



FOR IMMEDIATE RELEASE

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

***Chevron* Is Admin. Law’s “Lord Voldemort” Say Tenth Cir. En Banc Dissenters in Bump Stock Ban Case**

Aposhian v. Wilkinson, et al.

Washington, DC (March 5, 2021) – A majority *en banc* panel in the U.S. Court of Appeals for the Tenth Circuit [voted](#) 6-5 today to vacate the court’s Sept. 4, 2020 order granting *en banc* rehearing of *Aposhian v. Wilkinson*. It also reinstated the court’s deeply flawed May 7, 2020 opinion, which invoked the *Chevron* doctrine to [deny](#) NCLA client Clark Aposhian’s appeal of his challenge to the bump stock ban imposed by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) in March of 2019.

As a result, Chief Judge Tymkovich, writing for himself and four other dissenting members of the Court, compared *Chevron* to “Lord Voldemort”—a character from the Harry Potter series considered to be the most powerful and dark wizard of all time—because litigants must now be afraid of even mentioning the case. “Under the panel majority’s theory, a party that challenges an agency’s interpretation of a rule is forced to dance around *Chevron*, even where the government has not invoked it. *Chevron* becomes the Lord Voldemort of administrative law, ‘the-case-which-must-not-be-named.’ And litigants bold enough to expressly oppose *Chevron* in their briefing will be left guessing whether their reference to the case was fleeting or perfunctory enough to avoid making an invitation. All the while, courts are given a troubling amount of freedom when deciding whether to use *Chevron*—discretion that will dictate the outcome in many cases.”

In his appeal, Mr. Aposhian asked whether the *Chevron* doctrine applies when the agency does not invoke 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. By allowing ATF to create new criminal liability here, according to the dissenting judges, “the Final Rule violates the separation of powers” and the “delegation [of Congressional power] raises serious constitutional concerns by making ATF the expositor, executor, *and* interpreter of criminal laws.”

The case also raised key issues about whether an agency can rewrite a federal criminal law. Mr. Aposhian argues that the National Firearms Act is *not* ambiguous and bump stocks are not machineguns, 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. The dissenting judges agree, “The statute’s plain meaning unambiguously excludes bump stocks.” ATF’s rule, however, rewrites the federal law and declares that every person who lawfully purchased a bump stock is now a federal felon.

NCLA will continue to litigate this case, which may include seeking review in the U.S. Supreme Court.

On March 8, NCLA will file its opening brief in another case challenging the bump stock ban, *Cargill v. Wilkinson, et al.*, in the U.S. Court of Appeals for the Fifth Circuit.

NCLA released the following statements:

“Five members of the Tenth Circuit recognized that not only was the bump stock ban an invalid rule, but also that it violated the basic structure of the Constitution by empowering a prosecutorial agency to rewrite the federal criminal law. The majority’s dangerous and misguided decision must not stand.”

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

“Rather than bring clarity to a deeply confused area of administrative law, a majority of the Tenth Circuit has decided to wave its magic wand and Vanish this case from the docket. However, the manifold problems with *Chevron* deference have not disappeared. If anything, today’s antics have further underscored the mischief that this doctrine causes.”

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

For more information about this case visit [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.

For more information visit us online at NCLAlegal.org.

###