IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

United States of America,	:	
	:	No. 18-1468
	:	
Plaintiff-Appellee,	:	
	:	
v.	:	
	:	
Daniel Lovato,	:	
	:	
	:	
Defendant-Appellant.	:	

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

ON APPEAL FROM THE JUDGMENT OF
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

No. 18-CR-00213-RM
THE HONORABLE RAYMOND P. MOORE
DISTRICT JUDGE

New Civil Liberties Alliance
Caleb Kruckenberg
Litigation Counsel
Mark Chenoweth
General Counsel
Counsel for *Amicus Curiae*

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INTERESTS OF *AMICUS CURIAE*

The New Civil Liberties Alliance (NCLA) is a nonpartisan, 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 widespread 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 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). Indeed, as set out below, 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. 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 consented to the filing of this brief. No counsel for a party authored any part of this brief. No one other than the *amicus curiae*, its members, or their counsel contributed money that was intended to finance the preparation or submission of this brief.

SUMMARY OF ARGUMENT

This case presents an opportunity for this Court to join a growing chorus of courts correcting an erroneous and unconstitutional application of deference to the Sentencing Commission. Where the circuits were once unified in reflexively granting such deference, two circuits have now rethought that approach, and a third has recently decided to revisit its existing precedent *en banc*. *See United States v. Nasir*, No. 18-2888, ECF No. 120 (3d Cir. Mar. 4, 2020) (granting *en banc* rehearing); *United States v. Havis*, 927 F.3d 382 (6th Cir. 2019) (*en banc*); *United States v. Winstead*, 890 F.3d 1082 (D.C. Cir. 2018). Rather than wait for the Supreme Court to resolve this split in authority, this Court should grant the petition for rehearing to enable reconsideration of the fundamental constitutional concerns at issue.

The original panel was bound by this Court's decision in *United States v. Martinez*, 602 F.3d 1166 (10th Cir. 2010), but courts across the country have begun to revisit the assumptions taken in that decision. In *United States v. Havis*, 927 F.3d 382, the *en banc* Sixth Circuit reversed its long-standing deference to Application Note 1. This result came after Judge Thapar highlighted some of the constitutional problems arising

from deference to the Sentencing Commission's commentary in a concurrence to his own panel opinion. *See* 907 F.3d 439, 450 (6th Cir. 2018) (Thapar, J., concurring). More recently the Third Circuit, *sua sponte*, granted *en banc* review of its precedent to re-examine whether "it remains appropriate to defer to the U.S. Sentencing Commission's commentary to U.S.S.G. § 4B1.2[.]" *Nasir*, No. 18-2888, ECF No. 120.

As this trend illustrates, the very idea of an Article III court "deferring" to mere commentary of the 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). Judge Thapar acknowledged some of these constitutional issues in his concurrence—recognizing, for example, that "deference to a comment" "trespass[es] upon the court's province to 'say what the law is.'" *Havis*, 907 F.3d at 450 (Thapar, J., concurring) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). Moreover, deference here mandates judicial bias against a defendant, instead of lenity toward him, in violation of due process.

This Court should follow its sister circuits and grant rehearing to reconsider the assumptions made in *Martinez*. Furthermore, it should instruct the parties to brief and argue the constitutional issues raised by the role of deference in this context.

ARGUMENT

The Constitution requires federal judges to exercise independent judgment and refrain from exhibiting bias when interpreting the law. These are the most foundational constitutional requirements of 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. Additionally, the Due Process Clause forbids judges to display any bias in favor of 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.

The practice of deferring to the Sentencing Commission's interpretation of guideline commentary 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 any ambiguities *against* (rather than in favor of) criminal defendants.

I. *Stinson* Deference 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 decision-making 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." (Thomas, J., concurring)).

This abandonment of judicial responsibility 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 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 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 commands courts to abandon their duty of independent judgment and assign weight to a non-judicial entity's legal interpretation. It is no different in principle from an instruction that courts assign weight and defer to the statutory interpretations of a congressional committee, a group of expert legal scholars, or the *Denver Post* editorial page. In each scenario, the courts would be following another entity's interpretation of the law so long as it were "reasonable"—even if the court's independent judgment would lead to a different conclusion. 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 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. *See Cohens v. Virginia*, 19 U.S. 264, 404 (1821) ("We have no more right to decline the

[1] Indeed, some prior Commissioners, whose interpretations are supposedly authoritative for this Court, have been law professors.

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.")

Those Commissioners who are members of the judiciary are not acting as judges when they approve the Commentary to the Guidelines. Instead, they are serving as part-time Commissioners, even though their expertise as federal judges presumably informs their decisions. Mandating deference to the Commission creates a structure where only some judges' interpretations are authoritative, and only in a context wholly separate from the normal judicial order.

II. Applying *Stinson* Deference to the Commentary Bypasses Congress' Check on Commission Statements

Compounding this abdication of judicial responsibility is the fact that Congress only ever approves amendments to the Guidelines themselves, not the Commentary. *See* 28 U.S.C. § 994(p). And the Commission's written policy is "to include amendments to policy 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 in favor of 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 unconstitutional about a court's considering the Sentencing Commission's commentary to the extent it is persuasive. *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). The Commissioners may have their views considered by the court, just as any other litigant or *amicus*, and a court may and should consider the "unique insights" the Commissioners may bring on account of their expertise and experience. *See Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue*, 914 N.W.2d 21, 53 (Wis. 2018) ("'[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 consideration 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.

III. *Stinson* Deference Raises Grave Due-Process and Separation-of-Powers Concerns When It Contravenes 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 was bound by *Martinez*, 602 F.3d at 1174, which relied on the commentary as merely being a "reasonable" construction of the Guideline's definition of an object offense under § 4B1.2. 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"). No court should subordinate the rule of lenity to agency "deference" doctrines.

This Court has recognized that the rule of lenity applies when confronted with agency rules that have criminal consequences, and it requires a reviewing court to ensure that such regulations are "not in conflict with interpretive norms regarding criminal statutes." *N.L.R.B. v. Oklahoma Fixture Co.*, 332 F.3d 1284, 1287 (10th Cir. 2003) (*en*

banc). This requirement means this Court must apply the rule of lenity and read the scope of a criminal sanction "narrowly" and resolve any statutory ambiguities against a punitive outcome. *Id*. at 1287 n.5.

To defer to an agency's interpretation of a criminal statute would "upend ordinary principles of interpretation" and allow "federal administrators [to] in effect create (and uncreate) new crimes at will, so long as they do not roam beyond ambiguities that the laws contain." *Whitman v. United States*, 135 S. Ct. 352, 353 (2014) (Scalia, J., statement regarding denial of certiorari, joined by Thomas, J.). Deference in such a setting "threatens a complete undermining of the Constitution's separation of powers, while the application of the rule of lenity preserves them by *maintaining the legislature as the creator of crimes*." *Esquivel-Quintana v. Lynch*, 810 F.3d 1019, 1030 (6th Cir. 2016) (Sutton, J., concurring in part) (emphasis added), *reversed on other grounds*, 137 S.Ct. 1562 (2017). Thus, agency deference "has no role to play when liberty is at stake." *Guedes v. Bureau of Alcohol, Tobacco, Firearms and Explosives*, 140 S. Ct. 789, 790 (Gorsuch, J., statement regarding denial of certiorari).

Petitioner Lovato's liberty is surely at stake here. Mr. Lovato was sentenced to 100 months in prison, which was the bottom of his guideline range. But his recommended sentencing range would have been between 70 and 87 months in prison without an enhancement for his prior conviction of an inchoate offense. *See* Br. for Appellant at 8, n. 5. Thus, merely because the commentary presented a "reasonable" interpretation of an ambiguous provision, the trial court was required to premise its sentence on the higher range. *See Gall v. United States*, 552 U.S. 38, 49 (2007) ("As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark."). Lenity should preclude deference to the Commission's view.

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

None of these constitutional concerns was 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* 508 U.S. at 39 (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.

Stare decisis therefore presents no obstacle to a lower court's raising these constitutional issues and declaring *Stinson* deference unconstitutional—at least when a commentary interpretation runs against the defendant. *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.").

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 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 compromised 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.

April 22, 2020

Respectfully,

/s/ Caleb Kruckenberg
Caleb Kruckenberg
Litigation Counsel
Mark Chenoweth
General Counsel
New Civil Liberties Alliance

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I hereby certify that this document complies with Federal Rule of Appellate Procedure 29(b)(4). It is printed in Century Schoolbook, a proportionately spaced font, and includes 2576 words, excluding items enumerated in Rule 32(f). I relied on my word processor, Microsoft Word, to obtain the count.

I hereby certify that all required privacy redactions have been made pursuant to 10th Cir. R. 25.5, any required paper copies to be submitted to the Court are exact copies of the version submitted electronically, and the electronic submission was scanned for viruses with the most recent version of a commercial virus scanning program, and is free of viruses.

Respectfully,

/s/ Caleb Kruckenberg

Caleb Kruckenberg
Litigation Counsel
New Civil Liberties Alliance
1225 19th St. NW, Suite 450
Washington, DC 20036
caleb.kruckenberg@ncla.legal
(202) 869-5210
Counsel for *Amicus Curiae*

CERTIFICATE OF SERVICE

I hereby certify any required paper copies were mailed by Federal Express, next-day delivery, to the Clerk of the Court at the Byron White U.S. Courthouse, 1823 Stout St., Denver, Colorado 80257 on April 22, 2020. This document was electronically filed using the Tenth Circuit's CM/ECF system, which sent notification of such filing to all counsel of record.

Respectfully,

/s/ Caleb Kruckenberg

Caleb Kruckenberg
Litigation Counsel
New Civil Liberties Alliance
1225 19th St. NW, Suite 450
Washington, DC 20036
caleb.kruckenberg@ncla.legal
(202) 869-5210
Counsel for *Amicus Curiae*