IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

W. Clark Aposhian, Plaintiff-Appellant, v. William P. Barr, Attorney General of the U.S., et al., Defendants-Appellees.	:	No. 19-4036

On Interlocutory Appeal from the
United States District Court for the District of Utah
No. 2:19-cv-0037-JNP; District Judge Jill N. Parrish

MOTION OF PLAINTIFF-APPELLANT FOR LEAVE TO FILE REPLY IN SUPPORT OF PETITION FOR REHEARING *EN BANC*

Plaintiff-Appellant W. Clark Aposhian hereby moves for leave to file a reply brief in support of his pending petition for rehearing *en banc*. In support of the motion, Mr. Aposhian states as follows:

1. A principal issue in this petition is the panel's holding that even when the federal government disclaims reliance on *Chevron* deference, a court should nonetheless apply *Chevron* whenever it deems

deference warranted under federal law. The petition urges the Court to reconsider that holding *en banc*.

2. At the request of the Court, the Government responded to the petition and argued that rehearing is unwarranted. It noted that the panel's no-disclaimer ruling is in accord with a decision of the D.C. Circuit and argued that the Court should not accept Petitioner's invitation to consider creating an inter-circuit conflict with the D.C. Circuit.

3. In early July, after the petition was filed, the Ninth Circuit issued a decision that directly conflicts with the panel's (and the D.C. Circuit's) no-disclaimer holding.

4. Petitioner seeks to file this reply brief to call the Court's attention to the Ninth Circuit's decision. As a result of that decision, the Government's principal rationale for denying rehearing *en banc* no longer applies.

5. Petitioner also seeks to file this reply brief to point out that the panel's no-disclaimer holding is a distinctly minority position among the federal appeals courts and also conflicts with decisions of several

Tenth Circuit panels.

6. Counsel for Petitioner contacted counsel for the Government to ascertain whether the Government would consent to the filing of its reply brief. In response, counsel for the Government stated that the Government takes no position with respect to the motion.

WHEREFORE, Petitioner respectfully requests that the Court grant his motion for leave to file a reply brief.

Respectfully,

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July 27, 2020

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of July, 2020, I electronically filed the motion of Plaintiff-Appellant W. Clark Aposhian for leave to file a reply brief with the Clerk of the Court for the U.S. Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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REPLY BRIEF IN SUPPORT OF PETITION FOR REHEARING *EN BANC*

July 27, 2020

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INTRODUCTION

In its response to the petition, the Government readily concedes that it urged the panel *not* to afford *Chevron* deference to its interpretation of 26 U.S.C. § 5845(b) (which defines "machinegun" for purposes of federal gun-control laws). But it nonetheless asks the Court not to reconsider the panel's decision to ignore that *Chevron* disclaimer, arguing that doing so might create an inter-circuit conflict. Response at 12 ("Although plaintiff invites the Court to go into conflict with the D.C. Circuit's decision reviewing the Rule under *Chevron*, *see Guedes* [*v. ATF*], 920 F.3d [1,] 22 (D.C. Cir. 2019), he has provided no plausible basis on which the invitation can be accepted.").

But a decision issued earlier this month by the Ninth Circuit eliminates that rationale for denying rehearing. The Ninth Circuit held, contrary to *Guedes*, that the *Chevron* framework should not be applied to an agency statutory interpretation when, as here, the Government disclaims any right to *Chevron* deference. However the Court ultimately comes out on the issue, its decision will conflict with that of at least one other circuit; indeed, *Guedes*'s no-disclaimer rule is

now a distinctly minority position. Moreover, unless rehearing is granted, the conflict between the panel decision and decisions of other Tenth Circuit panels will persist.

I. THE NINTH CIRCUIT HELD THIS MONTH THAT *CHEVRON* DEFERENCE IS INAPPROPRIATE WHEN THE GOVERNMENT DISCLAIMS RELIANCE ON *CHEVRON*

Since Petitioner sought *en banc* review, the Ninth Circuit in *East Bay Sanctuary Covenant v. Barr*, ___ F.3d ___, 2020 WL 3637585 (9th Cir., July 6, 2020), has joined at least two other circuits in holding that *Chevron* deference is not a standard of review and is thus subject to waiver. *Albanil v. Coast 2 Coast, Inc.*, 444 F. App'x 788, 796 (5th Cir. 2011) (unpublished) ("Plaintiffs did not raise their *Chevron* argument in the district court... . Thus, they have waived this argument."); *C.F.T.C. v. Erskine*, 512 F.3d 309, 314 (6th Cir. 2008) ("[T]he CFTC waived any reliance on *Chevron* deference by failing to raise it to the district court."). The panel decision here has now created a deep split amongst the circuits.

The procedural posture of the case before the Ninth Circuit, *East Bay*, was nearly identical to the posture of this case. The plaintiffs

contended that a challenged rule issued by the federal government was invalid because it conflicted with a federal statute. The Government responded that its rule (governing when a noncitizen arriving at the Nation's border with Mexico is eligible to apply for asylum) was consistent with its interpretation of the underlying immigration statute, but it expressly disclaimed any right to *Chevron* deference for its interpretation.

Citing that disclaimer, the Ninth Circuit undertook its statutory analysis without applying the *Chevron* framework. *East Bay*, 2020 WL 3637585 at *9. While noting that it "generally" applies the *Chevron* framework to an agency's interpretation of a statute it administers, the appeals court did not do so there because "the government did not ask for *Chevron* in its briefs and specifically disclaimed reliance on *Chevron* during oral arguments." *Ibid.* The court ultimately struck down the asylum rule on the ground that it conflicted with relevant immigration statutes.[1]

[1] The Ninth Circuit provided a second basis for its holding. It stated that even if it had undertaken a *Chevron* analysis, it would have ruled against the Government at *Chevron* Step One because "the Rule is contrary to the unambiguous language of [8 U.S.C.] § 1158." *Ibid.*

The Ninth Circuit's decision directly conflicts with the panel's decision. Contrary to the Ninth Circuit, the panel here held that even when the Government's disclaims reliance on *Chevron*, a court must decide for itself whether *Chevron* applies and whether it requires courts to defer to an agency's statutory interpretation. Slip op. 15-17.

The Ninth Circuit's statements regarding the effects of disclaimed reliance cannot be dismissed as mere *dicta*; the court made clear—through use of the words "even if we were to apply *Chevron*"—that it was *not* applying the *Chevron* framework. The court's statement that it would have come out the same way under *Chevron* means that the court announced alternative holdings, both of which are now binding within the Ninth Circuit.[2]

[2] Any uncertainty on that score is eliminated by the partial dissent of Judge Miller. He criticized the majority for unnecessarily deciding the *Chevron* disclaimer issue, because "the court's conclusion that the rule is arbitrary and capricious is sufficient to resolve the case" and that by saying more, the majority was unnecessarily creating a conflict with the D.C. Circuit's *Guedes* decision. 2020 WL 3637585 at *21 (Miller, J., concurring in part and dissenting in part).

II. THE PANEL DECISION CONFLICTS WITH OTHER DECISIONS OF THIS COURT

The petition explains at length why the panel's we-pay-no-attention-to-disclaimers ruling conflicts with other decisions of this Court, including *Hydro Resources, Inc. v. EPA*, 608 F.3d 1131, 1146 (10th Cir. 2010) (*en banc*), and *Hays Med. Ctr. v. Azar*, 956 F.3d 1247, 1264 n. 18 (10th Cir. 2020). The Government's efforts to distinguish those cases are unavailing.

In *Hydro Resources*, the *en banc* Court held that it "need not" determine whether EPA's interpretation of a contested statute was entitled to *Chevron* deference because EPA had not requested deference. 608 F.3d at 1146. The Government argues that *Hydro Resources* is distinguishable because it held merely that a *Chevron* disclaimer permits a court to ignore *Chevron* when the *Chevron* framework would otherwise be applicable—but does not *require* the court to do so.

That interpretation of *Hydro Resources* is not plausible. If, as the panel and the Government (at Response 9-11) argue, *Chevron* is substantive law that courts have a duty to apply whenever the law so

dictates, then it cannot also be true that courts are free (when presented with a federal government disclaimer) to apply or not apply *Chevron* at their absolute discretion. In conflict with *Hydro Resources*, the Government's argument also renders its disclaimer wholly irrelevant; according to the panel and the Government, a court applies the *Chevron* regime whenever the court determines that it is appropriate to do so—regardless of whether the federal agency has raised the issue.

Hayes Medical is similarly not distinguishable. While acknowledging *Hayes Medical*'s clear statement that an agency "waives [its] argument for *Chevron* deference" if it inadequately invokes *Chevron*, the Government insists, "But whether a court is obliged to consider an argument about deference is an altogether different question from whether a court is barred from applying the appropriate level of deference." Response at 10. That purported distinction makes little sense. If the federal government waives its argument for *Chevron* deference, then (per *Hayes Medical*) the *Chevron* regime does not dictate "the appropriate level of deference."

Indeed, the panel recognized that its position broke ranks with prior decisions of this Court. The panel noted that this Court's decisions "are not entirely consistent" relating to whether *Chevron* is a "standard of review" or, as *Hayes Medical* recognized, a canon of interpretation that "can be waived." Slip op. at 17-18 n. 6. This Court's decisions are now in deep conflict concerning when, if ever, waiver of *Chevron* deference will be accepted by a court.

III. THE PANEL DECISION EFFECTIVELY NULLIFIES THE RULE OF LENITY

The panel held, in conflict with decisions from this Court and the U.S. Supreme Court, that *Chevron* deference is warranted even when the agency's interpretation of a criminal statute expands the scope of criminal liability. That holding effectively nullifies the rule of lenity, which dictates that any ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.

The Government does not deny this sweeping effect of the panel decision. Rather, it argues that the rule of lenity—despite its longstanding constitutional underpinnings—is simply not all that

important. It asserts that the rule of lenity is a statutory-construction canon that provides a rule of decision only if the statute remains ambiguous even "after considering text, structure, history, and purpose." Response at 12. If so, that is similar to the role played by *Chevron* deference: *Chevron* provides a rule of decision only when, after applying statutory canons at *Chevron* Step One, the statute at issue remains ambiguous. The Government provides no reason why, contrary to the case law cited by Petitioner, *Chevron* should always trump the rule of lenity and should apply in the criminal law context.

Indeed, there is strong reason to conclude that the opposite is true: that the rule of lenity should trump *Chevron*. The Supreme Court, in describing Step One of the *Chevron* framework, stated, "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Chevron*, 467 U.S. at 843 n. 9. Given its lengthy pedigree, the rule of lenity fits within *Chevron*'s definition of a "traditional tool of statutory construction." And if the rule of lenity is applied at *Chevron* Step One to resolve a

statutory ambiguity, courts would never have occasion to defer to a contrary agency interpretation of that statute. The Supreme Court could not have been more explicit in stating, "[W]e have never held that the government's reading of a criminal statute is entitled to any deference." *United States v. Apel*, 571 U.S. 359, 369 (2014).

IV. PETITIONER HAS NOT WAIVED HIS IRREPARABLE-HARM CLAIM

The Government argues that rehearing is also unwarranted because Petitioner no longer contends that the absence of a preliminary injunction is causing him irreparable harm.

That argument is without merit. Petitioner contends that the panel committed multiple errors of law in affirming the denial of a preliminary injunction—and that rehearing *en banc* is thereby warranted. The rehearing petition focused primarily on two of those errors (highlighted above). But by not focusing at length on irreparable harm as an additional reason why rehearing is warranted to correct a flawed decision, Petitioner cannot be deemed to have waived the issue. Throughout these court proceedings, Petitioner has made clear his claim that he is suffering irreparable harm due to the deprivation of

property rights protected both by statute and the U.S. Constitution. The rehearing petition describes that deprivation.

The Government's waiver argument is particularly ironic, because if anyone has waived the irreparable harm issue, the Government has. In the trial court, the Government conceded that Petitioner could demonstrate irreparable harm. Indeed, Judge Carson concluded that Petitioner met "his burden of proving that he would suffer irreparable harm absent an injunction" precisely because the Government conceded the issue in the district court and thereby waived its right to raise it in this Court. Slip op. at 17 (Carson, J., dissenting).

CONCLUSION

The Court should grant the petition for rehearing *en banc*.

Respectfully,

July 27, 2020

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule Federal Rule of Appellate Procedure 32(g), I hereby certify that this document complies with Federal Rule of Appellate Procedure 35(b)(2)(A). It is printed in Century Schoolbook, a proportionately spaced font, and (according to the word processing system in which it was prepared, WordPerfect X8) it contains 1,786 words, excluding words enumerated in Rule 32(f).

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.

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