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 CLOSING ARGUMENT

Plaintiff, Michael Cargill, through undersigned counsel respectfully submits the following closing argument.

I. INTRODUCTION

In 2010 the Bureau of Alcohol, Tobacco, Firearms and Explosives correctly determined, after conducting a physical examination and test-firing the Slide Fire bump stock, that it "was not regulated as a firearm under the Gun Control Act or the National Firearms Act." (AR, 126.) That conclusion accords with the statutory definition of a "machinegun," which is a firearm that shoots multiple times after only a single physical input. It was also consistent with at least 24 other classification rulings issued by the agency.

When Michael Cargill purchased his Slide Fire bump stock, he took ATF at its word. He expected ATF to adhere to its own approval. He certainly never expected the agency to suddenly reverse course and declare that he had committed a federal crime by merely *following* ATF's ruling.

Mr. Cargill failed to anticipate that the tragic events in Las Vegas in October 2017 would cause ATF to throw ordinary statutory analysis and consistent interpretation aside. He did not expect the agency to reject its own substantive expertise in the mechanics and operation of firearms and replace it with political expediency in order for the Department of Justice to carry out its desire to unilaterally alter federal criminal law. He did not expect to be branded a criminal as a scapegoat for an unspeakable tragedy. That is precisely what ATF did, however, when it issued its Final Rule, *Bump-Stock-Type Devices*, 83 Fed. Reg. 66514 (Dec. 26, 2018).

ATF's pretense in the face of the obviously defective process it employed is neither convincing nor legally sound. ATF defends its radical new expansion of the statutory definition of a machinegun as the "best interpretation" of what the statute always meant. It has been forced into this absurd position because it has *no* authority to issue a substantive rule filling any statutory gap in the definition of a machinegun. ATF can only suggest an interpretation, which is only binding if this Court agrees it is the correct meaning of Congress's words. Not even ATF believes that bump stocks have always been machineguns. It has explicitly and repeatedly said otherwise in no fewer than 24 classification

rulings, multiple official statements to Congress, and, even *after* the Las Vegas tragedy, in testimony before Congress. No wonder the United States *never* prosecuted anyone for possession of a bump stock before the Rule was issued.

ATF's prior rulings make sense. Nothing about a bump stock changes the internal, mechanical way the firearm on which a bump stock is installed works. The shooter can only fire one round every time he engages the trigger mechanism. If he holds the trigger down, the weapon won't fire again. The only way he can fire a second time is by pushing the weapon forward while pulling back against the trigger once the trigger has reset. Bump stocks do nothing other than facilitate a shooting technique—one ATF *still* insists is lawful. Bump stocks simply are not machineguns.

If this Court agrees with what has been obvious to ATF for decades—bump stocks have not *always been* machineguns—then ATF's Rule is invalid, and this Court should enter judgment for Mr. Cargill. In other words, the *only* way ATF prevails is if this Court accepts ATF's version of what the statute has always meant, even though that is not what the statute has ever meant.

Of course, what ATF *tried* to do with the Final Rule was alter the statutory definition. But ATF accepts that it cannot lawfully do so. As an agency, ATF can't rewrite a statute—it can, at most, "fill in gaps" left in the statute when empowered to do so by Congress. ATF accepts that Congress never empowered it to fill in any gaps, and it recognizes the statute lacks any gaps that it could fill. Thus, if the Final Rule is just a disguised attempt to issue a forbidden legislative rule, it is invalid.

ATF's concessions about the scope of its authority come from a recognition that, if this Court construed the relevant provisions to empower ATF to rewrite federal criminal law through the Final Rule, it would seriously erode constitutional limits on the agency's power. Even if Congress meant to give ATF that authority, the Constitution does not allow an agency to act as a super-legislature, particularly in deciding—or shifting the meaning of—the substantive *criminal law*.

While any of these other problems would individually require an order voiding the Final Rule,

the Court should also reject ATF's political machinations. ATF repudiated its own expertise and followed the political orders of the Department of Justice in responding to the Las Vegas tragedy. That political decision had the effect of derailing (lawful and more careful) Congressional efforts to address the legality of bump stocks. An agency like ATF must not be allowed to usurp what is clearly a lawmaking function in order to achieve a quick political fix.

This case is not about whether bump stocks *should* be legal. It is not about the correct *policy* choice. This case is only about safeguarding the role, function and authority of lawmakers to make law and ensuring that emotions and political considerations do not prevail over lawful and constitutional processes. Regardless of ATF's motivation, the Final Rule violated the Constitution and the Administrative Procedure Act. This Court should declare the Final Rule invalid.

II. ARGUMENT

A. ATF Lacks the Power to Issue Any Legislative Rules

ATF has acknowledged that it lacks authority to issue any legislative rule concerning the definition of a machinegun. *See* Defs. Tr. Br. ECF No. 46 at 21-22. It accepts that "the narrow statutory delegation on which the Rule relied does not provide the Attorney General the authority to" "engage in rulemaking that may lead to criminal consequences[.]" Defs. Tr. Br. ECF No. 46 at 22. Because the Final Rule is legislative, and purports to impose new legal obligations (and criminal liability), it exceeds ATF's authority.

As every federal judge in these cases has found, the Final Rule was meant to be a legislative rule that did substantially more than simply restate a settled interpretation. *See PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 139 S. Ct. 2051, 2055 (2019) (A "legislative rule" "has the force and effect of law.") (citation omitted). "All pertinent indicia of agency intent confirm that the Bump-Stock Rule is a legislative rule." *Guedes v. ATF*, 920 F.3d 1, 18 (D.C. Cir. 2019); *accord Aposhian v. Barr*, 958 F.3d 969, 980-81 (10th Cir. 2020) *rehearing en banc granted and vacated by* --- F.3d. ----, 2020 WL 5268055

(10th Cir. 2020). Four facts prove that this is so.

First, the Final Rule purported to take effect in the future. The rule says that bump stocks "will be prohibited when this rule becomes effective." Final Rule, 83 Fed. Reg. at 66514. Indeed, ATF said, "if prohibited bump-stock-type devices are possessed *after* the effective date of the final rule, the person in possession of the bump-stock-type device *will be* in violation of Federal law." *Id.* at 66539 (emphasis added). Such prospective effectiveness exposes the fallacy of ATF's pretense that its interpretation was *always* the best reading of the statute and bump stocks were *always* unlawful.

Second, the Rule's publication in the Code of Federal Regulations also indicates that it is a legislative rule. Publication in the CFR is limited to rules "having general applicability and *legal effect*." 44 U.S.C. § 1510 (emphasis added). The Final Rule purports to amend three sections of the code, 27 C.F.R. §§ 447.11, 478.11, 479.11. 83 Fed. Reg. at 66519, which makes no sense if the regulation was meant only to be a mere interpretation.

Third, the agency has explicitly invoked two separate delegations of legislative authority. 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 AG. 83 Fed. Reg. at 66515. Even though ATF now concedes those provisions do not actually vest it with any rulemaking authority, it is clear the drafters of the rule thought otherwise.

Fourth, the Final Rule has a significant economic impact. 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. How could such a massive financial impact arise from a mere interpretation of what the statute has always meant?

Because the Final Rule is legislative, it exceeds ATF's authority. The Final Rule purports to amend the statutory definition of machinegun found in the National Firearms Act under the authorization of 26 U.S.C. § 7805, and the same statutory definition as it applies to the Gun Control

Act under the authority set out in 18 U.S.C. § 926(a). *Final Rule*, 83 Fed. Reg. at 66554. As ATF now acknowledges, neither provision allows it to issue legislative rules creating new criminal prohibitions. ATF agrees that "the narrow statutory delegation on which the Rule relied does not provide the Attorney General the authority to" "engage in rulemaking that may lead to criminal consequences[.]" Defs. Tr. Br. ECF No. 46 at 22. ATF's interpretation in that regard is correct for several reasons.

First, the AG has no legislative rulemaking authority under 26 U.S.C. § 7805(a) because that authority was never "expressly given" to him under Title 26. The NFA only gives the AG or ATF the power 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 AG is empowered to undertake, nor is it an act of "interpretation[]" authorized to ATF.

Nor can the AG's authority under the GCA support the Final Rule. The Act allows the AG to "prescribe only such rules and regulations as are necessary to carry out the provisions of" the GCA. 18 U.S.C. § 926(a). ATF acknowledges this language does not allow it to issue new legislative rules about the scope of crimes. Defs. Tr. Br. ECF No. 46 at 22. The Final Rule goes far beyond a housekeeping regulation designed to implement the GCA of the kind permitted by Section 926(a).

Finally, the presence of the delegation 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 rulemaking authority. Congress explicitly delegated *limited interpretive* authority to ATF, which strongly confirms that it withheld *substantive* rulemaking authority. In short, ATF lacked any power to issue a legislative rule. The Final Rule is such a legislative rule. It is therefore void.

B. ATF Had No Authority to Issue the Final Rule Because There Is No Statutory Gap to Fill

There is no statutory ambiguity in the term "machinegun," and thus ATF has no authority to issue a legislative gap-filling rule. ATF agrees that "there is no ambiguity" in the "Rule's application

of the terms used to define 'machinegun.'" Defs. Tr. Br. ECF No. 46 at 25. Without a statutory ambiguity, there is no gap for ATF to attempt to fill through its legislative rule.

When confronted with an *unambiguous* statute "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) (citation omitted). The statute at issue here is unambiguous, defining a "machinegun" as "any weapon which shoots … automatically more than one shot, without manual reloading, by a single function of the trigger." 26 U.S.C. § 5845(b). In the course of criminally prosecuting people, DOJ has successfully argued 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 alsoconsistently 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). 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). The phrase "a single function of the trigger" is "plain enough" that efforts to parse it further become "brazen" and "puerile." *United States v. Fleischli*, 305 F.3d 643, 655 (7th Cir. 2002).

ATF is therefore correct that "there is no ambiguity" in the statute. Defs. Tr. Br. ECF No. 46 at 24. This means that ATF lacks any gap to fill through the Final Rule and lacks the authority to issue a gap-filling regulation.

C. The Final Rule Does Not Represent the Best Interpretation of What the Statute Has Always Meant

Ignore for a moment the other fundamental defects in ATF's position and its conceded inability to issue any substantive rules. No matter what the Final Rule is called, it is still invalid because it fundamentally changes the settled statutory meaning of a machinegun. 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 conflicts with the clear text of the statute. It also creates a muddle with no clear limits. What courts have recognized to be machineguns are no longer prohibited, while bump firing with a bump stock is criminal. Never mind that bump firing with a beltloop is not a crime. ATF's myopic effort to outlaw bump stocks simply doesn't work within the framework established by Congress. Only Congress could tinker with the definition of a machinegun, and ATF's attempt to get to its preferred outcome through confounding and inconsistent interpretations does not pass muster.

1. Congress's Definition of a Machinegun

Under both the GCA and NFA, the term "machinegun" means "any weapon which shoots … automatically more than one shot, without manual reloading, by a single function of the trigger." 26 U.S.C. § 5845(b); *see also* 18 U.S.C. § 921(23).

> The Supreme Court has 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).

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.

2. *Chevron* Deference Has No Role to Play in This Case

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* [] has nothing to say about the proper interpretation of the law before us." 140 S. Ct. 789 (2020). ATF has appropriately acknowledged that its view of the meaning of the Final Rule should not be afforded any deference under *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Defs. Tr. Br. ECF No. 46

at 24. Indeed, ATF stresses that "deference is *unwarranted* because neither party contends that it should apply." *Id.* (emphasis added). Of course, ATF cannot invoke *Chevron* because it insists that the Final Rule is interpretive, and *Chevron* deference only applies to legislative rules (that is, the kind of rule ATF admits it has no authority to promulgate here). The government's concession is appropriate for at least three additional reasons.

First, ATF's inconsistent interpretation is not owed deference. Deference is premised on the 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. But an interpretation that "conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n. 30 (1987) (citation omitted). That admonition applies here. The Final Rule marks an abrupt shift in ATF's interpretation. Across administrations of both political parties ATF consistently interpreted the statutory language to exclude bump stocks. (*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.) In this case the ATF suddenly reversed itself, not because it had conducted additional physical examinations. The statute did not change, nor did the way a bump stock operates. ATF simply changed its mind while at the same time providing no adequate reason for doing so.

Second, *Chevron* is based on the concept of special expertise. It is for that simple reason that a Court does not owe an agency deference "when the promulgating agency lacks expertise in the subject matter being interpreted." *United States v. Orellana*, 405 F.3d 360, 369 (5th Cir. 2005). In this case 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 President's insistence, overruling the agency's experts. (AR, 1094.) By disregarding its own technical expertise in writing the Rule, ATF has forgone the ability to seek "deference" from this Court. Put simply, the

Rule is not founded upon "expertise," but on choosing to ignore it.

Third, deferring to the ATF here 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) (citation 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).

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. To defer to ATF's interpretation 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.).

ATF has recognized this principle, agreeing that "criminal laws are for courts, not for the Government, to construe." Defs. Tr. Br. ECF No. 46 at 22 (citing *Abramksi*, 573 U.S. at 191). 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. 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.

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.

3. A Bump Stock Does Not Fit Congress's Definition of a Machinegun

David Smith is a firearms examiner for ATF and expert "in the field of firearm mechanics and operations." David Smith, Trial Tr., 39:17-22 (Sept. 9, 2020). His description of how a Slide Fire bump stock works has confirmed that the device is *not* a machinegun under existing law.

A machinegun is mechanically able to fire continuously once "the shooter pulls back on the trigger mechanism" "without further input from the shooter." Smith, 71:8-20. It typically relies on a mechanism called an "auto sear," which allows the firing pin to strike additional rounds without further input from the trigger mechanism. Smith, 71:9-25.

A semiautomatic firearm "needs additional input" between firing rounds. Smith, 67:21-23. A semiautomatic will not fire multiple rounds if the shooter holds the trigger, "because the hammer will catch" on a part called "the disconnector." Smith, 68:7; 71:17-25. The disconnector stops the firing pin from striking a new round, unless the shooter releases the trigger lever and resets it by pulling the lever again. Smith, 67:21-23; 68:7; 71:8-25; 75:13-15.

A bump stock, like the Slide Fire, does not change the internal mechanics of a semiautomatic firearm at all. it does not affect the trigger mechanism, and the shooter's finger must still "lose[] contact with the trigger lever" so that the "trigger mechanism [can] reset." Smith, 76:6-13; 78:18-21. A bump stock does not replace any mechanical part, such as a disconnector, nor does it add any mechanism such as an auto sear, that would allow a semiautomatic to function as a machinegun. Smith, 72:18-73:2. Bump stocks do not change the distance the trigger lever must travel between shots. Smith, 84:22-25. Indeed, when operating a semiautomatic with a bump stock, the firearm's trigger functions normally for every new shot fired—the shooter's finger must be released from the trigger lever, and

the trigger must lock back into place between each shot. Smith, 75:13-15; 76:6-13; 78:18-24; 80:1-6; 83:12-13. Every round fired with a bump stock follows the normal operation of a semiautomatic—the "hammer catches on the disconnector" after the first round is fired, and when the trigger is released, as "the trigger … moves forward, that moves the disconnector out of contact with the hammer and the hammer resets on that front sear surface of the trigger" to allow a new round to be fired following a new action on the trigger lever. Smith, 80: 1-16.

In this way, a bump stock is no different from a belt loop, or even the hands of a skilled marksman bump-firing a semiautomatic weapon. Smith, 86:2-6; 86:20-22. The bump stock simply facilitates the "bump fire" shooting technique, allowing the firearm to slide back and forth to create space for the shooter's finger to lose contact with the trigger lever. Smith, 74:24-75:4; 78:18-21. All of this lands ATF in the absurd position of considering a bump stock a machinegun, while it considers bump fire to be lawful. Smith, 87:17-19.

What explains this difference? Why does ATF view a Slide Fire as a machinegun?

One might think the explanation lies in the ability of a skilled marksman to fire a bump stock rapidly. But a "semi-automatic rifle can typically fire as fast as the shooter can pull with their trigger finger." Smith, 47:21-22. This can be "quite fast" for a skilled shooter—appearing as fast as a machinegun's rate of fire. Smith, 48:7. In the end, the "rate of fire of a weapon does not determine whether or not it is a machine gun." Smith, 72:1-3.

One might also think it is because the Slide Fire *adds* some mechanism to the firearm to make it function differently. Another device, an Akins Accelerator, had two springs that "drive the trigger mechanism and receiver back [and] forward into the shooter's trigger finger." Smith, 65:19-24. A shooter could fire an Akins Accelerator with one hand, because the springs mechanically assisted bump firing and would "continue to fire until [the shooter] remove[d] the trigger finger from the trigger guard or it r[an] out of ammunition." Smith, 65:19-24. But a Slide Fire has no springs, adds no

mechanical parts, and can only be operated with *both* hands performing separate tasks between shots. Smith, 65:2-3; 66:6-10; 72:12-24.

This leaves only ATF's reference to a Slide Fire's "cycle of operation." Smith, 57:1-18. But this "cycle" involves multiple *distinct* steps. For each new shot, the shooter must hold the rifle to his shoulder, and "press the firearm all the way back" "securely against [his] shoulder." Smith, 55:12-15. The shooter must then hold his "finger on th[e] trigger rest" continuously. Smith, 55:18. With his other hand, the shooter must "press the firearm forward," *into* his trigger finger, and the recoil forces the firearm back towards the shooter's shoulder. Smith, 55:23; 56:2-9. This creates separation of the trigger finger from the trigger, so the "trigger mechanism [can] reset." Smith, 76:6-13; 78:12-24. The shooter must then "overcome that recoil impulse" by "pressing [the firearm] back forward," and yet again pushing the "trigger back in contact with the trigger finger" to fire the next round. Smith, 57: 1-18; 79:9-12. While the shooter must push forward "continuously" for bump firing to occur, the weapon "recoils faster than [a shooter] can react," so while the shooter is "attempting to continually press forward, [] the recoil impulse overcomes [his] ability to press forward, [and] moves the firearm back inside the stock," and the shooter actually must use his "non-shooting hand [to] push[] [the weapon] forward." Smith, 79:9-12; 84:2-13. If a shooter fails to push forward in this fashion, using two hands, the weapon will not fire more than one round. Smith, 80:13-16, 21-25; 81:1-3.

The "cycle of operation" is just a description of bump firing and the multiple physical actions taken by a shooter between each new round. It is no different than bump firing without a bump stock. Smith, 86:2-6, 20-22. And it is not easy to do, even for an expert. Smith, 85:8-15.

4. ATF Has Relied on These Facts in Its Consistent Understanding That Bump Stocks Are Not Machineguns

ATF understood the foregoing for years. It understood 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.) ATF's reasoning in these 24 classification rulings is consistent—in each case it 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 individually "fired by a single function of the trigger." (AR, 106.) This is not automatic firing of multiple rounds as contemplated by the statute.

ATF's prior classifications were premised on manual review and test-firing of the devices. All classifications are based on FTB's manual inspection of the firearms. 62:22-63:4. FTB has repeatedly declined to classify devices because the requesting party had failed to furnish a sample. (*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.) Mr. Smith reaffirmed this limitation and testified based on his own experience test-firing a Slide Fire. Smith, 38:21-25; 62:22-63:4.

ATF's bump-stock approvals also represented an agency effort to correct obvious errors in earlier classifications and to 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 a results-based interpretation, ATF initially 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 previous inconsistent interpretations. (*See* AR, 8, 12, 19, 22, 58, 81, 121.) After ATF issued Ruling 2006-2, it adopted 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.)

Even now, Mr. Smith does nothing to cast doubt on ATF's prior understanding and decisions. The bump stocks are the same as when ATF approved them. The only thing that has changed is that ATF has found it inconvenient to adhere to the legal limits set by Congress.

5. ATF's New Interpretation Cannot Be Reconciled with the Statutory Definition

There's no way for ATF to show that a Slide Fire bump stock meets the statutory definition of a "machinegun." ATF can reach its preferred outcome *only* if it is allowed to radically rewrite that statute. A weapon equipped with a Slide Fire "fires only one shot with each pull of the trigger"—just like every other semiautomatic firearm. *See Staples*, 511 U.S. at 602 n. 1. A bump stock does not change the trigger mechanism, and semiautomatics won't fire again once the trigger is engaged unless the shooter releases the lever and lets it lock back into place and then pushes forward to engage the lever again. Smith, 75:13-15; 76:6-13; 78:18-24; 80:1-6; 83:12-13. This is the same mechanical firing action of every semiautomatic firearm. Smith, 67:21-23; 68:7; 71:8-25; 75:13-15.

There's also nothing "self-acting" about the "cycle of operations" it takes to fire using a bump

stock. *See Olofson*, 563 F.3d at 658. To the contrary, the shooter must act both deliberately and continuously to overcome recoil. If he fails to push forward against the gun's recoil after every shot, the gun will not fire again. Smith, 79:9-12; 80:13-16, 21-25; 81:1-3; 84:2-13. A Slide Fire is not a machinegun—it is just a tool for a particular shooting technique.

6. The Final Rule Undermines the Statutory Language in Other Contexts

Trying to awkwardly force bump stocks into the ill-fitting definition of machineguns comes with serious consequences to the settled meaning of the statute. This dangerous new outcome-based interpretation would undermine prior decisions banning machineguns that initiated automatic fire from other types of triggers that did not require pulling.

The statute focuses on the trigger's "function," which encompasses conduct beyond merely pulling a piece of metal. *See* 26 U.S.C. § 5845(b). This is because triggers come in different forms, with machineguns operated by things like "a trigger on a joystick," "a key on a keyboard," or even a "key or lanyard." Smith, 66:21-25. 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 "pulling a small lever," and instead means any action that "initiated the firing sequence"); *Fleischli*, 305 F.3d at 655 (minigun was machinegun because it fired automatically following a single activation of an electronic on-off switch).

The Final Rule, however, says that the only way to initiate firing is by a "pull of the trigger." *Final Rule*, 83 Fed. Reg. at 66553-54. That's how ATF can try to avoid the fact that the shooter still has to push the weapon into the trigger for each new round that is fired—ATF thinks that action doesn't count anymore. *See* Smith, 57: 1-18; 79:9-12. Indeed, the Final Rule disregards the fact that the shooter must use his "non-shooting hand [to] push[] [the weapon] forward" for every shot fired. Smith, 79:9-12; 84:2-13. But if the only way for a trigger to "function" is by "pulling" it, what are

courts to do with other types of triggers like buttons, cranks, or even lanyards?

ATF's distinction makes no sense because the trigger functions the same whether or not a bump stock is attached. *See* Smith, 72:18-73:2. 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. Smith, 75:13-15; 76:6-13; 78:18-24; 80:1-6; 83:12-13; 84:22-25. On the other hand, in a real machinegun, the trigger remains depressed and the trigger never has to move forward and then backwards again in order to reset and fire. Smith, 71:9-25. ATF has discarded this normal distinction for a totally unworkable and illogical one not found in any statute.

Moreover, ATF's insistence that a bump stock is a machinegun, but bump firing is permissible, is nonsensical. *See* Smith, 87:17-19. If ATF is correct, and the bump fire "cycle of operations" is the same as firing a machinegun, then bump fire clearly also must be prohibited. A Slide Fire has the same mechanical operation as a belt loop—it acts as a "post" for the trigger finger while the shooter allows the weapon to slide back and forth in his hands. Smith, 56:18-20, 86:2-6; 86:20-22. What this really shows is that ATF's definition is not a deliberate or careful reading of the statutory text; it is an attempt to achieve a policy goal *despite* the legal definition of a machinegun.

E. If Congress Had Allowed ATF to Rewrite Federal Criminal Law, Then the Final Rule Would Violate the Non-Delegation Doctrine

If ATF could nevertheless criminalize bump stocks with its Final Rule, it would violate core limits on Congressional delegation of authority. 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.

The President, acting through his agencies, 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). 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).

"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. "Second, once Congress prescribes the rule governing private conduct, it may make the application of that rule depend on executive fact-finding." *Id.* at 2136. "Third, Congress may assign the executive and judicial branches certain non-legislative responsibilities." *Id.* at 2137.

The Final Rule violates these principles. First, the Final Rule was a political decision by the agency. As discussed below, intense political pressure on the agency led it to reverse course, notwithstanding its prior factual examinations and determinations. The decision as to what conduct is *criminal*, however, is precisely the kind of policy decision reserved for Congress, and not an agency like ATF. *See United States v. Eaton*, 144 U.S. 677, 688 (1892) ("[i]t would be a very dangerous principle" to allow an agency to issue regulations that carried criminal penalties under the general rubric of being "a needful regulation" to enforce a statute).

Next, the exercise of legislative authority cannot be justified as being dependent on the agency's fact-finding powers. The Final Rule was 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.) Agency fact-finding certainly did not supply an intelligible limiting principle here. Nor can the Final Rule be justified based on any unique exercise of presidential powers. This statutory question implicates criminal punishment, which is a uniquely *legislative* interest. *See Eaton*, 144 U.S. at 687-88.

ATF recognized these implications when it urged this Court to accept its concession that it lacked authority to "engage in rulemaking that may lead to criminal consequences." Defs. Tr. Br. ECF

No. 46 at 22. Indeed, ATF acknowledges the limits set out by the Supreme Court as it emphasizes that it lacks the power to rewrite federal criminal law. *Id.* That means, however, that if this Court construes ATF's power more broadly than ATF does, it threatens the constitutional limits on Congressional delegation of authority.

F. ATF's Decision to Upend the Political Process Was Improper

The Final Rule's invalidity has now been shown in multiple, independent ways. But even looking past these defects, the rule is void because of what the agency was actually attempting to do (while it now pretends to have been merely codifying an existing view of the law). ATF was making a political choice that was only Congress's to make. In the process it not only ignored its own factual findings and technical expertise, but it also expressly repudiated its prior findings without conducting any new factual investigation. Its actions and decision-making process were arbitrary and capricious.

First, ATF crafted the Final Rule because of political pressure. Prior to the Las Vegas shooting, ATF insisted that bump 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 reaffirmed on October 2, 2017 by ATF in internal emails. (*See* AR, 358, 361.) At that point, the United States had never brought a criminal charge under 18 U.S.C. § 922(o) based on the theory that a bump stock was a machinegun. (AR, 681.) 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.)

The change in position was entirely political. Politicians intensely pressured the agency over its classifications of bump stocks. (*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. (*See* Complaint, ¶¶ 88, 90, 91, 94, 102; Answer, ¶¶ 88, 90, 91, 94, 102.) This pressure worked on the executive branch. On October 12, 2017, internal emails show that ATF had "been asked by DOJ to

look at our legal analysis on bump stocks." (AR, 713.) Then 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.) DOJ—and *not* ATF—was the impetus for the change in interpretation. 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.)

The change was not spurred by 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.) 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.) FTB, however, never reexamined any of the devices prior to now designating them as "machineguns."

In fact, Mr. Smith's new examination in the context of this lawsuit simply reaffirms ATF's *old* understanding of how bump stocks work. He test-fired the devices, and his explanation of how they operate tracked the former classification letters. *See* Smith, 38:21-25; 55:12-23; 56:2-9; 57: 1-18; 76:6-13; 78:12-24; 79:9-12; 84:2-13. All of the agency expertise before this Court only points one way—bump stocks are not machineguns.

Most tellingly, Acting Director Brandon tipped his hand and exposed the political nature of his decision in his emails. 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 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 saying, "At FTB now. Came to shoot it myself. I'm very concerned about public safety and share your view." (AR, 685.) ATF cannot have engaged in a meaningful decision if its Acting Director has candidly acknowledged that he does not want to "let the technical experts" lead him to a decision. (*See id.*)

Agencies may fill gaps in statutes, but they cannot supplant 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 Congressional Members. (*See* Complaint, ¶ 108; Answer, ¶ 108.) ATF took the political decision away from Congress, which is entirely contrary to the agency's proper role of carrying out the law, not writing it.

III. CONCLUSION

ATF's Final Rule, *Bump-Stock-Type Devices*, 83 Fed. Reg. 66514, 66516 (Dec. 26, 2018), must be permanently enjoined. ATF's effort to substantively rewrite federal criminal law for the sake of a political fix must not be tolerated. ATF's only defense of its actions denies the truth before our eyes. No one thought bump stocks were *always* machineguns—certainly not ATF.

ATF's slippery advocacy comes with serious consequences. Mr. Cargill has been branded a criminal for following ATF's own advice that a Slide Fire was a lawful firearm accessory. He and the other half-million people who relied on ATF's classifications should not have to face prison time for ATF's own disregard of the legal limits on its authority. This is not a hypothetical fear—the United States recently brought federal criminal charges against a person for allegedly possessing a bump stock. *See United States v. Kaiser,* 1:20-cr-00041 (N.D. Ind. 2020).

Simply put, this Court should enforce the pertinent statutory and constitutional limits and prohibit ATF's attempt to make new criminal law at will. This Court should order that Mr. Cargill's possession of a Slide Fire bump stock did not violate the criminal prohibition in 18 U.S.C. § 922(o) because the device was not a "machinegun" as set out in the statute.

Respectfully Submitted,

October 1, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on October 1, 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.

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