No. 19-1298

In the United States Court of Appeals
for the Sixth Circuit

GUN OWNERS OF AMERICA, INC., GUN OWNERS FOUNDATION, VIRGINIA CITIZENS DEFENSE LEAGUE, MATT WATKINS, TIM HARMSEN, RACHEL MALONE,
Plaintiffs-Appellants,

GUN OWNERS OF CALIFORNIA, INC.,
Movant,

v.

MERRICK B. GARLAND, U.S. Attorney General, in his official capacity as Attorney General of the United States, U.S. DEPARTMENT OF JUSTICE, BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, REGINA LOMBARDO, in her official capacity as Acting Director, Bureau of Alcohol, Tobacco Firearms, and Explosives,
Defendants-Appellees.

On Appeal from the United States District Court for the
Western District of Michigan

APPELLANTS' SUPPLEMENTAL REPLY BRIEF

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ARGUMENT

The government's supplemental brief once again criticizes Plaintiffs for "focus[ing] ... on whether ATF's interpretation of the statute is entitled to *Chevron* deference." Supplemental Brief for Appellees ("Govt. Br.") at 4. The government believes discussion of Chevron unnecessary because "ATF's classification ... is the best interpretation of the statutory text." *Id.* at 4. Yet of 13 circuit court judges across three circuits who have written or joined an opinion reviewing the Final Rule, *all* found it necessary to consider the application of *Chevron*. *Not one judge* has thought discussion of *Chevron* to be "not require[d]." *See id.* at 17. Of those 13 judges, eight judges (including the panel majority) concluded *Chevron* deference is inappropriate and *Plaintiffs* — not ATF — offered the best interpretation of the text, while five judges applied *Chevron* to uphold the Final Rule. Again, *not one judge* adopted ATF's position that the agency interpreted the statute *correctly* and that bump stocks are *actually* machineguns under the text.[1] Undaunted, the government forges ahead, asking this Court to reach that conclusion, based on the gross misreading (and indeed *revision*) of the statute advanced to the panel and below.

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[1] Even the Eleventh Circuit, in its unpublished opinion *Akins v. United States*, 312 Fed. Appx. 197 (11th Cir. 2009), on which the government relies heavily, did not conclude that the government had the *best* reading of the statute, but rather used a "deferential standard" finding that ATF had acted "within its discretion...." *Id.* at 200.

I. Bump Stocks Do Not Permit a Rifle to Fire Repeatedly By a "Single Function of the Trigger."

The government claims bump stocks permit firing multiple rounds by a "single function of the trigger," yet admits that there is "back-and-forth movement of the trigger" each time a shot is fired. Govt. Br. at 5, 9. Rather than explain this paradox, the government seeks the Court's permission to rewrite the statute, replacing the word "function" with "pull."[2] Arguing that "[t]he specific mechanical process that the trigger goes through" — *i.e.*, its "function" — "is not determinative," the government claims that Congress actually meant "single *pull* of the trigger" even though the statute inconveniently contains an entirely different word.[3] *Id.* at 5, 7, 8-9.

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[2] In support, the government misleadingly references the Supreme Court's decision in *Staples v. United States*, 511 U.S. 600, 602 n.1 (1994), where the Court used the phrase "single pull of the trigger" to describe the operation of a machinegun. Govt. Br. at 7. But the government fails to acknowledge the very next sentence of *Staples*, which explained what the Court meant: "That is, once its trigger is depressed, the weapon will automatically continue to fire until its trigger is released or the ammunition is exhausted." *Id.* (emphasis added). *See Gun Owners of America v. Garland*, Opinion ("Op.") at 33 ("the [*Staples*] Court's focus on whether the 'trigger is depressed' ... strongly suggests that the Court understood § 5845(b) as referring to the mechanical process of the depress-release-reset cycle of the trigger.")

[3] The government claims that it is "common-sense" and consistent with congressional intent for ATF and the courts to read the statute as if it contained an entirely different word than the one Congress used, on the theory that the statutory language does not adequately fulfill the congressional purpose divined by the agency: "the movement of the trigger during [] continuous firing [] has no significant bearing on the deadliness of the weapon." Govt. Br. at 7, 9. Of course, Congress did not ban *deadly weapons*, but rather "machineguns," defined by technical language that

But even after swapping out statutory wording, the government is still not satisfied, because it next claims that the "function" or even the "pull" of the trigger has *nothing to do with the trigger* itself, but instead that Congress was concerned "not [with] the 'trigger' mechanism," but with "the 'action'" by *the shooter* "'that enables the weapon to'" shoot automatically. Govt. Br. at 8-9. At bottom, then, the government's position is that the statutory language "single function of the trigger" involves *neither* a firearm's mechanical "function" *nor* its "trigger." It is small wonder the panel rejected the government's linguistic gymnastics.[4]

Apparently sensitive to the reality that the statutory language weighs heavily in Plaintiffs' favor, the government seeks to shift blame from the Final Rule to the panel, repeatedly faulting the majority for allegedly having "created a dichotomy between a 'mechanical process'" and "'the human process.'" Govt. Br. at 3; *see also* at 8, 13 (faulting Plaintiffs for the same). However, it was the Final Rule which created this so-called "dichotomy" in the first place, abandoning the statute's focus on the

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focuses on a specific mode of mechanical operation. If Congress desired to regulate weapons based on their lethality rather than based on how they function, it could have created a list of prohibited firearms, as it did in the 1994 Assault Weapons Ban.

[4] Copying and pasting from earlier briefs, the government appeals to legislative history, arguing that certain cherry-picked statements from a House report and a congressional witness override the language that Congress actually enacted. Govt. Br. at 10. Plaintiffs have already dealt with that argument. *See* Plaintiffs' Reply Brief (ECF #31) ("Reply Br.") at 16-17.

mechanical "function of the trigger" in favor of "the shooter's act of pulling the trigger." Brief for Appellees at 19-20.[5] The "dichotomy" which the government now denies exists is at the core of the fundamental dispute in this case.

II. The Panel Correctly Rejected the Government's Boogeyman.

The government fearmongers that, should this Court strike down the Final Rule, it thereby would "call into question the status of a number of [other] weapons" previously determined to be machineguns. Govt. Br. at 10. As examples, the government points to various devices that *replace the traditional firearm trigger* with another mechanism, like a "glove with a battery-operated piston" which functioned the trigger "when the shooter held down a plunger," a "switch-activated, motorized fishing reel," and "an electronic on-off switch...." Govt. Br. at 11-12. The government argues "'function' is [] not constrained to the precise mechanical operation of a specific type

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[5] Nor is the panel alone in recognizing this so-called "dichotomy," as literally every single judge to have considered the Final Rule has recognized the distinction between Plaintiffs' trigger-focused, mechanical interpretation of "single function of the trigger" versus the government's shooter-focused gloss "single pull of the trigger." *See* Op. at 56 (White, J., dissenting); *see also GOA v. Barr*, 363 F. Supp. 3d 823, 832 (W.D. Mi. 2019); *Guedes v. BATFE*, 356 F. Supp. 3d 109, 130 (D.D.C. 2019); *Guedes v. BATFE*, 920 F.3d 1, 31 (D.C. Cir. 2019); *see also* at 42-43 (Henderson, J., dissenting); *Aposhian v. Barr*, 2019 U.S. Dist. LEXIS 42988, *8-*9; *Aposhian v. Barr*, 958 F.3d 969, 986 (10th Cir. 2020); *see also* at 994 (Carson, J., dissenting); *Aposhian v. Wilkinson*, 989 F.3d 890, 895 (10th Cir. 2021) (Tymkovich, J., dissenting for five judges); *Hardin v. BATFE*, 501 F. Supp. 3d 445, 455 (W.D. Ky. 2020); *Cargill v. Barr*, 502 F. Supp. 3d 1163, 1192 (W.D. Tx. 2020).

of trigger or firearm."[6] Brief for Appellees (ECF #29) ("Appellees' Br.") at 15. But *no one has ever disputed* a trigger can "function" in different ways, and the panel rejected the government's boogeyman: "[w]e agree with both parties that a firearm's trigger does not necessarily need to be 'pulled' in order to constitute a trigger," and "firearms can have multiple types of triggers, such as a button that is pushed or an electric switch that is flipped." Op. at 30 n.5.

The government's hypotheticals deal with *what part or object constitutes the trigger* of peculiar firearms[7] that "dispens[e] with a traditional trigger altogether," so that manufacturers may not "avoid the [NFA] simply by using weapons that employ a button or switch mechanism for firing," thereby permitting multiple shots "by a single function of the trigger." Govt. Br. at 12; *United States v. Evans*, 978 F.2d 1112, 1113-14 n.2 (9th Cir. 1992). By contrast, this case involves *whether the trigger is*

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[6] Ironically, the government rejects the statutory word "function," replacing it with the word "pull," claiming "pull" better encapsulates the way triggers are operated. *Id.* at 5. But the government then objects to its own language, protesting that triggers not only are "pulled" but also pushed, switched, flipped, *etc*., and returns to the statutory word "function" as covering all the different ways to activate a trigger. Appellees' Br. at 15. Perhaps Congress knew what it was doing after all.

[7] Were the government to have alleged that a firearm equipped with a bump stock has somehow had its trigger replaced by *the entire firearm* (which is pushed forwards rather than pulled rearwards), that would mean that *all* semi-automatic firearms are machineguns, because they are *all capable of bump fire* (even without bump stocks) when "constant pressure" is applied to "the front of the weapon" and the trigger is depressed. *See* Op. at 6 n.2.

being "functioned" each time a round is fired when using a bump stock, on a firearm that operates quite traditionally.

III. Bump Stocks Do Not Operate "Automatically."

The government, like the panel dissent and the district court, would reduce the statutory language "automatically ... by a single function of the trigger" to just "automatically," completely ignoring the textual modifier as to *how* a machinegun operates "automatically" — "by a single function of the trigger." Thus, the government opines that "a weapon fires 'automatically' when it fires 'as the result of a self-acting or self-regulating mechanism.'" Govt. Br. at 15. But if all that was required to fire automatically were "a self-acting or self-regulating mechanism," then *all semi-automatic firearms would be machineguns*,[8] because they *all* harnesses recoil energy to eject a spent shell, then use internal springs to insert a fresh round of ammunition into the chamber. *See Guedes*, 920 F.3d at 44-45 (Henderson, J., dissenting). *The only thing* that differentiates semi-automatic firearms from fully-automatic firearms is that they require a separate "function of the trigger" for each shot, whereas a machinegun fires multiple rounds with a single trigger depression . Fortunately, Congress did not

[8] Shockingly, the government does not appear to object to this absurd result, criticizing a scheme "under which a weapon is not a machinegun if its trigger resets during the firing sequence." Govt. Br. at 13.

ban all firearms that operate "automatically," but only machineguns that operate "automatically ... *by a single function of the trigger*."

Undeterred, the government argues that bump stocks permit automatic fire by "the initial trigger pull ***and*** the pressure applied by the shooter to the weapon." *Id.* at 3, *see also* at 16 (emphasis added). But this adds to the statute, permitting *something more* than a "single function of the trigger." Writing in dissent in *Guedes*, Judge Henderson called this a "single function *plus*." *Guedes*, 920 F.3d at 35. The government objects to this characterization, opining that "even prototypical machineguns require ... constant pressure *on the trigger*...." *Id.* at 17 (emphasis added). But "constant pressure on the trigger" isn't a single function of the trigger "*plus*" something else — it's just a plain old "single function of the trigger."

IV. The Government Continues Flip-Flopping on *Chevron*.

Almost as an afterthought, the government argues that *Chevron* is inapplicable, on the theory that ATF's "rule adopts the best understanding of the statute." Govt. Br. at 17. Nonetheless, the government feels it necessary to mount a full-throated defense of *Chevron*, claiming "Congress often delegates authority" to agencies to "promulgate rules the violation of which will carry criminal consequences." *Id.* at 18-19. The government rejects the clear statements in *United States v. Apel*, 571 U.S. 359 (2014) and *Abramski v. United States*, 573 U.S. 169 (2014) that "the Government's reading

of a criminal statute is entitled to [no] deference," (*Apel* at 369), opining that those cases "did not involve regulations, much less regulations promulgated under a specific delegation of authority to establish standards or requirements,"[9] but concerned some other type of "administrative interpretation." Govt. Br. at 19-20. Of course, the Supreme Court never made any distinction between an agency's statutory interpretation made by regulation as opposed to some other means, holding broadly that "criminal laws are for courts, not for the Government, to construe." *Abramski* at 191. Moreover, *it was the government* which brought *Apel* to the district court's attention (Notice of Supplemental Authority, R.38, PageID# 302) as a governing authority, and *it was the government* which argued for *Abramski*'s application to this Court (Appellees' Br. at 34). The government cannot now credibly argue that these decisions have no impact on this case.

Next, the government pretends that there is no circuit split as to the impact of *Apel* and *Abramski*. Govt. Br. at 20. But while the panel cited to *numerous* decisions

[9] The government never points to any "specific delegation of authority [to ATF] to establish standards or requirements," and there is no such delegation in the statute here. Govt. Br. at 19; *see* Appellants' Supplemental Br. at 12-14. Congress clearly defined what constitutes a machinegun, and tasked ATF only with *enforcing* the statute's terms, not *determining* which devices *should be* machineguns. *See United States v. Kuzma*, 967 F.3d 959, 971 (9th Cir. 2020) (26 U.S.C. Section 5845(b) "is not a [statute] in which an agency has been delegated authority to promulgate underlying *regulatory* prohibitions.... On the contrary, the text of the applicable prohibitions and definitions is set forth in *statutory* language.").

of other courts which wrestled with that specific issue (Op. at 16), the government focuses only on the *two* bump stock cases decided by the 10th and D.C. Circuits (the only two cases going the government's way on the issue). *Id.* Even worse, some of the decisions the government blatantly ignores applied *Apel* and *Abramski* to ATF regulations — regulations which the government earlier argued are not implicated by the *Apel* and *Abramski* decisions. *See, e.g., United States v. Balde*, 943 F.3d 73, 83 (2d Cir. 2019); *United States v. Garcia*, 707 F. App'x 231, 234 (5th Cir. 2017).

Next, the government objects to the panel's discussion of the rule of lenity, claiming that the doctrine does not apply to "regulations *issued under authority to promulgate prohibitions*...." Govt. Br. at 21 (emphasis added). But as explained above, there is no such authority here — as the Ninth Circuit has expressly noted, this "is not a [statute] in which an agency has been delegated authority to promulgate underlying *regulatory* prohibitions...." *Kuzma* at 971. Indeed, the government's eleventh hour claim of authority to enact new *substantive prohibitions* directly conflicts with its prior claim that the Final Rule is interpretative, not legislative. *See, e.g.,* Appellees' Br. at 36-37. There is no way to read 26 U.S.C. Section 5845(b) to have "left ambiguity ... *meant for implementation* by an agency...." Govt. Br. at 21 (emphasis added). In fact, the government previously argued to this Court that:

> [t]he statutory scheme *does not [] appear to provide [the agency] the authority to engage in "gap-filling"* interpretations of what qualifies as a "machinegun." Congress has provided a detailed definition of the term "machinegun," ... In contrast to other statutes, Congress *did not expressly task the Attorney General with determining the scope of the criminal prohibition* on machinegun possession." [Appellees' Br. at 35 (emphasis added).]

Finally, the government argues that, even though it is not entitled to *Chevron* deference, ATF's "considered views" should still receive some sort of deferential consideration, because of the agency's purported "expertise" in this area. Govt. Br. at 17-18. But Plaintiffs explained that any supposed deference to agency "expertise" here really should mean deference not to the Final Rule, but instead to more than a decade of prior ATF letters determining repeatedly and unequivocally that bump stocks are *not* machineguns.[10] *See* Appellants' Supplemental Brief at 9-12.

CONCLUSION

Throughout this case, the government has flip-flopped on the law. ATF cannot decide if the statute is unambiguous or instead contains a limited ambiguity solved by

[10] The government is touchy on this issue, bizarrely claiming that "Plaintiffs forfeited this argument by failing to raise it in their panel briefs." Govt. Br. at 22. On the contrary, Plaintiffs argued repeatedly the Final Rule was a political decision forced upon ATF, and thus is entitled to no deference. *See, e.g.*, Compl., R.1, PageID# 2-3, ¶¶ 4,6; Memorandum in Support of Plaintiffs' Motion for a Preliminary Injunction, R.37, PageID# 169-70, 189-90; Reply Brief in Support of Plaintiffs' Motion for Preliminary Injunction, R.37, PageID# 288, 291-92; Brief for Appellants at 41, 53; Reply Br. at 26 n.24.

the Final Rule and otherwise is unambiguous *enough* to somehow not require *Chevron* deference. The government announced that *Apel* and *Abramski* are controlling authorities, but now claims they are irrelevant. The government claimed its views should not receive "any deference," but now argues for some sort of non-*Chevron* deferential treatment. The government argued the Final Rule was interpretative because ATF had no "'gap-filling' ... authority," but now says the statute was "meant for implementation by the agency" — but not entitled to *Chevron*.

The government also flip flops on the facts, first having recognized that bump stocks *do not* harness recoil energy, then claiming that they *do* then, when challenged by Plaintiffs admitting they *do not*, but now again arguing that they *do*. The government claims bump stocks operate by a "single function of the trigger," yet recognizes the trigger moves back and forth (*i.e.*, functions) each time a round is fired, demurring that the "function of the trigger" involves neither mechanical function nor a trigger. Although the Final Rule created this "dichotomy" between the mechanical and the biological, ATF now blames the panel.

The government asks this Court to uphold the Final Rule as "the best" interpretation of the statute, but to date no circuit judge across three circuits has agreed. That is hardly surprising. ATF's purported "interpretation" of the statute completely rewrites the statute — the government admitted it needed to "expand" and "revise" the

statute in order to ban bump stocks — first replacing one word and then "interpreting" another word divorced from its statutory context. The result is not only that bump stocks magically now become machineguns, but also that all semi-automatic firearms would be machineguns.

The Supreme Court has held that, "whatever argument might be mustered for deferring to the Executive ... surely it becomes a garble when the Executive speaks from both sides of its mouth, articulating no single position on which it might be held accountable." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1630 (2018). Surely that principle applies here. Since the inception of this case, the government has used a strategy of whack-a-mole, with Plaintiffs seeking to nail down its conflicting factual claims and ever-changing legal arguments. The Supreme Court recently stated that:

> The people who come before us are entitled ... to have independent judges exhaust "all the textual and structural clues" bearing on pa statute's] meaning ... our "sole function" is to apply the law as we find it ... not defer to some conflicting reading the government might advance. [*Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1480 (2021).]

This Court should not employ *Chevron* deference to "place[] an uninvited thumb on the scale in favor of the government" (*Guedes v. BATFE*, 140 S. Ct. 789, 790 (2020)), but instead should "say what the law is" and, in doing so, strike down the Final Rule as contrary to the unambiguous statutory text.

Respectfully submitted,

/s/ Robert J. Olson

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September 7, 2021

CERTIFICATE OF COMPLIANCE

IT IS HEREBY CERTIFIED:

1. That the foregoing Appellants' Supplemental Reply Brief complies with the Court's June 25, 2021 briefing letter, because it does not exceed twelve pages, excluding the parts of the brief exempted by Rule 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect version 18.0.0.200 in 14-point Times New Roman.

/s/ Robert J. Olson
Robert J. Olson
Counsel for Appellants

Dated: September 7, 2021

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing Appellants' Supplemental Reply Brief was made, this 7th day of September 2021, by the Court's Case Management/Electronic Case Files system upon all parties or their counsel of record.

/s/ Robert J. Olson
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