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Media Inquiries: [Judy Pino](#), 202-869-5218

Two NCLA Amicus Briefs in Third and Tenth Circuits Challenge Judicial Deference to U.S. Sentencing Commission’s Guidelines Commentary

NCLA Files Amicus Briefs in U.S. v. Malik Nasir (CA3) and U.S. v. Daniel Lovato (CA10)

Washington, DC (April 22, 2020) – The New Civil Liberties Alliance, a nonpartisan, nonprofit civil rights group today filed amicus briefs in two similar cases, [U.S. v. Malik Nasir](#) and [U.S. v. Daniel Lovato](#), urging federal courts to re-examine those circuits’ treatment of “*Stinson* Deference.” These cases present an opportunity for the U.S. Courts of Appeals in the Third and Tenth Circuits to join a growing chorus of circuits correcting an erroneous and unconstitutional application of judicial deference.

The 1993 Supreme Court decision, [Stinson v. United States](#), commands federal judges to abandon their duty of independent judgment in violation of Article III and the judicial oath, and to assign weight to a non-judicial entity’s interpretation of the law when imposing criminal sentences. It also raises serious due-process and separation-of-powers concerns when it causes courts to mandate judicial bias *against* a defendant, instead of lenity toward him.

In both *Nasir* and *Lovato*, the courts deferred to the U.S. Sentencing Commission’s commentary on its sentencing guidelines, and thereby increased the length of each man’s prison sentence. In cases like these, *Stinson* deference unjustly forces people to spend more time in prison than Congress required.

Where the circuits were once unified in reflexively granting such deference, two circuits have now rethought that approach—the DC Circuit in *United States v. Winstead* (D.C. Cir. 2018) and the Sixth Circuit in [United States v. Havis](#) (6th Cir. 2019), for which NCLA filed a successful amicus brief. More recently, the Third Circuit in *U.S. v. Nasir* independently decided to grant *en banc* review of its precedent to re-examine whether “it remains appropriate to defer to the U.S. Sentencing Commission’s commentary.” NCLA has urged the Court to agree that deference is not appropriate.

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 in the first place. *Stinson* itself involved commentary that worked in the defendant’s favor, so the constitutional issues did not surface.

Rather than wait for the Supreme Court to resolve this growing split in authority, NCLA urges the *en banc* Third Circuit to overturn circuit precedent and the Tenth Circuit to follow its sister circuits and grant the petition for rehearing *en banc* in *U.S. v. Lovato*.

NCLA released the following statements:

“Courts cannot allow an administrative agency to increase a person’s prison sentence out of ‘deference’ to its interpretation of the law. The Courts of Appeals must start acting like judges again and take back responsibility to say what the law is.”

—**Caleb Kruckenberg, Litigation Counsel, NCLA**

“The major problem with *Stinson*—and reflexive deference to the Sentencing Commission—may, ironically, be the way out. In a rush to accept the Sentencing Commission’s legal interpretations, the *Stinson* progeny of cases failed to consider the 500-year-old rule of lenity. *Nasir* and *Lovato* present an opportunity for the Third and Tenth Circuits to prioritize the rule of lenity over deference and, in turn, prioritize the Constitution over bad case law.”

—**Jared McClain, Staff Counsel, NCLA**

ABOUT NCLA

NCLA is a nonpartisan, nonprofit civil rights group founded by prominent legal scholar Philip Hamburger to protect constitutional freedoms from violations by the Administrative State. NCLA’s public-interest litigation and other pro bono advocacy strive to tame the unlawful power of state and federal agencies and to foster a new civil liberties movement that will help restore Americans’ fundamental rights.

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