IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,	:	
	:	No. 19-13776
Plaintiff-Appellee,	:	
	:	
v.	:	
	:	
BRANDON DUPREE,	:	
	:	
Defendant-Appellant.	:	

EN BANC BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLANT

APPEAL FROM THE JUDGMENT OF
THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

April 11, 2022

OLIVER J. DUNFORD
Pacific Legal Foundation
4440 PGA Blvd., Ste. 307
Palm Beach Gardens, FL 33410
(561) 691-5000
ODunford@pacificlegal.org

CALEB KRUCKENBERG
Pacific Legal Foundation
3100 Clarendon Blvd., Ste. 610
Arlington, VA 22210
(202) 888-6881
CKruckenberg@pacificlegal.org

Counsel for Amicus Curiae
Pacific Legal Foundation

Appeal No. 19-13776

United States v. Dupree

CERTIFICATE OF INTERESTED PERSONS

Amicus Curiae Pacific Legal Foundation certifies that the following is a complete list of interested persons as required by Fed. R. App. P. 26.1 and Eleventh Circuit Rules 26.1-2(c), and 29-2:

Andrejko, Nicole M.

Byron, The Honorable Paul G.

Cakmis, Rosemary

Cariglio, Gennaro, Jr.

Dunford, Oliver J.

Dupree, Brandon Romel

Elm, Donna Lee

Hall, A. Fitzgerald

Hoppmann, Karin

Irick, The Honorable Daniel C.

Kahn, Conrad Benjamin

Kidd, The Honorable Embry J.

Kruckenberg, Caleb

Appeal No. 19-13776

United States v. Dupree

CERTIFICATE OF INTERESTED PERSONS - continued

Lopez, Maria Chapa

Lukman, Joshua Roy

Napier, Shawn P.

Pacific Legal Foundation, a non-profit, tax-exempt, private California corporation

Rhodes, David P.

Sholl, Peter J.

Skuthan, James T.

Smith, The Honorable Thomas B.

Spaulding, The Honorable Karla R.

Tiffin, Dawn A.

Wick, Kara M.

No publicly traded company or corporation has an interest in the outcome of this appeal.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

STATEMENT OF THE ISSUE

Whether the U.S. Sentencing Commission's informal commentary can bind a federal court's interpretation of unambiguous provisions of the Sentencing Guidelines Manual.

IDENTITY AND INTEREST OF AMICUS CURIAE[1]

Founded in 1973, Pacific Legal Foundation is a nonprofit, tax-exempt, California corporation established for the purpose of litigating matters affecting the public interest. PLF provides a voice in the courts for Americans who believe in limited constitutional government, private property rights, and individual freedom.

PLF is the most experienced public-interest legal organization defending the constitutional principle of separation of powers in the arena of administrative law. PLF's attorneys have participated as lead counsel or counsel for amici in several cases involving the role of the Judicial Branch as an independent check on the Executive and Legislative branches under the Constitution's Separation of Powers. *See, e.g.*, *Lucia v. SEC*, 138 S. Ct. 2044 (2018) (SEC administrative-law judge is "officer of the United States" under the Appointments Clause); *U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.*, 578 U.S. 590 (2016) (judicial

[1] Counsel for all parties have consented to the filing of this brief. Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

review of agency interpretation of Clean Water Act); *Sackett v. EPA*, 566 U.S. 120 (2012) (same); *Rapanos v. United States*, 547 U.S. 715 (2006) (agency regulations defining "waters of the United States"). PLF's attorneys have also appeared as amici in other cases presenting the issue currently under review by this Court. *See United States v. Wynn*, No. 21-5714 (petition for certiorari concerning deference to federal sentencing guidelines commentary).

This case implicates significant concerns about the proper role an administrative agency may occupy in criminal sentencing. PLF, therefore, offers a discussion of the relevant constitutional principles and the dire consequences of the approach taken so far by this Court.

SUMMARY OF THE ARGUMENT

The U.S. Sentencing Commission, an administrative agency, may not create *ad hoc* sentencing enhancements outside the route specifically set out by Congress, nor may it bind federal court interpretations of existing guideline provisions merely from the force of its own will. Congress did not intend for the Commission to exert such absolute power over sentencing enhancements but instead guaranteed Congressional oversight into any amendments to the guidelines. By preserving

Congressional control, the Sentencing Reform Act ensured that the Commission could neither exercise legislative nor judicial prerogatives over criminal sentencing decisions.

Nevertheless, almost 30 years ago, a panel of this Court cast aside these fundamental principles with little analysis and no discussion of the core constitutional concerns. *See United States v. Smith*, 54 F.3d 690, 693 (11th Cir. 1995). That decision has bound sentencing judges ever since, and unlawfully lengthened countless prison sentences in this Circuit. The *Smith* opinion distorted the Commission's role, relinquished judicial authority, and has threatened Congressional control over the guidelines. This Court should correct that longstanding error, vacate *Smith* and its progeny, and hold that the Commission may not enlarge or amend its guidelines through informal commentary and that its commentary serves only as the Commission's nonbinding views of the guidelines themselves.

Appellant, Brandon Dupree, convincingly argued to the panel that the sentencing enhancement applied to him was an incorrect reading of the guideline provision that had been approved by Congress. PLF writes separately to stress the important constitutional implications of the approach taken by this Court in *Smith* and followed by the panel in this

case. If the Commission can bind a federal court with informal commentary, without even attempting to resolve a regulatory ambiguity, it can exercise legislative power specifically withheld from it and simultaneously intrude on the judicial prerogative to interpret the law. Instead of allowing the Commission to intrude on constitutionally separate functions of governance, principles of due process and respect for constitutional order require courts to abandon all deference to the Commission in favor of the rule of lenity.

ARGUMENT

I. Requiring Deference to the Commission Absent Ambiguity Violates the Separation of Powers

A. Congress Deliberately Limited the Commission's Authority To Amend the Guidelines, Which Avoids Separation of Powers Concerns

When Congress created the Commission, it explicitly delegated certain authority over federal sentencing. A product of the Sentencing Reform Act, the Commission was created to "establish sentencing policies and practices for the Federal Criminal justice system." 28 U.S.C. § 991(a), (b)(1). Seated nominally in the Judicial Branch while exercising quasi-legislative power, the Commission is "an unusual hybrid in structure and authority." *Mistretta v. United States*, 488 U.S. 361, 412 (1989).

Section 994(a) of the Act directs the Commission to take two types of action: (1) promulgating the guidelines, and (2) issuing "general policy statements regarding application of the guidelines or any other aspect of sentencing or sentence implementation." The Commission must promulgate its guidelines pursuant to notice-and-comment rulemaking. *Id.* at § 994(x). And the Commission must submit any amendments or modifications of the guidelines pursuant to § 994(a) to Congress for a mandatory review period of at least 6 months, during which Congress may modify or reject the Commission's amendments or modifications. *Id.* at § 994(p).

There is, however, a third category of action the Commission sometimes takes. The Act—by implication rather than express mandate—permits the Commission to publish commentary about its guidelines. *See Stinson v. United States*, 508 U.S. 36, 41 (1993) (citing 18 U.S.C. § 3553(b)). According to the Commission, the purpose of its commentary is to: (1) explain or interpret the guidelines; (2) suggest circumstances when courts should depart from the guidelines; and (3) provide background information, such as what factors the Commission considered. U.S.S.G. § 1B1.7. The Commission characterizes its

commentary as having the same legal "force of policy statements" and claims that a court's failure to follow the commentary "could constitute an incorrect application of the guidelines, subjecting the sentence to possible reversal on appeal." U.S.S.G. § 1B1.7, comment. But the commentary—unlike the guidelines—is not expressly authorized by statute, not issued following notice-and-comment rulemaking, and not subject to congressional review.

Because of its anomalous presence in our constitutional system, the Commission has long raised concerns that it might be exercising powers held exclusively by other branches. Nevertheless, the Supreme Court upheld the Commission's continued existence based, in part, on two limitations on the Commission's power: (1) Congress reviews amendments to the guidelines before they take effect, and (2) the Commission must promulgate its amendments through notice-and-comment rulemaking. *Mistretta*, 488 U.S. at 393–94. Because "the Commission is fully accountable to Congress," these limits prevented the Commission from exercising "the power of judging joined with the legislative." *Id.* at 394 (quoting The Federalist No. 47 (James Madison)). "These two constraints—congressional review and notice and comment—

stand to safeguard the Commission from uniting legislative and judicial authority in violation of the separation of powers." *United States v. Havis*, 927 F.3d 382, 385–86 (6th Cir. 2019) (*en banc*) ("*Havis II*").

B. Deference to Any Agency Relies on Congressional Delegation of Legislative Power To Fill in Statutory Ambiguities

Whereas Congress explicitly delegated authority to the Commission to issue the guidelines, administrative deference to the Commission's interpretation of those guidelines involves a different, implicit, delegation of power. Judicial deference to administrative interpretations of regulations is "rooted in a presumption about congressional intent—a presumption that Congress would generally want the agency to play the primary role in resolving regulatory ambiguities." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2412 (2019). It survives constitutional scrutiny only because Congress has implicitly directed an agency, not the judiciary, to "fill[] regulatory gaps" left by ambiguous regulatory text. *Id.* at 2413.

The Supreme Court has concluded that the "express congressional delegation of authority for rulemaking" that allows the Commission to "promulgate[] the guidelines," also allows it to issue binding commentary "to assist in the interpretation and application of those rules," to which a

court must defer. *Stinson v. United States*, 508 U.S. 36, 44–45 (1993) (citing *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)). To be sure, the Court also suggested in *Stinson* that deference to the Commission was "not the product of delegated authority for rulemaking" that would depend on an ambiguity. *Id.* at 44. But in *Kisor,* the Court repudiated the "mixed messages" found in *Stinson* and similar decisions, and stressed that "Congress intended for courts to defer to agencies when they interpret their own *ambiguous* rules." 139 S. Ct. at 2414 (emphasis added).[2] "If uncertainty does not exist, there is no plausible reason for deference. The regulation then just means what it means—and the court must give it effect, as the court would any law." *Id.* 2415. Otherwise, deference would "permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation." *Id.* (quotation omitted).

C. The Approach Taken by the Panel in *Smith* Violates the Separation of Powers

The panel in *Smith* decided only that the Commission had the statutory authority to issue commentary concerning the career offender

[2] The Court even cataloged *Stinson* as part of the "legion" deference cases issued before *Auer v. Robbins*, 519 U.S. 452 (1997), that had applied "reflexive" deference that was a "caricature" of the doctrine. *Kisor*, 139 S. Ct. at 2411 n.3, 2412.

guidelines and that Application Note 1 was not "inconsistent with, or a plainly erroneous reading of, sections 4B1.1 or 4B1.2." 54 F.3d at 693. Of course, the panel said nothing at all about the presence, or absence, of any ambiguity in the guidelines themselves. *See id.* And the now-vacated panel opinion simply said that "Dupree's argument that application note 1 to § 4B1.2 is unenforceable is [] foreclosed by [this] precedent," "even if it was wrongly decided." *United States v. Dupree*, 849 F. App'x 911, 912 (11th Cir. 2021) (unpublished), *reh'g en banc granted, opinion vacated*, 25 F.4th 1341 (11th Cir. 2022).

The approach taken by the *Smith* panel impermissibly consolidates *both* the lawmaking and judicial function in the Commission, doubly threatening the separation of powers. As the *en banc* Third Circuit recognized, courts must reform their practice of granting "uncritical and broad deference to agency interpretations" in order to "protect[] the separation of powers." *United States v. Nasir*, 982 F.3d 144, 158–60 (3d Cir. 2020) (*en banc*) ("*Nasir I*"), *vacated in part on other grounds by* — S. Ct. —, No. 20-1522, 2021 WL 4507560 (2021), *and reinstated by* 17 F.4th 459, 471 (3d Cir. 2021) (*en banc*) ("*Nasir II*"). Indeed, "[i]f we accept that the commentary can do more than interpret the guidelines, that it can

add to their scope, we allow circumvention of the checks Congress put on the Sentencing Commission, a body that exercises considerable authority in setting rules that can deprive citizens of their liberty." *Nasir I*, 982 F.3d at 159. "If the Commission can add to or amend the Guidelines solely through commentary, then it possesses a great deal more legislative power than *Mistretta* envisioned. This means that in order to keep the Sentencing Commission in its proper constitutional position—whatever that is exactly—courts must keep Guidelines text and Guidelines commentary, which are two different vehicles, in their respective lanes." *United States v. Havis*, 907 F.3d 439, 443 (6th Cir. 2018) ("*Havis I*") (Thapar, J., concurring). Thus, only by giving commentary "no independent legal force" can a court preserve the separation of powers. *Havis II*, 927 F.3d at 386.

The panel in *Smith* did not have the benefit of the Court's clarifications in *Kisor*, but its decision nevertheless elevated the Commission's informal commentary far beyond appropriate constitutional limits. *Smith*'s command that Application Note 1 "constitutes a binding interpretation of the term 'controlled substance offense,'" 54 F.3d at 693, even when the guidelines themselves are

unambiguous, deprives sentencing judges of their core interpretive role. This in turn allows the Commission to usurp the lawmaking function that properly belongs to Congress. And that flawed analysis has prevailed for nearly 30 years. *See Dupree*, 849 F. App'x at 912. Now that this Court *does* have the benefit of the Supreme Court's explanations in *Kisor*, it must correct these compound errors and simply interpret the guidelines on its own, without looking to the Commission's informal views on the matter. *See United States v. Campbell*, 22 F.4th 438, 445 (4th Cir. 2022) ("Thus, as *Kisor* instructs, if the inconsistency between U.S.S.G. § 4B1.2(b) and its Commentary were not apparent from the plain text, we would turn to the traditional tools of statutory construction to determine if U.S.S.G. § 4B1.2(b) is genuinely ambiguous.") (citation omitted).

II. All Judicial Deference to the Commission Threatens Constitutional Protections Enshrined in the Rule of Lenity

Another constitutional error lurks below the surface of this case, and this Court should simply follow its prior precedent making clear that deference to agency interpretation can *never* be acceptable when it increases criminal punishment. *See United States v. Phifer*, 909 F.3d 372,

385 (11th Cir. 2018) (Op. by Rosenbaum, J., joined by Jordan, Dubina, JJ.) ("*Auer* deference does not apply in criminal cases, and instead, we must look solely to the language of the regulatory provision at issue to determine whether it unambiguously prohibits the act charged"). "[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). The *Smith* line of cases, however, reflexively applied deference as a means of *increasing* criminal punishment. "Were this a civil case," the separation of powers concerns discussed above "would merit close attention. But as this is a criminal case, and applying *Auer* would extend [Mr. Dupree's] time in prison, alarm bells should be going off. The whole point of separating the federal government's powers in the first place was to protect individual liberty." *See Havis I*, 907 F.3d at 450 (Thapar, J., concurring).

"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 II*, 17 F.4th at 473 (Bibas, J., concurring). "The Commission thus exercises a sizable piece 'of the ultimate governmental power, short of

capital punishment'—the power to take away someone's liberty." *Havis II*, 927 F.3d at 385 (quoting *United States v. Winstead*, 890 F.3d 1082, 1092 (D.C. Cir. 2018)).

The rule of lenity is a vital means of limiting this "ultimate governmental power." *Id.* The rule is a tool of construction "perhaps not much less old than construction itself." *United States v. Wiltberger*, 18 U.S. (1 Wheat.) 76, 95 (1820). In simple terms, "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) (plurality op.). The rule also applies during sentencing, not merely to determining whether the defendant's conduct is criminal in the first place. *See 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."). Indeed, "[h]istorically, lenity applied to all 'penal' laws—that is, laws inflicting any form of punishment, including ones we might now consider 'civil' forfeitures or fines." *Wooden v. United States*, 142 S. Ct. 1063, 1086 (2022) (Gorsuch, J., concurring, joined by Sotomayor, J.) (citing cases). Lenity applies with equal force to the guidelines, which

"exert a law-like gravitational pull on sentences." *Nasir II*, 17 F.4th at 474 (Bibas, J., concurring) (citing *United States v. Booker*, 543 U.S. 220, 265 (2005)); *see also United States v. Inclema*, 363 F.3d 1177, 1182 (11th Cir. 2004) (applying the rule of lenity to the guidelines).

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." *Nasir II*, 17 F.4th at 473 (Bibas, J., concurring). 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. And "lenity's emphasis on fair notice isn't about indulging a fantasy. It is about protecting an indispensable part of the rule of law—the promise that, whether or not individuals happen to read the law, they can suffer penalties only for violating standing rules announced in advance." *Wooden*, 142 S. Ct. at 1083 (2022) (Gorsuch, J., concurring).

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). "It 'places the weight of inertia upon the party that can best induce Congress to speak more clearly,' forcing the government to seek any clarifying changes to the law rather than impose the costs of ambiguity on presumptively free persons." *Wooden*, 142 S. Ct. at 1083 (Gorsuch, J., concurring) (quoting *Santos*, 553 U.S. at 514). "In this way, the rule helps keep the power of punishment firmly 'in the legislative, not in the judicial department.'" *Id.* (quoting *Wiltberger*, 5 Wheat. at 95.).

Finally, and "perhaps most importantly," lenity "embodies 'the instinctive distaste[] against men languishing in prison unless the lawmaker has clearly said they should.'" *Nasir II*, 17 F.4th at 473 (Bibas, J., concurring) (quoting *Bass*, 404 U.S. at 347 (citation omitted)). By promoting liberty, lenity "fits with one of the core purposes of our

Constitution, to 'secure the Blessings of Liberty' for all[.]" *Id.* (quoting U.S. Const. pmbl.); *see also Wooden*, 142 S. Ct. at 1081 (Gorsuch, J., concurring) ("Under [the rule of lenity] any reasonable doubt about the application of a penal law must be resolved in favor of liberty.").

But deferring to the Commission and erring on the side of *more time* in prison, wreaks havoc with fundamental limits on when the government can exercise its ultimate power. "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); *see also United States v. Apel*, 571 U.S. 359, 369 (2014) ("[W]e have never held that the Government's reading of a criminal statute is entitled to any deference."). And if a guideline enhancement is truly uncertain, then a court cannot look to the Commission for an answer—the answer lies in lenity. The *Smith* line of cases has turned this baseline constitutional value upside down.

Of course, this Court has already recognized as much, and all that remains is to correct the *Smith* decision in light of these principles. This Court has explained that it can avoid these problems because the rule of lenity applies at *Chevron* [or *Kisor*] step one: it is a "canon of

construction" applied to discern if a statute is truly ambiguous in the first place. *Hylton v. U.S. Att'y Gen.*, 992 F.3d 1154, 1158 (11th Cir. 2021) (Op. by William Pryor, J., joined by Jill Pryor, Carnes, JJ.); *see also Nasir II*, 17 F.4th at 472 (Bibas, J., concurring) ("In *Kisor*, the Supreme Court awoke us from our slumber of reflexive deference: agency interpretations might merit deference, but only when the text of a regulation is truly ambiguous. Before deferring, we must first exhaust our traditional tools of statutory construction. Anything less is too narrow a view of the judicial role. . . . And one tool among many stands out as well suited to the task: the rule of lenity.").

This flows from the language of *Chevron* itself, because at step one, a court "evaluate[s] whether Congress has written clearly," but "[t]o determine whether a statute has a plain meaning, we ask whether its meaning may be settled by the 'traditional tools of statutory construction.'" *Hylton*, 992 F.3d at 1157–58 (quoting *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984)). "These tools encompass our 'regular interpretive method,' *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600 (2004), including the canons of construction." *Id.* at 1158; *see also Robinson v. Shell Oil Co.*, 519 U.S.

337, 341 (1997) ("The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole."). "Where, as here, the canons supply an answer, *Chevron* leaves the stage." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1630 (2018).

No wonder then, this Court has also held that "that *Auer* deference does not apply in criminal cases, and instead, we must look solely to the language of the regulatory provision at issue to determine whether it unambiguously prohibits the act charged." *Phifer*, 909 F.3d at 385. "[W]hen a criminal regulation is ambiguous . . . the rule of lenity governs instead." *Id.* at 383. This ensures that "the public is entitled to 'fair warning' of prohibited conduct if it can be penalized for engaging in such behavior," and "'circumscribes the discretion of the enforcing authority and its agents' . . . to maintain separation of powers between the legislature (the executive serving as the legislature's agent) and the executive (serving as the executive)." *Id.* at 384 (quoting *Diamond Roofing Co., Inc. v. Occupational Safety & Health Review Commission*, 528 F.2d 645, 649 (5th Cir. 1976)). Indeed, this Court's decision followed

from the Fifth Circuit's "binding precedent in the Eleventh Circuit" from *Diamond Roofing*. *Id*. at 385.

The *Smith* line of cases thus included hidden constitutional errors that this Court must not repeat. *See Nasir II*, 17 F.4th at 472 (Bibas, J., concurring) (observing that the "narrow scope" of the court's ruling on ambiguity "hints at a broader problem" with *Stinson*). Instead, to respect the basic premises of the separation of powers and fair notice, this Court should follow the standard it laid down in *Phifer*, which was echoed by the Third and Sixth Circuits, and apply the rule of lenity *first* to any lingering interpretive questions presented by the guidelines provisions here.

CONCLUSION

"As [the Supreme Court has] explained on many prior occasions, the separation of powers is designed to preserve the liberty of all the people." *Collins v. Yellen*, 141 S. Ct. 1761, 1780 (2021). When power is improperly consolidated, violations of other rights have no remedy. But Mr. Dupree and countless others have been sentenced to *years* of additional prison time through the Commission's improper arrogation of

power. This Court should therefore correct this injustice, which threatens all of our liberty, and overrule *Smith*.

DATED: April 11, 2022.

Respectfully submitted,

/s/ Caleb Kruckenberg
CALEB KRUCKENBERG
Pacific Legal Foundation
3100 Clarendon Blvd., Ste. 610
Arlington, VA 22201
(202) 888-6881
CKruckenberg@pacificlegal.org

OLIVER J. DUNFORD
Pacific Legal Foundation
4400 PGA Blvd., Ste. 307
Palm Beach Gardens, FL 33410
(916)503-9060
ODunford@pacificlegal.org

Counsel for Amicus Curiae
Pacific Legal Foundation

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitations of Fed. R. App. P. 29(a)(5), 32(a)(7) and 11th Cir. R. 35-7, 35-8, because this brief contains 3,843 words, excluding items authorized by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements and the type style requirements because this brief has been prepared in a proportionately spaced typefaces using Microsoft Word for Office 365 in 14-point Century Schoolbook font.

DATED: April 11, 2022.

Respectfully submitted,

/s/ Caleb Kruckenberg
CALEB KRUCKENBERG
Counsel for Amicus Curiae
Pacific Legal Foundation

CERTIFICATE OF SERVICE

I hereby certify that on April 11, 2022, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system which sent notification of such filing to all counsel of record.

DATED: April 11, 2022.

Respectfully submitted,

/s/ Caleb Kruckenberg
CALEB KRUCKENBERG
Counsel for Amicus Curiae
Pacific Legal Foundation