[ORAL ARGUMENT NOT SCHEDULED]

No. 21-5045

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DAMIEN GUEDES, et al.,

Plaintiffs-Appellants,

v.

BUREAU OF ALCOHOL, TOBACCO,
FIREARMS AND EXPLOSIVES, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLEES

BRIAN M. BOYNTON
Acting Assistant Attorney General

MARK B. STERN
MICHAEL S. RAAB
ABBY C. WRIGHT
BRAD HINSHELWOOD
KYLE T. EDWARDS
Attorneys, Appellate Staff
Civil Division, Room 7527
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 514-4214

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties and Amici

1. The plaintiffs-appellants are Damien Guedes, Shane Roden, Firearms Policy Foundation, Madison Society Foundation, Inc., and Florida Carry, Inc. Firearms Policy Coalition, Inc. was a plaintiff in this case in the district court but was voluntarily dismissed.

The defendants-appellees are the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF); the United States; Merrick B. Garland, in his official capacity as Attorney General of the United States; and Marvin Richardson, in his official capacity as Acting Director of ATF.

There were no amici or intervenors in district court. John Cutonilli is a pro se amicus before this Court. There are no intervenors before this Court.

2. As discussed below, this case was previously before this Court on appeal from the denial of a preliminary injunction, and additional parties and amici were before the Court at that time. *See Guedes v. ATF*, No. 19-5042 (D.C. Cir.). The case was consolidated with two

related cases, *Firearms Policy Coalition, Inc. v. ATF*, No. 19-5043 (D.C. Cir.), and *Codrea v. Barr*, No. 19-5044 (D.C. Cir.). Additional plaintiffs at that time were David Codrea, Owen Monroe, Scott Heuman, and Firearms Policy Coalition, Inc. There were no additional defendants. The following were amici: the Cato Institute, Giffords Law Center to Prevent Gun Violence, W. Clark Aposhian, Virginia Canter, Erwin Chemerinsky, Citizens for Responsibility and Ethics in Washington, Don Fox, Marilyn Glynn, Karen Kucik, Alan Butler Morrison, Victoria Nourse, Richard Painter, Lawrence Reynolds, Morton Rosenberg, Trip Rothschild, Peter M. Shane, Jed Shugerman, and the New Civil Liberties Alliance.

This Court affirmed the denial of the preliminary injunction, *Guedes v. ATF*, 356 F. Supp. 3d 109 (D.D.C. 2019), and plaintiffs-appellants here, along with David Codrea, Scott Heuman, and Owen Monroe, petitioned for certiorari, *Guedes v. ATF*, No. 19-296 (U.S.), which was denied, *Guedes v. ATF*, 140 S. Ct. 789 (2020). Before the Supreme Court, the following were amici: Firearms Policy Coalition, NFA Freedom Alliance, Inc., California Gun Rights Foundation, Arizona Citizens Defense League, Center for Constitutional

Jurisprudence, the Cato Institute, Due Process Institute, National Right to Work Legal Defense Foundation, Inc., and New Civil Liberties Alliance.

B. Rulings Under Review

The rulings under review are an order and memorandum opinion entered on February 19, 2021, by Judge Dabney L. Friedrich, in the U.S. District Court for the District of Columbia, No. 18-2988 (Dkt. Nos. 73 and 74). The memorandum opinion is available at *Guedes v. ATF*, 520 F. Supp. 3d 51 (D.D.C. 2021).

C. Related Cases

1. In the district court, this case was consolidated with *Firearms Policy Coalition, Inc. v. Whitaker*, No. 18-3083 (D.D.C.), and the two cases were designated as related to *Codrea v. Whitaker*, No. 18-3086 (D.D.C.). The plaintiffs in all three cases moved to preliminarily enjoin the ATF rule at issue here. In 2019, the district court denied all three motions for a preliminary injunction. *See Guedes v. ATF*, 356 F. Supp. 3d 109 (D.D.C. 2019). The plaintiffs all appealed to this Court, which consolidated the three appeals. *See Guedes v. ATF*, No. 19-5042 (D.C. Cir.); *Firearms Policy Coal., Inc. v. ATF*, No. 19-5043 (D.C. Cir.); *Codrea*

v. Barr, No. 19-5044 (D.C. Cir.). Firearms Policy Coalition, Inc. voluntarily dismissed its appeal. This Court affirmed the district court's denial of a preliminary injunction in the *Guedes* and *Codrea* actions, *see Guedes v. ATF*, 920 F.3d 1 (D.C. Cir. 2019) (per curiam), and the Supreme Court denied the *Guedes* and *Codrea* plaintiffs' petition for certiorari, *Guedes v. ATF*, 140 S. Ct. 789 (2020).

The district court granted summary judgment to the government in the *Firearms Policy Coalition, Inc.* action. *See* Dkt. Nos. 51 (judgment), 52 (memorandum opinion). That judgment was appealed to this Court, which affirmed in an unpublished opinion. *See Guedes v. ATF*, No. 19-5304, 2020 WL 6580046 (D.C. Cir. Oct. 30, 2020).

The district court subsequently granted summary judgment in the government's favor in the *Guedes* and *Codrea* actions, in the order and memorandum under review in this appeal. The *Codrea* plaintiffs, who brought a takings claim seeking compensation, appealed to the U.S. Court of Appeals for the Federal Circuit and that appeal is pending. *See Codrea v. Garland*, No. 21-1707 (Fed. Cir.).

2. There are similar challenges to the rule pending in the U.S. Courts of Appeals for the Fifth Circuit, *see Cargill v. Garland*, No. 20-

51016 (5th Cir.), the Sixth Circuit, *see Gun Owners of Am., Inc. v. Garland*, No. 19-1298 (6th Cir.); *Hardin v. ATF*, No. 20-6380 (6th Cir.), and the Seventh Circuit, *see Doe v. Biden*, No. 21-2777 (7th Cir.). A petition for writ of certiorari to the Tenth Circuit raising similar challenges to the rule is pending before the Supreme Court. *See Aposhian v. Garland*, No. 21-159 (U.S.).

/s/ Kyle T. Edwards
Kyle T. Edwards

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GLOSSARY

ATF	Bureau of Alcohol, Tobacco, Firearms and Explosives
SEC	Securities and Exchange Commission

STATEMENT OF JURISDICTION

Plaintiffs invoked the district court's jurisdiction under 5 U.S.C. §§ 702 and 704, and 28 U.S.C. § 1331. JA__ (Second Am. Compl., Dkt. No. 58, at 8). On February 19, 2021, the district court entered final judgment, granting the government's motion for summary judgment and denying plaintiffs' cross-motion for summary judgment. JA__ (Order, Dkt. No. 73); JA__ (Op., Dkt. No. 74). That same day, plaintiffs filed a timely notice of appeal. JA__ (Notice of Appeal, Dkt. No. 75). This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Whether ATF correctly concluded that bump stocks fall within the statutory definition of machinegun.

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes and regulations are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

A. Statutory Background

1. The National Firearms Act of 1934, 26 U.S.C. ch. 53, was the first major federal statute to impose requirements on persons possessing or engaged in the business of selling certain firearms,

including machineguns. *See* H.R. Rep. No. 73-1780, at 1 (1934) (stating that "there is no reason why anyone except a law officer should have a machine gun" and that "[t]he gangster as a law violator must be deprived of his most dangerous weapon, the machine gun").

The Act, in its present form, defines a "machinegun" as "any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger." 26 U.S.C. § 5845(b). The definition also encompasses parts that can be used to convert a weapon into a machinegun. A "machinegun" thus includes "the frame or receiver of any such weapon, any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun, and any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person." *Id.*; *see* Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213, 1231; H.R. Rep. No. 90-1956, at 34 (1968) (Conf. Rep.) (noting that the bill expanded the definition of "machinegun" to include parts).

In 1986, Congress generally barred the sale and possession of new machineguns, making it "unlawful for any person to transfer or possess a machinegun" unless a governmental entity is involved in the transfer or possession. 18 U.S.C. § 922(o).[1] In enacting the ban, Congress incorporated the definition of "machinegun" provided in the National Firearms Act. *Id.* § 921(a)(23); *see* Firearms Owners' Protection Act, Pub. L. No. 99-308, 100 Stat. 449 (1986); *see also* H.R. Rep. No. 99-495, at 2, 7 (1986), *reprinted in* 1986 U.S.C.C.A.N. 1327, 1327, 1333 (describing the machinegun restrictions as "benefits for law enforcement" and citing "the need for more effective protection of law enforcement officers from the proliferation of machine guns").

2. Congress has vested in the Attorney General the authority to prescribe rules and regulations to enforce the National Firearms Act and other legislation regulating firearms. 18 U.S.C. § 926(a); 26 U.S.C. § 7805(a); *see id.* § 7801(a)(2)(A). In turn, the Attorney General has delegated that responsibility to ATF, a bureau within the Department of Justice. 28 C.F.R. § 0.130.

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[1] Congress excluded from the ban machineguns that were lawfully possessed prior to the effective date of the National Firearms Act. *See* 18 U.S.C. § 922(o)(2)(B).

Although there is no statutory requirement that manufacturers do so, ATF encourages manufacturers to submit novel weapons or devices to ATF for a classification of whether the weapon or device qualifies as a machinegun or other firearm regulated by the National Firearms Act. *See* ATF, *National Firearms Act Handbook* § 7.2.4 (Apr. 2009).[2] The classification process enables ATF to provide manufacturers with "the agency's official position concerning the status of the firearms under Federal firearms laws" before a manufacturer "go[es] to the trouble and expense of producing" the weapon or device, in order to assist manufacturers in "avoid[ing] an unintended classification and violations of the law." *Id.* §§ 7.2.4, 7.2.4.1; *cf.* 26 U.S.C. § 5841(c) (noting that manufacturers must "obtain authorization" before making a covered firearm and must register "the manufacture of a firearm"). ATF has made clear, however, that "classifications are subject to change if later determined to be erroneous or impacted by subsequent changes in the law or regulations." *National Firearms Act Handbook*, *supra*, § 7.2.4.1.

[2] Available at https://go.usa.gov/xVgqB.

B. Prior Classifications of Bump Stocks

1. "Bump stocks" are devices that permit a shooter to fire hundreds of rounds per minute with a single pull of the trigger. Inventors and manufacturers have expressly designed these devices to "permit shooters to use semiautomatic rifles to replicate automatic fire," but they have attempted to design them in a way that does not "convert[] these rifles into 'machineguns'" under federal law. *Bump-Stock-Type Devices*, 83 Fed. Reg. 66,514, 66,515-16 (Dec. 26, 2018).

A bump stock replaces the standard stationary stock on an ordinary semiautomatic rifle—the part of the weapon that typically rests against the shooter's shoulder. It is composed of a sliding stock attached to a grip fitted with an "extension ledge" where the shooter rests his trigger finger while shooting the firearm. 83 Fed. Reg. at 66,516. With a single pull of the trigger, the bump stock "harnesses and directs the firearm's recoil energy to slide the firearm back and forth so that the trigger automatically re-engages by 'bumping' the shooter's stationary finger without additional physical manipulation of the trigger by the shooter." *Id.*

2. ATF first addressed bump stock devices in 2002, when it received a classification request for the "Akins Accelerator." 83 Fed. Reg. at 66,517. The Akins Accelerator, which attached to a standard semiautomatic rifle, used a spring to harness the recoil energy of each shot, causing "the firearm to cycle back and forth, impacting the trigger finger" repeatedly after the first pull of the trigger. *Id.* Thus, by pulling the trigger once, the shooter "initiated an automatic firing sequence" that was advertised as firing "approximately 650 rounds per minute." *Id.* ATF initially determined that the Akins Accelerator was not a machinegun because it "interpreted the statutory term 'single function of the trigger' to refer to a single movement of the trigger." *Id.*

In 2006, however, ATF revisited its determination, concluding that "the phrase 'single function of the trigger'" should be understood to include "a 'single pull of the trigger.'" 83 Fed. Reg. at 66,517. The agency explained that the Akins Accelerator created "a weapon that '[with] a single pull of the trigger initiates an automatic firing cycle that continues until the [shooter's] finger is released, the weapon malfunctions, or the ammunition supply is exhausted.'" *Id.* (first alteration in original) (quoting *Akins v. United States*, No. 8:08-cv-988,

2008 WL 11455059, at *3 (M.D. Fla. Sept. 23, 2008)). Accordingly, ATF reclassified the device as a machinegun within the meaning of the statute. Expecting further classification requests for devices designed to increase the firing rate of semiautomatic weapons, ATF also published a public ruling announcing its interpretation of "single function of the trigger," in which it reviewed the National Firearms Act and its legislative history and explained that the phrase denoted a "single pull of the trigger." ATF, ATF Ruling 2006-2, *Classification of Devices Exclusively Designed to Increase the Rate of Fire of a Semiautomatic Firearm* (Dec. 13, 2006) (ATF Ruling 2006-2).[3]

When the inventor of the Akins Accelerator challenged ATF's action, the district court and then the Eleventh Circuit upheld the determination. *See Akins v. United States*, 312 F. App'x 197 (11th Cir. 2009) (per curiam). The court of appeals explained that interpreting "single function of the trigger" as "'single pull of the trigger' is consonant with the statute and its legislative history." *Id.* at 200. It also rejected a vagueness challenge to the statute because "[t]he plain

[3] Available at https://go.usa.gov/xHd89 and reproduced at Add. 2-4.

language of the statute defines a machinegun as any part or device that allows a gunman to pull the trigger once and thereby discharge the firearm repeatedly." *Id.* at 201.

3. When it classified the Akins Accelerator, ATF advised that "removal and disposal of the internal spring . . . would render the device a non-machinegun under the statutory definition" because ATF believed at the time that such a device would no longer operate "automatically." 83 Fed. Reg. at 66,517. ATF soon received classification requests for other bump stock devices that did not include internal springs. In a series of classification decisions between 2008 and 2018, ATF concluded that some such devices were not machineguns based on its view that, in the absence of internal springs or similar mechanical parts that channel recoil energy, such devices did not enable a gun to fire "automatically." *Id.*

C. The 2018 Rule

On October 1, 2017, a gunman armed with semiautomatic rifles that had been fitted with bump stock devices killed 58 people and wounded 500 more in Las Vegas. 83 Fed. Reg. at 66,516. The bump

stock devices did not have internal springs and were therefore not of the type that ATF then believed fell within the definition of "machinegun."

At the urging of members of Congress and other non-governmental organizations, the Department of Justice and ATF undertook a review of the prior analysis of the terms used to define "machinegun" in 26 U.S.C. § 5845(b) and published an advance notice of proposed rulemaking in the Federal Register in December 2017. *Application of the Definition of Machinegun to "Bump Fire" Stocks and Other Similar Devices*, 82 Fed. Reg. 60,929 (Dec. 26, 2017). Public comment on the advance notice concluded on January 25, 2018. *Id.* at 60,929.

On February 20, 2018, then-President Trump issued a memorandum concerning bump stocks to then-Attorney General Jefferson B. Sessions, III. *See* 83 Fed. Reg. 7949 (Feb. 23, 2018). The memorandum directed the Department of Justice, working within established legal protocols, "to dedicate all available resources to complete the review of the comments received [in response to the advance notice], and, as expeditiously as possible, to propose for notice

and comment a rule banning all devices that turn legal weapons into machineguns." *Id.* at 7949.

On March 29, 2018, the Department published a notice of proposed rulemaking, proposing amendments to the regulations in 27 C.F.R. §§ 447.11, 478.11, and 479.11, which concern the meaning of the terms "single function of the trigger" and "automatically" as used in the statutory definition of "machinegun." *See Bump-Stock-Type Devices*, 83 Fed. Reg. 13,442 (Mar. 29, 2018). The notice elicited over 186,000 comments. *See* 83 Fed. Reg. at 66,519.

The final Rule was published in the Federal Register on December 26, 2018. Press Release, Dep't of Justice, *Department of Justice Announces Bump-Stock-Type Devices Final Rule* (Dec. 18, 2018).[4] The agency explained, as it had previously, that the phrase "single function of the trigger" means a "single pull of the trigger" and clarified that the term also includes "analogous motions." 83 Fed. Reg. at 66,515. The Rule further explained that the term "automatically" means as a result

[4] Available at https://go.usa.gov/xEDrx. The Rule was later ratified by Attorney General Barr. *See Bump-Stock-Type Devices*, 84 Fed. Reg. 9239 (Mar. 14, 2019).

of a "self-acting or self-regulating mechanism [that] allows the firing of multiple rounds through a single function of the trigger." *Id.* at 66,519.

The agency explained that bump stocks—even those that lack an internal spring—fire "automatically" and fall within the definition of "machinegun." After a single pull of the trigger of a weapon equipped with a bump stock, the shooter's trigger finger remains stationary on the extension ledge as the shooter applies constant forward pressure with the non-trigger hand on the barrel-shroud or the fore-grip of the rifle, parts at the front of the firearm. The bump stock then directs the firearm's recoil energy into a continuous backwards-and-forwards cycle without "the need for the shooter to manually capture, harness, or otherwise utilize this energy to fire additional rounds." 83 Fed. Reg. at 66,532. A bump stock thus constitutes a "self-regulating" or "self-acting" mechanism that allows the shooter to attain continuous firing after a single pull of the trigger and, consequently, converts a semiautomatic rifle into a machinegun. *Id.*; *see also id.* at 66,514, 66,518.

The agency acknowledged that some of its prior classifications had concluded that certain bump stocks, such as those that do not include

an internal spring, are not machineguns because they do not fire automatically. In conducting its comprehensive examination of the statute and its history, the agency explained that these prior classifications "did not provide substantial or consistent legal analysis regarding the meaning of the term 'automatically.'" 83 Fed. Reg. at 66,518.

Consistent with the amended regulations, the Rule rescinded the agency's prior, erroneous classification letters treating certain bump stocks as unregulated firearms parts. *See* 83 Fed. Reg. at 66,514, 66,516, 66,523, 66,530-31, 66,549. In explaining to members of the public that bump stocks are machineguns, the agency provided instructions for "[c]urrent possessors" of bump stocks "to undertake destruction of the devices" or to "abandon [them] at the nearest ATF office" to avoid liability under the statute. *Id.* at 66,530.

D. Prior Proceedings

1. Plaintiffs moved to preliminarily enjoin the Rule. As relevant here, they asserted that the Rule was contrary to law and arbitrary and capricious under the Administrative Procedure Act, 5 U.S.C. § 706. The

district court denied plaintiffs' motion. *Guedes v. ATF* (*Guedes I*), 356 F. Supp. 3d 109 (D.D.C. 2019).

2. This Court affirmed in a per curiam decision, with Judge Henderson concurring in part and dissenting in part. *Guedes v. ATF* (*Guedes II*), 920 F.3d 1 (D.C. Cir. 2019) (per curiam).

This Court concluded that plaintiffs had failed to demonstrate a substantial likelihood of success on their claim "that the statutory definition of 'machinegun' cannot be read to include bumpstock devices." *Guedes II*, 920 F.3d at 17. Concluding that the Rule is a legislative rule to which it would accord *Chevron* deference, *see id.* at 17-28, the Court determined that the statutory terms "single function of the trigger" and "automatically" are each ambiguous and that the agency's interpretations of those terms is reasonable, *id.* at 28-33. The Court noted that in assessing the reasonableness of those interpretations, it was not deciding "whether the agency's interpretation is the best interpretation of the statute." *Id.* at 28 (alteration and quotation marks omitted).

Judge Henderson concurred in part and dissented in part. She would not have accorded the Rule *Chevron* deference and would have

concluded on de novo review that bump stocks are not machineguns. *Guedes II*, 920 F.3d at 42, 46 (Henderson, J., concurring in part and dissenting in part).

3. Plaintiffs filed a petition for writ of certiorari, which the Supreme Court denied with no noted dissents. *Guedes v. ATF*, 140 S. Ct. 789 (2020). Justice Gorsuch filed a statement respecting the denial, expressing his view that *Chevron* "has nothing to say about the proper interpretation" of Congress's bar on the possession of machineguns. *Id.* at 789.

4. On remand, plaintiffs filed an amended complaint, which raised the same set of claims addressed by this Court. Plaintiffs also reprised their arguments, previously raised before the district court but not on their appeal of the preliminary injunction decision, that the Rule is invalid because ATF did not hold a formal public hearing before promulgating the Rule and did not extend the notice-and-comment period by five days. In a memorandum opinion, the district court granted defendants' motion for summary judgment and denied plaintiffs' cross motion for summary judgment. *See* JA__ (Op., Dkt. No. 74, at 2).

Applying this Court's guidance, the district court held that the Rule is entitled to *Chevron* deference, that the terms "single function of the trigger" and "automatically" are ambiguous, and that the Rule's interpretations of those terms are reasonable. *See* JA__-__ (Op., Dkt. No. 74, at 7-14). The court rejected plaintiffs' arguments that *Chevron* deference does not apply—either because ATF waived deference under *Chevron* or because the rule of lenity applies instead—noting that these "two arguments have already been addressed in detail by the D.C. Circuit in *Guedes II*, which held that the application of *Chevron* deference in this case was proper." JA__ (Op., Dkt. No. 74, at 8).

The court also rejected plaintiffs' contentions that ATF lacked authority to promulgate the Rule, JA__-__ (Op., Dkt. No. 74, at 14-15), that the Rule was arbitrary and capricious, JA__-__ (Op., Dkt. No. 74, at 15-20), that the Rule violated the Ex Post Facto Clause, JA__-__ (Op., Dkt. No. 74, at 23-24), and that the statute was void for vagueness, JA__-__ (Op., Dkt. No. 74, at 24-25).[5]

[5] The order and memorandum opinion under review in this appeal also resolved the claims in a related case, *Codrea v. Whitaker*, No. 18-3086 (D.D.C.). The *Codrea* plaintiffs, who brought a takings claim seeking compensation, appealed to the U.S. Court of Appeals for the

5. Plaintiffs appealed and petitioned the Court to grant initial en banc review on the ground that law-of-the-case principles would likely apply were a panel to hear this appeal in the first instance. *See* Pet. 3-4 (Apr. 16, 2021) ("Efforts to persuade a panel of this Court that the earlier preliminary injunction decision should not bind a merits panel . . . would have limited chances of success."). The Court denied the petition. *See* Order (June 10, 2021).

SUMMARY OF ARGUMENT

Federal law defines a "machinegun" as a weapon that shoots "automatically more than one shot, without manual reloading, by a single function of the trigger," as well as parts that can be used to convert a weapon into a machinegun. 26 U.S.C. § 5845(b). It is not disputed that by attaching a bump stock to a semiautomatic weapon, a shooter can fire hundreds of bullets per minute by pulling the trigger once, stabilizing the trigger finger, and maintaining pressure on the front of the weapon. ATF explained in the bump stock classification challenged here, as it had in previous classifications, that the question

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Federal Circuit, and that appeal is pending. *See Codrea v. Garland*, No. 21-1707 (Fed. Cir.); *see also* 28 U.S.C. § 1295(a)(2).

under the statute is whether a shooter sets in motion an automatic firing sequence by a single application of the trigger—whether "a single function of the trigger" causes the weapon to shoot "automatically more than one shot." That is the case with a bump stock. That the trigger moves after the shooter initiates the automatic firing sequence has no bearing on the statutory inquiry.

In reaching its determination that bump stocks are "machineguns," ATF acknowledged that it had previously erred in concluding that that a bump stock would fire "automatically" only if it operated with the type of internal springs used in an early bump stock called the Akins Accelerator. The only functional difference between a bump stock with springs and a bump stock without springs is that, in the case of a bump stock without springs, the shooter must maintain forward pressure on the front of the rifle with his non-trigger hand. *See* 83 Fed. Reg. 66,514, 66,518 (Dec. 26, 2018). That distinction, ATF explained, does not provide a textual or practical basis for distinguishing between the two weapons.

The bump stock classification should be upheld both because this Court has already decided the issue and because the classification is a correct application of the governing statute.

The law-of-the-case doctrine seeks "to ensure that the *same* issue presented a second time in the *same case* in the *same court* should lead to the *same result*." *Sherley v. Sebelius*, 689 F.3d 776, 780 (D.C. Cir. 2012) (quotation marks omitted). As plaintiffs do not dispute, this Court's prior decision, which issued after full briefing and oral argument, comprehensively addressed the arguments they present on this appeal. Plaintiffs' principal contention is that the statutory definition of machinegun precludes ATF's classification. That argument is foreclosed by this Court's holding that "the Bump-Stock Rule sets forth a permissible interpretation of the statute's ambiguous definition of 'machinegun.'" *See Guedes II*, 920 F.3d 1, 32 (D.C. Cir. 2019) (per curiam). The Court similarly explained at length why the classification should be accorded *Chevron* deference. This case falls into none of the limited exceptions to law-of-the-case principles, and the district court's judgment can be affirmed on that basis.

Because the Court previously upheld ATF's classification after applying *Chevron* deference, it explicitly did not decide whether ATF offered the best interpretation of the statutory text. If the Court reaches the question now, it should uphold the classification because it reflects the best understanding of the statute—one that fully accords with its text, history, and purpose. *See Akins v. United States*, 312 F. App'x 197, 201 (11th Cir. 2009) (per curiam) ("The plain language of the statute defines a machinegun as any part or device that allows a gunman to pull the trigger once and thereby discharge the firearm repeatedly."). ATF explained its view of the statute comprehensively and set out in detail how that understanding applies to the mechanical workings of a bump stock. *Chevron* deference is not required to sustain the agency's classification, and, as the Supreme Court has made clear, even when a court does not reach the question of *Chevron* deference, it is appropriate to "pay particular attention to an agency's views in light of the agency's expertise in a given area, its knowledge gained through practical experience, and its familiarity with the interpretive demands of administrative need." *County of Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1474 (2020). The classification should thus be sustained

whether or not the Court believes that *Chevron* deference is appropriate.

STANDARD OF REVIEW

This Court reviews de novo the district court's decision to grant the government's motion for summary judgment. *See Baylor v. Mitchell Rubenstein & Assocs., P.C.*, 857 F.3d 939, 944 (D.C. Cir. 2017).

ARGUMENT

I. The Law of the Case Requires That ATF's Bump Stock Classification Be Upheld

This case was previously before this Court on an appeal from the denial of plaintiffs' motion for a preliminary injunction. *See Guedes II*, 920 F.3d 1 (D.C. Cir. 2019) (per curiam). In affirming the district court's order, this Court held that ATF's classification is entitled to *Chevron* deference, that ATF offered a permissible interpretation of the ambiguous statutory definition of "machinegun," and that plaintiffs' remaining arguments were meritless. On this appeal, plaintiffs contend that the Rule is invalid for the same reasons that this Court rejected in *Guedes II*. Plaintiffs' appeal is accordingly foreclosed by the law-of-the-case doctrine.

1. "The purpose of the law-of-the-case doctrine is to ensure that the *same* issue presented a second time in the *same case* in the *same court* should lead to the *same result*." *Sherley v. Sebelius*, 689 F.3d 776, 780 (D.C. Cir. 2012) (quotation marks omitted). Courts are accordingly "loathe to reconsider issues already decided, except in the case of extraordinary circumstances such as where the initial decision was clearly erroneous and would work a manifest injustice." *Id.* at 781 (quotation marks omitted).

This Court has recognized a limited exception to this doctrine for rulings made at the preliminary injunction stage, but that exception does not apply "where the earlier ruling, though on preliminary-injunction review, was established in a definitive, fully considered legal decision based on a fully developed factual record and a decisionmaking process that included full briefing and argument without unusual time constraints." *See Sherley*, 689 F.3d at 782.

2. This Court's decision in *Guedes II* addressed all the issues raised by plaintiffs on this appeal.

a. Plaintiffs principally argue (Br. 22-32) that the statutory definition of "machinegun" unambiguously precludes ATF's

interpretation of the term. But this Court has already held that "the Bump-Stock Rule sets forth a permissible interpretation of the statute's ambiguous definition of 'machinegun.'" *Guedes II*, 920 F.3d at 32.

This Court also rejected plaintiffs' various arguments (Br. 38-56) for why the Rule is not entitled to *Chevron* deference. Plaintiffs contend the Rule is not a legislative rule (Br. 41-44); but this Court disagreed. *Guedes II*, 920 F.3d at 20. Plaintiffs urge that the government "waived" *Chevron* deference by declining to invoke it in this litigation (Br. 40-41); but this Court held that "[a]gency counsel's later litigating decision to refrain from invoking *Chevron* . . . affords no basis for our denying the Rule *Chevron* status." *Guedes II*, 920 F.3d at 23. This Court also rejected plaintiffs' claim (Br. 48-50) that *Chevron* deference cannot apply to the Rule because it has criminal implications, explaining that this contention was barred by circuit precedent. *Guedes II*, 920 F.3d at 23-27; *see, e.g.*, *id.* at 24 ("[W]e apply the *Chevron* framework . . . even though violating [the statute] can bring criminal penalties[.]" (quoting *Competitive Enter. Inst. v. U.S. Dep't of Transp.*, 863 F.3d 911, 915 n.4 (D.C. Cir. 2017))). The Court likewise rejected plaintiffs' contention (Br. 44-56) that resolution of ambiguities should be guided by the rule of

lenity, explaining that "the rule of lenity applies only when the ordinary canons of statutory construction have revealed no satisfactory construction" and that "*Chevron* is a rule of statutory construction, insofar as it is a doctrine that construes what Congress has expressed." *Guedes II*, 920 F.3d at 27 (quotation marks and alteration omitted). Finally, plaintiffs again argue (Br. 56-58) that application of *Chevron* deference here would be unconstitutional because it would violate the separation of powers. Rejecting that argument, this Court explained that "*Chevron* is consistent with the separation of powers, including for regulations defining criminal activity." *Guedes II*, 920 F.3d at 28.

The Court also rejected additional contentions advanced again on this appeal. It rejected plaintiffs' contention (Br. 32-35) that ATF's classification rests on a misunderstanding of the workings of a bump stock. *Guedes II*, 920 F.3d at 33. It also rejected plaintiffs' assertion that the classification must be mistaken because ATF's reasoning would potentially make all semiautomatic weapons machineguns (Br. 35-36) and because it excludes binary-trigger guns (Br. 37). *Guedes II*, 920 F.3d at 33. The Court also rejected plaintiffs' contentions that the Rule was improperly motivated by political pressure (Br. 61-62) and that

ATF's interpretation of "automatically" is ambiguous (Br. 62-63). *Guedes II*, 920 F.3d at 33-34. Plaintiffs also claim (Br. 59-61) that the Rule is arbitrary and capricious because ATF did not understand itself to be promulgating a legislative rule. But this Court held that the Rule "unequivocally bespeaks an effort by the Bureau to adjust the legal rights and obligations of bump-stock owners—i.e., to act with the force of law." *Guedes II*, 920 F.3d at 18.

b. The law-of-the-case doctrine applies where, as here, a decision addressing an appeal from the grant or denial of a preliminary injunction was "established in a definitive, fully considered legal decision based on a fully developed factual record and a decisionmaking process that included full briefing and argument without unusual time constraints." *Sherley*, 689 F.3d at 782. This Court definitively addressed the issues presented here, none of which required further factual development, as evidenced by the fact that on remand the parties agreed that the claims here are "exclusively legal in nature" and proceeded to summary judgment without discovery. *See* JA__ (Joint Proposed Schedule, Dkt. No. 57, at 1). Although the preliminary

injunction appeal was expedited, the panel issued a comprehensive opinion after full briefing and argument.

c. Plaintiffs acknowledged in their petition for initial en banc review that "[e]fforts to persuade a panel of this Court that the earlier preliminary injunction decision should not bind a merits panel . . . would have limited chances of success." Pet. 3-4 (citing *Sherley*). Now, plaintiffs offer several cursory arguments for why the portion of *Guedes II* concerning *Chevron* deference should not be considered binding.

First, plaintiffs urge (Br. 38) that "[a]s a general matter, a preliminary decision should not preclude revisiting those issues on summary judgment." But as discussed, the limited exception to the law-of-the-case doctrine for preliminary injunction rulings does not apply to definitive rulings issued in a fully considered decision, like those in *Guedes II*. Similarly, in *Pitt News v. Pappert*, 379 F.3d 96 (3d Cir. 2004), on which plaintiffs seek to rely (Br. 38), the Third Circuit noted that if a panel reviewing the grant or denial of a preliminary injunction "does not stop at the question of likelihood of success and instead addresses the merits, the later panel, in accordance with our

Court's traditional practice, should regard itself as bound by the prior panel opinion." 379 F.3d at 105.

Second, Justice Gorsuch's statement that *Chevron* deference does not apply to the bump stock classification, *see Guedes v. ATF*, 140 S. Ct. 789 (2020), does not, as plaintiffs suggest (Br. 38), constitute intervening case law in the requisite sense of a new controlling precedent. *See National Treasury Emps. Union v. Federal Labor Relations Auth.*, 30 F.3d 1510, 1516 (D.C. Cir. 1994) (explaining that the law-of-the-case doctrine "contains an exception . . . when an intervening interpretation of the law has been issued by a controlling authority").

Plaintiffs similarly err in urging that *HollyFrontier Cheyenne Refining, LLC v. Renewable Fuels Ass'n*, 141 S. Ct. 2172 (2021), compels reconsideration of *Guedes II*. As plaintiffs note (Br. 41), in *HollyFrontier* the Supreme Court "decline[d] to consider whether any deference might be due" to an agency's regulation when the government did not invoke *Chevron*. 141 S. Ct. at 2180. But the Supreme Court did not suggest that courts are *barred* from according deference to a regulation in such circumstances, as plaintiffs here urge. And the

Supreme Court's decision certainly does not call into question *Guedes II*'s conclusion that ATF's interpretation is, at the very least, a permissible interpretation of the statutory text, which forecloses plaintiffs' argument that the statute unambiguously excludes bump stocks. Nor does it call into question the Court's conclusive rejection of plaintiffs' sweeping arguments for why *Chevron* cannot apply to statutes with criminal implications.

Third, plaintiffs cite as relevant intervening precedent (Br. 39) *United States v. Sineneng-Smith*, 140 S. Ct. 1575 (2020), in which, after oral argument, the panel interjected the question of whether a federal statute was unconstitutionally overbroad; ordered new briefing not from the parties but rather from three amici selected by the panel; and assigned the parties "a secondary role" in the "ensuing do over of the appeal." *Id.* at 1578. Plaintiffs do not seriously attempt to analogize the prior decision in this case to "the panel's takeover of the appeal" in *Sineneng-Smith*. *Id.* at 1581.

Plaintiffs also renew their request (Br. 39) that the case be heard en banc if the panel believes the Court's prior decision is binding with respect to *Chevron* issues. Plaintiffs offer no reason for the Court to

revisit a request that it recently denied, and they do not explain why the criteria for en banc review would be satisfied. Nor, contrary to plaintiffs' suggestion (Br. 39), would an *Irons* footnote be appropriate in this case, where there is no "intervening Supreme Court decision, or the combined weight of authority from other circuits" suggesting that *Guedes II* rests on "an incorrect statement of current law." *Oakey v. U.S. Airways Pilots Disability Income Plan*, 723 F.3d 227, 232 (D.C. Cir. 2013) (quoting Policy Statement on En Banc Endorsement of Panel Decisions (*Irons* Footnote Policy) at 1 (Jan. 17, 1996)).

II. The Bump Stock Classification Should Be Upheld, In Any Event, Because It Is a Correct Application of the Statute's Definition of Machinegun

Because the *Guedes II* panel afforded *Chevron* deference to the 2018 Rule, the panel explicitly did not decide whether ATF's interpretation is the best interpretation of the statutory text. In starting at *Chevron* step one, the Court "d[id] not ask" whether ATF's or plaintiffs' interpretation was "the better reading of the statute"; it asked only "whether either of those interpretations is unambiguously 'compelled' by the statute, to the exclusion of the other one," and concluded that "the answer is no." *Guedes II*, 920 F.3d at 30 (alteration

omitted). If the Court reaches the question, it should conclude that ATF's classification of bump stocks as machineguns reflects the best understanding of the statutory definition.

A. Bump Stocks Permit a Shooter To Produce Automatic Fire "by a Single Function of the Trigger"

In addressing the proper classification of bump stocks, ATF was required to determine whether bump stocks allow a shooter to fire "automatically more than one shot . . . by a single function of the trigger." 26 U.S.C. § 5845(b). ATF explained in detail why bump stocks meet both of the closely related parts of this definition. It explained that a bump stock is engaged by a single function of the trigger in the same way as other devices that it had previously classified as machineguns, such as the Akins Accelerator. And ATF explained that after that single function of the trigger, a bump stock produces automatic fire. In doing so, ATF acknowledged that it had previously erred in concluding that bump stocks that lack internal springs do not enable a shooter to fire automatically.

A bump stock replaces the standard stationary stock on an ordinary semiautomatic rifle—the part of the weapon that typically

rests against the shooter's shoulder. It is composed of a sliding stock attached to a grip fitted with an "extension ledge" where the shooter rests his trigger finger while shooting the firearm. 83 Fed. Reg. at 66,516. With a single pull of the trigger, the bump stock "harnesses and directs the firearm's recoil energy to slide the firearm back and forth so that the trigger automatically re-engages by 'bumping' the shooter's stationary finger without additional physical manipulation of the trigger by the shooter." *Id.* This creates a fire-recoil-fire sequence that converts a semiautomatic weapon into a machinegun capable of firing hundreds of rounds per minute with a single pull of the trigger.

1. A Bump Stock's Firing Sequence Is Initiated by a Single Function of the Trigger

For many years, ATF has consistently understood that the firing sequence of a bump stock is initiated by a "single function of the trigger." In 2006, ATF classified a bump stock device known as the Akins Accelerator as a machinegun. 83 Fed. Reg. at 66,517. The Akins Accelerator, which attached to a standard semiautomatic rifle, used a spring to harness the recoil energy of each shot, causing "the firearm to cycle back and forth, impacting the trigger finger" repeatedly after the first pull of the trigger. *Id.* Thus, by pulling the trigger once, the

shooter "initiated an automatic firing sequence" that was advertised as firing "approximately 650 rounds per minute." *Id.*

Although ATF initially concluded that the Akins Accelerator was not a machinegun on the ground that the statutory term "single function of the trigger" should be understood to refer to a "single movement of the trigger," 83 Fed. Reg. at 66,517, it recognized that this understanding impermissibly restricted the definition established by Congress. The statute is concerned with whether an automatic firing sequence is initiated by a single pull of the trigger. The statute is not concerned with whether the trigger moves after the automatic sequence begins. The Akins Accelerator—which created "a weapon that '[with] a single pull of the trigger initiates an automatic firing cycle that continues until the [shooter's] finger is released, the weapon malfunctions, or the ammunition supply is exhausted'"—was thus properly classified as a machinegun, even though the rifle's trigger continued to move during the automatic firing cycle. *Id.* (first alteration in original) (quoting *Akins v. United States*, No. 8:08-cv-988, 2008 WL 11455059, at *3 (M.D. Fla. Sept. 23, 2008)).

Anticipating further classification requests for devices designed to increase the firing rate of semiautomatic weapons, ATF also published a public ruling announcing its interpretation of "single function of the trigger," in which it reviewed the National Firearms Act and its legislative history and explained that the phrase denoted a "single pull of the trigger." ATF Ruling 2006-2; *see* Add. 2-4.

When the inventor of the Akins Accelerator challenged ATF's action, the Eleventh Circuit sustained ATF's determination, explaining that interpreting "single function of the trigger" as "'single pull of the trigger' is consonant with the statute and its legislative history." *Akins v. United States*, 312 F. App'x 197, 200 (11th Cir. 2009). It also rejected a vagueness challenge to the statute because "[t]he plain language of the statute defines a machinegun as any part or device that allows a gunman to pull the trigger once and thereby discharge the firearm repeatedly." *Id.* at 201.

Over the next decade, ATF issued classification letters that applied the "single pull of the trigger" interpretation to bump-stock-type devices and also to "other trigger actuators, two-stage triggers, and

other devices." 83 Fed. Reg. at 66,517; *see id.* at 66,518 n.4 (listing examples of other ATF classifications using the definition).

ATF's interpretation of "single function of the trigger," and the *Akins* decision sustaining that interpretation, reflect the common-sense understanding of the statute and the means by which most weapons are fired. As the Supreme Court has observed, the National Firearms Act treats a weapon that "fires repeatedly with a single pull of the trigger" as a machinegun, in contrast to "a weapon that fires only one shot with each pull of the trigger." *Staples v. United States*, 511 U.S. 600, 602 n.1 (1994).

2. A Bump Stock's Firing Proceeds Automatically After Being Initiated by a Single Function of the Trigger

The only way in which the 2018 Rule alters ATF's prior interpretation of the statutory definition of "machinegun" is to correct its mistaken view that a bump stock would fire "automatically" only if it operated with the type of internal springs used by the Akins Accelerator. When ATF issued the Akins Accelerator determination, it advised that removal of the internal spring would render the device a non-machinegun, based on the theory that the device would no longer

fire "automatically." 83 Fed. Reg. at 66,517. Manufacturers accordingly began producing spring-less bump stocks that—just like bump stocks with internal springs—allow a shooter to fire hundreds of rounds per minute with a single pull of the trigger. Between 2008 and 2017, ATF issued several classification determinations for such bump stocks, concluding that these devices, like the Akins Accelerator, fire multiple rounds by a single function of the trigger, but that they do not fire automatically because they lack internal springs or other mechanical parts. *Id.* at 66,517-18.

In issuing the 2018 Rule, the agency acknowledged that its prior classification decisions had erroneously concluded that such weapons do not fire "automatically," and it explained that those decisions "did not provide substantial or consistent legal analysis regarding the meaning of the term 'automatically.'" 83 Fed. Reg. at 66,518. The only functional difference between a bump stock with springs and a bump stock without springs is that, in the case of a bump stock without springs, the shooter must maintain forward pressure on the front of the rifle with his non-trigger hand. *See id.* That distinction, ATF explained, does not provide a textual or practical basis for

distinguishing between the two weapons. Instead, a weapon fires "automatically" within the meaning of the statute when it fires "as the result of a self-acting or self-regulating mechanism that allows the firing of multiple rounds." *Id.* at 66,554. That definition "is borrowed, nearly word-for-word, from dictionary definitions contemporaneous to the [National Firearms Act]'s enactment." *Aposhian v. Barr*, 374 F. Supp. 3d 1145, 1152 (D. Utah 2019). "'[A]utomatically' is the adverbial form of 'automatic,' meaning '[h]aving a self-acting or self-regulating mechanism that performs a required act at a predetermined point in an operation.'" 83 Fed. Reg. at 66,519 (alteration in original) (first quoting *Webster's New International Dictionary* 187 (2d ed. 1934); and then citing *Oxford English Dictionary* 574 (1933) (defining "automatic" as "[s]elf-acting under conditions fixed for it, going of itself")); *see United States v. Olofson*, 563 F.3d 652, 658 (7th Cir. 2009) ("automatically" in § 5845(b) means "as the result of a self-acting mechanism").

Indeed, the entire point of a bump stock is to permit a semiautomatic rifle to fire "automatically." It "performs a required act at a predetermined point" in the firing sequence by "directing the recoil energy of the discharged rounds into the space created by the sliding

stock," ensuring that the rifle moves in a "constrained linear rearward and forward path[]" to enable continuous fire. 83 Fed. Reg. at 66,519, 66,532 (quotation marks omitted). This process is also "[s]elf-acting under conditions fixed for it." *Id.* at 66,519 (alteration in original) (quotation marks omitted). The shooter's positioning of the trigger finger on the extension ledge and application of pressure on the front of the rifle with the other hand provide the conditions necessary for the bump stock to repeatedly perform its basic purpose: "to eliminate the need for the shooter to manually capture, harness, or otherwise utilize th[e] [recoil] energy to fire additional rounds." *Id.* at 66,532.

B. Plaintiffs Offer a Seriously Flawed Interpretation of the Statutory Text That Is Inconsistent with Appellate Decisions Regarding Other Devices and Would Call into Question Several Other ATF Classifications

Plaintiffs' contentions cast no doubt on the correctness of ATF's conclusions. Still less do they suggest that the statute precludes classification of a bump stock as a machinegun.

1. a. Plaintiffs wrongly contend (Br. 22-26) that a bump stock cannot fire multiple shots by a single function of the trigger. They rely primarily on the now-vacated panel opinion in *Gun Owners of America,*

Inc. v. Garland, 992 F.3d 446 (6th Cir.), *reh'g en banc granted*, 2 F.4th 576 (6th Cir. 2021). There, the panel interpreted the statute to establish a dichotomy between a "mechanical process" and a "human process." It thus framed the interpretive question as "whether 'function' is referring to the mechanical process (*i.e.*, the act of the trigger's being depressed, released, and reset) or the human process (*i.e.*, the shooter's pulling, or otherwise acting upon, the trigger)." *Id.* at 469. The panel acknowledged that if the statute were concerned with "the human process," the definition would encompass a bump stock "because the firearm shoots multiple shots despite the shooter's pulling the trigger only once." *Id.* The panel declared, however, that the statute is concerned solely with "the mechanical process" and that a bump stock did not fall within its understanding of the definition because it is "not capable of firing more than one shot for each depressed-released-reset cycle the trigger completes." *Id.*

That argument, echoed by plaintiffs here, misunderstands the statutory text. The question under the statute is whether "a single function of the trigger" causes the weapon to shoot "automatically more than one shot." 26 U.S.C. § 5845(b). That is the case here: a single

function of the trigger—whether described as the shooter's initial pull or the trigger's initial movement—initiates an automatic fire-recoil-fire sequence that continues until the shooter stops the process or runs out of ammunition. The specific mechanical process that the trigger goes through after that initial function is not relevant to the statutory definition. The statute instead looks to the "action that enables the weapon to 'shoot . . . automatically . . . without manual reloading,' not the 'trigger' mechanism." *United States v. Evans*, 978 F.2d 1112, 1113 n.2 (9th Cir. 1992) (alterations in original); *accord Olofson*, 563 F.3d at 658 (noting that "a single function of the trigger" "set[s] in motion" the automatic firing of more than one shot); *Akins*, 312 F. App'x at 201 (the "plain language" encompasses a weapon "that allows a gunman to pull the trigger once and thereby discharge the firearm repeatedly").

The "function of the trigger" that concerned Congress was the initial pull of the trigger (or other similar action) that permits continuous firing, not the movement of the trigger during the continuous firing, which has no significant bearing on the deadliness of the weapon. The *Gun Owners* panel's observation that the statute and Rule refer to a "single function *of the trigger*" and not "the trigger

finger" thus misses the critical point. 992 F.3d at 471 (quotation marks omitted). The Rule does not interpret the statute by substituting "single function of the trigger finger" for a "single function of the trigger." The point, as ATF made clear even prior to the 2018 Rule, is that it takes only one function of the trigger itself—here, the initial pull—to engage a bump stock's automatic firing system. That bump stocks automate the back-and-forth movement of the trigger rather than the internal movement of the hammer does not take them outside the statutory definition.

The legislative history of the National Firearms Act confirms that the focus of congressional concern was with devices that enable a shooter to initiate a firing sequence with a single action rather than on subsequent movements of the trigger not initiated by additional motions of the shooter. The report of the House Committee on Ways and Means that accompanied the bill that ultimately became the National Firearms Act, *see* H.R. 9741, 73d Cong. (1934), stated that the bill "contains the usual definition of machine gun as a weapon designed to shoot more than one shot without reloading and by a single pull of the trigger." H.R. Rep. No. 73-1780, at 2; *see* S. Rep. No. 73-1444 (1934)

(reprinting the House's "detailed explanation" of the provisions, including the quoted language). Similarly, the then-president of the National Rifle Association proposed that a machinegun should be defined as a weapon "which shoots automatically more than one shot without manual reloading, by a single function of the trigger." *National Firearms Act: Hearings on H.R. 9066 Before the H. Comm. on Ways & Means*, 73d Cong. 40 (1934) (statement of Karl T. Frederick, President, National Rifle Association of America). Mr. Frederick testified that "[t]he distinguishing feature of a machine gun is that by a single pull of the trigger the gun continues to fire as long as there is any ammunition in the belt or in the magazine." *Id.* He explained that "[o]ther guns require a separate pull of the trigger for every shot fired, and such guns are not properly designated as machine guns. A gun, however, which is capable of firing more than one shot by a single pull of the trigger, a single function of the trigger, is properly regarded, in my opinion, as a machine gun." *Id.*

b. Plaintiffs' contrary reading of the statute would legalize the Akins Accelerator and call into question the status of a number of weapons that ATF described in the 2018 Rule. *See* 83 Fed. Reg. at

66,517-18, 66,518 n.4. For example, in 2016, ATF classified "LV-15 Trigger Reset Devices" as machinegun parts. *Id.* at 66,518 n.4; *see* Add. 11-21. These devices attached to an AR-15 rifle and used a battery-operated "piston that projected forward through the lower rear portion of the trigger guard" to push the trigger forward, enabling the shooter to pull the trigger once and "initiate and maintain a firing sequence" by continuing the pressure while the piston rapidly reset the trigger. 83 Fed. Reg. at 66,518 n.4. ATF applied the same reasoning in classifying another device—a "positive reset trigger"—that used the recoil energy of each shot to push the shooter's trigger finger forward, *see id.*; Add. 5-10, and in classifying the "AutoGlove," a glove with a battery-operated piston attached to the index finger that pulled and released the trigger on the shooter's behalf when the shooter held down a plunger to activate a motor, *see* Add. 22-28.

Plaintiffs' reasoning would also call into doubt the status of weapons recognized as machineguns by other courts of appeals. In *United States v. Camp*, 343 F.3d 743 (5th Cir. 2003), the Fifth Circuit considered a rifle that had been modified with a switch-activated, motorized fishing reel placed within the trigger guard. As a result,

whenever a shooter operated the switch, the reel would rotate and "that rotation caused the original trigger to function in rapid succession." *Id.* at 744. Because the shooter needed to perform only "one action—pulling the switch he installed—to fire multiple shots," the court held that the rifle was a "machinegun" that fired more than one shot "by a *single* function of the trigger." *Id.* at 745 (quoting 26 U.S.C. § 5845(b)). The original trigger, however, had to be released, reset, and depressed again for each shot fired.

Courts have also uniformly rejected attempts to evade the scope of the statute by dispensing with a traditional trigger altogether, recognizing that the critical question is whether a single action can initiate an automatic firing sequence. In *United States v. Fleischli*, 305 F.3d 643 (7th Cir. 2002), for example, the defendant activated his firearm with an electronic on-off switch rather than a more traditional mechanical trigger. The Seventh Circuit "join[ed] our sister circuits in holding that a trigger is a mechanism used to initiate a firing sequence." *Id.* at 655 (first citing *United States v. Jokel,* 969 F.2d 132, 135 (5th Cir. 1992); and then citing *Evans,* 978 F.2d at 1113-14 n.2). The court observed that "Fleischli's definition 'would lead to the absurd

result of enabling persons to avoid the [National Firearms Act] simply by using weapons that employ a button or switch mechanism for firing.'" *Id.* (quoting *Evans,* 978 F.2d at 1113-14 n.2). Similarly, under plaintiffs' reasoning, a shooter could evade the statute and initiate continuous firing with a single action as long as the device caused the weapon's trigger to move in rapid succession. *Cf. Akins*, 2008 WL 11455059, at *7 ("This unhindered capability would be wholly inconsistent with the strict regulation of machineguns imposed by the [National Firearms Act] and the prohibition on post-1986 machineguns imposed by the [Gun Control Act].").

c. Plaintiffs are also wrong to suggest (Br. 37) that bump stocks cannot be distinguished from binary-trigger guns, which are not machineguns. *See Guedes II*, 920 F.3d at 33 (rejecting argument). As the *Guedes II* panel explained, "[b]inary-trigger guns shoot one round when the trigger is pulled and another round when the trigger is released." *Id.* (citing 83 Fed. Reg. at 66,534). Because the shooter must release the trigger to fire the second shot through a "volitional motion," *id.*, the second shot is "the result of a separate function of the trigger," *id.* (quoting 83 Fed. Reg. at 66,534), meaning that the weapon cannot

fire more than one shot by a single function of the trigger. By contrast, a bump stock permits automatic fire after a single function of the trigger because, after the initial pull, the shooter "merely hold[s] the trigger finger stationary." *Id.*

2. Plaintiffs are on no firmer ground in urging (Br. 27-30) that bump stocks without springs do not fire automatically. They note that spring-less bump stocks require the shooter to maintain forward pressure on the front of the weapon to sustain the automatic firing sequence. But even prototypical machineguns require the shooter to maintain pressure on the weapon after the initial pull of the trigger—in that case, backward pressure on the trigger itself. Spring-less bump stocks instead require forward pressure on the front of the weapon. In either case, the weapon is "[s]elf-acting under conditions fixed for it" because the initial trigger pull and pressure on the weapon are the fixed conditions that produce continuous fire. 83 Fed. Reg. at 66,519 (alteration in original) (quotation marks omitted).

Plaintiffs find no support for their interpretation in the various dictionary definitions they cite. *See* Br. 27-28. They assert (Br. 27) that those definitions establish that "'automatically' was understood as

referring to the operation of a 'self-acting' mechanism—not merely a vaguely 'self-regulating' mechanism." Plaintiffs' distinction is unclear. And, in any event, the definitions of "automatic" on which plaintiffs rely are similar to those that ATF relied on. Indeed, one of the definitions that plaintiffs cite—"[s]elf-acting under the conditions fixed for it, going of itself"—is cited by ATF in the Rule. Plaintiffs are even farther afield in seeking to rely on definitions of "automatic pistol, automatic rifle, etc." that shed no light on Congress's understanding in defining machinegun.[6] *Id.* (quotation marks omitted).

Plaintiffs also mistakenly assert (Br. 32-34) that the Rule provides no principled reason why a bump stock is a machinegun but other devices that make it easier to bump fire a semiautomatic weapon—such as a rubber band or belt loop—are not. *See Guedes II*, 920 F.3d at 32 (rejecting argument). As ATF explained, such items do not operate

[6] Plaintiffs cite dictionary definitions of "automatically" contemporaneous to both the National Firearms Act of 1934 and the Gun Control Act of 1968. While there are no meaningful differences between the two sets of definitions, plaintiffs' focus on the 1968-era dictionaries is misplaced. The Gun Control Act amendments to the statutory definition of "machinegun" did not add or alter the terms "single function of the trigger" or "automatically," both of which appeared in the original statute in 1934.

"automatically" because they are "not a 'self-acting or self-regulating mechanism'": "[w]hen such items are used for bump firing, no device is present to capture and direct the recoil energy; rather, the shooter must do so." 83 Fed. Reg. at 66,533. Thus, a shooter must manually "harness the recoil energy" and "control the distance that the firearm recoils and the movement along the plane on which the firearm recoils." *Id.* By contrast, a bump stock "direct[s] the recoil energy of the discharged rounds into the space created by the sliding stock . . . in constrained linear rearward and forward paths," relieving the shooter of these tasks and enabling "a continuous firing cycle." *Id.* at 66,532 (quotation marks omitted).

Plaintiffs are quite wrong to assert (Br. 33-34 (quoting Def. Summ. J. Mem., Dkt. No. 61-1, at 14)), that ATF considers a bump stock to function automatically simply because it makes it "easier to bump fire." The summary judgment memorandum to which they refer explains that a bump stock "permits a firearm to function automatically by directing the recoil energy of the discharged rounds into the space created by the sliding stock in constrained linear rearward and forward paths so that the shooter can maintain a continuous firing sequence,"

which, in turn, "makes it easier to bump fire." *See* JA__ (Def. Summ. J. Mem., Dkt. No. 61-1, at 14 (quoting *Guedes I*, 356 F. Supp. 3d 109, 132-33 (D.D.C. 2019))). Plaintiffs' contention (Br. 36) that "numerous innovations have made it easier to shoot consecutive rounds" and that "simple physical aids, such as a belt-loop, a rubber band, any fixed stock itself, or a padded shooting jacket, likewise facilitate bump-firing" is beside the point; that is not the test that the Rule sets out.

For similar reasons, plaintiffs' contention (Br. 35) that ATF's interpretation means that "every modern semiautomatic firearm is a machinegun" is plainly incorrect. *See Guedes II*, 920 F.3d at 32, 33 (rejecting two variations of this argument). A semiautomatic weapon by definition can fire only one shot after a single function of the trigger. And the fact that a skilled shooter can bump fire a semiautomatic weapon with common household objects (or, indeed, without any additional devices) does not turn the semiautomatic weapon into a machinegun; as noted, the shooter must manually harness the firearm's

recoil energy in those instances, while a bump stock automates the bump firing process.[7]

Plaintiffs do not advance their argument by urging (Br. 33) that ATF has not accurately understood the way in which a bump stock works. As discussed, to fire multiple shots automatically with a bump stock, the shooter must maintain forward pressure on the front of the weapon. But plaintiffs are wrong to suggest that the shooter must "push[] the body of the firearm forward *again*" to fire each shot. Br. 33 (emphasis added). As ATF explained, the shooter need simply "maintain[] *constant* forward pressure with the non-trigger hand on the

[7] This argument echoes a colloquy between the then-President of the National Rifle Association and a member of the House Committee considering the 1934 legislation regarding the difference between a machinegun and firearms that simply enable a shooter to fire more quickly: "For purposes of example, you may look at the automatic pistol which is the standard weapon of the United States Army. That has an automatic discharge of the empty cartridge and a reloading principle which is operated by the force of the gas from the exploded cartridge. But with a single pull of the trigger only one shot is fired. You must release the trigger and pull it again for the second shot to be fired. You can keep firing that as fast as you can pull your trigger. But that is not properly a machine gun and in point of effectiveness any gun so operated will be very much less effective than one which pours out a stream of bullets with a single pull and as a perfect stream." *National Firearms Act: Hearings on H.R. 9066 Before the H. Comm. on Ways & Means*, 73d Cong. 40-41 (statement of Karl T. Frederick, President, National Rifle Association of America).

barrel-shroud or fore-grip of the rifle." 83 Fed. Reg. at 66,518 (emphasis added). The bump stock "itself then harnesses the recoil energy of the firearm," by "directing the recoil energy of the discharged rounds into the space created by the sliding stock (approximately 1.5 inches) in constrained linear rearward and forward paths." *Id.* That understanding of how a bump stock operates is entitled to deference because it reflects the agency's broad experience and technical expertise. *See, e.g., Sig Sauer, Inc. v. Brandon*, 826 F.3d 598, 603 (1st Cir. 2016) (explaining that review of a firearm part was "within [ATF's] special competence" and required "a high level of technical expertise," entitling the agency to deference) (alteration in original) (quotation marks omitted); *York v. Secretary of Treasury*, 774 F.2d 417, 420 (10th Cir. 1985) (rejecting factual challenge to ATF's classification of a weapon as a machinegun); *see generally Federal Power Comm'n v. Florida Power & Light Co.*, 404 U.S. 453, 463 (1972) (noting that courts should defer to an agency's analysis of "purely factual question[s]" that "depend[] on 'engineering and scientific' considerations" in light of "the relevant agency's technical expertise and experience").

3. Plaintiffs mistakenly urge (Br. 30-32) that the Gun Control Act of 1968 narrowed the definition of "machinegun" set out in the National Firearms Act of 1934. As purported evidence of this "narrowing," plaintiffs note that the 1934 statute defined a machinegun as "any weapon which shoots, or is designed to shoot, automatically or semiautomatically, more than one shot, without manual reloading, by a single function of the trigger," *see* Pub. L. No. 73-474, § 1(b), 48 Stat. 1236, 1236 (1934), and that the 1968 amendments removed the words "or semiautomatically." They also point to a 1955 ATF classification concerning Gatling Guns and argue that the 1968 Congress ratified the views in that decision because "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it reenacts a statute without change[.]" Br. 31 (alteration in original) (quoting *Lorillard v. Pons*, 434 U.S. 575, 580 (1978)).

The legislative history of the 1968 amendments makes abundantly clear, however, that the amendments broadened, rather than narrowed, the definition of machinegun, by explicitly extending the definition to include parts that convert a weapon into a

machinegun. *See* S. Rep. No. 90-1501, at 46 (1968) (describing the amendment as "an important addition to the definition of 'machinegun'"); H.R. Rep. No. 90-1956, at 34 (describing the amendments as part of the "[e]xtension of the scope of the National Firearms Act"). Nor does the legislative history suggest that the removal of "or semiautomatically" altered the substantive scope of the statute. *See* S. Rep. No. 90-1501, at 45 (observing that the sentence defining a machinegun as a weapon that shoots "automatically more than one shot" reflected "existing law"). Moreover, as the district court concluded, plaintiffs have not established that the 1955 Gatling Gun classification "so settled the definition of 'machinegun' that it implicitly bound the future Congress." JA__ (Op., Dkt. No. 74, at 12 n.7 (quoting *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998) ("When administrative and judicial interpretations have *settled* the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well." (emphasis added) (quotation marks omitted))).

C. The Court Need Not Consider Plaintiffs' *Chevron* Arguments, Which Are, In Any Event, Meritless

If the Court concludes that the Rule offers the best interpretation of the statutory definition of "machinegun," there is no need to address plaintiffs' *Chevron* arguments. *See Edelman v. Lynchburg Coll.*, 535 U.S. 106, 114 (2002) (observing that "there is no occasion to defer and no point in asking what kind of deference, or how much" would apply where the agency has adopted "the position [the court] would adopt" when "interpreting the statute from scratch"). Those arguments are, in any event, meritless.

1. Plaintiffs argue (Br. 40-44) that the *Guedes II* panel erred in according *Chevron* deference to the Rule because the government "waived" *Chevron* deference in litigation and because ATF understood itself to be promulgating an interpretive—not a legislative—rule. As an initial matter, plaintiffs correctly note that the government has consistently urged that the Rule is an interpretive rule that should be upheld as the best understanding of the statute, and we have not invoked *Chevron* in defending it.

That said, plaintiffs are wrong to frame the applicability of *Chevron* deference as a question of party "waiver." *Chevron* deference

reflects an analytical framework relevant when Congress has implicitly delegated to an agency the authority to fill gaps in a statute or engage in interpretations that will have the force of law. *See City of Arlington v. FCC*, 569 U.S. 290, 296 (2013); *id.* at 316 (Roberts, C.J., dissenting). When Congress has delegated such authority, and an agency has exercised it, a reviewing court that defers to the agency's reasonable interpretation is exercising its interpretative authority in the manner anticipated by Congress. *Chevron*'s applicability is thus not a litigation judgment susceptible to "waiver" (or forfeiture) in the ordinary sense. Its application is instead dependent on judgments about congressional intent (in questions about the existence and scope of congressional delegations of authority) and agency action (in the question whether the agency exercised that delegated authority).

Thus, once the *Guedes II* panel concluded that *Chevron*'s preconditions were satisfied, it did not err in applying *Chevron*. The fact that it may not have been *required* to consider the applicability of *Chevron* deference—whether because the Rule offers the best interpretation of the statute or because the government did not invoke

it, *see HollyFrontier*, 141 S. Ct. at 2180—does not mean that the Court erred in doing so.

Moreover, that *Chevron* deference is not at issue here does not suggest that ATF's considered views should receive no weight in this Court's assessment. A court may properly gather wisdom from an agency charged with implementing a statute, particularly when it has done so in a formal process that involved receipt of close to 200,000 comments. As the Supreme Court observed in *County of Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1474 (2020), after noting that the government had not sought *Chevron* deference, "[e]ven so, we often pay particular attention to an agency's views in light of the agency's expertise in a given area, its knowledge gained through practical experience, and its familiarity with the interpretive demands of administrative need."

2. Plaintiffs are wrong in asserting (Br. 44) that "*Chevron* deference is inappropriate for statutes with criminal applications." Congress often delegates authority to the Executive Branch to promulgate rules the violation of which will carry criminal consequences, and the Supreme Court has regularly "upheld

delegations whereby the Executive or an independent agency defines by regulation what conduct will be criminal." *Loving v. United States*, 517 U.S. 748, 768 (1996). Indeed, that was the case in *Chevron* itself, which involved the Environmental Protection Agency's interpretation of the term "stationary source" for purposes of a provision of the Clean Air Act that required private parties to obtain permits related to "new or modified . . . stationary sources." 42 U.S.C. § 7502(a)(1), (b)(6) (1982). A knowing violation of that requirement was a federal crime punishable by a fine or up to a year in prison. *Id.* § 7413(c)(1) (1982). And in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 703 (1995), the Court held that the agency's "reasonable" interpretation of the relevant ambiguous statutory term was sufficient "to decide th[e] case," even though a violation of the regulation at issue carried criminal consequences. *Id.* (citing *Chevron, USA Inc. v. Natural Res. Def. Council, Inc.* 467 U.S. 837 (1984)); *see also id.* at 704 n.18. Similarly, in *United States v. O'Hagan*, 521 U.S. 642 (1997), the Supreme Court applied *Chevron* deference to a regulation issued by the Securities and Exchange Commission (SEC) in the context of reviewing a criminal conviction. The relevant statute delegated to the SEC the

authority to "by rules and regulations define" the prohibited conduct, 15 U.S.C. § 78n(e), and specified that violations of such regulations were criminally punishable, *id.* § 78ff(a). The Court made clear that the SEC's regulation defining the prohibited conduct pursuant to its delegated authority received "controlling weight." *O'Hagan*, 521 U.S. at 673 (quoting *Chevron,* 467 U.S. at 844).

United States v. Apel, 571 U.S. 359 (2014), and *Abramski v. United States*, 573 U.S. 169 (2014), on which plaintiffs seek to rely (Br. 49), did not involve regulations, much less regulations promulgated under a specific delegation of authority to establish standards or requirements. In *Apel*, the defendant sought to rely on statements in the United States Attorneys' Manual and opinions of the Air Force Judge Advocate General. As the Court explained, "those opinions are not intended to be binding," and, in this context, the Court stated that "we have never held that the Government's reading of a criminal statute is entitled to any deference." *Apel*, 571 U.S. at 368, 369 (citing *Crandon v. United States,* 494 U.S. 152, 177 (1990) (Scalia, J., concurring in judgment)). Likewise, in *Abramski* the Court accorded no deference to an ATF view abandoned by the agency twenty years

previously, 573 U.S. at 191. Similarly, Justice Scalia's concurrence in *Crandon* explained that "the vast body of *administrative* interpretation that exists—innumerable advisory opinions not only of the Attorney General, the OLC, and the Office of Government Ethics, but also of the Comptroller General and the general counsels for various agencies—is not an administrative interpretation that is entitled to deference under [*Chevron*]." 494 U.S. at 177 (Scalia, J., concurring in judgment). In contrast, cases such as *Chevron, O'Hagan*, and *Babbitt* concerned regulations issued under a clear delegation of authority.

3. Plaintiffs next mistakenly assert that the rule of lenity "applies before *Chevron* deference." Br. 54; *see* Br. 50-56; *Guedes II*, 920 F.3d at 27-28 (rejecting argument). Lenity has a role only when, "after considering text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the statute such that the Court must simply guess as to what Congress intended." *Maracich v. Spears*, 570 U.S. 48, 76 (2013) (quoting *Barber v. Thomas*, 560 U.S. 474, 488 (2010)); *accord Liparota v. United States*, 471 U.S. 419, 427 (1985). "*Chevron* established a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency,

understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows." *National Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005) (quotations omitted). An express or implied delegation to an agency to resolve ambiguities is thus an instruction about congressional intent, making it unnecessary for courts to "simply guess as to what Congress intended." *Maracich*, 570 U.S. at 76 (quoting *Barber*, 560 U.S. at 488).[8]

4. Citing "separation of powers and delegation concerns," plaintiffs conclude by asserting that "*Chevron* deference . . . should be held unconstitutional, at least as applied." Br. 56; *see* Br. 56-58. But as the *Guedes II* panel explained, "*Chevron* is consistent with the separation of powers, including for regulations defining criminal activity, because delegations of legislative authority in the criminal sphere are constitutional." 920 F.3d at 28.

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[8] Contrary to plaintiffs' suggestion (Br. 51-52), *Gundy v. United States*, 139 S. Ct. 2116 (2019), concerned neither the rule of lenity, *Chevron* deference, nor the relationship between the two, *see id.* at 2121 (plurality op.) (concluding that a provision of the Sex Offender Registration and Notification Act does not violate the non-delegation doctrine).

D. Plaintiffs' Remaining Arguments Are Foreclosed by the Law of the Case and Also Lack Merit

Plaintiffs' brief concludes with three arguments for why the Rule is "unreasonable, arbitrary, and capricious" (Br. 58), none of which is substantial.

First, plaintiffs wrongly contend (Br. 59-61) that the Rule is arbitrary because ATF failed to recognize that it was exercising legislative-rulemaking discretion. As discussed, the government has consistently argued that the Rule is an interpretive rule that evinces the agency's understanding that the statutory text compels the conclusion that bump stocks are machineguns. ATF's discussion in issuing its classification underscores that understanding. The agency invoked its authority to reconsider and rectify erroneous past classifications. *See* 83 Fed. Reg. at 66,516 ("classification errors"); *id.* at 66,523 ("misclassified" and "correct its mistakes"); *id.* at 66,530 ("reconsider and rectify" and "regulatory correction"); *id.* at 66,531 ("reconsider and rectify its classification errors" (quotation marks omitted)). ATF also made clear that "[t]he Department believes that this rule's interpretations of 'automatically' and 'single function of the trigger' in the statutory definition of 'machinegun' accord with the plain

meaning of those terms." *Id.* at 66,527. It also observed, however, that Congress "left it to the Department to define 'automatically' and 'single function of the trigger' in the event those terms are ambiguous." *Id.* This Court's conclusion that the Rule was legislative, *Guedes II*, 920 F.3d at 18, does not call into question any aspect of the agency's analysis, and, moreover, forecloses plaintiffs' argument that the agency did not recognize it was exercising legislative-rulemaking discretion.

Second, citing a statement made by then-President Trump, plaintiffs contend (Br. 61-62) that the Rule is arbitrary because it "resulted from a foregone conclusion" and "appears to stem from political compulsion, not agency expertise." The *Guedes II* panel properly rejected that contention, concluding that "the administrative record reflects that the agency kept an open mind throughout the notice-and-comment process and final formulation of the Rule." *Guedes II*, 920 F.3d at 34; *see also id.* ("[A]s long as the agency remains within the bounds established by Congress, it is entitled to assess administrative records and evaluate priorities in light of the philosophy of the administration." (quotation marks omitted)).

Third, plaintiffs suggest that the Rule is arbitrary because its

interpretation of "automatically" is ambiguous because it does not "specif[y] how much manual input is too much." Br. 62-63 (quotation marks omitted). The Court correctly rejected this argument in *Guedes II*, noting that "the existence of latent ambiguity does not render an interpretation arbitrary or capricious" and that "[a]gencies are permitted to promulgate regulations interpreting ambiguous statutes without having to resolve *all* possible ambiguity." 920 F.3d at 34.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

BRIAN M. BOYNTON
Acting Assistant Attorney General

MARK B. STERN
MICHAEL S. RAAB
ABBY C. WRIGHT
BRAD HINSHELWOOD
/s/ Kyle T. Edwards
KYLE T. EDWARDS
Attorneys, Appellate Staff
Civil Division, Room 7527
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 514-4214
kyle.t.edwards@usdoj.gov

November 2021

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 11,900 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Century Schoolbook 14-point font, a proportionally spaced typeface.

/s/ Kyle T. Edwards
Kyle T. Edwards

CERTIFICATE OF SERVICE

I hereby certify that on November 1, 2021, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Service will be accomplished by the appellate CM/ECF system.

/s/ Kyle T. Edwards
Kyle T. Edwards