19-1298

United States Court of Appeals
for the Sixth Circuit

GUN OWNERS OF AMERICA, INC.; GUN OWNERS FOUNDATION;
VIRGINIA CITIZENS DEFENSE LEAGUE; MATT WATKINS;
TIM HARMSEN; RACHEL MALONE,

Plaintiffs-Appellants,

-and-

Movant-Appellant,

-against-

MERRICK B. GARLAND, U.S. Attorney General, in his official capacity as ActingAttorney General of the United States; U.S. DEPARTMENT OF JUSTICE; BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES; THOMAS E. BRANDON, in his official capacity as Acting Director, Bureau of Alcohol, Tobacco, Firearms, and Explosives,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN AT GRAND RAPIDS

BRIEF OF THE NATIONAL FOUNDATION FOR GUN RIGHTS AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

The National Foundation for Gun Rights (NFGR) is a nonprofit educational, research, and legal aid organization operating under § 501(c)(3) of the Internal Revenue Code. NFGR is not a subsidiary or affiliate of a publicly owned corporation, and does not issue shares of stock. No publicly held corporation has a direct financial interest in the outcome of this litigation due to *amicus*' participation.

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INTEREST OF AMICUS CURIAE

Amicus Curiae, the National Foundation for Gun Rights, Inc. ("NFGR"), is a nonprofit educational, research, and legal aid organization, exempt from income tax operating under the Internal Revenue Code ("IRC") § 501(c)(3). The NFGR was established, *inter alia*, to conduct research and inform and educate the public on the right to keep and bear arms as protected by the Second Amendment to the United States Constitution. NFGR accomplishes its mission through public communications and litigation. Through its litigation program, the NFGR has filed *amicus* briefs and has assisted gun owners in both criminal and civil matters where their rights have been violated.

Pursuant to Fed. R. App. P. 29, counsel for *amicus* states that 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.

INTRODUCTION

The United States Constitution sets forth a system in which the various branches of government balance one another and the rights of the individual are protected. The Founders of the United States witnessed a world in which all powerful royal monarchs dictated the law of the land with minimal concern for the rights of the individual. Under that historical understanding, the framers of the Constitution

drafted the document and subsequent Bill of Rights with an intent of establishing a framework in which power was not solely enshrined in one monarch, but in co-equal branches of government. Further, these documents created the various enumerated rights that each American citizen is guaranteed, such as the right to life, liberty and property.

Unfortunately, since the ratification of the founding documents, our country's branches of government have grown exponentially and the originally sought-after balance between them has waned. Most notably, the powers of the executive branch and its various entities have swollen to the point of becoming a rogue sovereign dictating expansive regulations that subvert the legislative authority entrusted in Congress, threatening the very framework of government. These regulations can affect minute or massive aspects of every American citizen's life and can result in the deprivation of their rights. Even worse, this power can blatantly be used as a tool or weapon for political expediency by the President of the United States.

In the present case, the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), charged with regulating machineguns, relented to political pressure after a mass shooting which took place in 2017. The ATF reversed their long-held interpretation related to the classification of bump stocks and issued the regulation in question in this case, 83 Fed. Reg. 66514 (Dec. 26, 2018) (the "Final Rule"). This regulation re-classified bump stocks as machineguns and made ownership,

possession, and sale illegal, depriving thousands of otherwise law-abiding American citizens of their property rights and subjecting them to harsh criminal penalties for merely owning or possessing something that was legal to own and possess until the enactment of this Final Rule. In doing so, the ATF ordered the forfeiting or destruction of over half a million bump stocks owned by gun owners across the country. All were premised on a change in interpretation of the word "machinegun" by an executive bureau under pressure from the chief executive. The actions taken by the Appellees constitute a violation against the constitutional rights of those who possess bump stocks, while generally continuing the alarming tendency of legislating by executive fiat.

A. ATF'S Regulation Banning Bump Stocks Violates the Takings Clause

The Court's panel did not address arguments related to the Takings Clause within its most recent opinion. Regardless of whether or not the Court finds that Chevron deference applies, the Court should analyze the regulation and its validity against the Takings Clause. The regulation at issue in this case constitutes a taking of private property for a public use or purpose, without compensation. Further, the ATF's bump stock regulation is not a proper or valid exercise of police power for public use or purpose. Lastly, firearms are not a nuisance that can be regulated out of existence under the police power without triggering the Fifth Amendment. This

Court should find based on the arguments below, that the ATF violated the Fifth Amendment Rights of bump stock owners across the United States.

"[N]or shall private property be taken for public use, without just compensation." Fifth Amendment, United States Constitution. The Supreme Court of the United States has recognized that the Fifth Amendment protects personal property as well as real property and there is no distinction between these two types of property for purposes of the Takings Clause. *Horne v. Department of Agriculture*, 135 S. Ct. 2419, 2426 (2015) ("The Government has a categorical duty to pay just compensation when it takes your car, just as when it takes your home.").

Simply put, banning the ownership of a certain type of personal property implicates the application of the Takings Clause and amounts to a "taking." See *Duncan v. Becerra*, 366 F.Supp.3d 1131 (S.D. Cal. 2019) (Holding California's ban on possession of firearm magazines that exceed a certain magazine capacity was a taking under the Fifth Amendment). In the present case, when the ATF recategorized bump stocks as machineguns, it made possession of bump stocks illegal, thereby depriving bump stock owners of their property rights just as if the ATF had physically confiscated them.

i. The ATF's Regulation Takes Complete Property Interest in Bump Stocks, Since it Bans Possession.

Under the NFA, possession of a machinegun that is not registered to the possessor is a crime. Since May 19, 1986, there exists no provision allowing the

registration of an existing or a newly made machinegun by ordinary persons. 18 U.S.C. § 922(o). Once the ATF arbitrarily decided, under political pressure, that it considered bump stocks to be machineguns, they became subject to the restrictions of the NFA. Thus, their possession became illegal.

As of the effective date of the Final Rule, bump stocks possessed by ordinary law-abiding persons became essentially contraband. This total deprivation of any ability to lawfully own or sell formerly lawful, indeed unregulated, personal property fits into the definition of a regulatory taking or a *per se* taking. *Horne v. Department of Agriculture*, 135 S. Ct. 2419, 2426 (2015); *Duncan v. Becerra*, 366 F.Supp.3d 1131 (S.D. Cal. 2019). There is no property interest in the bump stock left after the ATF regulation applies to it. An owner of a bump stock, who wishes to follow the law, may destroy it or, if the owner prefers, forfeit it to the government for prescribed destruction. The ultimatum imposed on those who own bump stocks deprives the owner of any remaining property interest in the bump stock, amounting to a taking.

ii. The Total Confiscation of Bump Stocks is Different and More Egregious than any Previous Government Firearm Control Action.

The Final Rule marks a different, and more egregious, attempt by the ATF to eliminate the property rights of gun owners through its regulation of bump stocks compared to previous efforts to institute gun control. Previously, legislative efforts to limit importation of rifles eventually allowed possessors to have the ability to sell

the firearms for their value. *Gun South, Inc. v. Brady*, 677 F.2d 858 (11th Cir. 1989) and *Mitchell Arms, Inc., v. United States*, 7 F.3d 212 (Fed. Cir. 1993)

Those facts are markedly different from those here. The importers were never compelled to destroy their inventory by threat of harsh criminal penalties. Such a fact pattern and resulting consequences are relatively new because the government has never enacted such a sweeping ruling until now. With the above in mind, it is important to note that the United States Supreme Court has rejected the argument that a government exercise of its police power can never amount to a taking. In *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992), the Supreme Court reasoned that the "legislature's recitation of a noxious-use justification cannot be the basis for departing from our categorical rule that total regulatory takings must be compensated." *Id*. at 1026.

iii. While the Tucker Act, 28 U.S.C. § 1491, May Provide a Means for Monetary Compensation for Federal Takings, it Does Not Eliminate a Fifth Amendment Violation.

In the recent decision in *Knick v. Township of Scott*, 588 U.S. __ (2019), slip op at 6, the Supreme Court reiterated that the fact that a law may provide a mechanism for compensation does not change whether or not a law violates the Fifth Amendment:

> Contrary to *Williamson County [Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U. S. 172 (1985)], a property owner has a claim for a violation of the Takings Clause as soon as a government takes his property for public use without paying for it. The Clause provides: "[N]or shall private property be taken for public use, without just compensation." It does not say: "Nor shall private property be taken for public use, without an available procedure that will result in compensation." *Id.*

The question of whether or not compensation will be due greatly informs governmental decision-making when enacting a ban such as the one here. The ATF estimated that "the total undiscounted cost of this rule [is] $312.1 million over 10 years[.]". The ATF estimates that there are as many as 520,000 bump stocks owned by gun owners throughout the United States — all of these devices are now required to be destroyed or surrendered for destruction.

Whether or not a law or a rule makes sense for government to enact is informed, at least in part, on its financial burden to the government. It is quite possible that this rule would not have been enacted if the government knew it would have to pay $312,100,000 to the various owners of the bump stocks it was banning. Therefore, it is important for this Court to review the issue of whether or not this rule requires payment of compensation to the parties that suffered the loss of $312,100,000.

B. The ATF's regulation is not a proper exercise of police power for public use or purpose.

Compensability aside, a taking must be for a public use or public purpose to be lawful under the Fifth Amendment. A taking for a private use or the private

purpose of a particular government official is not a lawful government action. *Kelo v. City of New London*, 545 U.S. 469 (2005). Earlier, nineteenth century cases took the position that police power regulation of nuisances was not a taking, even though private property was arguably rendered worthless by government action, and that government action was taken to serve a public purpose. See, *Mugler v. Kansas*, 123 U.S. 623, 668-69 (1887). Certainly, this view that a police power regulation is never a taking is no longer true. Cases that followed this idea, like *Fesjian v. Jefferson*, 399 A.2d 861 (D.C. Ct. App. 1979), are wrong on this point. Otherwise lawful use of property cannot be totally barred, without such a bar constituting a taking. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

C. Firearms, including machineguns, are not a nuisance that can be regulated out of existence under the police power without triggering the Fifth Amendment.

Here, the Federal government attempts to regulate machineguns through its taxing power and its power to regulate interstate commerce. Although the Federal government lacks a general police power under the United States Constitution, it can achieve some police power goals through exercise of its enumerated powers. Indeed, in a case concerning whether or not a prior bump stock regulation was a taking, the Court of Claims dropped the pretense of a Federal Government of limited enumerated powers, and called the Federal Government's regulation of machineguns

the exercise of its police power. *Akins v. United States*, 82 Fed. Cl. 619 (U.S. Claims 2008).

This, however, does not make machineguns and other firearms as well as attachments a nuisance. There is a long line of cases holding that government regulation of uses of property are not a taking, so long as other valuable uses of the property are still permitted. Likewise, there is a long line of cases that holds that the government does not owe compensation for destroying property that constitutes a hazard or a nuisance, such as food that is unfit for consumption. *Amicus* submits that under current precedent, this category of nuisances is the only assertion of the police power by government that can both take all value from property and not result in compensation being due. In fact, another way of looking at this fact pattern is that such government action is not a taking because the property lacks value; if it has any value it is a negative one. Spoiled food, or old and unstable dynamite is only a liability. It has no positive value.

Declaring a common, not inherently dangerous object to be a nuisance, without value and therefore banned under a power like the police power, is not a way out of the application of the Fifth Amendment. In *Staples v. United States*, 511 U.S. 600 (1994), the Supreme Court rejected the argument that the NFA's regulation of machineguns should put all gun owners on notice that guns that might be machineguns were subject to the strict liability regulation that might apply to

possession of hand grenades or narcotics: "Guns in general are not 'deleterious devices or products or obnoxious waste materials,'…that put their owners on notice that they stand 'in responsible relation to a public danger.'" Id. at 610 (internal citations omitted).

Items that are a nuisance are often those for which their manufacturers and users have strict liability in tort for harm that results from them (such as explosives or dangerous chemicals). However, this treatment for firearms has been expressly rejected by Congress. The Protection of Lawful Commerce in Arms Act ("PLCAA") enacted in 2005 and codified at 15 U.S.C. §§ 7901 et. seq., bars strict liability in tort for firearm manufacturers for the use or misuse of the firearms they made. The PLCAA constitutes a decision by Congress that firearms, including machineguns, are not a nuisance that should trigger strict liability for their use or misuse under state tort law. Indeed, a court has found that the PLCAA protected a maker of bump stocks from liability for their alleged misuse in the 2017 Las Vegas music concert murders that were the motivating factor for enactment of the ATF rule at issue here. *Prescott v. Slide Fire Solutions, LP*, 341 F. Supp. 3d 1175 (D. Nev. 2018).

D. Deference Should be Declined Based on Appellees' Failure to Invoke Chevron.

The Court was correct in its determination that Chevron deference did not apply to criminal statutes, but it should still find on a separate basis that the Appellees waived any claim to it. The Supreme Court of the United States has

expressly waived the need to consider whether an agency is due deference based on their own failure to invoke Chevron. In a recent opinion drafted by Justice Gorsuch, the Supreme Court blatantly declined to consider whether deference is due based on the failure to invoke. *HollyFrontier Cheyenne Ref., LLC v. Renewable Fuels Ass'n*, 141 S. Ct 2172, 2021 U.S. LEXIS 3399, *19 (2021). This finding in regard to the need to invoke deference was not a matter of first impression for the Supreme Court as it has been addressed before in similar terms. (Gorsuch, J., concurring in the denial of cert.) (explaining that the Supreme Court "has often declined to apply Chevron deference when the government fails to invoke it"); *Burlington Northern Santa Fe Ry. v. Loos*, 139 S. Ct. 893 (2019).

As noted in the Appellant's principal brief, the Appellees have made an express waiver of Chevron by failing to invoke it. See Notice of Supplemental Authority, R.38, Page ID#302; Transcript, R.56, Page ID#498; Opinion, R.48, Page ID#461-462; Brief for Appellees, ECF #29 at 16; Petition for Rehearing En Banc, ECF #55-1 at 3, 14. This Court should follow the Supreme Court's determination that Chevron can be waived and declare that in its ruling.

E. <u>The ATF's Final Rule has No Basis in the Language of the 26 U.S.C. § 5845 (b).</u>

When using a bump stock for a single shot to be fired, the trigger must be depressed, released, and reset before another shot may be fired. This should be considered as a single function of the trigger. The term "machinegun" means:

> "any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger…" 26 U.S.C. § 5845 (b) (excerpt).

An individual operating a bump stock shoots the firearm through the use of multiple recoil-induced successive functions of the trigger; this action does not meet the standard set by the plain language above that calls for more than one shot to occur for each "single function of the trigger". A bump stock may change how the pull of the trigger is accomplished, but it does not change the fact that the semiautomatic firearm shoots only one shot for each pull of the trigger. *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 920 F.3d at 48 (Henderson, J., concurring in part and dissenting in part).

Based on this plain definition of the phrase "single function of the trigger"; bump stocks should not be classified as machineguns under 26 U.S.C. § 5845 (b).

CONCLUSION

The ATF rule completely banning possession of bump stocks is a taking within the Fifth Amendment, requiring the government to pay affected owners the fair market value of their bump stocks before the ban. Additionally, the Final Rule is not the best interpretation of 26 U.S.C. § 5845 (b) and Chevron deference was properly waived by the Appellees. For these reasons, and those stated by the Appellant, the District Court's decision should be reversed.

Respectfully,

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CERTIFICATION PURSUANT TO
<u>Fed. R. App. P. 32(a)(7)(B) and (C)</u>

The undersigned hereby certifies that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and (C) because the brief contains 2,980 words of text.

The 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 this brief was prepared in a proportionally spaced typeface using Microsoft Word 2016, Times New Roman, Size 14.

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CERTIFICATE OF SERVICE

I hereby certify that on August 3rd, 2021, an electronic copy of the foregoing brief was filed with the Clerk of Court for the United States Court of Appeals for the Sixth Circuit using the appellate CM/ECF system, and that service will be accomplished by the appellate CM/ECF system.

Respectfully submitted,

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