No. 19-1298

In the United States Court of Appeals
for the Sixth Circuit

Gun Owners of America, Inc., et al.
Plaintiffs-Appellants,
v.
Merrick B. Garland, in his official capacity as the Attorney General of the United States, et al.
Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Michigan at Grand Rapids
No. 1:18-cv-01429 – Paul Lewis Maloney, District Judge

BRIEF *AMICI CURIAE* OF TENNESSEE FIREARMS ASSOCIATION AND NINE ADDITIONAL FIREARMS RIGHTS ORGANIZATIONS IN SUPPORT OF PLAINTIFFS-APPELLANTS

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 19-1298 Case Name: Gun Owners of America, Inc. v. Garland

Name of counsel: John I. Harris III; David G. Browne

Pursuant to 6th Cir. R. 26.1, Tennessee Firearms Association et al.
Name of Party

makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

None of the proposed Amici parties are subsidiaries or affiliates of publicly owned corporations

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

None known to proposed Amici

CERTIFICATE OF SERVICE

I certify that on August 2, 2021 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ John I. Harris III
Counseo for Amicus Curiae

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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INTEREST OF THE AMICI CURIAE

Amici curiae are Tennessee Firearms Association, Grass Roots North Carolina, Oregon Firearms Federation, Connecticut Citizens Defense League, Bama Carry, Arizona Citizens Defense League, Open Carry Texas, Iowa Firearms Coalition, New Jersey Second Amendment Society, and Oklahoma Second Amendment Association. All ten amici are non-profit organizations organized under the laws of their respective states.

Lead amicus Tennessee Firearms Association ("TFA") has thousands of members and supporters in Tennessee, as well as members and supporters in the other states within this Circuit. TFA promotes the right to keep and bear arms, with an emphasis on the Second and Tenth Amendments to the United States Constitution and Article I, Section 26 of the Tennessee Constitution.

The additional amici are similar state-level non-profit organizations which, collectively, have members and supporters numbering in the hundreds of thousands throughout the country. These organizations exist in order to promote and support the right to keep and bear arms under the Second Amendment and corresponding state constitutional provisions, as well as to provide and promote training and education to both the public and government officials regarding technical and legal aspects of firearms. Each and every amici organization has members and supporters who were

affected by the Final Rule[1] and were deprived of their right to own bump stocks as a result.

This case also raises much broader issues, with implications far beyond bump stocks, for the hundreds of thousands of members and supporters of the amici organizations. The ability of the ATF (or any executive branch agency) to reinterpret and effectively change the statutory definitions of entire categories of firearms puts all members of these organizations – and all law-abiding firearm owners – in a state of continuous and ongoing confusion and peril.[2] These issues can already be seen on the horizon, as ATF moves toward reinterpreting definitions of commonly owned firearms far more numerous than bump stocks.[3] The members of the *amici* organizations have a strong interest in the outcome of this case given the severe criminal penalties for violations of firearms laws, the administrative reclassification of lawfully owned firearms and accessories as contraband, and the effects on their right to keep and bear arms.

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[1] Capitalized and abbreviated terms in this brief shall have the same meaning as in the Panel Opinion.

[2] In 2013, nearly a decade ago, it was estimated that Americans owned between 262 million and 310 million firearms, of which 28 million were semi-automatic rifles. *See* Hill, Edward W., *How Many Guns are in the United States: Americans Own between 262 Million and 310 Million Firearms* (2013). Urban Publications. 0 1 2 3 676. These numbers have undoubtedly grown substantially since 2013.

[3] *See*, *e.g.,* ATF's Notice of Proposed Rulemaking issued in May of this year (86 *Fed. Reg.* 27720), proposing to reinterpret the very foundational definitions what is a "firearm" by drastically broadening the meaning of the terms "frame" and "receiver" that have existed for decades.

ARGUMENT

A. Bump Stocks Cannot Be Machineguns Under the Best Reading of 26 U.S.C. § 5845(b)

The parties, the panel, precedent of this Court, and the Supreme Court, are all in agreement that *Chevron* deference is inapplicable to the Final Rule and ATF's reinterpretation of the definition of a machinegun. This issue has been extensively briefed and addressed. In deciding this appeal, the Court should not rely upon or apply *Chevron* deference. Given that *Chevron* deference clearly does not apply, this Court is tasked with finding the best meaning of the statute, without regard to ATF's ever-changing or even politically motivated interpretations.

"Our analysis begins with the language of the statute." *Leocal v. Ashcroft*, 543 U.S. 1, 8, (2004). As the Supreme Court recently explained in *Facebook, Inc. v. Duguid*, 141 S.Ct. 1163 (2021), Congress often defines devices for purposes of a statutory framework by setting forth (1) what the device must do and (2) how it must do it, in order to be that device. *Id*. at 1169 ("Congress defined an autodialer in terms of what it must do ('store or produce telephone numbers to be called') and how it must do it ('using a random or sequential number generator').").

A machinegun, as defined by § 5845(b), must (1) fire more than one shot, and (2) it must do so (a) automatically, (b) without manual reloading, and (c) by a single function of the trigger. The plain language of the statute requires that ALL of these elements exist in the same firearm (or collection of parts that may be readily assembled)

at the same time in order to be a machinegun. The term "automatically" is not defined by the Code and has generated relatively little applicable discussion in this case and in others dealing with § 5845(b). The most applicable contemporary definitions, however, show that the term refers to a function "having a self-acting or self-regulating mechanism," and in specific reference to firearms, "firing repeatedly until the trigger is released[4]." Such definitions would strongly repudiate any notion that a bump stock could be a machinegun, given that its mode of action indisputably requires repeated release and re-activation of the trigger and, in any event, also requires continuous manipulation of the firearm and the trigger via deliberate human input.

There is no dispute that a semiautomatic firearm, with or without a bump stock, can fire repeatedly "without manual reloading." By definition, such a firearm "reloads" its chamber each time it is fired, until all ammunition is expended. Yet it is worth noting that the district court appears to have erred in reading the statutory elements of a machinegun in the disjunctive, when it stated that "[r]ead in context, a weapon is a machine gun when more than one shot occurs without manual reloading." District Court Opinion, RE 48, Page ID 465. Of course, this cannot be the case – if it were, then *any* firearm that holds more than one round of ammunition, regardless of the mechanical manipulations required to fire a subsequent shot, would be a machinegun. Even when

[4] *See* Definition of "Automatic(ally)," Miriam-Webster Dictionary (2021), *available at* https://www.merriam-webster.com/dictionary/automatically (*last accessed July 30, 2021).*

read more narrowly, this statement in the court below would encompass millions of double-barreled shotguns used for sporting clays and hunting, which could not possibly be machineguns by any definition or understanding. Finally, it is worth noting that, oddly enough, there are firearms which will continue to fire if the trigger is held down, *but* require manual action to reload for each shot – and for good reason, they have never been considered machineguns by ATF or otherwise.[5]

Both ATF and the district court refer at times to a "pull" of the trigger despite the statute's use of the word "function." "Pull" implies the discrete action of a human, whereas "function" implies the machinations of a device. The trigger, of course, is a self-contained mechanical system, which functions in a defined and repeatable manner.[6] Thus, its function is the same regardless of how many times, or how quickly, that function is initiated. But the distinction between "pull" and "function" is one without a difference in this case. As the panel aptly and correctly explained in different terms, the trigger is still "pulled" once for each shot on a semi-automatic firearm regardless of

[5] For example, Ithaca manufactured approximately 2 million Model 37 pump action shotguns, which have the ability to "slam fire" – one simply holds the trigger down and the gun will continue to fire each time the action is manually cycled to reload it. *See* Anthony, Richard, "The Ithaca Model 37 DS Police Special is a 'Slamfire' Shotgun," September 5, 2017, *available at* *https://greatamericanoutdoors.com/2017/09/the-ithaca-model-37-ds-police-special-is-a-slamfire-shotgun/* (*last accessed July 30, 2021).*

[6] *See* "How an AR-15 Trigger Works," animated GIF *available at* https://imgur.com/WzRuu5t (*last accessed July 30, 2021)*. When the trigger is fully depressed, it releases the hammer which in turn swings forward and fires a shot. The trigger then resets, and must be moved forward – that is, "released" – before it can again be depressed/pulled to release the hammer and fire another shot.

whether a "bump stock" is utilized. This aspect of a bump stock's function on a semiautomatic firearm is indisputable factually, and is legally supported by the definition of a "semiautomatic rifle" found in 18 U.S.C. § 921(a)(28) ("The term "semiautomatic rifle" means any repeating rifle which utilizes a portion of the energy of a firing cartridge to extract the fired cartridge case and chamber the next round, and which requires a separate pull of the trigger to fire each cartridge. (emphasis added).

If the trigger must be pulled, released, and reset (completing one "function" of it) for each shot, then the mere fact that a bump stock allows the user to execute this function more rapidly does not a machinegun make. Expanding the definition of "machinegun" to include any semiautomatic firearm configured to be rapidly fired semi-automatically via a bump stock is no different than "[e]xpanding the definition of an autodialer to encompass any equipment that merely stores and dials telephone numbers," and "would take a chainsaw to these nuanced problems when Congress meant to use a scalpel." *Duguid*, 141 S.Ct. at 1171. In effect, the ATF's interpretation of § 5845(b) would redefine virtually any of the tens of millions of semiautomatic rifles in the nation as machineguns, just as "Duguid's interpretation of an autodialer would capture virtually all modern cell phones, which have the capacity to "store ...telephone numbers to be called" and "dial such numbers."" *Id.* Such an interpretation would not merely miss the mark of being the "best" one – it would border on absurd and have far-reaching consequences.

B. The Rule of Lenity Should Resolve Any Ambiguity in Favor of Plaintiffs-Appellants

If *Chevron* deference is inapplicable to the Final Rule, and this Court is thus charged with finding the best meaning of the statutory language defining a machinegun, then as clear and unambiguous as the definition of "machinegun" may be, any ambiguity to be found must be resolved in favor of Plaintiffs-Appellants. [7] The rule of lenity has been ingrained in our criminal law for centuries, long before the administrative state. *United States v. Wiltberger*, 18 U.S. 76, 93 (1820) ("In criminal cases, a strict construction is always to be preferred; and if there be doubt, that is of itself conclusive.").

A single footnote in *Babbitt*[8], never again addressed or relied upon by the Supreme Court, cannot possibly serve as the basis to execute what amounts to a wholesale end-around on the longstanding rule of lenity, solely because the government inserts the formalistic buffer of the administrative rulemaking process (by unelected bureaucrats) between itself and the criminalization of an act or object which the underlying statute does not criminalize. A rule based on such a distinction is

[7] In *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722 (6th Cir. 2013), Judge Sutton expressed, in concurrence, skepticism regarding the application of *Chevron* deference to regulations implicating criminal penalties, observing that *Chevron's* proper place was in granting deference to agency interpretation of ambiguities in "humdrum regulatory statutes" of a solely civil nature – and that this distinction was often, and should be, the state of peaceful co-existence between the rule of lenity and *Chevron* deference.

[8] *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687,704, n. 18 (1995).

constitutionally inconceivable, and would put blinders on the courts, forcing them to ignore and abdicate their basic duties under Article III to interpret the law. Ironically, this very same footnote in *Babbitt* cites a case from just three years prior - *United States v. Thompson Center Arms Company*, 504 U.S. 505 (1992) – which provides a far better and more developed discussion of why the rule of lenity must apply *if* there is any ambiguity in to be found in the statute at issue in this case.

In *Thompson Center*, the Supreme Court examined the definition of a "short-barreled rifle" under the National Firearms Act of 1934, the very same legislation that defines and regulates machineguns at issue in this case. In *Thompson Center*, the Supreme Court found ambiguity in the statutory definition of "making" a firearm when a collection of parts sold together could be assembled into a pistol or (long-barreled) rifle not regulated under the Act, but could also be assembled into a regulated "short-barreled rifle." "Making a firearm without approval may be subject to criminal sanction, as is possession of an unregistered firearm and failure to pay the tax on one, 26 U.S.C. §§ 5861, 5871. It is proper, therefore, to apply the rule of lenity and resolve the ambiguity in Thompson/Center's favor." *Id*. at 518.

The Supreme Court, just three years before *Babbitt,* spoke clearly and unequivocally in *Thompson Center* regarding application of the rule of lenity to the very same statutory scheme at issue in this case. *Thompson Center's* treatment of this issue was not, as Justice Scalia later described *Babbitt*, a mere "drive-by." Nor does the fact

that this bump stock case involves a formally promulgated administrative rule (as opposed to a mere letter or less formal action by ATF) serve to insulate it from application of the rule of lenity. The very purpose of the rule of lenity is to avoid creation of "offenses that have never received legislative approbation, and about which adequate notice has not been given to those who might be ensnared." *U.S. v. Thompson*, 484 F.3d 877, 881 (7th Cir. 2007). That is precisely what the ATF has done with bump stocks via the Final Rule, by reinventing the very definition of a machinegun without Congressional involvement, and then providing notice which directly contradicts their repeatedly and recently communicated prior position regarding bump stocks. The Final Rule is exactly the type of unlegislated and confusing action that the rule of lenity is intended to address if there is any ambiguity. Even taking as true the district court's view that § 5845(b) is susceptible to readings that could render a bump stock both a machinegun and not a machinegun, application of the rule of lenity would require that the Final Rule be enjoined.

C. The District Court Should Be Directed to Issue a Nationwide Injunction

If the Final Rule is facially incongruent with the best or unambiguous meaning of § 5845(b), then this Court can and should direct the district court to fashion a proper and suitable remedy. A district court, pursuant to its powers in equity, "may command persons properly before it to cease or perform acts outside its territorial jurisdiction." *Steele v. Bulova Watch Co.* , 344 U.S. 280, 289 (1952) ; *see also United States v. Oregon* , 657 F.2d 1009, 1016 n.17 (9th Cir. 1981) ("When a district court has

jurisdiction over all parties involved, it may enjoin commission of acts outside of its district."). A nationwide injunction regarding ATF, which operates and would presumably enforce the Final Rule throughout the United States, is clearly within the judicial power of the district court. In this case, both logic and necessity strongly support a nationwide injunction. The panel expressly declined to extend any injunction outside this Circuit due to other circuits having applied *Chevron* to deny preliminary injunctions regarding bump stocks. Yet in the same breath, the panel admits that it is not bound by sister circuits, and also reached the opposite conclusion regarding both *Chevron* and the appropriateness of a preliminary injunction generally. Simply put, this Court has the same power to issue a nationwide preliminary injunction as the other circuits had to deny one.

The panel supports its decision to circumscribe preliminary injunctive relief to the boundaries of this Circuit by noting the value of allowing issues to "percolate" in the circuit courts. Given that this is at least the third circuit court case to examine bump stocks (with plenty of percolation having taken place by now), the value of any further "percolation" of these issues is far outweighed by the immediate, widespread, and ongoing harm to the former and would-be owners of bump stocks throughout the nation, and in fact owners of all semiautomatic firearms given the clear and growing danger of ATF's reinterpretation of basic definitions in a manner that imperils millions nationwide. More importantly, a nationwide preliminary injunction to prevent these harms, an interim measure by its nature, does not in any way prevent further percolation

of the issues in the form of further litigation and final adjudication in one or more circuits. It would simply preserve the far less perilous state of affairs that existed prior to the effective date of the Final Rule, and allow final adjudication and perhaps resolution by the Supreme Court without the risk to millions of otherwise law-abiding firearm owners.

Furthermore, there clearly are not any "different factual contexts" in each circuit which would support the value of percolation or deference to sister circuits in this case. Triggers, bump stocks, and firearms in general, all function in the same manner in every circuit, and of course the applicability of the Final Rule and the statutory language remains a geographic constant as well. The main, perhaps only, defining difference amongst the circuits regarding bump stocks is a purely legal one regarding the applicability of *Chevron*, not the operative facts or mechanics of bump stocks which exist and operate identically throughout the nation. The value of any further judicial "percolation" seems elusive if each circuit has already staked out its position on *Chevron* deference in this context, while all the operative facts remain homogenous, constant, and frankly uncontroversial[9]. The harm and risk to all Americans, including the *amici* which represent firearm owners outside of this circuit, remains substantial and ongoing.

[9] There does not appear to be any factual controversy regarding the mechanical and physical function of bump stocks and semiautomatic firearms.

Finally, amici urge this Court to examine constitutional dimensions of this case in determining the necessary remedy. As the panel noted at the opening of its opinion, this case rests as much on *who* determines the statute's meaning as it does on *what* the statute means. The Final Rule is as much an affront to both separation of powers and the role of the judiciary, as it is to the plain language of § 5845(b). If this Court finds the Final Rule to be violative of one or more of these fundamental principles, as amici would implore and as the panel found and discussed[10], then it cannot leave all Americans but those in its four states without the vital protection of a preliminary injunction in the face of severe criminal penalties. *See Hills v. Gautreaux* , 425 U.S. 284, 293–94 (1976) ("Once a constitutional violation is found, a federal court is required to tailor the scope of the remedy to fit the nature and extent of the constitutional violation.") (emphasis added). The remedy in this case must be a nationwide injunction, as the nature and extent of the constitutional violation require it.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the briefs of Plaintiffs-Appellants, amici urge the Court to reverse the district court and remand this case with instruction to issue a nationwide preliminary injunction enjoining application or enforcement of the Final Rule.

[10] *See* Panel Opinion 25-29, noting serious concerns about both usurpation of legislative powers by ATF and the need to maintain the role of the judiciary in interpretation of the law, and declining to apply *Chevron* deference as a result.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and 29(d) because, excluding the parts of the document exempted by Fed. R. App. P. 32(a)(7)(B)(iii) it contains 3670 words.
2. This brief complies with the typeface requirements of Fed. R. App. P.32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

/s/ *John I. Harris III*
John I. Harris III
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system on August 2, 2021.

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Executed this 2nd day of August, 2021.

/s/ *John I. Harris III*
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