IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

W. Clark Aposhian, Plaintiff-Appellant, v. William Barr, Attorney General of the United States, et al., Defendants-Appellees.	: : : : : : : : : : : :	No. 19-4036

PLAINTIFF-APPELLANT'S SUPPLEMENTAL REPLY BRIEF

INTERLOCUTORY APPEAL FROM THE JUDGMENT OF
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

No. 2:19-cv-00037-JNP
THE HONORABLE JILL N. PARRISH
DISTRICT JUDGE

Oral Argument Is Requested

December 3, 2020

NEW CIVIL LIBERTIES ALLIANCE
Caleb Kruckenberg
Litigation Counsel
Harriet Hageman
Senior Litigation Counsel
Mark Chenoweth
General Counsel
Counsel for Plaintiff-Appellant

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ARGUMENT

ATF is correct that deference under *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984) has no role in this case. First, ATF had no authority to issue its legislative rule, *Bump-Stock-Type Devices*, 83 Fed. Reg. 66514 (Dec. 26, 2018). Second, ATF has never asked for deference to its legal interpretation, instead maintaining that it is "inappropriate" for this Court to apply *Chevron* here. Third, the constitutionally required rule of lenity forbids deference to ATF's novel interpretation of a criminal law. Finally, the rule was not a product of ATF's expertise—it was issued *in spite of* the agency's technical understanding of bump stocks. Interpreting the statute's text without *Chevron* deference yields only one answer. The Final Rule is not the best interpretation of the existing statutory restriction on machineguns. It is therefore invalid and must be enjoined.

I. ATF AGAIN CONCEDES THAT IT LACKED AUTHORITY TO ISSUE THE FINAL RULE

ATF has argued throughout this litigation that *Chevron* does not apply because the "agency did not act pursuant to a congressional delegation of authority to issue gap-filling rules that establish what qualifies as a 'machinegun,' [] and it had no policy-making authority to exercise." (Aplee. Supp. Br. at 3.) ATF agrees, in other words, that it *cannot* lawfully issue a substantive rule. These concessions are dispositive of this case, a fact that is reinforced by the Panel's correct determination that the rule is substantive. *Aposhian v. Barr*, 958 F.3d 969, 979-80 (10th Cir. 2020). This Court must therefore hold that the rule is invalid, as it exceeds the scope of ATF's authority. *See La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). In *Chevron* terminology, ATF fails at step zero.

II. *CHEVRON* DEFERENCE REQUIRES INVOCATION BY THE AGENCY

Chevron deference is not automatically triggered by an agency's mere act of issuing a rule, and ATF is wrong when it says that "*Chevron* is not susceptible to litigation waiver or forfeiture" (Aplee. Supp. Br. at 5). ATF in fact acknowledges that *Chevron* is not a default position, admitting that "*Chevron*'s applicability turns on whether the agency has engaged in a particular exercise of a particular type of authority granted by Congress." (Aplee. Supp. Br. at 6-7). But ATF then wrongly suggests that *Chevron* becomes an automatic function of the "court based on its assessment of *congressional* intent" in allowing the agency to promulgate rules. (Aplee. Supp. Br. at 5.)[1]

Merely issuing a legislative rule does not satisfy the preconditions for *Chevron* deference. The Supreme Court recently emphasized that even after the initial delegation and ambiguity questions are resolved "not all reasonable agency constructions of those truly ambiguous rules are entitled to deference." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2414 (2019). If "the reasons for th[e] presumption [of deference] do not apply, or countervailing reasons outweigh them, courts should not give deference to an agency's reading, except to the extent it has the power to persuade." *Id*. (citation omitted).

In *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1629 (2018), the Supreme Court refused to apply deference to an order of the NLRB that purported to have binding legal

[1] ATF's argument also reinforces its lack of authority to issue the rule here. ATF argues that this Court should apply *Chevron* deference so long as it determines that *Congress* "had in fact delegated authority on this question to the agency." (Aplee. Supp. Br. at 7.) But ATF concedes "it did not act pursuant to a congressional delegation of authority to issue 'gap-filling' rules that establish what qualifies as a 'machinegun[.]'" (Aplee. Supp. Br. at 3.) Even under its own test then, ATF agrees that *Chevron* deference is improper here.

effect.[2] It did so, in part, because the Executive Branch did not articulate a "single position" concerning the policy. *Id*. at 1630. In other words, while the Board had *tried* to speak with the force of law in issuing its order, the conflicting views of the Executive Branch as a whole negated the application of deference. *See id.*

ATF tries to focus only on an agency's decision "to issue a legislative rule" instead of "an agency's position as to whether a rule should receive deference." (Aplee. Supp. Br. at 7). This Court repudiated that notion in *Hydro Res., Inc. v. E.P.A.*, 608 F.3d 1131, 1146 (10th Cir. 2010), refusing to grant *Chevron* deference to a substantive rule issued by the EPA in part because the agency did not "ask for deference to its statutory interpretation[.]"

This conclusion follows, in part, from the party presentation principle. *Id*. While ATF bristles at the suggestion that it has not been sufficiently adversarial, it misses the point made by this Court in *Hydro Res., Inc.* (*See* Aplee. Supp. Br. at 8.) ATF has been adversarial throughout this litigation, but it has never sought *Chevron* deference, and has stressed that it does not seek it. (*See* Aplee. Supp. Br. at 3.) Indeed, ATF, has yet again explained that it believes applying *Chevron* "deference would be inappropriate" here because it "does not intend [the Final Rule] to have the force and effect of law." (Aplee. Supp. Br. at 2-3). Again, this concession should be dispositive. This Court should not apply deference "when a party chooses not to pursue [the] legal theory potentially available to it" out of "concern for the affected parties to whom we traditionally extend notice and an

[2] "[S]tatutory interpretation by the Board would normally be entitled to deference unless that construction were clearly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 574 (1988).

opportunity to be heard on issues that affect them." *Hydro Res., Inc.*, 608 F.3d at 1146 n. 10 (citation omitted).

ATF also wrongly suggests that there is "no reason why a court's independent assessment of congressional intent" should "turn on an agency's litigation position." (Aplee. Supp. Br. at 7.) But "each party is deemed bound by the acts of his lawyer-agent," even when that harms the party in litigation. *Link v. Wabash R. Co.*, 370 U.S. 626, 633-34 (1962). The government is bound by concessions of its lawyers like any other party. *See United States v. Faust*, 795 F.3d 1243, 1252 (10th Cir. 2015) (finding government waived argument). ATF's present position *is* the agency's position.

Moreover, in this case Attorney General Barr is the agency head who oversees the ATF and approved the Final Rule. *See Bump-Stock-Type Devices*, 84 Fed. Reg. 9239, 9240 (Mar. 14, 2019). Attorney General Barr is also the head of the Department of Justice, which has now disclaimed reliance on *Chevron* deference. (*See* Aplee. Supp. Br. at 2-3.) As ATF has often emphasized, "[a]gencies are free to change their existing policies as long as they provide a reasoned explanation for the change." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016). But they still must be held to account for their *current* position.

Finally, ATF's attempts to distinguish instances where both the Supreme Court and this Court have refused to apply *Chevron* deference because the parties did not ask for it fall short. (*See* Aplee. Supp. Br. at 7-8.) ATF distinguishes the Supreme Court's decision in *County of Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462 (2020), because the Court considered "an interpretive rule" not otherwise entitled to deference; this Court's decision in *Hydro Res., Inc.,* because the rule at issue was also not in "EPA's particular expertise or

charge to administer"; and *Hays Medical Center v. Azar*, 956 F.3d 1247 (10th Cir. 2020) because deference would "not materially alter the outcome[.]" (Aplee. Supp. Br. at 7-8.) Even if there were other reasons for the Courts to reject deference in those case, they still concluded that *Chevron* depends on *invocation* by the agency during litigation. Indeed, in *County of Maui*, 140 S.Ct. at 1474, just as here, the government had not asked the Court to defer because the agency did not assert it has special "expertise" and the Court still made a special point of relying on that disclaimer. (*Cf.* Aplee. Supp. Br. at 2-3 (*Chevron* deference is "inappropriate" because ATF "had no policy-making authority to exercise").)

III. THE RULE OF LENITY APPLIES INSTEAD OF *CHEVRON* DEFERENCE WHEN THE SAME STATUTORY PROVISION IMPOSES CIVIL AND CRIMINAL PENALTIES

In arguing that "the rule of lenity … does not preclude the application of *Chevron* to valid legislative rules," ATF focuses on its insistence that the rule of lenity's "basic purposes" are not "undermined by *Chevron*." (Aplee. Supp. Br. at 9.) But ATF ignores a key point—unlike *Chevron*, which has *no* constitutional foundation, the rule of lenity arises out of constitutional necessity. *See United States v. Santos*, 553 U.S. 507, 514 (2008) (plurality op.). ATF never explains why *Chevron* and *not* lenity should prevail when the two conflict. If both canons seem to apply, the choice is clear. "Whatever the virtues of giving experts flexibility to adapt rules to changing circumstances in civil cases, in criminal justice those virtues cannot outweigh life and liberty. Efficiency and expertise do not trump justice." *United States v. Nasir*, No. 18-2888, 2020 WL 7041357, at *26 (3d Cir. Dec. 1, 2020) (Bibas, J., concurring).

The Supreme Court has long recognized that *Chevron* deference gives way to rules that protect constitutional rights. In *Edward J. DeBartolo Corp.*, 485 U.S. at 575, the Court refused to apply *Chevron* deference, which was otherwise applicable, because "[a]nother rule of statutory construction … [wa]s pertinent []: where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."

ATF also gives inadequate consideration to the underlying reasons for the rule of lenity. ATF first suggests that there is no separation of powers concern in allowing an agency to write criminal laws at will because "where Congress has delegated authority to an agency, and an agency exercises that authority, there is no occasion for applying the rule of lenity." (Aplee. Supp. Br. at 9.) ATF equates an alleged delegation of authority as an inviolable concession by Congress that the agency can take over the legislative function. (Aplee. Supp. Br. at 9.)[3] This notion disregards the separation of powers. "[B]ecause of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity." *United States v. Bass*, 404 U.S. 336, 348 (1971). Lenity applies when Congress left gaps in a statute by not using "language that is clear and definite." *Id*. Thus lenity

[3] ATF also says that it received no delegation from Congress in this case (Aplee. Supp. Br. at 3), so even if ATF is correct, the rule of lenity should still apply here. *Chevron* depends on the premise that Congress implicitly delegated gap-filling power to the agency, but without a delegation an agency interpretation of a statute is "beyond the *Chevron* pale." *United States v. Mead Corp.*, 533 U.S. 218, 234 (2001).

"strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability." *Liparota v. United States*, 471 U.S. 419, 427 (1985). Expanding criminal punishment by *either* the prosecutor or the judiciary offends the basic legislative function. *See id.*

ATF dismisses any fair warning problems by saying, "Where Congress … delegates authority to an agency, parties are on notice that the agency's regulatory framework will be relevant to their exposure to criminal sanction, and the regulation itself provides any further needed clarity." (Aplee. Supp. Br. at 11.) ATF's conception of fair warning is antithetical to due process. "[D]ue process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope ... ." *United States v. Lanier*, 520 U.S. 259, 266 (1997). ATF would alter this idea to mean that a statute gives fair warning merely by being *ambiguous* enough to allow an agency to rewrite it. *Chevron* requires a "gap for the agency to fill" before an agency can act. 467 U.S. at 843 n. 9. But uncertainty about what is and is not prohibited does not provide fair warning for a criminal defendant—quite the opposite. Indeed, ATF told the public, including Mr. Aposhian, that the statute excluded bump stocks only to turn around and declare them to be prohibited by its Final Rule. (*See* Aplt. Appx. at A67-A69.) Yet ATF believes that the public should have been astute enough to disregard ATF's advice because a purported statutory ambiguity provided "fair warning" to the public of a potential future ban. (Aplee. Supp. Br. at 11.)[4]

[4] ATF also argues that the rule of lenity does not apply because the statute is not "grievously ambiguous." (Aplee. Supp. Br. at 10 n. 1.) ATF's hairsplitting is of no consequence here.

ATF is left relying on a footnote in *Babbitt v. Sweet Home Chapter of Cmts. for a Great Ore.*, 515 U.S. 687, 704 n. 18 (1995). (*See* Aplee. Supp. Br. at 11.) That stray footnote, however, has been repudiated by the Supreme Court. (*See* Aplt. Supp. Br. at 14-15.) Regardless, ATF's current insistence that *Babbitt*'s footnote was the Court's holding (Aplee. Supp. Br. at 12), must also be rejected. ATF claims the "Court relied on that reasoning [in the footnote] to reject an argument that the regulation was invalid." (Aplee. Supp. Br. at 12). *Babbitt* refused to apply the rule of lenity because the regulation at issue had "existed for two decades and gives a fair warning of its consequences." 515 U.S. at 704 n. 18. *Babbitt*'s logic cuts the other way applied to the brand-new rule issued here.

IV. THIS COURT SHOULD HONOR ATF'S FACTUAL CONCESSION CONCERNING THE PRESENCE OF IRREPARABLE INJURY

ATF's argument concerning irreparable harm is premised largely on a dispute over the proper "weight to be given" to the harms at issue in this case. (Aplee. Br. at 15.) Mr. Aposhian does not contest that it rests with this Court to balance the competing harms at issue. ATF, however, cannot now walk back its concession that Mr. Aposhian will suffer "irreparable harm." ATF equivocates on its earlier concession, citing only its appellate brief. But ATF's concession in district court was clear. It:

> d[id] not contest Plaintiff's assertion that he has "been ordered by the Defendants to destroy" (or abandon) a "bump-stock device, which he legally purchased, by March 26, 2019, or face criminal prosecution." [Pl.] Mot. at 2.

While the rule of lenity applies to "a novel construction of a criminal statute," *Lanier*, 520 U.S. at 266, a statute or regulation must be "genuinely ambiguous, even after a court has resorted to all the standard tools of interpretation" before an agency can fill in a legislative "gap." *Kisor*, 139 S. Ct. at 2113-14. "But as *Kisor* teaches" a "key tool in that judicial toolkit is the rule of lenity." *Nasir*, 2020 WL 7041357, at *25-26 (Bibas, J., concurring).

> … Defendants acknowledge that the irreparable harm prong of the preliminary injunction test is met here.

(Aplt. App. at A105-106.) The trial court acknowledged that ATF "concede[d]" the irreparable harm in the form of "the loss of [Mr. Aposhian's] Slide Fire device," but declined to weigh that harm against other factors after ruling against him on the substance of his challenge. (Aplt. App. at A131.)

Contrary to ATF, Mr. Aposhian did identify "'facts' that he would have been able to present in district court" to support a showing of harm. (*See* Aplee. Supp. Br. at 16.) He pled, and ATF conceded, that the Final Rule required him to destroy his unique property, which he legally purchased, or face criminal prosecution. (*See* Aplt. App. at A43-44.)

V. DEFERENCE IS IMPROPER BECAUSE THE BUMP-STOCK FINAL RULE IS NEITHER THE PRODUCT OF ATF'S EXPERTISE NOR A CONSISTENTLY HELD INTERPRETIVE POSITION

This Court ordered the parties to brief the question whether "the bump stock policy determination made by [ATF was] peculiarly dependent upon facts within the congressionally vested expertise of that agency." This question matters because *Chevron* deference is inappropriate when the interpretation of a statute is outside an agency's area of expertise. (*See* Aplt. Supp. Br. at 19.) "An agency does not acquire special authority to interpret its own words when" it fails to "us[e] its expertise and experience to formulate a regulation[.]" *Gonzales v. Oregon*, 546 U.S. 243, 257 (2006).

ATF avoided answering the Court's question, stopping short of claiming that the Final Rule was the *product* of its expertise. It instead seeks to emphasize that it has expertise on "technical evaluation of the functioning of bump stocks" "to the extent this Court's consideration of the Rule's validity turns" on its expertise. (Aplee Supp. Br. at 19.)

The record shows that the agency did not rely on its expertise in crafting the Final Rule. ATF does not dispute that its original classification rulings were premised on physical examinations of bump stocks by its technical experts. (*See* Aplt. Supp. Br. at 19.) It does not dispute that the function of a bump stock never changed, that it promulgated its new rule without consulting the technical examiners, and that the rule change was prompted by political actors outside the agency. (*See* Aplt. Supp. Br. at 19.) ATF just insists that the rule adopts "the correct understanding of the statutory term." (*See* Aplee. Supp. Br. at 19.) But this Court is certainly more capable of interpreting the statutory text than ATF, so there is no basis to defer to any technical expertise.

ATF is also not entitled to deference because its latter-day interpretation has not been held consistently, which is a point it never addresses in its supplemental briefing. (*See* Aplt. Supp. Br. at 20.) ATF's sudden reversal in its interpretation undermines any reason to defer to the agency. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n. 30 (1987) (an interpretation that "conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view") (citation omitted). Thus, even if ATF's technical expertise *were* implicated here, this Court should still refuse to defer to ATF's newfound understanding of the statute.

CONCLUSION

This Court should vacate the district court opinion and direct entry of a preliminary injunction.

December 3, 2020

Respectfully,

/s/ Caleb Kruckenberg
Caleb Kruckenberg
Litigation Counsel
Harriet Hageman
Senior Litigation Counsel
Mark Chenoweth
General Counsel
New Civil Liberties Alliance

CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with the page limits set by this Court in its September 4, 2020 en banc order. It is printed in Times New Roman, a proportionately spaced 13-point font, and is 10 pages or fewer in length. I relied on my word processor, Microsoft Word, to obtain the count.

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Respectfully,

/s/ Caleb Kruckenberg
Caleb Kruckenberg
Litigation Counsel
New Civil Liberties Alliance
1225 19th St. NW, Suite 450
Washington, DC 20036
caleb.kruckenberg@ncla.legal
(202) 869-5210
Counsel for Plaintiff-Appellant

CERTIFICATE OF SERVICE

I hereby certify that the original and 16 copies were mailed by Federal Express to the Clerk of the Court at the Byron White U.S. Courthouse, 1823 Stout St., Denver, Colorado 80257. On December 3, 2020 this document was electronically filed using the Tenth Circuit's CM/ECF system, which sent notification of such filing to all counsel of record.

Respectfully,

/s/ Caleb Kruckenberg
Caleb Kruckenberg
Litigation Counsel
New Civil Liberties Alliance
1225 19th St. NW, Suite 450
Washington, DC 20036
caleb.kruckenberg@ncla.legal
(202) 869-5210
Counsel for Plaintiff-Appellant