IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

MICHAEL CARGILL, Plaintiff, v. MERRICK GARLAND, in his official capacity as Attorney General of the United States, et al., Defendants.	:	CIVIL ACTION NO.: 1:19-cv-349-DAE

PLAINTIFF'S REPLY IN SUPPORT OF HIS MOTIONS TO ALTER THE JUDGMENT

The parties agree that the Court should amended its judgment (ECF No. 65) to include declaratory relief. They differ, however, over the contents of such declaration. Defendants' proposal (ECF No. 94-1) to declare broad legal conclusions regarding the meaning of 26 U.S.C. § 5845(b) and the lawfulness of the Final Rule is inconsistent with the Declaratory Judgment Act's narrow authorization to "declare the rights and other legal relations of *any interested party* seeking such declaration." 28 U.S.C. § 2201(a) (emphasis added); *see also* David P. Currie, *Misunderstanding Standing*, 1981 Sup. Ct. Rev. 41, 45 ("[T]he court is empowered to declare only the 'rights' of the 'party seeking such declaration,' and he must be 'interested' "). The Court should instead amend the judgment to provide party-specific declaratory relief that Mr. Cargill proposes. *See* ECF No. 96-1.[1]

[1] Mr. Cargill's original proposal (ECF No. 95-2) asked the Court to issue abstract pronouncements of law as declaratory relief. But in preparing this reply brief, we determined that the text of the Declaratory Judgment Act does not authorize or permit relief of that sort and thus Mr. Cargill has corrected his proposal to seek proper declaratory relief.

This Court is further duty bound to follow Fifth Circuit precedent holding that vacatur is required where, as here, agency action exceeds statutory authority. That precedent does not—as Defendants argue (ECF No. 94 at 5–6)—permit balancing "various equities at stake before determining whether a party is entitled to vacatur. Section 706 [of the APA], after all, provides that a 'reviewing court *shall*' set aside unlawful agency action." *Braidwood Mgmt., Inc. v. Becerra*, 104 F.4th 930, 952 (5th Cir. 2024) (footnotes omitted). Limiting the scope of relief to Mr. Cargill, in addition to being wrong as a statutory matter, is especially inappropriate because he has a concrete interest in selling bump stocks to non-party customers who will otherwise remain subject to the Final Rule.

The availability of declaratory relief—which must be party-specific—does not allow this Court to depart from vacatur—which must be universal—as the mandatory remedy under § 706 of the Administrative Procedure Act (APA). Indeed, if declaratory judgment were an adequate substitute for vacatur in APA cases—as Defendants suggest (at ECF No. 94 at 6)—then vacatur would become a rare exception to declaratory judgment rather than the "default rule" that this circuit's precedent requires. *Data Mktg. P'ship, LP v. DOL*, 45 F.4th 846, 859 (5th Cir. 2022). This Court should therefore vacate the Final Rule in addition to providing party-specific declaratory relief.

ARGUMENT

I. VACATUR IS REQUIRED UNDER BINDING FIFTH CIRCUIT PRECEDENT

Defendants' assertion that "nationwide vacatur is inconsistent with Article III and equitable principles," ECF No. 94 at 5, is squarely foreclosed by binding precedent holding that, on finding a rule exceeds statutory authority in violation of the APA, "universal vacatur" under § 706 is "required." *Tex. Med. Ass'n v. HHS*, 110 F.4th 762, 780 (5th Cir. 2024); *see also Franciscan All.,*

Inc. v. Becerra, 47 F.4th 368, 374–75 (5th Cir. 2022) ("Vacatur is the only statutorily prescribed remedy for a successful APA challenge to a regulation."); *Data Mktg. P'ship*, 45 F.4th at 859 (the "default rule is that vacatur is the appropriate remedy"); *see also Corner Post, Inc. v. Board of Governors of Federal Reserve System*, 144 S. Ct. 2440, 2460-70 (2024) (Kavanaugh, J., concurring) (endorsing this interpretation of 5 U.S.C. § 706). The only exception to this mandatory universal-vacatur rule arises when the "deficiency can be corrected on remand." *Tex. Med. Ass'n*, 110 F.4th at 779. Defendants cannot make such corrections on remand, and they do not even argue that they could. The Supreme Court held that the Final Rule exceeds ATF's statutory authority, and Defendants cannot rewrite the statutory definition of machinegun in response to the Supreme Court's ruling.

The Fifth Circuit has explicitly rejected Defendants' argument (ECF No. 94 at 5-6) that § 706 does not authorize universal vacatur. *Tex. Med. Ass'n*, 110 F.4th at 779 (rejecting argument that the APA "may not authorize vacatur at all" and noting that vacatur is the remedy recognized by "[b]inding Fifth Circuit precedent"). Where, as here, an agency action exceeds statutory authority, universal vacatur is mandatory. *Nat'l Ass'n of Priv. Fund Managers v. SEC*, 103 F.4th 1097, 1114 (5th Cir. 2024) ("Under section 706 of the APA, when a court holds that an agency rule violates the APA, it '"shall"—not may—"hold unlawful and set aside" [the] agency action.' Because the promulgation of the Final Rule was unauthorized, no part of it can stand. Accordingly, we VACATE the Final Rule.") (quoting *Sw. Elec. Power Co. v. EPA*, 920 F.3d 999, 1022 (5th Cir. 2019)); *In re Clarke*, 94 F.4th 502, 512 (5th Cir. 2024) ("Should plaintiffs prevail on their APA challenge, this court must 'set aside' CFTC's *ultra vires* recission action, with nationwide effect. That affects persons in all judicial districts equally." (footnote omitted)).

Contrary to Defendants' assertion (ECF No. 94 at 5), the APA's text explicitly authorizes and indeed requires vacatur of unlawful agency rules. Section 706 expressly provides that a "reviewing court *shall* … hold unlawful and set aside agency action, findings, and conclusions found to be … in excess of statutory jurisdiction, authority, or limitation[.]" 5 U.S.C. § 706(2)(C) (emphasis added). "'Set aside' usually means 'vacate.'" *V.I. Tel. Corp. v. FCC*, 444 F.3d 666, 671 (D.C. Cir. 2006). When Congress enacted the APA, "set aside" meant "to cancel, annul, or revoke." *Set Aside*, Black's Law Dictionary 1612 (3d ed. 1933). And contemporary jurists understood that § 706 "affirmatively provides for vacation of agency action." *Cream Wipt Food Prods. Co. v. Fed. Sec. Adm'r*, 187 F.2d 789, 790 (3d Cir. 1951). This interpretation harmonizes § 706's "set aside" authority with the rest of the APA. After all, it would be illogical for the APA to allow a court to "postpone the effective date of an agency action" as preliminary relief during litigation, 5 U.S.C. § 705, but be powerless to terminate that action if the court ultimately concludes it is "unlawful," *id.* § 706(2); *see also Career Colleges & School of Texas v. U.S. Dep't of Education*, 98 F.4th 220, 255 (5th Cir. 2024) (preliminarily enjoining agency action nationwide under 5 U.S.C. § 705).

Defendants' appeal to principles of equity (ECF No. 94 at 5) fails because equity must give way to the APA's text. The remedy of vacatur is one of statutory command and not equitable discretion. The Fifth Circuit made clear that courts should not balance "various equities at stake before determining whether a party is entitled to vacatur. Section 706, after all, provides that a 'reviewing court *shall*' set aside unlawful agency action, and we do not understand vacatur to be a remedy familiar to courts sitting in equity[.]" *Braidwood Mgmt.*, 104 F.4th at 952 (footnotes omitted). Even if equities were to be considered, Defendants' request to narrow relief to Mr. Cargill would still be wholly inappropriate because such relief would not fully redress his injuries. As the

owner of a gun store, the Final Rule injures Mr. Cargill not only by prohibiting him from owning bump stocks but also rendering him unable to sell bump stocks to his customers, including his customers outside the Fifth Circuit, who are equally subject to the Final Rule that makes bump stocks contraband. Unless relief is extended to third parties, the Final Rule will continue to injure Mr. Cargill by threatening his customers and dampening the market for his products. Full relief thus requires extending relief beyond Mr. Cargill himself. *See Professional Association of College Educators v. El Paso County Community College District*, 730 F.2d 258, 273–74 (5th Cir. 1984) ("An injunction … is not necessarily made overbroad by extending benefit or protection to persons other than prevailing parties in the lawsuit—even if it is not a class action—if such breadth is necessary to give prevailing parties the relief to which they are entitled."). By contrast, Defendants have no legitimate interest in maintaining a regulation that exceeds statutory authority and falsely informs citizens that "[t]he term 'machine gun' includes a bump-stock-type device[.]" 27 C.F.R. § 479.11 (2024). Consideration of the equities, if allowed, only strengthens the need for vacatur in this case.

Contrary to this Court's suggestion at the October 17 hearing, the Supreme Court does not disfavor vacatur in APA cases. The Court explicitly affirmed the D.C. Circuit's universal vacatur after concluding that an agency action violated the APA in *DHS v. Regents of the University of California*, 591 U.S. 1, 36 & n.7 (2020) ("Our affirmance of the [D.C. Circuit's] order vacating the rescission makes it unnecessary to examine the propriety of the nationwide scope of the injunctions issued by the District Courts in *Regents* and *Batalla Vidal*."); *see also Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 486 (2001) (vacating "EPA's implementation policy [that the Court

found] to be unlawful."). Defendants' reliance (ECF No. 94 at 5) on *Gill v. Whitford*, 585 U.S. 48, 66, 72–73 (2018), to limit the scope of remedy is misplaced because that was not an APA case.[2]

To be sure, Justice Gorsuch and two of his colleagues have questioned the appropriateness of vacatur under the APA in a recent concurring opinion. *United States v. Texas*, 599 U.S. 670, 694 (2023) (Gorsuch., J., concurring), cited at ECF No. 94 at 6. But their concern about universal vacatur is driven by "lower courts hav[ing] asserted the authority to issue decrees that purport to define the rights and duties of sometimes millions of people." *Id*. That concern is absent here because the Supreme Court has already held the Final Rule exceeds statutory authority. *Garland v. Cargill*, 602 U.S. 406, 415 (2024). And other justices on the Court continue to believe that the APA explicitly authorizes vacatur of unlawful agency action. Tr. of Oral Argument at 35-38, *United States v. Texas* (22-58) (Chief Justice Roberts objecting to Solicitor General's position that the APA does not authorize vacatur); *see also Corner Post*, 144 S. Ct. at 2460–70 (Kavanaugh, J., concurring) (endorsing vacatur under the 5 U.S.C. § 706 as the proper remedy for unlawful agency action). At bottom, the Fifth Circuit has clearly chosen to require universal vacatur in APA cases. And until the Supreme Court holds otherwise, this Court must follow binding Fifth Circuit precedent.

II. DECLARATORY JUDGMENT DOES NOT JUSTIFY DEPARTING FROM VACATUR AS THE DEFAULT RULE

Conceding that vacatur is the "default rule" in this circuit, Defendants next argue that the availability of declaratory judgment justifies departing from that remedy. ECF No. 94 at 6. They

[2] And in any event, as explained above, Mr. Cargill's injuries here extend to the Final Rule's effects on non-party customers.

cite no authority suggesting that declaratory relief is an adequate substitute for vacatur,[3] and we are not aware of any.

And for good reason: Declaratory relief is party-specific and thus cannot serve as a substitute for universal vacatur. Under the Declaratory Judgment Act, this Court "may declare the rights and other legal relations of any interested party seeking such declaration." 28 U.S.C. § 2201(a). In other words, declaratory relief under § 2201(a) must be limited to defining *Mr. Cargill*'s rights and legal relations, and not those of third parties not before this Court. The Act does not authorize the Court to issue abstract legal pronouncements regarding the meaning of 26 U.S.C. § 5845(b) or the Final Rule's validity. *Chamber of Com. of United States of Am. v. Consumer Fin. Prot. Bureau*, 691 F. Supp. 3d 730, 744 (E.D. Tex. 2023) ("By statute, a declaratory judgment declares the rights or legal relations 'of any interested party.' It is party-specific relief, not merely a statement of legal conclusions."). While vacatur is universal, declaratory relief can only be party specific. Declaratory relief thus cannot serve as a substitute for vacatur. As explained above, full relief in this case must extend beyond Mr. Cargill himself because he has a concrete interest in selling bump stocks to third-party customers.

Allowing declaratory judgment as a substitute to vacatur in APA cases would also turn upside down the Fifth Circuit's instruction that vacatur is the "default rule." *See Data Mktg. P'ship*,

[3] Defendants' reliance on the *en banc* decision in this case to argue that "vacatur is not a mandatory remedy," ECF No. 94 at 6 (citing *Cargill v. Garland*, 57 F.4th 447, 472 (5th Cir. 2023) (en banc)), is misplaced. The Fifth Circuit remanded the remedy question to this Court only because "the parties ha[d] not briefed the remedial-scope question." *Cargill*, 57 F.4th at 472. As another Fifth Circuit panel recently explained when rejecting the Federal Government's attempt to rely on *Cargill* to avoid vacatur of unlawful agency action: "What the Government's [] citation to *Cargill* fails to capture is that just before the plurality decided that remand was appropriate given the lack of briefing, it recited plainly the proposition that is at odds with [the Government's] argument: 'vacatur of an agency action is the default rule in this Circuit.' " *Braidwood Mgmt.*, 104 F.4th at 952 n.102 (quoting *Cargill*, 57 F.4th at 472).

45 F.4th at 859. Declaratory relief as to the applicability of the challenged agency action to the plaintiff is available as a discretionary remedy in virtually every APA case in which the plaintiff prevails. If, as Defendants argue, such relief requires departing from vacatur as a remedy to APA violations, then vacatur would no longer be the "default rule" in the Fifth Circuit. Rather, it would become a rare exception to declaratory relief. But that is not so. "[C]ourts in this circuit generally consider a declaratory judgment only after addressing vacatur." *Texas v. DOT*, No. 5:23-CV-304-H, 2024 WL 1337375, at *21 (N.D. Tex. Mar. 27, 2024) (collecting cases). "This ordering makes sense given that the APA directs that a 'reviewing court *shall* ... hold unlawful and set aside agency action' — which, again, generally means vacate — while declaratory relief is instead equitable and discretionary." *Id* (quoting 5 U.S.C. § 706). This Court should follow circuit practice and grant the statutorily required remedy of vacatur before exercising its discretion to grant declaratory relief.

There is no basis for distinguishing this case from the many Fifth Circuit rulings that vacated agency actions that exceeded agencies' statutory authority. *See, e.g.*, *Tex. Med. Ass'n*, 110 F.4th at 780; *Career Colleges & School of Texas*, 98 F.4th at 255; *Nat'l Ass'n of Priv. Fund Managers*, 103 F.4th at 1114; *Sw. Elec. Power*, 920 F.3d at 1022. The Supreme Court has not differed with the Fifth Circuit in any of these cases regarding the scope of relief and did not do so in this case. Defendants fail to justify departing from the default remedy of vacatur for unlawful agency actions, and the Court should therefore vacate the Final Rule.

CONCLUSION

For the foregoing reasons, Mr. Cargill respectfully requests that the Court amend its judgment of March 6, 2023. The amended judgment should vacate the Final Rule and declare that Mr. Cargill has the right to possess and transfer non-mechanical bump stocks under 18 U.S.C. § 922(o)(1) and 26 U.S.C. § 5845(b).

October 23, 2024

Respectfully submitted,

/s/ Sheng Li
Sheng Li, *pro hac vice*
John J. Vecchione, *pro hac vice*
Mark Chenoweth, *pro hac vice*
NEW CIVIL LIBERTIES ALLIANCE
4250 North Fairfax Drive, Suite 300
Arlington, Virginia 22203
(202) 869-5210
sheng.li@ncla.legal

Jonathan F. Mitchell
Texas Bar No. 24075463
MITCHELL LAW PLLC
111 Congress Avenue, Suite 400
Austin, Texas 78701
(512) 686-3940
jonathan@mitchell.law

CERTIFICATE OF SERVICE

I certify that on October 23, 2024, I filed the foregoing reply brief electronically with the United States District Court for the Western District of Texas by means of the CM/ECF system.

/s/ *Sheng Li*
Sheng Li