No. 17-5772

In the United States Court of Appeals for the Sixth Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JEFFERY HAVIS,

Defendant-Appellant.

On Appeal from the United States District Court
for the Eastern District of Tennessee, Chattanooga Division
Case No. 1:16-cr-00121-1

BRIEF OF THE NEW CIVIL LIBERTIES ALLIANCE AS AMICUS CURIAE IN SUPPORT OF APPELLANT'S PETITION FOR REHEARING EN BANC

PHILIP HAMBURGER
MARK CHENOWETH
CALEB KRUCKENBERG
New Civil Liberties Alliance
P.O. Box 19005
Washington, DC 20036-9005
(202) 869-5210

Counsel for Amicus Curiae

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Interests of Amicus Curiae

The New Civil Liberties Alliance (NCLA) is a nonprofit civil-rights organization and public-interest law firm devoted to defending constitutional freedoms. 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, the right to be tried in front of an impartial and independent judge, and the right to live under laws made by the nation's elected lawmakers through constitutionally prescribed channels. Yet these selfsame rights are also very contemporary—and in dire need of renewed vindication—precisely because Congress, federal administrative agencies, and sometimes even the courts have trampled them for so long.

NCLA views the administrative state as an especially serious threat to civil liberties. No other current aspect of American law denies more rights to more Americans. Although Americans still enjoy the shell of their Republic, there has developed within it a very different sort of government—a type, in fact, that the Constitution was designed to prevent. This unconstitutional administrative state within the Constitution's United States is the focus of NCLA's concerns.

NCLA is particularly disturbed by the spreading practice of extending judicial "deference" to the commentary of the United States Sentencing Commission. 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 v. United States*, 508 U.S. 36 (1993) (instructing federal courts to treat the Sentencing Commission's commentary as

"authoritative," without ever considering or discussing the constitutional problems that arise from a mandatory deference regime of this sort). Indeed, Judge Thapar's concurrence touched on some of the many constitutional problems that arise when Article III judges abandon their duty of independent judgment and "defer" to someone else's views about how the laws should be interpreted. *See* slip op. at 16–18 & n.1 (Thapar, J., concurring). Rehearing en banc is warranted to enable all members of this Court to consider these oft-overlooked or disregarded constitutional concerns.

Statement of Compliance with Rule 29

All parties have been consulted about the filing of this brief. Defendant-Appellant Jeffery Havis consented to the filing of this brief. Plaintiff-Appellee the United States of America takes no position concerning the filing of this brief. No counsel for a party authored any part of this brief. And no one other than the amicus curiae, its members, or their counsel contributed money that was intended to finance the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

Rarely does a court encounter a more compelling case for en banc review. All three judges on the original panel have called for the reconsideration of *United States v. Evans*, 699 F.3d 858 (6th Cir. 2012), an unsound decision that will continue to bind three-judge panels of this Court until it is overruled en banc. A recent decision from the D.C. Circuit Court of Appeals has also contradicted *Evans*, *see United States v. Winstead*, 890 F.3d 1082, 1090–91 (D.C. Cir. 2018), and the en banc court should at least consider whether to reconcile its jurisprudence with the D.C. Circuit before leaving a split of authority for the Supreme Court to resolve.

But there are even more reasons for taking this case en banc—beyond those that Mr. Havis has already presented in his trenchant and powerful petition. The very idea of an Article III court "deferring" to mere commentary of the U.S. Sentencing Commission presents grave constitutional concerns, and none of these concerns has been considered or discussed in the Supreme Court rulings that established this deference regime. *See Stinson v. United States*, 508 U.S. 36 (1993); *Auer v. Robbins*, 519 U.S. 452 (1997). Judge Thapar acknowledged some of these constitutional issues in his concurrence, *see* slip op. at 16–18 & n.1 (Thapar, J., concurring), but they deserve a full airing before the en banc court. The Court should not only grant rehearing to reconsider *Evans*, but it should also instruct the parties to brief and argue the constitutional issues described in Judge Thapar's concurrence.

ARGUMENT

The Constitution requires federal judges to exercise independent judgment and refrain from bias when interpreting the law. These are foundational constitutional requirements for having an independent judiciary. Article III gives federal judges life tenure and salary protection to ensure that judicial pronouncements will reflect a court's independent judgment rather than the desires of the political branches. And the Due Process Clause forbids judges to display any type of bias in favor or against a litigant when resolving disputes. These statements of judicial duty are so axiomatic that they are seldom if ever mentioned or relied upon in legal argument—because to even suggest that a court might depart from its duty of independent judgment or display bias toward a litigant would be a scandalous insinuation.

Yet the judiciary flouts these foundational constitutional commands whenever it "defers" to an agency's interpretation of the law—and that remains the case even when the "deference" regime is commanded by a ruling of the Supreme Court. *See Stinson v. United States*, 508 U.S. 36, 47 (1993) (instructing federal courts to treat the Sentencing Commission's commentary as "authoritative," unless the commentary is "plainly erroneous or inconsistent" with the text of a guideline, or unless the commentary violates the Constitution or a federal statute). The practice of deferring to the Sentencing Commission's interpretation of a sentencing guideline violates the Constitution by requiring judges to abandon their duty of independent judgment, in violation of Article III and the judicial oath. It also raises serious due-process

and separation-of-powers questions when it causes courts to construe ambiguities *against* (rather than in favor of) criminal defendants.

I. *STINSON* VIOLATES ARTICLE III BY REQUIRING JUDGES TO ABANDON THEIR DUTY OF INDEPENDENT JUDGMENT

The first constitutional problem with *Stinson*'s deference regime is that it compels judges to abandon their duty of independent judgment. The federal judiciary was established as a separate and independent branch of the federal government, and its judges were given life tenure and salary protection to shield their decisionmaking from outside influences. *See* U.S. Const. art. III. Yet *Stinson* commands Article III judges to abandon judicial independence by giving automatic weight to the Sentencing Commission's opinion of what a Sentencing Guideline means—not on account of its persuasiveness, but on account of the brute fact that this non-judicial entity has weighed in on the interpretive question before the Court. *See Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring) ("'The judicial power . . . requires a court to exercise its independent judgment in interpreting and expounding upon the laws,' . . . [D]eference precludes judges from exercising that judgment." (quoting *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1217 (2015) (Thomas, J., concurring))).

This abandonment of independent judgment would never be tolerated in any other context—even if it were commanded by statute and even if it commanded deference to a uniquely expert body. Imagine if a statute established

a committee of expert law professors and instructed the federal judiciary to "defer" to this committee's announced interpretations of federal statutes or regulations so long as its pronouncements were "reasonable." A statute of this sort would be laughed out of court; it would be declared an invasion of the judicial prerogatives of Article III and a perversion of the independent judgment that the Constitution requires from the judiciary. Yet *Stinson* operates precisely the same way: It allows a non-judicial entity—the U.S. Sentencing Commission—to partake in the powers of judicial interpretation, and it commands judges to "defer" to the legal pronouncements of a supposedly expert body external to the judiciary.[1] And for constitutional purposes, it does not matter whether a statute or an article III precedent is causing the offense.

Stinson deference is nothing more than a command that courts abandon their duty of independent judgment and assign weight to a non-judicial entity's interpretation of the law. It is no different in principle from an instruction that courts assign weight and defer to statutory interpretations announced by a congressional committee, a group of expert legal scholars, or the *Cincinnati Enquirer* editorial page. In each of these scenarios, the courts would be following another entity's interpretation of the law so long as it were "reasonable"—even if the court's own judgment would lead it to conclude that the law means something else. A judge who acted in such a manner *without* being commanded to do so by a ruling of the Supreme Court would be accused of

1. Indeed, one of the four sitting Commissioners, whose interpretations are supposedly authoritative for this Court, is a law professor.

gross dereliction of judicial duty and would be violating Article III, which not only empowers but requires independent judges to resolve the "cases" and "controversies" within their jurisdiction.[2] Article III makes no allowance for judges to abandon their duty to exercise their own independent judgment, let alone to rely upon the judgment of entities that do not necessarily enjoy life tenure or salary protection. But, if anything, the constitutional offense is even greater if courts behave this way in lockstep under the command of the Supreme Court.

Even to the extent that the Commission often consists mainly of members of the judiciary, those Commissioners are not acting as judges when they approve the Commentary to the Guidelines. Instead, they are serving as part-time Commissioners and presumably using their expertise as federal judges to inform their decisions. Mandating deference to these decisions by the Commission, though, creates a structure where only some judges' interpretations are authoritative, and only in a context wholly separate from the normal judicial order.

This abdication of judicial responsibility is compounded by the fact that the Commission is required to submit amendments to the Guidelines for Congressional approval before they may take effect. *See* 28 U.S.C. § 994(p). And the Commission's written policy is "to include amendments to policy

2. *See Cohens v. Virginia*, 19 U.S. 264, 404 (1821) ("We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution.").

statements and commentary in any submission of guideline amendments to Congress." U.S. Sentencing Commission, Rules of Practice and Procedure, Rule 4.1. Yet Congress is never asked to approve the commentary. *See* 28 U.S.C. § 994(p). *Stinson* therefore requires judges to abandon their duty on commentary over which Congress has had no say. The only say, it seems, comes from a majority of the Commission.

To be clear, there is nothing at all wrong or constitutionally problematic about a court that considers the U.S. Sentencing Commission's commentary and gives it weight according to its persuasiveness. *See, e.g.*, 18 U.S.C. § 3553(b) (allowing but not requiring courts to "consider" the "official commentary of the Sentencing Commission" when deciding whether to depart from a guidelines range); *Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue*, 914 N.W.2d 21, 53 (Wis. 2018) (noting "administrative agencies can sometimes bring unique insights to the matters for which they are responsible" but that "does not mean we should defer to them."). The Commissioners may have their views and opinions heard and considered by the court, just as any other litigant or amicus party, and a court may and should consider the "unique insights" the Commissioners may bring on account of their expertise and experience. *Tetra Tech*, 914 N.W.2d at 53; *see also id.* ("'[D]ue weight' means giving 'respectful, appropriate consideration to the agency's views' while the court exercises its independent judgment in deciding questions of law. . . . 'Due weight' is a matter of persuasion, not deference."). None of this compromises a court's duty of independent judgment. But *Stinson* requires far

more than respectful consideration of an agency's views; it commands that courts give weight to those views simply on account of the *fact* that they appear in the Commissioners' "commentary," and it instructs courts to subordinate their own judgments to the views preferred by the Commission. The duty of independent judgment allows (indeed, requires) courts to consider an agency's views and to adopt them *when persuasive*, but it absolutely forbids a regime in which courts give automatic weight to a non-judicial entity's interpretations of the law.

II. *STINSON* RAISES GRAVE DUE-PROCESS AND SEPARATION-OF-POWERS CONCERNS WHEN IT IS USED TO CONTRAVENE THE RULE OF LENITY

Another constitutional problem with *Stinson* is that it often (though not always) requires the judiciary to construe ambiguities in criminal laws *against* the criminal defendant. In this case, for example, the panel relied on the commentary to the Guidelines to broadly construe a Guideline's definition of "controlled substance offense." *See* slip op. at 2–4. Such a construction built on such a basis not only runs afoul of the venerable rule of lenity, but it also presents serious constitutional questions that *Stinson* never considered nor addressed.

The rule of lenity is rooted in constitutional due-process and separation-of-powers concerns. It ensures that would-be lawbreakers have fair notice of the consequences of their actions, and it ensures that the *legislature* establishes crimes and punishments rather than leaving those tasks to subsequent

interpreters such as prosecutors or courts. *See United States v. Lanier*, 520 U.S. 259, 266 (1997) (describing the rule of lenity as one of the "manifestations of the fair warning requirement" in the Due Process Clause); *United States v. Kozminski*, 487 U.S. 931, 952 (1988) ("The purposes underlying the rule of lenity [are] to promote fair notice to those subject to the criminal laws, to minimize the risk of selective or arbitrary enforcement, and to maintain the proper balance between Congress, prosecutors, and courts"); *see also Whitman v. United States*, 135 S. Ct. 352, 354 (2014) (statement of Scalia, J., respecting the denial of certiorari) ("[T]he rule of lenity's purpose [includes] providing 'fair warning' to would-be violators. . . . [E]qually important, it vindicates the principle that only the *legislature* may define crimes and fix punishments."); William N. Eskridge Jr., *Public Values in Statutory Interpretation*, 137 U. Pa. L. Rev. 1007, 1029 (1989) ("The rule of lenity rests upon the due process value that government should not punish people who have no reasonable notice that their activities are criminally culpable, as well as the separation-of-powers value that prosecutors and courts should be unusually cautious in expanding upon legislative prohibitions where the penalty is severe."). To be sure, the Supreme Court has never gone so far as to say that the Constitution *mandates* the rule of lenity. *See* Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 Harv. L. Rev. 2085, 2094 (2002) (discussing the constitutional status of the rule of lenity). But the Court's pronouncements have made clear that an *anti-lenity* regime—in which ambiguities in sentencing laws are construed *against* rather than in favor of criminal defendants—

threatens due-process rights and the separation of powers. No court should subordinate the rule of lenity to agency "deference" doctrines without at least considering whether doing so would undermine or violate these constitutional requirements.

None of these constitutional concerns were presented or discussed in *Stinson*, because the relevant commentary in that case had construed a Sentencing Guideline *in favor of* the criminal defendant's position. *See Stinson v. United States*, 508 U.S. 36, 39 (1993) (deferring to commentary that interpreted "crime of violence" to *exclude* the unlawful possession of a firearm by a felon). In that case, both *Stinson* deference and the rule of lenity pointed in the same direction—so the Supreme Court had no occasion to consider the constitutional problems that arise when *Stinson* deference is used to invert the rule of lenity and interpret ambiguous Sentencing Guidelines against criminal defendants. The Court should grant rehearing en banc to discuss these constitutional issues, and it should instruct the parties to brief them.

III. The En Banc Court Should Call Out These Constitutional Problems with *Stinson* Deference Notwithstanding Stare Decisis

Stinson never even considered or addressed the constitutional objections to its deference regime—and neither has any subsequent decision of the Supreme Court. So it cannot be said that the Supreme Court has rejected these constitutional objections to *Stinson* deference, because judicial precedents do not resolve issues or arguments that were never raised or discussed. *See*

Waters v. Churchill, 511 U.S. 661, 678 (1994) (plurality opinion) ("[C]ases cannot be read as foreclosing an argument that they never dealt with."); *see also Lewis v. Casey*, 518 U.S. 343, 352 n.2 (1996) (holding that when "standing was neither challenged nor discussed" in an earlier case, that case "has no precedential effect" on the issue of standing); *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) ("The [issue] was not there raised in briefs or argument nor discussed in the opinion of the Court. Therefore, the case is not a binding precedent on this point."); *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 557 (2001) (Scalia, J., dissenting) ("Judicial decisions do not stand as binding 'precedent' for points that were not raised, not argued, and hence not analyzed."). *Stare decisis* therefore presents no obstacle to a lower court raising these constitutional issues and declaring *Stinson* deference unconstitutional. And in all events, a court's ultimate duty is to enforce the Constitution—even if that comes at the expense of Supreme Court opinions that never considered the constitutional problems with what they were doing. The abandonment of independent judgment and the display of systematic bias in favor of powerful government agencies is the legacy of the deference regimes, such as *Stinson*, that the Supreme Court has nurtured and propagated. It is long past time for conscientious judges to call out the ways in which this "deference" has corrupted the judiciary—and to advocate a return to the judicial independence that our Constitution prescribes.

CONCLUSION

The petition for rehearing en banc should be granted.

Respectfully submitted.

/s/ Caleb Kruckenberg
PHILIP HAMBURGER
MARK CHENOWETH
CALEB KRUCKENBERG
New Civil Liberties Alliance
P.O. Box 19005
Washington, DC 20036-9005
(202) 869-5210

Counsel for Amicus Curiae

Dated: November 13, 2018

Certificate of Service

I certify that on November 13, 2018, I e-mailed this document to Ms. Beverly Harris in the clerk's office, who will send notice of this filing to all registered CM/ECF users.

/s/ Caleb Kruckenberg
Caleb Kruckenberg
Counsel for Amicus Curiae

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/s/ Caleb Kruckenberg
CALEB KRUCKENBERG
Counsel for Amicus Curiae

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