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NCLA Asks 10th Cir. to Reverse Panel’s Failure to Follow *Chevron* Precedent in Bump Stock Ban Case

W. Clark Aposhian v. William Barr, Attorney General of the United States, et al.

Washington, DC (June 19, 2020) – The New Civil Liberties Alliance today filed a [petition for rehearing en banc](#) in the U.S. Court of Appeals for the Tenth Circuit in the case of *W. Clark Aposhian v. William Barr, Attorney General of the United States, et al.* NCLA is seeking review from the full Court, arguing that the panel majority erred in last month’s 2-1 decision to [deny](#) NCLA client Clark Aposhian’s appeal. Aposhian, who last spring was the “last man in America” to own a bump stock legally, is challenging the ban on bump stocks issued by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) as an unlawful effort to amend a statute via regulation.

Mr. Aposhian’s en banc Tenth Circuit appeal argues that the panel majority committed two main legal errors. First, the panel applied *Chevron* deference even though ATF specifically waived that argument. *Chevron* is a judicial doctrine that usually allows courts to defer to agency interpretations of ambiguous statutes. ATF presumably refused to invoke *Chevron* deference, because it agrees with Mr. Aposhian that *Chevron* does not apply to the interpretation of criminal laws. Second, the panel majority disregarded the rule of lenity. When a criminal statute is ambiguous, the rule of lenity dictates that the law be interpreted to the benefit of the criminal defendant. Although Mr. Aposhian is not charged with a crime, the statute he is challenging is a criminal law, so the rule of lenity applies. Instead, the panel majority applied *Chevron* deference to resolve the alleged ambiguity in the statute. U.S. Supreme Court precedent and prior Tenth Circuit precedent point in the opposite direction from what the panel majority held on both of these issues.

As Judge Joel Carson wrote in his dissenting opinion in May, by “turning a blind eye to the government’s request and applying *Chevron* anyway—the majority placed an uninvited thumb on the scale in favor of the government.” Mr. Aposhian’s appeal asks the Tenth Circuit to rehear this case and reverse these two legal errors.

The potential consequences of this appeal are dire. ATF has made bump stocks illegal to possess through a [Final Rule](#) issued without statutory or constitutional authority. In so doing, ATF turned 500,000 innocent purchasers into felons (but gave them 90 days to turn in or destroy their devices to avoid prosecution).

The Final Rule reinterpreted the words “automatically” and “single function of the trigger” in the National Firearms Act to classify bump stocks as “machine guns.” Even though ATF had previously approved bump stocks for sale, and determined that they were not machine guns, the new Rule treats owning a bump stock the same as owning an actual machine gun, which is a federal crime punishable by up to 10 years in prison. The panel’s decision upholding the rule would allow the same agency tasked with enforcing the law to create new criminal liability via regulation. If the Tenth Circuit denies *en banc* review, Mr. Aposhian will either have to

appeal the denial of his preliminary injunction to the U.S. Supreme Court or return to federal district court for a trial on the merits.

NCLA released the following statements:

“The panel refused to interpret the law independently and instead applied *Chevron* deference even when ATF itself understood that it would be improper to do so. The full court should take this case and do what judges are supposed to do—decide for themselves what the law Congress wrote means.”

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

“The panel’s decision relied upon *Chevron* deference to avoid answering the only question before it: did ATF have the legal authority to redefine bump stocks as ‘machineguns.’ Unwilling to support ATF’s nonsensical arguments, the panel could only affirm the agency’s decision by ‘deferring’ to an argument that the agency never made, while refusing to ‘defer’ to the argument that it did make. This is the topsy-turvy world you get when courts allow agencies to legislate.”

— **Harriet Hageman, Senior Litigation 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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