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NCLA Asks Full Fifth Circuit to Toss ATF’s Bump Stock Ban and Reject Deference to the Government

Michael Cargill v. Merrick B. Garland, et al.

Washington, DC (July 25, 2022) – Today, the New Civil Liberties Alliance filed its [appellant brief](#) in the U.S. Court of Appeals for the Fifth Circuit in *Michael Cargill v. Merrick B. Garland, et al.* This lawsuit could determine who has the constitutional authority to change the criminal law if changes are warranted. The appeals court in June vacated the three-judge panel’s opinion upholding ATF’s legal interpretation and granted *en banc* review—that is, review by all 17 active judges on the court. Adoption of the rarely used *en banc* procedure is a sign that the appeals court views the issues in this case as highly important. The Fifth Circuit will be the third U.S. Court of Appeals to hear this issue *en banc*, but it could be the first to reach the merits. The Tenth Circuit dismissed the *en banc* over five dissents, and the Sixth Circuit split 8-8 on the questions at stake.

NCLA is seeking invalidation of the Bureau of Alcohol, Tobacco, Firearms and Explosives’ (ATF) Bump Stock Final Rule, in which the agency declared that non-mechanical bump stocks are “machineguns” within the meaning of the relevant statute. Because the Final Rule is not a valid legislative rule, ATF may not seek judicial deference to its statutory interpretation. Moreover, the agency expressly waived any deference claim for the Bump Stock Rule under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*

Plaintiff Michael Cargill alleges that: (1) the Final Rule conflicts with the statutory definition of a machinegun and thus exceeds ATF’s authority; (2) ATF’s construction is not entitled to *Chevron* deference; (3) to the extent that the courts determine that the definition of machinegun is ambiguous with respect to bump stocks, they should apply the rule of lenity to determine that bump stocks are not machineguns; and (4) if the statute were interpreted as authorizing ATF’s declaration that bump stocks are prohibited machineguns, then it would be an unconstitutional delegation of Congress’s legislative powers.

The district court’s erroneous construction of the statute has been rejected by a significant majority of federal appellate judges outside the Fifth Circuit who have considered the same question. The best reading of the statute is, in fact, the one espoused by ATF before December 2018: non-mechanical bump stocks are not “machineguns.” A separate NCLA lawsuit, *Aposhian v. Garland*, also challenges the Final Rule. That suit is pending in the U.S. Supreme Court on a petition for a *writ of certiorari*.

The current statute, adopted in 1986, prohibits “machineguns” in a manner that does not include non-mechanical bump stocks. The evidence at trial demonstrated conclusively that a semi-automatic rifle equipped with a non-mechanical bump stock is not a weapon that “shoots, is designed to shoot, or can readily be restored to shoot, automatically more than one shot ... by a single function of the trigger.” It is impossible to square the Final Rule’s conclusion that bump stocks are machineguns with the uncontested evidence that every shot fired by a bump-stock-equipped semi-automatic rifle requires a separate “function” of the trigger. Furthermore, it is unlawful for a prosecutorial entity like ATF to rewrite existing law. Congress itself must initiate any change in gun control laws. The Court should enjoin ATF’s brazen effort to enact a new criminal law on its own.

NCLA released the following statements:

“Two appeals courts—the D.C. and Tenth Circuits—have upheld the Final Rule. But they did so only after placing a thumb on the scale by deferring to the Government’s interpretation of the ‘machinegun’ statute. Any court that conducts a truly independent analysis of the statute will quickly discern that bump stocks do not fit within the statutory definition of a machinegun.”

— **Rich Samp, Senior Litigation Counsel, NCLA**

“Like a majority of federal appeals judges who have weighed in on the merits, NCLA believes the federal statute banning machine guns does not encompass bump stocks. But if there is any ambiguity in the statute, then the rule of lenity still dictates construing the statute in Mr. Cargill’s favor to exclude bump stocks. Under no circumstance may ATF rewrite the statute to create new criminal liability for bump stock owners.”

— **Mark Chenoweth, President and General Counsel, NCLA**

For more information visit the case page [here](#) and the case video [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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