

No.

In the Supreme Court of the United States

BLAUSTEIN & REICH, INC.,
D/B/A/ BOB'S GUN & TACKLE SHOP,
Petitioner,

v.

CARL J. TRUSCOTT, DIRECTOR,
BUREAU OF ALCOHOL, TOBACCO, FIREARMS,
AND EXPLOSIVES,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Federally-licensed firearms dealers are required to report information from their records for purposes of tracing firearms to the Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF”) only “in the course of a bona fide criminal investigation.” 18 U.S.C. § 923(g)(7). ATF may not require licensees to submit reports from their records “except as expressly required by this section,” § 923(g)(1)(A). ATF may require licensees to submit “record information required to be kept by this chapter,” § 923(g)(5)(A). However, ATF may not prescribe any rule after the enactment of the Firearms Owners’ Protection Act of 1986 requiring that licensee records “be recorded at or transferred to” a government facility, or establish “any system of registration” of firearms. § 926(a).

The issue is whether ATF’s power set forth in § 923(g)(5)(A) nullifies the above limiting provisions, thereby authorizing ATF to require reporting of licensee records for possible tracing when not in the course of a bona fide criminal investigation.

PARTIES TO PROCEEDING

All parties to the proceeding are identified in the caption. Petitioner is a corporation which has no parent corporation. No publicly held company owns 10% or more of the corporation's stock.

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The opinion of the court of appeals, 365 F.3d 281, is printed in the Appendix (“App.”) at 1a. The unreported order denying the petition for rehearing and for rehearing *en banc* is at App. 44a. The district court’s memorandum opinion, 220 F. Supp.2d 535, is at App. 21a.

JURISDICTION

On April 21, 2004, the court of appeals rendered judgment affirming the district court’s order dismissing the complaint. On June 28, 2004, the court of appeals denied the petition for rehearing and for rehearing *en banc*. The Chief Justice extended until October 26, 2004, the time within which to file this petition. This Court has jurisdiction under 28 U.S.C. § 1254(l).

STATUTES AND REGULATIONS

The texts of the following are in the Appendix: 18 U.S.C. §§ 923, 926; 27 C.F.R. §§ 478.25a, 478.426.

STATEMENT OF THE CASE

(i) Proceedings in the Courts Below

Petitioner Blaustein & Reich, Inc., d/b/a Bob’s Gun & Tackle Shop (“Bob’s”), filed the complaint on November 23, 2001, alleging that a demand letter from the Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF”) requiring Bob’s to report all used firearm acquisitions was unlawful. Bob’s alleged

that such reporting was not expressly required by law and was not for a bona fide criminal investigation, contrary to 18 U.S.C. § 923(g)(1)(A) and (7). Bob's also alleged that ATF's demand violated the prohibitions in § 926(a) on the transfer of licensee records to a federal facility and on any system of registration of firearms or firearms transactions.

The district court had jurisdiction under 28 U.S.C. § 1331. That court granted summary judgment for Respondent ATF Director Carl J. Truscott,¹ issuing a final judgment on September 30, 2002.

The court of appeals affirmed. On June 28, 2004, that court denied the petition for rehearing and rehearing *en banc*.

This Court granted an application for an extension of time to file this petition to and including October 26, 2004.

(ii) Statement of Facts

Bob's, a federally-licensed firearms dealer, received a demand letter from ATF requiring the reporting of all used firearm acquisitions, by make, model, caliber, and serial number, for 1999 and thereafter. Upon request by ATF, licensees are required to report a firearm disposition "in the course of a bona fide criminal investigation." 18 U.S.C. § 923(g)(7). The demand letter was not in the course of a bona fide criminal investigation. Moreover, Bob's was in compliance with all applicable provisions of law. However, the letter threatened license revocation and criminal sanctions for failure to comply.

Because it would make it easier to conduct traces, ATF supported legislation to amend § 923 that would have required dealers to report all used firearm acquisitions. "However,

¹ Truscott is successor to Bradley A. Buckles, who was the ATF Director when this case was in the courts below.

Congress has yet to act on this legislation.” ATF, *Commerce in Firearms in the United States* 26 n.40 (2000). Because Congress never acted, ATF imposed the requirements of the unenacted legislation on some 450 licensees, including Bob’s. ATF then used the records provided to establish an electronic registry of the used firearm acquisitions.

ATF’s criteria for sending a demand letter was that ATF had traced, in 1999, at least ten new firearms sold by a licensee within a three-year period. ATF euphemistically labeled them “crime guns,” but well knew that many firearms it traces were not used in any crime.² ATF recognizes that meeting the criteria does not imply that a dealer has committed any violation.³ Indeed, two of the ten traces involving Bob’s were guns stolen from his customers and returned to them by police. Moreover, ATF’s formula gave no consideration to sales volume. In 1999, Bob’s sold 1,986 firearms, yet had only ten firearms traced.

At a later date, ATF changed the criteria to 15 firearm traces, but continued to apply the 10-trace criteria to Bob’s.

² See Brief for the Petitioner, *U.S. Dep’t of Treasury, BATF, Petitioner v. City of Chicago*, No. 02-322, U.S. Supreme Court, filed Jan. 3, 2003, at 10 (“the agency requesting the trace does not inform ATF of whether possessors and their associates are ever indicted or convicted of any offense”); *id.* at 27 (tracing only identifies first retail purchaser, who “may have long since relinquished ownership of the weapon”).

³ “[T]races do not necessarily indicate illegal activity by licensed dealers or their employees.” ATF, *Commerce in Firearms in the United States* 22-23 (Feb. 2000).

ARGUMENT**THE WRIT SHOULD BE GRANTED TO DECIDE WHETHER, WHERE CONGRESS ONLY AUTHORIZES ATF TO REQUIRE LICENSEES TO REPORT TRANSACTIONS IN THE COURSE OF “BONA FIDE CRIMINAL INVESTIGATIONS” AND OTHERWISE LIMITS ATF’S AUTHORITY OVER RECORDS, A PROVISION AUTHORIZING DEMANDS FOR RECORDS NULLIFIES THE LIMITING PROVISIONS**

The court of appeals decided an important question of federal law that has not been, but should be, settled by this Court, and did so in a way that conflicts with relevant decisions of this Court.

First, the decision below upsets a delicate balance set by Congress regarding the privacy interests of federal firearms licensees who are in full compliance with the law. The decision elevates a single provision providing for reporting of licensee records to ATF over countervailing provisions which strictly define and limit ATF’s access to records. The provisions at issue represent an historic compromise in which records concerning firearms are kept by licensees and are made accessible to ATF only for bona fide criminal investigations or other specific purposes established by law.⁴ The purposes evident on the face of the statute should have resulted in the

⁴ Senator James McClure, chief sponsor of the Firearms Owners’ Protection Act, noted: “The central compromise of the Gun Control Act of 1968 – the sine qua non for the entry of the Federal Government into any form of firearms regulation was this: Records concerning gun ownership would be maintained by dealers, not by the Federal Government and not by State and local governments.” 131 Cong. Rec. S9163-64 (July 9, 1985).

harmonization of the provisions at issue rather than the emasculation of all but one. This is an important question of federal law that this Court should settle.

Treating such straightforward acts of Congress which are the product of historic compromises over a highly sensitive political issue in this manner can only serve to erode confidence in the executive and judicial branches by a large segment of the American population. “There is a long tradition of widespread lawful gun ownership by private individuals in this country,” *Staples v. United States*, 511 U.S. 600, 610 (1994), and “roughly 50 percent of American homes contain at least one firearm of some sort.” *Id.* at 614 n.8.

Second, the opinion conflicts with fundamental principles of statutory interpretation. The statute limits ATF’s authority to demand records for tracing to a “bona fide criminal investigation.” 18 U.S.C. § 923(g)(7). “When a statute limits a thing to be done in a particular mode, it includes a negative of any other mode.” *Christensen v. Harris County*, 529 U.S. 576, 583 (2000). The demand-letter provision does not trump, but should be harmonized with, other provisions limiting requirements that licensees submit records only “as expressly required by this section,” § 923(g)(1)(A), and prohibiting transfer of records to government facilities and registration of firearms. § 926(a). “A court must therefore interpret the statute ‘as a symmetrical and coherent regulatory scheme,’ . . . and ‘fit, if possible, all parts into an harmonious whole’” *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (citations omitted).

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), held that, if Congress has clearly spoken to the issue, the court must apply the law without any deference to the agency’s interpretation. *Brown &*

Williamson added that, even in the absence of statutory clarity, the courts should not recognize an implied delegation of power to an agency where the issue is of great public magnitude. As applied to FDA regulation of tobacco, “Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.” 529 U.S. at 160-61. That is even more the case here, where clear statutory provisions expressly prohibit the claimed agency power.

This case would give the Court an opportunity further to clarify the *Brown & Williamson* branch of the *Chevron* doctrine in the context of a statutory scheme which seeks to protect privacy interests while requiring disclosure for bona fide criminal investigations.

1. The decision in this case is the first ever by any circuit since passage of the Gun Control Act of 1968 to hold that licensees must routinely report certain transaction records to ATF where (a) the reporting is not for a bona fide criminal investigation and (b) the licensees are in full compliance with the law.⁵

ATF unsuccessfully sought legislation that would have required all licensees to report all used firearms received into inventory.⁶ After Congress failed to pass that bill, ATF imposed

⁵ “The Bureau concedes that it is not seeking the information demanded in its letter in connection with a particular criminal investigation.” App. 10a n.11. “The Bureau does not assert that Bob’s Gun Shop has failed to comply with any recordkeeping requirement apart from the demand letter.” App. 10a n.10.

⁶ ATF, *Commerce in Firearms* 26 n.40 (2000), explains: As part of the Youth Gun Crime Enforcement Act of 1999, the President proposed that licensees be required to submit to the NTC [National Tracing Center] the

the bill's requirements on licensees who had been the subject of at least ten firearm traces in one year where the traces were conducted within three years of the sale. ATF disregarded that a large sales volume by a licensee would mean a higher number of traces.

While ATF traces firearms for a variety of reasons, it euphemistically referred to all *traced* firearms as "crime guns" seized from "crime scenes." It sent demand letters to the 450 licensees, including Bob's, which met the above criteria, requiring the reporting of all used firearms received into inventory. ATF then entered the information into its Firearms Tracing System computers. The letter insinuated that any licensee meeting the ten-traces per year threshold may be engaged in illegal "trafficking" or selling firearms to ineligible persons.

As authority for the demand letters, ATF relied on 18 U.S.C. § 923(g)(5)(A), which provides:

Each licensee shall, when required by letter issued by the Attorney General,⁷ . . . submit on a form specified by the Attorney General, for periods and at the times specified in such letter, all record information required to be kept by this chapter or such lesser record information as the Attorney General in such letter may specify.

serial numbers and other identifying information for used firearms taken into inventory. This would fill a major void in the tracing system. However, Congress has yet to act on this legislation.

⁷ References were originally to the Secretary of the Treasury, but enforcement has been transferred to the Attorney General, under whom ATF now serves.

That provision, according to the decision below, trumps countervailing privacy protections which were enacted in the Firearms Owners' Protection Act ("FOPA"), P.L. 99-308, 100 Stat. 449 (1986) and in subsequent legislation. Section 923(g)(1)(A) provides that a licensee "shall not be required to submit to the Secretary reports . . . except as expressly required by this section." Section 926(a) prohibits any rule adopted after FOPA providing that required records or portions thereof "be recorded at or transferred to" a government facility, or establishing "any system of registration of firearms, firearms owners, or firearms transactions." Further, § 923(g)(1)(B)(iii) authorizes ATF to inspect licensee records to trace a firearm "in the course of a bona fide criminal investigation." Section 923(g)(7) requires a licensee to respond within 24 hours to an ATF request for records "as may be required for determining the disposition of 1 or more firearms in the course of a bona fide criminal investigation."⁸

The court below held that the demand letter violated none of these provisions.

2. Section 923(g)(1)(A) provides that licensees shall not be required to submit reports "except as expressly required by this section."⁹ Several provisions expressly require submission

⁸ In addition to the above, an annual appropriations rider prohibits expenditure of ATF funds for "consolidating or centralizing . . . the records, or any portion thereof, of acquisition and disposition of firearms maintained by Federal firearms licensees." *E.g.*, Consolidated Appropriations Resolution, 2003, P.L. 108-7, 117 Stat. 11, 377 (2003).

⁹ *See National Rifle Assoc. v. Brady*, 914 F.2d 475, 483-84 (4th Cir. 1990) ("While the information requested in the regulation may well be beneficial to BATF in its efforts to track firearm dispositions, the plain language of the statute makes clear that this is information that Congress did not wish licensees to be required to record.").

of reports. *See* § 923(g)(3) (multiple handgun sales), (4) (discontinuance of business), (6) (lost or stolen firearm), and (7) (disposition records in course of criminal investigation). These were the reporting obligations identified as being “expressly required.” Senate Report 98-583, 98th Cong., 2d Sess., 15 & n.32 (1984).

The court of appeals obliterates the above limitation in § 923(g)(1)(A) by concluding that the demand-letter provision *itself* “expressly requires an FFL to produce record information when the Bureau issues a demand letter seeking it.” App. 11a. The demand-letter provision is not, however, an “express” requirement like those in § 923(g)(3), (4), (6), and (7). It is a procedural mechanism which was to “ensure the Secretary’s authority to conduct legitimate tracing activities in connection with bona fide criminal investigations.” Senate Report 98-583, *supra*, at 18.

Section § 923(g)(7) requires a licensee to respond within 24 hours to a request for information about specific firearms “in the course of a bona fide criminal investigation.”¹⁰

¹⁰ Elsewhere, ATF’s access to licensee records is predicated on the existence of a criminal investigation. Section 923(g)(1)(A) authorizes issuance of a warrant, based on reasonable cause to believe evidence of a violation of the Act may be found, to inspect licensee records. Under the holding here, ATF could just send a demand letter for the records, and need not have reasonable cause or a warrant.

Similarly, § 923(g)(1)(B) authorizes ATF to inspect licensee records without warrant (i) “during the course of a criminal investigation” of someone other than the licensee; (ii) for ensuring compliance with record keeping requirements regarding “records relating to a firearm involved in a criminal investigation that is traced to the licensee;” and (iii) when “required for determining the disposition of one or more particular firearms in the course of a bona fide criminal investigation.” The holding here would allow ATF to circumvent these limits by sending a demand letter for all such records without there being any criminal investigation.

As the court of appeals concedes, “The Bureau has some access to this information but only as authorized by statute or regulation.” App. 4a. Yet the court of appeals deems § 923(g)(7) irrelevant because the demand letter was not issued in the course of a criminal investigation and did not require a response within 24 hours. App. 11a n.13. That interpretation would allow ATF to circumvent § 923(g)(7)’s “bona fide criminal investigation” requirement and compel information to be reported within 24 hours through the demand-letter provision.

ATF claims that it may need the records here should it wish to trace specific firearms in some possible future criminal investigation, but that would render insignificant the limitations in § 923(g)(1)(B)(iii) and (g)(7) that records may be required for tracing only “in the course of” a criminal investigation which is “bona fide.” “When a statute limits a thing to be done in a particular mode, it includes a negative of any other mode.” *Christensen v. Harris County*, 529 U.S. 576, 583 (2000). “It is familiar law that a specific statute controls over a general one” *Bulova Watch Co. v. United States*, 365 U.S. 753, 758 (1961).¹¹

¹¹ “However inclusive may be the general language of a statute, it ‘will not be held to apply to a matter specifically dealt with in another part of the same enactment. . . . Specific terms prevail over the general in the same or another statute which otherwise might be controlling.’” *Fourco Glass Co. v. Transmirra Corp.*, 353 U.S. 222, 228-29 (1957). “We are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law.” *Kawaauhau v. Geiger*, 523 U.S. 57, 62 (1998). See *Ratzlaf v. United States*, 510 U.S. 135, 140-41 (1994) (statutory terms must not be treated “essentially as surplusage--as words of no consequence.”). “It is our duty to give effect, if possible, to every clause and word of a statute, . . . rather than to emasculate an entire section, as the Government’s interpretation requires.”

Had Congress wished to do so, it could have required dealers to report receipt of used firearms, but did not.¹² Further, Congress was well aware that traces of firearms sold by some licensees would be greater than those sold by others, but imposed no special reporting requirements on those with more traces. “The Secretary’s regulation creates a whole new recordkeeping requirement above and beyond the requirements provided for by the plain language of the statute.” *NRA v. Brady*, 914 F.2d at 484.¹³

The court of appeals does not articulate any restraints imposed by the above provisions on ATF’s demand-letter authority. It is as if they were never enacted.

3. The prohibition of § 926(a) applies to a “rule or regulation prescribed after the date of the enactment of” FOPA.¹⁴ ATF’s reinterpretation of the statute to authorize

United States v. Menasche, 348 U.S. 528, 539 (1955).

¹² Indeed, Congress created one class of licensees – pawnbrokers – whose record of every acquisition would be of a used firearm. 18 U.S.C. § 921(a)(11)(C).

¹³ “While the Secretary may accurately depict the enforcement problems that invalidation of this requirement may create, courts are simply not at liberty to ignore the plain language of the statute.” *Id.* at 484-85.

¹⁴ Section 926(a) provides in part:

No such rule or regulation prescribed after the date of the enactment of the Firearms Owners’ Protection Act may require that records required to be maintained under this chapter or any portion of the contents of such records, be recorded at or transferred to a facility owned, managed, or controlled by the United States or any State or any political subdivision thereof, nor that any system of registration of firearms, firearms owners, or firearms

demand letters to compliant licensees routinely to report the receipt of all used firearms is a new “rule” adopted in 2000, long after enactment of FOPA.

While the demand-letter provision is a statute, a radical reinterpretation of statutory authority is a rule. *Shell Offshore Inc. v. Babbitt*, 238 F.3d 622, 630 (5th Cir. 2001), explains:

If a new agency policy represents a significant departure from long established and consistent practice that substantially affects the regulated industry, the new policy is a new substantive rule and the agency is obliged, under the APA, to submit the change for notice and comment.

The court of appeals noted that Bob’s “has shown that the demand letter in question is the first seeking information from compliant FFLs” App. 16-17a. Indeed, ATF never asserted such authority from 1968 until the demand letters in question were sent out in 2000. Its only pre-2000 statements on the issue explained that no such authority existed,¹⁵ and it thought it needed legislation to cure the defect.

Section § 926(a) provides that ATF may not prescribe a rule after enactment of FOPA to:

transactions or dispositions be established.

¹⁵ In 1968, the ATF Director stated that “we have no intention of requiring law-abiding gun dealers to report their firearms transactions to us.” 131 Cong. Rec. S9129 (July 9, 1985) (inserted into the record by Senator Hatch in FOPA debates as “clarifying the record information submission requirement for firearms licensees”). A 1978 ATF Order stated: “The purpose of a demand letter is to obtain information concerning the movement of firearms . . . which may be unlawful” Gun Control and Constitutional Rights: Hearing Before the Subcom. on the Constitution, Com. on the Judiciary, U.S. Senate, 96th Cong., 2d Sess., at 262-63 (1981).

require that records required to be maintained under this chapter or any portion of the contents of such records, be recorded at or transferred to a facility owned, managed, or controlled by the United States

Section § 926(a) also prohibits the establishment of “any system of registration of firearms, firearms owners, or firearms transactions or dispositions.”¹⁶ The records herein are transferred to ATF and the information entered into its electronic database.

The court of appeals stressed that the demand letter was sent to “only” 450 licensees. Yet they are high volume – that is why they have more traces than others – and their reporting must include tens of thousands of firearm acquisitions. Section 926(a) applies to “*any portion* of the contents of such records,” and prohibits “*any system* of registration of firearms, firearms owners, or firearms transactions,” which encompasses the used firearms received and owned by licensees.¹⁷ Nothing in § 926(a) suggests that there is a threshold number of licensees, or transactions, below which § 926(a) does not apply.

The use of the demand-letter authority was intended to be limited to real criminal investigations and non-compliant

¹⁶ “Read naturally, the word ‘any’ has an expansive meaning, that is, ‘one or some indiscriminately of whatever kind.’ *Webster’s Third New International Dictionary* 97 (1976). Congress did not add any language limiting the breadth of that word” *United States v. Gonzales*, 520 U.S. 1, 5 (1997).

¹⁷ While the registry of used firearms received by 450 licensees does not include all firearms nationwide, it is nonetheless encompassed in the terms “*any system* of registration of firearms.” *Cf.* 26 U.S.C. §§ 5841, 5845(a) (providing for a “central registry of all firearms in the United States,” but defining “firearm” narrowly).

licensees. It was not intended to trump the provisions of FOPA which set limits on ATF's authority.

The demand-letter provision "is based on existing Treasury regulations describing activities which facilitate the Secretary's ability to trace the disposition of firearms in connection with criminal investigations." Senate Report 98-583, 98th Cong., 2d Sess., 17 (1984). "The purpose of [this provision] is to clarify and ensure the Secretary's authority to conduct legitimate tracing activities in connection with bona fide criminal investigations."¹⁸ *Id.* at 18. However, the authority granted under that and other provisions:

are not to be construed to authorize the United States . . . to use the information obtained from any records or form which are required to be maintained for inspection or submission by licensees under Chapter 44 to establish any system of registration of firearms, firearms owners, or firearms transactions or dispositions.

Id.

The records demanded here were unrelated to any bona fide criminal investigation. Contrary to § 926(a), ATF's policy is a new rule which requires "any portion" of required licensee records to be recorded at and transferred to a government facility, and which constitutes a "system of registration of firearms."

4. ATF's demand-letter program adversely affects

¹⁸ Senator Hatch explained about the 1968 demand-letter regulation which FOPA would codify: "In order to facilitate tracing of firearms used in violent crimes, licensed dealers currently are required to provide the Secretary of Treasury with information about specific weapons upon request." 131 Cong. Rec. S8691 (June 24, 1985).

hundreds of licensees nationwide. Moreover, the decision here is a serious breach of Congress' fundamental statutory scheme under which licensees constitute the repository of information on firearms other than in the specific instances spelled out by statute, such as reporting information for a bona fide criminal investigation.

No circuit conflict exists because the issue has not been extensively litigated. However, a district court has declared ATF's program at issue here to be unlawful. *J & G Sales, Ltd. v. Edgar A. Domenech, Acting Director, Bureau of Alcohol, Tobacco, Firearms and Explosives*, CV 03-2263-PCT-PGR, D. Ariz., *notice of appeal filed*, Sept. 28, 2004 (9th Cir.). By Judgment entered August 5, 2004, Hon. Paul G. Rosenblatt found that "the demand letter is an unlawful request for its FFL records outside the scope of BATFE's statutory authority." The court ordered that ATF "is enjoined from seeking to enforce its . . . demand letter issued to Plaintiff." *Id.* By memorandum Order entered August 5, 2004, the court explained in detail why the demand letter, since it was not issued in the course of a bona fide criminal investigation, is unlawful.

Moreover, the decision is in conflict with a prior Fourth Circuit precedent. *RSM, Inc. v. Buckles*, 254 F.3d 61, 68 (4th Cir. 2001), sought to reconcile the Gun Control Act's privacy protections with ATF's authority to require licensees to report information. *RSM* upheld a demand letter requiring 41 dealers to report information on transactions "[b]ecause BATF's issuance of the letter was limited to federal firearms licensees who had violated federal law in failing to comply with firearms

trace requests”¹⁹ *Id.* at 63.

RSM declared that “the [demand-letter] statute does not grant BATF an unbounded delegation of authority to request record information,” “is not a limitless delegation of authority to BATF to request record information,” and “cannot be construed in an open-ended fashion.” *Id.* at 66-67. *RSM* explained:

[S]ection 923(g)(1)(A) provides that FFLs [federal firearms licensees] “shall not be required to submit to the Secretary reports and information with respect to such records and the contents thereof, except as expressly required by this section.” . . . Section 923(g)(1)(A)’s express limitation on the Secretary’s authority would be nullified if section 923(g)(5)(A) were interpreted to permit the Secretary to issue demand letters for any purpose. Likewise, while section 926(a) does not directly prohibit BATF’s issuance of the letter in this case, that provision clearly demonstrates Congress’ concern about any attempt by BATF to establish a national firearms registry. Section 926(a) would be rendered meaningless if BATF could issue limitless demand letters under section 923(g)(5)(A) in a backdoor effort to avoid section 926(a)’s protections for law-abiding firearms owners.

Id. at 67.

¹⁹ The district court in that case had invalidated even that type of demand letter as violative of § 926(a). *RSM, Inc. v. Buckles*, 94 F. Supp. 2d 692 (D. Md. 2000).

RSM upheld the demand letter there because it was narrowly tailored to apply only to licensees who failed to comply with lawful trace requests and would terminate once they did comply. *Id.* But “Congress did not intend to give BATF carte blanche with regard to informational requests from federal firearms licensees.” *Id.* at 69. The decision here does give ATF carte blanche by nullifying the provisions enacted by Congress to limit ATF’s authority.

5. The demand letter was arbitrary, capricious, and contrary to law because the criteria for selection are irrational and because it is based on inaccurate factual allegations which the recipient had no opportunity to rebut.

The letter is a form letter which was sent to hundreds of licensees, all with the same allegation that “crime guns” seized from “crime scenes” had been traced to each such licensee. JA 54. In reality, the mere fact of having been *traced* is the real criterion, and the trace may have nothing to do with any crime.

ATF never produced evidence that any of the ten traces of Bob’s involved “crime guns.” Bob’s introduced evidence that “two firearms were traced because they were stolen from the individuals to whom Bob’s Gun Shop sold them.”²⁰ App. 6a n.7. Bob’s customers were crime victims, not criminals. Yet the premise of the selection criteria of ten traced guns was that the licensee might be involved in “illegal firearms trafficking” or that “you are also selling a high volume of secondhand guns used in crime.” App. 7a.

Moreover, ATF predicated its demand based on the arbitrary number of ten firearms having been traced in one year,

²⁰ Another gun was traced after its owner was charged with carrying a concealed weapon, which was dismissed.

without any consideration of sales volume.²¹ Bob's transferred nearly 2000 firearms in 1999. Noting that "trace data are not controlled for dealer sales volume," the Inspector General has explained:

Large-scale FFLs [Federal Firearms Licensees] may have more guns traced to them simply because they sell more guns than smaller FFLs. . . . [A] hypothetical FFL selling 40 guns a year of which 8 are subsequently traced as crime guns would be a much greater concern than a dealer selling 2,000 guns of which 15 are subsequently traced.

U.S. Dept. of Justice, Office of the Inspector General, Evaluation & Inspections Division, *Inspections of Firearms Dealers by the Bureau of Alcohol, Tobacco, Firearms & Explosives*, Report No. I-2004-005 (July 2004), at 26, www.usdoj.gov/oig/inspection/ATF/0405/final.pdf.²²

Indeed, ATF changed its criteria from 10 to 15 traces – making Bob's situation identical to the above hypothetical – yet ATF continued to apply the old criteria to Bob's. This demonstrates that ATF does not need the information after all and application of the old criteria is irrational.

Trace information compiled by ATF does not constitute a reliable index of firearms used in crime. A study by the Congressional Research Service explained:

[A] law enforcement officer may initiate a trace

²¹ See *Hamilton v. Beretta U.S.A. Corp.*, 96 N.Y.2d 222, 750 N.E.2d 1055, 237 n.5 (N.Y. App. 2001) (a large number of traces may "merely reflect[] a high volume of legal sales").

²² Although this publication is recent, Bob's has made the same argument since the beginning of this litigation.

request for any reason. No crime need be involved. No screening policy ensures or requires that only guns known or suspected to have been used in crimes are traced. . . . [T]he extent to which trace requests focus on guns not involved in crimes cannot be determined.²³

In short, because ATF's criteria was fundamentally flawed, ATF failed 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 Vehicle Manufacturers Ass'n. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983). *See id.* at 56 ("the agency has failed to offer the rational connection between facts and judgment required to pass muster under the arbitrary and capricious standard").

6. This case involves one of those unique and controversial issues in which this Court's intervention is

²³ Congressional Research Service, *Report for Congress; "Assault Weapons": Military Style Semiautomatic Firearms Facts and Issues, 1992*, App. B, at 66. The report explained further, *id.* at 70:

For example, a trace may be conducted on a firearm found at the residence of a suspect though the firearm itself is not associated with a criminal act. Traces may also be requested with respect to abandoned firearms, those found by chance, those seen by officers for sale at guns shows or pawn shops, or those used by suicide victims. In addition, traces may be requested with respect to firearms seized pursuant to an investigation not directly related with a violent criminal offense, such as tax evasion or a technical violation of the Gun Control Act provisions. It is not possible to identify how frequently firearms traces are requested for reasons other than those associated with violent crimes.

warranted. Like firearms, tobacco has been the subject of public controversy and hard-fought legislative compromises. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), aptly begins its discussion by stating:

Regardless of how serious the problem an administrative agency seeks to address, however, it may not exercise its authority “in a manner that is inconsistent with the administrative structure that Congress enacted into law.” . . . And although agencies are generally entitled to deference in the interpretation of statutes that they administer, a reviewing “court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”

Id. at 125-26, quoting *Chevron*, 467 U.S. at 842-843.

Congress directly spoke to the issue here in providing that a licensee shall not be required to submit reports from transaction records “except as expressly required by this section,” § 923(g)(1)(A), and restricting record access for tracing to be “in the course of a bona fide criminal investigation.” §§ 923(g)(1)(B)(iii), 923(g)(7). “Under *Chevron*, a reviewing court must first ask ‘whether Congress has directly spoken to the precise question at issue.’ . . . If Congress has done so, the inquiry is at an end . . .” *Brown & Williamson*, 529 U.S. at 132 (citation omitted). Yet the panel here elevated a single provision over restrictive ones, nullifying the latter. This is contrary to *Brown & Williamson*:

In determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in

isolation. The meaning--or ambiguity--of certain words or phrases may only become evident when placed in context. . . . It is a “fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.” . . . A court must therefore interpret the statute “as a symmetrical and coherent regulatory scheme,” . . . and “fit, if possible, all parts into an harmonious whole . . .”

529 U.S. at 132-33 (citations omitted).

In the legislative development of the Gun Control Act, not a single hint exists that ATF would have the power claimed here. *See Brown & Williamson*, 529 U.S. at 147 (“Given the economic and political significance of the tobacco industry at the time, it is extremely unlikely that Congress could have intended to place tobacco within the ambit of the FDCA absent any discussion of the matter.”). Indeed, the only “discussion of the matter” was Senator Hatch’s undisputed explanation of the demand letter provision that licensees are required to provide “information about specific weapons upon request.” 131 Cong. Rec. S8691(June 24, 1985).²⁴ Senator Hatch also inserted into the record, without dispute, a statement by the ATF Director that ATF had “no intention of requiring law abiding gun dealers to report their firearms transactions to us.” 131 Cong. Rec.

²⁴ As the sponsor of the provision, Senator Hatch’s explanation of its purpose “deserves to be accorded substantial weight in interpreting the statute.” *FEA v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976). *See also Schwegmann Bros. v. Calvert Corp.*, 341 U.S. 384, 394-395 (1951) (“It is the sponsors that we look to when the meaning of the statutory words is in doubt”).

S9129 (July 9, 1985).

Moreover, Congress enacted specific prohibitions on agency action. *Brown & Williamson* explains:

Finally, our inquiry into whether Congress has directly spoken to the precise question at issue is shaped, at least in some measure, by the nature of the question presented. Deference under *Chevron* to an agency's construction of a statute that it administers is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps. *See Chevron*, 467 U.S. at 844. In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation.

529 U.S. at 159. Given the always visible and sometimes rancorous debate on gun control, whether the agency may demand routine transaction information from licensees is hardly a detail that Congress would have implicitly delegated to the agency.

The provisions at issue are pillars of hard-won compromises, the core of which is the concession that licensees must keep records on firearm transactions in exchange for the promise that the government will not have access to the records except when necessary for a bona fide criminal investigation.²⁵

²⁵ *See Board of Governors, FRS v. Dimension Financial*, 474 U.S. 361, 373-74 (1986) (“the final language of the legislation may reflect hard-fought compromises. . . . The statute may be imperfect, but the Board has no power to correct flaws that it perceives in the statute it is

Brown & Williamson observes:

Owing to its unique place in American history and society, tobacco has its own unique political history. Congress, for better or for worse, has created a distinct regulatory scheme for tobacco products, squarely rejected proposals to give the FDA jurisdiction over tobacco, and repeatedly acted to preclude any agency from exercising significant policymaking authority in the area. Given this history and the breadth of the authority that the FDA has asserted, we are obliged to defer not to the agency's expansive construction of the statute, but to Congress' consistent judgment to deny the FDA this power.

529 U.S. at 159-60.

Despite several provisions restricting ATF's access to records to particular purposes, the court of appeals here rendered such provisions lifeless in the face of a supposed delegation to demand records for any purpose or for no purpose.²⁶ *Brown & Williamson* forbids such an implied delegation:

Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion. To find that the FDA has the authority to

empowered to administer.”).

²⁶ “An agency may not confer power upon itself. To permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant to the agency power to override Congress.” *Louisiana Pub. Serv. Comm'n. v. FCC*, 476 U.S. 355, 374-75 (1986).

regulate tobacco products, one must not only adopt an extremely strained understanding of “safety” as it is used throughout the Act -- a concept central to the FDCA’s regulatory scheme -- but also ignore the plain implication of Congress’ subsequent tobacco-specific legislation. It is therefore clear, based on the FDCA’s overall regulatory scheme and the subsequent tobacco legislation, that Congress has directly spoken to the question at issue and precluded the FDA from regulating tobacco products.²⁷

529 U.S. at 160-61.

The reality here is that ATF was dissatisfied that Congress failed to enact legislation requiring licensees to report receipt of used firearms, and decided to impose the requirement by fiat on selected licensees. *Brown & Williamson* admonishes:

Nonetheless, no matter how “important, conspicuous, and controversial” the issue, . . . an administrative agency’s power to regulate in the public interest must always be grounded in a valid grant of authority from Congress. And “in our anxiety to effectuate the congressional purpose of protecting the public, we must take care not to extend the scope of the statute beyond the point where Congress indicated it

²⁷ “It is highly unlikely that Congress would leave the determination of whether an industry will be . . . rate-regulated to agency discretion -- and even more unlikely that it would achieve that through such a subtle device as permission to ‘modify’ rate filing requirements.” *MCI Telecommunications Corp. v. AT & T Co.*, 512 U.S. 218, 231 (1994).

would stop.””
529 U.S. at 161 (citations omitted).

This case presents an opportunity for this Court further to expand its jurisprudence related to the reconciliation of statutory provisions concerning the limits of agency regulatory power over a controversial issue on which Congress sought to achieve a delicate balance.

CONCLUSION

This Court should grant this petition for a writ of certiorari.

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