

Stephen Gutowski (00:03.478)

All right. Welcome, ladies and gentlemen, to another episode of the Weekly Reload Podcast. I'm your host, Stephen Gutowski. I'm also a CNN contributor and the founder of thereload.com where we're actually having a sale right now, a third anniversary sale on memberships. So you can get 20% off your first year. If you head over and sign up today for a membership, which will give you exclusive access to hundreds of pieces of news analysis, you will not find anywhere else. You'll also get this podcast day early and the opportunity to appear on the show. If you would like to do that.

I think we'll have some more member segments coming up soon. But this week we are focused on the Supreme Court and its latest gun case, or gun related case at least, which is why we have law professor Jonathan Adler with us from Case Western Reserve University, who is joining the show. He's a Supreme Court expert, somebody who's written a lot about all, a number of these gun cases the court has taken up and,

Welcome to the show, Jonathan. Thank you so much for joining us.

Jonathan Adler (01:05.761)

My pleasure. Good to be here.

Stephen Gutowski (01:07.21)

Yes, can you tell people just a little bit more about your background and who you are?

Jonathan Adler (01:10.89)

Sure. So as mentioned, I'm a law professor here at the Case Western Reserve University School of Law in Cleveland. I should say I'm the Johann Verhij Memorial Professor of Law. I focus on constitutional law, administrative law, and environmental law. A lot of issues relating to guns these days involve both constitutional law and administrative law. Constitutional law on the Second Amendment side, sometimes the due process side, on the administrative law side of things.

how do we interpret statutes, how do we know what agencies are allowed to do, not allowed to do. I do a lot of work in that space. And then I do some work on judicial behavior. And I edited a book on the Supreme Court and observing its behavior in the Roberts Court and do a fair amount on that. I'm one of those folks that's always tallying up how many cases have been argued and how many have been decided and who's written what so we can pretend like we can predict who's

Stephen Gutowski (02:08.164)

There you go.

Jonathan Adler (02:09.962)

In terms of evaluating how, particularly the Trump nominees, and most specifically the replacement of Justices Kennedy and Ginsburg with Justices Kavanaugh and Barrett affects the court's jurisprudence, that's a question that I and a bunch of others spend some time trying to figure out, and certainly in areas both related to administrative law and it looks like gun law in particular, that we're going to see a shift.

Stephen Gutowski (02:34.094)

Hmm.

Stephen Gutowski (02:40.265)

Yeah.

Jonathan Adler (02:40.623)

and, or are in the midst of seeing a shift. And so cases like this and some of the other ones on the court's docket are important.

Stephen Gutowski (02:48.542)

Yes, so you are an expert in this topic. You also write, of course, at National Review, the Volokh Conspiracy as well. So people will, yes.

Jonathan Adler (02:55.346)

Yes. Volconspiracy hosted betreason.com, an independent, often, although not always, libertarian legal blog that used to be at the Washington Post, but they wanted to put us behind their paywall and we did not want people to have to pay to read us. So we left and Reason offered to host the site without exercising any editorial control. So we...

We said yes. And so we've been at Reason.com ever since.

Stephen Gutowski (03:23.367)

That is a nice arrangement. Yes. Good resource for those looking for, like you said, libertarian leaning analysis from a number of law experts. Several of them we've had on the show before. David Kopel.

Jonathan Adler (03:36.562)

Yes, I have quite a few very gun-focused co-bloggers. Eugene Volek, who oversees the blog, David Kopel, both very interested in gun-related issues, Randy Barnett sometimes.

Stephen Gutowski (03:42.188)

Yes.

Stephen Gutowski (03:47.678)

Mm-hmm. And very influential in the, especially in the legal field on, on the Second Amendment. We haven't had Eugene Balak on yet, so we'll have to have, maybe we can convince him to come on.

Jonathan Adler (03:56.778)

You should. He's done some very interesting work on the history of gun control and the Second Amendment. And yeah, so, and then my colleague Josh Blackman, I know, who co-blogs there as well, has done some stuff on our topic.

Stephen Gutowski (04:09.174)

Mm-hmm. Yes. He's, he's given us comment before in the past for stories, but this, uh, like you mentioned, there's a, it seems to be the court is very interested in administrative law, specifically, uh, gun law or administrative law related to guns, the ATF. Uh, and so they've taken up this new case on what, you know, colloquially people would call the Biden ghost gun ban. Um,

If you want to be a bit more technical, it's actually a regulation on the sale of unfinished firearm frames and receivers. And recently we had the court in the Fifth Circuit, a district court ruled that this law was, or this rule, sorry, was violated the law because it expanded the ATF's power beyond what.

is allowed under the statute and so it violated the administrative procedures act and the three-judge panel in the fifth circuit agreed with the lower court and now the government has appealed this to the supreme court and they've agreed to take it up. Can you just give us a little bit of a breakdown on what where this case stands and what it means for the supreme court to take it up?

Jonathan Adler (05:28.298)

Sure. So, I mean, two things. Initially, when the district court had found that the regulation redefining or expanding the definition of firearms and a frame and receiver, and those are, we'll get into, I'm sure, it did both of those things. And legally, what the ATF did with each is distinct, perhaps in a meaningful way.

District Court enjoined the rule as a whole. The Fifth Circuit narrowed that sum. There's a big question in a lot of these cases about when an agency issues a regulation that has a problem and a court finds a problem with it, do you invalidate the entire regulation or you just invalidate the parts that were challenged and that are a problem? There's a second question about to what extent do you provide relief beyond the parties to the case? And these are issues that the court has been dealing with quite a bit of late.

Initially, the federal government went to the Supreme Court asking for a stay of the injunction, so allow the regulation to go into force while the litigation proceeds. The court took a...

Stephen Gutowski (06:33.354)

Right, because the lower courts denied that, right? They said, no, you're not getting a stay. This is being vacated completely for everyone. That was the first step here. Then they went to the Supreme court.

Jonathan Adler (06:42.982)

And the. Right, they went to the Supreme Court and the Supreme Court took a little bit of time to decide on that, ultimately granted it. But four justices, Thomas Gorsuch, Kavanaugh and Alito, indicated that they would not have granted that temporary relief, which. You know, suggests either that they're skeptical of the government's arguments or perhaps that.

Stephen Gutowski (07:02.059)

Mm-hmm.

Jonathan Adler (07:12.362)

Um, insofar as the fifth circuit narrowed, um, the injunction to some extent that that, that dealt with what the court should be concerned with for now. But I think the former is more likely. So a hint at least that four justices are skeptical. Um, uh, this, the justice department asked the Supreme court to hear the case, um, uh, filed a petition for certiorari.

Stephen Gutowski (07:33.814)

Well, didn't it go through two, there were like two rounds here because there was the initial phase where they issued that stay where they had the noted dissents. And that was just on what the on that broader expanded view of, you know, vacation of the rule and applying to everyone. Then, then it went back to the Fifth Circuit panel and they

I think that well then it went all the way back to the district court. He wasn't there a decision on the merits at that point. Cause it kind of did this whole thing over again.

Jonathan Adler (08:03.154)

Yeah, so, right, so went back, they agreed on the merits, Fifth Circuit affirmed in part and vacated in part and...

Stephen Gutowski (08:10.75)

Right. That's when that Fifth Circuit tried to narrow the, the ruling a bit, but, but the court still wasn't happy with that. Right.

Jonathan Adler (08:15.346)

Right. And now the court as a granted certiorari? No. And, you know, it's interesting is that, you know, the court has only taken four cases for next term. The court takes, you know, what's interesting, I mean, just to step back for a second, you know, after District of Columbia versus Heller and the courts and validation of the District of Columbia's prohibition on having a functional fire in the home.

The court wasn't in a rush to hear more cases. It heard a case called McDonald versus Chicago, which expanded, applied that same right to the states, which was really a no-brainer, although it was a 5-4. In fact, I would argue as a constitutional matter, the outcome of McDonald's was more foreordained than even in D.C. versus Heller, because there's very little question that the 14th Amendment

Stephen Gutowski (08:48.426)

Yeah.

Jonathan Adler (09:13.054)

when the 14th Amendment was adopted, that one of the privileges or immunities of citizenship that it was protecting was the right of free citizens to protect themselves. And that it was understood at the time that free black people would

be able to protect themselves with weapons. And that was very much on the minds of those who drafted and supported the 14th Amendment. And that applies as against the states where only the second amendment applies as against the federal government.

After that, the court didn't hear a lot of cases about the Second Amendment. That's been up until Berlin. That's really been interesting that you've had lots of litigation over guns, both constitutionally and increasingly in the administrative law context. The court really had been avoiding them. There was this one silly case out of Massachusetts involving, I guess, stun guns where the court vacated and sent it back and just said, you know,

Stephen Gutowski (10:05.762)
Yeah, seitano.

Jonathan Adler (10:09.726)
It was basically, you didn't apply the right test. We're saying nothing else about what you did, but at least apply the right test. And.

Stephen Gutowski (10:16.362)
Yeah, which was about the, I mean, Massachusetts had said, stun guns aren't protected by the second amendment because they didn't exist at the founding era and the court, yeah.

Jonathan Adler (10:23.538)
Right, right, which is just goofy, right? And clearly, I mean, as an academic or as a professor that creates students, it's like you answered the question without having done the reading. I mean, was essentially what the court was saying to the Supreme Court of Massachusetts. But what's interesting is now as the court has been avoiding gun cases, the court overall is taking far fewer cases. So it's only heard argument in 61 cases this term. That's the smallest in years.

Stephen Gutowski (10:36.17)
Right, and that was a 9-0 ruling.

Jonathan Adler (10:54.743)
When I started as a professor, the court would routinely hear over 100. You go back to the 80s, there are terms where it heard like 150, 160 cases a term, only hearing 61. And yet we have this explosion of gun cases, right? We have Bruin from just a couple of years ago, this term we have the Bumstock case, and we have Rahimi, so both an administrative law case and a constitutional case involving guns. And then the court has...

thus far only accepted four cases for next term so far. That's way behind what we would normally expect. And of those four, one of them is another administrative law related gun case, a gun case which as we'll get into, I assume, could be affected by what the court does in the Baumstot case in terms of what the court says about how to interpret the language in statutes relating to guns and also could be affected by what the court does.

Stephen Gutowski (11:47.554)
Right.

Jonathan Adler (11:51.378)
in a case called, a pair of cases called Relentless and Lope or Bright, which deal with something called the Chevron Doctrine, which is a rule about how courts review agency interpretations of statutes. And that could affect this case too. So it's plausible to me that this court case ultimately gets remanded in light of what's done in these other cases. So it's just interesting the court is, while it's hearing so much less, it's

Stephen Gutowski (12:13.131)
Really?

Jonathan Adler (12:19.582)
devoting more time to gun-related questions than it has in a long time. And the assumption has, I mean, the natural

assumption is that has something to do with the change in the court's composition in the last few years, that it's now willing to say, look, we've got to deal with these cases because they're coming up, they're being argued in the lower courts, people are being prosecuted, people are filing these challenges. We need certainty and we need consistency across the federal system. And...

So we're getting a lot of attention to guns in given how little the court's doing.

Stephen Gutowski (12:54.058)

That is very interesting for several reasons to me. One, it's interesting to see that you're connecting these administrative law cases that have to do with the ATF and guns with the Second Amendment cases, because obviously they're not the same legal claims. There's no Second Amendment claim in this case that they've taken up. There are Second Amendment claims against this rule, but not at issue in this case.

So it's interesting that you see these as connected as a sort of a larger effort by the court to focus more on the Second Amendment. It's interesting for a second reason because, I mean, that was a complaint you heard from the conservative members of the court for years. Thomas and Alito had, was it Thomas and Gorsuch, I believe it was, wrote dissents when they, yeah, Thomas did it all the time, but.

Jonathan Adler (13:47.23)

I mean, Thomas consistently and sometimes others. I mean, yeah, it was a complaint from him. It was a complaint from certainly from gun rights advocates. It was also a complaint from folks who just believe that one of the most important things if not the most important thing the Supreme Court does is ensure consistency in the application of federal law throughout the country. And after Heller and McDonald, there was a lot of uncertainty about what...

Stephen Gutowski (13:55.134)

Oh, sure.

Jonathan Adler (14:13.726)

what they meant for a wide range of gun regulations, particularly in those states that have more aggressive or more stringent gun regulations. The case they ultimately take Bruin, I would argue should have been a no-brainer. That is to say, you know, Heller and McDonald dealt with fairly extreme laws concerning guns in the home. Bruin, you know, the New York law there was about as broad as you could get for a law affecting carry in that.

Stephen Gutowski (14:17.153)

Yeah.

Stephen Gutowski (14:42.828)

Mm-hmm.

Jonathan Adler (14:43.666)

It basically said, you know, government official gets to decide whether you have a good reason, which given the history of firearm regulation, particularly in the wake of the Civil War, you know, clearly has to be out of bounds. And then the court gives this test in Bruin, which lower courts have been struggling with. And so you have the need for more certainty there. You also simultaneously have federal agencies, the ATF in particular, trying to

do more to update or clarify the way existing laws and regulations apply to firearms at a time when Congress is not doing that. And so whether they're connected, whether the justice say, these are connected because they all involve guns, or it's just two paths that happen to be reaching the court at the same time, they have to be aware that the share of their docket

Stephen Gutowski (15:22.595)

Mm-hmm.

Jonathan Adler (15:40.542)

the share of their time that is being spent on gun-related questions is increasing. And then there are also a whole bunch of gun-adjacent things that the court deals with regularly, like application of the Armed Career Criminal Act, or there's a First Amendment case this term that involving the NRA. So I mean, there are other kind of gun-adjacent things, but it is, while I would hope the justices think about

cases first and foremost in terms of the legal questions they raise and not the context in which those questions arise. When you're doing so little and a growing share of it relates to a certain subject matter, the justices have to be aware of it, whether it's deliberate or not. And it's certainly going to affect the way the court is perceived, right? I mean, if the court deals with 100 cases a year and two of them deal with guns, then it's going

Stephen Gutowski (16:27.287)
Hmm.

Jonathan Adler (16:35.37)
Okay, if it deals with 50 cases a year and four of them deal with guns, well then, you know, the association of the court and gun law and policy is going to be greater. And that's just a descriptive fact, whether the court is doing it deliberately or not, in terms of the politics, when we think about the court, that's going to be true.

Stephen Gutowski (16:46.626)
That's it.

Stephen Gutowski (16:50.586)
Yeah, that's a good point. Yeah, but you know, because the way I've been looking at these cases is pretty separate in my view, in my mind, just because... And so it's interesting to hear you connect them like this, because I mean, obviously there is that base level, just they're about guns, so they're connected. But I've looked at a lot of these cases stemming from these executive...

branch or executive agency rules and changes made there as much more in line with how the court is trying to approach administrative policy and trying to, it seems like part of what they're doing of late is trying to rein in the administrative state. Like they're trying to rein in these agencies. And that I've looked at it as connected more to that than the, their second amendment stuff.

Jonathan Adler (17:35.706)
I think so, but it is interesting.

Jonathan Adler (17:42.334)
I mean, yes and no on this. Well, if the goal is just to deal with the administrative law question.

Jonathan Adler (17:50.962)
The court does have some degree of choice about which cases it takes, right? The case it took on the Chevron Doctrine, which a lot of people have focused on, is about fishing. And whether or not fishing boats have to pay for the people that are, for the observers that are making sure they're violating the rules and whether the agency could impose that. I suspect that at least some of the justices, that is the justices that are more concerned about the court's...

kind of political capital or about the way it's perceived. So Chief Justice perhaps. Yeah. Would prefer to deal with the administrative law questions in very kind of sleepy, arcane, technical areas of the law and where the party that's being burdened is sympathetic. So there are a bunch of examples of administrative law questions that come up with some frequency where the court...

Stephen Gutowski (18:23.426)
So John Roberts, yes.

Stephen Gutowski (18:33.206)
Hmm. Yeah.

Jonathan Adler (18:48.594)

avoided hearing those questions when it's like General Electric or Exxon, but rushes to take it when it's Michael and Chantel Sackett who are small property owners or perhaps when it's brought by a state. And what's interesting, certainly in the bump stock litigation, what's interesting is that the way that case arose and the way the government adopted its-

Stephen Gutowski (19:03.798)

Hmm

Jonathan Adler (19:16.23)

its new interpretation of the law that it said wasn't a new interpretation or the newly discovered meaning of the law that hadn't changed, kind of did present an administrative law question in a way that was hard for the court to avoid. And there were enough of those cases and there was a clear circuits, but the court kind of had to take the bump stock case in my view. Well, the cert petition that the federal government filed,

Stephen Gutowski (19:36.79)

But you don't think the same is true for this case, the unfinished frames and receivers case.

Jonathan Adler (19:44.63)

purely put it in terms of, look, you know, this is, this regulation was invalidated, reviewed on that basis, not on the basis of different courts had done different things. So in the Bumstock case, the court waited until different federal appeals courts had reached conflicting opinions. And then it kind of felt it had to. And that's certainly my read of it. Yeah. It waited a long time.

Stephen Gutowski (20:04.618)

Yeah, it did wait a long time. It was years. Well after the confiscation deadline came and went to

Jonathan Adler (20:11.13)

Right. And I think one interpretation of that is the court likes to not have to decide things. And with the bump stock, as you know, and as listeners, I'm sure know, one question was always, well, why doesn't Congress just do this? And it certainly appeared initially the votes were there to impose some sort of limitation on bump stocks after what happened in Las Vegas. And

Stephen Gutowski (20:35.63)

Hmm.

Jonathan Adler (20:40.338)

The Trump administration just chose not to do that. And there's been, right. Right, but.

Stephen Gutowski (20:43.346)

Yeah, I think this was the pressure relief valve solution of going rulemaking instead of lawmaking, especially because the sort of unintended consequences of lawmaking, I think, was viewed as the risk at the time.

Jonathan Adler (20:54.114)

But the flip side of that is the court, I think, was view of like, well, maybe if we don't take this, maybe Congress will eventually do it. Because then it's an easier question, right? Then it's what did Congress enact? Is there a second amendment issue? You know, I, you know, without seeing Rahimi without knowing what the court's going to do there, you know, if I were looking to bolster

Stephen Gutowski (21:09.143)

Right.

Jonathan Adler (21:20.934)

the protective, the gun rights protectiveness of the courts, second amendment jurisprudence, bump stocks would not be

at the top of my list of things to bring before the court. And so, you know, the court would have had time to deal with a range of other second amendment cases before having to think about bump stocks. Had Congress acted, Congress didn't, the courts now stuck with it and it will decide that. Here, you know, I...

I suspect that the five justices that voted for the stay.

Did so in part because they believed the question in, in the Vanderstot case and the case involving what people refer to as ghost guns, but obviously where it was privately made firearms or privately made firearms and parts of firearms or frames receivers, et cetera. I suspect that the five that voted for it to stay on lower court injunction did so in part on a belief

that the case was cert-worthy and that the federal government had a reasonable likelihood of success on the merits. There was some debate right now in the court over, well, there's a debate right now in the court over what the proper standard is for providing that sort of relief at the Supreme Court level on what people refer to as the shadow docket, although it's really just the motions docket. And we've seen in recent weeks, we've seen some opinions from justices

Stephen Gutowski (22:31.224)

Really?

Jonathan Adler (22:53.426)

Um, uh, the question of to what extent should a view of the merits influence that choice and to what extent should a view of the cert worthiness of the case influence that choice? Um, pretty clearly the cert worthiness plays a role and I'm oversimplifying this a bit, but the idea being that if it's likely that this is a case that the court would hear and the court generally likes to keep the status quo in place while it's hearing a case,

a stay is justified to preserve the status quo while the case kind of makes its way to the court. Yeah. And there is though this question about, you know, if, when the court issues a stay or some sort of injunctive relief, especially on some sort of preliminary basis, there is this idea that we're concerned about the effect on the parties in the interim of either giving or not giving that

Stephen Gutowski (23:28.946)

Yeah, yeah, I mean, that's how I've traditionally heard people refer to this.

Jonathan Adler (23:51.414)

And if you have a good reason to believe that one party is going to ultimately win, you are, and again, I'm oversimplifying this, but you are more concerned about the.

the inequity of harm that could happen to their interests in the meantime. So the more likely you are to think that the government will be able to defend its regulation, the more likely you are to allow that regulation to go into force while the litigation is pending. And again, there's some debate about whether, how much of a role that should play in the analysis. And there were some opinions about a week or so ago involving a...

Stephen Gutowski (24:08.492)

Right.

Stephen Gutowski (24:19.63)

I mean that.

Jonathan Adler (24:30.362)

an Idaho statute, a totally different topic relating to gender affirming care for minors, but where the justices laid out the extent to which these things should matter. So long way of saying you come into this case pretty confident for justices are skeptical of the government reason to believe that.

four or five might actually be sympathetic given that the state was issued, but we're not entirely sure because they don't

explain the state, right? The state's a one-line order. Right.

Stephen Gutowski (25:00.546)

Hmm. That's yeah, there was no explanation other than, I mean, I think they don't have to explain when a justice has voted against granting a stay, right? They don't have to say anything in that situation.

Jonathan Adler (25:15.634)

No, no, I mean, if the state is granted, we know five had to vote for that.

Stephen Gutowski (25:20.47)

Five have to vote for it, but they don't have to say that they didn't vote for it. You know what I mean? Right. So that's why, that's why, when I, when I look at this case, and this is where maybe we disagree a little bit about how the sort of tea leaf reading and I know that's, uh, always a risky thing to do with the Supreme court. Um, even, even after they've had oral arguments, right. But, um, you know, when I look at the, this case and the Supreme court's intervention in it. Um,

Jonathan Adler (25:23.786)

They don't have to tell us anything. In this case, we know.

Stephen Gutowski (25:48.502)

It says more to me that they had those four come out. Now you watch this closer than I do, so I'm interested in why we might disagree here, but that says four are almost certainly not going to vote with the government on this case. And so you have the remaining five, three of them are the liberal justices who, frankly, you can probably just chalk up to vote against any sort of pro-gun litigant in almost any case. Maybe that's a bit too unfair or generalized.

Jonathan Adler (25:53.535)

Yeah, I mean...

Jonathan Adler (26:15.638)

I mean, three justices that are both hostile to firearms and very sympathetic to regulatory agencies.

Stephen Gutowski (26:21.078)

I mean, Jackson doesn't have a long track record yet, but how she's performed in oral arguments doesn't, you know, in Rahimi and the bomb stop case. Yeah.

Jonathan Adler (26:28.99)

But they're sympathetic to the federal government generally. They're sympathetic to agencies generally. They're sympathetic to allowing agencies interpret statutes the way they want to generally. I mean, so.

Stephen Gutowski (26:37.654)

So it seems like it comes down to me, to those, you know, Roberts and Barrett, and Roberts and Barrett, to this point, they both were on the majority in Bruin, right? So if you're looking at it from a Second Amendment standpoint, you'd think they'd favor a program litigant, maybe. Obviously, like we've established this as in a Second Amendment case, although you seem to definitely think that's a little bit related. Yeah.

Jonathan Adler (26:43.01)

Robertson Barrett. Yeah.

Jonathan Adler (27:03.83)

Well, it affects guns and it affects the availability of guns and...

Stephen Gutowski (27:07.114)

And then the other aspect is how have they performed on these administrative cases so far? Haven't they also been skeptical, both of them of government expansion power?

Jonathan Adler (27:11.731)

Well.

Jonathan Adler (27:17.162)

Generally, we're waiting on the Chevron case, right? So the Chevron case is which I think, there's a footnote in the Fifth Circuit saying, hey, Chevron wasn't raised here, but the Chevron doctrine says, and if statute's clear, obviously you apply the statute, but if it's ambiguous, and certainly in the context of an agency issuing a regulation, that the agency is presumed to have the authority to

resolve the ambiguity in the statute and that courts should defer to that. Now there's a whole bunch of footnotes I could add and clarifications and so on. The court has been asked to overturn that, unclear whether they're going to overturn it or simply modify it. But there is this background rule that is at least still technically on the books that says where a statute is ambiguous, courts are going to defer to an agency's reasonable interpretation. Roberts...

has shown some skepticism of that rule, at least in its broadest application. On the other hand, we tend to think Roberts is concerned about the public perception of the court. So, and if it's that fair or not, you know, I don't know, but there's certainly that is a widespread view and there's certainly a lot of, yeah, right. And there are a lot and things he said and so on and other case and, um, justice Barrett.

Stephen Gutowski (28:31.538)

Ever since the Obamacare case, right? That was big. Yeah.

Jonathan Adler (28:39.858)

you know, we don't know as much because she hasn't been on the court for as long, but she certainly joined plenty of opinions that are skeptical of aggressive efforts by agencies to assert more authority. And he has written some opinions about how we think about what is, to me, at least the underlying question here, which is how much authority did Congress give the agencies? In this case, you know,

I think there are parts of this case that are close, and I think it actually combines two issues that I can at least make the argument cut in different directions. That is to say, if you go to the statute, the statute seems to anticipate more flexibility with regard to how you define a firearm than to how you define a framer receiver. I think that's probably why the Fifth Circuit opinion starts with framer receiver.

Jonathan Adler (29:38.23)

the kind of the authority the agency clearly has to implement the statute, you can imagine a justice who is generally skeptical of really broad assertions of agency authority saying a rule that does no more than apply or interpret a or apply or enforce a broad statutory provision with what we might characterize as an anti-circumvention rule.

is different from the agency simply just roping in things that it had never roped in before. That is to say, I could see a justice who is skeptical of the government's position in the bump stock case, at least with regard to the firearm definition, thinking the ATF is okay here. I think it's harder for frame or receiver, but that...

Stephen Gutowski (30:29.89)

Hmm. That's interesting.

Jonathan Adler (30:34.47)

that also starts to get into the weeds and the question is how much do the justices want to get into those weeds, which

Stephen Gutowski (30:39.134)

Yeah, well, so when you say that, I mean, the regulated part in the statute is the framer receiver, right?

Jonathan Adler (30:46.59)

Well, so the act defines firearm to include any weapon which will or is designed to or may readily be converted to expel

a projectile by the action of an, right? So, and that language, yeah, so I think that language means that insofar as the regulation apply, expand or applied that definition to weapons part kits that.

Stephen Gutowski (30:58.827)

Mm-hmm.

Jonathan Adler (31:14.206)

that is designed or may readily be completed, assembled, restored, or otherwise converted to expel a projectile by the action of an explosive. I think the government comes into court with a stronger argument there than it does with the regulation that seeks to kind of apply an equivalently broad definition to frame or receiver, in part because the definition in the statute of frame and receiver, it doesn't have this readily converted language, or it doesn't have this language that

Stephen Gutowski (31:34.636)

Right.

Stephen Gutowski (31:41.406)

Yeah, that was the basic holding at the lower court, right? That essentially the ATF is trying to add the readily converted to language to frame and receiver when it's not actually in the statute that way. And the lower court made the, yeah.

Jonathan Adler (31:53.478)

Right, so as a textual matter, and again, the Fifth Circuit led with that in its lower court opinion, and I think as a textual matter, the government has a harder time there, right, because there are a bunch of arguments you would make, one of which is Congress knew how to include an anti-circumvention principle, right? Congress knew how to say if it's covered when it's assembled, you can't readily disassemble it and have it suddenly not covered. If you're the seller and

you're selling all the pieces. Congress did that for firearm, arguably. And again, there's this debate about what readily converted means. It didn't do it with frame or receiver, and that difference matters, right? So we kind of assume that if Congress adopt in the same statutory scheme, adopts broader and more flexible language in one part and not in the other,

We generally assume Congress did that for a reason. And there were some rationality, right? Congress was not trying to say anything that could ever be used as part of a gun, is it counts as a gun or counts even as a framer receiver. But Congress did seem to say that when you have all the parts or at least the government can make this argument again, I'm not saying the government necessarily wins on this, but it's a stronger argument. And as academics, we kind of say, you know.

We like to play around with these gray areas. Congress did at least arguably say that with the assembled firearm or all of the parts that are together that could readily be reassembled or converted.

Stephen Gutowski (33:36.51)

Right, you can't sell somebody all of the parts they need already finished to just put a gun together and claim it's not a gun. That's sort of, I guess, at least what the lower court was interpreting that part of the law to mean. But but.

Jonathan Adler (33:51.41)

Right. And my view is just that unless one is going to say that the phrase, any weapon which will or is designed to or readily or may readily be converted to expel a projectile, et cetera, et cetera, unless one is going to say that language is fully

Jonathan Adler (34:21.542)

one draws the line between what is covered and what is not, the government seems to have a fairly strong argument about the full, about the firearm as a whole. And that the lack of such language with regard to firearm receiver kind of simultaneously strengthens the argument with regard to all the parts, weakens the argument with regard to firearm or to a frame or receiver.

Stephen Gutowski (34:36.087)
Mm-hmm.

Stephen Gutowski (34:49.826)
Hmm.

Jonathan Adler (34:51.038)
And so it would not surprise me at all. Again, not having read merits briefs because they haven't been filed, not having heard oral argument. It wouldn't just from what we know now, it wouldn't surprise me if one or two justices think that the two parts don't necessarily rise and fall together.

Stephen Gutowski (35:11.942)
Yeah, well, so let me ask you this. Do you think this is what the moral arguments in this case are going to be what we're just going back and forth here on basically these specific, just like, because that's what the bump stock case seemed to come down to is just arguing over what exactly the statute means, less so because the other half of this is the way that the ATF has reinterpreted things that they used to say, something completely different than what they say now. This was a major point.

Jonathan Adler (35:20.334)
I think so.

Yeah.

Jonathan Adler (35:38.111)
which was more of an issue, which was more...

Stephen Gutowski (35:39.702)
but doesn't really come up in the oral arguments in the bump stock case.

Jonathan Adler (35:43.494)
Well, although, I mean, it came up a little bit. I mean, but everyone knows that the weird thing about the ATF position in the Bumpstock case is the ATF not wanting to rely on the Chevron Doctrine, which I mentioned, in part because the Trump administration didn't want to rely on it and was happy with the idea that it might be overturned. And kind of prudentially, agencies have been trying to rely upon it less, especially in the Supreme Court.

Jonathan Adler (36:14.894)
So we're not asking for Chevron deference and we're not reinterpreting it. It just always meant this, we just never knew it, which I have a lot of problems with that in any context. Well, yeah. But

Stephen Gutowski (36:24.714)
I thought that would come up a lot more in oral arguments than it did.

Stephen Gutowski (36:30.634)
And it's a similar thing here where this, this rule that they're reinterpreting comes from, you know, the sixties where, and now suddenly it means something else.

Jonathan Adler (36:37.474)
Yeah, so yeah, although it's interesting here, it was at least again with, and you probably understand and know some of this history better than I do, but as I understand the way the ATF has at least interpreted the firearm definition historically, that it has historically adopted kind of an anti-circumvention gloss on that language historically. And

There are arguments, and again, I think the Chevron decision matters. I mean, the Chevron decision, this low, bright, and relentless case that the court will decide sometime between now and July, that decision will affect how this case is briefed. And the government is not going to want to brief this case until it sees that decision. Because an alternative to

Chevron, there is an alternative to Chevron, which says, it's called Skidmore, which says,

don't defer to the agency, but you recognize that the agency has expertise, that the agency implements this statute, that the agency might have even played a role in advising Congress about how to write the statute, and that if an agency has interpreted a statute in a very consistent way, especially if it did so beginning at relevant periods, that we place a lot of weight on that. And so if, in fact, the ATF can establish that

It has always viewed this language about something that is designed or that can readily may readily be converted as the anti-circuit as anti-circumvention language, right? To avoid someone from being able to not have to have a license or not have to do background checks or whatever else by disassembling of firearms, but essentially selling all the relevant pieces to people that they expect can assemble, then

the ATF saying we're just updating that would be on stronger ground than if the ATF could not make that case. And it wouldn't be that the ATF automatically wins, but rather the idea being that the ATF having adopted this general approach to the statute for an extended period of time, both is itself evidence of what everyone understood the statute to mean, as well as perhaps

Stephen Gutowski (38:40.449)
Yeah.

Jonathan Adler (39:02.042)
entitled to some degree of weight because Congress has never gotten around to correcting them and everyone who's subject to the rule is kind of aware of it and is on notice of it. They make the argument, again, I know they made the argument, I know the Fifth Circuit said no, if it's a bad interpretation, it's always been a bad interpretation. My point is that there are

Stephen Gutowski (39:14.694)
Yeah, I don't think that's the case here though. Right, because the real...

Jonathan Adler (39:32.722)
with an administrative law doctrine that might be strengthened if the court overturns Chevron, which would actually give those arguments more weight. Again, I'm assuming for the sake of argument that the ATF can actually provide the evidence of that claim. The Fifth Circuit said it doesn't matter.

Stephen Gutowski (39:52.746)
Right. Yeah, it's kind of, it's sort of ironic in this case, because like all the focus is on the, you know, the ghost gun stuff and the home built firearms and, uh, you know, that, that sort of aspect of it, cause that's, that's what the president emphasizes and that's what gets headlines or whatever, but the ATF, we really read this, um, this rule. They're honestly much more focused on the concept of, uh,

redefining what a frame receiver is from how they had originally defined those terms. Because not so much because of these, you know, buy build shoot kits or polymer 80 lowers or whatever, 80% AR lowers. It's because of the way that they have been essentially misinforming their own rule for like 50, 60 years.

when they originally defined frame and receiver, especially receiver, they said it had to contain a number of parts, including like the breach of the gun, the trigger control group, they all had to be in one piece for it to be a receiver. And then they did the, honestly, it's just sort of, seems like bureaucratic incompetence from the ATF and then they just.

ignored their own rule and because I can like I can bring one right here right I have a For anyone listening and not watching this is a and I'm holding an AR 15 fully complete lower receiver and If you you'll notice that if you buy one of these or if you look at mine it has a serial number Engraved into it because this is the part that the ATF classifies as the receiver for an AR 15 the problem is

that this part does not include all of those components that the ATF's old rule said it has to. And so they've just been

doing that for decades and it hadn't become a problem until relatively recently when federal judges started to notice that this part does not actually fit the ATF's own definition for what a receiver is and the ATF is just kind of.

Stephen Gutowski (42:07.55)

and the industry has gone along with this issue. And so a lot of the, like it gets a lot of headlines, the other aspect of this, but really it's kind of about trying to fix some of these screw-ups, which is funny because this gun existed at the time, like split receiver, there's an upper receiver part to an AR-15, comes in two pieces. And so like the breach of the AR-15 is in the upper receiver, not the lower receiver.

Jonathan Adler (42:18.998)

Yeah, and-

Well...

Stephen Gutowski (42:33.854)

So, you know, it's sort of interesting because that's more the core of this.

Jonathan Adler (42:36.658)

Well, I think that's the more vulnerable part of the rule. I think that's the more vulnerable part because I think you're absolutely right that the framer receiver part of the statute is written more specifically or kind of with greater specificity. It doesn't have that, what I'm referring to is kind of the anti-circumvention language, right? So the way to think about it is Congress sometimes says, look, we're not the experts. This is what we're trying to reach, but we're gonna write our language in a way so that if we don't nail it,

perfectly, the agency is going to be able to get what it needs to get at. It arguably did that with the firearm definition. It did not do that with the framer receiver definition. And I think it's also fair to say that historically, the ATF was not known as an agency that really sweated the details of administrative law. It was not alone. The IRS, until very recently, that complaint was long made of the IRS, I think fairly.

Stephen Gutowski (43:25.358)

That's a good way of putting it.

Jonathan Adler (43:33.97)

It's a complaint made about immigration law. There are some agencies that are very good at administrative law, that are very good at dotting every I, crossing every T, updating things the way they need to, going to Congress and saying, hey, we need help when they don't have the authority they need. And there are some agencies that are kind of like, eh, you know, no one's going to complain. We're going to win. We're going to leave, you know. We're not worried about it.

courts aren't getting on us or the leverage we have over those we regulate as such. And the ATF has arguably been in that latter category.

Stephen Gutowski (44:03.211)

Right.

Stephen Gutowski (44:07.086)

I think the industry has been fine with this particular compromise or, you know, screw up of the law for a while because it's a practical solution.

Jonathan Adler (44:11.274)

Well, and if you're a large established manufacturer, if you're a large established manufacturer, that's to deal with the ATF on a regular basis and doesn't wanna be hassled, and it's not gonna affect your bottom line, why are you worried about it, right? If you're a small manufacturer, where the compliance burdens are greater, where you see an opportunity for competitive advantage, or just because you're not some big corporation, you're a small...

you know, small entity that's in the business for other reasons, right? Reasons of principle, not just you might be more inclined to challenge. And we see that happen too, right? In a lot of regulatory contexts, the larger players are like, just tell me what the rule is. I'll live with the rule within reason. I want certainty. I want the ability to invest in compliance. I can hire my lawyers. Yeah.

Stephen Gutowski (44:59.524)
Right.

Stephen Gutowski (45:03.594)
And that's a lot of this rule is just kind of trying to update the language to fit what they were already doing. Like they're not planning, according to the ATF at least, and, you know, take them with their take them at their word, I guess, is what they're trying to tell people. But they just want this to be they just want to keep things the same. They want to keep doing this. So they're trying to update their language so that it's actually fits with what they're currently doing.

Jonathan Adler (45:16.383)
Well, here's a quick question.

Well, here's a question for you, right? I mean, to what extent?

Jonathan Adler (45:31.166)
And I would assume that larger manufacturers, insofar as smaller manufacturers aren't complying or weren't complying, might be really happy with the idea of make the little guy do the same thing that we do.

Stephen Gutowski (45:44.31)
Well, it wasn't, it's not that anyone wasn't doing this. The problem was that people were being arrested for having just a lower receiver and

uh, you know, for being a prohibited person, being a felon in possession and just having these lower receivers and the problem would they be charged for that. And then when it got to court, uh, you had a couple of judges who were like, wait a second, this doesn't fit the definition that you have. What this person is possessing doesn't fit your definition of a receiver. So these charges can't stand. And that created a real problems for the ATF and DOJ in court. And that's honestly, I think that's the main goal that they have at this, this rule.

Jonathan Adler (46:17.994)
That's interesting because the government's portraying, I mean, certainly the way the government portrays the issue to the Supreme Court in its cert petition is that this is primarily about sale. And

Stephen Gutowski (46:28.931)
Mm-hmm.

Stephen Gutowski (46:34.018)
And they've kind of pushed the boundaries on what they were originally saying about this sort of 80% stuff, because they were still claiming that it was really just about the kits and selling it as part of this kit, that was the problem, not the 80% lowers themselves, but selling it with a jig and with other parts that was their issue. And that's where it becomes a...

a firearm, the collection of parts, even if the included 80% receiver doesn't meet the definition of a receiver. But they've kind of tried to expand upon that since they put out the rule too. So it's, I don't know, they kind of went out on a limb on some of these things.

Jonathan Adler (47:11.006)
Yeah, I mean, it's, it's.

Yeah, I mean, I suspect too, you know, for issues, you know, what often comes up in a lot of these cases is arguments about things like the rule of lenity and the like. And for those sorts of reasons or to try to avoid those sorts of problems,

it makes sense for the government to emphasize, you know, it makes sense that they would emphasize that this is about gun sales.

Stephen Gutowski (47:22.05)

Hmm.

Stephen Gutowski (47:40.65)

Yeah, I mean, their line is all about, people can sell 80% lowers without having to get it. They can make them and sell them without having to get any licenses or doing background checks on the people who are buying them. And also they don't have to include serial numbers. That's why they call them ghost guns, because you can't trace the serial number, so forth, but.

But yeah, you look at the rule closely and look at the what the recent history of some of the issues the ATF and DOJ have run into with prosecutions, you start to see what they're the bulk of this rule is really about. And, and then the other half of it is a little bit more of a political fight in line with the president's, you know, agenda on these sorts of questions, but, but it'll be interesting to see what the Supreme Court does with it. I think you're, you know, you've laid out a pretty, pretty compelling case of

why this is not necessarily a slam dunk for the plaintiffs here and it'll be fascinating.

Jonathan Adler (48:35.93)

And let's face it, the phrase ghost guns here, I mean, you'd always rather go into court with the kind of the broader facts and narrative being, you know, making people sympathetic to your side. And folks that aren't aware of the long history of people gunsmithing and making parts and assembling guns, I mean, you know, here are ghost guns and they're scared.

Stephen Gutowski (48:50.574)

Sure, sure, of course.

Stephen Gutowski (48:59.618)

Mm-hmm. Which has been legal our entire, our entire history.

Jonathan Adler (49:06.014)

But yeah, I think as a technical matter, it doesn't, you know, the fact that it's relating to the rule, the fact that you have at least some, at least for parts of it, a language where there's at least a plausible argument for the government. And again, I'm assuming that some of what the government says it can show, it can show.

Stephen Gutowski (49:21.323)

Mm.

Stephen Gutowski (49:27.338)

Yeah, yeah. And to be fair, the definition of what a receiver and frame isn't in the statute, right? You have these, uh, this terminology around it, like, readily converted to that might, that isn't next to frames and receivers, but it doesn't say what a frame and receiver is in the statute. That comes from, all from ATF rulemaking in the first place.

Jonathan Adler (49:44.946)

Right, and they say a framer receiver is a framer receiver, or something that, I'm paraphrasing, or something that can be a framer receiver or can become a framer receiver. Yeah.

Stephen Gutowski (49:52.734)

Yeah, that's where they're trying to, the ATF is trying to add that into that section, but really they have a lot of discretion over what is a framer receiver because it's not actually defined in this section. That's another area where maybe they have some additional leeway there. Maybe the justices will see that. I don't know. It'll be really interesting, but we really appreciate you taking the time to give us your view on this. I think perhaps we have to have you back on maybe after

oral arguments happen so we can get some more of your insight because I think...

Jonathan Adler (50:19.126)

Sure. Yeah. This should be heard in October. We assume it will. I mean, we don't know for sure. Usually the court schedules cases in line with when they were granted and the initial sitting is usually eight, 10, 12 cases. This sitting will... Usually, sitting is eight or 10 cases. They're only for granted for next term. So presumably this will be heard in October.

Stephen Gutowski (50:21.934)

It's been really good.

Jonathan Adler (50:47.558)

The court isn't obligated to do that, but we assume it will be heard in October.

Stephen Gutowski (50:52.778)

Wonderful. Well, hopefully we can have you back on at that point. In the meantime, I'm sure you'll be writing about these things and lots of other, uh, well fascinating stories that involve guns and administrative law or the second amendment or what have you. Uh, if people want to follow your work, where can they do that?

Jonathan Adler (51:07.114)

So on Twitter, I'm at jadler1969 or X or whatever I'm supposed to call it. Most of my writing is either directly on the Volokh conspiracy blog or I link to it there. And that's at reason.com. If you go there, there is a, on the banner, it says Volokh, V-O-L-O-K-H. You can click on that or reason.com slash Volokh, V-O-L-O-K-H. And I'm one of the contributors there.

I think under the Who We Are tab, you can look at just my stuff. But my co-bloggers write lots of good stuff too. So I wouldn't want to discourage folks from reading them as well.

Stephen Gutowski (51:43.65)

Wonderful.

All right, wonderful. Well, that's all the time we've got this week. Thank you guys for tuning in and listening. If you are interested in taking advantage of our sale, you can head over to thereload.com and pick up a membership today, 20% off your first year. It's a good deal. We don't do sales very often, so I encourage you to take advantage of that while you can. And of course, if not ready to commit to a membership yet, you could have...

Always sign up for our free weekly newsletter, which goes out every Friday morning and keeps you up to date with what's going on with guns in America. That's all we've got for you this week. We will see you guys again real soon.