No. 19-1298

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

GUN OWNERS OF AMERICA, INC., *et al.,*
Plaintiffs–Appellants,

GUN OWNERS OF CALIFORNIA, INC.,
Movant–Appellant,

v.

MERRICK B. GARLAND, *et al.*,
Defendants–Appellees.

On Appeal from the United States District Court
for the Western District of Michigan
No. 1:18-cv-01429 - Hon. Paul L. Maloney

BRIEF OF *AMICUS CURIAE* FIREARMS POLICY COALITION IN SUPPORT OF PLAINTIFFS-APPELLANTS AND IN SUPPORT OF REVERSING THE DECISION OF THE DISTRICT COURT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *Amicus Curiae* submits this corporate disclosure and financial interest statement.

Firearms Policy Coalition, Inc., is a nonprofit corporation with no parent corporation, nor has it issued any stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Regulations

Other Authorities

I. INTEREST OF *AMICUS* AND SUMMARY OF ARGUMENT[1]

The Firearms Policy Coalition, Inc. (FPC) is a nonprofit membership organization that works to defend constitutional rights and promote individual liberty, including the right to keep and bear arms, throughout the United States. FPC engages in direct and grassroots advocacy, research, legal efforts, outreach, and education to this end.

FPC agrees with the many reasons offered by others in support of reversal, including those of the panel opinion. It writes separately to discuss whether *Chevron* deference is appropriate where the government has disavowed having exercised such deference and does not seek to defend any supposedly legislative judgments the courts would impute to it against its express statements to the contrary. The government is correct that ATF did not engage in legislative rulemaking as far as the definitional questions are concerned. It repeatedly disclaimed having any leeway to implement alternative approaches to bump stocks because it understood its discretion to be foreclosed by its erroneous view of the plain meaning of the statute. And its brief discussion of *Chevron*, claiming that its view was reasonable because that was the plain meaning of the statute, confirms that it did not imagine itself implementing a policy choice, but rather a legal choice dictated by the statute. As

[1] All parties have consented to the filing of this brief. No party's counsel authored any part of this brief and no person other than *amicus* made a monetary contribution to fund its preparation or submission.

for ATF's discussions relating to the implementation of its new interpretations, those transitional issues—the starting point for enforcement, the means of dispossessing oneself of bump stocks, etc.—were certainly discretionary choices on how to avoid the due process problems of instant application of a newfound statutory interpretation, but they hardly convert the interpretation itself into a legislative act.

Even assuming *Chevron* deference was available and not waived, because the ATF suffered under the erroneous view that the statute left it no leeway, its ultimate interpretation was not a matter of "choice," but a matter of mistaken obligation. Regardless of whether ATF's interpretation is erroneously viewed as one of several reasonable possibilities, the failure to recognize discretion is itself an abuse of discretion. The Final Rule rejected numerous proposed alternatives precisely because ATF erroneously thought it had no choice. But if the definition of machinegun was indeed ambiguous and permitted the view advanced by Appellants, then ATF had more choices than it acknowledged and hence the interpretation it believed was compelled was instead an arbitrary and capricious failure to choose.

II. ARGUMENT

A. THE GOVERNMENT HAS DISCLAIMED ENGAGING IN RULEMAKING THAT MIGHT BE ENTITLED TO *CHEVRON* DEFERENCE, THEREBY WAIVING ANY SUCH DEFERENCE.

Amicus agrees with Appellants that the government has waived *Chevron* deference and thus this Court cannot rely on such deference in resolving this case.

See GOA Supp. Br. at 17–21. *Amicus* would add that the government's express waivers and descriptions of its own action as involving an interpretive, rather than a legislative, rule deserves far more of this Court's deference than its interpretation of a statute that literally defines a substantive element of a criminal offense.

That the D.C. Circuit in *Guedes v. ATF*, 920 F.3d 1, 17–19 (D.C. Cir. 2019), *cert. denied* 140 S. Ct. 789 (2020), incorrectly viewed the Final Rule as legislative because it selected a future starting date and clumsily declared that conduct would "become" illegal after that date should not guide this Court's view of matters here. In purporting to have suddenly "discovered" that the plain and true meaning of the statute was contrary to decades of agency interpretation and public guidance, ATF was faced with a due process dilemma. It certainly could not have begun immediate enforcement actions against all of the persons it had repeatedly assured that bump stocks were legal. That would have been a grotesque violation of due process. So it created a grace period to allow persons it now claimed it had misled for years to bring themselves into compliance with ATF's miraculously enlightened understanding of the meaning of the law. The decision whether and how to implement a grace period were, of course, "legislative" in nature.[2] Were those details

[2] Determining the transitional procedures for how much time to give existing owners to dispossess themselves of bump stocks, how innocently acquired supposed contraband could be surrendered or destroyed, and similar matters of implementation of curse required the exercise of judgment, are not predetermined by the statute, and at some level represent formal guidance instructing Department

alone being challenged, they would more plausibly trigger *Chevron* deference as judgement-driven gap-filling measures involving a range of potential options for reconciling a sudden change of interpretation with the constitutional demand of fair notice and opportunity for persons to conform their behavior to the law.

Nor does the Final Rule's brief discussion of *Chevron*, *Bump-Stock-Type Devices*, 83 Fed. Reg. 66,514, 66,527 (Dec. 26, 2018), suffice to invoke deference to ATF's interpretive opinions regarding the meaning of the definition of "machine gun." What the agency said in reference to *Chevron* was that because it believed its definition was correct (and required) by the statute, it was definitionally "reasonable" under *Chevron*. But saying, in effect, that because ATF believes it should prevail at *Chevron* step one, it necessarily would win at step two, is oxymoronic. To even reach *Chevron* step two, the agency and a court would need to recognize that the language is ambiguous and reasonably admits of *more than one meaning*. Deference to the "legislative" choices of an agency only applies if the agency is choosing between two or more reasonable alternatives and provides policy-based reasons for its particular choice where such policy decisions are deemed to have been delegated to the agency. An agency saying it thinks option A

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lawyers not to prosecute in circumstances that surely would raise due process and retroactivity concerns. But those "legislative" components of the rulemaking did not extend to the Department's interpretation of the operative words of the definition of "machinegun," regarding which the Department claimed it had no discretion at all.

is reasonable because there is no option B is not an exercise of *discretion*, legislative or otherwise, it is a legal conclusion about what the meaning of the law *is*, rather than what it *should be* in the event of a choice. There is no presumed or permissible delegation of the plainly judicial function of saying what the law is, as opposed to the still-suspect delegation of the legislative function of saying what the law should be in the event the legislature itself failed to make a relevant legislative choice or there arises a supposed legislative gap that needs to be filled.

ATF's reading of the term machinegun was never a *judgment* call in the rulemaking, was never understood by ATF as a judgment call, and in all instances the agency claimed to believe it was acting according to the binding terms of the law, not its own legislative or policy discretion. That determination is in every sense an interpretive rule, not a legislative rule, and is not entitled to *Chevron* deference, as the government has repeatedly and explicitly conceded.

B. EVEN WERE *CHEVRON* DEFERENCE THEORETICALLY AVAILABLE, IT WAS NEITHER RECOGNIZED NOR EXERCISED BY THE AGENCY AND HENCE ITS INTERPRETATION WOULD BE ARBITRARY AND CAPRICIOUS.

Even were this Court disinclined to rest on a waiver or forfeiture theory in rejecting *Chevron* deference, the government's view and conduct readily confirms that it did not properly recognize or exercise any legislative discretion it might theoretically have had, and hence its eventual choice of interpretation was arbitrary and capricious for having not properly considered the alternatives. "Agency action

is arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider" or "offered an explanation for its decision that runs counter to the evidence before the agency." *Animal Legal Def. Fund, Inc. v. Perdue*, 872 F.3d 602, 611 (D.C. Cir. 2017) (cleaned up; citation omitted). A corollary to relying on improper factors is that the failure to consider all of the proper factors and alternatives, or even to recognize discretion where it exists, is also arbitrary and capricious. *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1911 (2020) (rejecting repeal of DACA because Acting Secretary of DHS "did not appear to appreciate the full scope of her discretion").

As noted above, the government does not invoke deference for its interpretive rule, it did not genuinely do so in the rulemaking, and on numerous occasions it affirmatively denied having the sort of discretion that leads to deference for an agency's legislative choices. *See, e.g.*, Brief for Resps. in Opp. ("BIO"), *Guedes v. ATF*, No. 19-296 (U.S. Supreme Court, 2019) at 14, 20–27; Reply in Supp. of Defs.' Mot. for Summ. J. and Mem. of P. & A. in Op. to Pls.' Cross-Mot. for Summ. J. at 16–17, *Guedes v. ATF*, No. 18-cv-02988-DLF (D.D.C. July 24, 2020, Doc. #67) (hereinafter "ATF's *Guedes* Reply") (conceding that *Chevron* is inappropriate here and that ATF did not believe it had any discretion in defining a machinegun when it adopted the Final Rule). Before the Supreme Court in the *Guedes* case, the government repeated and expanded on its arguments that the Final Rule was not

legislative, it did not understand itself to be engaging in legislative rulemaking, and that the definitions should rise or fall of a court's independent construction of the statute. And it likewise denied having any delegated "legislative" gap-filling authority regarding the definition of "machinegun." BIO at 25.[3]

Similarly, in the rulemaking itself, ATF repeatedly rejected numerous alternatives not because it disagreed with them on policy grounds or in its "legislative" judgment, but because it did not believe it had any choice. *See, e.g.*, 83 Fed. Reg. at 66,529 ("The bump-stock-type device rule is not a discretionary policy decision based upon a myriad of factors that the agency must weigh, but is instead based only upon the functioning of the device and the application of the relevant statutory definition."); *ibid.* ("[T]he materials and evidence of public safety implications that commenters seek have no bearing on whether these devices are appropriately considered machineguns based on the statutory definition."); *id.* at 66,535 (rejecting various alternatives to the reclassification, stating that "the Department has concluded that the NFA and GCA require regulation of bump-stock-type devices as machineguns, and that taking no regulatory action is therefore not a

[3] That Attorney General Barr was the Head of the Department responsible for ratifying the Final Rule itself, and for defending that rule in court and in the Supreme Court, makes this case different than if litigation counsel makes assertions that may or may not reflect the views of the agency *qua* agency. Here, the Department of Justice and its counsel are one and the same and there is no basis for ignoring the Department's explanation of what it was doing in the rulemaking.

viable alternative to this rule"); *id.* at 66,533–34 ("This is because the statutory definition alone determines whether a firearm is a machinegun. The Department believes that the final rule makes clear that a bump-stock-device will be classified as a machinegun based only upon whether the device satisfies the statutory definition."); *id.* at 66,536 ("Because bump-stock-type devices are properly classified as "machineguns" under the NFA and GCA, the Department believes that ATF must regulate them as such, and that the recommended alternatives are not possible unless Congress amends the NFA and GCA."); *see also Guedes*, 920 F.3d at 39 n.6 (Henderson, J., concurring in part and dissenting in part) ("I would note that the ATF in fact declared that the Rule's interpretations of 'single function of the trigger' and 'automatically' 'accord with the *plain meaning* of those terms.' *Bump-Stock-Type Devices*, 83 Fed. Reg. at 66,527 (emphasis added).").

Because the government repeatedly claimed that it was bound by the plain meaning of the statute, even if deference to a "legislative" definition of machinegun were otherwise appropriate, no legislative discretion was in fact exercised here. It is a fundamental truism that an agency that does not *understand* that it has discretion cannot be deemed to have exercised such discretion. If the Court determines that the statutory definition is ambiguous and that ATF was perhaps *permitted* to define machinegun as it did in a legislative rule, but not *required* to do so, then all of the Final Rule's responses rejecting proposed alternatives due to a lack of discretion rest

on a false assumption. A legislative choice to expand to the outer reaches of the potential definitions of machinegun is not *required* and hence ATF would have to consider and articulate "legislative" reasons for rejecting the comments, not simply rely on an erroneously perceived legal constraint. As with the Supreme Court's recent DACA decision, a remand would be required. *DHS*, 140 S. Ct. at 1916. The government itself seems to concede as much in previous briefings in *Guedes*, acknowledging that the failure to recognize the existence of any "legislative" discretion would render its Final Rule arbitrary and capricious. ATF's *Guedes* Reply at 18–19 (citing *PDK Labs. v. DEA*, 362 F.3d 786, 798 (D.C. Cir. 2004) (discussing whether remand is required when an "agency wrongly believes that [its] interpretation is compelled by Congress") (internal quotations omitted). One cannot defer to a discretionary choice the agency neither made nor believed it was making.

The failure to understand and exercise discretion is, of course, arbitrary and capricious regardless of how one imagines such discretion *would have been* exercised. Even if ATF believed its interpretation was the best interpretation of the language, it did not claim to consider the policy implications or the alternatives in the event that it were not constrained by the statute. ATF gave absolutely no consideration to many alternatives that would still be compatible with such an unconstrained interpretation, for example grandfathering certain bump stocks in

precisely the manner actual machineguns were grandfathered.[4] Any potential suggestion that ATF would have reached the same result even if it understood itself to have discretion is speculative at best and does not provide a reviewable record to test the rationality and coherence of any such hypothetical decision.

Any other suggestion that ATF lacked authority to adopt some of the proposed alternatives simply begs the question by assuming a lack of discretion. For example, a claimed lack of authority to issue amnesty depends on the assumption that the statute itself necessarily prohibits bump stocks rather than merely giving the agency the option to ban them (or not). If bump stocks do not *have* to be included in the definition of machinegun, and if the agency has the option of regulating prospectively, as it did in this case, then amnesty is not forbidden by an inapplicable statute. Failure to consider various partial measures if the statute can be construed more narrowly is reversible error. *DHS*, 140 S. Ct. at 1914.

[4] *Cf*. ATF Ruling 82-8, https://www.atf.gov/file/58146/download, at pp. 143–144 ("SM10 and SM11A1 pistols and the SAC carbine are machine guns as defined in Section 5845(b) of the Act. … [T]his ruling will not be applied to SM10 and SM11A1 pistols and SAC carbines manufactured or assembled before June, 21, 1982.").

III. CONCLUSION

This *en banc* Court should reverse the decision of the district court for the reasons given in the panel opinion and such other reasons as provided above and in the further *en banc* briefing.

Respectfully submitted,

August 2, 2021

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and Fed. R. App. P. 32(a)(7)(B) because it contains 2,578 words, excluding the parts exempted by Fed. R. App. P. 32(f). Alternatively, it complies with the page limits for *amicus* briefs in that it is less than half the 25 pages allotted for the principal pray brief.

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 14-point Times New Roman, a proportionally spaced font.

/s/ Joseph G.S. Greenlee
August 2, 2021

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I hereby certify that I electronically filed the foregoing with the Clerk of Court, who will enter it into the CM/ECF system, which will send a notification of such filing to the appropriate counsel.

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