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NCLA Seeks Fifth Circuit *En Banc* Review of ATF's Bump Stock Ban to Resolve Circuit Split

Michael Cargill v. Merrick Garland, Attorney General, DOJ, Marvin Richardson, Acting Dir. of ATF, and ATF.

Washington, DC (January 28, 2022) – The New Civil Liberties Alliance, a nonpartisan, nonprofit civil rights group, today filed a [petition](#) for rehearing *en banc* in the lawsuit, *Michael Cargill v. Merrick Garland, et al.* NCLA is asking the full bench of the U.S. Court of Appeals for the Fifth Circuit to review two questions: (1) whether a [statute's](#) definition of “machineguns” unambiguously includes bump stocks, and (2) if it is ambiguous, does either the rule of lenity or *Chevron* deference apply to the 2018 reinterpretation of the statute adopted by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF). The previous Fifth Circuit panel [decision](#) in this lawsuit is at odds with the decision of every appeals court that has ruled on the issue, creating a conflict among the circuits.

For well over a decade, ATF determined that non-mechanical “bump stock” devices were not “machineguns,” and hence their possession was not prohibited. In 2018, the agency reversed course, creating a new “Bump Stock Rule,” holding that bump stocks are “machineguns” after all. It turned hundreds of thousands of bump stock owners into felons overnight and ordered law-abiding Americans to destroy or surrender their devices to ATF or face ten years in prison. ATF admits that the loss of property will exceed \$100 million.

The Fifth Circuit panel held that the Bump Stock Rule's interpretation of the statutory definition of “machineguns”—which ATF used to determine that bump stocks are machineguns—“is the best interpretation of the statute.” That holding conflicts with holdings of at least three other federal appeals courts—the D.C. and Tenth Circuits and the U.S. Navy-Marine Corps Court of Criminal Appeals. Plus, the *en banc* Sixth Circuit deadlocked 8-8 on the issue and thus was unable to render a decision. The Navy-Marine Corps court held that bump stocks are not “machineguns”; it also held that even if the statute were ambiguous, no deference would be warranted because the federal government has consistently and affirmatively waived any right to deference.

If the Court rules against ATF on the first of the two questions presented, it may need to address the deference question. The Supreme Court has repeatedly held that deference is unwarranted when the federal government affirmatively disavows it. It has also repeatedly rejected the view that the government's reading of a criminal statute is entitled to deference. A conflict among the circuits existed even before the panel's ruling, and that ruling only exacerbated the conflict. In light of this split, this lawsuit presents questions of exceptional importance that the full Fifth Circuit should address—as the full Sixth Circuit and full Tenth Circuits already did.

NCLA released the following statements:

“The panel decision in this case is out of step with decisions from other appeals courts. The panel held that ‘the best reading’ of the federal machinegun statute is that bump stocks are ‘machineguns.’ Fully 21 of the 27 judges from other federal appeals courts who have addressed the issue have disagreed with that holding. Rehearing *en banc* is warranted to resolve that conflict.”

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

“The panel tried to dodge the rule of lenity and *Chevron* deference questions inherent in this case by deciding—implausibly—that ATF’s newly discovered interpretation of a 35-year-old statute is the ‘best reading’ of the law. The full Fifth Circuit should not countenance that too-clever-by-half approach to statutory interpretation. Congress never banned bump stocks. The bills introduced in Congress to ban bump stocks did not contain 10-year prison sentences for the offense. Interpreting bump stocks to be ‘machineguns’ subject to that 10-year prison sentence makes a mockery of the rule of lenity.”

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

For more information visit the case page [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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