No. 19-4036

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

W. CLARK APOSHIAN,
Plaintiff-Appellant

v.

WILLIAM P. BARR, Attorney General of the United States, *et al*.,
Defendants-Appellees

On Appeal from the United States District Court for the District of Utah
No. 2:19-cv-37
The Honorable Jill N. Parrish, United States District Judge

BRIEF *AMICI CURIAE* OF CATO INSTITUTE AND FIREARMS POLICY COALITION IN SUPPORT OF PLAINTIFF-APPELLANT

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INTEREST OF AMICI CURIAE[1]

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The Firearms Policy Coalition, Inc. (FPC) is a nonprofit membership organization that works to defend constitutional rights and promote individual liberty, including the right to keep and bear arms, throughout the United States. FPC engages in direct and grassroots advocacy, research, legal efforts, outreach, and education to this end.

Amici address an issue that no other *amicus* discusses: the executive branch cannot use the administrative process to accomplish legislative goals that Congress declined to enact. The implications of this case extend far beyond bump stocks.

[1] Pursuant to Fed. R. App. P. 29, counsel for *amici* states that all parties have consented to the filing of this brief. Further, no party's counsel authored any part of this brief and no person other than *amici* made a monetary contribution to fund its preparation or submission.

SUMMARY OF ARGUMENT

For decades, Congress, the executive branch, and the people shared a common understanding: "single function of the trigger" and "automatically," as those terms are used in the National Firearms Act of 1934 (NFA) and Gun Control Act of 1968 (GCA), were not ambiguous. In response to a tragic mass killing in Las Vegas, however, President Trump announced that his administration would change course. Expressly declining to pursue a legislative solution, he directed his administration to redefine bump-stock devices—a type of firearm accessory thought to have been used by the Las Vegas killer—as automatic weapons. In turn, the Bureau of Alcohol, Tobacco, and Firearms (ATF) broke from decades of precedent and discovered a new power to prohibit that widely held type of firearm accessory. This expansion of regulatory authority, motivated by political expediency, is arbitrary and capricious.

But this change is not limited to a ban on bump stocks. ATF has asserted the plenary authority to prohibit new classes of weapons that long-extant federal law did not address. This approach broadly expands the executive branch's power to rewrite generally applicable criminal laws and threatens to stifle new developments in firearm technology.

ARGUMENT

I. The ATF's Interpretative Reversal Is Based on Political Expediency, Not Statutory Ambiguity

The NFA and the GCA include the same definition of a machine gun: "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). Between 2008 and 2016, the Bush and Obama administrations determined in a series of classification decisions that "bump-stock type devices were not machine guns." 82 Fed. Reg. 66514, 66518 (2018). In 2018, the Trump administration reversed course. The new executive action determined that the prior classifications "do[] not reflect the best interpretation of the term 'machinegun' under the GCA and NFA." 83 Fed. Reg. 13442, 13443 (2018). Indeed, the rulemaking attacks the prior classifications for not "includ[ing] extensive legal analysis relating to the definition of 'machinegun.'" *Id*.

What prompted this reversal? The proposed rulemaking reveals that the impetus for this change in position was not an organic review of agency policy. Instead, the change was triggered by public outrage following the October 2017 mass killing in Las Vegas, which likely involved a bump-stock-type device:

> Following the mass shooting in Las Vegas on October 1, 2017, ATF has received correspondence from members of the United States Senate and the United States House of Representatives, as well as nongovernmental organizations, requesting that ATF examine its past classifications and determine whether bump-stock-type devices currently on the market constitute machineguns under the statutory definition. *In response*, on December 26, 2017, as an initial step in the process of promulgating a federal regulation interpreting the definition of ''machinegun'' with respect to bump- stock-type devices, ATF published an Advance Notice of Proposed Rulemaking (ANPRM) in the Federal Register.

Id. at 13446.

The ATF admits that the rulemaking was commenced "in response" to outside political pressure. The proposed rule recounts the president's role in this reversal:

> On February 20, 2018, President Trump issued a memorandum to Attorney General Sessions concerning "bump fire" stocks and similar devices. The memorandum noted that the Department of Justice had already started the process of promulgating a Federal regulation interpreting the definition of "machinegun" under Federal law to clarify whether certain bump stock type devices should be illegal. The President then directed the Department of Justice, working within established legal protocols, to dedicate all available resources to complete the review of the comments received in response to the ANPRM, and, as expeditiously as possible, to propose for notice and comment a rule banning all devices that turn legal weapons into machineguns.

Id. (cleaned up). Publication of this NPRM is the next step in the process of promulgating such a rule.

That process, however, was a *fait accompli*. On February 28, 2018, the president hosted a meeting with members of Congress to discuss school and community safety. Senator John Cornyn, the majority whip, suggested that Congress

could pass legislation "on a bipartisan basis" to deal with "the bump stock issue." Remarks by President Trump, Vice President Pence, and Bipartisan Members of Congress in Meeting on School and Community Safety (Feb. 28, 2018), https://bit.ly/2M6Mjvz. President Trump interjected that there was no need for legislation because he would deal with bump stocks through executive action:

> And I'm going to write that out. Because we can do that with an executive order. I'm going to write the bump stock; essentially, write it out. So you won't have to worry about bump stock. Shortly, that will be gone. We can focus on other things. Frankly, I don't even know if it would be good in this bill. It's nicer to have a separate piece of paper where it's gone. And we'll have that done pretty quickly. They're working on it right now, the lawyers.

Id. Later during the meeting, Rep. Steve Scalise, the House majority whip, proposed other gun-control measures that Congress could vote on. Again, the president reiterated that there was no need to legislate on bump stocks, because his administration would prohibit the devices through executive action:

> And don't worry about bump stock, we're getting rid of it, where it'll be out. I mean, you don't have to complicate the bill by adding another two paragraphs. We're getting rid of it. I'll do that myself because I'm able to. Fortunately, we're able to do that without going through Congress.

Id.

The president left little doubt how his administration would "clarify" the NFA and GCA. Yet, according to press accounts, there was internal dissent within the administration about whether the executive branch had the statutory authority to

prohibit bump stocks. "[P]rivate and public comments from Justice Department officials following the October shooting," the *New York Times* reported, "suggest there is little appetite within the agency to regulate bump stocks, regardless of pressure from the Trump administration." Ali Watkins, *Despite Internal Review, Justice Department Officials Say Congress Needs to Act on Bump Stocks*, N.Y. Times, Dec. 21, 2017, https://nyti.ms/2EFFpy9. Reportedly, Justice Department officials told Senate Judiciary Committee staff that the government "would not be able to take [bump stocks] off shelves without new legislation from Congress." *Id*. Likewise, the ATF director told police chiefs that his agency "did not currently have the regulatory power to control sales of bump stocks." *Id.*

While the Department stated that "no final determination had been made," President Trump boasted that the "legal papers" to prohibit bump stocks were almost completed. Indeed, moments before the rulemaking was announced, President Trump tweeted: "Obama Administration legalized bump stocks. BAD IDEA. As I promised, today the Department of Justice will issue the rule banning BUMP STOCKS with a mandated comment period. We will BAN all devices that turn legal weapons into illegal machine guns." Donald Trump (@realDonaldTrump), Twitter (Mar. 23, 2018, 1:50 PM), https://bit.ly/2DPV1cY. The *Times* would later report that "[t]he reversal was the culmination of weeks of political posturing from Mr. Trump, whose public demands have repeatedly short-circuited his administration's

regulatory process and, at times, contradicted his own Justice Department." Ali Watkins, *Pressured by Trump, A.T.F. Revisits Bump Stock Rules*, N.Y. Times, Mar. 13, 2018, https://nyti.ms/2tczdWI.

Amici have no objection when the president exercises his constitutional authority to direct the actions of his principal officers. Indeed, the president's duty of faithful execution depends on his ability to supervise subordinates. There can be a problem, however, when those actions *reverse* past executive actions by *discovering* new authority in old statutes. Law professor and Cato adjunct scholar Josh Blackman has referred to the former phenomenon as *presidential reversals*[2] and the latter as *presidential discovery*.[3] When interpreting an unambiguous statute, courts should hesitate before deferring to exercises of reversal coupled with discovery:

> There is nothing nefarious when a new administration disagrees with a previous administration. Indeed, it is quite natural that presidents see things differently. The question is how courts should treat this reversal. Outside of *Chevron*'s framework, the Supreme Court has maintained

[2] Josh Blackman, *Presidential Maladministration*, 2018 U. Ill. L. Rev. 397, 405 (2018) ("The first species of presidential maladministration [*presidential reversal*] is by far the most commonplace: when the incumbent administration abandons a previous administration's interpretation of a statute. Every four to eight years, to comply with the new President's regulatory philosophy, political appointees in agencies alter certain interpretations of the law.").

[3] *Id*. at 423 ("The second species of presidential maladministration is *presidential discovery*, which occurs when the President's administration of the regulatory process affects the location of some new authority, jurisdiction, or discretion that was heretofore unknown. This influence may constitute a reversal . . . or it may be a novel discovery altogether on a question the agency never considered.").

> that presidential reversals are "entitled to considerably less deference." . . . Within the cozy confines of "*Chevron*'s domain," however, old interpretations of ambiguous statutes are not chiseled in stone, so "sharp break[s] with prior interpretations" do not weaken deference. Both blends of reversals are policy decisions all the way down and should give courts pause to consider whether the newly minted interpretation is any more reasonable than the abandoned one.

Josh Blackman, *Presidential Maladministration*, 2018 U. Ill. L. Rev. 397, 405 (2018).

It is a "core administrative-law principle" that "an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate." *Util. Air Reg. Group v. EPA*, 572 U.S. 302, 328 (2014). The phrase "single function of the trigger," as used in the NFA, is not ambiguous, so *Chevron* deference is inappropriate. In the court below, the government asserted that it was irrelevant that the rulemaking began in response to political pressure. The Supreme Court's precedents teach otherwise: the combination of presidential reversal and presidential discovery demonstrates that the government's new interpretation ought to be "entitled to considerably less deference." *Watt v. Alaska*, 451 U.S. 259, 273 (1981).

II. The Rulemaking Expands ATF's Authority and Threatens to Bring an Unknowable Number of Firearms into the NFA's Purview

The proposed rule would not only ban bump stocks: ATF's expanded definition of "automatically" places an unknowable amount of firearm owners in criminal peril. For example, crank-operated Gatling guns have never been considered "machineguns" under the NFA. *See* Rev. Rul. 55-528, 1955-2 C.B. 482.

Gatling guns fire when the operator rotates a crank, which cocks and releases a series of strikers, firing successive rounds of ammunition. The crank mechanism of a Gatling guns requires far less "manual input" than does a bump stock. Accordingly, under the proposed rulemaking, owners of Gatling guns face a threat of prosecution. This threat is particularly credible because the government maintains that its reversal is not rulemaking-qua-rulemaking. Instead, the government asserts that it is merely "clarifying" its interpretation of a longstanding statute. In other words, the government is merely exercising discretion not to prosecute Americans who have long abided by the law. In effect, there is now a Damoclean sword over law-abiding Americans: what was legal yesterday can be illegal tomorrow. This sort of abrupt reversal of the criminal law does not warrant deference, *Chevron* or otherwise.

Moreover, ATF has previously distinguished manually operated guns from electric versions. An M-134 "minigun" for example, is considered a machine gun. Functionally, it resembles a Gatling gun, except the role of the crank is performed by an electric motor, which is activated by a switch. The M-134 and its derivatives have always been considered "machineguns." ATF Rul. 2004-5. This type of weapon differs from a Gatling gun in one regard: the weapon fires continuously upon just pressing an electric switch, rather than manually turning a crank. For decades, a machine gun was understood to fire continuously without additional manual input. The ATF's expansive interpretation obliterates this distinction. *Cf*. *id*. (ATF's

previous explanation that the Gatling gun "is not a 'machinegun' as that term is defined . . . because it is not a weapon that fires automatically").

The phrase "single function" of the trigger was selected deliberately because of the vast array of firing mechanisms already then in existence, and which will come to exist in the future. The government here seeks to impose an arbitrary definition that is not only inconsistent with the statute's plain meaning, but threatens to ban any form of novel firing mechanism that might come into existence. At the time of the NFA's passage, a litany of firing mechanisms already existed that did not involve the "pull" of a trigger.[4] There are many novel semi-automatic firing mechanisms that exist, including solenoid-actuated mechanical triggers[5] and electric-fired primers.[6] Indeed, innovation abounds and new mechanisms will likely come to market in the future. These new approaches can improve the accuracy of a firearm, provide access to the disabled, and even make guns safer. The ATF should not be allowed to

[4] For example, "release triggers," which fire the weapon upon releasing the trigger, have existed for over a century. *See* Ed Clapper, *Final Shot – Release Triggers*, Shotgun Sports Magazine, Feb. 3, 2018 https://bit.ly/2KO7XHs. "Spade triggers," which also long predate the NFA, fire upon the forward pressure of a spade shape with the shooter's thumbs. *See* Hrachya H, *KNS Precision Gen 2 AR15/M16 Spade Grip*, TheFirearmBlog, Jan. 28, 2018, https://bit.ly/2WuX7Ze.

[5] *See*, *e.g*. Miles, Bullpup 2016: Vadum Electronic eBP-22 Bullpup, TheFirearmBlog, Sept. 28, 2016, https://bit.ly/2IAieb1.

[6] *See*, *e.g*. Chris Dumm, *Electric Cartridge Primers: Gone But Not Lamented*, The Truth About Guns, Dec. 19, 2013, https://bit.ly/2NLkhbb.

arbitrarily re-interpret a statute targeting machine guns to lock firearm technology in time and put innovators in peril of being locked in federal prison.

CONCLUSION

For the foregoing reasons, and those stated by the Appellant, the district court should be reversed.

Dated: June 13, 2019

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(1) This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because this brief contains 2,497 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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I hereby certify that with respect to the foregoing:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system on June 13, 2019, which will automatically send notification to the counsel of record for the parties.

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