IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

DAMIEN GUEDES, *et al.*,	)	
	)	
Appellants,	)	
	)	
v.	)	**No. 21-5045**
	)	
BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES, *et al.*	)	
	)	
Appellees.	)	
_____	)	

PETITION FOR HEARING *EN BANC*

Pursuant to Fed. R. App. P. 35, Appellants hereby petition for this case to be heard *en banc* in lieu of a panel hearing.

ARGUMENT

As described in Appellants' docketing statement, the issues presented in this case are:

1. Whether the definition of "machinegun" in 28 U.S.C. § 5845(b) and 18 U.S.C. § 921(a)(23) related encompasses bump-stock devices as interpreted by ATF in its December 26, 2018 Final Rule?

2. Whether the district court erred in applying *Chevron* deference rather than the rule of lenity to uphold ATF's interpretation of a statute having both criminal and civil application?

3. Whether the Government waived *Chevron* deference either by expressly rejecting its application throughout this case or by failing to recog-

nize or exercise any interpretive discretion regarding language it viewed as plain?

4. Whether application of *Chevron* deference in the circumstances of this case violates the separation of powers and due process under the Constitution?

5. Whether the formulation and application of ATF's revised interpretation of "machinegun" is arbitrary and capricious in general and as applied to bump stocks?

Most of those issues were addressed, in whole or in part, by a panel of this Court on appeal from the denial of preliminary injunction. *Guedes v. ATF*, 920 F.3d 1, 17–24 (D.C. Cir. 2019), *cert. denied*, 140 S. Ct. 789 (2020). The panel held that, on the record before it, there was no likelihood of success because, although the definition of "machinegun" was ambiguous, *Chevron* deference applied, had not been waived by the government, took priority over the rule of lenity, and the government's interpretation was reasonable and entitled to deference. Judge Henderson dissented both as to the application of *Chevron* deference and as to whether the statutory definition of "machinegun" could be read to encompass bump stocks. 920 F.3d at 35-49 (Henderson, J., dissenting in part).

Appellants' subsequent petition for a writ of certiorari was denied, though Justice Gorsuch issued an accompanying statement agreeing with Petitioners that the panel decision was incorrect as to the fundamental issues surrounding deference but also agreeing with his colleagues that the interlocutory appeal was premature and expressing the hope that the errors would be corrected on remand. *See*

Guedes v. ATF, 140 S. Ct. 789, 789–91 (2020) (statement of Gorsuch, J., regarding denial of cert.).

On remand to the district court, the parties briefed cross-motions for summary judgment and, without calling for oral argument, the court granted the government's motion and denied Appellants' motion largely based on the prior panel decision having addressed the central issues in the case. *Guedes v. ATF*, 2021 WL 663183 (D.D.C. Feb. 19, 2021).

Since that decision, a panel of the Sixth Circuit has rejected the application of *Chevron* deference to the same regulation at issue here and determined that the better reading of the statute excludes the government's interpretation. *See Gun Owners of America, Inc. v. Garland*, 2021 WL 1138111, at *4-*21 (6th Cir., March 25, 2021) (rejecting application *Chevron* deference and rejecting ATF's reading of the definition of "machinegun" at issue in this case).

The present appeal would benefit from direct *en banc* review for several reasons. First, it seems unlikely that a panel of this Court will decline to apply the prior panel's legal rulings on preliminary injunction, and hence many of the central issues concerning the error of those rulings will not be as effectively briefed or decided as they would be before the *en banc* Court not constrained by the prior opinion. Efforts to persuade a panel of this Court that the earlier preliminary injunction decision should not bind a merits panel would distract from briefing the underlying

issues and would have limited chances of success. *See, e.g.*, *Sherley v. Sebelius*, 689 F.3d 776, 781–83 (D.C. Cir. 2012) (declining to apply the preliminary-injunction exception to the law-of-the-case doctrine in similar circumstances).

Second, there is no reason to duplicate effort at the panel and subsequent *en banc* stage given the inevitability of a petition for rehearing *en banc* should a panel in this appeal follow the earlier panel decision regarding denial of preliminary injunction. And apart from duplication, briefing before the *en banc* Court can more directly address whether the prior legal rulings were correct, rather than having to focus substantially on arguments within the framework of that prior decision if briefing is initially to a panel. Both judicial economy and an interest in avoiding unnecessary additional expenditure of government and private resources in this long-running litigation counsel in favor of expediting the matter directly to the *en banc* Court.

Third, given the Circuit split and Justice Gorsuch's statement suggesting a strong likelihood of certiorari should the result in this case remain the same, it would be a service to both the parties and the Supreme Court to have a decision of the full *en banc* Circuit regarding its view of the issues involved. Such a decision, whichever way it came out, would give the Supreme Court the benefit of further detailed analysis from jurists who were free to consider the issues anew in light of Justice Gorsuch's concerns and the recent conflicting Sixth Circuit decision.

CONCLUSION

Because of the importance of the questions at issue in this appeal, the likely limited reconsideration a panel would give to questions addressed in the preliminary injunction appeal, the concerns raised by Justice Gorsuch, and the recently developed split with the Sixth Circuit, this Court should grant the petition for initial hearing *en banc*.

Respectfully Submitted,

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Counsel for Appellees

April 16, 2021

CERTIFICATE OF SERVICE

I hereby certify that on April 16, 2021, I electronically filed the foregoing with the Clerk of the Court by using the appellate CM/ECF system. I also hereby certify that the participants in the case are registered CM/ECF users and will be served via the CM/ECF system.

/s/ Erik S. Jaffe
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Attorney for Appellants