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NCLA Reply Brief Argues ATF’s Rule Banning Bump Stocks Exceeds Agency’s Legal Authority

Aposhian v. Barr, et al.

Washington, DC (December 3, 2020) – The New Civil Liberties Alliance, a nonpartisan, nonprofit civil rights group filed a [reply brief](#) today in the case of *Aposhian v. Barr, et al.*, which the U.S. Court of Appeals for the Tenth Circuit is hearing *en banc*. The brief outlines why a rule banning bump stocks issued by the Bureau of Alcohol, Tobacco, Firearms and Explosives exceeds ATF’s legislative authority and is invalid.

NCLA is challenging ATF’s Final Rule that went into effect on March 26, 2019 on behalf of [Clark Aposhian](#) of Utah and [Michael Cargill](#) of Texas (in a separate case). After a panel of the Tenth Circuit upheld the Final Rule in a split decision, the *en banc* Court vacated that decision and ordered the parties to answer important questions about the application of *Chevron* deference. At issue in this case is whether a court can apply *Chevron* deference even when an administrative agency declines to invoke it. The Court also asked for briefing on whether the rule of lenity, a rule of constitutional necessity, forbids deference to ATF’s novel interpretation of a criminal law and whether the Court should accept a concession by ATF that Mr. Aposhian has suffered irreparable harm because of the Final Rule.

ATF has argued throughout this litigation that *Chevron* does not apply because the “agency did not act pursuant to a congressional delegation of authority to issue gap-filling rules that establish what qualifies as a ‘machinegun,’ [] and it had no policy-making authority to exercise.” That is, ATF insists that its rule is an interpretive rule only, and *Chevron* deference never applies to interpretive rules. Additionally, *Chevron* should not be applied to defer to an agency’s statutory interpretation here, because the government has waived any reliance on it. NCLA argues, and 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.

NCLA also contends that the rule of lenity applies instead of *Chevron* deference when agency action has both criminal and civil applications. The rule of lenity is constitutionally required and protects due process and the separation of powers by requiring courts to construe any ambiguities in criminal laws against the government. This rule ensures that prosecutors cannot hold people accountable for acts that were not clearly unlawful at the time they were committed. ATF’s novel interpretation extending the federal ban on machineguns to bump stocks violates this rule.

This court should also honor ATF’s factual concession concerning the presence of irreparable injury. ATF conceded in the trial court that the Final Rule required Mr. Aposhian to destroy his unique property, which he legally purchased, or face criminal prosecution. ATF, cannot now walk back its concession—despite what the Tenth Circuit panel held in its now-vacated decision.

NCLA released the following statements:

“ATF has argued to the Court that it has virtually unlimited power to create new crimes at will by issuing new rules and that members of the public “are on notice” that they could become criminals overnight. The Tenth Circuit has an important opportunity to forcefully reject such an absurd notion of administrative power and declare once and for all that courts need not defer to a prosecutor’s view of what criminal laws prohibit.”

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

“*Chevron* deference has no place in this case. Either the rule is an interpretive rule, as ATF argues, in which case *Chevron* never applies to interpretive rules. Or else the rule is a legislative rule, which ATF does not have the statutory authority to issue. Even if the Tenth Circuit should somehow decide, erroneously, that ATF has the power to issue legislative rules, this particular rule still cannot receive *Chevron* deference for at least four distinct reasons: First, the government has eschewed any reliance on *Chevron* and thus waived it. Second, the rule of lenity does not permit deference to the government’s interpretation of criminal laws. Third, ATF ignored the experts at the agency in crafting this rule and does not merit deference for that reason. Finally, ATF’s legal interpretation of the statute has shifted and administrative agencies do not receive *Chevron* deference for positions they have not held consistently.”

— **Mark Chenoweth, Executive Director and General Counsel, NCLA**

For more information visit the case summary [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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