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## **NCLA Amicus Brief Urges Supreme Court to Put an End to Deference to USSG Commentary**

*Lenair Moses v. United States of America*

**Washington, DC (October 20, 2022)** - The New Civil Liberties Alliance, a nonpartisan, nonprofit civil rights group, filed an [amicus curiae brief](#) with the U.S. Supreme Court today in support of a petition for *writ of certiorari* in *Lenair Moses v. United States*. Lenair Moses is challenging the lower court’s application of *Stinson* deference to sentence him as a “career offender” based on language in interpretive commentary to the U.S. Sentencing Guidelines (USSG) that appears nowhere in the Guidelines themselves. NCLA’s *amicus* brief urges the Supreme Court to grant Mr. Moses’s petition and to put an end to the unconstitutional doctrine of *Stinson* deference once and for all. Alternatively, at the very least, NCLA argues that the Supreme Court must rule that *Stinson* deference is unconstitutional whenever it would result in an increased criminal sentence, as it did for Mr. Moses.

Following the Supreme Court’s 1993 decision in *Stinson v. United States*, the courts of appeals began to give nearly dispositive weight to the U.S. Sentencing Commission’s commentary to the Sentencing Guidelines—even over the plain text of the Guidelines. However, when the Court decided *Kisor v. Wilkie* in 2019, all nine Justices agreed on the need to “reinforce” and “further develop” limitations on the deference courts owe to an administrative agency’s interpretation of its own rules. They concluded that courts may defer to an agency’s interpretation only if a rule or regulation remains genuinely ambiguous after the court has applied all its traditional tools of statutory construction.

NCLA argues that *Stinson* deference raises serious constitutional concerns, as it commands judges to defer as a matter of course to the judgment of a litigant before them—the government litigant—which denies the criminal defendant any semblance of due process. When *Stinson* deference is applied, the government litigant wins based on commentary even to Sentencing Guidelines that are unambiguous so long as the commentary “is not plainly erroneous or inconsistent with” the Guidelines. NCLA’s brief points out that due process requires lenity in the interpretation of criminal statutes to preclude criminal punishment when Congress did not provide a fair warning through clear statutory language. Hence, ambiguous criminal laws must be interpreted in favor of the defendant. NCLA argues that lenity is a traditional tool of statutory construction that the courts must apply before resorting to deference.

The Third, Sixth, and D.C. Circuits have recognized that a strict reading of *Stinson* is inconsistent with the Supreme Court’s modern administrative-law jurisprudence, the Sentencing Commission’s legal authority, and the Constitution. A majority of circuits, however, continues to adhere to the outdated language in *Stinson* and refuses to reconsider circuit precedent in light of *Kisor*. Only the Supreme Court can resolve this dispute by clarifying that courts do not owe deference to Commission commentary—particularly when it expands the Guidelines or increases a criminal defendant’s sentence.

This week, NCLA also submitted a [Comment](#) in response to the U.S. Sentencing Commission’s *Proposed 2022-2023 Priorities*, specifically challenging the widespread practice of extending judicial “deference” to the U.S. Sentencing Commission’s commentary to the U.S. Sentencing Guidelines.

**NCLA released the following statement:**

“Despite the fact that the Commission’s commentary to the Sentencing Guidelines is merely advisory and not the law, *Stinson* deference commands courts to pay overwhelming deference to the Commission in its application of harsh criminal sentences—even when the Commission’s interpretation exceeds the Guidelines’ outer bounds. It is high time for the Supreme Court to intervene and make clear that the Commission cannot use its commentary to skirt congressional review, unilaterally expand the Guidelines, and impose draconian sentences on criminal defendants whose liberty will remain at risk across the nation until the Court ends this unconstitutional practice.”

— Casey Norman, Attorney, NCLA

**For more information about this issue visit [here](#).**

**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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