

1 UNITED STATES COURT OF APPEALS
2 FOR THE DISTRICT OF COLUMBIA CIRCUIT

3 ----- X
4 DAMIEN GUEDES, ET AL.; :
5 FIREARMS POLICY COALITION, :
6 INC. CA 18-3083, :
7 Appellants, :
8 v. : No. 19-5042
9 BUREAU OF ALCOHOL, TOBACCO, :
10 FIREARMS AND EXPLOSIVES, :
11 ET AL., :
12 Appellees. :
13 ----- X

14 Friday, March 22, 2019

15 Washington, D.C.

16 The above-entitled matter came on for oral
17 argument pursuant to notice.

18 BEFORE:

19 CIRCUIT JUDGES HENDERSON, SRINIVASAN, AND MILLETT

20 APPEARANCES:

21 ON BEHALF OF THE APPELLANTS:

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P R O C E E D I N G S

THE CLERK: Case number 19-5042, Damien Guedes, et al., Appellants; Firearms Policy Coalition, Inc., CA 18-3083 v. Bureau of Alcohol, Tobacco, Firearms and Explosives, et al.

JUDGE HENDERSON: Mr. Jaffe, good morning.

ORAL ARGUMENT OF ERIK JAFFE, ESQ.

ON BEHALF OF THE APPELLANTS

MR. JAFFE: Good morning. Hello, may it please the Court. I'm Erik Jaffe, I represent the Guedes Appellants, and am arguing on behalf of both Guedes and the Codrea Appellants on the APA issues.

To win this case, just this case --

JUDGE HENDERSON: Can you do something with the microphone? Just raise the, a little bit? I'm having trouble hearing you.

MR. JAFFE: This right here?

THE CLERK: I'll adjust it for you.

MR. JAFFE: Thank you.

THE CLERK: You're welcome.

JUDGE HENDERSON: Great.

MR. JAFFE: To win this appeal all I need to show is some prospect, some reasonable prospect for success on the merits to get the preliminary injunction, and to do that all I need to show is that there is ambiguity in the

1 statute, at which point the Rule of Lenity would apply. At
2 this stage you don't have to decide what the statute
3 ultimately means, you don't have to decide whether I'm going
4 to win, you just have to decide that I have some chance, a
5 reasonable chance, a modest chance, because it's conceded
6 that the lower court did not balance the multiple factors;
7 it is conceded at least in this Court that the other three
8 factors favor me, and the Government doesn't dispute that in
9 those circumstances I don't even need a particularly good
10 argument on the merits, I just need a substantial chance of
11 doing right. And if I don't have a substantial chance of
12 showing that this statute is ambiguous given that for 70-
13 plus years the Government itself read it the other way, I
14 just don't know what ambiguity means at that point.

15 JUDGE SRINIVASAN: So, in order to view the case
16 that way I guess you'd have to espouse the position that
17 Chevron plays no role --

18 MR. JAFFE: I think the Government --

19 JUDGE SRINIVASAN: -- because otherwise --

20 MR. JAFFE: -- concedes there was no Chevron --

21 JUDGE SRINIVASAN: Well, the Government says that,
22 now whether they concede it is a different issue, but --

23 MR. JAFFE: That's fine.

24 JUDGE SRINIVASAN: -- I'm just saying in terms of
25 the frame of analysis that you've set before us it means

1 that ambiguity goes in your favor.

2 MR. JAFFE: That's right.

3 JUDGE SRINIVASAN: Right, and --

4 MR. JAFFE: And --

5 JUDGE SRINIVASAN: -- Chevron would suggest, if
6 Chevron applied Chevron would suggest the opposite.

7 MR. JAFFE: Correct, it would if Chevron applies.
8 I think at least at the preliminary injunction stage where
9 you're suggesting do I have a reasonable argument, the fact
10 that they concede it even if it's not ultimately
11 determinative of the legal question should say I have a
12 decent argument, that they admit that they have not relied
13 on Chevron.

14 JUDGE SRINIVASAN: Well, can I ask you think, so,
15 there's two different questions with Chevron, one is can
16 Chevron apply, and two is if it can, can it be relinquished
17 by the Government? Now, as to the former one, can or does
18 it apply in this context --

19 MR. JAFFE: We cite cases --

20 JUDGE SRINIVASAN: -- we have some decisions from
21 our Court that say that even though an agency's
22 interpretation has criminal law consequences that doesn't
23 deny the applicability of Chevron.

24 MR. JAFFE: You also have cases going the other
25 way. There's also Supreme Court precedent that we cite --

1 JUDGE SRINIVASAN: Which cases do we have that go
2 the other way?

3 MR. JAFFE: I'm sorry. We cite --

4 JUDGE SRINIVASAN: Because I know at least --

5 MR. JAFFE: -- McGoff, I think it was, an '87 case
6 from this Court that we cite in our brief on page 21. That
7 suggests that this is far outside of Chevron territory.

8 JUDGE SRINIVASAN: But we have some pretty recent
9 ones that seem unequivocal about it, Competitive Enterprise,
10 I mean, that they're just saying that even though an
11 interpretation has criminal consequences Chevron applies.

12 MR. JAFFE: Well, this is a little more than
13 simply criminal consequences. It's one thing to say I'm
14 interpreting what revenue means, and if you don't pay your
15 taxes you're going to go to jail, there's a second or
16 tertiary effect; here, the statute says it's a legal loaded
17 machine gun, this is what machine gun means. I think 922
18 that's not indirect criminal consequences that many civil
19 things might have that you might play a little more loose
20 with, this is the definition of what it means to commit a
21 serious felony, and if we give the Government the ability to
22 move back and forth on that and expand that at will I think
23 that has meaningful separation of powers problems.

24 JUDGE SRINIVASAN: So, why do you say that?
25 Because so, for example, suppose the statute unambiguously

1 gave the Agency authority to define the term.

2 MR. JAFFE: I would then argue that that was
3 unconstitutional for Congress to delegate its criminal law
4 making authority, and then we've have a constitutional
5 claim, but that didn't come up in this case.

6 JUDGE SRINIVASAN: So, we know, for example, the
7 Supreme Court has said at least in certain contexts the
8 Agency can define something that then determines whether
9 there's a criminal act that's been committed, (2) (B) says
10 that, right?

11 MR. JAFFE: Well, I would like to at least
12 distinguish two scenarios, one is the definition of a crime,
13 and the other is some incidental administrative facts that
14 if you don't comply with means you have violated the
15 definition of crime. And here is a good example of that,
16 they say turn it in by a date certain, or destroy it in this
17 way by a date certain. I don't dispute that they have some
18 discretion on saying when do you pay a fee, when do you
19 register, when do you have to turn it in, of course they can
20 define these sort of mechanics of implementation, that is
21 different I think than defining the baseline of what it is
22 that is a crime. Yet, if you violate all of those mechanics
23 you've still ultimately committed a crime by not
24 registering.

25 JUDGE SRINIVASAN: So, where does the Supreme

1 Court's decision in (2)(B) fall on that spectrum because
2 that had to do with the definition of what's a controlled
3 substance, which has direct criminal consequences, and the
4 Supreme Court said it was fine for an agency to do that
5 definition?

6 MR. JAFFE: I think in that instance the word
7 controlled almost begs the question, right, I mean, if the
8 answer is a controlled substance means it's illegal to sell
9 a substance listed by X agency --

10 JUDGE SRINIVASAN: Yes.

11 MR. JAFFE: -- well, then sure, but the
12 definition --

13 JUDGE SRINIVASAN: But why isn't that
14 unconstitutional under your view?

15 MR. JAFFE: Well, it might be, they just didn't
16 raise that, I don't know if they --

17 JUDGE SRINIVASAN: No, there was a separation,
18 correct me if I'm wrong, but I thought that there was.

19 MR. JAFFE: Yes, but my argument would be much
20 like the case that's up there now that says to the, it's
21 illegal to do anything that the Attorney General says is
22 illegal, I would say that that's an improper delegation of
23 authority that in the criminal context is severely more
24 problematic than some incidental things about I don't know
25 if X drug or Y drug quite meets the definition of a

1 narcotic, so go figure it out, versus I don't -- so, let's
2 say this batch --

3 JUDGE MILLETT: But what about the securities
4 laws? Right? 10(b)(5) is a very, very powerful law, and it
5 is applied almost quite commonly in tandem civil and
6 criminal enforcement, and the criminal law simply just
7 brings in the definition as determined by the SEC, an
8 agency.

9 MR. JAFFE: So, you know, I think Justice Thomas
10 and Justice Scalia just recently commented on the denial of
11 cert on this saying that in the securities context the
12 notion that we give deference is seriously problematic, we
13 don't do this in other criminal situations, and they're just
14 waiting for the proper vehicle. I don't think they
15 disagreed that this is a serious issue.

16 JUDGE MILLETT: So, Supreme Court precedent --

17 MR. JAFFE: Well --

18 JUDGE MILLETT: -- I'd rather talk about binding
19 precedent than --

20 MR. JAFFE: -- they say it's an open question --

21 JUDGE MILLETT: -- some of the Justice's opinions.

22 MR. JAFFE: -- about whether or not one can
23 properly give Chevron deference in that scenario, and I
24 agree that's an open question as far as the Supreme Court is
25 concerned.

1 JUDGE MILLETT: No, but is that, how is that
2 materially different from this case?

3 MR. JAFFE: Well, once again, I think that there
4 is just a long history of the SEC deciding what kind of
5 crimes, this is like common law crimes, and so we had to
6 delegate to somebody.

7 JUDGE MILLETT: There's a long history of federal
8 agencies interpreting this statute. You've told us that you
9 like most of the history.

10 MR. JAFFE: Well, no, I've only said that the
11 history reflects the common understanding of the words. I
12 don't approve or disapprove of it in any --

13 JUDGE MILLETT: Okay.

14 MR. JAFFE: -- other sense other than to say that
15 when people talk --

16 JUDGE MILLETT: But I think under your view all
17 that interpretation in the past would be just as
18 illegitimate.

19 MR. JAFFE: It's just evidence, it's not binding.
20 The difference I have with Chevron is --

21 JUDGE MILLETT: But their definition of, that bump
22 stocks were not machine guns were in fact, they had no, they
23 had no authority to do that either.

24 MR. JAFFE: It didn't control any subsequent
25 prosecution for possessing a bump stock, for example, I

1 think a court would have made an independent decision in the
2 criminal case. Yes, the fact that they said it --

3 JUDGE MILLETT: You've made a lot of
4 arguments --

5 MR. JAFFE: -- is evidence --

6 JUDGE MILLETT: There are a lot of arguments in
7 this case about how oh, my gosh, you're springing criminal
8 liability on us, we relied on your interpretations, and it
9 just seems somewhat inconsistent to me with your position
10 that the Agency interpretations on matters of criminal law
11 can't carry any weight.

12 MR. JAFFE: The consistency that I see is that
13 those determinations are not binding, they are merely
14 evidence of the meaning of language, much like early
15 congressional usage, much like The Federalist papers, much
16 like anything else we use --

17 JUDGE MILLETT: So, then you have no reliance of
18 interest affected by the fact that they have now said that
19 our view is that this has been criminal all along.

20 MR. JAFFE: Oh, no, no, there's reliance interests
21 in terms of us being misled, in terms of mens rea, in terms
22 of due process --

23 JUDGE MILLETT: It's just evidence.

24 MR. JAFFE: -- but that's not the point here.

25 JUDGE MILLETT: Right. You just said it's just

1 evidence that the Government has no authority, had no, the
2 Agency had no authority to ever interpret that language in
3 the first place because of its criminal applications.

4 MR. JAFFE: The lack of authority doesn't mean
5 they can't mislead you, or cause you to lack mens rea.

6 JUDGE MILLETT: How can we rely on somebody who
7 doesn't have authority? How can you reasonably rely on
8 someone who has no authority to speak to the Agency?

9 MR. JAFFE: Well, because they assert apparent
10 authority. Even if they're wrong, if I'm a gun owner and I
11 say can I do this, and they say yes, and then I do it, and
12 they say ha, ha, you committed a crime, that's a due process
13 problem, that's a mens rea problem, it's not a what does the
14 law mean problem. They may be right that ha, ha, that
15 really was illegal because it turns out we were wrong, but
16 you still could prosecute me, but that's not because the law
17 means something, means what they said one time and not the
18 other, the law is what the law is, and if it's ambiguous
19 there are rules about what to do about that. But I'm not
20 suggesting that their interpretation was the law, merely
21 that it correctly reflected the law because they were not
22 people that lacked intelligence, they were not people --

23 JUDGE MILLETT: Then that sounds like not
24 ambiguity.

25 MR. JAFFE: -- unfamiliar with the words.

1 JUDGE MILLETT: That just sounds like there was,
2 there is no ambiguity.

3 MR. JAFFE: I'm suggesting -- well, my position
4 was there was no ambiguity the way they interpreted it for
5 70 years, but that, the version they propose now at best
6 contradicts that and hence means the statute is ambiguous,
7 that can't be right, they may make an argument why the
8 statute is ambiguous, but they can't possibly be right in an
9 unambiguous plain way because if they were right that means
10 that for 70 years Treasury, the ATF, and every Examiner who
11 looked at every weapon didn't understand what they were
12 reading, and if those folks didn't understand what they were
13 reading how can that language possibly, possibly have been
14 plain? It can't be.

15 JUDGE SRINIVASAN: Can I ask one question? I find
16 this case to be complicated as a matter of administrative
17 law, maybe I'm alone, but I find it to be pretty darn
18 complicated as a matter of administrative law. As I
19 understand the upshot of your view of what the Government
20 did is when the Government rendered its interpretation in
21 the rule that's now before us all they were doing is
22 interpreting the statute so it's just an interpretative
23 rule.

24 MR. JAFFE: Yes, and I believe that's their
25 position other than --

1 JUDGE SRINIVASAN: That I think it --

2 MR. JAFFE: -- some other technicalities --

3 JUDGE SRINIVASAN: Yes.

4 MR. JAFFE: -- like turn it in by X date or Y
5 date, which I admit are --

6 JUDGE SRINIVASAN: It may well be their position,
7 too, and we'll explore that. So, you may be in agreement on
8 that. And I'm just, in terms of the practical consequences
9 about understanding, so that would mean that if, and you're
10 not going to accept this, but I'm just saying if, if we
11 agree with the Government's interpretation, then the part of
12 the rule that says that no bump stock owner has been
13 violating the law until March 26th is just wrong, so that
14 everybody who has owned a bump stock all along has been a
15 felon.

16 MR. JAFFE: Absolutely.

17 JUDGE SRINIVASAN: That's your, that's -- you buy
18 into that, and then you --

19 MR. JAFFE: If you agree that the statute says
20 what they say it says then, then yes, they've been in, well,
21 they have engaged in acts that would be a felony if
22 committed with mens rea. I guess my answer would be --

23 JUDGE SRINIVASAN: Yes.

24 MR. JAFFE: -- ultimately they may not have had
25 mens rea because they were misled by the Government, so

1 whether you could prosecute them for that is an interesting
2 question, but certainly they would have been committing
3 the --

4 JUDGE SRINIVASAN: But they would have known that
5 they committed the acts.

6 MR. JAFFE: -- actus reus.

7 JUDGE SRINIVASAN: They would have known that they
8 committed the acts that --

9 MR. JAFFE: Yes.

10 JUDGE SRINIVASAN: -- turn out to be criminal.

11 MR. JAFFE: Right. And then we --

12 JUDGE SRINIVASAN: Yes.

13 MR. JAFFE: -- get to have the Staples debate
14 about did you --

15 JUDGE SRINIVASAN: Yes.

16 MR. JAFFE: -- need to know --

17 JUDGE SRINIVASAN: Okay.

18 MR. JAFFE: -- it was an automatic weapon even if
19 it was one, but you didn't know it.

20 JUDGE SRINIVASAN: And then if it's an
21 interpretive rule then we have decisions that say that
22 interpretive rules aren't final rules for purposes of an APA
23 challenge.

24 MR. JAFFE: Well, it's an interesting question
25 whether they purport this to be a final rule. If the answer

1 is it's not a final rule but it's just some form of notice I
2 think we would arguably still have standing based on a
3 threat of prosecution, and it's a pretty credible threat of
4 prosecution, it says in three days we're coming after you if
5 you don't turn in your bump stocks. So, whether or not it's
6 an APA challenge, or whether it's a challenge to the
7 Government's threatening to throw me in jail just without
8 the APA --

9 JUDGE SRINIVASAN: You can bring an APA challenge
10 based on, even if the rule isn't in effect based on the
11 threat of a prosecution?

12 MR. JAFFE: I don't know that it would be an APA
13 challenge at that point as opposed to a --

14 JUDGE SRINIVASAN: But that's all you brought.

15 MR. JAFFE: -- declaratory judgment action. Well,
16 we brought that because they purported that this was a rule.
17 If the answer is it's not really a rule then I think you
18 should have the preliminary injunction, let us amend the
19 complaint to make it another challenge that, you know, would
20 say you can't do this, you're threatening us --

21 JUDGE SRINIVASAN: But they're not purporting it's
22 a rule anymore. I think where you started is what I
23 understand which is that you agree with them, but --

24 MR. JAFFE: They just say an interpretative rule,
25 but they say --

1 JUDGE SRINIVASAN: Yes.

2 MR. JAFFE: -- because it has notice and comment
3 that has lots of credibility, and et cetera, et cetera, so
4 if you're going to use the notice and comment procedures I
5 don't see how you say I'm going to use those procedures to
6 get the upside, but not to get the reviewability. I don't
7 think you can have your cake and eat it too in that exact
8 way.

9 JUDGE SRINIVASAN: Yes.

10 MR. JAFFE: But if you decide that it's not a rule
11 and that it's inappropriate to challenge this like I said, I
12 think at that point that would be such an upending of
13 everyone's understanding of this case going forward,
14 including the District Court Judge's understanding of this
15 case that at a minimum some level of a stay pending further
16 proceedings would be appropriate, and let us go back to the
17 District Court and fight about that. But to have it kick in
18 and say, you know, get rid of your bump stocks or go to jail
19 seems overwhelmingly troubling as a result of them having
20 changed positions, if you view it as that.

21 JUDGE SRINIVASAN: And can I ask one question
22 about the interpretation that's --

23 JUDGE MILLETT: Sure.

24 MR. JAFFE: Of course.

25 JUDGE SRINIVASAN: -- at issue? Which is what's

1 your understanding of why Congress would have wanted to draw
2 a distinction between a situation in which a, what everybody
3 agrees is a machine gun, where an individual volitionally
4 pulls a trigger and it results in multiple shots being
5 fired, and a situation in which an individual pulls, makes
6 the motion to pull the trigger once and then because of
7 recoil and other affects the gun bumps up against the finger
8 repeatedly and you have at the end of the day the same
9 consequence, but it's being activated in a way that you see
10 distinct? Why would Congress have wanted --

11 MR. JAFFE: So, Congress never would have
12 considered that issue at the time they --

13 JUDGE SRINIVASAN: Yes. Yes.

14 MR. JAFFE: -- originally enacted it. By 1968
15 when they amended it to take out the word semi-automatic, it
16 seems to me that they at that moment understood that there
17 were things like Colt semi-automatic weapons that they
18 didn't want to cover. And so, remember, the original
19 statute said automatically or semi-automatically, and they
20 would have a better argument if it was semi-automatically.
21 Having taken that out in '68 the answer why Congress would
22 do that is because that kind of rule might cover a whole
23 range of weapons that they didn't want to cover, and if
24 there's some ambiguity at the margins then there's ambiguity
25 and the Rule of Lenity should apply, but Congress didn't

1 have a unilateral purpose to get rid of bad guns, it was
2 balancing a lot of competing interests, as it always does,
3 and in this instance it defined narrowly what a machine gun
4 was. Whether or not in the future they would say that's too
5 narrow, we should expand it, look, in '68 they added things
6 like grenades and explosives because they missed that in
7 '34, not that they didn't exist, but they -- this is what
8 they, it doesn't matter what you think of bump stocks, it
9 doesn't matter whether you think they shoot fast and are
10 terrible, that's fine, but that's for Congress to decide not
11 only whether, but how far to go in banning these and other
12 accelerating devices, devices that enable you to pull the
13 trigger faster, and there are lots of devices like that.

14 JUDGE HENDERSON: Can I ask you about the merits
15 as far as whether this rule, whether it's interpretative or
16 not is ultra vires. Now, I have watched that video, I
17 watched it again this morning several times, and I've read
18 Mr. Vasquez's declaration and explanation of what's
19 happening, and to me the video in the locked position takes
20 more than one pull, in the single, or one-handed unlocked
21 position it still takes more than one pull, it is only when
22 that non-shooting hand is pushing forward that whether it
23 shoots automatically or semi-automatically it shoots more
24 than one shot.

25 MR. JAFFE: Correct.

1 JUDGE HENDERSON: All right. Now, my question is
2 this, I have seen, and I'm sure all of us have, this footage
3 of terrorists with one hand shooting an automatic firearm.

4 MR. JAFFE: Yes.

5 JUDGE HENDERSON: And my question is do you agree
6 with me that whatever gun that terrorist is shooting is not
7 a semi-automatic with a bump stock?

8 MR. JAFFE: I'd have to see the gun, but the
9 answer is yes, in all likelihood that --

10 JUDGE HENDERSON: I mean, this is all outside the
11 record, but I'm just trying --

12 MR. JAFFE: Yes. If they're holding the trigger
13 down, and the trigger remains depressed, and more shots keep
14 coming out that's literally the definition of an automatic
15 weapon, that's the Staples definition of an automatic
16 weapon, that's the Government's definition, that's every
17 encyclopedia of weaponry definition is if it can keep firing
18 while the trigger remains depressed it's an automatic
19 weapon. So, yes, somebody holding it up with an AK-40, you
20 know, a modified AK-47 it would have to be modified, because
21 a normal AK-47 would be semi-automatic. But if you modified
22 it, there are ways to modify those weapons that really do
23 make them automatic weapons.

24 JUDGE HENDERSON: I mean, it seems to me that a
25 machine gun can be shot with one hand.

1 MR. JAFFE: Yes.

2 JUDGE HENDERSON: And we've seen this --

3 MR. JAFFE: Pulling the trigger.

4 JUDGE HENDERSON T: -- in these videos, whatever
5 the gun is, but the video I watched that is in evidence
6 takes two hands.

7 MR. JAFFE: Absolutely. Not only does it take two
8 hands, it takes the second hand engaging in what is
9 ultimately, I mean, it's rapid, but it's this, this --

10 JUDGE HENDERSON: Yes.

11 MR. JAFFE: -- this, the recall pulls it back and
12 you have to shove it forward.

13 JUDGE MILLETT: Are you saying all machine guns,
14 all machine guns by definition require operation by one
15 hand?

16 MR. JAFFE: By one function of the trigger
17 which --

18 JUDGE MILLETT: No, no. I'm asking the question
19 that was just answered, by one hand because there are slow
20 operating military machine guns that someone actually has to
21 sort of push the bullets into while, while someone else is
22 firing it. So, those take more than one hand, and they're
23 military machine guns.

24 MR. JAFFE: Well, so that would violate a
25 different part of this definition, which would be manual

1 reloading.

2 JUDGE MILLETT: No, no. I'm asking you about your
3 definition of machine gun.

4 MR. JAFFE: I'm saying --

5 JUDGE MILLETT: As -- I thought you just answered
6 that question by saying all machine guns can be operated
7 with one hand, and I don't know that that's factually true,
8 we're way outside the record, but I don't think that's true.

9 MR. JAFFE: I can't think of an example, but your
10 hypothetical about somebody having to feed the ammo into the
11 gun in order for it to continue firing would violate --

12 JUDGE MILLETT: A Gatling gun.

13 MR. JAFFE: A Gatling gun is not a machine gun.

14 JUDGE MILLETT: Gatling gun are not -- on
15 helicopters a lot of times the military ones they'll jam
16 after a few fires if you don't keep pushing, you don't, you
17 can probably get the two, two shots out needed to be a
18 machine gun, but people are pushing the ammo in to make it
19 work.

20 MR. JAFFE: Sure. But there's ample case law on
21 the if it jams does that make it not a machine gun, and the
22 answer to that is unequivocally no. It's not about whether
23 it effectively does it every time, but whether it's capable
24 of doing it.

25 JUDGE MILLETT: But they're not operated at all

1 commonly, or successfully with one hand.

2 MR. JAFFE: That's not the ATF's position, that's
3 not the definition, so you're right, you may need to do
4 other things to ultimately make it work when it jams and use
5 a second hand, but that's not shooting more -- all you need
6 to do to be a machine gun is shoot two rounds. If I
7 shoot --

8 JUDGE MILLETT: Right.

9 MR. JAFFE: -- two rounds and it jams it's still a
10 machine gun. If I shoot --

11 JUDGE MILLETT: But if it does two hands --

12 MR. JAFFE: -- one round then it always jams then
13 it's not a machine gun.

14 JUDGE MILLETT: But if you use two hands it
15 doesn't make it, the question is whether what the other hand
16 is doing somehow exceeds the definition of single pull of
17 the trigger.

18 MR. JAFFE: Well, I agree that if all the other
19 hand is doing is propping the thing up so it doesn't fall
20 down and I shoot myself in the foot that has nothing to do
21 with activating the firing sequence.

22 JUDGE SRINIVASAN: Well, what if the other hand,
23 I'm just imagining something, I don't think it's based on
24 reality, but what if what the other hand does is it
25 depresses a button, and all it's doing is depressing a

1 button, so the right hand has a single pull of the trigger,
2 and then the left hand in order to emit multiple rounds with
3 a single pull of the trigger, the left hand is just holding
4 a button?

5 MR. JAFFE: Well, but that's just in a two-part
6 trigger, it doesn't really change the effect -- if the
7 answer is you're not doing this --

8 JUDGE SRINIVASAN: But it's using two hands, it
9 requires, I'm just imagining a weapon that requires the use
10 of both hands.

11 MR. JAFFE: I guess it's important as to what the
12 second hand is doing.

13 JUDGE SRINIVASAN: Yes.

14 MR. JAFFE: And in my, in this scenario, in this
15 case the second hand is causing the trigger to move back and
16 forth, the second hand, so, recoil resets the trigger by
17 causing you to release it, which the Government says is a
18 separate function of the trigger, the release, and then the
19 second hand pushes it again causing it to bump your finger.
20 Now, if all the second hand is doing is coming in with a
21 two-part trigger system and maintaining, that's it, you just
22 have to keep the trigger depressed and both, okay, so you
23 have a two-part trigger, I don't know that that changes it.
24 But what I would say --

25 JUDGE SRINIVASAN: That would be, you think that

1 would be a machine gun?

2 MR. JAFFE: I think it might be a machine gun. I
3 think it's ambiguous is what I actually think is that that's
4 an ambiguity on what the definition of a trigger is, and in
5 this instance they've taken a trigger mechanism, they've
6 broken it in two, and they've claimed oh, no, it's two
7 hands, that might be too clever by half, that's the minigun
8 ruling, that's Olofson to some degree talks about that's too
9 clever by half. But that's an ambiguity, at worst that's an
10 ambiguity, it doesn't mean I'm wrong, it just means the
11 definition of trigger is ambiguous. In the bump stock case
12 we have a normal trigger, it's the little lever thingy that
13 you pull, nobody disputes that, the bump stock doesn't,
14 isn't a trigger, it doesn't replace the trigger, it just
15 provides you a different means of causing that trigger to
16 move, which the Government admits that pull is not the only
17 way to make a trigger move, you can push a trigger, you can
18 bump a trigger, you can do all kinds of things to a trigger
19 to make it move.

20 JUDGE MILLETT: When you talk about the pressure
21 from the non-trigger hand in a bump stock, and they
22 certainly have to do the pressure when the trigger is pulled
23 to make it function in the way that the bump stock is meant
24 to function, I thought I heard you say that they then have
25 to push again, and again, and again --

1 MR. JAFFE: It just happens very quickly, so it's
2 a little bit hard to see.

3 JUDGE MILLETT: Are they pushing again and again,
4 or is it just constant pressure, are they just maintaining
5 pressure?

6 MR. JAFFE: Well, I guess you're counteracting the
7 recoil, or after the recoil stops you push it forward again.
8 But the answer is I'm pushing forward --

9 JUDGE MILLETT: Are they maintaining the pressure
10 they began with, or is your position --

11 MR. JAFFE: They're titrating the pressure to
12 respond to the recoil. So, it's not a constant --

13 JUDGE MILLETT: Well, maintaining pressure can't
14 count as another function of the trigger because you have to
15 maintain pressure on the trigger of a machine gun to keep
16 it, you know, as soon as you release it will finally stop,
17 it will stop firing --

18 MR. JAFFE: Well, but --

19 JUDGE MILLETT: -- so, what I'm trying to ask is
20 are they just maintaining pressure, they're just maintaining
21 pressure with two hands rather than one with a bump stock to
22 have the round fire effect?

23 MR. JAFFE: They're maintaining pressure, just not
24 on the trigger.

25 JUDGE MILLETT: Okay.

1 MR. JAFFE: And so, the definitions, Justice
2 Thomas' --

3 JUDGE MILLETT: But it's not a new pressure or a
4 new movement that comes in, they just have to maintain and
5 continue the pressure they had, and everything's probably
6 shaking because these things are strong and --

7 MR. JAFFE: Sure.

8 JUDGE MILLETT: -- a lot of bullets coming out.

9 MR. JAFFE: If that's the definition of every
10 semi-automatic, literally every semi-automatic is an
11 automatic weapon because if I take a semi-automatic weapon
12 and put a stick into the trigger guard and just push on the
13 back of the thing, the exact same bump firing happens. Just
14 a stick, I don't have to put my finger in there, I don't
15 have to press, I don't have to do anything, a stick, and
16 push on the back of the stock, and it goes da-da-da-da-da.
17 Every semi-automatic pistol, semi-automatic gun all I have
18 to do is take that and push on the back, that can't be the
19 definition with a trigger, keep moving. It's why, by the
20 way, that the Government is wrong in focusing on the
21 behavior of the person rather than the function of the
22 trigger, the trigger keeps moving back and forth, however I
23 cause that to happen is somewhat beside the point. But once
24 again, I don't have to be right, I just have to show that
25 this is a reasonable, and in fact, the more -- the

1 interpretation that they had for years to win this, putting
2 aside the Chevron portion, obviously, but my contention is
3 if it's ambiguous I win, and if the question is does
4 function of the trigger mean the trigger, or does function
5 of the trigger mean function of the shooter pulling the
6 trigger? I concede that pulling the trigger is a means of
7 making the trigger function, but what the statute asks is
8 not how did you make the trigger function, but whether the
9 trigger functioned. And the fact that they say releasing a
10 binary trigger is a separate function of that trigger --

11 JUDGE MILLETT: Can I back you up when you said if
12 it's ambiguous you win in that you would have a likelihood
13 of success for purposes of the preliminary --

14 MR. JAFFE: Yes.

15 JUDGE MILLETT: -- injunction, and why is it that
16 if it's ambiguous that wouldn't just launch us into Chevron
17 land rather than Rule of Lenity?

18 MR. JAFFE: Well, I said putting aside the Chevron
19 debate under the rule --

20 JUDGE MILLETT: Well, that's kind of --

21 MR. JAFFE: -- of Lenity.

22 JUDGE MILLETT: -- kind of a big put aside.

23 MR. JAFFE: Well, okay. But, I mean, if this
24 Court wants to rule that the Rule of Lenity doesn't actually
25 apply, that Chevron trumps the Rule of Lenity in a situation

1 that directly defines a crime then that's a legal position,
2 I think it's wrong, I think it contradicts a bunch of
3 Supreme Court cases, I think Scalia has talked about this a
4 lot, I think it contradicts the non-delegation doctrine, but
5 if the Court says that that's fine, that's at least a
6 straightforward legal fight that we can have, and eventually
7 that'll get resolved, but I don't think the Government
8 disputes that the Rule of Lenity applied and that they don't
9 get Chevron. So, at least for the purposes of the
10 preliminary injunction to jump ahead and rule in the
11 Government's favor on an argument that they not only don't
12 advance, but affirmatively disavow strikes me --

13 JUDGE MILLETT: Well, the Agency didn't disavow
14 it, the Agency rule at issue here invokes Chevron.

15 MR. JAFFE: I can't do anything but argue what was
16 litigated, and if they concede the point having made -- they
17 don't --

18 JUDGE MILLETT: Well, you're challenging --

19 MR. JAFFE: -- they said a lot of silly things in
20 the rule.

21 JUDGE SRINIVASAN: Well --

22 JUDGE MILLETT: -- you're challenging the --
23 sorry. You're challenging the rule.

24 MR. JAFFE: I am challenging the rule, and the
25 Government's own admission that things they said in the rule

1 are wrong I would think would make the rule arbitrary and
2 capricious, just on its face at some level, once they back
3 away from some of the justifications for their conclusion
4 you would think that that would make the rule arbitrary and
5 capricious on not having properly considered it now that
6 they admit that a key lynchpin of their reasoning is wrong.

7 JUDGE SRINIVASAN: Can I ask one question that
8 follows up on Judge Henderson's question about the way that
9 the --

10 MR. JAFFE: Yes.

11 JUDGE SRINIVASAN: -- trigger mechanism works?
12 So, what I heard you say just a little bit ago is as long as
13 the device is activated by a repeated activation of the
14 trigger mechanism that's necessarily semi-automatic. And I
15 guess my question is suppose, and again, I'm just making
16 this up, but suppose you had a situation in which you have a
17 button that's pushed, and what happens with the remote
18 button is that it results in repeated activation of the
19 trigger mechanism.

20 MR. JAFFE: This is a gray area, and I'll tell you
21 why, because the definition of a trigger in that instance is
22 uncertain, what the --

23 JUDGE SRINIVASAN: So, you think if the button is
24 the trigger --

25 MR. JAFFE: Sometimes the button --

1 JUDGE SRINIVASAN: -- then it's a machine --

2 MR. JAFFE: -- can be the trigger.

3 JUDGE SRINIVASAN: Yes.

4 MR. JAFFE: So, think about on planes, on
5 airplanes that have guns, the trigger is not a traditional
6 trigger that is mechanical, it's an electronic button that
7 causes stuff to happen inside the plane, right. That's the
8 minigun ruling, by the way. Now, the minigun ruling is
9 interesting in that it's in tension with the Gatling gun
10 ruling, so if you look back to the 1955 Gatling gun ruling
11 it says a hand crank that makes the trigger do this really,
12 really fast.

13 JUDGE SRINIVASAN: Yes.

14 MR. JAFFE: Not a machine gun, because multiple
15 functions of the trigger. And the reason we know it's not
16 merely because it's not automatic, but that it's multiple
17 functions of the trigger, is because it also says even if
18 you substitute an electric motor for the hand still not a
19 machine gun. Now, one can debate whether they missed
20 whether or not the button is now the trigger, et cetera, et
21 cetera, one could debate about that, but what we do know is
22 that's the last meaningful decision before Congress than in
23 1968 took the word semi-automatically out and added a bunch
24 of other stuff in where they saw problems. So, for that to
25 be the extent ruling at the time, whether or not you think

1 it's a good ruling, a bad ruling, or perhaps got trigger
2 wrong, if that doesn't at least get me ambiguity that
3 Congress had that in front of it, was looking at other ATF
4 decisions, expanded the statute to places that it thought it
5 missed, narrowed it in other places like this, yet somehow
6 the plain meaning of the statute is contrary to that extent
7 ruling that Congress thought was just fine, I'm not saying
8 you have to like that ruling, I'm not even saying that
9 ruling at the end of the day might be the best ruling, I'm
10 just saying that it was plain enough to Congress and the ATF
11 at the time that yes, if what you're doing even
12 electrically, or even through a secondary source is causing
13 the trigger to do this, and we recognize that's the trigger,
14 as opposed to that, it's not a machine gun. And there are
15 plenty of ways they could have, look, they could have
16 written a law that said that any gun that shoots at a rate
17 faster than 10 rounds per second, or, you know, 100 rounds a
18 minute, or 50 rounds a minute, or 30 rounds a minute is a
19 machine gun, they could have said that, that would have been
20 easy, it would have been a piece of cake, we would not be
21 having this debate. And then you could have guns that had
22 limitations on how fast they re-cock and how fast they
23 reset, but that's not what they did, they had a much more
24 complicated problem in front of them, they did the best they
25 could, they used language that everyone understood for 70

1 years that function of the trigger means movement of the
2 trigger, and if that causes problems there's a way of
3 solving that, and that way is not the Agency, it's Congress.

4 JUDGE HENDERSON: Unless there are other
5 questions, we'll give you some time in reply.

6 MR. JAFFE: Thank you very much.

7 JUDGE HENDERSON: All right. Mr. Hinshelwood.

8 ORAL ARGUMENT OF BRAD HINSHELWOOD, ESQ.

9 ON BEHALF OF THE APPELLEES

10 MR. HINSHELWOOD: Good morning, Your Honors, may
11 it please the Court, Brad Hinshelwood on behalf of the
12 Government again addressing the APA questions here. A
13 shooter --

14 JUDGE HENDERSON: All right. I can barely hear
15 you. Okay.

16 MR. HINSHELWOOD: I'll speak up, Your Honor. A
17 shooter using a rifle equipped with a bump stock takes one
18 act, pulling the trigger, that produces an automatic cycle
19 of continuous fire that produces hundreds of rounds per
20 minute until the shooter releases his pull, the weapon
21 malfunctions, or the ammunition is exhausted. This
22 continuous cycle of fire after an initial act of the shooter
23 is precisely what Congress has banned through the National
24 Firearms Act, and later legislation. The plain language of
25 the Act, its legislative history, and consistent judicial

1 interpretation of the statute all confirm the rule's
2 conclusion that a bump stock qualifies as a machine gun.

3 JUDGE SRINIVASAN: So, that gets to the ultimate
4 issue of the proper interpretation. Can I just get a little
5 bit more on your understanding of what frame of analysis we
6 use to figure this out? And as I understand the brief that
7 you filed now your understanding of the rule is that it's
8 just an interpretative rule --

9 MR. HINSHELWOOD: Correct.

10 JUDGE SRINIVASAN: -- it's not a legislative rule?

11 MR. HINSHELWOOD: Correct.

12 JUDGE SRINIVASAN: So, that would mean that
13 everybody who's owned a bump stock has been a felon?

14 MR. HINSHELWOOD: Your Honor, yes. The --

15 JUDGE SRINIVASAN: Yes. Okay.

16 MR. HINSHELWOOD: -- bump stock was always a
17 prohibited device --

18 JUDGE SRINIVASAN: Right.

19 MR. HINSHELWOOD: -- under the statute.

20 JUDGE SRINIVASAN: And so, I'm trying to square
21 that with the rule. So, for example, on 66523 in the third
22 column the following sentence appears, "anyone currently in
23 possession of a bump stock type device is not acting
24 unlawfully unless they fail to relinquish or destroy their
25 device after the effective date of this regulation." So,

1 that says that you're not acting unlawfully until you
2 continue to possess it after the effective date. But the
3 understanding in your brief is you were always acting
4 unlawfully. How do I square that?

5 MR. HINSHELWOOD: Well, Your Honor, I mean,
6 certainly as a statutory matter we think that the proper
7 interpretation of the statute means that these devices were
8 from their inception illegal, prohibited machine guns.

9 JUDGE SRINIVASAN: That's not what --

10 MR. HINSHELWOOD: Now, of course --

11 JUDGE SRINIVASAN: -- that sentence says.

12 MR. HINSHELWOOD: I understand, Your Honor,
13 that --

14 JUDGE SRINIVASAN: Right.

15 MR. HINSHELWOOD: -- in the instructions that are
16 given to individuals who are current possessors of those
17 bump stocks who have possessed them, you know, obviously in
18 reliance on the fact that ATF has previously classified
19 these devices as not being machine guns --

20 JUDGE SRINIVASAN: No, I'm not talking about
21 instructions. I don't know what you mean by instructions.
22 I'm talking about what's in the rule. The rule says someone
23 currently in possession of a bump stock is not acting
24 unlawfully. And then the rule -- and then right at the
25 beginning says the bump stock devices covered by this final

1 rule were not in existence prior to the effective date of
2 the statute and therefore will be prohibited when this rule
3 becomes effective. In other words, nothing unlawful going
4 on until the effective date --

5 MR. HINSHELWOOD: Your Honor --

6 JUDGE SRINIVASAN: -- but what your brief says is
7 it's not right, it's always unlawful.

8 MR. HINSHELWOOD: Well, Your Honor, I mean, as a
9 matter of statutory interpretation I think that's correct.
10 I think as a practical matter what the rule reflects is the
11 fact that, you know, the Department of Justice is not going
12 to be prosecuting individuals --

13 JUDGE SRINIVASAN: That's not --

14 MR. HINSHELWOOD: -- who possess these --

15 JUDGE SRINIVASAN: That would be --

16 MR. HINSHELWOOD: -- particular --

17 JUDGE SRINIVASAN: That would have been easy to
18 say, and that's what I got from your brief is that this is
19 an exercise of prosecutorial discretion, that's just not
20 what it says. When the Government says we're not going to
21 prosecute something as an exercise of discretion you don't
22 say it's not unlawful, you say it's unlawful but we're not
23 going to prosecute. This says it's not unlawful. I don't
24 understand how to square that with what's in your brief.

25 MR. HINSHELWOOD: Well, Your Honor --

1 JUDGE SRINIVASAN: It's not -- it doesn't, it just
2 doesn't read as an enforcement, an exercise in enforcement
3 discretion, it reads as a legislative rule that says this
4 wasn't unlawful until the effective date, at which point it
5 becomes unlawful. And why do I think that? Because I get
6 to speak with the force of law, and that's what I'm doing.

7 MR. HINSHELWOOD: Well, but, Your Honor, even if
8 you think that that particular language is inconsistent with
9 other aspects of the rule which direct people to, you know,
10 turn in, or destroy their bump stocks by the effective date
11 of the rule that wouldn't really affect the scope of
12 Plaintiff's challenge here and their request for a
13 preliminary injunction --

14 JUDGE SRINIVASAN: But it would affect how --

15 MR. HINSHELWOOD: -- I mean, either way --

16 JUDGE SRINIVASAN: -- we're supposed to analyze
17 the validity of the rule because if it's a legislative rule
18 that doesn't become effective until March 26th because it's
19 not unlawful now, then that would mean you're claiming
20 Chevron. And that's why the rule is replete with references
21 to Chevron, it has an entire section that talks about how
22 Chevron applies, and yet your brief says this is not a
23 Chevron case. I don't understand how to square that with a
24 rule that says it's not unlawful until March 26th.

25 MR. HINSHELWOOD: Well, Your Honor, even if you

1 thought that it was not properly an interpretive rule, for
2 example, even though it -- sorry -- or not properly a
3 legislative rule even though it purported to be a
4 legislative rule, that still wouldn't change the basic
5 fact --

6 JUDGE SRINIVASAN: So, it does purport to be a
7 legislative rule?

8 MR. HINSHELWOOD: Your Honor, I don't concede that
9 that's the case. I mean, I think --

10 JUDGE SRINIVASAN: How is it not?

11 MR. HINSHELWOOD: -- what the rule has -- what --

12 JUDGE SRINIVASAN: How is it not a legislative
13 rule if it says anyone currently in possession of a bump
14 stock device is not acting unlawfully?

15 MR. HINSHELWOOD: Your Honor, even then you would
16 have to answer the question of whether it's properly a
17 legislative rule --

18 JUDGE SRINIVASAN: Right. Okay.

19 MR. HINSHELWOOD: -- and that's part of why --

20 JUDGE SRINIVASAN: That's a --

21 MR. HINSHELWOOD: -- we have not pushed, you know,
22 this idea that Chevron deference is applicable here, we've,
23 as you point out, explained that we don't believe Chevron
24 deference is appropriate --

25 JUDGE SRINIVASAN: No, you did.

1 MR. HINSHELWOOD: -- in this case.

2 JUDGE SRINIVASAN: You've explained, you have,
3 first of all you haven't explained it, you say it in your
4 brief. The explanation is in the rule, the rule says it's a
5 Chevron rule. The rule --

6 MR. HINSHELWOOD: Well, Your Honor --

7 JUDGE SRINIVASAN: -- goes on, it's got three
8 columns on how Chevron applies.

9 MR. HINSHELWOOD: The rule discusses Chevron, but
10 it also says that even if Chevron does not apply these
11 definitions reflect the best understanding of the statute,
12 and we think that's absolutely correct.

13 JUDGE SRINIVASAN: So, I didn't see that anywhere
14 in the rule, by the way, that even if Chevron does not
15 apply, does it say that?

16 MR. HINSHELWOOD: I believe, in the discussion of
17 Chevron I believe you're referring to, Your Honor, I believe
18 afterwards -- I'm sorry, I'm going to have to find the
19 specific page, but in any event, Your Honor, whether or
20 not -- the bottom line is we don't believe that Chevron
21 deference is necessary in this particular context because --

22 JUDGE SRINIVASAN: So, you might win without it,
23 but what I'm trying to figure out is what the Government
24 thinks the rule did, because the rule on its face acts,
25 talks, every bit about it is a legislative rule. I don't

1 even -- is there another example of an interpretative rule
2 that has an effective date?

3 MR. HINSHELWOOD: Your Honor, I'm not familiar
4 with an example off the top of my head, Your Honor, but --

5 JUDGE SRINIVASAN: And then why not? Because I
6 don't even understand what that means, because if it's just
7 an interpretation why would you say we have an
8 interpretation, all we're doing is interpreting the statute,
9 and by the way, our interpretation becomes effective on
10 March 26th.

11 MR. HINSHELWOOD: Well, Your Honor, in --

12 JUDGE SRINIVASAN: Until then we'll pretend like
13 we have a different interpretation.

14 MR. HINSHELWOOD: Well, Your Honor, again, in this
15 context where this interpretation certainly overrules prior
16 classification letters that ATF had issued to manufacturers,
17 and certainly puts the regulated public on notice that, you
18 know, a device that ATF had previously erroneously
19 classified as not a machine gun in fact falls within the
20 statute as, you know, as best understood, there's every
21 reason to provide not only notice to the public, but also,
22 you know, a grace period for individuals in which they can
23 destroy or otherwise dispose of their bump stocks to come
24 into compliance --

25 JUDGE SRINIVASAN: If it was an exercise of

1 prosecutorial --

2 MR. HINSHELWOOD: -- with the law.

3 JUDGE SRINIVASAN: -- discretion, but when you're
4 saying that it's just not unlawful, can I just ask you well,
5 why do you think that Chevron doesn't apply, because it's
6 the criminal context, is that the Government's view?

7 MR. HINSHELWOOD: Yes, Your Honor. Yes. So, in
8 this context where we're -- yes.

9 JUDGE SRINIVASAN: That's ultimately what -- and
10 even though we have decisions that say that notwithstanding
11 the fact that the rule has criminal consequences Chevron
12 still applies.

13 MR. HINSHELWOOD: Your Honor, there may be other
14 contexts in which there is some sort of delegation of
15 specific authority that has sort of follow on consequences,
16 and in those circumstances, you know, there may be
17 situations where an agency's interpretation of a statute
18 produces, as my colleague was saying, sort of follow on
19 criminal consequences. But at least for this particular
20 statute in this particular context we don't believe Chevron
21 deference is appropriate.

22 JUDGE MILLETT: Well, what's particular about this
23 context?

24 MR. HINSHELWOOD: Well, Your Honor --

25 JUDGE MILLETT: It has --

1 MR. HINSHELWOOD: -- we have --

2 JUDGE MILLETT: -- tax consequences, and it has
3 criminal consequences.

4 MR. HINSHELWOOD: It does, Your Honor, but --

5 JUDGE MILLETT: How is that different from SEC
6 regulations?

7 MR. HINSHELWOOD: Your Honor, I mean, I think the
8 question there is whether there's been some specific
9 delegation to, you know, the Agency to define like the
10 actual --

11 JUDGE MILLETT: There are two specific delegations
12 --

13 MR. HINSHELWOOD: -- context of the crime.

14 JUDGE MILLETT: -- at issue here.

15 MR. HINSHELWOOD: Well, Your Honor, there's,
16 there's a general delegation -- I'm sorry.

17 JUDGE MILLETT: No, go ahead.

18 MR. HINSHELWOOD: Were you talking about the
19 general delegation -- sorry.

20 JUDGE MILLETT: There's two, yes.

21 MR. HINSHELWOOD: General delegation of rule-
22 making authority to the Attorney General to carry out, to
23 make rules to carry out the Act. I mean, there are other
24 very specific ones, so for example, in 5845(a) the
25 immediately preceding subsection there's, the Attorney

1 General has the authority to determine that a firearm
2 doesn't come within the coverage of the National Firearms
3 Act because it's an antique, and so there may be some degree
4 of deference that's warranted in a situation like that,
5 there, you know, there'd be different types of questions
6 even though there might be follow on criminal consequences
7 from the determination that a firearm is not an antique and
8 thus comes within the coverage of the Act, but at least as
9 to this particular question we haven't asserted that
10 there's --

11 JUDGE MILLETT N: Sorry, do you agree --

12 MR. HINSHELWOOD: -- Chevron deference.

13 JUDGE MILLETT: -- that the definition of antique
14 gets Chevron deference?

15 MR. HINSHELWOOD: Your Honor --

16 JUDGE MILLETT: Since it would divide the line
17 between criminality and non-criminality?

18 MR. HINSHELWOOD: Well, Your Honor, it's not
19 necessarily true that it would divide the line between
20 criminality and non-criminality immediately, I mean, I think
21 that's what's distinct about this --

22 JUDGE MILLETT: In the same way here, right?

23 MR. HINSHELWOOD: -- particular version of the
24 statute.

25 JUDGE MILLETT: In the same way --

1 MR. HINSHELWOOD: But again, you know, the bottom
2 line is we haven't pressed Chevron deference as an argument
3 here.

4 JUDGE MILLETT: It's not a question of pressing
5 Chevron deference --

6 MR. HINSHELWOOD: And it's not to say that --

7 JUDGE MILLETT: -- I thought the question is do
8 you believe Chevron deference applies or not to a statute
9 like this that has pretty direct criminal consequences?

10 MR. HINSHELWOOD: Not to this particular
11 provision, not to these particular --

12 JUDGE MILLETT: What's particular about --

13 MR. HINSHELWOOD: -- interpretations.

14 JUDGE MILLETT: If we have to write an opinion how
15 would we say this situation is different from an awful lot
16 of others where agency interpretations vigorously defended
17 by the Justice Department have direct and immediate criminal
18 implications, what would we say in an opinion as to why this
19 is special?

20 MR. HINSHELWOOD: Your Honor, I think the point is
21 that in this, with this particular statute where the
22 definition of machine gun and the actual possession of a
23 machine gun is in fact a felony, the question is going to be
24 what is the best reading of that statute, not whether the
25 Agency can further define the terms within the statute. But

1 again, Your Honor, the point is that Chevron deference isn't
2 --

3 JUDGE MILLETT: So, if they had a machine gun but
4 they thought it was an antique --

5 MR. HINSHELWOOD: Your Honor --

6 JUDGE MILLETT: -- and they were -- and the
7 Attorney General said no, it's not we would give no Chevron
8 deference to that either?

9 MR. HINSHELWOOD: I don't know that that's true,
10 Your Honor, we would have to give you a somewhat different
11 analysis where there's a specific delegation of authority to
12 the Attorney General to make a determination of that kind,
13 and also the types of consequences that flow from it might
14 be very different depending on the type of weapon at issue,
15 et cetera. So, the point is just that for this particular
16 provision it's just the definition of it is illegal to
17 possess this device, what is this device? Congress has set
18 out a definition, and the rule adopts the best reading of
19 that definition.

20 JUDGE MILLETT: What if we disagree? What if we
21 disagree that it was the best reading?

22 MR. HINSHELWOOD: Your Honor --

23 JUDGE MILLETT: I thought it was a permissible
24 reasonable reading, what are we supposed to do?

25 MR. HINSHELWOOD: Your Honor, we have not advanced

1 Chevron deference.

2 JUDGE MILLETT: I'm aware that you haven't. I'm
3 telling --

4 MR. HINSHELWOOD: So --

5 JUDGE MILLETT: -- you what if we thought it's not
6 the best reading, but we think it's a, just hypothetically,
7 but if we thought it was a permissible reasonable reasoning
8 under Chevron II --

9 MR. HINSHELWOOD: Right.

10 JUDGE MILLETT: -- do you win or lose?

11 MR. HINSHELWOOD: Well, Your Honor, I think get to
12 the question of whether the Government can waive or
13 otherwise forfeit --

14 JUDGE MILLETT: Right. What's your position?

15 MR. HINSHELWOOD: -- Chevron deference, and, I
16 mean, I think I don't know off the top of my head exactly
17 what this Court's precedent on that is, but, you know,
18 again, we haven't pushed for that position here.

19 JUDGE SRINIVASAN: But what's your view on whether
20 Chevron can be waived?

21 MR. HINSHELWOOD: I couldn't -- I'd have to -- off
22 the top of my head I don't have a view on that particular
23 question.

24 JUDGE SRINIVASAN: You don't have a view on that
25 even though you're not asserting, you, I mean, it seems like

1 a pretty significant step not to assert Chevron deference
2 when the rule claims Chevron, and the Government doesn't
3 have a view on whether it's waivable.

4 MR. HINSHELWOOD: Just off the top of my head I
5 couldn't provide you with a, with like a general view on
6 that question. I don't know the Court's law on that
7 particular issue. But again, relevant here, the only
8 question is whether the rule provides the best
9 interpretation of the Act.

10 JUDGE MILLETT: No, I'm --

11 JUDGE SRINIVASAN: No.

12 JUDGE MILLETT: -- asking --

13 MR. HINSHELWOOD: And there's no --

14 JUDGE MILLETT: I guess I still would like an
15 answer to my question, which is if we were to conclude, and
16 that's a big if, that it's not the best reading, but if,
17 another big if we were to conclude that it's a permissible
18 reasonable reading based on the Agency's own invocation of
19 Chevron what do you think we should do?

20 MR. HINSHELWOOD: Well, Your Honor, if you
21 conclude that it's not the best reading of the statute under
22 the argument we have advanced then we don't believe that we
23 would be successful in that particular case. Of course --

24 JUDGE MILLETT: What does that mean?

25 MR. HINSHELWOOD: -- if you were to determine that

1 Chevron deference could not be waived --

2 JUDGE MILLETT: What does that mean?

3 MR. HINSHELWOOD: -- and that Chevron --

4 JUDGE MILLETT: This is a PI appeal.

5 MR. HINSHELWOOD: -- deference applied.

6 JUDGE MILLETT: What does that mean, it's a PI
7 appeal, you conceded irreparable harm, are you conceding
8 that if we don't agree with you that it's the best reading
9 they get a preliminary injunction?

10 MR. HINSHELWOOD: Your Honor, because the question
11 is what is the, have they shown a substantial likelihood of
12 success on the merits, and we have said no, because we have
13 the best reading of the statute.

14 JUDGE MILLETT: And let's assume you're wrong.

15 MR. HINSHELWOOD: Right. I understand that. But
16 if you think that they have the better reading of the
17 statute, or the best reading of the statute then --

18 JUDGE MILLETT: No.

19 MR. HINSHELWOOD: -- under our approach --

20 JUDGE MILLETT: No. No, no, no. I'm not going to
21 change the question. The question is if we conclude it's
22 not best, but it doesn't have to be best, it's reasonable
23 under Chevron II what is the outcome of this case?

24 MR. HINSHELWOOD: Your Honor --

25 JUDGE MILLETT: Preliminary injunction, yes or no?

1 MR. HINSHELWOOD: If you conclude that then I
2 think if you assume that the Government can't have waived,
3 or otherwise forfeited Chevron then you would affirm the
4 District Court's denial if you think we can't waive or
5 forfeit it, and if you think we've waived or forfeited it
6 then you would reverse the District Court's denial of the
7 preliminary injunction.

8 JUDGE MILLETT: I'm sorry. Okay.

9 JUDGE SRINIVASAN: Okay.

10 JUDGE MILLETT: So, you're agreeing -- your
11 position, I guess, is that if Chevron is waivable, and
12 you're wrong about best interpretation, but in fact it's
13 reasonable under Chevron II, the Justice Department's
14 position is we should nonetheless preliminarily enjoin as
15 regulation?

16 MR. HINSHELWOOD: Your Honor --

17 JUDGE MILLETT: That's his position. Now, is that
18 your, is that what you just said to me?

19 MR. HINSHELWOOD: I mean --

20 JUDGE MILLETT: Is that a yes?

21 MR. HINSHELWOOD: -- yes, Your Honor. I mean,
22 like, if, if you don't think we have the best reading of the
23 statute then we believe --

24 JUDGE MILLETT: And then secondly, what would you
25 do if --

1 JUDGE SRINIVASAN: And --

2 JUDGE MILLETT: -- we -- I'm sorry, go ahead.

3 JUDGE SRINIVASAN: And you've affirmatively --
4 you're saying if the -- we're telling you the consequence is
5 that affirmative waiver by the Government of Chevron would
6 mean that you lose, you're saying that you intend to
7 affirmatively waive Chevron so that the Government loses on
8 this rule?

9 MR. HINSHELWOOD: Your Honor, again, we don't
10 believe any of this discussion is necessary.

11 JUDGE SRINIVASAN: I understand that.

12 MR. HINSHELWOOD: But --

13 JUDGE SRINIVASAN: But you might be wrong about
14 that.

15 MR. HINSHELWOOD: -- assuming that I'm wrong --

16 JUDGE MILLETT: Maybe we do.

17 MR. HINSHELWOOD: I, I credit that, like, you
18 know, assuming that that's wrong, yes, I mean, our position
19 is in order to succeed in this appeal and to defend the
20 District Court's judgment we need to show that we have the
21 best reading of the statute, and we do, so it's not an issue
22 for us to acknowledge that Chevron deference does not apply
23 in this context. And Your Honor, that's not to say that you
24 should ignore ATF's expertise and experience in this area,
25 and the reasoning expressed in the final rule, and its

1 discussion of bump stocks --

2 JUDGE SRINIVASAN: Well, have you asked for
3 Skidmore deference?

4 MR. HINSHELWOOD: -- it's just to say -- Your
5 Honor, the particular label that's attached to this isn't
6 really important, the point is --

7 JUDGE MILLETT: You haven't asked --

8 JUDGE SRINIVASAN: Really?

9 JUDGE MILLETT: -- for any deference --

10 MR. HINSHELWOOD: -- you can discuss --

11 JUDGE MILLETT: But you haven't asked for any
12 deference at all, so I don't know --

13 MR. HINSHELWOOD: Your Honor, I think you can
14 look --

15 JUDGE MILLETT: -- how we get to consider the
16 ATF's experience on --

17 MR. HINSHELWOOD: -- at the, you can certainly
18 look at the persuasive force of the discussion in the
19 rule --

20 JUDGE MILLETT: You haven't asked for Skidmore
21 deference.

22 MR. HINSHELWOOD: -- as well as -- I mean, I think
23 you look at the persuasive force of the Agency's reasoning
24 regardless.

25 JUDGE SRINIVASAN: Are you asking for Skidmore

1 deference?

2 MR. HINSHELWOOD: Your Honor, again, the point is
3 do we have the best reading of the statute?

4 JUDGE SRINIVASAN: Are you asking for Skidmore
5 deference?

6 MR. HINSHELWOOD: Again, Your Honor, the specific
7 language that's used is not the point, it's I'm not asking
8 for any particular form of deference, the question is
9 just --

10 JUDGE SRINIVASAN: So, you're not asking for
11 Skidmore deference?

12 MR. HINSHELWOOD: Your Honor, the only question is
13 whether the Agency has put forward the best reading of the
14 statute, and I think you can look at all appropriate
15 sources, including the rule, and the Agency's description to
16 determine that. And whatever --

17 JUDGE SRINIVASAN: Do you agree with Mr., with
18 your colleague on the other side that if there were a
19 specific delegation, let's suppose there were a specific
20 delegation of authority to the Agency to decide what's a
21 machine gun, that that would be unconstitutional as a
22 violation of the separation of powers?

23 MR. HINSHELWOOD: I don't have a position on that
24 question. I assume we would defend, you know, the
25 constitutionality of the statute in that circumstance,

1 but --

2 JUDGE SRINIVASAN: So, it's not -- then if that's
3 true -- right, I would have assumed that, too. So, if
4 that's true then it's not a separation of powers problem
5 with applying Chevron here.

6 JUDGE MILLETT: Your position at least is that.

7 MR. HINSHELWOOD: I mean, look, what we know is
8 that the Supreme Court has said on several occasions that an
9 agency's interpretation of a criminal statute, so if you
10 look at cases like Apel, is not entitled to deference. And
11 so, where we are here interpreting --

12 JUDGE SRINIVASAN: And we also know that in
13 Babbitt (phonetic sp.) there was Chevron deference extended
14 to a rule that had criminal consequences.

15 MR. HINSHELWOOD: Your Honor, there are some, you
16 know, certainly there are cases cutting both ways on the
17 hard questions on this issue, but the bottom line here is
18 that again --

19 JUDGE SRINIVASAN: So, if there, can I, if there
20 are cases cutting both ways then why doesn't the Government
21 claim Chevron deference?

22 MR. HINSHELWOOD: Your Honor, because we think the
23 best understanding particularly in this specific context is
24 that Chevron deference is not appropriate, and we're not
25 asking for Chevron deference here.

1 JUDGE MILLETT: How do you define this --

2 MR. HINSHELWOOD: So, the question is --

3 JUDGE MILLETT: -- specific, how do you define
4 this specific context in a way that doesn't sweep in other
5 Agency interpretations that have direct criminal
6 implications?

7 MR. HINSHELWOOD: Your Honor --

8 JUDGE MILLETT: What is it -- I still don't get
9 what this context is.

10 MR. HINSHELWOOD: Your Honor, I mean, again, I
11 think the distinction for our purposes is just whether in
12 this particular statute there is some delegation to
13 determine these particular terms, and, you know, maybe in
14 some other circumstances it might have sort of secondary or
15 follow on consequences, but here you're talking about
16 individuals (indiscernible) who have now been told that they
17 are subject to prosecution for possessing those devices, and
18 the question of whether or not those things qualify as
19 machine guns is purely a question of textual interpretation.

20 JUDGE MILLETT: Why is 7805 not a sufficient
21 delegation?

22 MR. HINSHELWOOD: Your Honor, it's a general
23 delegation to make rules, but it doesn't necessarily confer
24 the ability to define the scope of criminal --

25 JUDGE MILLETT: I thought in the Gonzalez case the

1 reason the Supreme Court thought the AG didn't have
2 authority under the Controlled Substances Act is that it was
3 a narrow definition and not a general broad one, and so now
4 you're saying well, general broad ones don't work either.
5 So, I'm really very confused as to the Government's position
6 on what kind of delegation, you want Congress to say that
7 you can interpret these words, you can interpret every word
8 in this provision? I'm not sure what this is supposed to
9 be. You're going to take an awful lot of stuff down.

10 MR. HINSHELWOOD: Your Honor, I'm not certain that
11 there's anything -- Your Honor, I don't know that there's
12 the specific contours of all the different types of
13 delegations that these cases have looked at, the only
14 question for our purposes has been consistently from the
15 beginning of this case and throughout these cases across the
16 country has been whether or not the Agency has put out --

17 JUDGE MILLETT: Are these cases just bump stock
18 cases?

19 MR. HINSHELWOOD: Yes, Your Honor, in these bump
20 stock cases, of which there are several.

21 JUDGE MILLETT: Is 7801 also a delegation?

22 MR. HINSHELWOOD: 7801 is the provision that
23 transfers the authority, right, from the --

24 JUDGE MILLETT: To administer and enforce.

25 Administration and enforcement doesn't include interpreting

1 the language?

2 MR. HINSHELWOOD: Your Honor, I think certainly it
3 includes interpreting the language in some circumstances,
4 and I think the question is whether for this particular
5 definition whether it has the right --

6 JUDGE MILLETT: So, anywhere, any other statutes
7 then --

8 MR. HINSHELWOOD: -- to criminal consequences.

9 JUDGE MILLETT: -- any other statutes where
10 Congress used similar language as the two delegations at
11 issue here, if the statutory interpretation has criminal
12 consequences the Government's position I take it, since it
13 can't adopt inconsistent positions, is those aren't
14 delegations either?

15 MR. HINSHELWOOD: Your Honor, I don't know what
16 the other specific delegations you're referring to are, or
17 what the particular context it arises --

18 JUDGE MILLETT: I guess I would have thought the
19 Government --

20 MR. HINSHELWOOD: -- in --

21 JUDGE MILLETT: -- would have looked pretty
22 thoroughly at other delegations to ensure itself it wasn't
23 implicating for example securities laws, immigration law,
24 EPA law, environmental laws.

25 MR. HINSHELWOOD: Your Honor, I can't speak to all

1 of those different bodies of law at this point, all I can
2 say is that for purposes of this case what we have said is
3 the best interpretation of the statute is the one adopted by
4 the rule, and we clearly win under that standard, and
5 there's no need to consider whether or not some degree of
6 deference is appropriate because it's simply not necessary.

7 JUDGE SRINIVASAN: Can I ask a practical question
8 that follows from your interpretation? So, there's
9 something that the rule calls an effective date of March
10 26th, I have to say I don't understand what an effective
11 date is that if it only has to do with prosecutorial
12 discretion, but let's just buy into your worldview for the
13 moment. What is that effective date practically doing,
14 because you can just decide that you're not going to enforce
15 the statute on, you're going to defer enforcement until
16 March 30th, April 1st, April 15th, what magically happens on
17 March 26th other than that the Government under your reading
18 it telling the world that's the date on which we're going to
19 start enforcing the statute, is that all that's happening on
20 March 26th?

21 MR. HINSHELWOOD: I think as a practical matter,
22 and of course, for individuals who are in possession of bump
23 stocks for them --

24 JUDGE SRINIVASAN: So, why are we going --

25 MR. HINSHELWOOD: -- it functions --

1 JUDGE SRINIVASAN: -- so fast in this litigation?
2 Because why don't you just wait to enforce the statute until
3 there's a decision?

4 MR. HINSHELWOOD: Your Honor, because we think the
5 best reading of the statute bans these devices, and these
6 devices under that reading should be banned --

7 JUDGE MILLETT: Well, then why did you --

8 JUDGE SRINIVASAN: But why --

9 MR. HINSHELWOOD: -- that's Congress' instruction,
10 so --

11 JUDGE SRINIVASAN: But why are we, why do we, why
12 are we in an emergency situation where we have to do
13 something, the world has to do something by March 26th if
14 all we're talking about is your exercise of prosecutorial
15 discretion? Why not just say we'll start enforcing the
16 statute when there's a decision, or --

17 MR. HINSHELWOOD: Because --

18 JUDGE SRINIVASAN: -- when the mandate issue?

19 MR. HINSHELWOOD: Because Congress has made a
20 determination that machine guns are prohibited devices,
21 and --

22 JUDGE SRINIVASAN: But you're already --

23 MR. HINSHELWOOD: -- we have concluded --

24 JUDGE SRINIVASAN: -- deferring enforcement --

25 MR. HINSHELWOOD: -- that these things --

1 JUDGE SRINIVASAN: -- until March 26th.

2 MR. HINSHELWOOD: Correct, Your Honor, and, you
3 know, the Agency drew a line to give the public time to come
4 into compliance with the statute, but that doesn't change
5 the basic fact that Congress has banned these devices, and
6 that they are not supposed to be in the possession of
7 members of the public, and --

8 JUDGE SRINIVASAN: But it's just that everybody is
9 acting as if something magical has to happen by March 26th,
10 and it's because the Government decided, on your reading of
11 the statute, not the statute, on your reading of the rule
12 the Government just decided voluntarily we're going to stay
13 our hand until March 26th, but we've decided March 26th is a
14 magic date, and so heaven and earth have to move by March
15 26th because we've decided that that's the date on which
16 we're going to start enforcing the statute.

17 MR. HINSHELWOOD: Your Honor, I mean, that's --

18 JUDGE SRINIVASAN: So, can you wait?

19 MR. HINSHELWOOD: -- that's the line that's been
20 drawn. I mean, Your Honor, if, for example, if Plaintiffs
21 here had sought temporary injunctive relief from this Court
22 pending an appeal to allow full litigation of the question
23 they could have done so, and they chose not to do so in this
24 case, and so we've --

25 JUDGE SRINIVASAN: But what --

1 MR. HINSHELWOOD: -- we've litigated it --

2 JUDGE SRINIVASAN: So, could the Justice
3 Department just decide even though the rule says March 26th
4 could the Justice Department just decide you know what, as
5 an accommodation we won't enforce the statute until say
6 April 30th, or do you feel like you're bound by the rule to
7 start enforcing it on March 26th?

8 MR. HINSHELWOOD: I think as a theoretical matter
9 the Department could possibly put it off, but that doesn't
10 change the fact that for the regulated public what's going
11 to matter is the notice that's been given, the fact that
12 we've put out this notice to the public that on March 26th
13 we expect that individuals will have either destroyed or
14 turned in all their --

15 JUDGE SRINIVASAN: Yes. All of which makes it
16 seem like a legislative --

17 MR. HINSHELWOOD: -- bump stock.

18 JUDGE SRINIVASAN: -- rule, that's because you're
19 right, the rule says that March 26th is the magic day, all
20 of which makes it sound awfully, an awful lot like this is a
21 legislative rule because we're dictating when it becomes
22 unlawful.

23 MR. HINSHELWOOD: Your Honor, again, the point is
24 just that, you know, part of what the purpose of the rule
25 is, and part of the reason this went through notice and

1 comment was to provide public notice and public opportunity
2 to be aware of the Department's interpretation and how it
3 applies to bump stocks. And so, you know, providing an
4 effective date in the rule gives the public the notice that
5 it needs to come into compliance with something even though
6 as a legal matter these devices never should have been
7 available to the public in the first place. And so, you
8 know, just from a --

9 JUDGE SRINIVASAN: And never should have been
10 possessed.

11 MR. HINSHELWOOD: Correct, Your Honor. Yes.

12 JUDGE MILLETT: You said we could just do, so they
13 could have asked for a stay, is it right that courts have
14 the power pre-application to just issue broad injunctions
15 against statements of prosecutorial discretion?

16 MR. HINSHELWOOD: Your Honor --

17 JUDGE MILLETT: Is that your position?

18 MR. HINSHELWOOD: No, but, you know, Your Honor,
19 to the --

20 JUDGE MILLETT: It's not your position?

21 MR. HINSHELWOOD: Your Honor, to the extent
22 that --

23 JUDGE MILLETT: No was your answer?

24 MR. HINSHELWOOD: Your Honor, for these particular
25 individuals the practical effect for them, and the thing

1 that they're asserting as their harm is the fact that they
2 will have to destroy or turn over their bump stock. And so,
3 you could certainly have provided that those individuals
4 could continue to possess --

5 JUDGE MILLETT: My question was you just said --

6 MR. HINSHELWOOD: -- their bump stocks.

7 JUDGE MILLETT: -- this is all, the statute has
8 prohibited this all along, and all that this rule is is an
9 announcement of, an explanation of what the law is, and we
10 are withholding our hand to prosecute until March 26th, and
11 then I thought you said their job was to come here if March
12 26 was to continue to be the magical date it was their job
13 to ask us to enjoin you to continue your prosecutorial
14 discretion even though you haven't actually started a
15 prosecution against anybody, but to enjoin an announcement
16 of temporary prosecutorial discretion. I just wasn't sure
17 that the Justice Department thought courts were supposed to
18 do that.

19 MR. HINSHELWOOD: Your Honor, certainly the
20 practical effect for these individuals is on the
21 possession --

22 JUDGE MILLETT: I'm asking you about the power of
23 the court.

24 MR. HINSHELWOOD: The continued -- Your Honor, I
25 think you could issue an injunction that says that these

1 particular individuals the rule could not be enforced
2 against those particular individuals for the possession of
3 bump stocks.

4 JUDGE MILLETT: The termination of your
5 prosecutorial discretion could not be -- I mean, I'm trying
6 to say, because you're saying what this rule is, and if we
7 accept what the rule is we would have to then be making a
8 judgment that we have, if we accept your position we're not
9 enjoining the operation of a legislative rule, we are
10 ordering you not to exercise your prosecutorial discretion
11 until we're done?

12 MR. HINSHELWOOD: Your Honor, I mean, I mean, the
13 Court certainly has the authority to issue a preliminary
14 injunction against the enforcement of a criminal law, and
15 so, in a sense you can describe that as being an injunction
16 against the enforcement discretion of the prosecutor, but
17 that doesn't change, like, the basic consequence for the
18 putative defendant.

19 JUDGE MILLETT: No, but they haven't asked an
20 injunction of the law, they've asked for an injunction of
21 the rule, and that's what I'm asking you about. You said
22 they could come up and get a stay of the rule, not of the
23 statute, I don't think anyone's enjoining the statute. And
24 then you've said that really what they needed to do was get
25 a stay of March 26, that's not the statute, that's a stay of

1 the termination date of your prosecutorial discretion.

2 MR. HINSHELWOOD: Your Honor, you can characterize
3 it --

4 JUDGE MILLETT: I just want to know --

5 MR. HINSHELWOOD: -- in that way, or you can I
6 think characterize it as --

7 JUDGE MILLETT: Yes, but I'm asking --

8 MR. HINSHELWOOD: -- the enforcement of, I mean,
9 this is an announcement of what we think --

10 JUDGE MILLETT: Okay.

11 MR. HINSHELWOOD: -- the criminal statute means,
12 and they have, you know, a disagreement about what the
13 criminal statute means, and so --

14 JUDGE MILLETT: And you see --

15 MR. HINSHELWOOD: -- in that respect --

16 JUDGE MILLETT: And so far the Government's
17 position is that there's no, they agree, you agree as to
18 irreparable harm, and that there's no countervailing public
19 interests against enjoining the operation of a criminal
20 statute?

21 MR. HINSHELWOOD: I mean, Your Honor, there's a
22 public interest insofar as Congress has --

23 JUDGE MILLETT: You've conceded those issues.

24 MR. HINSHELWOOD: -- banned these devices, and
25 so --

1 JUDGE MILLETT: You've conceded those issues for
2 purposes of the PI appeal, you haven't raised them. I guess
3 that's what's getting all the more surprising to me.

4 MR. HINSHELWOOD: Your Honor, I mean, I think as a
5 practical matter the public interest is tied up with the
6 success on the merits question here because as a practical
7 matter if we're right about the statute Congress does not
8 want these devices in the possession of the public, it is a
9 felony to possess these devices. And so, you know, if you
10 think we have the correct reading of the statute --

11 JUDGE MILLETT: I hadn't thought it was the usual
12 position --

13 MR. HINSHELWOOD: -- which we do --

14 JUDGE MILLETT: -- of the Justice Department that
15 even if someone has a likelihood of success on the merits
16 then there is no public interest in continued enforcement of
17 the law.

18 MR. HINSHELWOOD: Your Honor, we certainly think
19 there is a continued interest in enforcement, you know,
20 again, insofar as Congress has banned these devices, but we
21 think that that's true because Congress has in fact banned
22 these devices. And, you know, they've banned these devices
23 because the statutory terminology looks at whether an
24 individual can take one step, one act and produce a
25 continuous firing cycle that in the case of something like

1 the Akins Accelerator fires at 650 rounds a minute.

2 JUDGE MILLETT: I know we're way over time, I'm
3 sorry, because I actually had, was hoping you could help
4 explain to me some of the disagreements between the two of
5 you, the two sides, it's more than two of you, but on how
6 these bump stocks operate, and in particular, first of all,
7 how do we characterize the bouncing back and forth of the
8 trigger, so the finger's not moving, so it's a single action
9 of the trigger finger it seems for sure, and then what do we
10 do with the fact of the constant forward pressure? If you
11 could just explain to me why their vision is incorrect in
12 your view?

13 MR. HINSHELWOOD: Your Honor, they seem to have a
14 very peculiar focus on the specific mechanical operation of
15 the hammer inside the gun, but that's not at all what,
16 that's not a line that the statute draws that it's focused
17 on.

18 JUDGE MILLETT: I'm not sure it's the hammer
19 inside the gun, I think the trigger outside the gun is
20 actually bouncing back and forth and hitting the finger, is
21 it not?

22 MR. HINSHELWOOD: As to a --

23 JUDGE MILLETT: Am I wrong about that?

24 MR. HINSHELWOOD: As to a bump stock, Your Honor.

25 JUDGE MILLETT: Yes.

1 MR. HINSHELWOOD: But as to other devices, which
2 they also believe would not qualify as a machine gun --

3 JUDGE MILLETT: All right. But let's just focus
4 on bump stocks. So, that's, the external trigger as I
5 understand it is bouncing back and forth and hitting the
6 finger, but the finger doesn't, the finger itself is not
7 pulling back --

8 MR. HINSHELWOOD: Right, after the --

9 JUDGE MILLETT: -- each time.

10 MR. HINSHELWOOD: -- first pull. So, the
11 shooter --

12 JUDGE MILLETT: After the first. Of course.

13 MR. HINSHELWOOD: -- takes one act --

14 JUDGE MILLETT: Yes.

15 MR. HINSHELWOOD: -- and then that initiates a
16 cycle, it initiates the firing sequence, as many courts have
17 held that's what a trigger is. My colleague suggested the
18 term trigger is ambiguous, but I don't think any court has
19 ever held that. The question is just whether what, you take
20 one action to initiate the firing sequence, and then that
21 initiates a continuous cycle of fire that lasts until you
22 release it, or the ammunition runs out.

23 JUDGE MILLETT: And does that alone have to
24 initiate it, or how do you with your plain reading of the
25 statute explain the fact that that alone won't initiate the

1 automatic firing unless there's also constant forward
2 pressure with the non-trigger hand?

3 MR. HINSHELWOOD: Your Honor, that goes to two
4 different terms in the statute, and I think it illustrates
5 one of the flaws with their reading, which is the first
6 question is whether there's a single function of the
7 trigger, so a single act by the shooter to start the
8 process. The question of what the shooter is doing on the
9 front end of the gun, and how that process continues goes to
10 the definition of automatically, and that's why we say, you
11 know, they don't give any meaning to the term automatically.
12 From their standpoint the statute should just say fires more
13 than one shot by a single function of the trigger, but
14 that's not what the statute says, it fires automatically
15 more than one shot.

16 JUDGE MILLETT: Well, it's the, the single -- what
17 I'm trying to understand is that as I read the statute, and
18 tell me if I'm wrong since it's apparently plain, that that
19 single pull, that's one action, it's defined as you've
20 defined it here, that is what has to trigger, that single
21 pull is what has to trigger the automatic firing sequence,
22 am I right --

23 MR. HINSHELWOOD: Correct, Your Honor.

24 JUDGE MILLETT: -- about that?

25 MR. HINSHELWOOD: Yes.

1 JUDGE MILLETT: But if someone does a single pull
2 with a bump stock but isn't pushing forward will it trigger
3 the automatic firing sequence? I don't think it will.

4 MR. HINSHELWOOD: Not with a current bump stock,
5 Your Honor, but if you look at something like the Akins
6 Accelerator which had a bump stock --

7 JUDGE MILLETT: I know, but the bump stock --

8 MR. HINSHELWOOD: -- with an internal string --

9 JUDGE MILLETT: -- you're banning all of them.

10 MR. HINSHELWOOD: Well, but Your Honor, under
11 their reading of single function of the trigger the Akins
12 Accelerator is also not a machine gun.

13 JUDGE MILLETT: I would like just to answer my
14 question about how does the single pull of the trigger
15 activate an automatic sequence, or is it your -- it seems to
16 me that factually doesn't, it's a single pull of trigger,
17 and a push on the non-trigger hand.

18 MR. HINSHELWOOD: Your Honor, it's --

19 JUDGE MILLETT: One I have just is that a
20 factually correct understanding? If that is factually
21 correct just --

22 MR. HINSHELWOOD: Your Honor, if it's --

23 JUDGE MILLETT: -- why that doesn't matter for
24 purposes of saying it's a single pull plus a push that
25 triggers automatic fingering.

1 MR. HINSHELWOOD: Your Honor, again, because it
2 goes to two different parts of the statute. So, what the
3 definition of automatically does is it looks at whether this
4 is a self-regulating or self-acting mechanism going under
5 conditions set for it. So, the shooter sets the conditions
6 by pulling and having some slight forward pressure on the
7 gun, okay? And then by taking that first pull they initiate
8 that sequence that will continue as long as they keep the
9 conditions the same --

10 JUDGE MILLETT: Okay. So, you're saying --

11 MR. HINSHELWOOD: -- until the weapon --

12 JUDGE MILLETT: -- it's the pull and forward
13 pressure together are the initiating action?

14 MR. HINSHELWOOD: No, the pull is the initiating
15 action, there's one step that's taken, the question is once
16 you've taken that pull does the mechanism continue to
17 function under the conditions set for it, and the answer is
18 absolutely yes with a bump stock.

19 JUDGE MILLETT: And you just --

20 MR. HINSHELWOOD: And again --

21 JUDGE MILLETT: -- keep the forward pressure, you
22 don't have to keep, I thought --

23 MR. HINSHELWOOD: It's maintaining constant
24 forward --

25 JUDGE MILLETT: -- the description it sounded like

1 they were, keep moving, you don't move the non-trigger hand,
2 you just --

3 MR. HINSHELWOOD: It's just constant --

4 JUDGE MILLETT: -- constant pressure.

5 MR. HINSHELWOOD: -- pressure, I mean, there may
6 be movement in the sense that, you know, your body is
7 moving, but there's no, there's just constant forward
8 pressure on the gun. So --

9 JUDGE MILLETT: So, that's your single function is
10 the forward pressure and then the pull of the trigger?

11 MR. HINSHELWOOD: The pull of the trigger is the
12 single function, that's the function, and that's what courts
13 have always looked at to determine what the single function
14 of the trigger is. What is the first act the shooter does,
15 Olofson uses the language set in motion the firing sequence.
16 Evans and Camp use the language the action the shooter
17 takes. And so, the action the shooter is taking with most
18 weapons is pulling the trigger one time, and once you've
19 taken that single step the question then becomes --

20 JUDGE MILLETT: Well, are they right that we can
21 tell if --

22 MR. HINSHELWOOD: -- is it producing automatically
23 more than one shot? And --

24 JUDGE MILLETT: Can it be a machine gun, to be a
25 machine gun I thought they were suggesting essentially you

1 have to be able to do it one-handed?

2 MR. HINSHELWOOD: Your Honor, that appears nowhere
3 in the statute, and I don't understand where they've drawn
4 that particular line. It doesn't appear in any of the
5 cases.

6 JUDGE MILLETT: I assume that's what they mean by
7 single action of the trigger that you can't require
8 something with the other hand.

9 MR. HINSHELWOOD: Your Honor --

10 JUDGE MILLETT: That's what I'm, I guess I don't
11 mean to speak for them, and they can clarify when they get
12 up, that's --

13 MR. HINSHELWOOD: But Your Honor, there's
14 nothing --

15 JUDGE MILLETT: Is it accurate that other machine
16 guns that have already been banned always operate one-
17 handed?

18 MR. HINSHELWOOD: I mean, in many circumstances
19 there are devices that fire with one hand, I mean, I don't
20 know that, I can't speak for the entire universe of devices
21 that have been banned, but that's not the question under the
22 statute. The question under the statute is do you take a
23 single act, in this case pulling the trigger, and then does
24 that initiate automatically more than one shot? And so, in
25 order to give both of those, you know, parts of the statute

1 meaning to understand that the initiation of the firing is
2 the first thing the shooter does is what's relevant for that
3 portion of the statute. And again, that's why devices like,
4 you know, something that pulls and releases the trigger on
5 the shooter's behalf are banned, it's because you're doing
6 one act as the shooter, and then that causes the trigger to
7 be pulled and released over and over again, even though you
8 yourself are not pulling and releasing the trigger over and
9 over again.

10 JUDGE MILLETT: Yes. I guess what I'm trying to,
11 what I'm trying to understand here is as I understand their
12 argument it's that the single pull will not initiate the
13 automatic firing sequence, it is the single pull and a push
14 with the other hand, now what, is that factually accurate?

15 MR. HINSHELWOOD: I mean, it is accurate that with
16 a bump stock that is unlikely Akins Accelerator, so it does
17 not have an internal spring, that the first pull if you have
18 no forward pressure on the gun it will not fire again. But
19 the point is -- and so, in that circumstance like a regular
20 stock it's not a machine gun. But if you are, if you've set
21 the conditions properly by applying the correct pressure on
22 the front, and having the bump stock engaged --

23 JUDGE MILLETT: I think what they would say
24 is -- I think the question is is that setting the
25 conditions, having to add another condition, does that take

1 you out of the plain language of the statute?

2 MR. HINSHELWOOD: It doesn't take you out of the
3 plain language automatically, that's certainly true. I
4 mean, that's what the --

5 JUDGE MILLETT: (Indiscernible.)

6 MR. HINSHELWOOD: -- that's the work that
7 automatically is doing. The point is that automatically in
8 the statute as we know from, you know, the contemporaneous
9 definitions of the term in 1934, as we know from the Seventh
10 Circuit's decision in Olofson, and as the District Court
11 properly recognized here, you know, automatically just looks
12 to whether --

13 JUDGE HENDERSON: Have you looked at the video --

14 MR. HINSHELWOOD: I'm sorry?

15 JUDGE HENDERSON: Have you looked at the video? I
16 mean, the forward pressure is not being applied
17 automatically, that hand is on the barrel, and why isn't
18 this statutory construction as simple as it's a single
19 function of the trigger, it's pull plus, it's not just pull,
20 it's pull plus, and you all are saying it's just pull,
21 that's all you need, and you need that second hand, and the
22 videos show that.

23 MR. HINSHELWOOD: Your Honor --

24 JUDGE HENDERSON: And to say -- let me just
25 finish -- to say that automatically refers to the second,

1 the non-shooting hand when it is modified by the phrase by a
2 single function of the trigger.

3 MR. HINSHELWOOD: Your Honor, I don't think the
4 words single function of the trigger is doing in the statute
5 is modifying automatically, I mean, all of these terms --

6 JUDGE HENDERSON: Well, you need to diagram that
7 sentence then.

8 MR. HINSHELWOOD: Well, I mean, all of these terms
9 are used to define machine gun, and so in this, we generally
10 want to give all of these terms some distinct meaning. And
11 the point is that it is certainly true as you point out that
12 an individual can take, can make one pull, and if they
13 aren't putting any forward pressure on the gun the bump
14 stock will not continue to cycle. But at least for purposes
15 of what constitutes a single function of the trigger that's
16 why courts have consistently not looked to, have
17 consistently looked to what the shooter is doing to initiate
18 that firing sequence, that's why the Akins Accelerator
19 qualifies as a single function of the trigger, because the
20 individual pulls the trigger once, and even though the, you
21 know, the trigger mechanism is bouncing back and forward,
22 back and forth against the finger that still qualifies as a
23 single function of the trigger for purposes of the statute.

24 JUDGE MILLETT: All right.

25 MR. HINSHELWOOD: So --

1 JUDGE HENDERSON: You had a question?

2 JUDGE SRINIVASAN: I have one question, yes, which
3 is, which goes to the point of whether you can win even if
4 it's only a reasonable interpretation of the statute, and
5 not necessarily the winning one, even if you don't want to
6 win if it's only a reasonable interpretation of the statute.
7 And my question is this, if the, if it's just an
8 interpretive rule all along, which is your view, then why
9 didn't the Government argue that there's no APA action
10 because it's not a final Agency action?

11 MR. HINSHELWOOD: Your Honor, I mean, I think,
12 again, from a practical standpoint we've treated this as,
13 you know, these are individuals who have a belief that
14 they're going to be criminally prosecuted, that don't
15 register their devices.

16 JUDGE SRINIVASAN: But could you have made that
17 argument?

18 MR. HINSHELWOOD: You know, if you think there's
19 no final agency action here, I mean, that's --

20 JUDGE SRINIVASAN: No, no. Not if I think it, I'm
21 saying that I think there's general case law that says, and
22 understandably that interpretive rules generally are not
23 final agency actions, and so you can't bring an APA action
24 when all an agency is doing is interpreting a statute. So,
25 you could have said if you thought it was interpretive rule

1 you could have said no APA action, non-final agency action.
2 Yes, it's true we said that the enforcement date on which
3 we're going to begin enforcing the statute, and the way you
4 get to decide whether we're right in the way we interpret
5 the statute is you wait until the statute is enforced
6 against you, and then we'll have it out.

7 MR. HINSHELWOOD: Well, Your Honor, I think even
8 in that context because we're talking about a criminal
9 statute you wouldn't have individuals who could bring
10 credible pre-enforcement challenges to the provision, so I
11 think --

12 JUDGE SRINIVASAN: You would or you wouldn't?

13 MR. HINSHELWOOD: I think you would, I mean, you
14 have a situation where --

15 JUDGE SRINIVASAN: In an APA action?

16 MR. HINSHELWOOD: Well, maybe not through an APA
17 action --

18 JUDGE SRINIVASAN: Right.

19 MR. HINSHELWOOD: -- but you would certainly have,
20 you know --

21 JUDGE SRINIVASAN: So, you could have made the
22 argument that it's non-final agency action for purposes of
23 an APA action.

24 MR. HINSHELWOOD: I mean, possibly. But for
25 purposes of this sort of --

1 JUDGE MILLETT: Wait, then what action would they
2 bring?

3 MR. HINSHELWOOD: -- preliminary injunction
4 litigation. Sorry.

5 JUDGE MILLETT: What action would they bring?
6 Because they're, assuming no constitutional arguments --

7 MR. HINSHELWOOD: I mean --

8 JUDGE MILLETT: -- here.

9 MR. HINSHELWOOD: -- some sort of declaratory
10 judgment action, or something of that nature, maybe. But, I
11 mean, the --

12 JUDGE SRINIVASAN: And the --

13 JUDGE MILLETT: Sorry.

14 JUDGE SRINIVASAN: -- Government thinks that you,
15 the people can do that, they can bring pre-enforcement --

16 MR. HINSHELWOOD: You know --

17 JUDGE MILLETT: There's waivers of --

18 MR. HINSHELWOOD: -- again, Your Honor --

19 JUDGE MILLETT: -- of sovereign immunity for that?

20 MR. HINSHELWOOD: -- I'm not, I don't want to
21 litigate on their behalf, I don't know what kind of actions
22 they would want to bring, but --

23 JUDGE MILLETT: No, but this is on your own
24 behalf, you didn't raise an argument because you were,
25 apparently have the view that this litigation

1 jurisdictionally could go forward --

2 MR. HINSHELWOOD: Well, Your Honor, if you
3 conclude --

4 JUDGE MILLETT: -- and that there's a waiver of
5 sovereign immunity and a cause of action.

6 MR. HINSHELWOOD: -- if you conclude there's some
7 sort of jurisdictional defect here then --

8 JUDGE MILLETT: I'm asking you what your
9 theory --

10 MR. HINSHELWOOD: -- that's one thing.

11 JUDGE MILLETT: Judge Srinivasan asked you what
12 your theory was for allowing this litigation to go forward.

13 MR. HINSHELWOOD: Your Honor, I think we've
14 approached it as, you know, these individuals have, you
15 know, concrete interests that are being affected here, and
16 they have concerns about the potential for criminal
17 prosecution, and so, the only question that we've been
18 focused on I think throughout this litigation has been
19 whether or not we've provided the best reading of the
20 statute because it's going to have consequences for
21 individuals down the road. Now, are there other arguments
22 that potentially could have been raised, maybe, but I'm
23 unfortunately not here to litigate questions we haven't
24 raised.

25 JUDGE MILLETT: You see no jurisdictional bar to

1 them, if they couldn't sue under the APA there's no
2 jurisdictional lesson, waiver of sovereign immunity bar to
3 just filing a declaratory judgment action to challenge
4 exercise, terminating an exercise of prosecutorial
5 discretion?

6 MR. HINSHELWOOD: Your Honor, again, I mean, you
7 can certainly seek an injunction against the enforcement of
8 a criminal law, whether, like, exactly the form of that
9 action I can't speak to right now --

10 JUDGE MILLETT: Can you --

11 MR. HINSHELWOOD: -- but I could just --

12 JUDGE MILLETT: -- just broadly? And one, they
13 don't want an injunction against a criminal law, they want
14 an injunction against your Federal Register rule, but --

15 MR. HINSHELWOOD: The specific form of action they
16 brought here is an APA action, and so we are litigating the
17 question basically at this point of whether or not the
18 Agency has provided the best interpretation. Now, again, if
19 there are other grounds, or if the Court has jurisdictional
20 concerns then that's, you know, something that, you know,
21 can be addressed, but at least --

22 JUDGE MILLETT: I'm just saying do you know
23 what --

24 MR. HINSHELWOOD: -- for present purposes --

25 JUDGE MILLETT: -- the waiver of sovereign

1 immunity would be for that other suit?

2 MR. HINSHELWOOD: No. Your Honor, again, I don't,
3 I haven't tried to map out how people can challenge this
4 rule in other ways. But for our purposes the question is,
5 you know, what does the, does the rule properly interpret
6 the terms of the statute, and we don't think there's any
7 doubt that it does, and certainly the interpretation
8 Plaintiffs have offered, I mean, I think they've been not
9 particularly shy about saying what they want to do is open
10 the door to a host of devices that the Agency has long
11 treated as qualifying as machine guns because they're
12 focused on the particular movement of the trigger. So, you
13 know, a device like the AutoGlove, or a device like the
14 weapon that was at issue in United States v. Camp, the Fifth
15 Circuit case where there was an unmodified trigger on the
16 semi-automatic rifle, but by flipping a switch a motor
17 started that pulled and released the trigger repeatedly, and
18 the Fifth Circuit had no problem saying that that was a
19 machine gun even though, again, on Plaintiff's definition
20 the hammer is being released by the trigger on the gun each
21 time when it's fired. So, those types of devices under
22 their understanding of the statute would no longer be
23 machine guns despite the fact that I think everyone
24 recognizes those devices function identically.

25 JUDGE MILLETT: If we were enjoining the statute

1 what would be enjoined? Would you say you can't --

2 JUDGE HENDERSON: The statute.

3 MR. HINSHELWOOD: I'm sorry, Your Honor.

4 JUDGE MILLETT: What would the injunction be if
5 they were enjoining, if they wanted an injunction against
6 the statute it would be the Justice Department can't enforce
7 the machine gun prohibition? That can't be right.

8 MR. HINSHELWOOD: Your Honor, again, I --

9 JUDGE MILLETT: And so, you can't enjoin that
10 interpretation in the Federal Register of what machine gun
11 means, right?

12 MR. HINSHELWOOD: Your Honor, again, I don't, in
13 terms of what sort of form of action they can bring in other
14 contexts I don't know, I'm here --

15 JUDGE HENDERSON: All right. Do you have any more
16 questions?

17 MR. HINSHELWOOD: I don't have a good answer to
18 that question.

19 JUDGE HENDERSON: All right. Thank you.

20 MR. HINSHELWOOD: If there are no further -- thank
21 you.

22 JUDGE HENDERSON: Does Mr. Jaffe have any time
23 left?

24 THE CLERK: Mr. Jaffe did not have any time left.

25 JUDGE HENDERSON: All right. Why don't you take a

1 couple of minutes?

2 ORAL REBUTTAL OF ERIK JAFFE, ESQ.

3 ON BEHALF OF THE APPELLANTS

4 MR. JAFFE: I think this has illustrated that this
5 is certainly ambiguous, and the fact that the Government is
6 rushing to implement whatever this is, legislative or
7 interpretive rule screams for a preliminary injunction.
8 You've raised lots of interesting questions, about
9 deference, about waiver, about Chevron, all of which could
10 be litigated if they had either not shut down the Government
11 earlier and we had time to litigate it, or had they not
12 waived the argument and thus effectively allowed the
13 District Court to sandbag us, not purposefully, obviously,
14 but sandbag us with all these interesting Chevron questions
15 that have never been litigated, and that you need not decide
16 in two days. That's asking too much, and that in and of
17 itself is a huge public interest in putting a brake on this
18 and letting us litigate this in a reasonable manner, even if
19 you think those are serious arguments.

20 JUDGE MILLETT: You've never asked for an
21 injunction pending appeal.

22 MR. JAFFE: I asked for injunction in the District
23 Court, and I'm here asking --

24 JUDGE MILLETT: You never asked for an injunction
25 pending appeals.

1 MR. JAFFE: Because the whole theory of this was
2 the District Court wanted this to get decided before the
3 effective date, and we acceded to that request.

4 JUDGE MILLETT: Well, sometimes Appellants don't
5 always agree with what the District Court wants.

6 MR. JAFFE: Well, but if the short answer is okay,
7 make the motion now, I'll make it standing here orally,
8 please give an injunction pending appeal, on cert and on
9 remand, and then we'll do it. If that's, if it's just a
10 technical problem I did ask for an injunction, I just --

11 JUDGE MILLETT: It wasn't a technical problem when
12 a party doesn't move for something.

13 MR. JAFFE: Well, then -- if I can waive the
14 injunction from you, all I'm asking you is to order the
15 District Court to give me the injunction the District Court
16 should have given me, because this is a hard question, and I
17 have reasonable, substantial arguments. No matter how much
18 you think those arguments may or may not be successful
19 they're substantial, and the District Court should have
20 given me that. All I want from you is to say that, and then
21 the District Court will give me my injunction. But if you
22 want to give me the injunction yourself I'll make the
23 motion. I don't think that's the point.

24 I just want to point out one thing, by the way,
25 about deference. United States v. Thompson/Center Arms

1 Company, addressing the ATF's authority to define a term in
2 the firearms statute, and they said no, no Chevron deference
3 lenity applies. Whatever you think about drug laws, and
4 narcotics, and all of that other stuff, direct Supreme Court
5 precedent on this statute with this Agency, I just don't
6 know how better it gets than that in terms of the Rule of
7 Lenity applying there.

8 As for your answers about guns, they never
9 answered the point that if all you're talking about is
10 putting pressure on it, remember, it's not just pressure for
11 pressure's sake, it is pressure to move the trigger, it's
12 not one function, it is multiple functions of the trigger.
13 The purpose of the pressure on the second hand is not some
14 standalone pressure, not squeezing it, I'm moving it so that
15 the trigger moves, and then releases, and then moves, like
16 any semi-automatic. If I take a semi-automatic, put a stick
17 in it, and just keep constant pressure on the back that gun
18 fires repeatedly, bump fires repeatedly with no
19 modifications, just a stick. If that's true their
20 definitions are wrong because it's clear that Congress
21 authorizes the possession and sale of semi-automatic
22 weapons. If their definition would encompass every semi-
23 automatic weapon it is clearly wrong, and they, their
24 position is it's just constant pressure by the shooter
25 regardless of what's happening with the trigger, if that's

1 true every semi-automatic weapon is illegal. And that's the
2 problem with their definition, by the way, it contradicts
3 not only 70 years of history, it contradicts every other
4 section of the statute that recognizes semi-automatic
5 weapons, including the original testimony by the guy who put
6 the single function of the trigger in, which the whole point
7 of this was to protect what he called repeating rifles,
8 which we now call semi-automatic weapons.

9 The other thing that I would just point out very
10 quickly is look, their litigation strategy, if they can't be
11 bound to a litigation strategy at least for this case, I
12 understand it may not bind them in some future case, but at
13 least here I just don't know how we litigate, if I have to
14 answer questions that were never raised that are sprung at
15 the last second on an emergency basis at a minimum that
16 requires a preliminary injunction so that we can litigate
17 this in a reasonable sense. Waivers of that sort I would
18 imagine have to.

19 As to whether or not it was always illegal or not
20 illegal, whether this is legislative, they certainly at one
21 point had made the argument that the original language of
22 the statute and the identical language of the regulation
23 were not enough to ban bump stocks, which is why they felt
24 the need to do more. But to the extent that it's a
25 legislative rule it only makes it worse because I think the

1 ambiguity in the statute, no Chevron deference
2 (indiscernible) and that concedes that the language itself
3 is not plain if the original worded letters, and they
4 conceded this down below.

5 JUDGE MILLETT: Well, the Agency itself invoked
6 Chevron.

7 MR. JAFFE: Well, and then abandoned it. So --

8 JUDGE MILLETT: No, the Agency didn't abandon, the
9 litigating --

10 MR. JAFFE: Well, I --

11 JUDGE MILLETT: -- lawyers abandoned it, but
12 the --

13 MR. JAFFE: I take that they speak for the Agency,
14 if that's a mistake --

15 JUDGE MILLETT: We review the, but we review --
16 it's pretty well established that lawyers litigating Agency
17 cases can't add argument, there's a ton rules against that,
18 so --

19 MR. JAFFE: They can waiver things all the time.
20 And to the extent --

21 JUDGE SRINIVASAN: No.

22 MR. JAFFE: -- that they concede Chevron doesn't
23 apply --

24 JUDGE MILLETT: (Indiscernible) Chevron.

25 MR. JAFFE: Well, but to the extent that they

1 concede Chevron doesn't apply it means the Agency's analysis
2 was arbitrary and capricious. So, whatever the Agency did,
3 if it contradicts the position of the Department of Justice
4 that is almost definitionally arbitrary and capricious, the
5 fact that they didn't address the fact the Department of
6 Justice actually thinks they have no deference, but they
7 claimed it anyway, how could that not be an arbitrary and
8 capricious analysis of the statute. And like I said, it's
9 just at the end of the day the Agency, DOJ is correct in
10 waiving Chevron because Thompson/Center on point as to the
11 ATF.

12 JUDGE HENDERSON: All right. We have your
13 argument. Thank you.

14 MR. JAFFE: Thank you very much.

15 JUDGE HENDERSON: So, we'll move on to the other
16 issues, Mr. Goldstein.

17 ORAL ARGUMENT OF TOM GOLDSTEIN, ESQ.

18 ON BEHALF OF THE APPELLANTS

19 MR. GOLDSTEIN: Thank you, Your Honors. My name
20 is Tom Goldstein, I represent FPC, and I'm here on the
21 Whitaker questions. So, I think there are three kind of
22 bodies of things to talk about, the first is kind of where,
23 what you do now, and how this interacts with other cases,
24 and that is do you have to decide it by Tuesday, what's the
25 effect of what you might rule with respect to the APA type

1 challenges on the Whitaker things. Then the second body of
2 arguments is this question of ratification, so would you
3 even reach our arguments. And then there's the third, we
4 have a statutory informed by constitutional challenges.

5 So, the first thing, and what we would suggest you
6 do, the first is you do not have to decide our part of this
7 case by Tuesday, you can sever our appeal from their appeal
8 if you decide you have to decide the rest of it by Tuesday,
9 and the reason for that is we recognize, although again, the
10 Government hasn't even made this argument, we recognize that
11 in light of the ratification the rule will be effective as
12 against the Whitaker challenge because Attorney General Barr
13 has issued a rule. Now, we'll table for just a second,
14 whether it's legislative or interpretive, that sort of
15 thing, but the thing exists and he signed it, so I don't
16 think we would get a preliminary injunction against that,
17 therefore you don't have to do something by Tuesday. So, I
18 just wanted to make that clear in terms of what there is a
19 rush to decide, and what there isn't a rush to decide.

20 So, if I could then go to the question of whether
21 you'd even reach our case given the ratification, and --

22 JUDGE SRINIVASAN: So, on the first piece --

23 MR. GOLDSTEIN: Sure. Sure.

24 JUDGE SRINIVASAN: -- I hadn't thought of it this
25 way before until --

1 MR. GOLDSTEIN: Yes.

2 JUDGE SRINIVASAN: -- you raised it, but so,
3 you're only speaking about the Whitaker piece of the case?

4 MR. GOLDSTEIN: Yes.

5 JUDGE SRINIVASAN: So, your view is that because
6 Attorney General Barr ratified then the Whitaker piece of
7 the case can be cordoned off?

8 MR. GOLDSTEIN: Yes. We have a separate appeal,
9 you can just sever our appeal. I'm just, I'm very concerned
10 about --

11 JUDGE SRINIVASAN: Yes. Okay.

12 MR. GOLDSTEIN: -- the logistics for the Court,
13 and I'm very sensitive to the speed. And just, you know,
14 forgive us for having pursued this emergency appeal, when we
15 were here there was no ratification, right? So, and we
16 initially pursued it the day after the Court's panel was
17 identified and they had got a favorable ruling from the
18 District Court the day before they filed their brief then
19 they attempted this ratification maneuver. So, the, I'm
20 just telling you that the --

21 JUDGE SRINIVASAN: Okay.

22 MR. GOLDSTEIN: -- that things have changed. I'm
23 just trying to make it easier for you.

24 Now, I should say one other thing, that you would
25 have the option to be clear given the ratification to simply

1 dismiss the appeal or to remand to the District Court, but
2 under, you were involved in a case called Reptile Keepers
3 that stands for a well-known proposition and that is once
4 the preliminary injunction ruling comes from the District
5 Court, if the District Court's ruling is all based on I'm
6 just rejecting all your substantive claims, you have
7 jurisdiction over the whole case, and it just kind of
8 doesn't make sense to send this back to the District Court
9 to get a final judgment, to come back to you again. I'm
10 just saying that while you have the whole case in front of
11 you, and it would make sense to decide the case, you just
12 don't have to do it on an emergency basis, we're just, we're
13 very sensitive to the timing concerns of the Court.

14 So, the second thing is this question of
15 ratification, and the intersection between the Court's
16 ratification precedence, and its voluntary cessation
17 precedent, so the Government says look, this thing has been
18 ratified, and we say wait a second, it's pretty commonly
19 understood that the Government can't just come along and
20 just kind of say in response to litigation we're going to
21 stop doing this thing, and not prove that it can't recur,
22 and how do those two lines of cases interact?

23 So, just to start with the voluntary cessation
24 part, if you were to ask the Government how would you do
25 this ratification thing and make sure that you trigger the

1 voluntary cessation doctrine so that the case could go
2 forward, what would you do? You'd do two things, one is you
3 would insist that it's still your position, and of course,
4 the ratification document by Attorney General Barr says I
5 really think we're right about this, and then the
6 Government, you know, says absolutely we are defending the
7 substance of the position, it's filed briefs all over the
8 country saying that they continue to maintain their
9 position.

10 And then what's the second thing you would do is
11 you would insist that you're going to keep doing it, and the
12 Government says OLC says since 2003 that we can do this,
13 Attorney General Barr insists that, you know, we're not
14 stepping back from that, but what you would do is you would
15 say you're doing it just to end the litigation, you would be
16 trying to make the case moot, and the ratification document
17 says I see the litigation, and it's in the wake of a
18 favorable ruling from the District Court. And so, what the
19 Government is transparently trying to do is to say we want
20 to end the case, but we're not saying we're not going to
21 turn around and do close to the same thing again. Now,
22 there's a level of generality question --

23 JUDGE MILLETT: I was going to say, don't they
24 have to turn around, doesn't there have to be a risk that
25 they're going to turn around and do the same thing to you?

1 MR. GOLDSTEIN: The question --

2 JUDGE SRINIVASAN: To you.

3 MR. GOLDSTEIN: Yes.

4 JUDGE MILLETT: To you.

5 MR. GOLDSTEIN: No, that is definitely not the
6 case. So, if you look at cases like -- that's the
7 difference between the voluntary cessation cases and the
8 capable of repetition yet evading review cases, so if I
9 could just talk about that for a tenth of a second. And
10 those cases say you have to prove it's going to happen again
11 to you, because it's not the Defendant trying to moot the
12 issue. If you look at cases like Friends of the Earth v.
13 Laidlaw, you had a case called Aref v. Lynch, the cases on
14 voluntary cessation don't require you to prove that it will
15 happen specifically to you because this is, what the Supreme
16 Court has said is that when the Government ceases doing the
17 thing it is not Article III moot, then you have a remedial
18 question of what do you want to do? Is it necessary for the
19 courts to continue to resolve the case? What's the, you
20 know, what's the judicial interest? And when, what the
21 courts understand is that the Government or whoever the
22 Defendant is can't act to strip the courts of power, when we
23 know it's not Article III moot as a result of voluntary
24 cessation the courts power is there, and then there's a
25 question of, you know, what's the right result? And we

1 think has got to be an a fortiori voluntary cessation case
2 because you not only have the Government ceasing this one
3 thing, but it doesn't dispute that it did everything
4 conceivable to make sure nobody could ever sue them.

5 So, the Attorney General, you know, has a lot of
6 important policy making responsibilities, but does sign
7 things, but not Acting Attorney General Whitaker, no
8 definite determinations, no immigration rulings, no FISA
9 warrants apparently, no civil institutionalized litigation,
10 the, we say in our opening brief citing articles, the
11 Government does not dispute that they have attempted to make
12 it impossible for the judiciary to decide this question, and
13 so, that's got to be at the heart of the concern of the
14 voluntary cessation doctrine.

15 JUDGE SRINIVASAN: Now, why are we talking about
16 voluntary cessation? Why doesn't that effect a ratification
17 that it's a merits question about whether you can't win
18 because on the merits it's been ratified?

19 MR. GOLDSTEIN: So, that is what the argument
20 always is in voluntary cessation, right? And that is you
21 are always getting what you want, and they're saying in this
22 case we got what we want. So, I do want, I need to answer
23 your question in two ways, if I could, one is this is a very
24 special kind of voluntary cessation case in that we do have
25 a retrospective concern that is sufficient under the Court's

1 appointments clause precedent. So, what happened is, and
2 this is alleged in the complaint and not disputed, Acting
3 Attorney General Whitaker did issue this rule, and while the
4 rule doesn't have an effective date in, has an effective
5 date in the sense of the day they will prosecute, the
6 Government's point is that it issued it 90 days ahead of
7 time so people would start doing things, they would start
8 disposing of their bump stocks, they would not purchase any
9 more, and they would as a result not be able to sell them.
10 So, when the rule was issued at that day by we allege an
11 improper official it did something to us, so this is
12 different from cases that only have a request for
13 prospective relief. Now, you say --

14 JUDGE MILLETT: Are you seeking damages in this
15 case?

16 MR. GOLDSTEIN: No, that -- and that is, it is
17 quite important that this is an appointments clause case.
18 So, if you look at cases like Landry, the Supreme Court, and
19 the Supreme Court's Ryder decision, what the Supreme Court
20 has said is this is the one context because it's so easy for
21 the Government to change the decision-maker, to swap
22 somebody out that we don't really look at the normal kinds
23 of injuries. So, Landry is a case where you have one level
24 of administrative decision, and then there is sitting on top
25 of that a de novo review by another administrative actor,

1 and this Court says that does not matter, you have a right
2 not to have a determination by an unconstitutionally
3 appointed official, and that's what happened here, we are,
4 we, for reasons related to sovereign immunity and the
5 availability of even nominal damages, we do not have a
6 damages request, but it doesn't mean that we weren't subject
7 to an unconstitutional official. I mean, put another way --

8 JUDGE MILLETT: I don't understand what remedy
9 would be afforded to you --

10 MR. GOLDSTEIN: A declaration.

11 JUDGE MILLETT: -- because -- what does that
12 remedy? You've agreed that they're already going to have to
13 turn in all their guns in or destroy them on Monday or
14 Tuesday --

15 MR. GOLDSTEIN: Right.

16 JUDGE MILLETT: -- and that can't be, presumably
17 can't be undone.

18 MR. GOLDSTEIN: Right, that -- right. And that,
19 that is --

20 JUDGE MILLETT: So, how would the declaration do
21 anything for them other than make them feel good?

22 MR. GOLDSTEIN: It would just be a declaration
23 that they were treated unconstitutionally. And as an
24 understanding that normally when we talk about Article III
25 injuries, we talk about something much more consequential in

1 terms of either an affirmative injunction or money damages,
2 we do not do that in the appointments clause context, it is
3 a structural constitutional failure. So, to take the Landry
4 example, nothing happened to that person, right, there,
5 literally nothing because the de novo review was undertaken
6 by a superior official. But can I just look at this through
7 the other end of the telescope for just one second?

8 JUDGE MILLETT: Well, in Landry did they have to
9 start the process over again?

10 MR. GOLDSTEIN: Well, that was the, the remedy,
11 so --

12 JUDGE MILLETT: Right, but that remedy
13 doesn't -- right. That remedy can't be afforded to your
14 clients in this case.

15 MR. GOLDSTEIN: Right.

16 JUDGE MILLETT: There's absolutely nothing a court
17 could give them other than a constitutional declaration, at
18 which point constitutional avoidance principles would seem
19 to factor in, as well.

20 MR. GOLDSTEIN: Well --

21 JUDGE MILLETT: Don't make unnecessary
22 constitutional rulings.

23 MR. GOLDSTEIN: Well, it just depends on what we
24 think unnecessary means there. If you just want us to,
25 if --

1 JUDGE MILLETT: Well, unnecessary would be there's
2 nothing they could do about it but line the bird cage with
3 the opinion.

4 MR. GOLDSTEIN: Well, Your Honor, in the cases
5 where there are, someone just seeks the declaration we don't
6 say if you have a constitutional claim that it's a, you
7 know, if you want a declaration that it was
8 unconstitutional, we just won't give it to you because of
9 constitutional avoidance.

10 JUDGE MILLETT: No, but normally what is a,
11 there's something that would change going forward, either
12 they would get --

13 MR. GOLDSTEIN: Yes.

14 JUDGE MILLETT: -- a whole new hearing --

15 MR. GOLDSTEIN: Right.

16 JUDGE MILLETT: -- or they're repeat players --

17 MR. GOLDSTEIN: Right. But that is the --

18 JUDGE MILLETT: -- or they have repeat interests,
19 but that's not here.

20 MR. GOLDSTEIN: Right. But that's the voluntary
21 cessation doctrine. Remember, every voluntary cessation
22 case is exactly what you've described, right? What you, I
23 will say I did give you a slightly incorrect answer, and
24 that is there are multiple voluntary cessation cases that
25 say we actually are doing something for the future that's

1 prospective, and that is we are making sure they won't do it
2 again, it's the burden on the Defendant who ceases the
3 practice to, there's a stringent burden, the Supreme Court
4 has said, to prove that they won't do effectively the same
5 thing again, and the level, right level of generality here
6 is that you will not have an Acting Attorney General who
7 will issue regulations related to firearms, and we are
8 entitled to an injunction with respect to that. So, there
9 is a prospective effect. Now, you may say ordinarily we
10 would think that that's, you know, too speculative, but the
11 voluntary cessation is --

12 JUDGE MILLETT: Just to be clear, I hasn't, or
13 maybe I just didn't read the complaint, I didn't read it as
14 a general argument against Acting Attorney General Whitaker
15 regulating firearms at large, it was an attack on Attorney
16 General, Acting Attorney General Whitaker making this
17 decision about bump stocks, did I misread the complaint?

18 MR. GOLDSTEIN: Yes. So, there are -- what you
19 have to do is I think you have to look at the amended
20 complaint. There's a complaint and an amended complaint.
21 The amended complaint goes beyond just bump stocks. What
22 happened was we saw this train coming, and so, in front of
23 the District Court we said we're worried that they're going
24 to try and moot our case by ratifying it, we are moving to
25 amend the complaint, the Government did not object, there is

1 a --

2 JUDGE MILLETT: Do you have a J.A. page on that?

3 Sorry.

4 MR. GOLDSTEIN: I will --

5 JUDGE SRINIVASAN: It's not --

6 MR. GOLDSTEIN: -- get you the --

7 JUDGE MILLETT: Okay.

8 MR. GOLDSTEIN: -- J.A. cite for it.

9 JUDGE SRINIVASAN: Well, I think the complaints
10 are in the J.A., if I'm -- I don't believe they are.

11 MR. GOLDSTEIN: Okay. And so, we, there's -- I
12 represent to you that there is an allegation that you
13 cannot, it's both with respect to this bump stock rule, but
14 a broader allegation that an Acting Attorney General cannot
15 do this, and you can't --

16 JUDGE SRINIVASAN: An Acting Attorney General, or
17 Acting Attorney General Whitaker?

18 MR. GOLDSTEIN: I apologize, an Acting Attorney
19 General who is designated pursuant to the FERA rather than
20 the AG.

21 JUDGE SRINIVASAN: And that's what the amended
22 complaint says?

23 MR. GOLDSTEIN: Yes.

24 JUDGE SRINIVASAN: It's not pegged Acting Attorney
25 General Whitaker?

1 MR. GOLDSTEIN: Correct. It is -- that's right.
2 We just understanding that the Government might try and pull
3 this. So, just can I, if I could just step back, as I said,
4 and look at it through the other end of the telescope, we
5 think it has to be the case, given the significance of the
6 legal question here, that somebody somewhere has to be able
7 to challenge the designation of the Acting Attorney General,
8 it's a humongous deal that raises significant constitutional
9 and statutory questions. If somebody has to be able to do
10 it I think we have to be able to do it, the Government can't
11 avoid having the Acting Attorney General sign things that
12 would give rise to a legal challenge, still nonetheless do
13 incredibly important policy making related things, then when
14 he does sign one thing have it ratified once they get a
15 favorable ruling of the District Court, that is in the teeth
16 of what voluntary cessation is about, which is making sure
17 that the judiciary can pass on the lawfulness and
18 constitutionality of a question like this. If this was, you
19 know, one in a thousand different challenges one could look
20 at the remedial question here differently. Remember, both
21 voluntary --

22 JUDGE SRINIVASAN: But would that be true even if,
23 suppose Acting Attorney General Whitaker is appointed and
24 then does nothing.

25 MR. GOLDSTEIN: Is he -- and does nothing? I

1 still --

2 JUDGE SRINIVASAN: Yes.

3 MR. GOLDSTEIN: -- think it would be true, because
4 the legal principle is really important. If Acting Attorney
5 General Whitaker himself didn't do anything, that is to say
6 on day one we sue, okay, and he hasn't done anything yet,
7 right? I still think you would look at it the same way
8 because it's the, for the judiciary --

9 JUDGE SRINIVASAN: And then, and Attorney General
10 Barr is confirmed on day two.

11 MR. GOLDSTEIN: Well, if he did nothing -- no, I
12 suppose that if we literally have nothing to sue over, but
13 if we do finally get something to sue over, right? That it
14 may -- I'm not saying that the courts will utterly ignore
15 the requirements of Article III. My point is this, both the
16 ratification cases and the voluntary cessation cases say the
17 Court is at this point making a remedial determination, and
18 that is a judgment about how important it is for the courts
19 to pass on the question, the question has to have been
20 presented in the first instance. Remember, the voluntary
21 cessation cases say we have an Article III case, that is
22 undisputed, the Government does not contend this case is
23 Article III moot. The question is whether or not you should
24 give us any form of remedy, both the voluntary cessation
25 cases and we think the ratification cases look at what the,

1 you know, what the Government, the interests of the
2 judiciary would be.

3 So, can I, one thing that I haven't talked about
4 is kind of the relationship between those two lines of cases
5 which tend to kind of run past each other a little bit. The
6 Government thinks that its best case, or at least its
7 briefing says is the Doolin case, and Doolin is a case where
8 the Court did not reach the appointments clause question
9 when it determined there had been ratification, but the big
10 difference between this case and Doolin is that the
11 ratification occurred while the case was still in the
12 administrative proceedings. There was no voluntary
13 cessation question. Voluntary cessation is an Article III
14 mootness doctrine, and whether you will give a remedy when
15 the Government during a court case in response to the claim
16 stops what they were doing, but in Doolin that didn't
17 happen, Doolin the Agency changed the, the new official came
18 into being, into the position before the case ever went to
19 Court. The Court has been very clear in cases like
20 Intercollegiate in describing Landry that in all those other
21 contexts it does decide the appointments question without
22 allowing ratification to undo --

23 JUDGE MILLETT: Why isn't a pre-enforcement
24 challenge much closer to, much more analogous to the
25 administrative context, as in the Government is not actually

1 operating on your client in a way that's a pre-enforcement
2 challenge?

3 MR. GOLDSTEIN: I think that the --

4 JUDGE MILLETT: It's a preliminary -- sorry, just
5 a preliminary stage, the Government itself is not
6 affirmatively exercising the power on the citizen.

7 MR. GOLDSTEIN: Yes, a couple of things about
8 that. The first is the Government made quite clear, both in
9 the rule, in its statements in the briefs that it did expect
10 that people would begin doing things. Even if you were to
11 determine today that this is an interpretive rule, it at
12 least represented itself as a legislative rule at the time.
13 I just think there's no -- that's just true. And the
14 Government expected people to begin doing things
15 immediately. It's true we haven't gone to jail, thank
16 goodness, but they certainly expected the rule to be
17 operative at the time. What they said they wouldn't do is
18 actually, you know, begin prosecutions for 90 days, but
19 their view was people need to be able, they were, expected
20 us to do things.

21 And the second thing is that the Court has never
22 in the voluntary cessation context looked at the question of
23 it being too pre-enforcement or premature, that is to say
24 the cases involving voluntary cessation do sometimes I
25 think, and I just don't understand why there would be a

1 distinction, seek to get an injunction against something
2 that is going to happen, and a lot of the ratification cases
3 are like that. The way that the ratification cases and the
4 voluntary cessation cases intersect each other is this, what
5 the courts have tended to do, and I would look at two
6 precedents here, one is the City of Houston case from this
7 Court, and there is a Conservation Law Foundation v. Evans
8 case from the First Circuit. What the courts have done is
9 they have looked at the question of whether the Agency is
10 doing something as a one off, or instead has an ongoing
11 policy, that's what matters to the Court, and that is if
12 there's something that can be described as an ongoing
13 policy, a commitment to this practice, then the courts are
14 much more willing to say this is voluntary cessation, we're
15 going to adjudicate the claim.

16 If instead it's the Agency just doing something
17 one time and it gives you what you want then it tends to
18 just look at this as a pure remedial question, kind of
19 you've gotten everything, there's no other remedy we could
20 give you. But when the Agency is kind of committed to doing
21 this thing and it has power to do the same thing in the
22 future the Court says well, there really is something to
23 declare against, there really is something to enjoin
24 against. And so, the question here is is this a one off, or
25 is this something that, you know, we could expect to see

1 again? And again, there's the level --

2 JUDGE MILLETT: Well, I think your merits argument
3 is that this is one off, right? Am I right? This only
4 happened one other time in history.

5 MR. GOLDSTEIN: Right. I think that it just
6 depends on what the it is at that point. It is the case
7 that with respect to the question of whether the Government
8 has under 3347 and A, the subsection B cases, which are that
9 the statute designates, that has only happened twice, it
10 happened in, with respect to the CFPB, and it happened with
11 respect to us. Now, the 3347(a) things have been happening
12 since 2003, what really matters is the Government's view is
13 does it have a policy, and the Government has a policy that
14 it believes that it's been able to do this since 2003, OLC
15 started saying that then --

16 JUDGE MILLETT: So, did this -- just to be clear,
17 so --

18 MR. GOLDSTEIN: Yes.

19 JUDGE MILLETT: -- your this would be had it not
20 been the Chief of Staff that was made Acting Attorney
21 General, but instead then the Associate Attorney General and
22 not the Deputy Attorney General, so you would have had
23 someone Senate confirmed, Presidentially appointed and
24 Senate confirmed, and in the line, but just leapfrogged over
25 one person, that's the issue that you say, because I --

1 that's the issue we're talking about now?

2 MR. GOLDSTEIN: Well, we have a few different
3 things, that would raise the constitutional question --

4 JUDGE MILLETT: Right.

5 MR. GOLDSTEIN: -- and it would raise the
6 statutory question, as well. So, the -- because --

7 JUDGE MILLETT: I had thought you had a distinct
8 constitutional argument --

9 MR. GOLDSTEIN: We have two constitutional
10 arguments.

11 JUDGE MILLETT: -- which was then informing the
12 statutory construction --

13 MR. GOLDSTEIN: That's true.

14 JUDGE MILLETT: -- and that was taking an employee
15 and making them a principal.

16 MR. GOLDSTEIN: Right. So, but we have two
17 constitutional arguments, we have the argument that under
18 the Supreme Court's decision in Eaton you cannot have
19 someone who is not the equivalent of the First Assistant in
20 the absence of an exigency and make them the acting
21 official. So, that constitutional challenge would remain.
22 I think the, you know, my basic point is when you're
23 deciding whether to give us some sort of remedy you have to
24 figure out is this gamesmanship, and the Government's just
25 trying to avoid having this claim litigated, and they'll

1 just keep doing the same thing over and over again, or was
2 there just one problem that we identified, and they fixed
3 this one problem, and therefore there's no need for the
4 courts to step in here --

5 JUDGE MILLETT: Is it fair to say that the
6 presidential nomination and Senate confirmation of an
7 Attorney General is just gamesmanship? At a minimum you've
8 got the intervention of the Senate.

9 MR. GOLDSTEIN: Well, two things, the first is we
10 claim two different kinds of voluntary cessation, so
11 accepting that that's not gamesmanship, and I don't think
12 that's gamesmanship. The ratification is the gamesmanship
13 here, and that is take the favorable ruling from the
14 District Court, then once you know who's going to be here on
15 appeal then you engage in the ratification, but there's
16 another form of gamesmanship, we just can't, we cannot link
17 reality to the fact that the Government went well out of its
18 way to make sure that Acting Attorney General Whitaker
19 didn't do anything else that could give rise to a legal
20 claim. My best example of that is in the DDC in front of
21 Judge Moss the Government simultaneously refused to disclose
22 whether Acting Attorney General Whitaker was supervising a
23 piece of litigation, but was willing to disclose that he had
24 recused from a quo warranto proceeding so he could not be
25 challenged there. More broadly, I do not know what the

1 Government could possibly have done to make it less possible
2 for the judiciary to decide this important question, and
3 when we do have an admitted Article III controversy right
4 here, right now, it cannot terminate the judiciary's ability
5 to decide the question by this act of ratification which has
6 no substantive benefit to it which it claims is totally
7 unnecessary, and it adheres to its legal position.

8 JUDGE MILLETT: I just want to make sure we still,
9 putting aside the Justice Department's position that we
10 still have an Article III injury here, when the complaint's
11 injury, and your current position is not that we have a
12 right to keep these guns, we have to turn them in or destroy
13 them, it's just that Mr. Whitaker can't take them.

14 MR. GOLDSTEIN: Yes. The Supreme Court is very
15 clear about that, that all the voluntary -- this is just a
16 fact, the voluntary cessation cases, Friends of the Earth,
17 City of Mesquite, say in terms when you have a complaint
18 that is an Article III controversy, which it was the day
19 before the day before they filed their brief, undoubtedly,
20 when you have that and then the Government ceases what
21 you're doing you still have an Article --

22 JUDGE MILLETT: It depends on the ceasing, it
23 depends on the -- normally, in those cases is they have some
24 sort of primary conduct, and they want to say the Government
25 can't do it to us.

1 MR. GOLDSTEIN: I'll give you an --

2 JUDGE MILLETT: And what it seems -- I'm sorry.

3 MR. GOLDSTEIN: I'm sorry.

4 JUDGE MILLETT: Which is it seems to me at least
5 as I read the complaint they're saying the Government can do
6 this as long as it's not Mr. Whitaker, that's -- tell me how
7 I'm wrong about that, because I read the complaint as Mr.
8 Whitaker can't take the guns.

9 MR. GOLDSTEIN: We have an amended complaint.

10 JUDGE MILLETT: No, but you otherwise don't
11 challenge the power of the Government to take these guns
12 away.

13 MR. GOLDSTEIN: Yes. Well, I guess that this is
14 the point --

15 JUDGE MILLETT: And you're agreeing they give them
16 all up in a couple of days, we don't have to decide it.

17 MR. GOLDSTEIN: So, Your Honor, the complaint has
18 multiple levels of an injunction request and a declaratory
19 judgment request, it says --

20 JUDGE MILLETT: Right, but they're all about what
21 Mr. Whitaker can do.

22 MR. GOLDSTEIN: They are not.

23 JUDGE MILLETT: Okay.

24 MR. GOLDSTEIN: All right. That's, I mean, we may
25 reduce to this point, they are not. When we saw the

1 prospect that the Government was going to engage in this
2 ratification we looked at the Court's precedence, and we
3 amended the complain to make quite clear that we wanted, and
4 we were entitled to it at the time, a broader determination
5 by the Court that an, you couldn't name this kind of Acting
6 Attorney General who could not do this kind of thing, so we
7 have a whole --

8 JUDGE MILLETT: A preliminary injunction is
9 necessary to prevent Mr. Whitaker from unlawfully exercising
10 authority as Acting Attorney General, that's not happening
11 anymore. Mr. Whitaker's designation violates the
12 Constitution. There must be other parts I'm assuming.

13 MR. GOLDSTEIN: Are you reading from the PI
14 request or the complaint, Your Honor?

15 JUDGE MILLETT: The amended complaint.

16 MR. GOLDSTEIN: The amended complaint. There are
17 a whole series of allegations. So, the amended complaint --

18 JUDGE MILLETT: What is the relief sought in the
19 amended complaint?

20 MR. GOLDSTEIN: A series of declarations and
21 injunctions.

22 JUDGE MILLETT: Okay. So, which injunction are
23 you hanging your -- or which, I'm sorry, which declaratory
24 judgment?

25 MR. GOLDSTEIN: That you can't --

1 JUDGE MILLETT: Can you just read it from the
2 complaint?

3 MR. GOLDSTEIN: Sure. I can --

4 JUDGE MILLETT: Sorry. I'm sorry, I don't have it
5 here with me.

6 MR. GOLDSTEIN: Okay. Absolutely. So, I'll give
7 you the summary paragraph is at page one, Plaintiffs also --

8 JUDGE MILLETT: No, I just want to read it from
9 you, the last page of the complaint where you say here is a
10 declaratory judgment --

11 MR. GOLDSTEIN: Sure.

12 JUDGE MILLETT: -- what do you want.

13 MR. GOLDSTEIN: Okay. Okay. Declares that the
14 Federal Vacancies Reform Act, 5 U.S.C. 3345, does not apply
15 when there is an office specific designation statute, such
16 as 28 U.S.C. 508, and the designated official is available
17 to serve. Declares that 5 U.S.C. 3345(a) (3) is
18 unconstitutional insofar as it permits the President to
19 designate an employee, such as the Chief of Staff, to act as
20 an officer in violation of the appointments clause.
21 Declares that 5 U.S.C. 3345(a) (3) is unconstitutional
22 insofar as it permits the President to bypass an available
23 first assistant by designating a non-Senate confirmed
24 officer who is not the first assistant to act as a principal
25 officer in violation of the appointments clause.

1 JUDGE MILLETT: Okay.

2 MR. GOLDSTEIN: We saw this coming. So.

3 JUDGE HENDERSON: All right. And we should wind
4 it up because you're probably over your time.

5 MR. GOLDSTEIN: Okay. Absolutely, Your Honor. Do
6 you -- if the Court wants me to talk about the merits of the
7 case I can, or we can just stop at the --

8 JUDGE HENDERSON: Or we're got it on your brief.

9 MR. GOLDSTEIN: Okay. Thank you.

10 JUDGE HENDERSON: Thank you. Mr. Mooppan.

11 ORAL ARGUMENT OF HASHIM MOOPPAN, ESQ.

12 ON BEHALF OF THE APPELLEES

13 MR. MOOPPAN: May it please the Court, Hashim
14 Mooppan. So, I think Mr. Goldstein has conflated his
15 challenge to the rule, and his challenge to the designation,
16 I think that has caused him to confuse the distinction
17 between merits and justiciability. So, let me try to
18 disentangle and simplify matters. On the one hand his
19 clients had injury that lets them get into court from the
20 rule, that the rule is going to injure them because they're
21 going to have to give up their bump stocks. That claim and
22 that injury is not moot, even after the ratification there
23 is still a rule, and if the rule is not set aside, or our
24 enforcement of the statute is not set aside they are still
25 injured.

1 JUDGE MILLETT: Why is -- sorry. I do want to
2 hear all this, and I don't mean to interrupt, I just want to
3 clarify this one thing, why as to them? I get as to the
4 other Plaintiffs that have the APA and were joining the
5 Whitaker challenges, but as to them they just said fine, let
6 the enforcement date come into effect, they're going to have
7 to get rid of them next week, we don't need an, we're not
8 seeking any injunction against that. Why does that mean
9 they're still -- so what would they still be challenging
10 after the --

11 MR. MOOPPAN: They are --

12 JUDGE MILLETT: Let's assume that they have to
13 comply with the law, they, from wonderful law abiding
14 people, and so they turn everything in on the effective
15 date, or just turn it in or destroy it, would the next day
16 would they, would you still be the same, the same thing you
17 just said to me?

18 MR. MOOPPAN: Yes, they'd have nothing left. So,
19 if I could finish --

20 JUDGE MILLETT: What's -- okay.

21 MR. MOOPPAN: -- the first part of the claim, and
22 then the answer to your question --

23 JUDGE MILLETT: Okay.

24 MR. MOOPPAN: -- is they've got nothing left.

25 So --

1 JUDGE MILLETT: So, it's not justiciable.

2 MR. MOOPPAN: One thing is justiciable and one
3 thing is not. Their challenge to the rule, they're
4 injunction seeking, they want the -- this is what we're up
5 on is they sought an injunction against the rule and the
6 enforcement of the rule, that's part of what their
7 injunction is. If you look at their motion for preliminary
8 injunction that's what they sought, that's what was denied,
9 that's what they've appealed. That challenge is not moot.
10 The ratification just means they lose for two reasons rather
11 than one. Not only was the designation of Mr. Whitaker
12 lawful, as we've argued and as the District Court held,
13 whether or not it was lawful, Attorney General Barr has
14 validly ratified it, they haven't even challenged the
15 validity of the ratification. On page 22 of their reply
16 brief they concede that the ratification was lawful and
17 therefore they had no claim against the rule.

18 Therefore, that claim fails on the merits, there
19 is still a rule in place, it is still injuring them, they
20 just have no valid merits claim anymore. You don't get to
21 mootness, you don't get to mootness exceptions, they just
22 lose on the merits, so that's that part of the claim.

23 JUDGE MILLETT: Well, why wouldn't they on
24 Wednesday, assuming all their bump stocks are destroyed, why
25 wouldn't it be moot at that point?

1 MR. MOOPPAN: It's not -- if it's moot it's mooted
2 by their conduct because they went and destroyed it, it's
3 not based on our conduct. We have a rule in place, the rule
4 is still in place, it is still injuring them.

5 JUDGE MILLETT: Right. I'm just trying to deal
6 with what do I do with the fact that they've said you don't
7 need to decide this (indiscernible).

8 MR. MOOPPAN: So, I actually don't think it's
9 right, to be fair to them, I don't actually think it would
10 be moot because presumably the rule still prevents them from
11 buying new ones, right? So, even if they destroy the old
12 ones they are still injured going forward. But, so their
13 challenge to the rule is not moot, it is just meritless,
14 it's meritless twice over because the validity of the
15 designation in the first instance, and the ratification in
16 the second instance. You never get to a mootness exception,
17 they have no way around it, they just lose on the merits.
18 So, that's part of their claim.

19 The other part of their claim, as they said, is in
20 the District Court in both their complaint and their motion
21 for an injunction they did ask for a challenge against Mr.
22 Whitaker's designation in the air, wholly apart from the
23 rule they just want injunctive and declaratory relief that
24 this just wasn't proper, and the problem with that is they
25 don't have standing to seek that because that is just a

1 generalized grievance. If you separate it from the rule
2 that actually injured their clients they have no injury from
3 the President's designation of Mr. Whitaker, this was Judge
4 Srinivasan's question of if Attorney General Whitaker had
5 just done nothing between the time he was designated and the
6 time that Attorney General Barr was confirmed they would of
7 course have no basis to sue, it would be a quintessential --

8 JUDGE SRINIVASAN: So, can I just clarify?

9 MR. MOOPPAN: -- generalized grievance.

10 JUDGE SRINIVASAN: So, you don't disagree that the
11 amended complaint actually presents that challenge?

12 MR. MOOPPAN: Yes, I do think that their amended
13 complaint does present those claims, and I think their
14 motion for an injunction actually did ask for an injunction
15 in the abstract, and I think technically the District Court,
16 it's partly our fault, I just overlooked the fact that they
17 asked for the injunction in the air, that part of the
18 injunction probably should have been dismissed for lack of
19 standing rather than the merits, but it is quite clear that
20 they do not have standing to challenge the designation in
21 the air.

22 JUDGE SRINIVASAN: And could I just ask on that
23 part of the amended complaint is that part of the amended
24 complaint under the Government's, from the Government's
25 perspective is that a challenge to Mr. Whitaker as such, or

1 is it more in the air than that, that it's a challenge to an
2 official?

3 MR. MOOPPAN: I think it's even more in the air as
4 that, I think their argument is anyone of the type of Mr.
5 Whitaker, i.e. if there is a designation of a non-Senate
6 confirmed individual in a situation where there is a first
7 assistant in place they say that that violates both the
8 statute and the Constitution.

9 JUDGE SRINIVASAN: And your point as to that is
10 the only way you get injury as to that is by going back to
11 the rule --

12 MR. MOOPPAN: If someone does something.

13 JUDGE SRINIVASAN: -- because --

14 MR. MOOPPAN: They're asking for an, essentially
15 an advisory opinion that the President --

16 JUDGE SRINIVASAN: Yes.

17 MR. MOOPPAN: -- can't do this. Once you separate
18 out the rule there is no injury. Their argument is
19 essentially if in Doolin, if the Plaintiff, the Plaintiff
20 there was only complaining about the application of the
21 enforcement proceedings, that's why this Court said the
22 ratification is valid, case over. If the Plaintiff there
23 had said you know what, I get that, I'm just curious, was
24 the initial officer properly appointed, I would just like a
25 ruling on that, their view is that somehow voluntary

1 cessation would kick in and the Court would render an
2 advisory opinion, that's just not how it works. So, because
3 they don't have standing for their freestanding claim you,
4 again, you never get to mootness, you never get to mootness
5 exceptions, they just don't have standing.

6 But even if you set that aside for a moment and
7 say for some reason we'll think about this as mootness, they
8 still lose, because critically their freestanding in the air
9 challenge is to, it's not to Attorney General, Acting
10 Attorney General Whitaker, it is to the President's action
11 in designating Acting Attorney General Whitaker who is the
12 Defendant in this complaint, the President is not named as a
13 Defendant in the complaint, Acting Attorney General Whitaker
14 didn't voluntary cease anything. I'm sure Acting Attorney
15 General Whitaker would have been perfectly happy to continue
16 serving as the Acting Attorney General, the reason he's no
17 longer the Acting Attorney General is because as Judge
18 Millett pointed out the President nominated, the Senate
19 confirmed, and then the President appointed Attorney General
20 Barr.

21 There is no voluntary cessation with respect to
22 the Defendant they have named, and this isn't just some
23 technical pleading problem, because the point is they cannot
24 sue the President, they cannot bring an in the air lawsuit
25 against the President saying the President should not be

1 able to name an Acting Attorney General in these
2 circumstances, they don't have a cause of action or
3 sovereign immunity to sue the President in those
4 circumstances. The Supreme Court has recognized in cases
5 like Franklin and Mississippi that you can't seek injunctive
6 relief against the President for his official acts, this
7 Court has recognized the same in Swan v. Clinton. So, those
8 parts of their claims, their freestanding in the air
9 challenges to the President's action, they don't have
10 standing, and it doesn't trigger the voluntary cessation
11 doctrine for mootness. If there are no other questions.

12 JUDGE SRINIVASAN: Well, I assume that the reason
13 that the Defendant is, was, is Acting Attorney General
14 Whitaker is because the challenge started out as a challenge
15 to the rule.

16 MR. MOOPAN: So, that's right, but, you know,
17 they did amend their complaint, if they had wanted to bring
18 a totally improper challenge against the President they
19 could have included the President in the complaint, we would
20 have of course said you can't do that, but their challenge
21 is to Whitaker, and he did not voluntarily cease anything,
22 and they could not sue the President because of Franklin and
23 Mississippi and Swan v. Clinton.

24 JUDGE MILLETT: Does voluntary cessation usually
25 have to be unilateral? Because obviously the appointment of

1 Attorney General is not unilateral, there's another party
2 involved, the Senate --

3 MR. MOOPPAN: Yes.

4 JUDGE MILLETT: -- that controls both the decision
5 and the timing, I'm --

6 MR. MOOPPAN: Yes, so I --

7 JUDGE MILLETT: -- trying to figure out whether
8 this (indiscernible) whether this type of action can ever be
9 labeled a voluntary cessation.

10 MR. MOOPPAN: Yes. So, again, I would say it's
11 not voluntary cessation for two reasons, one is the more
12 fundamental one, which I said a second ago, which is again
13 the Defendant here is the Acting Attorney General, he
14 didn't, forget about unilateral, he didn't do anything. He
15 didn't cease doing anything. The reason he's no longer the
16 Acting Attorney General is because the Senate confirmed and
17 the President appointed Attorney General Barr. They are not
18 Defendants in this case, they can't be Defendants in this
19 case. Even if you ignore that wrinkle in this case I think
20 Your Honor is right that there are cases that recognize that
21 the reason that voluntary cessation is a mootness exception
22 is the concern that the Government will sort of try to
23 interfere with a lawsuit by toggling on and off, you do
24 something unlawful, they sue, you stop it, case goes away,
25 then you start again. In the circumstance where you can't

1 start again that's a pretty good reason to not apply the
2 voluntary cessation doctrine, and in this circumstance it
3 can't start again, Attorney General Barr has been confirmed,
4 the rule has been ratified, you don't, we can't undo those
5 things. Their clients, Mr. Goldstein's clients, their
6 injury from the rule, it's there, but they have no merits
7 claim, and they have no injury from the designation in the
8 abstract.

9 JUDGE SRINIVASAN: Can I just, a technical
10 question. So, when you say Attorney General Barr can't be
11 sued, you just mean for the abstract claim, Attorney General
12 Barr --

13 MR. MOOPPAN: Yes, he has not --

14 JUDGE SRINIVASAN: -- you could bring an action
15 for the ratification --

16 MR. MOOPPAN: -- done anything unlawful.

17 JUDGE SRINIVASAN: -- and say that --

18 MR. MOOPPAN: Yes.

19 JUDGE SRINIVASAN: Yes.

20 MR. MOOPPAN: Yes, the, in the --

21 JUDGE SRINIVASAN: So, that he --

22 MR. MOOPPAN: -- air abstract claim, the only
23 person --

24 JUDGE SRINIVASAN: Yes.

25 MR. MOOPPAN: -- who could actually sue for that

1 in terms of who has done some conduct that you would say is
2 illegal would be the President, or you could sue a future
3 Attorney General who was --

4 JUDGE SRINIVASAN: Displaces.

5 MR. MOOPPAN: Right. But there is no such person,
6 and more importantly, again, you cannot sue the President in
7 the air for his future designations of Acting Attorney
8 Generals.

9 JUDGE HENDERSON: All right. Thank you.

10 MR. MOOPPAN: Thank you.

11 JUDGE HENDERSON: Does Mr. Goldstein have any time
12 left?

13 THE CLERK: Mr. Goldstein did not have any time
14 remaining.

15 JUDGE HENDERSON: All right. Why don't you take
16 two minutes.

17 ORAL REBUTTAL OF TOM GOLDSTEIN, ESQ.

18 ON BEHALF OF THE APPELLANTS

19 MR. GOLDSTEIN: Thank you. So, the overarching
20 point is that the Government doesn't dispute that this is
21 exactly what the voluntary cessation doctrine is concerned
22 with. If they can do this then they can cease any time and
23 they can avoid the judiciary adjudicating this claim ever.
24 So, as to Judge Millett's question, FBC, while we on this
25 appeal are pursuing the Whitaker question below, FBC did

1 join the substantive APA challenges, just to be clear.

2 JUDGE MILLETT: Okay.

3 MR. GOLDSTEIN: Yes. The second is that the rule
4 is what gave us standing in the first --

5 JUDGE MILLETT: But you agree you're not entitled,
6 by not appealing you agree you're not entitled to
7 preliminary injunction against the date next week?

8 MR. GOLDSTEIN: Right. But the question is
9 whether we have to challenge, right?

10 JUDGE MILLETT: Right.

11 MR. GOLDSTEIN: Well that's just the Whitaker
12 thing doesn't give us. I'm just, again, just to
13 accommodate --

14 JUDGE MILLETT: Got it. Okay.

15 MR. GOLDSTEIN: -- the timing. The second thing
16 is that the rule is what gave us standing in the first
17 instance, both with respect to the challenge to the rule,
18 and Acting Attorney General Whitaker, and the question of
19 whether you could make a designation like this. When the
20 rule is ratified, the voluntary cessation cases say that
21 challenge is not moot, so we had standing with respect to
22 the broader claim, and by ratifying the rule you cannot get
23 rid of our standing to bring that.

24 The third thing is that the Government is citing
25 zero cases for a reason that all --

1 JUDGE SRINIVASAN: But I don't think they're
2 saying that you got rid of standing with respect to
3 challenging the rule.

4 MR. GOLDSTEIN: I'm sorry? No, that's right. But
5 what I'm saying is we had standing because of the rule
6 originally to challenge Matthew Whitaker's status as the
7 Acting Attorney General --

8 JUDGE SRINIVASAN: Yes.

9 MR. GOLDSTEIN: -- in the bigger picture. Then
10 what (indiscernible) we asked why don't we have that
11 standing anymore, and would, the only reason would be
12 because they ratified the rule. And my point is
13 ratification is a form of voluntary cessation that does not
14 end standing, standing continues to exist. Both
15 ratification and voluntary cessation are only remedial
16 matters. I have two very brief points.

17 JUDGE HENDERSON: All right.

18 MR. GOLDSTEIN: The first is the cases are
19 uniformly on our side, your Aref case, the Evans case out of
20 the First Circuit say when the Agency has an ongoing policy
21 which they do not deny then giving the individual relief
22 does not end the case, including in the context like
23 ratification.

24 Then the final thing is this question of who we
25 sued, several things, this is the argument that you can

1 never challenge a presidential designation because the
2 President who does that, is the one who does that, that's
3 obviously wrong. We did sue the United States, it is Barr
4 who ratified the rule, not the President, and we have that
5 challenge, that's entirely unilateral. Attorney General
6 Barr did that, he was substituted into the case for Matthew
7 Whitaker, he is a Defendant here. I don't think there's any
8 serious argument that we have valid claims. And all I would
9 impress on you is that if they can do this then this
10 incredibly important issue will forever evade review, and
11 that's what the doctrine is intended to stop. Thank you.

12 JUDGE HENDERSON: All right. Thank you.

13 (Whereupon, the proceedings were concluded.)

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DIGITALLY SIGNED CERTIFICATE

I certify that the foregoing is a correct transcription of the electronic sound recording of the proceedings in the above-entitled matter.



Paula Underwood

March 25, 2019
Date

DEPOSITION SERVICES, INC.