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

NCLA Asks Supreme Court to Decide Three *Chevron* Deference Questions ATF's Bump Stock Ban Poses

Aposhian v. Garland, et al.

Washington, DC (August 2, 2021) – NCLA client Clark Aposhian's challenge to the federal [ban](#) on bump stocks is headed to the highest court in the land. The New Civil Liberties Alliance, a nonpartisan, nonprofit civil rights group, filed a [petition](#) for a *writ of certiorari* today in the U.S. Supreme Court in *Aposhian v. Garland, et al.* The cert. petition asks the Justices to review a flawed ruling of the U.S. Court of Appeals for the Tenth Circuit, which invoked the *Chevron* doctrine in at least three improper ways: (1) The majority below applied *Chevron* deference even though the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) and other federal defendants waived it below. (2) The court of appeals also improperly applied *Chevron* deference to interpret a criminal statute; and (3) it refused to let the rule of lenity resolve statutory ambiguity instead of *Chevron*. Five judges on the *en banc* Tenth Circuit, including Chief Judge Tymkovich, dissented on these grounds below.

The petition asks the Court to rule on whether courts may apply *Chevron* deference to an agency interpretation of federal law when the federal government declines to assert *Chevron* deference. ATF has refused throughout this litigation to seek *Chevron* deference, likely because ATF insists that its rule is an interpretive rule only, and *Chevron* deference never applies to interpretive rules. In any event, *Chevron* should not be applied to defer to the agency's statutory interpretation here because the government has deliberately waived the argument. NCLA insists, and three other circuits have held, that *Chevron* deference is subject to waiver. So, there is a circuit split on that issue worth the Court's attention.

A second question dividing the circuit courts is whether the *Chevron* doctrine applies to criminal laws at all. The Tenth Circuit joined those circuits that read a footnote in a Supreme Court precedent called *Babbitt* to allow *Chevron* to apply to the interpretation of criminal laws, so long as the regulation went through formal notice-and-comment rulemaking. NCLA argues that applying *Chevron* in the criminal sphere is a gross violation of defendants' due process, whether or not a rule is formal.

Finally, NCLA contends that the rule of lenity applies instead of *Chevron* deference when a court perceives ambiguity that must be resolved in a statute with both criminal and civil applications. The rule of lenity is a constitutionally required canon of statutory construction that protects due process and separation-of-powers principles. It requires courts to construe any ambiguity in a criminal law against the government if ordinary tools of statutory interpretation do not resolve it. 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. Like the first two questions, the split in the circuits on this issue exacerbated below calls out for Supreme Court resolution.

Bump stocks are devices designed for people with limited hand mobility. If used proficiently, they can also increase a semi-automatic firearm's rate of fire. Before 2017, ATF issued classification decisions under three different presidential administrations concluding that bump-stock-type devices were *not* machineguns. The agency changed course in 2018, concluding that non-mechanical bump stocks should be classified as

machineguns. ATF estimated that Americans possessed up to 520,000 previously legal non-mechanical bump stocks. The Final Rule required those devices to be destroyed or abandoned by March 26, 2019.

NCLA released the following statements:

“The federal appeals courts have issued conflicting decisions regarding the scope of *Chevron* deference, both with respect to whether courts should apply *Chevron* when the federal government disavows its applicability and whether *Chevron* has any relevance to the interpretation of criminal statutes. The Supreme Court needs to review this case in order to resolve the conflicts.”

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

“All eight court of appeals judges to review ATF’s bump stock ban without using *Chevron* deference—including five Tenth Circuit judges below—have decided ATF’s interpretation of the statute is flat wrong. The *Aposhian* case supplies the Supreme Court with a well-suited vehicle to clarify three aspects of *Chevron* deference and limit the damage this doctrine is doing to the rule of law. The Justices should seize this opportunity to clarify the law.”

— **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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