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

MICHAEL CARGILL	:	
	:	CIVIL ACTION NO.: 1:19-cv-349-DAE
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
WILLIAM BARR,	:	
IN HIS OFFICIAL CAPACITY AS	:	
ATTORNEY GENERAL	:	
OF THE UNITED STATES, et al.	:	
	:	
Defendants.	:	

PLAINTIFF'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to this Court's Scheduling Order (Doc. 26), Plaintiff, Michael Cargill, through undersigned counsel respectfully submits the following proposed findings of fact and conclusions of law.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Regulations

Constitutional Provisions

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

PARTIES, JURISDICTION AND VENUE

1. Plaintiff Michael Cargill is a natural person and a resident of the State of Texas. (Complaint, ¶ 1; Answer, ¶ 1.)[1]

2. Mr. Cargill is a law-abiding person and has no disqualification that would prevent him from lawfully owning or operating a firearm and related accessories. (Complaint, ¶ 2; Answer, ¶ 2.)

3. Mr. Cargill owned two bump stocks until March 25, 2019, when he was forced to surrender them to the Bureau of Alcohol, Tobacco, Firearms and Explosives under the Final Rule. (Complaint, ¶ 2; Answer, ¶ 2.)

4. Defendant William Barr, Attorney General of the United States, is the head of the Department of Justice. (Complaint, ¶ 3; Answer, ¶ 3.)

5. Defendant AG Barr is sued in his official capacity. (Complaint, ¶ 4; Answer, ¶ 4.)

6. Defendant United States Department of Justice is an agency of the United States, which is partially responsible for the administration and enforcement of the National Firearms Act and the Gun Control Act. (Complaint, ¶ 5; Answer, ¶ 5.)

---

[1] Where indicated the facts have been established by the pleadings. *See* Fed. R. Civ. P. 8(b)(6) (An allegation … is admitted if a responsive pleading is required and the allegation is not denied."). We also identify those circumstances where this Court has taken judicial notice of legislative materials, including legislative history, as well as publicly available news reports. *See* Fed. R. Evid. 201 (b) ("Kinds of Facts That May Be Judicially Noticed"); *Territory of Alaska v. Am. Can Co.*, 358 U.S. 224, 227 (1959) (taking judicial notice of "legislative history); *U.S. ex rel. Lam v. Tenet Healthcare Corp.*, 481 F. Supp. 2d 673, 680 (W.D. Tex. 2006) (Cardone, J.) ("Courts have the power to take judicial notice of the coverage and existence of newspaper and magazine articles.").

7. Defendant Regina Lombardo, Acting Director of the Bureau of Alcohol, Tobacco, Firearms and Explosives, is the acting head of the Bureau of Alcohol, Tobacco, Firearms and Explosives. (Complaint, ¶ 6; Answer, ¶ 6.)

8. Defendant Acting Director Lombardo is sued in her official capacity. (Complaint, ¶ 7; Answer, ¶ 7.)

9. Defendant the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) is an agency of the United States, which is partially responsible for administration and enforcement of the National Firearms Act and the Gun Control Act. (Complaint, ¶ 8; Answer, ¶ 8.)

10. This Court has federal question jurisdiction pursuant to 5 U.S.C. § 702 and 28 U.S.C. § 1331. (Complaint, ¶ 9; Answer, ¶ 9.)

11. Venue for this action properly lies in this district pursuant to 5 U.S.C. § 703 and 28 U.S.C. §§ 1391(b)(2), (e)(1)(C) because Mr. Cargill resides in this judicial district, a substantial part of the events or omissions giving rise to the claim occurred in this judicial district, and because the property at issue in this action was situated in this judicial district. (Complaint, ¶ 11; Answer, ¶ 11.)

STATEMENT OF FACTS

I. LEGAL BACKGROUND

A. The Relevant Statutes

12. In 1934 Congress passed the National Firearms Act (NFA), Pub. L. No. 73-474, which regulated firearms under Congress' power to lay and collect taxes.

13. Under the NFA, Congress criminalized the possession or transfer of an unregistered firearm, while also prohibiting the registration of firearms otherwise banned by law. *See* 26 U.S.C. §§ 5812(a) (registration prohibited "if the transfer, receipt, or possession of the firearm would place the transferee in violation of law"), 5861 (prohibited acts).

14. In the 1934 legislation, Congress defined "machinegun" as a specific type of "firearm." National Firearms Act § 1(b).

15. The original text defined a "machinegun" as "any weapon which shoots, or is designed to shoot, automatically, or *semiautomatically*, more than one shot, without manual reloading, by a single function of the trigger." National Firearms Act § 1(b) (emphasis added).

16. This reflected a compromise position.

17. As originally proposed, the statute defined a "machinegun" as "any weapon designed to shoot automatically, or semiautomatically, 12 or more shots without reloading." *Hearing on H.R. 9066, House Ways and Means Comm.*, 73rd Cong., 6 (1934) (Testimony of Homer S. Cummings, Attorney General of the United States).

18. Advocates proposed altering the definition to read, "A machine gun or submachine gun as used in this act means any firearm by whatever name known, loaded or unloaded, which shoots automatically more than one shot without manual reloading, by a single function of the trigger." *Id.* at 40 (Testimony of Karl T. Frederick, President National Rifle Association of America).

19. This change first eliminated the 12-shot threshold, which they feared could be easily circumvented. *Id*. at 39.

20. At the same time, it eliminated the term "semiautomatically," because including that term would result in outlawing the ordinary repeating rifle. A semiautomatic gun shoots only one shot with a single pull of the trigger, "which is in no sense and never has been thought of as a machine gun." *Id*. at 40-41.

21. The final statutory definition jettisoned the 12-shot threshold, but nevertheless included a prohibition on semiautomatic weapons. National Firearms Act § 1(b).

22. In 1968, Congress passed the Gun Control Act (GCA), Pub. L. No. 90-618, criminalizing possession of firearms for certain classes of people. *See* 18 U.S.C. § 921 *et seq*.

23. The GCA deleted the phrase "or semiautomatically" and included "parts" designed and used to "convert a weapon into a machinegun." Gun Control Act, tit. II, § 201 (codified at 26 U.S.C. § 5845(b)).

24. The 1968 statutory revision more broadly "extend[ed] the Act's provisions so as to cover 'destructive devices' (bombs, grenades, etc.)." Congressional Research Service, *Gun Control Act of 1968: Digest of Major Provisions*, CRS Report 75-154, at 12, Harry Hogan (1968, rev. 1981).

25. In 1986 Congress amended the GCA through the Firearms Owners' Protection Act (FOPA). Pub. L. No. 99-308.

26. FOPA, codified at 18 U.S.C. § 922(o), outlawed most machineguns and simultaneously made it unlawful for any person to register those weapons.

27. FOPA was prospective only, its criminal sanctions did "not apply with respect to" "any lawful transfer or lawful possession of a machinegun that was lawfully possessed before the date this subsection takes effect." 18 U.S.C. § 922(o).

28. Today, with limited exceptions for governmental actors and machineguns that were in existence and registered prior to the effective date of the statute, May 19, 1986, it is a federal felony offense for any person to "transfer or possess a machinegun." 18 U.S.C. § 922(o).

29. This offense is punishable by up to 10 years in federal prison for first-time offenders. 18 U.S.C. § 924(a)(2).

30. As defined by Congress, under both the GCA and NFA, the term "machinegun" means

> any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without 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); *see also* 18 U.S.C. § 921(23) ("The term 'machinegun' has the meaning given such term in section 5845(b) of the National Firearms Act.").

31. The President is also empowered by the Arms Export Control Act of 1976, 22 U.S.C. § 2778, to limit the import and export of certain firearms. This law restricts the import and export of "machineguns" by reference to both the GCA and the NFA. 27 C.F.R. § 447.2(a); *see also* 27 C.F.R. § 447.21 (U.S. Munitions Import List, Category I(b) ("Machineguns, submachineguns, machine pistols and fully automatic rifles")).

B. Delegation of Statutory Authority

32. With respect to the NFA, Congress provided that the Secretary of the Treasury was tasked with "the administration and enforcement" of the statute, while ATF, under the authority of the Attorney General, was tasked with issuing certain "rulings and interpretations" related to the NFA's requirements. 26 U.S.C. § 7801(a)(2)(B).

33. Congress also granted the Secretary of the Treasury the authority to "prescribe all needful rules and regulations for the enforcement of this title, including all rules and regulations as may be necessary by reason of any alteration of law in relation to internal revenue." 26 U.S.C. § 7805(a).

34. ATF was under the supervision of the Department of Treasury prior to 2002, but it now operates under the authority of the Attorney General. *See* 26 U.S.C. § 7801(a) (outlining distinct NFA authority after 2002).

35. With respect to the GCA, Congress granted the Attorney General the authority to "prescribe only such rules and regulations as are necessary to carry out the provisions of" the GCA. 18 U.S.C. § 926(a).

36. This authority previously belonged to the Secretary of the Treasury. *See* Pub. L. 107-296, Title XI, § 1112(f)(6), Nov. 25, 2002, 116 Stat. 2276 (transferring Secretary's authority to the Attorney General).

37. The Attorney General has delegated his authority under the GCA to ATF. 28 C.F.R. § 0.130(a)(1).

38. The Attorney General has also delegated his purported authority under the NFA to ATF. 28 C.F.R. § 0.130(a)(2).

C. ATF Classifications

39. ATF Firearms and Ammunition Technology Division (FATD) is responsible for technical determinations concerning types of firearms approved for importation into the United States and for rendering opinions regarding the classification of suspected illegal firearms and newly designed firearms. (Complaint, ¶ 32; Answer, ¶ 32.)

40. Within FATD, the Firearms Technology Industry Services Branch (FTISB), formerly known as the Firearms Technology Branch (FTB), responds to industry requests regarding importation evaluations and domestic manufacturing examinations. (Complaint, ¶ 33; Answer, ¶ 33.)

41. These entities provide guidance to the industry, by evaluating and classifying items submitted as either being a firearm, an NFA firearm, or not subject to the jurisdiction of ATF. (Complaint, ¶ 34; Answer, ¶ 34.)

42. Individuals may submit letter requests to ATF to clarify what laws and regulations the items may or may not be subject to. (Complaint, ¶ 35; Answer, ¶ 35.)

43. ATF makes classifications based on the most current laws and regulations at the time of submission and on the results of physical examination of that specific item. (Complaint, ¶ 36; Answer, ¶ 36.)

44. Classifications are memorialized via a letter from ATF, and each letter is particular to the specific item submitted for evaluation. (Complaint, ¶ 37; Answer, ¶ 37.)

II. ATF'S PREVIOUS ACTIONS REGARDING BUMP STOCKS

A. Shoestring Classifications

45. In 1996, FTB issued its first known classification letter concerning mechanical "bump fire" devices. (Administrative Record for *Bump-Stock-Type Devices* at 1 (hereinafter "AR").)

46. "Bump fire" is a shooting technique where a user of a firearm quickly engages the trigger of a semiautomatic weapon multiple times, resulting in rapid fire. (AR, 72.)

47. In the 1996 classification, FTB evaluated "a length of shoe string" that was described as being "designed for one end to be attached to the cocking handle of a semiautomatic rifle. The shoe string is brought down the right side of the firearm, crossed over the top of the stock directly behind the receiver, looped over the original trigger and the end is attached to the shooter's finger." (AR, 1.)

48. The classification continued, "When the device is attached to a semiautomatic firearm as described, finger pressure on the rear loop will cause the firearm to discharge. Rearward movement of the bolt will cause the shoe string to slacken. Forward movement of the bolt will fire repeatedly until finger pressure is released from the shoe string." (AR, 2.)

49. Based on this description, FTB classified the "shoe string" as a "machinegun[] as defined in § 5845(b)." (AR, 2.)

50. In September 2004 FTB reaffirmed its view that a shoestring was a machinegun if it was "designed and intended" to be used to bump fire a semiautomatic firearm. (AR, 30.)

B. Spring- Loaded Devices

51. On July 28, 2002 FTB issued a classification letter for an Akins spring-loaded bump stock, declining to rule on the device. (AR, 8.)

52. Akins provided patent drawings and a description of the device, which "consists of a modified stock assembly with a cavity or depression at the rear of the unit where it would normally meet the rear portion of the firearm receiver. This cavity permits the entire firearm (receiver and all its firing components) to recoil a short distance within the stock, when fired. As the firearm moves rearward in the modified stock, a spring located with[in] the modified stock is compressed. Energy from this spring subsequently drives the firearm forward and back into its normal firing position. After the shooter initially activates the trigger, the shooter's finger is held in a fixed position by a stop screw device embedded into the stock that does not move during the firing process. The effect of this is that the trigger mechanism moves rearward and disengages from the shooter's finger as the firearm recoils in the modified stock. After the firearm recoils a sufficient distance, the recoil spring located within the stock drives the firearm forward and the trigger again makes contact with the shooter's stationary finger. This action trips the firearm's trigger and begins the firing cycle once more." (AR, 7-8.)

53. In 2003, after examining the device, ATF determined the Akins device, called the "Akins Accelerator," which used recoil springs to mechanically increase a firearm's firing rate, was not a machinegun. *See Akins v. United States*, 82 Fed. Cl. 619, 621 (Ct. Cl. 2008).

54. On November 17, 2003 FTB classified a similar Bowers bump stock as not being "a machinegun as defined in the NFA." (AR, 12.)

55. This device was a sample stock that included a "rectangular channel," "spring actuated recoiling mechanism affixed to the forward end of the rectangular channel," and a "shoulder stock assembly welded to the underside of the rectangular channel." (AR, 11.)

56. The device operated using "the application of the movement of the counter recoiling rifle to initiate a rapid succession of semiautomatic fire. The shooter places his trigger finger behind two adjustable screws and forward of the weapon's trigger. After the weapon is initially fired and the action is moved to the rear (by the recoiling mechanism), the subsequent forward movement of the action is halted by the shooter's trigger finger being held against the adjustable screws. The trigger is then depressed, and a second firing of the weapon commences. The movements of the action within the stock assembly are used to consecutively fire the weapon in lieu of the traditional method of manually pulling the trigger." (AR, 11-12.)

57. FTB determined that as fired, "[t]he weapon did not fire more than one shot by a single function of the trigger." (AR, 12.)

58. On January 29, 2004 FTB reaffirmed this interpretation in a separate classification letter sent to a different Bowers bump stock. (AR, 19.)

59. As with the first Bowers device, FTB determined that a shoulder stock assembly that was designed to facilitate bump fire "does not constitute a 'machinegun' as defined in the NFA." (AR, 19.)

60. These classifications contrasted with FTB's evaluation of a Blakely "firing mechanism," which was proposed to be integrated into "an AR 15 clone" rifle. (AR, 22.)

61. The Blakely device replaced the extant semiautomatic firing mechanism in the rifle, and, "as soon as the trigger is pulled" would enable the firearm to operate in the following manner: "The hammer falls, firing a shot;" "The hammer is recocked when the bolt comes to the rear;" "The forward pressure of the bolt against [a] cam forces the trigger forward;" "The continuous steady pressure on the trigger from the trigger pull causes the trigger to travel rearward and releases the cocked hammer, enabling firing to continue;" "The weapon ceases firing when the firing finger is physically removed from the trigger." (AR, 22.)

62. Because the weapon would "continue to fire" "from the moment of the application of trigger pressure—and as long as rearward pressure is applied to the trigger" FTB determined that it was a machinegun. (AR, 22-23.)

63. The Blakely firing mechanism did not appear to require the application of any forward pressure by the shooter in order to fire multiple shots. (AR, 22-23.)

64. On June 28, 2006, FTB classified another spring-loaded device, the "Basic AK47 Semiautomatic Tool And Reciprocating Device (B.A.S.T.A.R.D.)," as a machinegun. (AR, 58-59.)

65. This device consisted of a housing for an AK-47 type semiautomatic rifle, which permitted "the entire firearm (receiver and all its firing components) to recoil a short distance within the device, when fired. As the firearm moves rearward … an 'accelerator' spring located forward of the firearm is compressed. Energy from this accelerator spring subsequently drives the firearm forward into its normal firing position." (AR, 58.)

66. As with the Blakely firing mechanism, the B.A.S.T.A.R.D. device did not appear to require the application of any forward pressure by the shooter in order to fire multiple shots. (AR, 61-71.)

67. Then, on November 22, 2006, FTB reversed course and declared the Akins Accelerator and the Bowers device to be machineguns. (AR, 75.)

68. On December 13, 2006, ATF issued ATF Ruling 2006-2, which classified as a machinegun any device that, "when activated by a single pull of the trigger, 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) (ATF Rul. 2006-2); AR, 81.)

69. ATF concluded the Akins Accelerator was a machinegun because "when activated by a single pull of the trigger, [it] initiates an automatic firing cycle that continues until either the finger is released or the ammunition supply is exhausted." (ATF Rul. 2006-2, at 2-3; AR, 82-83.)

70. ATF highlighted the effect of the Akins Accelerator's recoil spring:

> A shooter pulls the trigger which causes the firearm to discharge. As the firearm moves rearward in the composite stock, the shooter's trigger finger contacts the stock. The trigger mechanically resets, and the device, which has a coiled spring located forward of the firearm receiver, is compressed. Energy from this spring subsequently drives the firearm forward into its normal firing position and, in turn, causes the trigger to contact the shooter's trigger finger. Provided the shooter maintains finger pressure against the stock, the weapon will fire repeatedly until the ammunition is exhausted or the finger is removed.

(ATF Rul. 2006-2, at 2; AR, 82.)

71. Following Ruling 2006-02, FTB again classified the Akins Accelerator as a machinegun. (AR, 90.)

C. Non-Spring "Bump-Fire" Devices

72. As described by ATF in an October 13, 2006 classification letter, "'bump fire' is a vernacular used in the firearms culture … meaning rapid *manual* trigger manipulation to simulate automatic fire." (AR, 72.)

73. ATF continued, "As long as you must consciously pull the trigger for each shot of the 'bump fire' operation, you are simply firing a semiautomatic weapon in a rapid manner and are not violating any Federal firearm laws or regulations." (AR, 72.)

74. As ATF has since explained, "bump-stock-type devices" are a type of firearm stock that allows the firearm to slide back-and-forth freely in the shooter's hands. *Bump-Stock-Type Devices*, 83 Fed. Reg. 66514, 66516 (Dec. 26, 2018) (hereinafter, *Final Rule*).

75. According to ATF, when using a bump stock, a shooter places his trigger finger on a plastic ledge that is part of the bump stock (and not on the trigger itself), with that dominant hand holding the stock firmly against his shoulder. *Id*.

76. Then, while "maintaining constant forward pressure with the non-trigger hand on the barrel-shroud or fore-grip of the rifle, and maintaining the trigger finger on the device's ledge with constant rearward pressure[,]" the shooter engages the trigger. *Id.* at 66518.

77. The recoil from the initial shot pushes the firearm rearward and causes the trigger to lose contact with the finger and *manually* reset. *Id.* at 66516-17.

78. By applying continuous forward pressure with the non-trigger hand, the shooter is able to force the trigger back into his trigger finger, and thus "re-engages by 'bumping' the shooter's stationary finger" into the trigger. *Id*. at 66516.

79. Following Ruling 2006-02, FTB was asked to review numerous bump-firing devices without springs.

80. On June 18, 2008, ATF approved a bump-stock device that allowed the shooter to use the firearm's recoil to force the trigger back against the shooter's finger, without using a spring. (AR, 105.)

81. As described by ATF, if an "*intermediate* amount of pressure is applied to the fore-end [of the firearm] with the support hand, the shoulder stock device will recoil forward far enough to allow the trigger to mechanically reset." (AR, 106.)

82. So long as the shooter "[c]ontinue[s] intermediate pressure" "to the fore-end," the recoil would "push the receiver assembly forward until the trigger re-contacts the shooter's stationary firing hand finger, allowing a subsequent shot to be fired." (AR, 106.)

83. ATF concluded this did not meet the statutory definition of a machinegun because "every subsequent shot depends on the shooter applying the appropriate amount of forward pressure to the fore-end and timing it to contact the trigger finger of the firing hand," and "each shot [was] fired by a single function of the trigger" because "the shooter pulls the firearm forward to fire each shot." (AR, 106.)

84. Since the June 18, 2008 classification letter, ATF and FTB reaffirmed this position at least 26 times in classification letters and other official communications. (*See* AR, 111, 116, 126, 134, 138, 145, 157, 160, 167, 170, 175, 179, 191, 198, 201, 206, 218, 235, 238, 242, 250, 258, 263, 268, 272, 275.)

85. On June 26, 2008, the FTB approved a bump-stock device because "the absence of an accelerator spring … prevents the device from operating automatically" and thus was not a machinegun. (AR, 112.)

86. On October 13, 2009, FTB issued another letter reaffirming the legality of "bump-firing" a firearm, including when using "various aftermarket parts," as long as the modification would not "permit a weapon to fire automatically more than one shot with a single function of the trigger." (AR, 116.)

87. The "Slide Fire" is a type of bump stock that was commercially available in the United States starting in 2010. (Complaint, ¶ 47; Answer, ¶ 47.)

88. The Slide Fire device is a "hollow shoulder stock intended to be installed over the rear of an AR-15," and is "intended to assist persons whose hands have limited mobility to 'bump-fire' an AR-15 type rifle." (AR, 126.)

89. "The stock has no automatically functioning mechanical parts or springs and performs no automatic mechanical function when installed." (AR, 126.)

90. "In order to use the installed device, the shooter must apply constant forward pressure with the non-shooting hand and constant rearward pressure with the shooting hand." (AR, 126.)

91. On June 7, 2010, ATF concluded that the Slide Fire bump stock, which is the type owned by the Plaintiff Mr. Cargill, "has no automatically functioning mechanical parts or springs and performs no automatic mechanical function when installed." (AR, 126.)

92. Accordingly, ATF said that the Slide Fire "is a firearm part and is not regulated as a firearm under [the] Gun Control Act or the National Firearm Act." (AR, 126.)

93. On March 9, 2011, ATF approved "a sliding shoulder-stock type buffer-tube assembly" fitted over a rifle because it "has no automatically functioning mechanical parts or springs and performs no automatic mechanical function." (AR, 134.)

94. On May 25, 2011, ATF approved a stock designed to fit over a rifle and allow the rifle "to reciprocate back and forth in a linear motion," because the "absence of an accelerator spring or similar component in the submitted device prevents the device from operating automatically as described in ATF Ruling 2006-2." (AR, 138-39.)

95. On November 21, 2011, ATF sent a letter to Representative Robert B. Aderholt, explaining its approval of the Slide Fire device. (AR, 145.)

96. On January 12, 2012, FTB approved a "slide-fire stock" because it had "no automatically functioning mechanical parts or springs," and "in order to use the installed device, the shooter must apply constant forward pressure with the non-shooting hand and constant rearward pressure with the shooting hand." (AR, 157-58.)

97. On April 2, 2012, FTB approved a "plastic shoulder stock designed to function on an AR-15 type rifle" because it too required the application of "the appropriate amount of forward pressure to the fore-end," and thus was "incapable of initiating an automatic firing cycle." (AR, 160-61.)

98. On April 20, 2020, FTB approved a "mounting device for use with a semiautomatic" firearm, because, yet again, the shooter was required to apply manual pressure to the firearm between shots such that the trigger would have to be "re-contact[ed]" between shots. (AR, 167-78.)

99. "In this manner, the shooter pushes the receiver assembly forward to fire each shot, each firing utilizing a single function of the trigger." (AR, 168.)

100. On July 9, 2012, FTB approved a "replacement shoulder stock for a Saiga-12 type shotgun" which "allows the shotgun to slide back and forth, independently of the shoulder stock and pistol grip," and found that it "is a firearm part and is not regulated." (AR, 171.)

101. On July 13, 2012, FTB approved a "'bump fire' type stock designed for use with a semiautomatic AK-pattern type rifle," which allowed the rifle "to reciprocate back and forth in a linear motion," and found it was "NOT a machinegun under the NFA … or the GCA." (AR, 179.)

102. Also on July 13, 2012, ATF sent a letter to Representative William M. Thornberry explaining the agency's position that a "bump fire stock" is not a machinegun. (AR, 175-76.)

103. On February 11, 2013, ATF approved the "Bumpski" bump fire stock and, for the same reasons as above, concluded that "it is NOT a machinegun under the NFA … or the GCA." (AR, 191-92.)

104. On April 16, 2013, Richard W. Marianos, ATF Assistant Director for Public and Governmental Affairs, conveyed that ATF was denying a request from Representative Ed Perlmutter to reclassify bump stocks as machineguns. (AR, 198.)

105. ATF explained that, in the past, the "Akins Accelerator incorporated a mechanism to automatically reset and activate the fire-control components of a firearm," whereas modern bump stocks like "the Slide Fire Solutions stock," "require[] continuous multiple inputs by the user for each successive shot." (AR, 198-99.)

106. ATF noted that bump fire stocks "do not fall within any of the classifications for firearm contained in Federal law" and "ATF does not have the authority to restrict their lawful possession, use, or transfer." (AR, 199.)

107. On May 1, 2013, FTB approved the "HailStorm" "'bump-fire' type stock," once again because the device lacked "any operating springs, bands, or other parts which would permit automatic firing." (AR, 201.)

108. On January 14, 2014, FTB approved yet another "bump-fire" stock, adhering to its earlier analysis. (AR, 206-07.)

109. On July 31, 2014, FTB approved another "bump-fire" stock, adhering to its earlier analysis. (AR, 218-19.)

110. On April 28, 2015, FTB approved a "Bump Fire Grip Device," relying on its earlier bump-stock classifications. (AR, 238-39.)

111. On April 30, 2015, FTB approved a "pistol-type 'Bump Grip,'" relying on its earlier bump-stock classifications. (AR, 235-36.)

112. On July 24, 2015, FTB approved two "Bump Fire Grip Devices," relying on its earlier bump-stock classifications. (AR, 250-52.)

113. On July 29, 2015, FTB approved a "'bump-fire' type grip," relying on its earlier bump-stock classifications. (AR, 242-43.)

114. On September 14, 2015, FTB approved yet another bump-stock device because it too required manual input from the shooter and lacked springs or other similar parts. (AR, 258-61.)

115. On January 4, 2016, FTB approved another "Bump fire Grip," relying on its earlier bump-stock classifications. (AR, 263-65.)

116. On September 23, 2016, FTB approved a "Bump Fire Assistance Device," relying on its earlier bump-stock classifications. (AR, 268-71.)

117. On November 18, 2016, FTB approved an "'Action-Grip' bump-stock device," relying on its earlier bump-stock classifications. (AR, 272-74.)

118. Finally, on April 6, 2017, FTB again approved a "Bump Fire Stock" because, like all the others, the device required manual input from the shooter and lacked springs or other similar parts. (AR, 275-77.)

D. Other Notable Classifications

119. Meanwhile, while approving bump-stock devices, FTB consistently applied the reasoning of Ruling 2006-02 to classify other devices as machineguns.

120. For example, on October 19, 2009, FTB classified a bump-stock device as a machinegun because it employed an "action spring." (AR, 121.)

121. And on October 7, 2016, FTB classified two "Trigger Reset Devices" as machineguns, because they used "an electronic device that used a rechargeable battery." (AR, 312.)

122. In arriving at its conclusion, FTB tested the devices by using a zip-tie to depress the trigger mechanism completely, and observed the device firing an "entire five-round ammunition load automatically without the trigger being repeatedly pulled and released." (AR, 314.)

123. FTB also declined to classify a number of devices because the requesting parties had failed to furnish samples, with FTB making classifications only after test-firing a device. (*See* AR, 84, 95, 101, 102, 188, 210, 212, 228, 231, 233.)

124. As FTB wrote in one such letter, "FTB cannot make a classification on pictures, diagrams, or theory." (AR, 95.)

III. ATF'S AND CONGRESS'S ACTIONS FOLLOWING THE LAS VEGAS SHOOTING

A. ATF Maintains Its Prior Interpretation in Tthe Face of Intense Political Pressure

125. On October 1, 2017, a shooter opened fire on a large crowd of people in Las Vegas, Nevada, killing 58 people and injuring hundreds of others. *Final Rule*, 83 Fed. Reg. at 66516.

126. Some of the firearms found at the scene were equipped with bump fire stocks. (AR, 391.)

127. On October 2, 2017, ATF Acting Director Thomas Brandon sent an email to a subordinate, asking "are these [bump stocks] 'ATF approved' as advertised?" (AR, 323.)

128. Later that day Acting Director Brandon received a reply that said, "They are approved as advertised as long as an individual doesn't perform additional modifications to the firearm." (AR, 330.)

129. That same day, Acting Deputy Director Ronald B. Turk sent Acting Director Brandon "background material" on "bump-fire." (AR, 358.)

130. These materials explained that "live-fire testing indicates that" bump-stock devices required "an intermediate amount of pressure [] applied to the fore-end" of a weapon "with the support hand" between rounds for the device to function. (AR, 361.)

131. "In this manner, the shooter pulls the firearm forward to fire each shot, each shot being fired by a single function of the trigger. Further, every subsequent shot depends on the shooter applying the appropriate amount of forward pressure to the fore-end and timing it to contact the trigger finger on the firing hand." (AR, 361.)

132. "[U]nless there is some self-acting mechanism that allows a weapon to shoot more than one round, you cannot have a machinegun." (AR, 361.)

133. The materials also cited the "[O]lofson case," [*United States v. Olofson*, 563 F.3d 652 (7th Cir. 2009)], which "seems to support our conclusion concerning 'bump firing.'" (AR, 361.)

134. The materials concluded with the following passage: "Thus defined, in § 5845(b) 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 mechanism is one that is set in motion by a single function of the trigger and is accomplished without manual reloading." (AR, 361 [quoting *Olofson*, 563 F.3d at 658].)

135. On October 4, 2017, Representative David Cicilline proposed H.R. 3947, "The Automatic Gunfire Prevention Act," which would have amended the GCA to prohibit any "trigger crank, a bump-fire device, or any part, combination of parts, component, device, attachment, or accessory that is designed or functions to accelerate the rate of fire of a semiautomatic rifle but not convert the semiautomatic rifle into a machinegun." (Complaint, ¶ 88; Answer, ¶ 88.)

136. H.R. 3947 was never advanced in the House and lapsed with the conclusion of the 115th Congress. (Complaint, ¶ 89; Answer, ¶ 89.)

137. Also on October 4, 2017, Senator Dianne Feinstein proposed S. 1916, which was identical to H.R. 3947. (Complaint, ¶ 90; Answer, ¶ 90.)

138. On October 5, 2017, the Chief Counsel for ATF sent a proposed memorandum entitled, "Legality of 'Bump-Fire' Rifle Stocks" to the Office of the Attorney General of the United States. (AR, 534.)

139. While the legal analysis has been redacted, the Chief Counsel also described ATF's prior interpretation. (AR, 533-36.)

140. The memorandum noted that the "key factor" ATF looked to "in making the determination that these 'bump-fire' devices did not fall within the statutory machinegun definition was whether the device artificially enhanced the rate of fire by using a mechanical feature, as opposed to facilitating a shooter's ability to physically pull the trigger at a higher rate than would be possible without the device." (AR, 533.)

141. The memorandum also noted that ATF had determined that bump-stock devices were not machineguns because they lacked "automatically functioning mechanical parts or

springs" and "the shooter must apply constant forward pressure with the non-shooting hand and constant rearward pressure with the shooting hand." (AR, 536.

142. Also on October 5, 2017, Representative Mark Meadows sent a letter to Acting Director Brandon noting that ATF had previously determined that "the devices known as 'bump stocks' did not warrant regulation under the National Firearms Act" and inquiring "if the ATF plans to review whether or not these devices comply with federal law and regulations." (AR, 539.)

143. In the early morning of October 6, 2017, ATF's proposed legal analysis was sent to Acting Director Brandon, which outlined ATF's position on whether bump stocks could be considered machineguns under existing federal statutes. (AR, 687.)

144. On October 6, 2017, Senators Dean Heller, John Cornyn, Jodi Ernst, James Inhofe, Johnny Isakson, James Lankford, Lisa Murkowski, Tim Scott and John Thune sent a letter to Acting Director Brandon asking ATF to review its classification of bump-stock devices. (AR, 541.)

145. Also on October 6, 2017, Chris Pellettiere, Chief, ATF Office of Strategic Management, sent an email to Joseph Allen, Chief of Staff for ATF, with compiled information for every federal criminal case involving bump stocks that had been brought nationwide. (AR, 668.)

146. As of that date, the United States had not brought any prosecutions for alleged violations of 18 U.S.C. § 922(o) related to bump stocks. (AR, 681.)

147. At 11:24 a.m. on October 6, 2017, Jim Cavanaugh, a "Law Enforcement Analyst" for NBC and MSNBC, sent Acting Director Brandon an email outlining his "outside view" "on Bump Stocks." (AR, 685.)

148. Cavanaugh "recommend[ed] an overruling of the prior decision[s] and putting it under the NFA." (AR, 685.)

149. Cavanaugh continued his email by writing, "Regardless of what Congress does or does not do ... You can do it fast and it is the right thing to do, don't let the technical experts take you down the rabbit hole[.]" (AR, 685.)

150. Acting Director Brandon replied approximately 30 minutes later, writing, in full, "Thanks, Jim. At FTB now. Came to shoot it myself. I'm very concerned about public safety and share your view. Have a nice day, Tom." (AR, 685.)

151. Acting Director's Brandon's calendar for that day indicates his presence at ATF's National Training Center in Martinsburg, WV. (AR, 686.)

152. There is no other indication in the administrative record that Acting Director Brandon, or any other officer or employee of ATF test-fired, or physically re-evaluated any bump-stock device following the October 2, 2017 shooting in Las Vegas.

153. On October 7, 2017, Acting Director Brandon and other ATF officials exchanged emails under the subject line "ICYMI: The ATF Green Lit Bump Stocks Under Obama-Matt Vespa." (AR, 702.)

154. In the email exchanges ATF officials discussed a video demonstrating bump firing and noted that "a bump fire technique that doesn't use any type of device and just your finger" "can be perfected with practice[.]" (AR, 702.)

155. On October 10, 2017, Representative Carlos Curbelo proposed H.R. 3999, which would have amended the GCA to prohibit bump-stock devices. (Complaint, ¶ 91; Answer, ¶ 91.)

156. The bill, which apparently recognized that bump stocks could not be classified as machineguns, would have added a new prohibition to the GCA for "any part or combination of

parts that is designed and functions to increase the rate of fire of a semiautomatic rifle but does not convert the semiautomatic rifle into a machinegun." (Complaint, ¶ 92; Answer, ¶ 92.)

157. H.R. 3999 was never advanced in the House and lapsed with the conclusion of the 115th Congress. (Complaint, ¶ 93; Answer, ¶ 93.)

158. On October 11, 2017, Representatives Adam Kinzinger, Mike Gallagher, Martha McSally, Cathy McMorris-Rodgers, Greg Walden, Edward R. Royce, Michael T. McCaul, Steve Stivers, Fred Upton, Patrick J. Tiberi, Rodney Frelinghuysen, Joe Barton, F. James Sensenbrenner, Dave Reichert, Ted Poe, Mario Diaz-Balart, Michael C. Burgess M.D., Patrick Meehan, Tom MacArthur, Michael K. Simpson, Barbara Comstock, Gene Green, John Shimkus, Earl Blumenauer, Ileana Ros-Lehtinen, Carlos Curbelo, Pete Olson, Ed Perlmutter, Mike Coffman, Andre Carson, Darrell E. Issa, Jared Polis, Michael R. Turner, Donald M. Payne, Jr., Scott R. Tipton, Joyce Beatty, Erik Paulsen, Cheri Bustos, Peter Roskam, Kyrsten Sinema, Leonard Lance, Marc Veasey, Will Hurd, Filemon Vela, Andy Barr, Jacky Rosen, Jeff Fortenberry, Ken Calvert, Rodney Davis, Brian K. Fitzpatrick, Elise M. Stefanik, Jaime Herrera Beutler, Dennis A. Ross, Claudia Tenney, David Young, Randy Hultgren, Steve Knight, Glenn Grothman, Ryan A. Costello, John Rutherford, Gus M. Bilirakis, Mike Bishop, Brett Guthrie, Darin LaHood, Lloyd Smucker, Mike Bost, Dan Newhouse, Susan W. Brooks, Kevin Cramer, Mimi Walters, Lynn Jenkins CPA, Dave Trott, French Hill, David P. Joyce, Chris Collins, Vicky Hartzler, Don Bacon, Madeleine Z. Bordallo and Michelle Lujan Grisham sent a letter to Acting Director Brandon noting that it was their "understanding that" "a bump stock" "is technically legal under the National Firearms Act … and the Gun Control Act," and "enclosed two letters from the Firearms Technology Branch … which indicate this mechanism is not implicated by the laws that apply to machineguns." (AR, 545.)

159. The letter concluded that the Members of Congress would "be studying legislative options" and encouraging ATF to "expeditiously [] re-evaluate bump stocks and similar mechanisms to ensure full compliance with federal law." (AR, 545.)

160. Also on October 11, 2017, Michael C. Powell, Firearms Technology Specialist for FATD forwarded a document titled "Slide Fire Analysis," to senior ATF officials that had been written by Rick Vasquez, Former Assistant Chief and Acting Chief of FTB. (AR, 704.)

161. In the document, Vasquez described the FTB classification process, generally, and the reasoning behind the 2010 Slide Fire classification. (AR, 705.)

162. Vasquez explained that, generally, firearms and accessories were submitted to the FTB, where a technician would follow "Standard Operation Procedures (SOPs) that memorialize the method of evaluation." (AR, 706.)

163. "Items such as the Slide Fire bump fire stock … would have had additional scrutiny" because "a device of this nature had not been previously approved." (AR, 707.)

164. Once a tentative classification was reached, an opinion would be "sent to Chief Counsel and higher authority for review." (AR, 707.)

165. The Slide Fire classification was issued "[a]fter much study on how the device operates[.]" (AR, 707.)

166. According to Vasquez, the Slide Fire did not shoot more than one shot from a single function of the trigger because "[p]ulling and releasing of the trigger is two functions. The single function is pulling the trigger straight to the rear and causing a weapon to fire. If a shooter initially pulls and holds the trigger to the rear and a firearm continues to shoot continuously, that is a firearm shooting more than one shot with the single function of a trigger. This is critical to understanding why or why not a firearm is classified as a machinegun." (AR, 705-06.)

167. Vasquez continued, "The Slide Fire does not fire automatically with a single pull/function of the trigger. It is designed to reciprocate back and forth from the inertia of the fired cartridge. When firing a weapon with a Slide Fire, the trigger finger sits on a shelf and the trigger is pulled into the trigger finger. Once the rifle fires the weapon, due to the push and pull action of the stock and rifle, the rifle will reciprocate sufficiently to recock and reset the trigger. It then reciprocates forward and the freshly cocked weapon fires again when the trigger strikes the finger on its forward travel." (AR, 706.)

168. Thus, Vasquez concluded that the Slide Fire was "properly classified" "[a]fter lengthy analysis" as "not fit[ting] the definition of a machinegun as stated in the GCA and NFA." (AR, 706-07.)

169. On October 12, 2017, Michael R. Bouchard, President of the ATF Association, an organization consisting "of current and former employees" of ATF, sent a letter to Representative Curbelo. (AR, 708.)

170. The ATF Association defended the prior bump-stock classifications, because the "**law is very clear and it does not currently allow ATF to regulate**" "bump slide" devices. (AR, 708.)

171. The ATF Association also warned that "ATF makes rulings based on the statutory authority contained in law and **cannot change the law** to add new [prohibitions] that do not fall within the scope of existing law." (AR, 708.)

172. The ATF Association therefore endorsed seeking a legislative restriction on the availability of bump-stock devices. (AR, 709.)

173. On that same date, October 12, 2017, Earl Griffith, Chief of FATD, reported in internal emails that ATF had "been asked by DOJ to look at our legal analysis on bump stocks." (AR, 713.)

174. Griffith confirmed with ATF staff that the devices used in the Las Vegas shooting had not been internally modified in a way that would change their rates of fire. (AR, 713.)

175. On October 30, 2017, the Attorneys General for 33 states and territories sent a letter to both chambers of Congress urging a legislative ban on the devices. (AR, 717.)

176. On October 31, 2017, Representative Brian Fitzpatrick introduced H.R. 4168, "Closing the Bump-Stock Loophole Act," to amend the NFA to require registration of any "reciprocating stock, or any other device which is designed to accelerate substantially the rate of fire of a semiautomatic weapon." (Complaint, ¶ 94; Answer, ¶ 94.)

177. H.R. 4168 also failed to advance in the House and expired with the conclusion of the 115th Congress. (Complaint, ¶ 95; Answer, ¶ 95.)

178. On October 31, 2017, Senator Charles E. Grassley formally invited Acting Director Brandon to testify before the Senate Judiciary Committee "regarding the regulation of Bump Stocks." (AR, 734.)

B. ATF Suddenly Shifts Its Position

179. On November 9, 2017, Acting Director Brandon sent an email to senior staff saying that "the Department has reached a decision that ATF is to move forward with the issuance of a regulation on bump-stocks." (AR, 753.)

180. At Acting Director Brandon's "direction, [senior officials] ha[d] consulted with the Deputy Attorney General's Office as to implementation of this decision" and Acting Director

Brandon "request[ed] that the Department provide [] an informal written summary outlining the basis for OLC's conclusion that the statute allows for further regulation." (AR, 753-54.)

181. On November 14, 2017, ATF senior officials conducted a briefing with Senator Catherine Cortez-Masto. (AR, 757.)

182. During the briefing, ATF Chief of Staff Allen told the senator "that a legislative fix is straight forward and direct whereas an attempt to fix this in a regulatory manner[] would be challenging given that the definition of automatic would have to be reinterpreted." (AR, 759.)

183. On November 28, 2017, Joseph Lombardo, Sheriff of Clark County Nevada, sent a letter to the Senate Judiciary Committee noting that "[a]t a recent meeting of the Major Cities Chiefs Association, the Director of the Bureau of Alcohol, Tobacco and Firearms (ATF) reported that current legislative authority did not extend to 'bump stock' devices." (AR, 760.)

184. Lombardo also wrote in support of legislation to "giv[e] the ATF the ability and resources needed to perform their duties to include the evaluation, regulation and potential restriction of these types of devices." (AR, 760.)

185. On December 5, 2017, ATF sent letters to Members of Congress, informing them that the agency had initiated an Advance Notice of Proposed Rulemaking (ANPRM) to propose a regulatory ban on bump-stock devices. (AR, 761, 762, 763, 764.)

186. On December 6, 2017, Acting Director Brandon testified before the Senate Judiciary Committee. (AR, 765.)

187. During the testimony, Acting Director Brandon said, "After a thorough review of the options available, we decided to begin the process of promulgating a federal regulation interpreting the definition of 'machinegun' under the Gun Control Act and National Firearms Act to clarify whether certain bump-stock devices fall within that definition." (AR, 769.)

188. On December 11, 2017, ATF also responded to earlier inquiries from Members of Congress informing them of the ANPRM process. (AR, 540, 543, 552.)

189. On December 26, 2017, ATF published its ANPRM asking for public comment on whether bump stocks had been properly classified as "accessories" under federal law. (82 Fed. Reg. 60929 (Dec. 26, 2017); AR, 773.)

190. On February 20, 2018, President Trump issued a memorandum entitled, "Presidential Memorandum on the Application of the Definition of Machinegun to 'Bump Fire' Stocks and Other Similar Devices." (AR, 790.)

191. In the memorandum President Trump "direct[ed] the Department of Justice to dedicate all available resources" "to propose for notice and comment a rule banning all devices that turn legal weapons into machineguns" as "expeditiously as possible." (AR, 790.)

192. On February 20, 2018, Senator Feinstein issued a press release in response to the presidential memo, which said, "The ATF currently lacks authority under the law to ban bump stocks. The agency made this clear in a 2013 letter to Congress, writing that 'stocks of this type are not subject to the provisions of federal firearms statutes.' The ATF director said the same thing to police chiefs a few months ago, which they confirmed in an open Judiciary Committee hearing." (Complaint, ¶ 99; Answer, ¶ 99; *available at* https://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=924D0732-EAF8-4343-952E-9DEF34066B9D.)

193. On February 25, 2018, Acting Director Brandon sent an email to senior ATF officials quoting Senator Richard Blumenthal as saying, "ATF has already said it doesn't have authority to ban bump stocks under current law[.] I think ATF could have been more aggressive

and proactive and reached [a] different conclusion, but they chose the safer but less-safety minded route. So ATF will be hard-pressed to reverse itself." (AR, 1020.)

194. On February 28, 2018, Senator Jeff Flake introduced S. 2475, the "Banning Unlawful Machinegun Parts Act of 2018," which would have amended both the NFA and the GCA to *prospectively* ban any unregistered device that "materially increases the rate of fire of the firearm" or "approximates the action or rate of fire of a machinegun." (Complaint, ¶ 100; Answer, ¶ 100.)

195. Like H.R. 3947 and H.R. 3999, this legislation recognized that such devices were "not a machinegun" under existing definitions. (Complaint, ¶ 101; Answer, ¶ 101.)

196. S. 2475 did not advance in the Senate and expired at the conclusion of the 115th Congress. (Complaint, ¶ 102; Answer, ¶ 102.)

197. On March 16, 2018, the Senate Judiciary Committee held a hearing where it considered S. 1916, Senator Feinstein's bump-stock bill. (AR, 1095.)

198. At the hearing ATF Acting Director Brandon testified that legislation would be "clearly the best route" to attempt to regulate bump stocks, even though ATF had by then already issued the ANPRM. (AR, 1095.)

199. Acting Director Brandon also testified that on October 1, 2017, he had consulted with "technical experts," "firearms experts" and "lawyers" within ATF, and the consensus within the agency was that "bump stocks" "didn't fall within the Gun Control Act and the National Firearms Act." (AR, 1094.)

200. Acting Director Brandon testified, however, that he had since changed his position after he had gone "outside and over to DOJ." (AR, 1094.)

201. The administrative record is devoid of any commentary or input from FATD concerning when or precisely why ATF change its interpretation.

202. S. 1916 did not advance from the Judiciary Committee and expired at the conclusion of the 115th Congress. (Complaint, ¶ 107; Answer, ¶ 107.)

203. Senator Feinstein issued a statement on March 23, 2018, saying in full:

> Until today, the ATF has consistently stated that bump stocks could not be banned through regulation because they do not fall under the legal definition of a machine gun.
>
> Now, the department has done an about face, claiming that bump stocks do fall under the legal definition of a machine gun and it can ban them through regulations. The fact that ATF said as recently as April 2017 that it lacks this authority gives the gun lobby and its allies even more reason to file a lawsuit to block the regulations.
>
> Unbelievably, the regulation hinges on a dubious analysis claiming that bumping the trigger is not the same as pulling it. The gun lobby and manufacturers will have a field day with this reasoning. What's more, the regulation does not ban all devices that accelerate a semi-automatic weapon[']s rate of fire to that of a machine gun.
>
> Both Justice Department and ATF lawyers know that legislation is the only way to ban bump stocks. The law has not changed since 1986, and it must be amended to cover bump stocks and other dangerous devices like trigger cranks. Our bill does this—the regulation does not.

(Complaint, ¶ 108; Answer, ¶ 108; *available at* https://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=5131CB84-7855-4622-843D-97B270067E13.)

204. On March 16, 2018, Acting Director Brandon sent a letter to the Attorney General with ATF's conclusions from the ANPRM. (AR, 1240.)

205. In the memo Acting Director Brandon noted that "other bump-stock-type devices currently on the market, including those recovered from the Las Vegas shooting, have not been regulated by ATF as machineguns under the GCA or NFA." (AR, 1240.)

206. Acting Director Brandon concluded, "ATF has now determined, based on its interpretation of the definition of 'machinegun,' that all bump-stock-type devices that harness recoil energy using an internal spring or similar mechanism, or in conjunction with the shooter's manual motions, convert legal semiautomatic firearms into machineguns." (AR, 1240.)

IV. THE FINAL RULE

207. On March 29, 2018, ATF issued a "Notice of Proposed Rulemaking," (NPRM) proposing to classify bump stocks as machineguns and to amend ATF's various definitions of machinegun in the Code of Federal Regulations. (83 Fed. Reg. 13442 (Mar. 29, 2018); AR, 1242.)

208. The NPRM recounted how it had been issued "in response" to correspondence it had received "from members of the United States Senate and the United States House of Representatives, as well as nongovernmental organizations," and at the prompting of President Trump in his presidential memorandum, all "[f]ollowing the mass shooting in Las Vegas on October 1, 2017." 83 Fed. Reg. at 13443, 13446.

209. Following public comments on the NPRM, ATF officials raised concerns about whether the proposed ban on bump-stock devices constituted a taking for purposes of the Fifth Amendment. (AR, 1375.)

210. In one email, an ATF official noted that "[b]ump stocks were deemed legal for 8 years" and questioned the application of the Fifth Amendment. (AR, 1375.)

211. In response, other ATF officials said that a takings claim would not be valid so long as "possession of the property at issue is expressly forbidden." (AR, 1374.)

212. On December 26, 2018, the Attorney General and ATF issued the Final Rule. (83 Fed. Reg. at 66514; AR, 4032.)

213. The Final Rule alters the statutory definition of a "machinegun" by amending three regulations: 27 C.F.R. §§ 447.11, 478.11 and 479.11. *Final Rule*, 83 Fed. Reg. at 66553-54.

214. The amendment to Section 447.11 modifies the definition of "machinegun" under the Arms Export Control Act, 22 U.S.C. § 2778, pursuant to the President's authority to designate items on the United States Munitions List. *Final Rule*, 83 Fed. Reg. at 66553-54.

215. The amendment to Section 478.11 modifies the definition of machinegun under the GCA, purportedly under the Attorney General's authority set out in 18 U.S.C. § 926(a). *Final Rule*, 83 Fed. Reg. at 66554.

216. The amendment to Section 479.11 modifies the definition of machinegun under the NFA, purportedly under the authorization of 26 U.S.C. § 7805. *Final Rule*, 83 Fed. Reg. at 66554.

217. For all provisions, a "machinegun" means any weapon

> which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without 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. For purposes of this definition, the term 'automatically' as it modifies 'shoots, is designed to shoot, or can be readily restored to shoot,' means functioning as the result of a self-acting or self-regulating mechanism that allows the firing of multiple rounds through a single function of the trigger; and 'single function of the trigger' means *a single pull of the trigger* and analogous motions. The term 'machinegun' includes a bump-stock-type device, i.e., a device that allows a semi-automatic firearm to shoot more than one shot with a single pull of the trigger by harnessing the recoil energy of the semi-automatic firearm to which it is affixed *so that the trigger resets and continues firing without additional physical manipulation of the trigger by the shooter*.

Final Rule, 83 Fed. Reg. at 66553-54 (emphasis added).

218. Because these devices had been previously approved by ATF for sale, "current possessors of these devices will be required to destroy the devices or abandon them at an ATF office prior to the effective date of the rule." *Final Rule*, 83 Fed. Reg. at 66514.

219. The rule took effect on March 26, 2019. *Final Rule*, 83 Fed. Reg. at 66555.

220. ATF estimated that as many as 520,000 bump-stock devices were sold legally between 2010 and 2018, each at a price of between $179.95 and $425.95. *Final Rule*, 83 Fed. Reg. at 66547.

221. In total, ATF estimated that Americans spent $102.5 million on the purchase of these devices, all of which have now been ordered to be destroyed or surrendered to ATF. *Final Rule*, 83 Fed. Reg. at 66547.

V. THE FINAL RULE'S IMPACT ON MR. CARGILL

222. In April 2018, Mr. Cargill lawfully acquired two Slide Fire bump-stock devices, which were sold with a copy of approval letters from ATF for use in recreational shooting and target practice. (Complaint, ¶ 123; Answer, ¶ 123.)

223. In response to the Final Rule, on March 25, 2019, Mr. Cargill surrendered both of his Slide Fire devices to ATF but ATF has agreed to preserve his Slide Fire devices pending the outcome of this lawsuit. (Complaint, ¶ 124; Answer, ¶ 124.)

VI. ATF'S LITIGATING POSITION

224. ATF has defended the Final Rule in other challenges across the country. *See, e.g.*, *Guedes, et al., v. ATF, et al.*, No. 18-cv-2988 (D. D.C.); *Aposhian v. Barr, et al.*, No. 2:19-cv-37 (D. Utah).

225. In *Guedes v. ATF*, the plaintiffs sought a preliminary injunction to prevent the Final Rule from taking effect.

226. The district court, as well as the Court of Appeals for the District of Columbia Circuit denied the injunction, and the United States Supreme Court denied review of the interlocutory appeal.

227. In ATF's Brief in Opposition to a Petition for Certiorari in *Guedes v. ATF*, the Solicitor General of the United States conceded that it lacked "the authority to engage in [] 'gap-filling' with respect to the classification of the firearms at issue here," and said that the "court of appeals erred in concluding otherwise." Br. for the Respondents in Opp. at 14, 25, *Guedes v. ATF*, No. 19-296 (Dec. 4, 2019).

228. The Solicitor General also wrote, "ATF has never proceeded by legislative rule in determining whether particular devices are machine guns, it has not asserted the statutory authority to do so, and it did not do so here." Br. for the Respondents in Opp. at 14, *Guedes v. ATF*, No. 19-296 (Dec. 4, 2019).

229. The Solicitor General explained that there was no "reason to think that" "Congress intended to confer on the Attorney General any legislative-rulemaking authority to fill in gaps" "in the course of enacting a criminal prohibition on possession of new machineguns[.]" Br. for the Respondents in Opp. at 25-26, *Guedes v. ATF*, No. 19-296 (Dec. 4, 2019).

230. Indeed, the Solicitor General argued that "while Congress has specifically criminalized the violation of regulations governing licensing for firearms manufacturers, importers, dealers, and collectors, it has given no indication that such consequences attach to all regulations issued pursuant to the Attorney General's rulemaking authority." Br. for the Respondents in Opp. at 27, *Guedes v. ATF*, No. 19-296 (Dec. 4, 2019).

231. In defense of the Final Rule the Solicitor General said, "Contrary to the court of appeals' premise, however, the Department of Justice did not issue the rule as an exercise of

delegated authority to issue regulations 'with the force of law.'" Br. for the Respondents in Opp. at 20, *Guedes v. ATF*, No. 19-296 (Dec. 4, 2019).

232. Instead, the Solicitor General argued that the Final Rule merely represented an interpretation of existing legal requirements, which meant that all prior owners of bump stocks had violated federal law. Br. for the Respondents in Opp. at 20, 23-24, *Guedes v. ATF*, No. 19-296 (Dec. 4, 2019).

233. The Solicitor General noted that the "government has also consistently maintained that *Chevron* is not applicable (and that it would not apply in any future criminal prosecution), and petitioners agree." Br. for the Respondents in Opp. at 14, *Guedes v. ATF*, No. 19-296 (Dec. 4, 2019).

234. The Solicitor General asserted that the "court of appeals erred in concluding otherwise." Br. for the Respondents in Opp. at 14, *Guedes v. ATF*, No. 19-296 (Dec. 4, 2019).

235. The Solicitor General said simply, "*Chevron* does not apply to the rule at issue here." Br. for the Respondents in Opp. at 27, *Guedes v. ATF*, No. 19-296 (Dec. 4, 2019).

236. In *Aposhian v. Barr*, the plaintiff also sought a preliminary injunction.

237. The district court denied that request, and the United States Court of Appeals for the Tenth Circuit is currently reviewing that denial.

238. In its briefing in *Aposhian v. Barr*, ATF again conceded that it lacked the authority to issue substantive regulations concerning what constituted a prohibited machinegun. Br. for Appellees at 40-41, *Aposhian v. Barr*, No. 19-4036 (10th Cir. Aug. 26, 2019).

239. ATF wrote that it agreed that "Congress did not expressly task the Attorney General with determining the scope of the criminal prohibition on machinegun possession" and that the "statutory scheme does not … appear to provide the Attorney General the authority to

engage in 'gap-filling' interpretations of what qualifies as a 'machinegun[.]'" Br. for Appellees at 40-41, *Aposhian v. Barr*, No. 19-4036 (10th Cir. Aug. 26, 2019).

240. ATF further argued that "there is no ambiguity" in the "terms used to define 'machinegun' in the National Firearms Act[.]" Br. for Appellees at 35-36, *Aposhian v. Barr*, No. 19-4036 (10th Cir. Aug. 26, 2019).

241. Thus, ATF argued that the Final Rule is valid only as an "interpretive" rule that does nothing more than provide "the best interpretation of the statute" that bump stocks "were machineguns at the time of classification[.]" Br. for Appellees at 36, 38, 40-41, *Aposhian v. Barr*, No. 19-4036 (10th Cir. Aug. 26, 2019).

PROPOSED CONCLUSIONS OF LAW

I. LEGAL OVERVIEW

242. Article I, § 1 of the U.S. Constitution vests "[a]ll legislative powers" in the Congress. Article I, § 7, Clauses 2 and 3 of the Constitution require that "Every Bill" shall be passed by both the House of Representatives and the Senate and signed by the President "before it [may] become a Law." Article II, § 3 of the Constitution directs that the President "shall take Care that the Law be faithfully executed … ."

243. This separate constitutional structure divides the branches of government. "Even before the birth of this country, separation of powers was known to be a defense against tyranny," and "it remains a basic principle of our constitutional scheme that one branch of the Government may not intrude upon the central prerogatives of another." *Loving v. United States*, 517 U.S. 748, 756-57 (1996).

244. No agency has any inherent power to make law. Thus, "an agency literally has no power to act … unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). And an agency may only "fill [] statutory gap[s]" left by "ambiguities in statutes within an agency's jurisdiction to administer" to the extent Congress "delegated" such responsibility to the agency. *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005). Congressional delegations of authority can either be "express" or "implicit," but even if an agency asserts implied authority, there must first exist "a gap for the agency to fill." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984).

245. "Agency authority may not be lightly presumed." *Texas v. United States*, 497 F.3d 491, 502 (5th Cir. 2007) (internal citation and quotation marks omitted). "[M]ere ambiguity in a statute is not evidence of congressional delegation of authority." *Id*. (internal citation and

quotation marks omitted). A court does "not merely presume that a power is delegated if Congress does not expressly withhold it, as then agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well." *Contender Farms, L.L.P. v. U.S. Dep't of Agric.*, 779 F.3d 258, 269 (5th Cir. 2015) (internal citation and quotation marks omitted). "It stands to reason that when Congress has made an explicit delegation of authority to an agency, Congress did not intend to delegate additional authority *sub silentio*." *Texas*, 497 F.3d at 501. "When Congress has directly addressed the extent of authority delegated to an administrative agency, neither the agency nor the courts are free to assume that Congress intended the Secretary to act in situations left unspoken." *Id*. at 502.

246. Even if such authority is delegated, an agency can only fill in any "gaps left" in a statute. *Chevron*, 467 U.S. at 843 (internal citation and quotation marks omitted). "If uncertainty does not exist, there is no plausible reason for deference. The regulation then just means what it means—and the court must give it effect, as the court would any law." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019). Thus, "[i]f the statute is not ambiguous" any further attempt to define its terms is "invalid and unenforceable." *New Mexico v. Dep't of Interior*, 854 F.3d 1207, 1224, 1231 (10th Cir. 2017). In other words—"If the statute is not ambiguous, [the] inquiry ends there." *Keller Tank Servs. II, Inc. v. Comm'r of Internal Revenue*, 854 F.3d 1178, 1196 (10th Cir. 2017); *accord Haug v. Bank of Am., N.A.*, 317 F.3d 832, 835 (8th Cir. 2003) ("If the intent of the statute is clear, the judicial inquiry ends.").

247. In "review[ing] an agency's construction of [a] statute which it administers," the first question then is "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. "If the intent of Congress is clear, 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." *Id.* Under this analysis, the court "must reject administrative constructions which are contrary to clear congressional intent," because the "judiciary is the final authority on issues of statutory construction." *Id.* at n. 9; *see also Webster v. Luther*, 163 U.S. 331, 342 (1896) ("[T]his court has often said that it will not permit the practice of an executive department to defeat the obvious purpose of a statute.").

248. The Administrative Procedure Act (APA) separately allows a Court to "hold unlawful and set aside" an agency's rule that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," "contrary to constitutional right" or "in excess of statutory jurisdiction [or] authority." 5 U.S.C. § 706(2)(A), (B), (C).

249. Finally, even when agency action is otherwise permitted, it can still constitute an invalid exercise of legislative power. Article I of the Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." U.S. Const. art. I, § 1. "[T]he integrity and maintenance of the system of government ordained by the Constitution mandate that Congress generally cannot delegate its legislative power to another Branch." *Mistretta v. United States*, 488 U.S. 361, 371-72 (1989) (internal citation and quotation marks omitted). Furthermore, "the lawmaking function belongs to Congress … and may not be conveyed to another branch or entity." *Loving*, 517 U.S. at 758. Congress may not "abdicate or [] transfer to others the essential legislative functions with which it is thus vested." *A.L.A. Schecter Poultry Corp. v. United States*, 295 U.S. 495, 529 (1935). The President, acting through his agencies, therefore, may not exercise Congress's legislative power to declare entirely "what circumstances … should be forbidden" by law. *Panama Refining Co. v. Ryan*, 293 U.S. 388, 418-19 (1935).

II. CONCLUSIONS OF LAW

250. The Final Rule is invalid for six independent reasons. First, the Final Rule is ultra vires because ATF lacks authority to issue any legislative rules, such as the Final Rule. Second, even if ATF could issue some legislative rules, there is no statutory ambiguity in the term "machinegun," and thus ATF has no authority to issue a legislative rule filling the gap left in that term. Third, irrespective of the other defects, the Final Rule conflicts with the statutory definition of a machinegun and thus exceeds ATF's authority. Fourth, even if the analysis progressed beyond these infirmities, the Final Rule constitutes an invalid and unreasonable interpretation of the statutory definition of a machinegun. Fifth, because ATF relied wholly on impermissible factors in enacting the Final Rule, it constitutes arbitrary and capricious agency action. Sixth, even if the foregoing defects could be disregarded, the Final Rule would be an exercise of legislative power that has been improperly divested by Congress.

A. As Set out in Plaintiff's Complaint, Counts I, III, IV, V, VII, and VIII, ATF Had No Authority to Issue the Final Rule Because It Is a Legislative Rule

251. ATF has correctly acknowledged that it lacks authority to issue any legislative rule concerning the definition of a machinegun. *See* Br. for the Respondents in Opp. at 14, 25, *Guedes v. ATF*, No. 19-296, (Dec. 4, 2019); Br. for Appellees at 40-41, *Aposhian v. Barr*, No. 19-4036 (10th Cir. Aug. 26, 2019). But because the Final Rule is legislative, and purports to impose new legal obligations, it exceeds ATF's authority. The Final Rule is invalid pursuant to Article I, § 1, Article I, § 7, Clauses 2 and 3 and Article II, § 3 of the U.S. Constitution and pursuant to the APA, 5 U.S.C. §§ 706(A), (C), as set out in Counts, I, III, IV, V, VII and VIII of Plaintiff's Complaint.

252. As a threshold issue, the Final Rule is a legislative rule. The Final Rule attempts to rewrite the definition of "machinegun" set out in the NFA at 26 U.S.C. § 5845(b), and by its

own terms claims to be much more than the bare interpretation ATF has the power to issue. Even though the Court of Appeals for the District of Columbia Circuit upheld the Final Rule on other grounds, the court had no difficulty rejecting ATF's argument that the rule was a mere interpretation. As the court said, "All pertinent indicia of agency intent confirm that the Bump-Stock Rule is a legislative rule." *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 920 F.3d 1, 18 (D.C. Cir. 2019).

253. Agency statements usually take one of two forms: "interpretive rules" or "legislative rules." *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1204, 1206 (2015). A "legislative rule," also known as a substantive rule, is "issued by an agency pursuant to statutory authority and has the force and effect of law." *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 139 S. Ct. 2051, 2055 (2019) (internal quotation omitted). A legislative rule "affect[s] individual rights" and "create[es] new law." *Davidson v. Glickman*, 169 F.3d 996, 999 (5th Cir. 1999). "[N]onlegislative rules do not have the force of law[.]" *U.S. Dep't of Labor v. Kast Metals Corp.*, 744 F.2d 1145, 1152 (5th Cir. 1984). "[T]his Court is not bound by an administrative agency's classification of its own action"—"A paisley ribbon will not make up for damaged goods; the substance, not the label, is determinative." *Id*. at 1149.

254. The *Guedes* court recognized that three factors conclusively established that the Final Rule is a legislative rule. *See* 920 F.3d at 18-19. First, the Final Rule "unequivocally bespeaks an effort by the Bureau to adjust the legal rights and obligations of bump-stock owners—i.e., to act with the force of law. The Rule makes clear that "possession of bump-stock devices *will become unlawful* only as of the Rule's effective date, not before." *Id*. at 18.

255. Indeed:

> the Rule informs bump-stock owners that their devices '*will be prohibited when* this rule becomes effective.' 83 Fed. Reg. at 66,514 (emphasis added). It

> correspondingly assures bump-stock owners that '[a]nyone currently in possession of a bump-stock-type device *is not acting unlawfully unless* they fail to relinquish or destroy their device after the effective date of this regulation.' *Id*. at 66,523 (emphasis added). And the Rule 'provides specific information about acceptable methods of disposal, as well as the timeframe under which disposal must be accomplished to *avoid violating* 18 U.S.C. § 922(o).' *Id*. at 66,530 (emphasis added). Reinforcing the point, the Rule says it will '*criminalize only future conduct, not past possession* of bumpstock-type devices that ceases by the effective date.' *Id*. at 66,525 (emphasis added).

Id.

256. Second, "[t]he Rule's publication in the Code of Federal Regulations also indicates that it is a legislative rule." *Id.* at 19. By statute, publication in the Code of Federal Regulations is limited to rules "having general applicability and *legal effect*." 44 U.S.C. § 1510 (emphasis added). The Final Rule also purports to amend three sections of the code, 27 C.F.R. §§ 447.11, 478.11, 479.11. 83 Fed. Reg. at 66519. "Those sorts of amendments would be highly unusual for a mere interpretive rule." *Guedes*, 920 F.3d at 19.

257. Third, "the agency has explicitly invoked its general legislative authority" by "invoking two separate delegations of legislative authority." *Id*. The Final Rule cites to 18 U.S.C. § 926(a) and 26 U.S.C. § 7805(a) and claims that these provisions vest "the responsibility for administering and enforcing the NFA and GCA" in the Attorney General. 83 Fed. Reg. at 66515.

258. "In short, the Rule confirms throughout, in numerous ways, that it intends to speak with the force of law." *Guedes*, 920 F.3d at 19.

259. There is yet another reason the Final Rule is legislative that was not considered by the Guedes Court—it has a significant economic impact. It has long been held "that agency action cannot be a general statement of policy if it substantially affects the rights of persons subject to agency regulations." *Pickus v. U.S. Bd. of Parole*, 507 F.2d 1107, 1112 (D.C. Cir. 1974) (collecting cases). "The most important factor in differentiating between binding and

nonbinding actions is the actual legal effect (or lack thereof) of the agency action in question." *Ass'n of Flight Attendants-CWA, AFL-CIO v. Huerta*, 785 F.3d 710, 717 (D.C. Cir. 2015) (internal citation and quotation marks omitted). Legislative rules "produce [] significant effects on private interests." *Gulf Restoration Network v. McCarthy*, 783 F.3d 227, 236 (5th Cir. 2015) (internal citation and quotation marks omitted). By its own estimation the Final Rule voids the lawful sale of as many as 520,000 bump-stock devices, with an economic impact of approximately $102.5 million. *See Final Rule*, 83 Fed. Reg. at 66547. Such a massive financial impact is quintessentially the type of "significant effect[] on private interests" that only a legislative rule could produce. *See Gulf Restoration Network*, 783 F.3d at 236.

260. Because the Final Rule is legislative, it exceeds ATF's authority. ATF is correct that there is no "reason to think that" "Congress intended to confer on the Attorney General any legislative-rulemaking authority to fill in gaps" "in the course of enacting a criminal prohibition on possession of new machineguns[.]" *See* Br. for the Respondents in Opp. at 25-26, *Guedes v. ATF*, No. 19-296 (Dec. 4, 2019). But the Final Rule purports to amend the statutory definition of machinegun found in the NFA under the authorization of 26 U.S.C. § 7805. *Final Rule*, 83 Fed. Reg. at 66554. And it purports to amend the same statutory definition as it applies to the GCA under the Attorney General's authority set out in 18 U.S.C. § 926(a). *Final Rule*, 83 Fed. Reg. at 66554. As ATF now acknowledges, neither provision allows ATF to issue legislative rules creating new criminal prohibitions.

261. First, the Attorney General has no legislative rulemaking authority under 26 U.S.C. § 7805(a) because that authority was never "expressly given" to him under Title 26. Indeed, the only power expressly given to the Attorney General or ATF under the NFA was that of "administration and enforcement" of the statute and "interpretation[]" of its terms. 26 U.S.C.

§§ 7801(a)(1)(2)(A), (a)(2)(B). Issuing a legislative rule that rewrites a statutory definition and creates half a million new felons is not an act of "administration and enforcement" that the Attorney General is empowered to undertake, nor is it an act of "interpretation[]" authorized to ATF. Indeed, ATF now correctly agrees that a legislative regulation "with the force of law" exceeds ATF's interpretive authority under Section 7805. Br. for the Respondents in Opp. at 20, *Guedes v. ATF*, No. 19-296 (Dec. 4, 2019); Br. for Appellees at 40-41, *Aposhian v. Barr*, No. 19-4036 (10th Cir. Aug. 26, 2019). The Attorney General and ATF therefore had no power to issue the Final Rule as it relates to the NFA.

262. The Attorney General's authority under the GCA also cannot support the Final Rule. The GCA allows the Attorney General to "prescribe only such rules and regulations as are necessary to carry out the provisions of" the GCA. 18 U.S.C. § 926(a). Here too ATF acknowledges this authority does not allow it to issue new legislative rules concerning the scope of criminal prohibitions. Br. for the Respondents in Opp. at 15, 20, *Guedes v. ATF*, No. 19-296 (Dec. 4, 2019); Br. for Appellees at 40-41, *Aposhian v. Barr*, No. 19-4036 (10th Cir. Aug. 26, 2019). The Final Rule goes far beyond a housekeeping regulation designed to implement the GCA of the kind permitted by Section 926(a). The Attorney General and ATF therefore had no power to issue the Final Rule as it relates to the GCA.

263. Furthermore, the presence of the delegations of interpretive authority under 26 U.S.C. § 7805(a) and implementing authority under 18 U.S.C. § 926(a) confirms that Congress withheld a different type of legislative rulemaking authority. Mindful that "[a]gency authority may not be lightly presumed," Congress' "explicit delegation" of such limited authority is proof that it "did not intend to delegate additional authority *sub silentio*." *See Texas*, 497 F.3d at 501-02. After all, "Congress has directly addressed the extent of authority delegated" to the Attorney

General and ATF, and thus "neither the agency nor the courts are free to assume that Congress intended the [agencies] to act in situations left unspoken." *See id*. at 502.

B. As Set out in Plaintiff's Complaint, Counts I, III, IV, V, VII, and VIII, ATF Had No Authority to Issue the Final Rule Because There Is No Statutory Gap to Fill

264. Next, even if ATF could issue some legislative rules, there is no statutory ambiguity in the term "machinegun," and thus ATF has no authority to issue a legislative rule filling a gap left in that term. ATF has argued for decades that the term "machinegun" is not ambiguous, which is a point ATF maintains in related litigation. *See* Br. for Appellees at 35-36, *Aposhian v. Barr*, No. 19-4036 (10th Cir. Aug. 26, 2019) ("there is no ambiguity" in the "terms used to define 'machinegun' in the National Firearms Act[.]"). Without a statutory ambiguity, there is no gap for ATF to attempt to fill through its legislative rule. The Final Rule is therefore ultra vires and invalid pursuant to Article I, § 1, Article I § 7, Clauses 2 and 3 and Article II, § 3 of the U.S. Constitution and pursuant to the APA, 5 U.S.C. §§ 706(A), (C), as set out in Counts, I, III, IV, V, VII and VIII of Plaintiff's Complaint.

265. Agency rulemaking authority "comes into play, of course, only as a consequence of statutory ambiguity, and then only if the reviewing court finds an implicit delegation of authority to the agency." *Texas*, 497 F.3d at 501. In other words, there must be "gap[s]" for an agency to fill. *Chevron*, 467 U.S. at 843 (internal citation and quotation marks omitted). A statute that is unambiguous "means that there is 'no gap for the agency to fill' and thus 'no room for agency discretion.'" *United States v. Home Concrete & Supply, LLC*, 566 U.S. 478, 487 (2012) (quoting *Brand X Internet Servs.*, 545 U.S. at 982-83). Without a gap from statutory ambiguity, an agency has no power to act, and any further attempt to define the terms in a statute is "invalid and unenforceable." *New Mexico*, 854 F.3d at 1224, 1231.

266. Of course, 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"); *United States v. Day*, 700 F.3d 713, 725 (4th Cir. 2012) ("It is beyond cavil that a criminal statute need not define explicitly every last term within its text[.]"). If agencies can rewrite statutes by defining every undefined term, Congress cannot control the law. No matter how clear the statute, some term will always be left undefined—or else the definitions themselves will have undefined terms in them. But "silence does not always constitute a gap an agency may fill"; often it "simply marks the point where Congress decided to stop authorization to regulate." *Oregon Rest. & Lodging Ass'n v. Perez*, 843 F.3d 355, 360, 362 (9th Cir. 2016) (O'Scannlain, J., dissenting from the denial of rehearing en banc on behalf of 10 judges). Indeed, reading Congress' silence as an implicit grant of authority is both "a caricature of *Chevron*" and a "notion [] entirely alien to our system of laws." *Id*. at 359-60.

267. Further, a court has a duty to "exhaust all the traditional tools of construction" before "wav[ing] the ambiguity flag." *Kisor*, 139 S.Ct. at 2415 (internal citations and quotation marks omitted). "[O]nly when that legal toolkit is empty and the interpretive question still has no single right answer can a judge conclude that it is more one of policy than of law." *Id*. (internal citations and quotation marks omitted). "Deference in that circumstance would permit the agency, under the guise of interpreting a regulation, to create de facto a new regulation." *Id*. (internal citation and quotation marks omitted).

268. As discussed, the statute defines a "machinegun" as "any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger." 26 U.S.C. § 5845(b).

269. In the course of criminally prosecuting people for violating the statute at issue here, DOJ successfully argued for decades that the precise terms it now seeks to redefine were 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 statutory 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).

270. Courts also have ruled specifically that 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).

271. 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. Semiautomatic weapons existed at the time the NFA was drafted and passed in 1934. *See Hearing on H.R. 9066, House Ways and Means Comm.*, 73rd Cong., 6 (1934) (Testimony of Homer S. Cummings, Attorney General of the United States). Over opposition from the industry, Congress included those weapons under the original prohibition. *See id*. at 40 (Testimony of Karl T. Frederick, President National Rifle

Association of America). But Congress then restored that distinction in the 1968 amendments. Gun Control Act, tit. II, § 201 (codified at 26 U.S.C. § 5845(b)). By restoring the statutory distinction between semiautomatic weapons and machineguns, Congress unmistakably recognized a difference in the internal mechanism that allowed a machinegun to fire multiple rounds continuously with one function of the trigger and a semiautomatic weapon, which fires only one round with each function of the trigger. *See Guedes*, 920 F.3d at 43 (Henderson, J., dissenting) ("[T]he Bump Stock Rule reinterprets 'automatically' to mean what 'semiautomatically' did in 1934—a pull of the trigger *plus*. The Congress deleted 'semiautomatically' from the statute in 1968 and the ATF is without authority to resurrect it by regulation.").

272. ATF is therefore correct that "there is no ambiguity" in the "terms used to define 'machinegun' in the National Firearms Act[.]" Br. for Appellees at 35-36, *Aposhian v. Barr*, No. 19-4036 (10th Cir. Aug. 26, 2019). This means that ATF lacks any gap to fill through the Final Rule and lacks the authority to issue a gap-filling regulation. Because "the statute is not ambiguous" the Final Rule is "invalid and unenforceable." *See New Mexico*, 854 F.3d at 1224, 1231.

C. As Set out in Plaintiff's Complaint, Counts I, III, IV, V, VII, and VIII, ATF Had No Authority to Issue the Final Rule Because It Contradicts the Statutory Definition of a Machinegun

273. Next, the Final Rule conflicts with the statutory definition of a machinegun and thus exceeds ATF's authority even if it had been delegated legislative rulemaking power to fill a gap in the statutory terminology. The Final Rule alters the settled meaning of the statute by fundamentally altering what it means to be a semiautomatic firearm. Under the Final Rule's analysis, a weapon becomes a machinegun even if the shooter must engage the trigger

mechanism for each round fired. That restores a statutory distinction expressly eliminated in 1968. *See* Gun Control Act, tit. II, § 201 (codified at 26 U.S.C. § 5845(b)). The Final Rule is an invalid attempt to rewrite the statute pursuant to Article I, § 1, Article I § 7, Clauses 2 and 3 and Article II, § 3 of the U.S. Constitution and pursuant to the APA, 5 U.S.C. §§ 706(A), (C), as set out in Counts, I, III, IV, V, VII and VIII of Plaintiff's Complaint.

274. "It's a fundamental canon of statutory construction that words generally should be interpreted as taking their ordinary meaning at the time Congress enacted the statute." *New Prime Inc. v. Oliveira*, 586 U.S. ---, 139 S.Ct. 532, 539 (2019) (internal citations and quotation marks omitted). Otherwise, courts "would risk amending legislation outside the single, finely wrought and exhaustively considered, procedure the Constitution commands." *Id.* (internal citations and quotation marks omitted). Courts "would risk, too, upsetting reliance interests in the settled meaning of a statute." *Id.*

275. The Supreme Court has already explained that the current definition of a machinegun

> 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).

276. 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.

277. ATF has long recognized that bump-stock devices are not machineguns because they require manual manipulation of the firearm between firing of rounds in order to reset and engage the trigger mechanism between shots. ATF has publicly stated at least 27 times, either in classification rulings or formal letters defending those classifications, that bump-stock devices are not machineguns. (*See* AR, 106, 111, 116, 126, 134, 138, 145, 157, 160, 167, 170, 175, 179, 191, 198, 201, 206, 218, 235, 238, 242, 250, 258, 263, 268, 272, 275.) The reasoning of these 24 classification rulings is consistent—in each case ATF determined that the shooter must apply constant forward pressure with the non-shooting hand and constant rearward pressure with the shooting hand to manually engage the triggering mechanism between the firing of rounds. (*See* AR, 106, 111, 116, 126, 134, 138, 157, 160, 167, 171, 179, 191, 201, 206, 218, 235, 238, 242, 250, 258, 263, 268, 272, 275.) In other words, after every round is fired, the trigger is "mechanically reset" and the shooter must "pull[] the firearm forward" again to re-engage the trigger. (AR, 106.) "Each shot" is therefore "fired by a single function of the trigger." (AR, 106.) This is not automatic firing as contemplated by the statute.

278. ATF's prior classifications were premised on intensive fact-finding and manual review and test-firing of the devices. All classifications are based on FTB/FATD's manual inspection of the firearms. (*See* Complaint, ¶¶ 33-37; Answer, ¶¶ 33-37.) Indeed, the Administrative Record is filled with examples of circumstances where FTB has declined to classify devices because the requesting party had failed to furnish a sample, and FTB could only make classifications after test-firing a device. (*See* AR, 84, 95, 101, 102, 188, 210, 212, 228, 231, 233.) As FTB wrote in one such letter, "FTB cannot make a classification on pictures, diagrams, or theory." (AR, 95.) And based on this manual review, ATF approved at least 24

bump-stock devices. (*See* AR, 106, 111, 116, 126, 134, 138, 157, 160, 167, 171, 179, 191, 201, 206, 218, 235, 238, 242, 250, 258, 263, 268, 272, 275.)

279. ATF's bump-stock approvals also represented an agency effort to correct obvious errors in earlier classifications and maintain a consistent and logical distinction between other types of machineguns. Notably, ATF has been aware of the "bump fire" technique since at least 1996 and has understood that skilled shooters can rapidly engage the trigger of a semiautomatic firearm. (AR, 72.) In what can only be understood as an ends-based interpretation, ATF then classified a shoestring as a machinegun because a skilled shooter could use it to rapidly engage the trigger of a semiautomatic firearm, even though the shoestring, of course, contains no automatic mechanisms and the shooter must engage the trigger for each shot fired. (*See* AR, 1.) When ATF then considered spring-loaded devices, such as the Akins Accelerator, it wrestled with its own inconsistent interpretations. (*See* AR, 8, 12, 19, 22, 58, 81, 121.) But after ATF Ruling 2006-2, ATF enacted a consistent and workable understanding. (AR, 81.) Spring-loaded, or other mechanically-driven devices were understood to be machineguns because "[e]nergy from th[e] spring subsequently drives the firearm forward into its normal firing position and, in turn, causes the trigger to contact the shooter's trigger finger[.]" (AR, 82.) The same was true for devices relying on things like "a rechargeable battery." (AR, 312.) But the "absence of an accelerator spring or similar component in the submitted device prevents the device from operating automatically as described in ATF Ruling 2006-2." (AR, 138-39.)

280. Even now, ATF adheres to its basic *technical* understanding of how a bump stock operates, and reaffirms the analysis done by FTB in the prior classifications. As said in the Final Rule, "bump firing" is a shooting technique where a shooter fires a semiautomatic 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. Bump firing 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*. Bump stocks also merely facilitate bump firing and 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[.]" *Final Rule*, 83 Fed. Reg. at 66518, 66533.

281. Despite this settled meaning and technical understanding, ATF has now discarded its prior understanding of the statute. "The Rule's fatal flaw comes from its 'adding to' the statutory language in a way that is … plainly *ultra vires*. *Guedes*, 920 F.3d at 43 (Henderson, J., dissenting). 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 "invalidly expands the statutory text" by rewriting the phrase "automatically more than one shot, without manual reloading, by a single function of the trigger," in such a way as to encompass additional manual manipulation of the firearm between shots. *Id*. at 43-44. ATF's new rule therefore attempts to do what no agency may do; it "amend[s] legislation outside the single, finely wrought and exhaustively considered, procedure the Constitution commands" and "upset[s] reliance interests in the settled meaning of [the] statute." *See New Prime, Inc.*, 139 S.Ct. at 539.

282. ATF's new definition contradicts the statute, first, because 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 each shot. *Final Rule*, 83 Fed. Reg. at 66533. But "bumping" a trigger is functionally the same as "pulling" it. Even now ATF concedes that "bumping" the trigger "re-engage[s]" it between shots. *Final Rule*, 83 Fed. Reg. at 66516. And, in a dissenting opinion in the D.C. Circuit, Judge Karen LeCraft Henderson noted that "a semiautomatic rifle equipped with a bump stock *cannot* fire more than one round with a *single* function of the trigger" because "the trigger of a semiautomatic rifle must release the hammer for each individual discharge." *Guedes*, 920 F.3d at 47. Thus, ATF can only reach its preferred outcome by pretending that the well understood shooting technique of bump firing somehow does not involve additional physical manipulation of the trigger, even though it plainly does.

283. Second, the rule disregards the other physical manipulation bump firing requires. As Judge Henderson put it, "A 'machinegun,' then, is a firearm that shoots more than one round by a single trigger pull without manual reloading. The statutory definition of 'machinegun' does not include a firearm that shoots more than one round 'automatically' by a single pull of the trigger **AND THEN SOME** (that is, by 'constant forward pressure with the non-trigger hand')." *Id*. at 44. Instead of requiring that the firearm itself continuously operate "by a *single function* of the trigger," the rule's new definition 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, even though that manual manipulation is what resets the trigger before each shot with the bump firing technique.

284. Indeed, "[t]he Rule's very description of a non-mechanical bump stock manifests that its proscription is *ultra vires*:

> [Bump stock] devices replace a rifle's standard stock 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).

Guedes, 920 F.3d at 46 (Henderson, J., dissenting) (quoting *Final Rule*, 83 Fed. Reg. at 66516).

285. ATF's newly contrived view of what it means to automatically continue firing cannot be reconciled with the statute. The statute simply says that a machinegun's fire occurs "automatically" after a "single function of the trigger." 26 U.S.C. § 5845(b). 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, this still precludes the firing of each successive shot from being "automatic."

286. Next, the Final Rule improperly disregards "the longstanding distinction between 'automatic' and 'semiautomatic'" firearms, which, at the time of enactment, "depended on whether the shooter played a manual role in the loading and firing process." *Guedes*, 920 F.3d at 45 (Henderson, J., dissenting). Congress deliberately chose to include semiautomatic weapons in the original definition of a machinegun, even though this would encompass "the ordinary repeating rifle" and other weapons that would shoot "only one shot" from each trigger function. *See Hearing on H.R. 9066, House Ways and Means Comm.*, 73rd Cong., 40, 41 (1934) (Testimony of Karl T. Frederick, President National Rifle Association of America). Congress changed the law in 1968, however, and ever since that time, semiautomatic weapons have not

come under the statute's prohibition. *See Staples*, 511 U.S. at 602 n. 1. This amendment also coincided with expansion of the statute's prohibition of "destructive devices," which reflected a judgment that semiautomatic weapons were not in the same class as these other weapons. But "the Bump Stock Rule reinterprets 'automatically' to mean what 'semiautomatically' did in 1934—a pull of the trigger *plus*. The Congress deleted 'semiautomatically' from the statute in 1968 and the ATF is without authority to resurrect it by regulation." *Guedes*, 920 F.3d at 45 (Henderson, J., dissenting).

287. Finally, 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 dangerous new outcome-based interpretation expressly designed to encompass bump stocks would actually undermine prior decisions banning machineguns that initiated automatic fire from other types of triggers that did not require pulling.

288. 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).

289. 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 though, it must move backwards to precisely 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 and fire. The Final Rule therefore conflicts with the statutory language for this reason as well.

D. As Set out in Plaintiff's Complaint, Counts I, III, IV, V, VII, and VIII, ATF's Interpretation of the Statute Is Unreasonable and Therefore Ultra Vires

290. Even if this Court were to conclude that the rule is not in direct conflict with the statute, ATF's construction of the definition of machinegun must still be set aside. The Court owes no deference to ATF's construction of the NFA in this case, and the best interpretation of the statute runs counter to the Final Rule. Further, even if the Court were to consider deferring to ATF's construction, it is so unreasonable that it still must be rejected. The Final Rule exceeds ATF's authority pursuant to Article I, § 1, Article I § 7, Clauses 2 and 3 and Article II, § 3 of the U.S. Constitution and pursuant to the APA, 5 U.S.C. §§ 706(A), (C), as set out in Counts, I, III, IV, V, VII and VIII of Plaintiff's Complaint.

291. ATF has appropriately conceded that it is not entitled to any deference for its interpretation of the statute. *See* Br. for the Respondents in Opp. at 14, 25-27, *Guedes v. ATF*, No. 19-296 (Dec. 4, 2019). As Justice Gorsuch recently wrote in a statement respecting denial of certiorari in the interlocutory appeal in *Guedes*, "at least one thing should be clear … *Chevron U.S.A. Inc.* [] has nothing to say about the proper interpretation of the law before us." *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 140 S. Ct. 789 (2020) (Gorsuch, J., statement regarding denial of certiorari). The government's concession is appropriate for at least three reasons.

292. First, ATF's inconsistent interpretation is not owed deference. *See Watt v. Alaska*, 451 U.S. 259, 273 (1981) ("The Department's current interpretation, being in conflict with its initial position, is entitled to considerably less deference."). Deference is premised on assumption that an agency "with great expertise and charged with responsibility for administering the provision would be in a better position to do so" than courts. *See Chevron*, 467 U.S. at 865. Well before the *Chevron* regime—when courts respected agency interpretations while likewise retaining authority to exercise independent judgment over them—an interpretive pedigree carried significance, and the Supreme Court "declined to give weight to executive interpretations" that had "not been uniform." *Baldwin v. United States*, 589 U.S. ---, ---, 140 S. Ct. 690, 693 (2020) (Thomas, J., dissenting from denial of certiorari) (quoting *Merritt v. Cameron*, 137 U.S. 542, 552 (1890)). Thus, post-*Chevron*, "[a]n agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view." *Immigration and Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421, 446 n. 30 (1987) (quoting *Watt*, 451 U.S. at 273).

293. The Court owes no deference here because ATF has not provided adequate justification for its shift in policy. ATF consistently interpreted the statutory language to exclude bump stocks for well over a decade. (*See* AR, 106, 111, 116, 126, 134, 138, 145, 157, 160, 167, 170, 175, 179, 191, 198, 201, 206, 218, 235, 238, 242, 250, 258, 263, 268, 272, 275.) It even followed this understanding *after* the tragic events in Las Vegas in October 2017. (*See* AR, 358, 361, 533.) This consistent history of interpretation across administrations of both political parties was based on the agency's physical examination of these devices and its expertise in the area. (*See* AR, 106, 111, 116, 126, 134, 138, 157, 160, 167, 171, 179, 191, 201, 206, 218, 235, 238, 242, 250, 258, 263, 268, 272, 275 (classification letters).) As described in greater detail below, suddenly ATF changed course without conducting additional physical examinations, and without providing adequate reasons for disregarding its prior interpretation. The statute did not change, nor did the way a bump stock operates. ATF simply changed its mind. The new interpretation is therefore not owed any deference.

294. As Justice Gorsuch put it, "[W]hy should courts, charged with the independent and neutral interpretation of the laws Congress has enacted, defer to such bureaucratic pirouetting?" *Guedes*, 140 S. Ct. at 791 (statement regarding denial of certiorari). "How, in all this, can ordinary citizens be expected to keep up—required not only to conform their conduct to the fairest reading of the law they might expect from a neutral judge, but forced to guess whether the statute will be declared ambiguous; to guess again whether the agency's initial interpretation of the law will be declared 'reasonable'; and to guess again whether a later and opposing agency interpretation will also be held 'reasonable'?" *Id*. at 790.

295. Second, ATF disregarded its own technical expertise in writing the rule, and thus no deference is warranted for this reason as well. A Court does not owe an agency deference

when it interprets a statute "not in [its] area of expertise." *United States v. Ochoa-Colchado*, 521 F.3d 1292, 1298 (10th Cir. 2008); *see also Kisor*, 139 S.Ct. at 2413 (deference presumes that "[a]gencies (unlike courts) have unique expertise, often of a scientific or technical nature, relevant to applying a regulation to complex or changing circumstances") (internal citation and quotation marks omitted); *United States v. Orellana*, 405 F.3d 360, 369 (5th Cir. 2005) (deference is inappropriate "when the promulgating agency lacks expertise in the subject matter being interpreted").

296. Even after the Las Vegas shooting, ATF Acting Director Thomas E. Brandon consulted with "technical experts," "firearms experts" and "lawyers" within ATF, and the consensus within the agency was that "bump stocks" "didn't fall within the Gun Control Act and the National Firearms Act." (AR, 1094.) Nevertheless, the agency issued the Final Rule at the insistence of the President and the Acting Attorney General, overruling the experts within the agency. (AR, 1094.) Indeed, the administrative record is devoid of any commentary or input from FTB/FATD concerning ATF's change in interpretation, and there is no indication that ATF re-examined any bump-stock devices or test fired any bump-stock devices between the October 2, 2017, shooting and ATF's change in position. Because ATF disavowed its own technical expertise in crafting the rule, it is not entitled to any deference. *See Ochoa-Colchado*, 521 F.3d at 1298.

297. Third, ATF is owed no deference here because to do so would violate the separation of powers. A court owes no deference to a prosecutor's interpretation of a criminal law. *Abramski v. United States*, 134 S.Ct. 2259, 2274 (2014). Instead, "any ambiguity concerning the ambit of criminal statutes" is resolved "in favor of lenity." *Yates v. United States*, 135 S.Ct. 1074, 1088 (2015) (internal citation and quotation marks omitted). "Application of the

rule of lenity ensures that criminal statutes will provide fair warning concerning conduct rendered illegal and strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability." *Liparota v. United States*, 471 U.S. 419, 427 (1985).

298. Thus, "whatever else one thinks about *Chevron*, it has no role to play when liberty is at stake." *Guedes*, 140 S. Ct. at 790 (Gorsuch, J.) (statement regarding denial of certiorari). As the Fifth Circuit has recognized, when a statute is ambiguous and an agency purports to interpret it, the rule of lenity "cuts the opposite way" from deference "for the purpose of imposing *criminal liability*[.]" *Orellana*, 405 F.3d at 369. Indeed, the Fifth Circuit has accepted the Government's "reservations as to whether [a criminal] ATF regulation as a whole is entitled to any level of deference whatsoever" because of the role of the rule of lenity. *Id*. This is because, to defer to an agency's interpretation of a criminal statute would "upend ordinary principles of interpretation" and allow "federal administrators [to] in effect create (and uncreate) new crimes at will, so long as they do not roam beyond ambiguities that the laws contain." *Whitman v. United States*, 135 S. Ct. 352, 353 (2014) (Scalia, J., statement regarding denial of certiorari, joined by Thomas, J.). The application of *Chevron* deference in such a setting "threatens a complete undermining of the Constitution's separation of powers, while the application of the rule of lenity preserves them by *maintaining the legislature as the creator of crimes*." *Esquivel-Quintana v. Lynch*, 810 F.3d 1019, 1030 (6th Cir. 2016) (Sutton, J., concurring and dissenting in part) (emphasis added), *reversed on other grounds by* 137 S.Ct. 1562 (2017).

299. ATF has recognized this principle, and "consistently maintained that *Chevron* is not applicable" in this case because the Final Rule implicates criminal consequences. *See* Br. for the Respondents in Opp. at 14, *Guedes v. ATF*, No. 19-296 (Dec. 4, 2019). Indeed, the Final Rule purports to make the estimated 520,000 people who purchased bump stocks in reliance on ATF

approval into federal felons under 18 U.S.C. § 922(o). *Final Rule*, 83 Fed. Reg. at 66547. Even now as ATF disclaims deference to its interpretation, it insists that anyone who has ever possessed a bump stock, including Mr. Cargill, has violated the criminal prohibition on machineguns and faces up to 10 years in federal prison. Br. for the Respondents in Opp. at 20, 23-24, *Guedes v. ATF*, No. 19-296 (Dec. 4, 2019). Because of these consequences, the rule of lenity compels this Court to resolve any ambiguity in Mr. Cargill's favor. Thus, even if the definition of machinegun were ambiguous, this Court would have to reject ATF's interpretation.

300. When deference is not applicable, the statute "means what it means—and the court must give it effect, as the court would any law." *Kisor*, 139 S. Ct. at 2415. Under its most natural reading, ATF was correct in its initial understanding that bump-stock devices are not machineguns. 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. As described by the Supreme Court, a machinegun is activated "by a single function of the trigger" and continues firing "automatically" until the "ammunition supply is exhausted." *Staples*, 511 U.S. at 602 n. 1. A firearm does not meet this definition if either [1] the shooter is required to provide additional "manual manipulation" between shots; or [2] the trigger "mechanical[ly] reset[s]" between shots. *Id*. Moreover, the requisite manipulation of the trigger can be accomplished in ways other than simply pulling a lever on the underside of a firearm. *See Fleischli*, 305 F.3d at 655. Thus, the most natural reading of the statute has been the one adopted by ATF itself since 2006—a machinegun continuously fires rounds following [1] a single function of the trigger, no matter how initiated, and [2] without any additional manual manipulation, until the supply of ammunition is exhausted.

301. The new regulatory definition alters both conditions. The new rule says that a "single function of the trigger" actually means a "single pull of the trigger" at the exclusion of all other means of causing the trigger to function. *Final Rule*, 83 Fed. Reg. at 66553-54. The new rule also says that additional manual manipulation must be directed only to the act of pulling the trigger and cannot be any other form of physical activity. *Final Rule*, 83 Fed. Reg. at 66518, 66533. These limitations are not found anywhere in the statute and must be rejected.

302. Finally, even if this court were to consider deferring to ATF's interpretation under *Chevron*, that interpretation goes so far beyond any rational understanding of the statutory text that it is unreasonable and must be rejected. Courts have had no trouble defining a machinegun under the NFA's terms, and ATF has previously adopted a consistent and reasonable interpretation that respects the statutory language. The Final Rule, which conflicts with court interpretations and more than a decade of consistent ATF interpretation, is not reasonable.

E. As Set out in Count VI of Plaintiff's Complaint, the Final Rule Is Arbitrary, Capricious, an Abuse of Discretion and Otherwise Not in Accordance with Law, Violating 5 U.S.C. § 706(2)(A)

303. The Final Rule is also arbitrary and capricious and thus invalid. ATF relied almost exclusively on overtly political factors in crafting the rule. ATF not only ignored its own factual findings and technical expertise, it expressly repudiated its prior findings without conducting any new factual investigation. Its actions and decision-making process were arbitrary and capricious. This violated the limitations set out in 5 U.S.C. § 706(2)(A), as set out in Plaintiff's Count VI.

304. A court must set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A)[2] Under this standard, "[t]he Court must make a 'searching and careful review' to determine whether an agency action was arbitrary and capricious[.]" *Texas Oil & Gas Ass'n v. U.S. E.P.A.*, 161 F.3d 923, 933 (5th Cir. 1998) (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 401, 416 (1971)). While this Court "may not substitute its own judgment for that of the agency," there still must be "substantial evidence in the record" to support the agency decision. *Id*. at 933-34 (internal citation and quotation marks omitted). An agency's action is arbitrary and capricious "if the agency has relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

305. ATF's actions here were invalid. First, ATF "relied on factors which Congress had not intended it to consider" in promulgating the Final Rule, because the rule was crafted in response to political pressure and not any legitimate interpretive analysis. Prior to the Las Vegas shooting on October 1, 2017, ATF consistently insisted that bump fire stocks were not machineguns. (*See* AR, 106, 111, 116, 126, 134, 138, 145, 157, 160, 167, 170, 175, 179, 191, 198, 201, 206, 218, 235, 238, 242, 250, 258, 263, 268, 272, 275.) This understanding was

---

[2] While courts review agency action for reasonableness using an arbitrary and capricious standard, and use the same language for review under 5 U.S.C. § 706(2)(A), "the Venn diagram of the two inquiries is not a circle." *Humane Society of the United States v. Zinke*, 865 F.3d 585, 605 (D.C. Cir. 2017). Each inquiry is distinct, and agency action may be invalid under either form of review. *Id*.

reaffirmed on October 2, 2017, by ATF in internal emails. (*See* AR, 358, 361.) And at that point, neither ATF nor any federal prosecutor anywhere in the United States had ever brought a criminal charge under 18 U.S.C. § 922(o) based on the theory that a bump stock was a machinegun. (AR, 681.) Indeed, even after the tragedy, ATF insisted that "unless there is some self-acting mechanism that allows a weapon to shoot more than one round, you cannot have a machinegun," and thus bump stocks are not regulated devices. (AR, 361.)

306. The change in position was entirely political. Members of Congress and dozens of state attorneys general intensely pressured the agency over its classifications of bump stocks in a series of pointed letters. (*See* AR, 539, 541, 545, 717.) At the same time, at least five different bills were advanced in Congress that would have banned or restricted the sale of bump stocks—mostly prospectively. (*See* Complaint, ¶¶ 88, 90, 91, 94; Answer, ¶¶ 88, 90, 91, 94.) While the head of ATF clearly recognized that the decision to ban bump stocks was a legislative function, the pressure on the agency to do so instead intensified. It is apparent that this pressure worked on the executive branch, because on October 12, 2017, Earl Griffith, Chief of FATD, reported in internal emails that ATF had "been asked by DOJ to look at our legal analysis on bump stocks." (AR, 713.) Shortly thereafter on November 9, 2017, Acting Director Brandon sent an email to senior staff saying that "the Department has reached a decision that ATF is to move forward with the issuance of a regulation on bump-stocks." (AR, 753.) This indicates that DOJ, and *not* ATF, was the impetus for the change in interpretation, which is further confirmed by President Trump's February 20, 2018 Presidential Memorandum, "directing the Department of Justice to dedicate all available resources" "to propose for notice and comment a rule banning all devices that turn legal weapons into machineguns" as "expeditiously as possible." (*See* AR, 790.) Of course, Acting Director Brandon admitted this, testifying that on October 1, 2017, he had

consulted with "technical experts," "firearms experts" and "lawyers" within ATF, and the consensus within the agency was that "bump stocks" "didn't fall within the Gun Control Act and the National Firearms Act," but acknowledging that ATF's change in position had occurred after he had gone "outside and over to DOJ." (AR, 1094.)

307. The change was plainly not spurred by any new factual analysis. Classification rulings can *only* be issued after a physical examination of a device. (*See* AR, 84, 95, 101, 102, 188, 210, 212, 228, 231, 233.) And every *approval* of bump-stock devices arose after such a physical examination. (*See* AR, 106, 111, 116, 126, 134, 138, 157, 160, 167, 171, 179, 191, 201, 206, 218, 235, 238, 242, 250, 258, 263, 268, 272, 275.) But the Administrative Record contains no evidence at all that FTB or any other entity within ATF reexamined any devices, or otherwise engaged in a factual review of the devices. In fact, while Director Brandon apparently did go to ATF's National Training Center in Martinsburg, WV, there is no indication in the record what he did there, and, in any event Acting Director Brandon was not one of ATF's firearms experts within FTB. (*See* AR, 686.).

308. Most tellingly, while at the Training Center, Acting Director Brandon tipped his hand, and acknowledged the political nature of ATF's decision. That day Jim Cavanaugh, a "Law Enforcement Analyst" for NBC and MSNBC, sent Acting Director Brandon an email outlining his "outside view" "on Bump Stocks," "recommend[ing] an overruling of the prior decision[s] and putting [bump stocks] under the NFA." (AR, 685.) Cavanaugh, who was not even an employee of ATF said, "Regardless of what Congress does or does not do ... You can do it fast and it is the right thing to do, don't let the technical experts take you down the rabbit hole[.]" (AR, 685.) Acting Director Brandon appeared to agree, writing back less than 30 minutes later, saying, "At FTB now. Came to shoot it myself. I'm very concerned about public

safety and share your view. Have a nice day, Tom." (AR, 685.) ATF cannot be said to have engaged in a meaningful decision based on factual analysis if its Acting Director has candidly acknowledged that he does not want to "let the technical experts" lead him to a decision. (*See id*.) Nor can the agency argue that this Court should defer to its technical expertise when the "technical experts" were excluded from the discussion.

309. An agency's consistent, reasonable, and textually correct interpretation of a statute does not become invalid merely because it is unpopular, or because it would be more politically expedient for it to change. Agencies may fill appropriate gaps in statutes, but they cannot supplant Congress. *See Chevron*, 467 U.S. at 843 (an "agency" "must give effect to the unambiguously expressed intent of Congress"). Congress *was* attempting to address what it viewed as a statutory lacuna concerning the legality of bump stocks, but ATF derailed those efforts by forcing through the Final Rule over opposition from Members. (*See* Complaint, ¶ 108; Answer, ¶ 108.) ATF therefore took the political decision away from Congress, which is the opposite of the agency's proper role. ATF's political maneuvering is not entitled to any deference.

310. Next, ATF's proffered explanation for the Final Rule runs counter to the evidence before the agency, and thus there was no "substantial evidence in the record to support it." *See Texas Oil & Gas Ass'n*, 161 F.3d at 934. As mentioned, FTB concluded at least 24 times that specific bump-stock devices were not machineguns after physically examining them. (*See* AR, 106, 111, 116, 126, 134, 138, 157, 160, 167, 171, 179, 191, 201, 206, 218, 235, 238, 242, 250, 258, 263, 268, 272, 275.) Not only did the agency disregard that input when it issued the Final Rule, it ignored even more evidence submitted to it supporting the prior interpretation. For example, Rick Vasquez, Former Assistant Chief and Acting Chief of the Firearms Technology

Branch of ATF, submitted a letter to ATF defending the Slide Fire classification letter. (AR, 705.) Vasquez explained the prior classification based on the testing officer's determination that the Slide Fire could not fire multiple rounds without also manually resetting the trigger mechanism. (AR, 706.) For another example, Michael R. Bouchard, President of the ATF Association, issued a public letter defending the prior classifications. (AR, 708-09.) The Final Rule discarded this evidence, however, without any additional technical examination.

311. In short, neither the mechanism of bump stocks in general, nor the Slide Fire in particular, changed since their approval. The only thing that has changed is the President's view that ATF's prior interpretation is politically undesirable. But politics are not evidence, and ATF's reconsideration of the legality of bump stocks was not based on any evidence put before the agency. The Final Rule is therefore arbitrary and capricious.

F. As Set out in Count II of Plaintiff's Complaint, the Final Rule Is an Improper Exercise of Legislative Power

312. Even if this Court could otherwise conclude that the Final Rule was valid, it would represent an unlawful exercise of legislative power as set out in Plaintiff's Count II. Because it would involve a purely political determination of the scope of criminal liability, only Congress could pass a legislative rule that criminalized the possession of bump-stock devices. ATF's purported exercise of that authority is therefore unconstitutional.

313. Article I of the Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." U.S. Const. art. I, § 1. Agencies, therefore, may not exercise Congress's legislative power to declare entirely "what circumstances … should be forbidden" by law. *Panama Refining Co.*, 293 U.S. at 418-19.

314. The Supreme Court has struggled with defining the limits on the legislature's divestment of its authority. Traditionally the Court has allowed agencies to exercise authority so

long as Congress set out an "intelligible principle to which the person or body authorized to [exercise the authority] is directed to conform." *Mistretta*, 488 U.S. at 372. But that test lacks clear contours. Furthermore, five members of the Court have recently expressed interest in at least exploring a reconsideration of that standard. *See Gundy v. United States*, --- U.S. ----, 139 S. Ct. 2116, 2131-42 (2019) (Gorsuch, J., dissenting, joined by Roberts, C.J., and Thomas, J.); *id*. at 2130-31 (Alito, J., concurring in the judgment); *Paul v. United States*, --- U.S. ----, 140 S. Ct. 342 (2019) (mem.) (Kavanaugh, J., statement respecting the denial of certiorari) (stating that the issues raised in the *Gundy* dissent "may warrant further consideration in future cases").

315. As Justice Gorsuch recently highlighted in his dissenting opinion in *Gundy v. United States*, though, the Court's precedents offer at least three limiting principles to consider in order "to decide whether Congress has unconstitutionally divested itself of its legislative responsibilities."139 S. Ct. at 2135 (Gorsuch, J., dissenting).

316. "First, we know that as long as Congress makes the policy decisions when regulating private conduct, it may authorize another branch to fill up the details." *Id*. at 2136. The opposite is true as well—when Congress leaves policy decisions up to another branch, it unlawfully divests itself of power. *See A.L.A. Schecter Poultry Corp.*, 295 U.S. at 529. What constitutes a "policy decision[]" was illustrated as far back as 1825, when the Court upheld a statute that instructed the federal courts to borrow state-court procedural rules but allowed them to make certain "alterations and additions." *Wayman v. Southard*, 23 U.S. 1, 1 (1825). Writing for the Court, Chief Justice Marshall distinguished between those "important subjects, which must be entirely regulated by the legislature itself," and "those of less interest, in which a general provision may be made, and power given to those who are to act ... to fill up the details." *Id*. at 21.

317. The Court provided a concrete example of this distinction in *United States v. Eaton*, 144 U.S. 677 (1892). There, the Court struck down a series of federal tax regulations that purported to impose criminal liability even though Congress had not set out a penalty provision. *Id*. at 688. As there were "no common-law offenses against the United States," it was up to Congress to provide criminal punishment for violation of a regulation. *Id*. at 687. This decision could not be delegated to an agency, because "[i]t would be a very dangerous principle" to allow an agency to issue regulations that, themselves, carried criminal penalties under the general rubric of being "a needful regulation" to enforce a statute. *Id*. at 688. Thus, the Court held that "[i]t is necessary that a sufficient statutory authority should exist for declaring any act or omission a criminal offense," even if the agency could otherwise issue regulations that had, "in a proper sense, the force of law[.]" *Id*.

318. "Second, once Congress prescribes the rule governing private conduct, it may make the application of that rule depend on executive fact-finding." *Gundy*, 139 S.Ct. at 2136 (Gorsuch, J., dissenting). Thus, during the Napoleonic Wars the Court allowed an exercise of authority to impose a trade embargo that depended on predicate factual findings of need. *Cargo of The Brig Aurora v. United States*, 11 U.S. 382, 388 (1813). This distinction weighed heavily in the Court's more recent analysis in *Touby v. United States*, where the Court allowed the Attorney General to add a substance to a list of prohibited drugs temporarily if he determined that doing so was "necessary to avoid an imminent hazard to the public safety." 500 U.S. 160, 166 (1991). As described by Justice Gorsuch, "In approving the statute, the Court stressed all the[] constraints on the Attorney General's discretion and, in doing so, seemed to indicate that the statute supplied an 'intelligible principle' because it assigned an essentially fact-finding

responsibility to the executive." *Gundy*, 139 S.Ct. at 2141. Exercise of authority that lacks any such fact-intensive inquiry likely also lacks an essential limit. *See id*.

319. "Third, Congress may assign the executive and judicial branches certain non-legislative responsibilities." *Id*. at 2137. For instance, the Executive Branch possesses certain unique and historical constitutional authorities, such as those related to foreign affairs, and the Court may view such exercises of delegated authority more favorably. *Id*. This is a point that has been emphasized by lower courts following *Gundy*. *See United States v. Bruce*, 950 F.3d 173, 175 (3d Cir. 2020) ("Importantly, the non-delegation doctrine applies only to delegations by Congress of legislative power; it has no application to exercises of executive power."); *Am. Inst. for Int'l Steel, Inc. v. United States*, --- Fed.Appx. ----, 2020 WL 967925, at *7 (Fed. Cir. Feb. 28, 2020) (unpublished) (affirming tariff and opining that the President's "independent constitutional power" may justify the conclusion).

320. If the Final Rule was otherwise permitted it would represent an unlawful divestment of Congressional lawmaking power because it represents a quintessentially political decision. Indeed, the Final Rule runs afoul of all three of the limiting principles set out by the Court in this area.

321. First, as described above, the Final Rule was an overtly political decision by the agency. The Administrative Record suggests that intense political pressure on the agency led it to reverse course, notwithstanding its prior factual examinations. Acting Director Brandon essentially admitted as much, testifying that on October 1, 2017, he had consulted with "technical experts," "firearms experts" and "lawyers" within ATF, and the consensus within the agency was that "bump stocks" "didn't fall within the Gun Control Act and the National Firearms Act," but acknowledging that ATF's change in position had occurred after he had gone

"outside and over to DOJ." (AR, 1094.) The decision as to what conduct is or is not *criminal*, however, is precisely the kind of decision reserved for Congress, and not an agency like ATF. *See Eaton*, 144 U.S. at 687-88.

322. Next, the exercise of authority cannot be justified as being dependent on the agency's fact-finding powers. As discussed, the Final Rule was plainly not spurred by any new factual analysis. On the contrary it was a rejection of the past technical examinations. (*See* AR, 106, 111, 116, 126, 134, 138, 157, 160, 167, 171, 179, 191, 201, 206, 218, 235, 238, 242, 250, 258, 263, 268, 272, 275.) Indeed, Acting Director Brandon appeared to agree with an outside party that the agency should not "let the technical experts" decide the issue. (See AR, 685.) Agency fact-finding certainly did not supply an intelligible limiting principle here.

323. Finally, the Final Rule cannot be justified based on any unique exercise of presidential powers. This is a straightforward statutory question, but it implicates criminal punishment, which is a uniquely *legislative* interest. *See Eaton*, 144 U.S. at 687-88. If anything, the Executive Branch's power here should be at its weakest.

324. Thus, the Final Rule is an invalid exercise of legislative power.

CONCLUSION

325. ATF's Final Rule, *Bump-Stock-Type Devices*, 83 Fed. Reg. 66514, 66516 (Dec. 26, 2018), is permanently enjoined.

326. It is ordered that Plaintiff Michael Cargill's possession of a Slide Fire bump stock did not violate the criminal prohibition set out in 18 U.S.C. § 922(o) because the device was not a "machinegun" as set out in the statute.

327. Defendants shall immediately return Plaintiff Michael Cargill's Slide Fire bump stocks to him, and in no event later than ten days after entry of this Decision and Order.

Respectfully Submitted,

April 3, 2020

/s/ Caleb Kruckenberg
Caleb Kruckenberg
New Civil Liberties Alliance
1225 19th St. NW, Suite 450
Washington, DC 20036
(202) 869-5210
Counsel for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on April 3, 2020, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to all counsel of record in this case.

/s/ Caleb Kruckenberg
Caleb Kruckenberg
New Civil Liberties Alliance
1225 19th St. NW, Suite 450
Washington, DC 20036
(202) 869-5210
Counsel for Plaintiff