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Tenth Circuit Disregards Its Own Precedent in Appeal of Denied Challenge to ATF's Bump Stock Ban

Aposhian v. Barr, et al.

Washington, DC (May 7, 2020) – Today, the U.S. Court of Appeals for the Tenth Circuit invoked the *Chevron* doctrine to deny NCLA client Clark Aposhian's appeal of his challenge to ATF's bump stock ban in a 2-1 vote. Mr. Aposhian, who last spring was the "last man in America" to own a legal bump stock, thinks that only Congress should be able to ban bump stocks. Instead, the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) has made them illegal to possess through a Final Rule issued without statutory or constitutional authority. In so doing, ATF turned over 500,000 innocent purchasers into felons (but gave them 90 days to turn in or destroy their devices to avoid prosecution).

The Final Rule reinterpreted the words "automatically" and "single function of the trigger" in the National Firearms Act to classify bump stocks as "machine guns." Even though ATF had previously approved bump stocks for sale, and determined that they were not machine guns, the new Rule treats Mr. Aposhian's conduct as a federal crime punishable by up to 10 years in prison.

Mr. Aposhian's appeal raised key issues about whether an agency can create such a retroactive ban and about the *Chevron* doctrine, which instructs courts to defer to agencies' reasonable statutory constructions—but only if the court first concludes that the statute is ambiguous. Mr. Aposhian's brief argued that the National Firearms Act is *not* ambiguous, which is the same position the Department of Justice had taken in every prior machine gun possession case it has prosecuted in the last 30+ years. His appeal also asked whether the *Chevron* doctrine applies when the agency repudiates it and whether the *Chevron* doctrine may apply to criminal regulations given that the rule of lenity requires courts to construe ambiguous laws away from imposing criminal liability.

In its court filings, ATF admitted that it lacked rulemaking authority under the Gun Control Act and the National Firearms Act to issue a legislative rule banning bump stocks. That is why ATF insisted that its Final Rule was an "interpretive" rule rather than a "legislative" rule. Yet the Tenth Circuit ignored that crucial admission, treated the rule as a legislative rule anyway, and upheld it. ATF also agreed, in recognition of the rule of lenity, that if the law was unclear the Court could not read it to make innocent Americans into criminals. Yet the Tenth Circuit disregarded its own precedent to decide that the rule of lenity does not apply to regulations with criminal consequences.

In today's opinion, written by Judge Mary Beck Briscoe, a majority of the Court not only allowed upheld an unlawful legislative rule, but it bent over backward to "defer" to the ATF's reading of the law, even though the agency's brief refused to invoke *Chevron*. The court also disregarded Judge Briscoe's own prior opinion holding that the rule of lenity forecloses deference to an agency's interpretation of an ambiguous statute. In his

dissent, Judge Joel Carson recognized that deferring to ATF under *Chevron* "place[d] an uninvited thumb on the scale in favor of the government."

NCLA will continue to oppose the Final Rule in this case and in *Cargill v. Barr*.

NCLA released the following statements:

"The Court has allowed ATF to take the lawmaking decision away from Congress and create brand new criminal laws in defiance of the proper constitutional order. Judge Carson was right to say that both the ATF rule and the majority's decision 'subvert[] the constitutional prerogatives of each branch of government' by rewriting the clear language of a law passed by Congress."

—Caleb Kruckenberg, Litigation Counsel, NCLA

"Today's *Aposhian* decision from the Tenth Circuit once again reveals how pernicious the *Chevron* doctrine really is. Even where the statute was not ambiguous, even where the government refused to invoke it, and even where the rule of lenity forbade it, *Chevron* reared its monstrous head."

—Mark Chenoweth, General Counsel, NCLA

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