



FOR IMMEDIATE RELEASE

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

NCLA Earns *En Banc* Review from 10th Circuit in Bump Stock Ban Case, Including on *Chevron* Issues

Aposhian v. Barr, et al.

Washington, DC (September 4, 2020) – The New Civil Liberties Alliance, a nonpartisan, nonprofit civil rights group is celebrating a reprieve today in the case of *Aposhian v. Barr, et al.* after the U.S. Court of Appeals in the Tenth Circuit vacated the panel decision and [granted](#) NCLA’s petition for rehearing *en banc*. NCLA is challenging the ban on bump stocks issued by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) that went into effect on March 26, 2019.

The panel [decision](#) had created a deep split among the circuits when it denied Mr. Aposhian’s appeal 2-1 in May, but it also broke ranks with prior decisions of the Tenth Circuit itself and with the U.S. Supreme Court. *Chevron* should not be applied to defer to an agency’s statutory interpretation when, as here, the government waives any reliance on it. Contrary to the panel decision in this case, three other circuits have held that *Chevron* deference is not a standard of review but is instead just one tool for statutory interpretation—and is thus subject to waiver.

The *en banc* court will also consider whether it should apply the constitutionally required Rule of Lenity instead of *Chevron* deference when agency action has both criminal and civil application. The now-vacated panel opinion had held that *Chevron* deference applied instead of the Rule of Lenity. This interpretation would violate fundamental due process considerations of notice and an opportunity to be heard. Although Mr. Aposhian is not charged with a crime, the statute he is challenging carries criminal penalties, so the Rule of Lenity applies.

Eleven active judges of the court will rehear the entire case afresh but will also specifically address the following questions, on which they have ordered supplemental briefing:

1. Did the Supreme Court intend for the *Chevron* framework to operate as a standard of review, a tool of statutory interpretation, or an analytical framework that applies where a government agency has interpreted an ambiguous statute?
2. Does *Chevron* step-two deference depend on one or both parties invoking it, i.e., can it be waived; and, if it must be invoked by one or both parties in order for the court to apply it, did either party adequately do so here?
3. Is *Chevron* step-two deference applicable where the government interprets a statute that imposes both civil and criminal penalties?
4. Can a party concede the irreparability of a harm; and, if so, must this court honor that stipulation?
5. Is the bump stock policy determination made by the Bureau of Alcohol, Tobacco and Firearms peculiarly dependent upon facts within the congressionally vested expertise of that agency?

NCLA released the following statements:

“The full Tenth Circuit has recognized the troubling consequences of the panel’s prior decision. *Chevron* deference cannot guarantee a win for an agency even when the parties agree it doesn’t apply, because it contradicts the constitutional rule that criminal laws should be construed against the government. We look forward to the Court setting a major precedent limiting *Chevron*’s unconstitutional reach.”

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

“NCLA is grateful that the Tenth Circuit has recognized the importance of our client’s civil liberties at stake in this case. We are also delighted that the judges have decided to take a close look at several key *Chevron*-related issues that have surfaced. The bump stock ban illustrates some of the many problems with *Chevron* deference—including constitutional ones.”

— **Mark Chenoweth, Executive Director and General 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.

###