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No. 20-51016

In the

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MICHAEL CARGILL,

Plaintiff-Appellant,

v.

MERRICK B. GARLAND, U.S. Attorney General; U.S. DEPARTMENT OF JUSTICE; MARVIN RICHARDSON, Acting Director, Bureau of Alcohol, Tobacco, Firearms and Explosives; BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES,

Defendants-Appellees.

On Appeal from the United States District Court for the Western District of Texas

No. 1-19-cv-349 Hon. David A. Ezra, Judge

BRIEF OF AMICUS CURIAE ROBERT M. MILLER, PH.D. IN SUPPORT OF PLAINTIFF-APPELLANT

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August 9, 2022

STATEMENT OF INTERESTED PERSONS & RULE 26.1 DISCLOSURE

United States Court of Appeals for the Fifth Circuit

Michael Cargill v. Merrick Garland, U.S. Attorney General, et al.

No. 20-51016

The undersigned certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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Gun Owners of California, Amicus

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Center to Keep and Bear Arms, Amicus

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Arizona Citizens Defense League, Amicus John Cutonilli, Amicus Grass Roots North Carolina, Amicus Rights Watch International, Amicus Conservative Legal Defense Fund, Amicus Heller Foundation, Amicus New Civil Liberties Alliance, Amicus Robert M. Miller, Ph.D., Amicus

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29 and Fifth Circuit Rule 28.2.1, I hereby certify that *amicus curiae* Robert M. Miller is a private individual with no parent companies and no relation to or financial interest in any of the parties.

EXECUTED ON August 9, 2022:

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INTEREST OF AMICUS CURIAE¹

Amicus curiae Robert M. Miller, Ph.D., is a non-attorney Senior Financial Economist for a Federal financial regulator. He has an M.A. and Ph.D. in Economics from the University of Illinois (1995, 2002), and a B.A. in Mathematics and Economics from the University of Colorado at Denver (1992). Amicus's duties involve reviewing Federal government rulemaking for compliance with laws, executive orders, and Office of Management and Budget Circular A-4 ("OMB Cir. A-4"). Amicus proceeds in this case as a private citizen, and his positions in this matter do not represent the official positions of his Federal government agency.

Amicus is a firearms expert, owning numerous weapons including those regulated by the National Firearms Act, Pub. L. 73-474. Amicus submitted a public comment in opposition to Agency's Bump-Stock-Type Devices rule, 83 FR 66514 (Dec. 26, 2018), including economic and legal arguments described below pertinent to the issues on appeal. This part-legal, part-Brandeis Brief discusses issues not raised by the parties or other amici, and it will greatly aid this Court's determination to set aside this rule as unlawful under 5 U.S.C. §706.

¹ Plaintiff-Appellant consented to this out-of-time brief. Defendants-Appellees take no position on this brief or the extension. No party's counsel authored any part of this brief in whole or part, and no party, party's counsel, or anyone other than Amicus contributed money intended to fund preparing or submitting this brief.

<u>ARGUMENT</u>

I. <u>Introduction and Summary</u>

Agency's determination bump stocks convert semiautomatic weapons into "machineguns" is contrary to facts Agency relied upon in its rulemaking that bump stocks only *mimic* automatic fire. Agency also relied upon an impermissible fact that bump stocks increase the "cyclic rate of fire," which plays no part in the statutory definition of "machinegun." Courts have set aside rules when agencies consider factors not intended by Congress for them to consider.

Amicus argues the Court should set aside the rule within a doctrine broader than and encompassing the major questions doctrine when Courts find agencies should defer to legislation when a challenged rule is better left for Congress or the States to weigh competing policy interests. This issue was fairly raised by Appellant questioning whether this is a legislative rule, whether Agency has the authority to rewrite or fill gaps in a statute thereby expanding the scope of criminal liability, and whether the rule violates the non-delegation doctrine.

Lastly, *Amicus* raises new, immediately dispositive issues for the first time. While courts generally do not consider new arguments not raised by the parties, *Amicus* believes his arguments meet the rare exceptional circumstances because facts upon which he relies are subject to judicial notice, and there are no non-frivolous arguments that Agency can make in its defense to these arguments.

II. Scope of Review and Regulatory Requirements

Courts invalidate agency determinations failing to "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection' between the facts found and the choice made." *Motor Veh. Manu. Assoc.* v. State Farm Auto Mut. Ins. Co., 463 U.S. 29, 43 (1983) ("State Farm"), quoting Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962) ("Burlington Truck"). Courts "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." State Farm at 30—31, 43. This is known as the "hard look" doctrine whereby courts scrutinize agency reasons for its actions when challenged.

Agency decisions are arbitrary "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id.* at 43. Courts invalidate rules if agencies fail to consider policy effects. *Ctr. for Bio. Diversity v. U.S. Bur. of Land Mgmt.*, 698 F.3d 1101, 1124 (9th Cir. 2012) ("*Ctr. Bio. Div.*").

Agencies must demonstrate they used reasoned decision making. *State Farm* at 52. An agency's failure to provide adequate explanations for its decision is grounds for remand or invalidation. See e.g., *Williams Gas Processing-Gulf Coast Co., L.P.*

v. FERC, 475 F.3d 319, 329 (D.C. Cir. 2006) ("Williams Gas"). Courts may not sustain an action on a basis not mentioned by an agency if an agency's stated rationale for its decision is erroneous. *Id*.

Failure to reasonably respond to comments raised during notice-and-comment rulemaking is arbitrary and capricious. *Ass'n of Private Sector Colls. & Univs. v. Duncan*, 681 F.3d 427, 449 (D.C. Cir. 2012) ("*Duncan*"); *Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 626 F.3d 84, 94 (D.C. Cir. 2010) ("*Mine Workers*").

Courts invalidate rules for failure to consider regulatory alternatives also achieving rule objectives. *Off. Comm. of United Church of Christ v. FCC*, 779 F.2d 702, 714 (D.C. Cir. 1985) ("*United Church*"); *Wilderness Watch, Inc. v. U.S. Fish & Wildlife Serv.*, 629 F.3d 1024, 1039 (9th Cir. 2010) ("*Wilderness Watch*"); *Chamber of Commerce v. SEC*, 412 F.3d 133, 144 (D.C. Cir. 2005).

III. Agency Improperly Relies on 'Rate of Fire'

Issues raised by Appellant include whether Agency improperly or without Congressional authority rewrote the definition of a "machinegun." *Appellant Brief*, Doc. 00515769817, p. 4, Mar. 8, 2021; *Appellant's Supplemental Brief*, Doc. 00516406712, p. 17, Jul. 25, 2022.

Lurking in the shadows of this rule from inception to final rule is a pervasive "rate of fire" argument. *Complaint, Cargill v. Barr*, et al., 1:19-cv-349, ¶¶ 54, 88,

94, 100, 108. Advance Notice of Proposed Rulemaking ("ANPRM") said bump stocks "are devices used with a semiautomatic firearm to increase the firearm's cyclic firing rate to *mimic* nearly continuous automatic fire." [emphasis added] 82 FR 60930. Both Notice of Proposed Rulemaking ("NPRM") and Final Rule say, "Shooters use bump-stock-type devices with semiautomatic firearms to accelerate the firearms' cyclic firing rate to *mimic* automatic fire." [emphasis added] 83 FR 13444; 83 FR 66516. By saying bump stocks mimic automatic fire, Agency inadvertently admits weapons using bump stocks do not *actually* fire automatically.

Rate of fire plays no role in the definition of a machinegun under the NFA, including the words "automatic" or "single function of the trigger." 26 U.S.C. §5845(b); 18 U.S.C. §921(a)(24). Yet Agency repeatedly uses rate of fire to support its rule because of its perceived danger to the public. The rule must be set aside because there is no rational connection between the facts found by the Agency and the choice made, and Agency relied on a factor Congress did not intend it to consider. *State Farm* at 43, *Burlington Truck* at 168.

IV. Agency Should Have Deferred to Action by Congress or the States

The *major questions doctrine* and the *non-delegation* doctrine are both part of a broader normative question in jurisprudence: "Should an agency act on an issue, or should it defer action to Congress or the States?" The U.S. Supreme Court has not

fully addressed the interplay between these two doctrines and *Chevron* deference. *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837 (1984).

This Court is familiar with the *major questions doctrine* under which Courts will hold agency rules invalid when the rule covers issues of such importance or widespread national significance that Congress could not have intended to delegate authority for regulation to agencies. *BST Holdings, L.L.C. v. OSHA*, 17 F.4th 604 (5th Cir. 2021); *State v. Becerra*, 20 F.4th 260, 262 (5th Cir. 2021).

Subsequent to those decisions, the U.S. Supreme Court spoke directly on this topic, finding Congress did not grant an agency authority to promulgate rules where the "history and the breadth of the authority that the agency has asserted, and the economic and political significance of that assertion, provide a reason to hesitate before concluding that Congress meant to confer such authority." [quotes and brackets omitted] *West Virginia v. EPA*, No. 20-1530 at *3, 16 (June 30, 2022). In that case, the EPA implemented a proposal Congress had considered and rejected numerous times. *Id.* at *5. Thus, the high Court held the agency must point to a "clear Congressional authorization" for the authority it claims. *Id.* at 3.

In response to the COVID-19 pandemic, Congress enacted the Coronavirus Aid, Relief, and Economic Security Act, Pub. L. 116-136, 134 Stat. 281. *Ala. Ass'n of Realtors v. Dep't of Health & Human Servs.*, 141 S. Ct. 2485 (2021). The Act included a 120-day eviction moratorium for certain properties participating in

federal assistance programs. When that moratorium expired, Congress did not renew it. *Id.* at 2486. The Centers for Disease Control relied upon a separate statute to promulgate a rule to extend the eviction moratorium. The Supreme Court held the rule unlawful because it placed landlords "at risk of irreparable harm by depriving them of rent payments with no guarantee of eventual recovery." *Id.* at 2489. The Court held that despite an indisputable interest in averting the spread of COVID-19, "our system does not permit agencies to act unlawfully even in pursuit of desirable ends." *Id.* at 2490. The Court noted the rule affected between 6 and 17 million tenants and millions of landlords nationwide, and the landlord-tenant relationship is in the domain of State law. *Id.* at 2489. Thus, aside from the size and scope of the rule, the Court was expressly concerned about agencies encroaching on the bailiwick of Congress and the States.

The instant case appears, at first glance, to affect only the rights of but a half-million owners of bump stocks and several thousand firms that make or sell bump stocks. This raises a question of a court's subjective judgment about how far-reaching a regulation must be to be a major question. The Court need not tarry long on this question because while the immediate effects of the rule are on those persons and entities who made, sold, or bought bump stocks prior to rule enactment, the rule *permanently* affects the rights of every person who might choose to make, sell, or buy a bump stock [or some similar device] in the future with criminal penalties.

This Court need not rely solely on whether the instant case presents a major question because those are but the most extreme and obvious examples of agencies acting where Congress fears to tread. The *non-delegation doctrine* raised on appeal presents a broader question. *Amicus* raises additional facts and arguments relevant to either doctrine. The Executive power can to a limited extent *enhance* or *clarify* legislation with its technical expertise, but it cannot act as a *substitute* for legislation.

Congress has the power to "make all Laws which shall be necessary and proper for carrying into Execution" its specified powers. U.S. Const. Art. I, Sec. 8. The law presumes all such Acts of Congress meet the "necessary and proper" test, and Congress is accountable to the people through elections. In contrast, agencies must, under the Administrative Procedure Act, make an affirmative showing that their rules and regulations are "necessary and appropriate." See, e.g., 21 U.S.C. §871(b) for the Department of Justice's rulemaking authority.

Executive Order 12866 requires agencies to promulgate only such regulations as required by law, necessary to interpret the law, or are made necessary by a compelling public need. 58 FR 51735, Sec. 1(a). Agencies must "assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating." *Id.* Agencies must identify the problem and assess its significance. *Id.*, Sec. 1(b)(1). Regulation must be designed in the most cost-effective manner to

achieve objectives, and "adopt a regulation only upon a reasoned determination that the benefits justify its costs." 58 FR 51736, Sec. 1(b)(5)-6.

Executive Order 13563 requires regulations to be based on the "best available science." 76 FR 3281, Sec. 1(a). Regulations must "identify and use the best, most innovating, and least burdensome tools" and "take into account benefits and costs, both quantitative and qualitative." *Id.* Regulation must "impose the least burden on society," and choose the regulatory approach that maximizes net benefits. *Id.*

Office of Management and Budget Circular A-4 is "designed to assist analysts in the regulatory agencies by defining good regulatory analysis." Exhibit 1, OMB Cir. A-4, p. 1. Regulatory analysis should include: (1) a statement of the need for the proposed action, (2) an examination of alternative approaches, and (3) an evaluation of benefits and costs – quantitative and qualitative – of the proposed action and the main alternatives identified by the analysis." Id., p. 2.

In notice-and-comment rulemaking, Agencies are required by law, regulation, and executive orders to consider several alternative regulatory approaches. *EO 12866* Sec. 1(b), 58 FR 51735; *EO 13563*, Sec. 1(b), 76 FR 3821. Among these alternatives, agencies must fairly consider the option of taking no action, i.e., the *status quo ante. OMB Cir. A-4*, p. 2. For each alternative considered, the agency must decide which is the best alternative that satisfies rule objectives with the lowest burden on the public or in the best manner, i.e., maximizing net benefits. *EO 13563*,

Sec. 1(b); *OMB Cir. A-4*, p. 10. Courts invalidate rules for failure to consider regulatory alternatives that also achieve rule objectives. *United Church* at 714; *Wilderness Watch* at 1039. An Agency's failure to consider alternative regulatory approaches violates the Administrative Procedure Act of 1946. *Chamber of Commerce* at 144. "Where a party raises facially reasonable alternatives," the agency must either consider those alternatives or give some reason," for declining to do so." *Laclede Gas Co. v. F.E.R.C*, 873 F.2d 1494, 1498 (D.C. Cir. 1989). "It is not adequate simply to report a comparison of the agency's preferred option to the chosen baseline." *OMB Cir. A-4*, p. 16.

The Notice of Proposed Rulemaking ("NPRM") purportedly discussed alternatives to the proposal adopted by the Agency in its final rule, 83 FR 13454:

Alternative 1 - No change alternative. This alternative would leave the regulations in place as they currently stand. Since there would be no changes to regulations, there would be no cost, savings, or benefits to this alternative.

Alternative 2 - Patronizing a shooting range. Individuals wishing to experience the shooting of a "full-auto" firearm could go to a shooting range that provides access to lawfully registered "pre-1986" machineguns to customers, where the firearm remains on the premises and under the control of the shooting range. ATF does not have the information to determine which, where, or how many gun ranges

² Here, as in most regulations, the *status quo ante* is the baseline for comparing Agency's preferred policy and all other alternatives considered.

provide such a service and is therefore not able to quantify this alternative.

Alternative 3 - Opportunity alternatives. Based on public comments, individuals wishing to replicate the effects of bump-stock-type devices could also use rubber bands, belt loops, or otherwise train their trigger finger to fire more rapidly. To the extent that individuals are capable of doing so, this would be their alternative to using bump-stock type devices.

No other feasible alternatives were identified, and thus none were considered.

Agency failed to properly analyze the *status quo ante* in Alternative 1. At first blush, the *status quo ante* seems a mere straw man. How could the *status quo* possibly solve the problem the agency has identified? The answer is that the agency is not making rules in a vacuum. Rather, it exists among elected Congressional, State, and Tribal governments also having interest in the same problem. These democratically elected entities have the power to do things Agency cannot, and they are in a better position to weigh competing public interests. In the instant case, the *status quo* implicitly relies on tort liability and criminal liability to prevent attacks using bump stocks. Agency did not explain *why* these were unsatisfactory in achieving rule objectives. Agencies must make a "showing that regulation at the Federal level is the best way to solve the problem." *OMB Cir. A-4*, p. 6.

Agency's alternatives 2 and 3 were not alternative regulatory approaches *for the Agency* but rather are suggested ways *for the public* to enjoy high rates of fire.

These sham alternatives to the proposed rule are automatic grounds for setting aside the rule because they are "so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *State Farm* at 43.

Amicus suggested numerous other feasible alternatives based on Agency's presumption there exists a negative externality in the sale and consumption of bump stocks. 83 FR 13449; 83 FR 66544, Exhibit 2 – Amicus Comment to NPRM. The most obvious alternative policies were Pigouvian taxes and quotas reducing the number of bump stocks to the socially optimal level, which was far above the ban quota of zero as described in detail in Section V.B of this brief. Amicus demonstrated the bump stock ban destroys more social welfare than it saves. Exh. 2., pp. 12—16.

Amicus suggested Agency had obvious alternatives it failed to consider such as grandfathering existing bump stocks, compensating owners for loss of property, and deferring to Congressional, State, and local legislation. *Id.* pp. 17—21.

Agency rejected all these alternatives falsely claiming it was required only to consider "possible alternatives" that it could "legally employ under the NFA," i.e., within its authority to act. 83 FR 66535. Agency said, grandfathering and reimbursement policies "are not possible given the legal constraints of existing ATF authority." But *OMB Cir. A-4* provides explicit examples of alternatives an agency must consider beyond its own authority to act:

Even where a market failure clearly exists, you should consider other means of dealing with the failure before turning to Federal regulation. Alternatives to Federal regulation include antitrust enforcement, consumer-initiated litigation in the product liability system, or administrative compensation systems.

In assessing whether Federal regulation is the best solution, you should also consider the possibility of regulation at the State or local level.

* * *

The advantages of leaving regulatory issues to State and local authorities can be substantial. If public values and preferences differ by region, those differences can be reflected in varying State and local regulatory policies. Moreover, States and localities can serve as a testing ground for experimentation with alternative regulatory policies. One State can learn from another's experience while local jurisdictions may compete with each other to establish the best regulatory policies. You should examine the proper extent of State and local discretion in your rulemaking context. *OMB Cir. A-4*, p. 6.

Responding to the alternative of leaving regulation to the States, Agency said, "This alternative was rejected because ATF prioritizes public safety and preventing crime. This action will not prevent States from taking action on bump-stock-type devices." 83 FR 66545. Is Agency suggesting States are not prioritizing public safety and crime prevention, and Agency must act before they do? Agency's disingenuous and impertinent answer was non-responsive to the alternative posed, and it failed to *explain why* it could not defer to States to act for public safety while weighing competing policy concerns. *LaClede* at 1494. Indeed, many States and localities had

already taken action to restrict bump stocks comprising more than 17% of the nation's population. *Exh. 2.*, p. 20.

Responding to the suggested alternative of deferring to Congressional legislation, Agency responded, "This alternative was rejected because ATF has been delegated authority to issue rules to implement the NFA and GCA. This action will not prevent Congress from taking action on bump-stock-type devices." 83 FR 66545. This disingenuous response does not *explain why* Agency must exercise delegated authority rather than let Congress decide how to weigh competing policy interests.

Courts must set aside rules when an agency fails to meaningfully respond to comments. *Duncan* at 449. Courts set aside rules when agencies fail to consider alternative regulatory approaches. *United Church* at 714; *Wilderness Watch* at 1039, *Chamber of Commerce* at 144.

While it might be argued Agency's failure to consider alternative regulatory approaches is a claim not raised by Appellant, it is the *particular* alternatives not considered that raise the ambit of this Court's consideration under the *major question* or *non-delegation* doctrines Appellant did raise; Agency failed to, and refused when prompted to, consider deferring to Congress and the States. Given Congress considered banning bump stocks and took no action, this is an extraordinary factor counseling hesitation for rulemaking with serious *separation of powers* concerns. In

an *ultra vires* usurpation of the legislative power, the President chose to do himself what he believed Congress would not do, or would not do quickly enough:

We'll turn our grief into action. We have to have action. We don't have any action. It happens. A week goes by. Let's keep talking. Another week goes by. We keep talking. Two months go by all of a sudden everybody is off to the next subject. Then when it happens again, everybody's angry and let's start talking again. We gotta stop. By the way...bump stocks...we're writing that out...I'm writing that out myself. I don't care if Congress does it or not, I'm writing it out myself. You put it into the machinegun category which is what it is. It becomes essentially a machinegun. And nobody's gonna be able to...It's gonna be very hard to get them. So, we're writing out bump stocks. *Public remarks of President Donald J. Trump*, Feb. 26, 2018.

Agency succumbed to this executive willfulness and violated the Administrative Procedure Act and executive orders notwithstanding the President's admonition to follow the law in rulemaking.

V. <u>Issues First Raised by Amicus Curiae</u>.

It is generally well-settled within this Circuit that, absent exceptional circumstances, *amicus curiae* generally cannot raise new issues on appeal. *Christopher M. by Laveta McA v. Corpus Christi Indep. Sch. Dist.*, 933 F.2d 1285, 1293 (5th Cir. 1991); *Anderson v. City of New Orleans*, No. 21-30072, at *12 (5th Cir. June 30, 2022).

F.R.AP. 16(b) gives courts wide latitude in correcting omissions from the agency record under review, and a court's willingness to do so rests on a balancing of considerations of judicial orderliness and efficiency against the need for the

greatest possible accuracy in judicial decision making. The latter factor is of weight when the decision affects the broad public interest. *Consumers Union of U.S.*, *v. Fed. Power Com'n*, 510 F.2d 656, 661-62 (D.C. Cir. 1974). "The Courts' general refusal to consider arguments not raised by the parties, for example, is founded in part on the need to ensure that each party has fair notice of the arguments to which he must respond." *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990).

Courts can consider "issues not raised in the courts below only in "exceptional cases or particular circumstances . . . where injustice might otherwise result." *Hormel v. Helvering*, 312 U.S. 552, 557 (1941); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 275 n.4 (1981). Examples of such circumstances include jurisdictional issues that are immediately dispositive.

Amicus contends this Court should consider immediately dispositive facts and law raised for the first time on appeal for which Agency has no non-frivolous defenses. ANPRM, NPRM, Final Rule and Amicus's public comment to the rule, are subject to judicial notice and expansion of the record under F.R.A.P. 16(b).

A. Agency did not analyze rule benefits.

This Court may immediately dispose of this case in Plaintiff-Appellants' favor because Agency failed to monetize or quantify rule benefits, and it did not explain why it could not do so.

As difficult as determining a rule's costs and benefits may be, this does not excuse Agency from its statutory obligation to determine as best it can the economic implications of the proposed rule. *Chamber of Commerce v. SEC*, 412 F.3d 133, 143 (D.C. Cir. 2005). A rulemaking must be set aside when an agency fails to examine policy effects. *Ctr. Bio. Div.* at 1124. Effects of a rule includes benefits, costs, and transfers.

NPRM only vaguely and qualitatively describes two benefits of rulemaking: (1) Prevents criminal usage of bump-stock-type devices; (2) Could reduce casualties in an incident that would have involved a weapon fitted with a bump-stock-type device, as well as assist first responders when responding to incidents. 83 FR 13449. Agency does not even attempt to explain the benefits to first responders.

NPRM asserted without any theoretical or empirical basis, "the costs associated with this rule are easily exceeded by the benefits it will provide for public safety." 83 FR 13477. Violating *EO 12866*, Agency made no attempt to monetize or quantify the benefits of this rule even though the method for doing so was obvious. As *Amicus* explained in his public comment, rule benefits could be monetized in straightforward fashion by estimating the probability of future attacks using bump stocks times the expected damages from such an attack. *Exh. 2*, p. 4—7. Agency attempted to calculate neither of these.

Final Rule asserted benefits of: (1) Prevents usage of bump-stock-devices for criminal purposes; (2) Intended to reduce casualties in mass shootings; (3) Intended to help protect first responders when responding to shooting incidents. 83 FR 66543. Again, Agency made no attempt to monetize or quantify these benefits nor explain why it could not do so, and it failed to describe benefits to first responders.

Final Rule all but abandoned any claim the benefits exceed the costs, and Agency retreated to a qualitative statement, "This final rule clarifies that bump-stock-type devices are machineguns that are subject to the NFA and GCA. The provisions of those statutes addressing machineguns are designed to increase public safety by, among other things, limiting legal access to them. Consistent with the NFA and GCA, therefore, a desired outcome of this final rule is increased public safety." 83 FR 66515. Here, Agency attempts to usurp Congressional authority under its *Necessary and Proper Clause* rather than face its own burden to show the rule is "necessary and appropriate." Congress can make conclusory claims the NFA protects public safety, but the Agency cannot do the same for its rules. Because Agency did not base its decision on a proper consideration of rule benefits, the rule must be set aside. *Burlington Truck* at 168.

This raises an extremely important issue of first impression: Can an agency re-examine the meaning of a statute and expand regulatory enforcement in a manner having negative net benefits even though statutes and executive orders require it to

maximize net benefits by taking no action? Put another way, can the claimed need to reinterpret a statute trump other statutory requirements? This is a very different situation than, for example, Congress giving agencies explicit instructions for rulemaking in legislation representing clear Congressional authorization. *West Virginia* at 3. Or does such a situation *demand* Congress take action instead?

Because these facts are subject to judicial notice from the rule itself, and because Agency's duty to analyze rule benefits is indisputable, and because there are no non-frivolous arguments in Agency's defense, the rule must be set aside.

B. Agency's unsupported assertion of a negative externality.

Closely related to the unquantified rule benefits noted above, Agency claimed the rule addresses a "negative externality" arising from the sale of bump-stock devices to the public:

Another reason underpinning regulatory action is the failure of the market to compensate for negative externalities caused by commercial activity. A negative externality can be the byproduct of a transaction between two parties that is not accounted for in the transaction. This proposed rule is addressing a negative externality. The negative externality of the commercial sale of bump-stock-type devices is that they could be used for criminal purposes. This poses a public safety issue that the Department is trying to address. 83 FR 13449; 83 FR 66544.

Agency provides no citations to peer-reviewed research and no model for how this externality functions, much less estimate the size of this externality. Agencies should rely on peer-reviewed literature, where available, and the absence of such

analytical support violates governing laws and executive orders. *OMB Cir. A-4*, p. 17. In *Amicus's* decades as an economist, he is unfamiliar with any academic paper where the criminal misuse of a lawful product is considered a negative externality. *Exh. 2*, p. 13. But for purposes of this brief, *Amicus* assumes without conceding there is a negative externality.³

A negative externality is defined in economics as a cost imposed on third parties (or a negative benefit) when two other parties engage in a transaction, and the third party is not compensated by the market for bearing this. One example is the damage of second-hand smoke when a person buys and consumes cigarettes.

Negative externalities can be either production externalities or consumption externalities. Because Agency asserts this externality arises from the "commercial sale" of these devices and its misuse in consumption, **Amicus* assumes Agency posits a consumption externality.

Economists always speak about supply and demand. Supply represents the marginal costs of producing a good, and demand represents the marginal benefits of consuming it. "Marginal" refers to the addition to costs or benefits from the last unit

³ Amicus does not rule out the possibility negative externalities exist. Agency has the burden to prove the existence of this externality, and it is not Amicus's or the public's duty to disprove it.

⁴ 83 FR 13449, 66544.

consumed. The supply curve slopes upward because marginal costs rise as more of a good is produced.⁵ The demand curve slopes downward because marginal benefits decline with additional consumption.⁶ Social welfare⁷ is maximized when the marginal benefits of the good equal its marginal costs, i.e., when the last unit breaks even of costs and benefits. Producing less than this quantity leaves unenjoyed net benefits on the table. Beyond this point, the costs of production exceed the benefits.

Externalities are costs or benefits not included in the private market supply or demand curve. Because they are not considered in decision making for consumption or production, this leads to social welfare not being maximized. Taking these costs and benefits into account:

Marginal Social Costs = Marginal Private Costs + Marginal External Costs

Marginal Social Benefits = Marginal Private Benefits + Marginal External Benefits

Point B in Figure 1 shows that, in the absence of externalities, the market equilibrium is where the private supply curve (MSC=MPC)⁸ and private demand

⁵ Law of Supply; Law of Increasing Costs; Law of Diminishing Marginal Returns.

⁶ Law of Demand; Law of Diminishing Marginal Utility.

⁷ Social welfare is the sum of surplus value of trade to consumers, surplus value of trade to producers, tax revenues, and any deadweight losses from inefficiency.

⁸ In the absence of production externalities, Marginal Social Cost (MSC) equals Marginal Private Cost (MPC).

curve (MPB) intersect. With a negative consumption externality, there is a negative benefit imposed on third parties that is not compensated in the market transaction, depicted by the Marginal Social Benefit (MSB) curve. The presence of this externality creates a welfare loss shown by the triangle ABC in Figure 1. The socially optimal allocation is where the Marginal Social Cost (MSC) curve intersects the Marginal Social Benefit (MSB) curve at point A in Figure 1. This point is characterized by a lower quantity (Q1) than the market equilibrium (Q).

Importantly, the socially optimal quantity shown by Q1 is not zero.

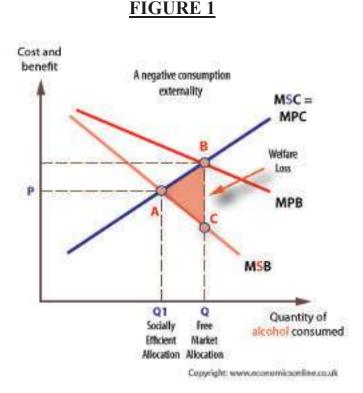
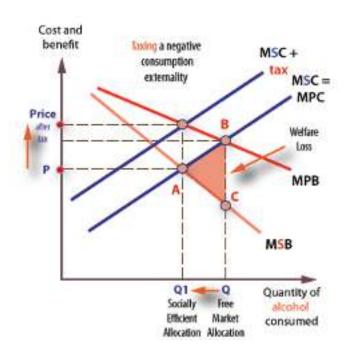


Figure 2 shows the implementation of a *Pigouvian* tax that shifts the supply curve upward (MSC + tax) such that the market obtains the socially optimal quantity

of Q1 with a higher price, which eliminates the inefficiency triangle ABC. Notably, the tax *does not eliminate* the externality altogether, but merely reduces it such that costs and benefits of the good (including tax revenue) are in balance.

FIGURE 2



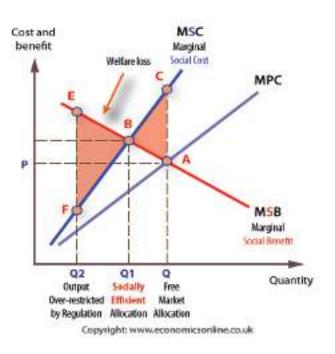
An optimal quota of Q1 would achieve the same objective as a tax by limiting the quantity of the good to eliminate the welfare loss shown by triangle ABC. As explained above with taxes, a quota does not eliminate all damages from the externality, but merely reduces it to a level that balances costs and benefits.

While it seems callous that government would allow damages of externalities to still accrue, even involving deaths, these are ordinary and usual tradeoffs government makes every day. For example, government could eliminate all traffic deaths with a speed limit of zero, at the massive expense of stopping nearly all

commerce. Notably, it was the Agency that asserted the existence of market inefficiency from a negative externality as an impetus for rulemaking. If Agency lives by this model, it must die by this model.

A ban on this good would be a quota of zero - well below the optimum quantity Q1. Figure 3 shows setting a quota at Q2 below Q1 (or imposing too high a tax) would create a welfare loss (triangle EBF) that is *larger* than the welfare loss of the unregulated market (triangle ABC). A total ban on this good would make the welfare loss of overregulation even larger. This is a classic example of *government failure* where government action does worse than doing nothing.

FIGURE 3



It's little wonder, looking at Figure 3, why Agency refused to show its work.

Basic economic theory tells us that, in the presence of a negative externality, a total

ban on bump stocks would destroy more social welfare than it preserves, i.e., negative net benefits. Even existing *sales taxes* on bump stocks would have an unintended Pigouvian effect, which Agency failed to analyze. Criminal and tort liability prevent adverse uses of bump stocks. This demonstrates in a different way what *Amicus* argued above in issues preserved for appeal:

- Agency failed to demonstrate any rule net benefits;
- Agency failed to consider alternative regulatory approaches such as taxes and quotas, implementable by Congress;
- Agency failed to fully consider the *status quo ante* inclusion of sales taxes, tort liability, and criminal liability already reducing or eliminating the externality.

Agency attempted to use the same specious arguments about negative externalities in two subsequent rules. When *Amicus* challenged those rules on the same basis described above, Agency withdrew its reliance on negative externalities as a basis for the *Definition of a Frame or Receiver* rule, which essentially knocked the legs out of its entire economic basis for rulemaking. 87 FR 24715.

⁹ Definition of 'Frame or Receiver' and Identification of Firearms, RIN 1140- AA54, 87 FR 24652; Factoring Criteria for Firearms with Attached 'Stabilizing Arm

Braces, 'RIN 1140-AA55, 86 FR 30826.

As explained above, Agency could have but did not provide a model of how the sale and consumption of bump stocks had negative externalities. The size of the externality would involve the exact same calculation of benefits Agency was required to do in the first place. Even assuming the existence of an externality, the model shows banning bump stocks destroyed more social welfare than it saved. The only way a ban (a quota of zero) could be socially optimal is if the externality were enormous. Agency did nothing more than assert the benefits easily exceed the costs.

Agency did not even attempt to calculate the probability of a future mass shooting using a bump stock, nor did it attempt to quantify the expected damages of such an attack.

VI. Conclusion and Verification

Amicus will say out loud what everyone knows but few will openly admit: Agency did what it wanted to do, and then it backward justified the administrative process. Agency was bullied into rulemaking by the President, the Attorney General, members of Congress, and pressure from the public based on a horrific mass shooting to change its prior determination bump stocks did not make semiautomatic weapons into machineguns. Agency's own technical experts made the initial determinations, and Agency obtained no new or enlightening information after the Las Vegas shooting to prompt a scientifically evidenced change in its determination.

Bowing to such pressure, Agency ramrodded this rule through statutory procedures. It made up a non-existent market failure as the economic underpinning for the rule. When challenged in subsequent rules for the same non-existent market failure, Agency withdrew it as a basis.

Agency made no attempt to monetize or quantify the benefits of the rule, claiming in conclusory fashion, "the costs associated with this rule are easily exceeded by the benefits it will provide for public safety," when any reputable economist would know the rule has virtually no benefits at all.

Agency failed to consider any alternative regulatory approaches including those that were obvious from its own asserted market failure. Agency included two sham alternatives in the NPRM not for itself, but for the public. When pressed by commenters to consider feasible alternatives, Agency claimed they were infeasible because it could not implement those alternatives itself, eschewing its requisite analysis of whether it should act in the first place.

The most important of these alternatives, as relevant to this case, was deferring action to Congressional legislation. Agency should have done so given the contentious and political nature of the policy debate, the loss of private property that could be compensated by Congress, and the availability of alternative remedial measures Congress could implement,

Agency heavily relied on "rate of fire" which is not part of the definition of a machinegun in the NFA, and therefore it relied on a factor Congress did not intend it to consider.

For these reasons, the rule is unlawful and must be set aside under 5 U.S.C. §706.

I hereby certify under penalty of perjury under the laws of the United States that the foregoing is true and correct. 28 U.S.C. §1746.

EXECUTED ON August 9, 2022:

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CERTIFICATE OF COMPLIANCE

IT IS HEREBY CERTIFIED:

That the foregoing **BRIEF OF AMICUS CURIAE ROBERT M. MILLER**, **PH.D.** complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because this brief contains 5,962 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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), as well as Circuit Rule 32.1, because this brief has been prepared in a proportionally spaced typeface using Microsoft Word version 16.63.1 in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on August 9, 2022, I filed a copy of the foregoing **BRIEF OF AMICUS CURIAE ROBERT M. MILLER, PH.D.** by CM/ECF.

I caused a copy of this filing to be served electronically by CM/ECF to all participants in the case.

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