

United States Court of Appeals  
for the Fifth Circuit

United States Court of Appeals  
Fifth Circuit

**FILED**

November 9, 2023

---

No. 23-10718

---

Lyle W. Cayce  
Clerk

JENNIFER VANDERSTOK; MICHAEL G. ANDREN; TACTICAL  
MACHINING, L.L.C., *a limited liability company*; FIREARMS POLICY  
COALITION, INCORPORATED, *a nonprofit corporation*,

*Plaintiffs—Appellees,*

BLACKHAWK MANUFACTURING GROUP, INCORPORATED, *doing  
business as* 80 PERCENT ARMS; DEFENSE DISTRIBUTED; SECOND  
AMENDMENT FOUNDATION, INCORPORATED; NOT AN L.L.C.,  
*doing business as* JSD SUPPLY; POLYMER80, INCORPORATED,

*Intervenor Plaintiffs—Appellees,*

*versus*

MERRICK GARLAND, *U.S. Attorney General*; UNITED STATES  
DEPARTMENT OF JUSTICE; STEVEN DETTELBACH, *in his official  
capacity as Director of the Bureau of Alcohol, Tobacco, Firearms and Explosives*;  
BUREAU OF ALCOHOL, TOBACCO, FIREARMS, and EXPLOSIVES,

*Defendants—Appellants.*

---

Appeal from the United States District Court  
for the Northern District of Texas  
USDC No. 4:22-CV-691

---

Before WILLETT, ENGELHARDT, and OLDHAM, *Circuit Judges.*

No. 23-10718

KURT D. ENGELHARDT, *Circuit Judge*:

It has long been said—correctly—that the law is the expression of *legislative* will.<sup>1</sup> As such, the best evidence of the legislature’s intent is the carefully chosen words placed purposefully into the text of a statute by our duly-elected representatives. Critically, then, law-making power—the ability to transform policy into real-world obligations—lies solely with the legislative branch.<sup>2</sup> Where an executive agency engages in what is, for all intents and purposes, “law-making,” the legislature is deprived of its primary function under our Constitution, and our citizens are robbed of their right to fair representation in government. This is especially true when the executive rule-turned-law criminalizes conduct without the say of the people who are subject to its penalties.

The agency rule at issue here flouts clear statutory text and exceeds the legislatively-imposed limits on agency authority in the name of public policy. Because Congress has neither authorized the expansion of firearm regulation nor permitted the criminalization of previously lawful conduct, the

---

<sup>1</sup> “Positive law is a manifestation of the legislative will.” *Arnold v. United States*, 13 U.S. 104, 119 (1815); *see also Farrar v. United States*, 30 U.S. 373, 379 (1831) (“[The President] cannot in the absence of *law* exercise the power of making contracts, and much less, as in this case, against the expression of the *legislative will*.”) (emphasis added); *Kindle v. Cudd Pressure Control, Inc.*, 792 F.2d 507, 512 (5th Cir. 1986) (describing “the express legislative will” as “the determinant”); *Sylvia Dev. Corp. v. Calvert Cnty., Md.*, 48 F.3d 810, 820 (4th Cir. 1995) (noting the “deference to legislative will” inherent in statutory interpretation); *Winstead v. Ed’s Live Catfish & Seafood, Inc.*, 554 So. 2d 1237, 1242 (La. Ct. App. 1989), *writ denied*, 558 So. 2d 570 (La. 1990) (“The supreme expression of legislative will . . . is of course the codes and statutes.”); *In re Chin A On*, 18 F. 506, 506–07 (D. Cal. 1883) (“[I]t is the duty of the court to obey the law, as being the latest expression of the legislative will.”).

<sup>2</sup> *See Forrest General Hospital v. Azar*, 926 F.3d 221, 228 (5th Cir. 2019) (“The Constitution, after all, vests lawmaking power in Congress. How much lawmaking power? ‘All,’ declares the Constitution’s first substantive word.”).

No. 23-10718

proposed rule constitutes unlawful agency action, in direct contravention of the legislature's will. Accordingly, for the reasons set forth below, we AFFIRM IN PART and VACATE AND REMAND IN PART the judgment of the district court.

### I. Statutory and Regulatory Background

In April of 2022, the Bureau of Alcohol, Tobacco, Firearms, and Explosives (“ATF”) issued a Final Rule in which the terms “firearm” and “frame or receiver,” among others, were given “an updated, more comprehensive definition.” Definition of “Frame or Receiver” and Identification of Firearms, 87 Fed. Reg. 24652 (Apr. 26, 2022) (the “Final Rule”). The Final Rule was almost immediately the subject of litigation claiming that ATF had exceeded its statutory authority. It is that Final Rule that is before this Court now.

First, a brief history of the regulatory agency under fire here. ATF was created in 1972 as an independent bureau of the U.S. Department of the Treasury.<sup>3</sup> The Homeland Security Act of 2002 later transferred ATF to the U.S. Department of Justice, where it remains active today. *See* 6 U.S.C. § 531. Upon its creation, ATF obtained jurisdiction to act under earlier legislation, including the Gun Control Act of 1968 (“GCA”),<sup>4</sup> which

---

<sup>3</sup> *ATF History Timeline*, Bureau of Alcohol, Tobacco, Firearms and Explosives, <https://www.atf.gov/our-history/atf-history-timeline>.

<sup>4</sup> The GCA's predecessor statutes include the National Firearms Act of 1934 and the Federal Firearms Act of 1938, both of which involved the taxation and regulation of firearms. *See* National Firearms Act of 1934, ch. 757, Pub. L. 73-474, 48 Stat. 1236; Federal Firearms Act of 1938, ch. 850, Pub. L. No. 75-785, 52 Stat. 1250 (1938) (repealed 1968).

Of particular note, the Supreme Court has stated: “The Nation’s legislators chose to place under a registration requirement only a very limited class of firearms, those they considered especially dangerous.” *Staples v. United States*, 511 U.S. 600, 622 (Ginsburg, J.,

No. 23-10718

permits the regulation and taxation of certain “firearms.” Under the GCA, Congress granted to the Attorney General the power to prescribe rules and regulations necessary to carry out the GCA’s provisions. *See* 18 U.S.C. § 926. The Attorney General thereafter delegated this authority to ATF, to “[i]nvestigate, administer, and enforce the laws related to alcohol, tobacco, firearms, explosives, and arson, and perform other duties as assigned by the Attorney General.” 28 C.F.R. § 0.130. Pursuant to this authority, ATF proposed the Final Rule as an extension of the GCA’s regulation of firearms.

The GCA requires all manufacturers and dealers of firearms to have a federal firearms license; manufacturers and dealers are thus known as “Federal Firearms Licensees” or “FFLs.” When those FFLs sell or transfer “firearms,” they must conduct background checks in most cases, record the firearm transfer, and serialize the firearm. *See* 18 U.S.C. §§ 922(t), 923(a), 923(g)(1)(A), 923(i).

The primary method by which the GCA ensures that the manufacture and sale of firearms are regulated as intended is through the imposition of criminal penalties.<sup>5</sup> As one example, the GCA generally prohibits “any

---

concurring) (noting also “the purpose of the *mens rea* requirement—to shield people against punishment for apparently innocent activity”).

<sup>5</sup> The GCA is found in Title 18 of the United States Code, which bears the label “Crimes and Criminal Procedure.” *See* 18 U.S.C. § 922.

Interestingly, Congress’s jurisdictional hook whereby it finds authority to regulate firearms in the manner described is the requirement that the firearm travelled in interstate commerce. *See generally id.*; 18 U.S.C. § 921(2) (defining “interstate or foreign commerce”); *see also, e.g., 2.43D Possession of a Firearm by a Convicted Felon*, Fifth Circuit District Judges Association Pattern Jury Instructions Committee, Pattern Jury Instructions, Criminal Cases (2019) (requiring, under element number four of the offense, that the Government prove beyond a reasonable doubt “[t]hat the firearm [ammunition] possessed traveled in [affected] interstate . . . commerce; that is, before the defendant possessed the firearm, it had traveled at some time from one state to another”). While not

No. 23-10718

person” who is not “a licensed importer, licensed manufacturer, or licensed dealer” (i.e., an FFL) from “importing, manufacturing, or dealing in firearms” and from “ship[ping] or transport[ing] in interstate or foreign commerce any firearm to any person.” *Id.* at § 922(a). As another example, the GCA prohibits a large class of persons from not only shipping or transporting firearms, but from possessing them at all. *Id.* at § 922(g). Should a person commit these or any of the other unlawful acts found in the twenty-six subsections of section 922, section 924 authorizes various penalties, including fines, imprisonment, or both. *Id.* at § 924.

The bedrock of the GCA and its plethora of requirements and restrictions is the word “firearm.” The GCA defines a “firearm” as: “(A) any weapon . . . which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device.” *Id.* at § 921(a)(3)(C). As no definition for “frame or receiver” is given in the GCA, ATF previously defined a “frame or receiver” in 1978 as: “That part of a firearm which provides housing for the hammer, bolt or breechblock, and firing mechanism, and which is usually threaded at its forward portion to receive the barrel.” Title and Definition Changes, 43 Fed. Reg. 13531, 13537 (Mar. 31, 1978). This definition remained unchanged for over forty years, until ATF issued the Final Rule in 2022.

ATF’s 1978 regulatory definition sufficiently captured most firearms of the era. Modern firearms, however, have developed such that many firearms no longer fall within the definition. In the Final Rule, ATF states that “the majority of firearms in the United States” no longer have a clear

---

challenged in this appeal, the interstate-commerce requirement may call into question ATF’s jurisdictional authority to promulgate certain provisions of the Final Rule.

# Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

## Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

## Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

## Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

## API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

## LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

## FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

## E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.