-modification provisions and is thus not part of the applicable policy statement binding the Court.").

On the anti-lenity side of the ledger sit the Second, Eighth, and likely the Fourth, Ninth, and Eleventh Circuits.

In *Mendoza-Figueroa*, the *en banc* Eighth Circuit deferred to the Commission's commentary over a dissent that called for the rule of lenity. 65 F.3d at 692, 696-98. And the Second Circuit did the same in *United States v. Tabb*, 949 F.3d 81, 89 n.8 (2d Cir. 2020), *cert. pending*, No. 20-579 (filed Oct. 28, 2020).

The Eleventh Circuit has "cast doubt" on whether the rule of lenity applies to the interpretative commentary to the Guidelines. *Cingari*, 952 F.3d at 1310-11 (quoting *United States v. Watts*, 896 F.3d 1245, 1255 (11th Cir. 2018)). And the Ninth Circuit's approach of searching beyond the Guidelines' text to add crimes to the Career Offender Guideline suggests an anti-lenity approach. *United States v. Crum*, 934 F.3d 963, 966 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 2629 (2020).

The Fourth has precedent prioritizing deference over lenity in other contexts. *See Yi v. Fed. Bureau of Prisons*, 412 F.3d 526, 535 (4th Cir. 2005) ("[D]eference trumps lenity when courts are called upon to resolve disputes about ambiguous statutory language.") (citation omitted).

And then there is the Tenth Circuit, which, in the decision below adhered to its pre-*Kisor* precedent without even discussing the lurking constitutional

questions, yet recently vacated a panel decision that refused to apply lenity before deference; the court will rehear the issue *en banc*. *Aposhian v. Barr*, 973 F.3d 1151 (10th Cir.), *vacating* 958 F.3d 969, 982-82 (10th Cir. 2020).

This Court's intervention is necessary to clarify that lenity is one of the traditional tools of interpretation that *Kisor* instructed courts to apply before concluding a rule is genuinely ambiguous such that *Stinson* deference might be appropriate.

Only this Court can resolve the issue largely because this Court's own past statements have added to the confusion. In dictum, the Court has stated once that, although it had applied lenity to "specific factual disputes" regarding "a statute that contains criminal sanctions," the Court had "never suggested that the rule of lenity should provide the standard for reviewing facial challenges to administrative regulations whenever the governing statute authorizes criminal enforcement." *Babbitt v. Sweet Home Chapter of Cmts. for a Great Ore.*, 515 U.S. 687, 704 n.18 (1995). Justice Scalia, joined by Justice Thomas, later described *Babbitt*'s footnote as a "drive-by ruling" that "deserves little weight" because it "contradicts the many cases before and since holding that, if a law has both criminal and civil applications, the rule of lenity governs its interpretation in both settings." *Whitman*, 135 S. Ct. at 353-54 (Scalia, J., statement respecting denial of *certiorari*) (citing *Leocal v. Ashcroft*, 543 U.S. 1, 11-12 n.8 (2004); *Thompson/Ctr. Arms*, 504 U.S. at 518 n.10). At least twice since *Babbitt*, the Court has granted a petition that raised the issue of whether lenity takes priority over deference but then disposed of the case on other grounds. *See Esquivel-Quintana*, 137 S. Ct. at 1572; *Barber v. Thomas*, 560 U.S. 474, 488 (2010); *see also Solid Waste Agency of N. Cook Cty.*

*v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 n.8 (2001) (declining to consider the rule of lenity's application to the Clean Water Act because the regulation at issue exceeded the agency's statutory authority).

Now is the time to finally resolve the issue; "liberty is at stake" for Mr. Lovato, as well as Mr. Broadway and Mr. Tabb. *Guedes*, 140 S. Ct. at 790 (Gorsuch, J., statement regarding denial of *certiorari*) (announcing that the Court is awaiting a case on the issue). Denying these pending petitions will signal to the lower courts that they can continue to disregard the important lessons of *Kisor*.

## CONCLUSION

This Court should grant Mr. Lovato's petition along with the petitions in *Broadway*, No. 20-___, and *Tabb*, 20-579, which present substantially similar issues.

December 22, 2020

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