IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

W. Clark Aposhian	:	
	:	No. 19-4036
	:	
Plaintiff-Appellant	:	
	:	
v.	:	
	:	
William Barr, Attorney General of the United States, et al.	:	
	:	
	:	
Defendants-Appellees	:	

Emergency Motion for Injunction Pending Appeal

Pursuant to Rule 8 of the Federal Rules of Appellate Procedure, Appellant, W. Clark Aposhian, moves for an injunction pending interlocutory appeal prohibiting Appellees, William Barr, Attorney General of the U.S., the U.S. Department of Justice (DOJ), Thomas E. Brandon, Acting Director of the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), and ATF, from enforcing the Final Rule, *Bump-Stock-Type Devices*, 83 Fed. Reg. 66514, 66553-54 (Dec. 26, 2018), against him and those similarly situated. Appellees oppose this motion.

Mr. Aposhian, like every other bump stock owner in the U.S., was explicitly informed by ATF that the device he purchased was legal to own and operate. Now, without any intervening statutory change, ATF has changed its mind and retroactively ordered Mr. Aposhian to either destroy or surrender his lawfully acquired property by March 26, 2019 or face criminal prosecution. Thus, purchasers like Mr. Aposhian who relied on ATF's explicit permission, but have not been informed of the pending retroactive ban, will be sent to federal prison starting March 27th.

This scenario distorts the constitutional order and is fundamentally at odds with the proper means of lawmaking. NCLA and Mr. Aposhian do not contest that Congress could prohibit the ownership of bump stocks, as for example, the City of Denver has already done. And lawmakers, or even agencies like the U.S. Sentencing Commission, could propose rules to punish criminals more harshly for committing crimes with bump stocks. Perhaps these entities *should* adopt such policies. But this litigation is *not* about whether bump stocks should be outlawed. This lawsuit solely deals with the question of whether ATF,

by administrative fiat, can declare bump stocks to be machineguns retroactively without a valid statutory basis.

The district court erred because it concluded that ATF's convenient interpretive gloss on a statute that was written in 1934, and has not been thought or found to be ambiguous for the last 85 years, was suddenly the "best reading" of the law, such that it would have been obvious to lawmakers in that year that, had they existed, bump stocks were "machineguns." No matter that ATF, for more than a decade, has viewed the statute as not encompassing these devices.

This Court should issue an injunction pending appeal. Unless this Court acts, all parties have recognized that Mr. Aposhian, and all others similarly situated, will face irreparable injury. Moreover, because there is a substantial question as to the validity of the Final Rule, the merits favor an injunction. Finally, the balance of equities favors the injunction as Mr. Aposhian's interest in not being bound by a criminal regulation lacking in a constitutional and valid statutory basis vastly outweighs the government's interest in enacting the Final Rule without delay.

I. FACTS AND PROCEDURAL HISTORY

Appellees have ordered Mr. Aposhian to destroy or surrender a legally-purchased bump-stock device by March 26, 2019 or face criminal prosecution. (*See* Doc. 1.)

Mr. Aposhian purchased his bump stock in reliance on ATF's prior determination that the device "is a firearm part and is not regulated as a firearm[.]" (Doc. 10).

Despite its prior determination, ATF issued a Final Rule on December 26, 2018, which altered the statutory definition of a prohibited "machinegun" to include his bump stock. *Bump-Stock-Type Devices*, 83 Fed. Reg. 66514, 66553-54 (Dec. 26, 2018). The Final Rule directs Mr. Aposhian "to destroy the device[] or abandon [it] at an ATF office prior to" "March 26, 2019." *Id.* at 66514, 66555. If he continues to possess his bump stock thereafter, he faces potential criminal prosecution and a prison sentence of up to 10 years, pursuant to 18 U.S.C. §§ 922(o), 924(a)(2).

Mr. Aposhian filed a Complaint on January 16, 2019, challenging the Final Rule. (Doc. 1.) Mr. Aposhian then moved for a preliminary injunction on January 17, 2019 (Doc. 10.). Defendants filed an

opposition on February 6, 2019, (Doc. 25), to which Mr. Aposhian replied on February 11, 2019. (Doc. 26.)

On March 15, 2019, the district court denied the request for a preliminary injunction in a written decision. (Doc. 31.) In its decision, the district court addressed only two of the four factors necessary for a preliminary injunction. First, the district court noted that the "parties do not dispute that Mr. Aposhian will experience irreparable harm if the injunction is denied." (Doc. 31 at 5.) Second, the district court determined that "Mr. Aposhian has not carried his burden of showing a substantial likelihood of success on the merits" and denied the injunction without addressing the remaining factors. (Doc. 31 at 5.)

Mr. Aposhian filed a notice of interlocutory appeal on March 18, 2019. The next day, he filed a motion for an injunction pending appeal with the district court. Mr. Aposhian now files this motion for an injunction pending appeal.

II. ARGUMENT

Rule 8 of the Federal Rules of Appellate Procedure allows this Court to issue an "injunction pending appeal." Under Circuit Rule 8.1 a proponent of an injunction pending appeal must show "(A) the basis for

the district court's or agency's subject matter jurisdiction and the basis for the court of appeals' jurisdiction, including citation to statutes and a statement of facts establishing jurisdiction; (B) the likelihood of success on appeal; (C) the threat of irreparable harm if the stay or injunction is not granted; (D) the absence of harm to opposing parties if the stay or injunction is granted; and (E) any risk of harm to the public interest."

While there is "substantial overlap" between this standard and that governing preliminary injunctions, they are not identical. *Nken v. Holder*, 556 U.S. 418, 434 (2009). If a party "can meet the other requirements for a stay pending appeal, they will be deemed to have satisfied the likelihood of success on appeal element if they show questions going to the merits so serious, substantial, difficult and doubtful, as to make the issues ripe for litigation and deserving of more deliberate investigation." *McClendon v. City of Albuquerque*, 79 F.3d 1014, 1020 (10th Cir. 1996).[1] Where serious legal questions are

[1] This Court previously applied this same relaxed standard in certain circumstances when reviewing a district court's denial of a preliminary injunction under Rule 65. *Dine Citizens Against Ruining Our Env't v. Jewell*, 839 F.3d 1276, 1282 (10th Cir. 2016). That standard has been abrogated with respect to Rule 65, in reliance on the Supreme Court's decision in in *Winter v. Natural Resources Defense Council*, 555 U.S. 7 (2008). *Id.* However, because the *Winter* decision did not address the

presented, an injunction on appeal may be necessary even when an injunction was not required at the trial level. *See, e.g.*, *O Centro Espirita Beneficiente Uniao De Vegetal v. Ashcroft*, 314 F.3d 463, 467 (10th Cir. 2002) (staying injunction on appeal without addressing the validity of the underlying injunction).

Mr. Aposhian has satisfied all five elements of this test, and this Court should grant an injunction pending appeal.

A. Statement of Jurisdiction

In his Complaint, Mr. Aposhian argued that the Final Rule was unconstitutional under Article I, § 1, Articles I, §§ 1, 7 and II, § 3 of the U.S. Constitution, and 5 U.S.C. § 706(2)(A), (B), and (C). (Doc. 1) He also moved for a preliminary injunction pursuant to 28 U.S.C. §§ 2201, 2202 and Rule 65(a) of the Federal Rules of Civil Procedure. (Doc. 10.)

The district court had federal question jurisdiction in this case pursuant to 5 U.S.C. § 702 and 28 U.S.C. § 1331 because Mr. Aposhian

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separate standard of whether a *stay pending appeal* is appropriate, the lower standard applies in this context. *See Citigroup Glob. Markets, Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 37, 37 n.7 (2d Cir. 2010) (noting that the "serious question" standard remains the "standard for granting a stay pending appeal," which need have a likelihood of success that is "better than negligible" but need not be "more likely than not") (quoting *Nken*, 556 U.S. at 434).

challenged the statutory and constitutional validity of the Final Rule. This Court has jurisdiction to review "interlocutory orders of the district courts of the United States" "refusing … injunctions." 28 U.S.C. § 1292(a)(1).

B. Mr. Aposhian Has Demonstrated Substantial Questions on the Merits, Making the Issue Deserving of More Deliberate Investigation

Mr. Aposhian has presented a substantial question as to the validity of the Final Rule because the statutory terms are not ambiguous, and thus ATF has no power to define them further. The rule also adopts a construction of plain statutory terms that contradict the text. Further, even if ATF's rule could have been lawfully issued, the agency interpretation is not owed any deference, and instead the rule of lenity commands that any ambiguity be read in Mr. Aposhian's favor. Applying that rule, it is apparent that the language chosen by Congress does not equate bump stocks with machineguns.

1. The Statutory Text Is Not Ambiguous

"In determining whether an agency's regulations are valid under a particular statute," a Court must first ask whether "Congress delegated authority to the agency generally to make rules carrying the force of

law." *New Mexico v. Dep't of Interior*, 854 F.3d 1207, 1221 (10th Cir. 2017). But that delegation only allows an agency to fill in "gaps" in a statute, and "[i]f the statute is not ambiguous" any further attempt to define its terms is "invalid and unenforceable." *Id.* at 1223-24, 1224, 1231.

At the first step of the required analysis, the statute's terms are not ambiguous, and so ATF had no authority to provide additional definitions.

In the course of criminally prosecuting people for violating the statute at issue here, DOJ has successfully argued for decades that the precise terms it now seeks to redefine are not ambiguous. *See, e.g.*, *United States v. Williams*, 364 F.3d 556, 558 (4th Cir. 2004) (finding the definition of "machinegun" to be unambiguous). Courts have likewise consistently ruled that the definition of "machinegun" "is unambiguous." *United States v. TRW Rifle 7.62X51mm Caliber, One Model 14 Serial 593006*, 447 F.3d 686, 689 n. 4 (9th Cir. 2006)

Courts also have ruled the "common meaning of 'automatically' is readily known by laypersons" and "a person of ordinary intelligence would have understood the common meaning of the term—'as the result

of a self-acting mechanism.'" *United States v. Olofson*, 563 F.3d 652, 660 (7th Cir. 2009). Furthermore, the phrase "a single function of the trigger" is "plain enough" that efforts to parse it further become "brazen" and "puerile." *United States v. Fleischli*, 305 F.3d 643, 655 (7th Cir. 2002).

ATF cannot have it both ways and argue that the statute is clear enough to allow criminal prosecution for one set of people but is also so vague that it must be redefined to allow prosecution of yet another set. Even if the Final Rule did not conflict with the statute, ATF had no power to issue the Final Rule because there was no statutory ambiguity for it to resolve. *See New Mexico*, 854 F.3d at 1223.

The district court sidestepped this analysis, concluding that the definition of a machinegun was ambiguous, and thus that the Attorney General had "been implicitly delegated interpretive authority to define ambiguous words or phrases." (Doc. 31 at 7.) The district court asserted that "when Congress leaves terms in a statute undefined, the agency charged with administering that statute has been implicitly delegated the authority to clarify those terms." (Doc. 31 at 6.) Apparently, unlike previous courts, the court below viewed the terms "automatically" and

"single function of the trigger" as ambiguous merely because they were not defined in the statute. (Doc. 31 at 7.)

In construing statutes, courts "give undefined terms their ordinary meanings," and the lack of a statutory definition does not render a statute ambiguous. *In re Taylor*, 899 F.3d 1126, 1129 (10th Cir. 2018); *see also United States v. Theis*, 853 F.3d 1178, 1181 (10th Cir. 2017) (undefined term was not ambiguous after determining term's "plain meaning").

While Congress did not necessarily anticipate the development of bump stocks, it did clearly choose to use unambiguous statutory terms to draw a line between weapons that fire one bullet with a single function of the trigger and machineguns, which fire multiple rounds continuously with one function of the trigger. Semi-automatic weapons existed at the time the NFA was drafted and passed. Congress incorporated the distinction between those weapons and machineguns into the statute and understood that there was a difference in the internal mechanism that allowed a machinegun to fire multiple rounds continuously with one function of the trigger and a semi-automatic weapon, which fires only one round with each function of the trigger.

The district court could not "manufacture[] an ambiguity" from Congress' failure to define every term in the statute or "foreclose each exception that could possibly be conjured or imagined." *See Prestol Espinal v. Attorney Gen.*, 653 F.3d 213, 220-21 (3d Cir. 2011). And as ATF insisted for years, Congress' directive was that bump stocks do not meet the unambiguous statutory terms. Because "the statute is not ambiguous" the Final Rule is "invalid and unenforceable." *See New Mexico*, 854 F.3d at 1224, 1231.

2. The Final Rule Conflicts with the Statutory Text

Next, even if there were an ambiguity in the statute, the Final Rule conflicts with clear statutory text.

If an agency has authority to issue substantive regulations, a court must inquire whether the regulation at issue is consistent with the statute's text. *Id.* at 1221. This inquiry asks whether "Congress has directly spoken to the precise question at issue," and, if so, "that is the end of the matter; for the court as well as the agency must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 842-43 (1984).

The NFA requires that the weapon at issue be able to "to shoot, *automatically* more than one shot, without manual reloading, by a *single function of the trigger*." 26 U.S.C. § 5845(b) (emphasis added).

The Supreme Court has already explained that this language

> refer[s] to a weapon that fires repeatedly with a single pull of the trigger. That is, once its trigger is depressed, the weapon will automatically continue to fire *until its trigger is released* or the ammunition is exhausted. Such weapons are 'machineguns' within the meaning of the Act. We use the term 'semiautomatic' to designate a weapon that fires only one shot with each pull of the trigger, and which requires no manual manipulation by the operator to place another round in the chamber after each round is fired.

Staples v. United States, 511 U.S. 600, 602 n. 1 (1994) (emphasis added).

A weapon functions "automatically" when it "discharge[s] multiple rounds" "as the result of a self-acting mechanism" "that is set in motion by a single function of the trigger and is accomplished without manual reloading." *Olofson*, 563 F.3d at 658.

ATF has long recognized that a machinegun commences firing after the manual activation of a trigger, which "initiates an automatic firing cycle that continues until the finger is released or the ammunition supply is exhausted." *Classification of Devices Exclusively*

Designed to Increase the Rate of Fire of a Semiautomatic Firearm, ATF Rul. 2006-2, at 3 (Dec. 13, 2006) (Doc. 10, Exhibit C). This does not include a firearm that "require[es] continuous multiple inputs by the user for each successive shot," even if the multiple user inputs are directed at parts of the firearm other than the trigger mechanism. Letter from Richard W. Marianos, ATF Assistant Director Public and Governmental Affairs, to Representative Ed Perlmutter, at 2 (Apr. 16, 2013) (Doc. 10, Exhibit D).

"Bump firing" is a shooting technique where a shooter fires a semi-automatic weapon by allowing the weapon to slide against his trigger finger such that he "re-engages" the trigger "by 'bumping' [his] stationary finger." *Final Rule*, 83 Fed. Reg. at 66532-33. Even now ATF recognizes that bump fire may be accomplished "without a bump-stock device," and could be achieved with "items such as belt loops that are designed for a different primary purpose but can serve an incidental function of assisting with bump firing." *Id.* And ATF has always previously understood that bump stocks are not machineguns because every shot requires a separate trigger function, and the weapon will not

continue to fire if the shooter simply holds the trigger stationary. Marianos Letter, at 2.

The Final Rule changes the statutory terms and defines certain devices as machineguns even when they do not initiate an automatic firing cycle from a single function of a trigger. To reach this outcome, the Final Rule disregards a shooter's manual manipulation of his firearm, even when it engages the trigger function between shots, so long as it is not the precise act of *pulling* the trigger lever. This new definition contradicts the statute.

First, it improperly defines the term "automatically" to disregard a shooter's additional manual manipulation of the firearm's *trigger* between shots. The statute speaks of automatic fire "that is set in motion by a single function of the trigger," *Olofson*, 563 F.3d at 658, but the Final Rule pretends that a shooter initiates automatic fire with a bump stock by only "'pull[ing]' the trigger once," even though he must continue "bumping" the trigger between rounds. *Final Rule*, 83 Fed. Reg. at 66533. But "bumping" a trigger is the same as "pulling" it. Even ATF conceded that "bumping" the trigger "re-engage[s]" it between shots. *Final Rule*, 83 Fed. Reg. at 66516. Thus, ATF can only reach its

preferred outcome by pretending that the well understood shooting technique of bump firing somehow does not involve physical manipulation of the trigger.

The rule also disregards the other physical manipulation bump firing requires. Instead of requiring that the firearm itself continuously operate without additional "manual manipulation by the operator," *Staples*, 511 U.S. at 602 n. 1, the rule says that additional physical manipulation is irrelevant if it is not "of the *trigger* by the shooter." *Final Rule*, 83 Fed. Reg. at 66553-54 (emphasis added). Bump stocks, which require the shooter to "maintain[] constant forward pressure with the non-trigger hand on the barrel shroud or fore-grip of the rifle, and maintain[] the trigger finger on the device's extension ledge with constant rearward pressure," are now deemed machineguns by the Final Rule because ATF no longer considers the shooter's physical actions between shots to be relevant. *Final Rule*, 83 Fed. Reg. at 66518, 66533. ATF now ignores manual manipulation by the shooter's "non-trigger hand." *Final Rule*, 83 Fed. Reg. at 66518, 66533.

This view of what it means to automatically continue fire cannot be reconciled with the statute. The statutory text does not restrict

where and how the additional manual manipulation occurs, it simply says that automatic fire occurs "automatically" after a "single function of the trigger." 26 U.S.C. § 5845(b). Ignoring manual manipulation of any part other than the trigger conflicts with text and with prior court interpretation. Further, the ordinary definition of the term "automatic," refers only to the series of shots "set in motion." *Olofson*, 563 F.3d 652, 658. If a firearm equipped with a bump stock requires separate physical input for each shot, even if not directed to the *trigger mechanism*, this still precludes the "automatic" firing of each successive shot.

The district court rejected these arguments because it concluded that the Final Rule's definition appropriately defined "the requisite degree of automaticity." (Doc. 31 at 9.) The district court believed that all automatic weapons "require at least some ongoing effort by an operator," and thus it was "the best interpretation" of the statute for ATF to define automatic operation as excluding both "mechanical movement of the trigger" from "bumping" and any physical input by the shooter to any part of a firearm apart from the "trigger mechanism." (Doc. 31 at 8, 9-10.)

The district court's view is hardly the best reading of the statutory text. The line other courts, and even ATF, have *always* drawn is that once the trigger is engaged, a machinegun simply keeps firing. And in some instances, this requires *no* additional physical input. *See Fleischli*, 305 F.3d at 655 (minigun, which operated with an on/off switch, initiated "automatic" fire). ATF's new determination that "automatic" fire can encompass fire that requires shooter input between shots, including repeated input to the trigger itself, is not only a completely novel view of the statutory term, but runs counter to the understanding of the term that has prevailed for decades.

Third, the new rule conflicts with the statute because it would exclude some actual machineguns by re-defining the phrase "single function of the trigger" to mean *only* the "deliberate and volitional act of the user pulling the trigger." *Final Rule*, 83 Fed. Reg. at 66534. This new outcome-based interpretation would undermine prior decisions banning machineguns that initiated automatic fire from other types of triggers that did not require pulling.

The statute focuses on the trigger's "function," which encompasses conduct beyond merely pulling a piece of metal. *See* 26 U.S.C. § 5845(b).

ATF even noted in the Final Rule that "the courts have made clear that whether a trigger is operated through a 'pull,' 'push,' or some other action such as a [*sic*] flipping a switch, does not change the analysis of the functionality of a firearm." *Final Rule*, 83 Fed. Reg. at 66518 n. 5. Courts have emphasized that a trigger's function is defined by how it mechanically operates, not by how the shooter engages it. *See United States v. Camp*, 343 F.3d 743, 745 (5th Cir. 2003) (internal citation and quotation marks omitted) ("single function of the trigger" "implies no intent to restrict" the meaning to only encompass "pulling a small lever," and instead means any action that "initiated the firing sequence"); *Fleischli*, 305 F.3d at 655 (minigun was machinegun because it fired automatically following a single activation of an electronic on-off switch).

The new rule, however, elevates one specific movement—a "pull of the trigger"—to a determinate place. If a shooter pulls only once, or perhaps not at all, but merely *pushes* a firearm with his non-trigger hand in a way that causes the trigger to function more than once, the new rule says he is firing a machinegun. The rule recognizes that bump stocks require the shooter to "re-engage [the trigger] by 'bumping' the

shooter's stationary finger" into the trigger but insists that a "bump" is not a "pull of the trigger" because it is not a *backward* action on the trigger lever. *Final Rule*, 83 Fed. Reg. at 66516. Whether a trigger is pushed or bumped, it must move backward to the same point in order to reset the trigger and fire the next shot—except in a real machinegun, where the trigger remains depressed and the trigger never has to move forward and then backward again in order to reset.

The district court reasoned, however, that the "best interpretation" of a "single function of the trigger" reflects a Congressional intent to reject the "mechanistic movement of the trigger in seeking to regulate automatic weapons," and instead was meant to broadly encompass any action that had the "ability to drastically increase a weapon's rate of fire, not the precise mechanism by which that capability is achieved." (Doc. 31 at 8). That unsupported theory about what Congress might have intended contradicts the statute's actual *text*. The statute never speaks in terms of a "weapon's rate of fire," and Congress carefully chose language that drew a line between weapons that fired once for every trigger function and machineguns. Hence, it has always been understood that weapons like "Gatling

gun[s]" are "not consider[ed] a machine gun," despite their ability to shoot rapidly. *See Fleischli*, 305 F.3d at 655. Even ATF "neither proposed the rate of fire as a factor in classifying machineguns, nor utilized this as the applicable standard in the proposed rule. The Department disagrees with *any assertion that the rule is based upon the increased rate of fire*." *Final Rule*, 83 Fed. Reg. at 66533 (emphasis added). The words Congress actually employed must be respected.

ATF has obliterated the statutory distinction between automatic and semi-automatic weapons that Congress created. That distinction rests on whether a gun fires one, or more than one, bullet with each reset of the trigger. ATF cannot unilaterally alter the statute to serve its preferred policy objectives. The Final Rule is therefore invalid.

3. The Final Rule Is Not the Best Reading of the Statute

As the parties have agreed, a court owes no deference to a prosecutor's interpretation of a criminal law. *Abramski v. United States*, 573 U.S. 169, 203 (2014). Appellees have "repeatedly stressed that they neither request, nor believe their interpretations are entitled to, any measure of deference." (Doc. 31 at 7 n. 8). The government also recognizes that the rule of lenity commands that any ambiguity in the

definition of machinegun "be construed narrowly" in favor of a potential criminal defendant. *See N.L.R.B. v. Oklahoma Fixture Co.*, 332 F.3d 1284, 1287 n.5 (10th Cir. 2003) (en banc).

When an agency is not entitled to deference, a court "proceed[s] to determine the meaning of [a statute] the old-fashioned way: [it] must decide for [itself] the best reading." *Miller v. Clinton*, 687 F.3d 1332, 1342 (D.C. Cir. 2012). In doing so, "any ambiguity concerning the ambit of [this] criminal statute[]" must be read "in favor of lenity" and against ATF. *Yates v. United States*, 135 S.Ct. 1074, 1088 (2015)

The district court insisted that the Final Rule "represents the best interpretation of the statute" (Doc. 31 at 10), but that determination is not faithful to the statutory text, or the principles of lenity. The Final Rule rejects several criteria previously required for a firearm to have been deemed a machinegun under the most natural reading of the statute. A firearm is not a machinegun if either [1] the shooter is required to provide additional "manual manipulation" between shots; or [2] the trigger "mechanical[ly] reset[s]" between shots. *Staples*, 511 U.S. at 602 n. 1; Spencer *Approval Letter* at 2. A semi-automatic firearm equipped with a bump stock requires *both* additional manual

manipulation and a mechanical reset of the trigger between shots. The best reading of the statute is the one adopted by ATF itself since 2006—bump stocks are not machineguns.

ATF's view today is that the Final Rule is the best reading of the statute, which has not changed since 1934. But the Final Rule has altered the statute in order to achieve a policy goal that the original statute did not encompass, and one which prior administrations recognized could only be achieved through legislative action. Worse, it has upended the "fair warning requirement" of the rule of lenity, and, unless enjoined now, will result in the criminal prosecution of innocent citizens who have done nothing more than rely on ATF's own prior interpretation. *See United States v. Lanier*, 520 U.S. 259, 266 (1997). For this reason as well, the final rule is invalid.

C. As the Parties Have Conceded, Mr. Aposhian Will Suffer Irreparable Harm Without Injunctive Relief

Absent an injunction Mr. Aposhian, and everyone like him, is "likely to suffer irreparable harm before a decision on the merits can be rendered." *Winter*, 555 U.S. at 22. "When an alleged constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary." *Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir.

2001) (internal citation and quotation marks omitted). "Any deprivation of *any* constitutional right" "makes an injury 'irreparable'" even without a prior "decision analyzing the specific injury asserted[.]" *Free the Nipple-Fort Collins v. City of Fort Collins, Colorado*, 916 F.3d 792 (10th Cir. 2019) (emphasis added).

Here, the "parties do not dispute that Mr. Aposhian will experience irreparable harm if the injunction is denied." (Doc. 31 at 5.) The Final Rule will take effect on March 26, 2019, but a decision on the merits cannot be rendered before that date. If the Final Rule goes into effect as scheduled, however, Mr. Aposhian, and every other bump stock owner, will be required to follow a rule that was issued in violation of constitutional limits set out in Articles I, § 1 and II, § 3 of the U.S. Constitution. Mr. Aposhian, and others like him, will therefore face an irreparable constitutional injury warranting an injunction. *See Kikumura*, 242 F.3d at 963.

D. The Injunction Is Equitable and in the Public Interest

A party seeking an injunction on appeal must demonstrate the injunction will not "substantially injure the other parties interested in the proceeding" and the injunction is in the "public interest." *Nken*, 556

U.S. at 434. "These factors merge when the Government is the opposing party." *Id.* at 435.

"[I]t is always in the public interest to prevent the violation of a party's constitutional rights." *Awad v. Ziriax*, 670 F.3d 1111, 1132 (10th Cir. 2012) (internal citation and quotation marks omitted). Moreover, a government's interest in enforcing regulations "pales in comparison" to either a plaintiff's "constitutional" or even "statutory rights." *Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1295 (D. Colo. 2012) (Kane, J.), *aff'd*, 542 F. App'x 706 (10th Cir. 2013). When an injunction "merely delay[s]" the effective date of a regulation, the government is "not prejudiced by a preliminary injunction," and the balance of equities tips in favor of a plaintiff. *Pennsylvania v. Trump*, 281 F.Supp.3d 553, 585 (E.D. Pa. 2017).

The balance of equities tips heavily in favor of this injunction. Mr. Aposhian's interests involve both his constitutional rights to be bound only by laws issued by Congress and statutory limitations on ATF's actions. If the Final Rule goes into effect as scheduled, he will be forced to abide by a law that is itself unlawful. On the other hand, the government faces only a delay in its Final Rule, which is a concern that

"pales in comparison" to Mr. Aposhian's interests. *See Newland*, 881 F. Supp. 2d at 1295. The injunction should therefore be entered.

III. CONCLUSION

For the reasons set out above, the Court should enjoin Appellees from enforcing the Final Rule against Mr. Aposhian pending appeal.

March 19, 2019

Respectfully,

/s/ Caleb Kruckenberg
Caleb Kruckenberg
Litigation Counsel
Steve Simpson
Senior Litigation Counsel
New Civil Liberties Alliance

CERTIFICATE OF COMPLIANCE

I hereby certify that all required privacy redactions have been made pursuant to 10th Cir. R. 25.5, any required paper copies to be submitted to the Court are exact copies of the version submitted electronically, and the electronic submission was scanned for viruses with the most recent version of a commercial virus scanning program, and is free of viruses.

Respectfully,

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CERTIFICATE OF SERVICE

I hereby certify that on March 19, 2019, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which sent notification of such filing to all counsel of record.

Respectfully,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

W. Clark Aposhian	:	
	:	No. 19-4036
	:	
Plaintiff-Appellant	:	
	:	
v.	:	
	:	
William Barr, Attorney General of the United States, et al.	:	
	:	
	:	
Defendants-Appellees	:	

Certificate Stating Basis for the Emergency Motion

Pursuant to Rule 8 of the Federal Rules of Appellate Procedure Consistent with Circuit Rule 8.2, counsel certifies the following:

1. Plaintiff-Appellant's Emergency Motion for an Injunction Pending Interlocutory Appeal could not have been filed before March 19, 2019.
2. Plaintiff-Appellant sought a preliminary injunction in the district court shortly after the challenged administrative rule was issued, and before the rule's effective date of March 26, 2019.

3. The district court's memorandum decision and order denying the injunction was docketed at 7:39 p.m. EDT, on March 15, 2019, and became effective upon filing.
4. Plaintiff-Appellant filed a notice of interlocutory appeal on Monday, March 18, 2019.
5. Also on Monday, March 18th, undersigned counsel contacted the Tenth Circuit clerk's office to alert the Court about Plaintiff-Appellant's intent to file an emergency motion for an injunction with this Court.
6. This appeal was docketed shortly thereafter on March 18th, and the preliminary record was transmitted from the District of Utah.
7. Plaintiff-Appellant has now filed this motion on March 19, 2019, which was as soon as was reasonably possible to address the legal issues presented by the district court's decision.
8. Undersigned counsel has also alerted counsel of record about this filing.
9. Counsel of record for appellees are:

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March 19, 2019

Respectfully,

/s/ Caleb Kruckenberg
Caleb Kruckenberg
Litigation Counsel
New Civil Liberties Alliance

CERTIFICATE OF SERVICE

I hereby certify that on March 19, 2019, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which sent notification of such filing to all counsel of record.

Respectfully,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

W. CLARK APOSHIAN, Plaintiff, v. WILLIAM P. BARR,[1] Attorney General of the United States, *et al.*, Defendants.	**MEMORANDUM DECISION AND ORDER DENYING MOTION FOR PRELIMINARY INJUNCTION** Case No. 2:19-cv-37 District Judge Jill N. Parrish

This matter comes before the court on plaintiff W. Clark Aposhian's Motion for Preliminary Injunction filed on January 17, 2019. (ECF No. 10). Defendants filed an opposition on February 6, 2019, (ECF No. 25), to which Mr. Aposhian replied on February 11, 2019, (ECF No. 26). The court heard oral argument for this motion on February 14, 2019. On the basis of that hearing, the parties' memoranda, a review of relevant law, and for the reasons below, plaintiff's Motion for Preliminary Injunction is denied.

I. BACKGROUND

A. REGULATORY FRAMEWORK OF MACHINE GUNS AND BUMP-STOCK-TYPE DEVICES

Congress began regulating machine guns with its passage of the National Firearms Act of 1934 (the "NFA"). That act defined such weapons as follows:

> The term "machinegun"[2] means any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without

[1] This action was initially commenced against the former Acting Attorney General Matthew Whitaker in his official capacity. By operation of Federal Rule of Civil Procedure 25(d), Mr. Barr was automatically substituted upon his confirmation as Attorney General of the United States.

> manual reloading, by a single function of the trigger. The term shall also include the frame or receiver of any such weapon, any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun, and any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person.

26 U.S.C. § 5845(b). The Gun Control Act of 1968 (the "GCA") incorporated this definition by reference into the criminal code. *See* 18 U.S.C. § 921(23) ("The term 'machinegun' has the meaning given such term in section 5845(b) of the National Firearms Act . . . ."). Today, with limited exceptions, it is "unlawful for any person to transfer or possess a machinegun." 18 U.S.C. § 922(o).

In 2006, the Bureau of Alcohol, Tobacco, Firearms, and Explosives (the "ATF") ruled that a bump-stock-type device[3] called the Akins Accelerator qualified as a machine gun. The Akins Accelerator employed internal springs to harness the weapon's recoil energy to repeatedly force the rifle forward into the operator's finger. In labeling the Akins Accelerator a machine gun, the ATF interpreted the statutory language "single function of the trigger" to mean "single pull of the trigger." The inventor of the Akins Accelerator subsequently challenged this interpretation in federal court. After the district court rejected the challenge, the Eleventh Circuit

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[2] The relevant statutes utilize an outmoded, one-word "machinegun" spelling. Except when quoting statutory language, this order uses the more contemporary, two-word "machine gun" spelling.

[3] "Shooters use bump-stock-type devices with semiautomatic firearms to accelerate the firearms' cyclic firing rate to mimic automatic fire. These devices replace a rifle's standard stock [the component of a rifle that rests against the shooter's shoulder] and free the weapon to slide back and forth rapidly, harnessing the energy from the firearm's recoil either through a mechanism like an internal spring or in conjunction with the shooter's maintenance of pressure (typically constant forward pressure with the non-trigger hand on the barrel-shroud or fore-grip of the rifle, and constant rearward pressure on the device's extension ledge with the shooter's trigger finger). . . . [W]hen a bump-stock-type device is affixed to a semiautomatic firearm, the device harnesses and directs the firearm's recoil energy to slide the firearm back and forth so that the trigger automatically re-engages by 'bumping' the shooter's stationary finger without additional physical manipulation of the trigger by the shooter." 83 Fed. Reg. at 66516.

Court of Appeals affirmed, concluding that the ATF's interpretation was "consonant with the statute and its legislative history." *See Akins v. United States*, 312 F. App'x 197, 200 (11th Cir. 2009).

From 2008 to 2017, the ATF issued ten letter rulings in response to requests to classify bump-stock-type devices. Applying the "single pull of the trigger" interpretation, these rulings found that the devices at issue—including Mr. Aposhian's Slide Fire device—indeed allowed a shooter to fire more than one shot with a single pull of the trigger. However, because the subject devices did not rely on internal springs or other mechanical parts to channel recoil energy like the Akins Accelerator, the ATF concluded that they did not fire "automatically" within the meaning of the statutory definition.

B. THE FINAL RULE

On October 1, 2017, a lone shooter employing multiple semi-automatic rifles with attached bump-stock-type devices fired several hundred rounds of ammunition into a crowd in Las Vegas, Nevada, killing 58 people and wounding roughly 500 more. Following this event, members of Congress urged the ATF to examine whether devices like the one used in the attack were actually machine guns prohibited by law. On December 26, 2017, the Department of Justice (the "DOJ") published an Advanced Notice of Proposed Rulemaking (ANPRM), soliciting comments and manufacturer/retailer data regarding bump-stock-type devices. *See* Application of the Definition of Machinegun to "Bump Fire" Stocks and Other Similar Devices, 82 Fed. Reg. 60929 (Dec. 26, 2017). On February 20, 2018, the President issued a memorandum directing the Attorney General "to dedicate all available resources to complete the review of the comments received, and, as expeditiously as possible, to propose for notice and comment a rule banning all devices that turn legal weapons into machineguns." Application of the Definition of

Machinegun to "Bump Fire" Stocks and Other Similar Devices; Memorandum for the Attorney General, 83 Fed. Reg. 7949 (Feb. 23, 2018).

On March 29, 2018, the DOJ published a notice of proposed rulemaking (NPRM). *See* Bump-Stock-Type Devices, 83 Fed. Reg. 13442 (Mar. 29, 2018). Following a period of public comment, the DOJ issued a Final Rule on December 26, 2018 that (1) formalizes the ATF's longstanding interpretation of "single function of the trigger" to mean "single pull of the trigger"; (2) interprets "automatically" to mean "as the result of a self-acting or self-regulating mechanism that allows the firing of multiple rounds through a single pull of the trigger"; and (3) concluding that bump-stock-type devices are machine guns proscribed by the statutory scheme as interpreted by the Final Rule. *See* Bump-Stock-Type Devices, 83 Fed. Reg. 66514 (Dec. 26, 2018). The Final Rule directs owners of bump-stock-type devices to either destroy or surrender them to the ATF before the Final Rule goes into effect on March 26, 2019. 83 Fed. Reg. 66515.

Mr. Aposhian lawfully purchased and continues to own a Slide Fire bump-stock-type device. On January 16, 2019, Mr. Aposhian filed suit against the Attorney General of the United States, the DOJ, the Director of the ATF, and the ATF. (ECF No. 2). On January 17, 2019, Mr. Aposhian filed this motion for preliminary injunction seeking to enjoin the Final Rule from going into effect on March 26, 2019. (ECF No. 10).

II. PRELIMINARY INJUNCTION STANDARD

To obtain preliminary injunctive relief, a movant must establish: "(1) a substantial likelihood of success on the merits; (2) irreparable harm to the movant if the injunction is denied; (3) the threatened injury outweighs the harm that the preliminary injunction may cause the opposing party; and (4) the injunction, if issued, will not adversely affect the public interest." *Gen. Motors Corp. v. Urban Gorilla, LLC*, 500 F.3d 1222, 1226 (10th Cir. 2007).

III. ANALYSIS

The parties do not dispute that Mr. Aposhian will experience irreparable harm if the injunction is denied.[4] And though they offer short arguments related to the third and fourth prongs of the preliminary injunction analysis, the parties devote the lion's share of their memoranda to the merits prong.

As explained below, Mr. Aposhian has not carried his burden of showing a substantial likelihood of success on the merits. As a result, his motion for a preliminary injunction must be denied.

This court's review of the Final Rule is governed by the Administrative Procedure Act (the "APA), 5 U.S.C. § 706(2)(A)–(C).[5] Under this framework, Mr. Aposhian asserts two general

[4] They do, however, disagree about what that irreparable harm is. Mr. Aposhian suggests that, absent an injunction, he will be harmed by being forced to comply with a rule that has been promulgated in contravention of constitutional principles of separation-of-powers. Defendants concede only that Mr. Aposhian's harm is the loss of his Slide Fire device, which, they assert, is irreplaceable because no entity presently manufactures such a device. Although it is clearly the case that the threatened infringement of a plaintiff's *individual* constitutional rights will satisfy the irreparable harm prong, the court can find no basis in law for the proposition that a generalized separation-of-powers violation gives rise to an injury on the part of an individual citizen. Regardless, articulating the precise harm becomes necessary only when weighing the threatened injury against the harm caused by the preliminary injunction (*i.e.*, the third prong). Because Mr. Aposhian's motion fails on the first prong—likelihood of success on the merits—the court need not resolve this dispute.

[5] Mr. Aposhian also raises a vague constitutional challenge supported by citations to cases involving the nondelegation doctrine. To the degree that Mr. Aposhian intended to assert a nondelegation challenge, the court can confidently reject any argument that the statutory grant of interpretive authority at issue here is devoid of an intelligible principle upon which the ATF may act. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472–76 (2001). To the extent Mr. Aposhian instead meant to assert a general separation-of-powers challenge to the Final Rule, such a challenge is subsumed by the APA's directive that a reviewing court set aside agency action taken "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." § 706(2)(C).

arguments. First, that Congress has not empowered the Attorney General[6] to interpret the NFA and the GCA. And second, that the Final Rule's interpretations conflict with the statutory language. The court addresses each challenge in turn.

A. INTERPRETIVE AND RULEMAKING AUTHORITY

Mr. Aposhian argues that the Final Rule was issued in excess of statutory jurisdiction because the NFA does not vest the Attorney General or the ATF with rulemaking authority. In response, the defendants argue, and the court agrees, that the Final Rule does no more than interpret undefined statutory terms.[7] Although the Attorney General and ATF promulgated their interpretations through the more laborious, formal notice-and-comment process, the use of that procedure does not alter the Final Rule's interpretive character. And Mr. Aposhian does not dispute that the ATF, under the direction of the Attorney General, is empowered to interpret and administer both the NFA and the GCA. *See* Pl.'s Mot. for Prelim. Inj. (ECF No. 10 at 6); 18 U.S.C. § 926(a); 26 U.S.C. § 7801(a)(2); *Guedes v. ATF*, No. 18-cv-2988 (DLF), 2019 WL 922594, at *9 n.3 (D.D.C. Feb. 25, 2019) (rejecting challenges to the Final Rule's interpretations

[6] The Attorney General has delegated, "[s]ubject to the direction of the Attorney General and Deputy Attorney General," the responsibility for administering and enforcing the NFA and the GCA to the ATF—an agency within the Department of Justice. *See* 28 CFR § 0.130(a)(1)–(3).

[7] Although the Final Rule is merely interpretive in nature, it appears, contrary to Mr. Aposhian's argument, that the Attorney General has indeed been granted rulemaking authority under the NFA. Mr. Aposhian is correct that 26 U.S.C. § 7805(a) declares that "the Secretary [of the Treasury] shall prescribe all needful rules and regulations for the enforcement of this title[.]" But he fails to account for the statutory language in § 7801(a)(2)(A), which functionally substitutes "Attorney General" for "Secretary of the Treasury" in § 7805(a) insofar as the rulemaking at issue relates to, among other weapons, machine guns. § 7801(a)(2)(A), (A)(ii) ("[T]he term 'Secretary' or 'Secretary of the Treasury' shall, when applied to [§ 7805, to the extent § 7805 relates to the enforcement and administration of Chapter 53, governing machine guns], mean the Attorney General . . . ."). And the Attorney General's rulemaking authority under the GCA is beyond question. 18 U.S.C. § 926(a) ("The Attorney General may prescribe only such rules and regulations as are necessary to carry out the provisions of this chapter . . . .").

and the ATF's interpretive authority, noting the "ATF's clear authority to interpret and administer" the relevant statutes).

In addition to his explicit statutory authority, the Attorney General has been implicitly delegated interpretive authority to define ambiguous words or phrases in the NFA and the GCA. Congress did not define "automatically" or "single function of the trigger," and when Congress leaves terms in a statute undefined, the agency charged with administering that statute has been implicitly delegated the authority to clarify those terms.[8]

B. FINAL RULE INTERPRETATIONS

The Final Rule interprets "single function of the trigger" to mean "single pull of the trigger" and analogous motions, and it interprets "automatically" to mean "as the result of a self-acting or self-regulating mechanism that allows the firing of multiple rounds through a single pull of the trigger." 83 Fed. Reg. Having supplied those definitions, the Final Rule clarifies that bump-stock-type devices—like the Slide Fire device owned by Mr. Aposhian—are machine guns proscribed by law. The court examines each interpretation in turn.

[8] The notion that an undefined or ambiguous term amounts to an implicit delegation of interpretive power is borne, unmistakably, from the administrative law doctrine announced by *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). In setting forth this principle in its memorandum in opposition, however, defendants went out of their way to avoid citing *Chevron* and its progeny, and repeatedly stressed that they neither request, nor believe their interpretations are entitled to, any measure of deference. *See* Defs.' Mem. in Opp'n (ECF No. 25 at 29) (citing *United States v. Apel*, 571 U.S. 359, 369 (2014) (remarking that the Supreme Court has never accorded deference to an agency's *internal* reading of a criminal statute)). This opinion is puzzling because it is far from settled that an agency is entitled to no deference when its interpretations implicate criminal liability. *See United States v. White*, 782 F.3d 1118, 1135 n.18 (10th Cir. 2015) (collecting Supreme Court and Tenth Circuit cases applying at least some deference to interpretations that affect criminal penalties). The court need not confront this deference dilemma here because the Final Rule's clarifying definitions reflect the best interpretation of the statute.

1. "Single Function of the Trigger"

The statutory language "single function of the trigger" gives rise to the parties' dispute about what "function" means.[9] Mr. Aposhian contends that "function" refers to the mechanical movement of the trigger, while the Final Rule adopts a shooter-focused interpretation. Because bump-stock-type devices operate through multiple movements of the trigger (by rapidly "bumping" the trigger into the operator's finger), a mechanically-focused interpretation would omit bump-stock-type devices from the statute's definition.

The court finds that "single pull of the trigger" is the best interpretation of "single function of the trigger," a conclusion similarly reached by the Eleventh Circuit Court of Appeals. *See Akins v. United States*, 312 F. App'x 197, 200 (11th Cir. 2009) ("The interpretation by the [ATF] that the phrase 'single function of the trigger' means a 'single pull of the trigger' is consonant with the statute and its legislative history."); *see also Guedes*, 2019 WL 922594, at *10 ("Tellingly, courts have instinctively reached for the word 'pull' when discussing the statutory definition of 'machinegun.'").

Moreover, it makes little sense that Congress would have zeroed in on the mechanistic movement of the trigger in seeking to regulate automatic weapons. The ill sought to be captured by this definition was the ability to drastically increase a weapon's rate of fire, not the precise mechanism by which that capability is achieved. At oral argument, defendants persuasively argued that the unusual choice of "function" is intentionally more inclusive than "pull." Thus,

[9] The court in *Guedes* noted, and this court agrees, that "dictionaries from the time of the NFA's enactment are of little help in defining a 'single function of the trigger.'" *Guedes*, 2019 WL 922594, at *9.

"function" was likely intended by Congress to forestall attempts by weapon manufacturers or others to implement triggers that need not be pulled, thereby evading the statute's reach.[10]

2. "Automatically"

The Final Rule interprets "automatically" to mean "as the result of a self-acting or self-regulating mechanism that allows the firing of multiple rounds through a single pull of the trigger." This interpretive language is borrowed, nearly word-for-word, from dictionary definitions contemporaneous to the NFA's enactment. *See* 83 Fed. Reg. 66519. The 1934 *Webster's New International Dictionary* defines the adjectival form "automatic" as "[h]aving a self-acting or self-regulating mechanism that performs a required act at a predetermined point in an operation[.]" 187 (2d ed. 1934); *see also* 1 *Oxford English Dictionary* 574 (1933) (defining "automatic" as "[s]elf-acting under conditions fixed for it, going of itself").

And as with "a single pull of the trigger," the Final Rule's interpretation of "automatically" accords with past judicial interpretation. *See United States v. Olofson*, 563 F.3d 652, 658 (7th Cir. 2009) (relying on the same dictionary definitions to conclude that "the adverb 'automatically,' as it modifies the verb 'shoots,' delineates how the discharge of multiple rounds from a weapon occurs: as the result of a self-acting mechanism . . . that is set in motion by a single function of the trigger and is accomplished without manual reloading.").

Mr. Aposhian's argument in opposing the propriety of this interpretation is difficult to follow, but it appears to relate to the requisite degree of automaticity. Specifically, he suggests that "[i]f a firearm requires separate physical input, even if not directed to the *trigger mechanism*, this still disrupts the automatic firing of each successive shot." (ECF No. 10 at 9)

[10] The Final Rule's interpretation does use "pull," but avoids the issue above by interpreting "'single function of the trigger' to mean 'single pull of the trigger' *and analogous motions*[.]" 83 Fed. Reg. at 66515 (emphasis added).

(emphasis in original). Because bump-stock-type devices require constant forward pressure by the shooter's non-trigger hand on the barrel or the shroud of the rifle, Mr. Aposhian argues, it does not fire "automatically."

But even weapons uncontroversially classified as machine guns require at least some ongoing effort by an operator. And Mr. Aposhian does not argue that the constant rearward pressure applied by a shooter's trigger finger in order to *continue* firing a machine gun means that it does not fire "automatically." Under Mr. Aposhian's view, it seems, the statute encompasses machine guns that require some, but not too much, ongoing physical actuation. But neither the statute nor the contemporaneous understanding of "automatic" provides any basis for an interpretation that restricts the degree of shooter involvement in an automatic process. As illustrated by the atextual line urged by Mr. Aposhian, any limit on the degree of physical input would invariably be supplied of whole cloth in service of one's desired result.

The Final Rule's interpretation of "automatically" is consistent with its ordinary meaning at the time of the NFA's enactment and accords with judicial interpretation of that language. Thus, it represents the best interpretation of the statute.

3. Classification of Bump-Stock-Type Devices as Machine Guns

Mr. Aposhian does not appear to argue that the interpretations above, if valid, would not permit the classification of his Slide Fire device as a machine gun. He does, however, request more aggressive judicial review of the Final Rule because of its allegedly political impetus, and because it represents a change in the ATF's position (*i.e.*, some devices previously ruled by the ATF to not be machine guns are now brought within the statutory ambit).

But the Supreme Court's modern administrative law jurisprudence expressly rejects both propositions. *See F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 523 (2009) (rejecting argument that heightened scrutiny applies to a "policy change [that] was spurred by significant

political pressure from Congress"); *Lockheed Martin Corp. v. Admin. Review Bd., Dep't of Labor*, 717 F.3d 1121, 1131 (10th Cir. 2013) ("The Supreme Court has rejected the notion that an agency's interpretation of a statute it administers is to be regarded with skepticism when its position reflects a change in policy."). Indeed, an agency's change in position need only be accompanied by the agency's acknowledgement that its position has changed, along with an explanation that "the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates." *F.C.C.*, 556 U.S. at 515 (emphasis in original).

The ATF's change in policy easily meets this standard. The Final Rule unambiguously acknowledges that the ATF is changing its position with respect to certain bump-stock-type devices, and explains that the ATF's prior rulings excluding those devices from the definition of machine gun "did not provide substantial or consistent legal analysis regarding the meaning of the term 'automatically,' as it is used in the NFA and GCA." 83 Fed. Reg. 66518. And the court has already determined that the definitions leading to the classification changes are permissible under, and in fact represent the best interpretation of, the statute. In sum, neither the alleged political genesis of the Final Rule nor the fact that it reflects a change in agency policy serve to undermine the Final Rule's validity.

Having found that each component of the Final Rule represents the best interpretation of the statute, the court cannot find that Mr. Aposhian is likely to succeed on the merits of his challenge to the Final Rule. Absent such a showing, an injunction may not issue.

IV. ORDER

For the reasons articulated, plaintiff's Motion for Preliminary Injunction is **DENIED.**

Signed March 15, 2019

BY THE COURT

Jill N. Parrish
United States District Court Judge