No. 20-51016

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MICHAEL CARGILL,

Plaintiff-Appellant,

v.

MERRICK GARLAND, U.S. Attorney General; UNITED STATES DEPARTMENT OF JUSTICE; REGINA LOMBARDO, in her official capacity as Acting Director of the Bureau of Alcohol, Tobacco, Firearms and Explosives; BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES,

Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of Texas
District Court Case No. 1:19-cv-349 (Hon. David Alan Ezra)

BRIEF FOR APPELLEES

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CERTIFICATE OF INTERESTED PERSONS

Cargill v. Garland, No. 20-51016

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Plaintiff-appellant:

Michael Cargill

Defendants-appellees:

All defendants are governmental

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STATEMENT REGARDING ORAL ARGUMENT

Defendants respectfully request oral argument in this case. Plaintiff challenges a rule interpreting the scope of Congress's ban on the possession and transfer of new machineguns by the public. Defendants believe that oral argument would provide substantial assistance to this Court in addressing the important issues in this case.

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INTRODUCTION

In 2017, a lone gunman in Las Vegas killed 58 people and wounded 500 more. The gunman used legally obtained semiautomatic rifles that he had transformed into automatic weapons by attaching commercially available devices known as bump stocks. A bump stock replaces a rifle's standard stationary stock—the part of the rifle that typically rests against the shooter's shoulder—with a sliding stock that is attached to a grip fitted with an extension ledge, where the shooter rests his trigger finger. When the shooter pulls the trigger, the bump stock harnesses and directs the firearm's recoil energy to slide the firearm back and forth within the sliding stock so that the trigger automatically re-engages by "bumping" the shooter's stationary finger. When the shooter maintains forward pressure on the front of the weapon, the device maintains a continuous cycle of fire-recoil-bump-fire, enabling a shooter to fire hundreds of rounds per minute with a single pull of the trigger.

In the wake of the Las Vegas shooting, the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) reconsidered whether bump stocks are "machineguns" within the meaning of the National Firearms Act and the statutory bar on the possession or sale of new machineguns. A "machinegun" is any weapon that permits a shooter to fire "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.

Following its review, ATF concluded that bump stocks fall within the plain terms of the statute. *See Bump-Stock Type Devices*, 83 Fed. Reg. 66,514 (Dec. 26, 2018) (Rule). Based on the evidence presented at trial in this case, the district court agreed and held that the Rule "adopts the proper interpretation of 'machinegun' by including bump stock devices." ROA.550.

Plaintiff contends that bump stocks do not convert weapons into machineguns for two principal reasons. First, plaintiff argues that bump stocks do not operate by a "single function of the trigger," because the trigger mechanism resets each time the weapon "bumps" the shooter's finger. But as the text and legislative history confirm, the statute is concerned with weapons that permit a shooter to initiate an automatic firing sequence with a single motion, as is the case with bump stocks. Second, plaintiff contends that bump stocks do not operate "automatically" because a shooter must apply pressure on the front of the firearm to maintain the firing sequence. As plaintiff recognizes, however, a shooter must apply pressure to enable automatic fire when using weapons that all agree are machineguns. Plaintiff's arguments are squarely at odds with the decisions of this Court and other courts that recognize that individuals cannot evade Congress's ban on machineguns by devising novel devices for generating an automatic firing sequence, and the district court correctly applied those precedents after a trial and careful consideration of the characteristics of the bump stocks at issue.

STATEMENT OF JURISDICTION

Plaintiff invoked the district court's jurisdiction to adjudicate his constitutional and statutory claims under 28 U.S.C. § 1331 and 5 U.S.C. § 702. *See* ROA.11. The district court denied plaintiff's petition for declaratory judgment, injunctive relief, and return of his bump stocks on November 23, 2020. *See* ROA.572. Plaintiff filed a timely notice of appeal on December 14, 2020. *See* ROA.573; Fed. R. App. P. 4(a)(1)(B). This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Whether ATF correctly concluded that the bump stocks at issue fall within the National Firearms Act's definition of machinegun.

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, 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").

[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).

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.

Although there is no statutory requirement that manufacturers do so, ATF encourages them to submit novel weapons or devices to ATF for a classification of whether the weapon or device qualifies as a machinegun or other firearm under 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." *National Firearms Act Handbook*, *supra*, §§ 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. 83 Fed. Reg. at 66,515-16.

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.* (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]

[3] Available at https://go.usa.gov/xHd89.

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 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. 20, 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 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 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—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-

[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).

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

Plaintiff is an individual who surrendered two bump stocks to ATF following issuance of the Rule. ROA.529. His complaint raises claims under the Administrative Procedure Act and various constitutional provisions, and seeks a declaratory judgment

and a permanent injunction barring enforcement of the Rule, as well as the return of his bump stocks. ROA.45-46; ROA.529-30.

The district court held a bench trial on plaintiff's claims, at which the parties submitted exhibits and defendants offered the testimony of an ATF firearms expert. ROA.500. Following trial, the court issued a memorandum containing its findings of fact and conclusions of law, in which it denied each of plaintiff's requests for relief. *See* ROA.498-99.

1. As primarily relevant here, the district court held that the Rule adopts the "correct" interpretation of both "single function of the trigger" and "automatically" as used in the statute's definition of "machinegun." ROA.556. The court emphasized that it reached these conclusions without reliance on deference to the interpretation announced in the Rule. The court stated that because the "Rule adopts the proper interpretation of 'machinegun' by including bump stock devices . . . there really is no occasion to apply the deference afforded under *Chevron* step-two in this case." ROA.550-51.

In explaining that the term "single function of the trigger" "is best interpreted to mean 'a single pull of the trigger and analogous motions,'" the court noted that Congress likely employed the "broad" term "'function' to forestall attempts by weapon manufacturers or others to implement triggers that need not be pulled, thereby evading the statute's reach." ROA.554. The court also explained that the Rule adopts the "correct reading of 'automatically' within section 5845(b)." ROA.556.

The Rule's understanding of the term to mean "the result of a self-acting or self-regulating mechanism that allows the firing of multiple rounds through a single function of the trigger," the court noted, "nearly mirrors" dictionary definitions at the time Congress passed the National Firearms Act. ROA.556-57. The court observed that the definition also accords with prior judicial interpretations of the term. ROA.557.

The court explained that the presence or absence of an internal spring does not determine whether a device is a machinegun. Bump stocks that lack an internal spring—like the ones at issue in this case—can be fired using two different methods, both of which rely on the same fire-recoil-bump-fire sequence. As the Rule explains, a shooter can start with the rifle slid to the front of the bump stock and then pull the trigger. The bump stock then channels the recoil from that shot into a defined path, allowing the weapon to slide rearwards a short distance into the stock—approximately an inch and a half—and shifting the trigger away from the shooter's trigger finger. 83 Fed. Reg. at 66,532. This separation from the trigger finger allows the firing mechanism to reset. *Id.* When the shooter maintains constant forward pressure on the front of the weapon, the firearm slides forward along the bump stock and back to its initial position, causing the trigger to "bump" the shooter's stationary finger and fire another bullet. *Id.* Alternatively, as the district court found based on the testimony of an ATF expert, the shooter can start with the rifle slid "all the way back into the bump-stock" and the trigger finger rested stationary on the extension ledge.

ROA.632 (ATF expert testimony). The shooter then uses the non-trigger hand to apply forward pressure on the front of the weapon, which will cause the trigger to come into contact with the shooter's stationary trigger finger. *Id.* This permits a shooter to fire the weapon without actually "pulling" the trigger finger. *See* ROA.511 ("The firing sequence begins when the shooter presses forward on the firearm to initially engage the trigger finger."). Under either firing method, the initial activation of the trigger causes a continuous cycle of fire-recoil-bump-fire that lasts until the trigger finger is removed, the shooter stops applying forward pressure on the front of the weapon, the weapon malfunctions, or the ammunition is exhausted. *See* 83 Fed. Reg. at 66,518.

The district court explained that "the pressing forward on the [bump stock-equipped semi-automatic weapon] is the equivalent of pulling the trigger on the [weapon] in full automatic," ROA.512, and that "[t]he continuous exertion of forward pressure on the fore-end of the gun while '[t]he weapon recoils faster than you can react' is a 'single pull of the trigger [or] analogous motion' just the same as continuing to hold the trigger of a fully automatic weapon is." ROA.562.

The court also explained that shooting with a bump stock occurs "automatically" because the device—with its extension ledge and recoil channeling—is a "self-acting or self-regulating mechanism" that enables continuous fire. ROA.558-59. The court rejected plaintiff's argument that "because the shooter must maintain constant forward pressure on the fore-grip or barrel shroud to continue

firing, the recoil-propelled process is not 'automatic.'" ROA.558. As the court recognized, fully automatic weapons—which all agree fire "automatically"—require a shooter to maintain pressure on the trigger. ROA.558. "[T]here is no meaningful difference" between that pressure and the forward pressure a shooter maintains in operating a weapon with a bump stock, as "[i]n both cases, maintaining pressure in one direction allows shooting to continue from a 'self-acting or self-regulating mechanism' until that pressure is released, or the firearm runs out of ammunition or malfunctions." ROA.559.

The court thus concluded that the Rule should be sustained without according deference to the agency's interpretation of the statute: "[T]he Court independently finds that the Final Rule adopts the proper interpretation of 'machinegun' by including bump stock devices, so there really is no occasion to apply the deference afforded under *Chevron* step-two in this case." ROA.550-51.

2. The court considered whether the Rule was "legislative" in nature, or "interpretive" as the government urged. The court concluded that the Rule should be understood as legislative, but that the Rule was not entitled to *Chevron* deference. *See* ROA.534-51. As discussed, the court explained that this conclusion did not bear on its judgment because the Rule adopted the correct interpretation of the statute. *See* ROA.550-51. The court also rejected a variety of other contentions regarding the promulgation of the Rule. *See* ROA.565-67 (rejecting contention that ATF inappropriately considered political factors in adopting the Rule); ROA.567-68

(rejecting contention that ATF failed to adequately explain its change of interpretation); ROA.568-71 (rejecting contention that ATF failed to consider certain evidence and comments).

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). As ATF recognized well before promulgation of the 2018 Rule, the phrase "single function of the trigger" generally describes a shooter's single pull of the trigger or analogous motion that initiates an automatic firing sequence. That is the case whether or not the trigger continuously resets itself during the automatic sequence. 83 Fed. Reg. at 66,534-35. A contrary reading would frustrate Congress's intention to encompass the full range of actions a shooter can take to initiate a firing sequence and to preclude creative attempts to evade the ban on machineguns. And the Rule explains that the term "automatically" refers to "a self-acting or self-regulating mechanism that allows the firing of multiple rounds." *Id.* at 66,554.

A bump stock is composed of a sliding stock and an extension ledge where the shooter rests his trigger finger. When attached to a semiautomatic weapon, a bump stock channels the recoil energy from an initial shot to slide the weapon back and forth within the stock so that the trigger automatically re-engages by "bumping" the shooter's stationary trigger finger. This results in a continuous cycle of fire-recoil-

bump-fire that enables a shooter to fire hundreds of rounds per minute simply by activating the trigger once and maintaining forward pressure on the front of the weapon. A bump stock is therefore a "machinegun" because a "single function of the trigger"—either a single pull of the trigger or the application of forward pressure on the front of the weapon with the non-trigger hand until the trigger hits the shooter's stationary trigger finger—initiates the device's "self-acting or self-regulating mechanism" that produces a continuous firing cycle.

Plaintiff mistakenly urges that a weapon cannot be a "machinegun" if the trigger mechanism on the weapon mechanically operates each time a bullet is discharged. But this Court has already rejected the argument that a semiautomatic rifle "d[oes] not become a machine gun" simply because its trigger "function[s] each time the rifle . . . fire[s]." *United States v. Camp*, 343 F.3d 743, 745 (5th Cir. 2003); *see id.* (a semiautomatic rifle modified with a switch-activated, motorized fishing reel placed within the trigger guard is a machinegun because the shooter need only perform "one action—pulling the switch he installed—to fire multiple shots"). Plaintiff's reading would remove from the scope of the statute a range of devices long recognized to be machineguns—including the firearm confronted by this Court in *Camp*. Plaintiff's argument that a semiautomatic firearm equipped with a bump stock does not operate "automatically" because it requires the shooter to maintain forward pressure on the front of the weapon is similarly without merit. Weapons that all agree are

machineguns still require the shooter to maintain pressure on the firearm—that de minimis manual input does not remove a weapon from the scope of Congress's ban.

Plaintiff's other arguments also fail to advance his case. Plaintiff's arguments about *Chevron* deference are irrelevant to resolving this case. The district court accepted plaintiff's contention that the 2018 Rule was legislative rather than interpretive and then concluded that the Rule was not entitled to *Chevron* deference. But as the district court correctly held, "the Final Rule adopts the proper interpretation of 'machinegun' by including bump stock devices, so there really is no occasion to apply the deference afforded under *Chevron* step-two in this case." ROA.550-51. The court also rejected a variety of other arguments, including plaintiff's contentions that ATF had not adequately explained its revised interpretation of the statute.

In sum, the district court held that ATF adopted the correct interpretation of the statute and had fully explained its interpretation. The decision is correct and should be affirmed.

STANDARD OF REVIEW

"After a bench trial, [this Court] review[s] findings of fact for clear error and legal conclusions de novo." *U.S. Dep't of Labor v. Five Star Automatic Fire Prot., LLC*, 987 F.3d 436, 441 (5th Cir. 2021).

ARGUMENT

I. In Issuing the 2018 Rule, ATF Correctly Determined that Bump Stocks Fall Within the Statutory Definition of "Machinegun"

A. A Bump Stock Enables a Rifle to Fire "Automatically More Than One Shot, Without Manual Reloading, by a Single Function of the Trigger"

1. Federal law bans the possession and transfer of "machinegun[s]," 18 U.S.C. § 922(o), defined in the National Firearms Act 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 includes "any part designed and intended solely and exclusively . . . 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.*

A bump stock replaces the standard stock on an ordinary semiautomatic firearm with a sliding stock that is 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. The shooter initially activates the trigger either by pulling the trigger or by leaving the trigger finger stationary on the ledge and applying forward pressure on the front of the weapon. In either case, 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.* And with either firing method, the continuous cycle of fire-recoil-bump-fire lasts until the trigger finger is removed, the shooter stops applying forward pressure on the front of the weapon, the weapon malfunctions, or the ammunition is exhausted.

ATF first addressed a bump stock device in 2002, when it received a classification request for the "Akins Accelerator." 83 Fed. Reg. at 66,517. The Akins Accelerator, when 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.*

In its initial classification letter, ATF 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. In revisiting that determination in 2006, ATF recognized that its letter unduly restricted the scope of the statute, and explained that "single function of the trigger"' should be understood to include a "single pull of the trigger." *Id.* 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. *Id.* (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.

The Eleventh Circuit upheld the agency's application of the statute and rejected Akins' challenge to the reclassification, 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) (per curiam). And in the decade following its guidance and the *Akins* decision, ATF issued classification letters that have applied the "single pull of the trigger" interpretation to bump-stock-type devices, and on other occasions 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).

The *Akins* decision and the classification that it sustained reflect the common-sense understanding of the statute and the means by which most weapons are fired, an understanding consistent with that of the Supreme Court and this Court. For example, in *Staples v. United States*, 511 U.S. 600, 602 n.1 (1994), the Supreme Court observed that 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." Similarly, this Court has recognized that a weapon qualifies as a machinegun where it could "fire more than one round of ammunition in response to a single pull of the trigger." *United States v. Anderson*, 885 F.2d 1248, 1250 (5th Cir. 1989) (en banc).

2. Like the Akins Accelerator, the bump stocks at issue here permit a shooter to initiate a firing sequence in which more than one shot is fired "by a single function of the trigger." With the device, a single pull of the trigger can initiate a continuous cycle of fire-recoil-bump-fire that lasts until the trigger finger is removed. Alternatively, a shooter can initiate automatic fire through a motion analogous to a pull—by simply applying forward pressure to the front of the weapon, causing the weapon to hit the shooter's stationary trigger finger and initiate the fire-recoil-bump-fire sequence. ROA.562.

The Rule reiterated its previous explanation that the phrase "single function of the trigger" is not limited to "a single pull of the trigger," but also includes analogous single motions by which a shooter can initiate a firing sequence, and that limiting its scope to a single "pull" would accord neither with the statutory language nor with legislative intent. 83 Fed. Reg. at 66,534. The Rule noted that "there are other methods of initiating an automatic firing sequence that do not require a pull," *id.* at 66,515, and that a "single function of the trigger" encompasses a "single pull of the trigger and analogous motions," like pressing a button, flipping a switch, or otherwise initiating the firing sequence without pulling a traditional trigger, *id.* at 66,553. *See also*

id. at 66,518 n.5 (observing that many machineguns "operate through a trigger activated by a push").

3. As ATF noted in classifying the bump stocks at issue here in the 2018 Rule, it had previously advised that if the internal spring in devices such as the Akins Accelerator were removed, the device would no longer operate "automatically" and would therefore not be classified as a machinegun. 83 Fed. Reg. at 66,517. But after reviewing a series of classification requests between 2008 and 2018, ATF concluded in the 2018 Rule that statutory classification as a machinegun could not properly turn on whether the device employed an internal spring in order to initiate a continuous fire sequence.

Plaintiff urges that ATF erred in reaching this conclusion on the ground that the statutory definition does not extend to a weapon in which the trigger mechanically "reset[s]" in order to "fire the next shot." Br. 44. Plaintiff urges that the "trigger of a semiautomatic [weapon] equipped with a bump stock functions normally for every new shot fired," and that bump stocks do "nothing to change the firing mechanism of a semiautomatic firearm." Br. 39. He thus contends that the firing of multiple rounds using a bump stock cannot be by means of a "single function of the trigger." Br. 39-40; *see also* Br. 44-45 (claiming that on a "real machinegun," the trigger "remains depressed" to fire multiple rounds).

Plaintiff cannot square his contention with this Court's decision in *United States v. Camp*, 343 F.3d 743 (5th Cir. 2003), in which the Court 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," this 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)). Other courts have similarly recognized that "single function of the trigger" refers to the action that "initiate[s] the firing sequence" and have rejected arguments by criminal defendants that weapons with novel designs do not qualify as machineguns under the Act. *United States v. Jokel*, 969 F.2d 132, 135 (5th Cir. 1992) (per curiam); *see United States v. Carter*, 465 F.3d 658, 665 (6th Cir. 2006) (per curiam) (holding that a weapon which fired automatically by "manual manipulation" of its "bolt" was a machinegun, even if the weapon had "no mechanical trigger"); *United States v. Fleischli*, 305 F.3d 643, 655 (7th Cir. 2002) (holding that a minigun fired by "an electronic switch" was a machinegun).

The legislative history of the National Firearms Act confirms that the focus of congressional concern was with devices that enabled 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) (*NFA Hearings*). Thus, any weapon "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 . . . as a machine gun," while "[o]ther guns [that] require a separate pull of the trigger for every shot fired . . . are not properly designated as machine guns." *Id.*

For these reasons, as the district court explained, "[i]t does not matter that the trigger mechanically resets to 'function' again when the shooter only takes one 'function' to initiate the firing of multiple rounds" by using a bump stock. ROA.562. When fitted with a bump stock, a shooter need only activate the trigger once—whether by pulling the trigger or by applying forward pressure on the front of the weapon to push the trigger into the stationary finger—to initiate the continuous cycle of fire-recoil-bump-fire that results in multiple rounds being fired. *See* 83 Fed. Reg. at 66,518. Consequently, as the district court recognized, that single pull of the firearm's

trigger or pressure on the front of the weapon constitutes a "single function of the trigger" within the statutory meaning of the term. ROA.562.

4. Plaintiff does not dispute that the shooter's first pull of the trigger or pressure on the front of the weapon "initiate[s] the firing sequence" of a bump stock-equipped weapon, *Jokel*, 969 F.2d at 135, nor does he dispute that a shooter's finger remains stationary on the bump stock's extension ledge after the initial shot to continue discharging multiple rounds. *See* 83 Fed. Reg. at 66,532. Plaintiff instead insists that a bump stock's channeling of recoil so that the trigger "bumps" the shooter's finger is "functionally the same as 'pulling'" a trigger separately for each round fired. Br. 44. To accept plaintiff's contention here would permit the sort of evasion of the National Firearms Act that Congress specifically intended to prevent by selecting the broad term "function" to refer to the act that enables a weapon to fire "automatically more than one shot, without manual reloading." *See Camp*, 343 F.3d at 744-45 (rejecting a similar argument because "accept[ing] this contention would allow transforming firearms into machine guns, so long as the original trigger was not destroyed"); *see also Fleischli*, 305 F.3d at 655; *United States v. Evans*, 978 F.2d 1112, 1113 n.2 (9th Cir. 1992); *cf. Abramski v. United States*, 573 U.S. 169, 185 (2014) (rejecting interpretation of criminal statute that would have "enable[d] evasion of the firearms law").

Departing from the reasoning of this Court and other courts, a divided panel of the Sixth Circuit recently accepted an argument similar to that urged here. *See Gun*

Owners of Am., Inc. v. Garland, 992 F.3d 446 (6th Cir. 2021). That decision framed the 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 court acknowledged that if the statute were concerned with what it described as "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 court declared, however, that the statute is concerned solely with what it described as "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.*; *see also id.* at 473 ("'[T]he single function of the trigger' refers to the mechanical process of the trigger, not the shooter's pulling of the trigger.").

For the reasons discussed, this interpretation accords with neither the text nor the purpose of the National Firearms Act and conflicts with this Court's decision addressing the scope of the definition of "machinegun," and the government will be seeking rehearing in that case. The Sixth Circuit's interpretation would also call into question the classification of weapons previously classified as machineguns. These would include the device at issue in *Camp*, as well as the Akins Accelerator, which, like the bump stocks at issue here, functions by separating the trigger from the shooter's finger, thereby allowing the firing mechanism to reset, *see* 83 Fed. Reg. at 66,517.

As ATF noted in the 2018 Rule, under the interpretation advocated by plaintiff, a variety of other weapons would no longer be deemed machineguns even though they operate, from the shooter's perspective, identically to a machinegun and produce the same results. *See* 83 Fed. Reg. at 66,517-18. For example, in 2016, ATF classified "LV-15 Trigger Reset Devices" as machinegun parts. *Id.* at 66,518 n.4. 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. *Id.* 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.*, 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* ROA.1073-79. That plaintiff's construction of the statute fails to capture these and other weapons as machineguns underscores its implausibility.

B. A Rifle Equipped with a Bump Stock Fires "Automatically" Because it Fires "As the Result of a Self-Acting or Self-Regulating Mechanism"

ATF also correctly concluded that bump stocks fire "automatically." Indeed, as the district court and other courts have recognized, the Rule's definition "is borrowed, nearly word-for-word, from dictionary definitions contemporaneous to the

[National Firearms Act]'s enactment," ROA.556 (quoting *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 (quoting *Webster's New International Dictionary* 187 (2d ed. 1934); citing *Oxford English Dictionary* 574 (1933) (defining "automatic" as "[s]elf-acting under conditions fixed for it, going of itself")). Thus, a weapon fires "automatically" when it fires "as the result of a self-acting or self-regulating mechanism that allows the firing of multiple rounds." 83 Fed. Reg. at 66,554; *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").

The entire point of a bump stock is to permit a 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. This process is also "[s]elf-acting under conditions fixed for it." *Id.* at 66,519. The shooter's positioning of the trigger finger on the extension ledge and application of pressure on the barrel-shroud or fore-grip 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.

In response, plaintiff urges that bump stocks do not permit rifles to fire automatically because their operation involves a shooter acting "both deliberately and continuously to overcome recoil using both hands." *See* Br. 41-42; *see also* Br. 43 (claiming that a bump stock fires multiple rounds by "a pull of the trigger *plus*"). As the district court explained, however, when using a bump stock, "the movement of the weapon back and forth between shots while the trigger finger remains stationary on the trigger ledge *is* the result of an automatic, 'self-acting or self-regulating mechanism.'" ROA.558. By channeling the recoil of a first shot in a constrained linear path, a bump stock causes the trigger to separate from the shooter's stationary trigger finger and permits the firing mechanism to reset. *See* 83 Fed. Reg. at 66,532. The bump stock then allows the firearm to return forward along the same constrained linear path, thereby "bumping" the shooter's stationary trigger finger on the extension ledge of the bump stock, to fire another bullet. *Id.* Thus, as the district court held, multiple shots are fired "automatically" because a bump stock—with its extension ledge and recoil channeling—is a "self-acting or self-regulating mechanism" that enables continuous fire. ROA.558-59. Indeed, bump stocks allow "[m]ultiple rounds [to] fire because 'the weapon recoils faster than [a shooter] can react.'" ROA.558.

The district court correctly rejected plaintiff's contention that a shooter's forward pressure on a firearm is an "additional manual manipulation" that places

bump stocks outside the scope of "automatically," Br. 41, and plaintiff takes no issue with the court's observation that a prototypical machinegun likewise requires a shooter to maintain pressure on the firearm, ROA.558-59. Plaintiff also makes no effort to explain why "automatically" includes those machineguns that require "constant pressure on the trigger with [a shooter's] trigger finger," but excludes bump stocks that require "constant forward pressure with [a shooter's] non-shooting hand." ROA.558-59. That is unsurprising: Congress did not ban machineguns only to have that ban circumvented by a shift in the locus of a shooter's pressure on the weapon. That a bump stock-equipped rifle and a prototypical machinegun both fire multiple shots "by just maintaining pressure on the weapon" "more accurately reflects the line Congress drew with the term 'automatically' than would a distinction based on the strict mechanical workings within the weapon." ROA.559 (citing *Aposhian*, 374 F. Supp. 3d at 1152-53; *NFA Hearings* at 40). Indeed, many weapons require a shooter to use their non-trigger hand to bear the weight of the weapon or otherwise exert pressure on the gun while firing, and no one contends that a weapon is not a machinegun because of that manual input.

Plaintiff likewise errs in believing it significant that a shooter can "bump fire" weapons by other means, such as through the use of a rubber band or belt loop. Br. 45. As the Rule explains, such items do not operate "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.

To the extent that plaintiff intends to suggest that the Rule (unlike past classifications) rests on incorrect factual premises, that suggestion is without merit. After considering all the evidence presented at trial, including the testimony of a firearms expert, the district court credited the Rule's technical conclusions concerning the operation of bump stocks. ROA.510-15. And notwithstanding the specific findings of fact made by the district court, the agency's understanding of how a firearm 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); *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"). Plaintiff has identified nothing in the factual underpinnings of the Rule that approaches error under this standard, or any other.

C. Plaintiff's Contention that a Modified Rifle Cannot Be a Machinegun Rests on a Fundamental Misunderstanding of the National Firearms Act

Plaintiff urges that the nature of his bump stock is beside the point because a weapon originally designed to operate as a semiautomatic rifle cannot, under any circumstances, be a machinegun under the statutory definition, Br. 34-35, an argument flatly contrary to the uniform understanding of the statute that is without basis in the statute's text or history.

As discussed, this Court in *Camp*, 343 F.3d at 744-45, held that a semiautomatic rifle fitted with a motorized fishing reel that pulled and released the trigger was a machinegun, a decision that accords with those of other circuits. And every court to consider a classification question has recognized that a semiautomatic rifle can be transformed into a machine gun by the addition of a variety of devices. The statutory text permits no other conclusion: the Gun Control Act amended the definition of machinegun specifically to include any part or parts "designed and intended solely and exclusively" to "convert[] a weapon into a machinegun." 26 U.S.C. § 5845(b).

Disregarding the statutory text and uniform precedent, plaintiff reconstructs history to urge that the prohibition of the 1934 statute extended far more broadly than it did, and that the 1968 amendments narrowed, rather than broadened, its

scope. This narrative focuses on the fact that the original National Firearms Act of 1934 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 Gun Control Act of 1968 removed the words "or semiautomatically."

It is uncontroverted that the definition of machinegun does not encompass semiautomatic weapons. And the legislative history of the 1968 amendment does not suggest that the removal of "or semiautomatically" altered the substantive scope of the statute. *See* S. Rep. No. 90-1501, at 45 (1968) (observing that the sentence defining a machinegun as a weapon that shoots "automatically more than one shot" reflected "existing law"). The relevance of the 1968 amendments is that they explicitly extended the definition to include parts that convert a weapon into a machinegun. *See id.* at 46 (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"). For the same reasons, plaintiff is wrong to assert that the Rule unsettles "'the longstanding distinction between "automatic" and "semiautomatic"' firearms." Br. 42-43 (quoting *Guedes v. ATF*, 920 F.3d 1, 44-45 (D.C. Cir. 2019) (Henderson, J., concurring in part and dissenting in part) (per curiam)).

Plaintiff's alternative history mistakenly posits that the original National Firearms Act banned weapons like "the ordinary repeating rifle" that would fire "only one shot" with each pull of the trigger, and that the 1968 amendment then removed such weapons from the scope of the definition. Br. 43 (quoting *NFA Hearings* at 41). "Repeating rifles"—a term generally used to refer to rifles capable of carrying multiple rounds of ammunition in a magazine—have never been treated as machineguns under the statute, because many require manual reloading (through operating a lever or pulling on a bolt) and none fire more than one shot by a "single function of the trigger." Indeed, that much is clear from the congressional hearing testimony cited in plaintiff's brief. The testimony distinguishes repeating rifles from covered machineguns because they "require[] a separate pull of the trigger for every shot fired." *NFA Hearings* at 41. Then and now, such weapons would qualify as "machineguns" only if modified to meet the statutory definition. And, apart from the series of errors underlying plaintiff's analysis, it is entirely unclear why a change in the scope of the definition as applied to repeating rifles in 1968 has any bearing on whether bump stocks meet the statutory definition.

II. Plaintiff's Remaining Arguments Are Without Merit

A. The District Court Correctly Held that ATF's Interpretation Should Be Sustained Regardless of the Deference Accorded to the Agency's View

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. Pursuant to that authority, ATF validly promulgated this Rule interpreting the statutory terms in the definition of machinegun.

Plaintiff urges that the Rule is "legislative" rather than "interpretive" and that ATF lacks authority to issue a legislative rule in this area. This Court has explained that "'substantive rules,' or 'legislative rules' are those which create law; whereas interpretive rules are statements as to what the administrative officer thinks the statute or regulation means." *Shell Offshore Inc. v. Babbitt*, 238 F.3d 622, 628 (5th Cir. 2001) (quoting *Brown Express Inc. v. United States,* 607 F.2d 695, 700 (5th Cir. 1979)). "[T]he critical feature of interpretive rules is that they are 'issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers.'" *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 97 (2015) (quoting *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 99 (1995)). They generally do not, however, "have the force and effect of law." *Id.*

That is the nature of the 2018 Rule. It is an interpretive rule that informs the public of the agency's understanding of the law; it does not purport to exercise authority to make law. The Rule makes clear that it does not have the force and effect of law and that the only source of legal force for the prohibition on bump stocks is Congress's statutory ban on new machineguns. *See, e.g.*, 83 Fed. Reg. at 66,529 ("[T]he

impetus for this rule is the Department's belief, after a detailed review, that bump-stock-type devices satisfy the statutory definition of 'machinegun.'"); *id.* ("ATF must . . . classify devices that satisfy the statutory definition of 'machinegun' as machineguns."); *id.* at 66,535 ("[T]he Department has concluded that the [National Firearms Act] and [Gun Control Act] require regulation of bump-stock-type devices as machineguns . . . ."). Thus, ATF concluded that bump stocks *are* machineguns under the statute, not that ATF was exercising discretion to classify them as such. *See Guedes v. ATF*, 140 S. Ct. 789, 789 (2020) (statement of Gorsuch, J., respecting the denial of certiorari) (describing the Rule as an "interpretive rule").

Although the government has made clear that ATF did not issue the Rule pursuant to authority to issue a legislative rule, the district court nevertheless concluded that the Rule was legislative in nature. More importantly, however, it correctly recognized that whether the Rule is legislative or interpretive does not affect the outcome here because the Rule adopts the correct understanding of the statutory terms and correctly determines that bump stocks qualify as machineguns. ROA.550-51. (The D.C. Circuit and Tenth Circuit upheld the Rule after concluding that it was legislative, whereas the Sixth Circuit reached a contrary conclusion. *See Guedes*, 920 F.3d at 17-20; *Aposhian v. Barr*, 958 F.3d 969, 979-80 (10th Cir.), *vacated on reh'g*, 973 F.3d 1151 (10th Cir. 2020), *reinstated*, 989 F.3d 890 (10th Cir. 2021); *Gun Owners of*

Am., 992 F.3d 446.[5]) As the district court correctly held, "the Final Rule adopts the proper interpretation of 'machinegun' by including bump stock devices, so there really is no occasion to apply the deference afforded under *Chevron* step-two in this case." ROA.550-51 (citing *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019)); *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").

B. Neither ATF's Prior Classifications nor the Rule of Lenity Advance Plaintiff's Case

1. Plaintiff stresses that ATF had previously concluded that certain bump stocks are not machineguns. *See, e.g.*, Br. 36-37. But in revisiting its prior classification of bump stocks, ATF set out its reasoning in detail, explaining that its earlier determinations rested on the mistaken premise that the term "automatically" in 26 U.S.C. § 5845(b) required the presence of springs or similar mechanical parts. The agency was not precluded from correcting its prior determination, and, of course, this Court is not bound to adopt an incorrect reading of the statute. *See* ROA.568 (explaining that the Rule "identifies the error in prior agency classification decisions and subsequently rectified the interpretation as applied to bump stocks").

[5] The Acting Solicitor General has authorized a petition for rehearing en banc in this case, which is due May 10, 2021.

Plaintiff's assertion that the Rule "rewrites a statutory definition and creates half a million new felons" is plainly mistaken. Br. 28. The Rule states that ATF had "misclassified some bump-stock-type devices and therefore initiated this rulemaking," which was "specifically designed to notify the public about changes in ATF's interpretation of the [National Firearms Act] and [Gun Control Act] and to help the public avoid the unlawful possession of a machinegun." 83 Fed. Reg. at 66,523; *id.* at 66,531 (observing that the agency has "authority to reconsider and rectify its classification errors" (quotation marks omitted)); *id.* at 66,516 (similar). In explaining that prior classifications were "errors," the agency clearly recognized that certain bump-stock-type devices were machineguns at the time of classification. Whether an individual could be prosecuted for possession of a bump stock prior to the 2018 Rule would turn on the meaning of the statute as interpreted by a court, and, in any event, the Department has made clear that it will not enforce the statute in such cases.[6]

2. Plaintiff's invocation of the rule of lenity likewise does not advance his argument. Br. 48-51. That tool of interpretation applies only where, "after

[6] The Rule's inclusion of an "effective date" does not transform the Rule into a legislative rule. *See* 83 Fed. Reg. at 66,523; *see also, e.g., id.* (stating that "[a]nyone currently in possession of a bump-stock-type device is not acting unlawfully unless they fail to relinquish or destroy their device after the effective date of this regulation"). Those statements reflected the government's decisions (1) not to prosecute individuals who possessed bump stocks during the period in which the Department had erroneously classified them, and (2) to provide a reasonable grace period for individuals who already possessed bump stocks to come into compliance with the law.

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). As the district court held, there is no call to resort to that canon of interpretation here because the Rule's application of the terms used to define "machinegun" in the National Firearms Act is correct, and there exists no ambiguity, let alone grievous ambiguity, in the statute. ROA.553-54. As the Supreme Court has explained, "[t]he rule [of lenity] comes into operation at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers." *Maracich*, 570 U.S. at 76 (quoting *Callanan v. United States*, 364 U.S. 587, 596 (1961)).

Notwithstanding the district court's clear ruling on this issue, plaintiff asserts that the district court "concluded that the statute was ambiguous . . . and recognized the need for lenity," Br. 51. The court held precisely the opposite: "Because the traditional tools of statutory interpretation yield unambiguous meanings for ['single function of the trigger' and 'automatically'], the rule of lenity does not apply." ROA.553-54. The district court noted that agencies generally have delegated authority to define undefined terms in a statute, ROA.545, but made clear that this was not the basis for its conclusion that the Rule is lawful, ROA.550-51, 562. And, contrary to plaintiff's assertion (Br. 30-31), the Attorney General's express authority to issue regulations under the National Firearms Act and the Gun Control Act does not turn

on the existence of an ambiguity. *See* 18 U.S.C. § 926(a); 26 U.S.C. § 7805(a); *see also* ROA.545-46.

In sum, the district correctly held that ATF correctly interpreted and applied the statutory definition of machinegun, and its ruling should be affirmed.

CONCLUSION

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

Respectfully submitted,

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MAY 2021

CERTIFICATE OF SERVICE

I hereby certify that on May 7, 2021, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fifth 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

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 10,315 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 Garamond 14-point font, a proportionally spaced typeface.

s/ Kyle T. Edwards
Kyle T. Edwards

ADDENDUM

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26 U.S.C. § 5845(b)

§ 5845. Definitions

(b) Machinegun.--The term "machinegun" means any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also include the frame or receiver of any such weapon, any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun, and any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person.