IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

W. Clark Aposhian,	:	No. 19-4036
Plaintiff-Appellant,	:	
v.	:	
William Barr, Attorney General of the United States, et al.,	:	
Defendants-Appellees.	:	

PLAINTIFF-APPELLANT'S BRIEF-IN-CHIEF

INTERLOCUTORY APPEAL FROM THE JUDGMENT OF
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

No. 2:19-cv-00037-JNP
THE HONORABLE JILL N. PARRISH
DISTRICT JUDGE

Oral Argument Is Requested

June 12, 2019

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PRELIMINARY STATEMENT

This case is not about gun control. When a deranged gunman opened fire on a crowd in Las Vegas, Nevada on October 1, 2017, the nation suffered a horrible tragedy. Using a large cache of weapons, many of which were equipped with scopes, 100-round magazines and bump stocks, that gunman murdered 58 innocent people and injured nearly 1,000 others. That tragedy cried out for a legislative response to the misuse of dangerous weapons. Many legislators, including the City Council for Denver, Colorado, responded by *prospectively* banning ownership of bump stocks after careful consideration of their capacity to inflict harm. Such policies are entirely appropriate for elected legislators to consider.

This case is, instead, about who has the constitutional prerogative to change the law when tragedy strikes. Rightly or wrongly, Congress has not prohibited bump stocks, and it is unlawful for a prosecutorial entity, like the Bureau of Alcohol, Tobacco, Firearms and Explosives, to rewrite the law in Congress' place. ATF's Bump Stock Final Rule took an administrative shortcut that violates basic constitutional principles concerning who makes the law. Even if ATF's goal is laudable, this

Court has a constitutional obligation of its own to strike down ATF's attempted legislative revision. Otherwise, the next national tragedy (or emergency), involving immigration, foreign trade, or domestic terrorism will result in Executive Branch efforts to usurp Congress' legislative function in other areas.

Significantly, ATF's quick fix has also undermined Congress' efforts to enact a lawful legislative response. After the tragedy in Las Vegas, Congress considered a variety of bi-partisan legislative efforts to prohibit the sale of new bump stocks, over the protest of many gun rights advocates. But when ATF's regulation preempted any decision from Congress, with the conspicuous absence of objections from major gun rights organizations, these legislative efforts all stalled. As Senator Dianne Feinstein put it, "ATF has consistently stated that bump stocks could not be banned through regulation because they do not fall under the legal definition of a machine gun. … Both Justice Department and ATF lawyers know that legislation is the only way to ban bump stocks. The law has not changed since 1986, and it must be amended to cover bump stocks[.]" Press Release, Sen. Dianne Feinstein, *Feinstein Statement on Regulation to Ban Bump Stocks* (Mar. 23, 2018).

Executive interference in prerogatives affairs comes at a steep cost. And only this Court can restore the appropriate constitutional balance.

PRIOR OR RELATED APPEALS

Mr. Aposhian has no prior or related appeals.

JURISDICTIONAL STATEMENT

In his Complaint, Mr. Aposhian argued that the Final Rule was unconstitutional under Article I, § 1, Article I, § 7 and Article II, § 3 of the U.S. Constitution, and 5 U.S.C. § 706(2)(A), (B), and (C). (Doc. 1) Mr. Aposhian also moved for a preliminary injunction pursuant to 28 U.S.C. §§ 2201, 2202 and Rule 65(a) of the Federal Rules of Civil Procedure. (Doc. 10.)

The district court had federal question jurisdiction in this case pursuant to 5 U.S.C. § 702 and 28 U.S.C. § 1331 because Mr. Aposhian challenged the statutory and constitutional validity of the Final Rule. This Court has jurisdiction to review "interlocutory orders of the district courts of the United States" "refusing … injunctions." 28 U.S.C. § 1292(a)(1).

ISSUE PRESENTED FOR REVIEW

Whether the Executive Branch may bypass Congress and make new criminal law outside the prescribed constitutional pathway, and thus whether the district court erred in denying Mr. Aposhian's motion for a preliminary injunction because it concluded he was not likely to succeed on the merits of his challenge to the Final Rule.

STATEMENT OF THE CASE AND FACTS

Appellees ordered Mr. Aposhian to destroy or surrender his legally-purchased Slide Fire bump-stock device by March 26, 2019 or face criminal prosecution. (*See* Aplt. App. at A8.)[1]

Mr. Aposhian purchased his bump stock in reliance on ATF's prior determination that the device "is a firearm part and is not regulated as a firearm[.]" (Aplt. App. at A68, A69.) The Slide Fire device is a "hollow shoulder stock intended to be installed over the rear of an AR-15," and it is "intended to assist persons whose hands have limited mobility to 'bump-fire' an AR-15 type rifle." (Aplt. App. at A69, John R. Spencer, Chief, Firearms Technology Branch, Slide Fire Approval (June 7, 2010) (*Slide Fire Approval*).) "The stock has no automatically functioning

[1] References to Plaintiff-Appellant's Appendix are set out as "Aplt. App."

mechanical parts or springs and performs no automatic mechanical function when installed." *Slide Fire Approval*. "In order to use the installed device, the shooter must apply constant forward pressure with the non-shooting hand and constant rearward pressure with the shooting hand." *Slide Fire Approval*. In reliance on this approval, Mr. Aposhian lawfully purchased a Slide Fire bump stock prior to its purported re-classification as a machinegun. (Aplt. App. at A67-68.).

Despite its prior determinations, ATF issued a Final Rule on December 26, 2018, which altered the statutory definition of a prohibited "machinegun" to include the Slide Fire bump stock. *Bump-Stock-Type Devices*, 83 Fed. Reg. 66514, 66553-54 (Dec. 26, 2018). The Final Rule directs Mr. Aposhian "to destroy the device[] or abandon [it] at an ATF office prior to" "March 26, 2019." *Id.* at 66514, 66555. If he possessed his bump stock thereafter, he faced potential criminal prosecution and a prison sentence of up to 10 years, pursuant to 18 U.S.C. §§ 922(o), 924(a)(2).

Mr. Aposhian filed a Complaint on January 16, 2019, challenging the Final Rule. (Aplt. App. at A6.)

Mr. Aposhian then moved for a preliminary injunction on January 17, 2019. (Aplt. App. at 42.) First, Mr. Aposhian argued that he was likely to succeed on the merits because, among other things, the Final Rule was "issued without statutory authorization" because it "conflicts with statutory language." (Aplt. App. at A45.) Mr. Aposhian also argued that ATF's interpretation was "owed no deference" and instead, any ambiguity in the statutory language should be "resolved in favor of lenity." (Aplt. App. at A53 (internal citation and quotation marks omitted).)

Mr. Aposhian next argued that an injunction was necessary because he would "suffer irreparable harm" because he would "be required to follow a rule that was issued in violation of constitutional limits," which would result in the destruction of his lawfully acquired property. (Aplt. App. at A61.) Finally, Mr. Aposhian argued that the injunction would be "equitable and in the public interest" because his interest in not being "forced to abide by a law that is itself unlawful" vastly outweighed ATF's interest in avoiding "a delay in its Final Rule." (Aplt. App. at A62)

Defendants filed an opposition on February 6, 2019. (Aplt. App. at A75.) In the opposition ATF "acknowledge[d] that the irreparable harm prong of the preliminary injunction test is met here." (Aplt. App. at A106.) Nevertheless, ATF asserted that a general interest in "public safety" warranted denial of the injunction. (Aplt. App. at A106.)

On the merits, ATF first argued that it had the authority to issue the Final Rule merely because "Congress has left undefined" certain terms in the statutory definition of a machinegun. (Aplt. App. at A92). ATF then argued that the Final Rule presented a "reasonable" interpretation of the statute, but simultaneously conceded that its "interpretation of criminal statutes," such as the Final Rule, would generally not be "entitled to deference." (Aplt. App. at A92, A103.)

Mr. Aposhian replied to ATF's opposition on February 11, 2019. (Aplt. App. at A109.) Mr. Aposhian pointed out that the "statutory text is not ambiguous," and thus ATF had no power to issue the rule under an implied grant of power. (Aplt. App. at A116.) Mr. Aposhian also noted that the rule of lenity required "any ambiguity in the statute [to] be resolved against Defendants' reading." (Aplt. App. at A117, A119.)

On March 15, 2019, the district court denied the request for a preliminary injunction in a written decision. (Aplt. App. at A127.) In its decision, the district court addressed only two of the four factors necessary for a preliminary injunction. First, the district court noted that the "parties do not dispute that Mr. Aposhian will experience irreparable harm if the injunction is denied." (Aplt. App. at A131.) Second, the district court determined that "Mr. Aposhian has not carried his burden of showing a substantial likelihood of success on the merits" and denied the injunction without addressing the remaining factors. (Aplt. App. at A131.) Underlying the merits decision, the district court concluded ATF had been "implicitly delegated the authority to clarify" any terms in the "statute [that were] undefined," and thus could issue a new definition of machinegun. (Aplt. App. at A133.) The court then concluded that ATF's rule presented the "best interpretation" of what the underlying statute had always meant. (Aplt. App. at A133, A134.)

Mr. Aposhian filed a notice of interlocutory appeal on March 18, 2019. The next day, he filed a motion for an injunction pending appeal

with the district court. He then moved for an injunction pending appeal with this Court. (Aplt. App. at A139.)

The district court denied Mr. Aposhian's motion for an injunction. On March 21, 2019, however, this Court, "temporarily enjoin[ed] appellees from enforcing the Final Rule only as to Mr. Aposhian during the time required to adequately consider and rule on the pending motion." (Aplt. App. at A183.) ATF filed a written opposition to the motion, to which Mr. Aposhian responded. (Aplt. App. at A185, A209.)

On April 30, 2019, a divided panel of this Court denied the motion for a stay, as "an exercise of the court's discretion." (Aplt. App. at A226.) Judge Carson would have granted the motion. (Aplt. App. at A226.)

In compliance with this Court's order, Mr. Aposhian thereafter surrendered his Slide Fire bump stock to ATF.

SUMMARY OF ARGUMENT

The district court committed four separate legal errors in the course of its finding that Mr. Aposhian lacked "a substantial likelihood of success on the merits" necessary for a preliminary injunction. (*See* Aplt. App. at A131.) Each of these errors independently warrants

reversal of the district court's decision. This Court should order the district court to issue the injunction.

First, the statute's plain terms conflict with the Final Rule. The statute applies to "machineguns," which are firearms capable of shooting "*automatically* more than one shot, without manual reloading, by a *single function of the trigger*." 26 U.S.C. § 5845(b) (emphasis added). The district court, however, adopted ATF's view that this language applies to a device that "allow[s] the firing mechanism to reset" between shots merely because its effect is to "mak[e] rapid fire easier." (*See* Aplt. App. at A195, A203.) A weapon does not fire "automatically" if it requires multiple trigger functions between shots. Because the rule conflicts with the statute, it is invalid.

Second, the court wrongly concluded that the underlying statute was ambiguous, merely because commonly-understood words were left undefined. But courts have consistently held that the very terms at issue were "readily known by laypersons." *See United States v. Olofson*, 563 F.3d 652, 660 (7th Cir. 2009). Furthermore, Congress' failure to define every word in a statute does not confer gap-filling authority to a

federal agency. Because there was no statutory ambiguity, ATF had no authority to issue the Final Rule.

Third, the court erred by not applying the rule of lenity, and instead construing any statutory ambiguity in the most punitive way possible. The district court determined that ATF had the authority to issue the Final Rule *only* because the court deemed the statutory terms to be ambiguous. Yet it simultaneously construed the statute to criminalize conduct ATF had previously declared lawful. The rule of lenity requires "*any* ambiguity concerning the ambit of criminal statutes" to be resolved "in favor of lenity." *Yates v. United States*, 135 S.Ct. 1074, 1088 (2015) (emphasis added). The district court's rejection of this rule was legal error warranting reversal.

Fourth, the Final Rule is not the best reading of the statute. To be the best reading, it must have always been the correct reading, and bump stocks must always have been prohibited. ATF previously insisted that bump stocks "do not fall within any of the classifications for firearm contained in Federal law" and that "ATF does not have the authority to restrict their lawful possession, use, or transfer[.]" (*See* (Aplt. App. at A73-A74, Letter from Richard W. Marianos, ATF

Assistant Director Public and Governmental Affairs, to Representative Ed Perlmutter, at 2 (Apr. 16, 2013) (*Marianos Letter*).) Given this repeated and formalized prior agency view, the statute has *not always* meant what ATF now says it means in the wake of a national tragedy. If this Court allows ATF to smuggle new meaning into a decades-old statute whose meaning was long settled, it will convert a national tragedy into a constitutional disaster.

ARGUMENT

This Court reviews a district court's decision on a request for a preliminary injunction for "abuse of discretion." *Planned Parenthood of Kansas v. Andersen*, 882 F.3d 1205, 1223 (10th Cir. 2018). "A district court's decision crosses the abuse-of-discretion line if it rests on an erroneous legal conclusion or lacks a rational basis in the record." *Free the Nipple-Fort Collins v. City of Fort Collins, Colorado*, 916 F.3d 792, 796 (10th Cir. 2019). This Court examines the district "court's factual findings for clear error and its legal conclusions de novo." *Id.* at 796-97.

"A plaintiff seeking a preliminary injunction must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the

balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

As set out below, Mr. Aposhian established all four elements of the required test, entitling him to relief.

I. MR. APOSHIAN HAS DEMONSTRATED THAT HE IS LIKELY TO SUCCEED ON THE MERITS

A. The District Court Erred by Adopting ATF's Interpretation, Which Contradicts the Statute Itself

The district court first erred by allowing ATF's purported "reasonable" interpretation to supplant the statute. (*See* Doc. 25 at 10.) The Final Rule conflicts with clear statutory text and fundamentally alters what it means for a device to be a machinegun.

"Regardless of how serious the problem an administrative agency seeks to address, ... it may not exercise its authority in a manner that is inconsistent with the administrative structure that Congress enacted into law." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000) (internal citation and quotation marks omitted). Thus, a court must first inquire whether a challenged regulation is consistent with the statute's text. *New Mexico v. Dep't of Interior*, 854 F.3d 1207, 1221

(10th Cir. 2017). This inquiry asks whether "Congress has directly spoken to the precise question at issue," and, if so, "that is the end of the matter; for the court as well as the agency must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 842-43 (1984). A court "must reject administrative constructions which are contrary to clear congressional intent," because the "judiciary is the final authority on issues of statutory construction." *Id.* at n. 9; *see also Webster v. Luther*, 163 U.S. 331, 342 (1896) ("[T]his court has often said that it will not permit the practice of an executive department to defeat the obvious purpose of a statute."). An agency interpretation is never valid if it is "arbitrary, capricious, or manifestly contrary to the statute." *In re FCC 11-161*, 753 F.3d 1015, 1041 (10th Cir. 2014).

i. The Statutory Scheme at Issue Omits Semiautomatic Weapons

The National Firearms Act of 1934, Pub. L. No. 73-474, "imposes strict registration requirements on statutorily defined 'firearms.'" *Staples v. United States*, 511 U.S. 600, 602 (1994). In the 1934 legislation, Congress defined "machinegun" as a specific type of "firearm." The original text 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." National Firearms Act § 1(b) (emphasis added).

The statutory language reflected a compromise position. As originally proposed, the statute defined a "machinegun" as "any weapon designed to shoot automatically, or semiautomatically, 12 or more shots without reloading." *Hearing on H.R. 9066, House Ways and Means Comm.*, 73rd Cong., 6 (1934) (Testimony of Homer S. Cummings, Attorney General of the United States). Advocates proposed altering the definition to read, "A machine gun or submachine gun as used in this act means any firearm by whatever name known, loaded or unloaded, which shoots automatically more than one shot without manual reloading, by a single function of the trigger." *Id.* at 40 (Testimony of Karl T. Frederick, President National Rifle Association of America). This change first eliminated the 12-shot threshold, which they feared could be easily circumvented. *Id.* at 39. At the same time, it eliminated the term "semiautomatically," because including that term would result in outlawing the ordinary repeating rifle. A semiautomatic gun shoots

only one shot with a single pull of the trigger, "which is in no sense and never has been thought of as a machine gun." *Id.* at 40-41. The final statutory definition jettisoned the 12-shot threshold, but nevertheless included a prohibition on semiautomatic weapons.

A few decades later, however, the Gun Control Act of 1968, Pub. L. No. 90-618, deleted the phrase "or semiautomatically" and included "parts" designed and used to "convert a weapon into a machinegun." Gun Control Act, tit. II, § 201 (codified at 26 U.S.C. § 5845(b)). The 1968 statutory revision more broadly "extend[ed] the Act's provisions so as to cover 'destructive devices' (bombs, grenades, etc.)." Congressional Research Service, *Gun Control Act of 1968: Digest of Major Provisions*, CRS Report 75-154, at 12, Harry Hogan (1968, rev. 1981). The result was that Congress made clear that a semiautomatic rifle was no longer an illegal "machinegun."

The definition of "machinegun" in effect today includes "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 Firearms Owners' Protection Act (FOPA) of 1986, Pub. L. No. 99-308, codified at 18 U.S.C. § 922(o)(1), effectively banned private ownership of machine guns. The Act makes it "unlawful for any person to transfer or possess a machinegun," 18 U.S.C. § 922(o)(1), and "machinegun" has "the meaning given ... in section 5845(b) of the National Firearms Act," *id*. § 921(a)(3). A person who "knowingly" violates the ban can be "fined ... [or] imprisoned not more than 10 years, or both." *Id*. § 924(a)(2).

Critically, FOPA's restrictions were prospective only. Its criminal sanctions did "not apply with respect to" "any lawful transfer or lawful possession of a machinegun that was lawfully possessed before the date this subsection takes effect." 18 U.S.C. § 922(o)(2)(B). Thus, even today, machineguns that were lawfully possessed before FOPA's effective date, remain legal for private use.

ii. The Final Rule Improperly Tries to Alter the Settled Meaning of the Statute

"It's a fundamental canon of statutory construction that words generally should be interpreted as taking their ordinary meaning at the time Congress enacted the statute." *New Prime Inc. v. Oliveira*, 586 U.S. ---, 139 S.Ct. 532, 539 (2019) (internal citations and quotation

marks omitted). Otherwise, courts "would risk amending legislation outside the single, finely wrought and exhaustively considered, procedure the Constitution commands." *Id.* (internal citations and quotation marks omitted). Courts "would risk, too, upsetting reliance interests in the settled meaning of a statute." *Id.*

The Supreme Court has already explained that the current definition of a machinegun

> refer[s] to a weapon that fires repeatedly with a single pull of the trigger. *That is, once its trigger is depressed, the weapon will automatically continue to fire until its trigger is released or the ammunition is exhausted.* Such weapons are 'machineguns' within the meaning of the Act. We use the term *'semiautomatic' to designate a weapon that fires only one shot with each pull of the trigger*, and which requires no manual manipulation by the operator to place another round in the chamber after each round is fired.

Staples, 511 U.S. at 602 n. 1 (emphasis added); *accord United States v. Bishop*, No. 18-4088, --- F.3d ----, 2019 WL 2414996, at * 2 (10th Cir. June 10, 2019).

A weapon functions "automatically" when it "discharge[s] multiple rounds" "as the result of a self-acting mechanism" "that is set in motion by a single function of the trigger and is accomplished without manual reloading." *United States v. Olofson*, 563 F.3d 652, 658 (7th Cir. 2009).

As this Court has recognized, a machinegun fires "automatically" when it allows "multiple bullets to be fired without releasing the trigger." *Bishop*, 2019 WL 2414996, at *9 (internal citation and quotation marks omitted).

ATF has long recognized that a machinegun commences firing after the manual activation of a trigger, which "initiates an automatic firing cycle that continues until the finger is released or the ammunition supply is exhausted." (Aplt. App. at A72, Exhibit C (Classification of Devices Exclusively Designed to Increase the Rate of Fire of a Semiautomatic Firearm, ATF Rul. 2006-2, at 3 (Dec. 13, 2006)).) This does not include a firearm that "require[es] continuous multiple inputs by the user for each successive shot," even if the multiple user inputs are directed at parts of the firearm other than the trigger mechanism. *Marianos Letter*.

"Bump firing" is a shooting technique where a shooter fires a semiautomatic weapon by allowing the weapon to slide against his trigger finger such that he "re-engages" the trigger "by 'bumping' [his] stationary finger." *Final Rule*, 83 Fed. Reg. at 66532-33. ATF continues to recognize bump firing may be accomplished "without a bump-stock

device" and could be achieved with "items such as belt loops that are designed for a different primary purpose but can serve an incidental function of assisting with bump firing." *Id.* And ATF has always previously understood that bump stocks are not machineguns because every shot requires a separate trigger function on a bump-stock-equipped semiautomatic weapon, and the weapon will not continue to fire (as a machinegun would) if the shooter simply keeps the trigger depressed. *Marianos Letter*, at 2.

Despite this settled meaning, ATF has now discarded its prior understanding of the statute. "The Rule's fatal flaw comes from its 'adding to' the statutory language in a way that is … plainly *ultra vires*. *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 920 F.3d 1, 43 (D.C. Cir. 2019) (Henderson, J., dissenting). The Final Rule changes the statutory terms and defines certain devices as machineguns even when they do not initiate an automatic firing cycle from a single function of a trigger. To reach this outcome, the Final Rule "invalidly expands the statutory text" by rewriting the phrase "automatically more than one shot, without manual reloading, by a single function of the trigger," in such a way as to encompass additional

manual manipulation of the firearm between shots. *Id.* at 43-44. ATF's new rule therefore attempts to do what no agency may do; it "amend[s] legislation outside the single, finely wrought and exhaustively considered, procedure the Constitution commands" and "upset[s] reliance interests in the settled meaning of [the] statute." *See New Prime, Inc.*, 139 S.Ct. at 539.

iii. ATF's Newly Contrived Definition Contradicts the Statute in Several Ways

ATF's new definition contradicts the statute, first, because it improperly defines the term "automatically" to disregard a shooter's additional manual manipulation of the firearm's *trigger* between shots. The statute speaks of automatic fire "that is set in motion by a single function of the trigger," *Olofson*, 563 F.3d at 658, but the Final Rule pretends that a shooter initiates automatic fire with a bump stock by only "'pull[ing]' the trigger once," even though he must continue "bumping" the trigger between each shot. *Final Rule*, 83 Fed. Reg. at 66533. But "bumping" a trigger is functionally the same as "pulling" it. Even now ATF concedes that "bumping" the trigger "re-engage[s]" it between shots. *Final Rule*, 83 Fed. Reg. at 66516. And, in a dissenting opinion in the D.C. Circuit, Judge Karen LeCraft Henderson noted that

"a semiautomatic rifle equipped with a bump stock *cannot* fire more than one round with a *single* function of the trigger" because "the trigger of a semiautomatic rifle must release the hammer for each individual discharge." *Guedes*, 920 F.3d at 47. Thus, ATF can only reach its preferred outcome by pretending that the well understood shooting technique of bump firing somehow does not involve additional physical manipulation of the trigger, even when it plainly does.

Second, the rule disregards the other physical manipulation bump firing requires. As Judge Henderson put it, "A 'machinegun,' then, is a firearm that shoots more than one round by a single trigger pull without manual reloading. The statutory definition of 'machinegun' does not include a firearm that shoots more than one round 'automatically' by a single pull of the trigger **AND THEN SOME** (that is, by 'constant forward pressure with the non-trigger hand')." *Id.* at *33. Instead of requiring that the firearm itself continuously operate "by a *single function* of the trigger," the rule's new definition says that additional physical manipulation is irrelevant if it is not "of the *trigger* by the shooter." *Final Rule*, 83 Fed. Reg. at 66553-54 (emphasis added). Bump stocks, which require the shooter to "maintain[] constant forward

pressure with the non-trigger hand on the barrel shroud or fore-grip of the rifle, and maintain[] the trigger finger on the device's extension ledge with constant rearward pressure," are now deemed machineguns by the Final Rule because ATF no longer considers the shooter's physical actions between shots to be relevant. *Final Rule*, 83 Fed. Reg. at 66518, 66533. ATF now ignores manual manipulation by the shooter's "non-trigger hand," *Final Rule*, 83 Fed. Reg. at 66518, 66533, even though that manual manipulation is what resets the trigger before each shot.

Indeed, "[t]he Rule's very description of a non-mechanical bump stock manifests that its proscription is *ultra vires*:

> [Bump stock] devices replace a rifle's standard stock and free the weapon to slide back and forth rapidly, harnessing the energy from the firearm's recoil either through a mechanism like an internal spring or *in conjunction with the shooter's maintenance of pressure* (typically constant forward pressure with the non-trigger hand on the barrel-shroud or fore-grip of the rifle, *and* constant rearward pressure on the device's extension ledge with the shooter's trigger finger).

Guedes, 920 F.3d at 46 (Henderson, J., dissenting) (quoting *Final Rule*, 83 Fed. Reg. at 66516).

ATF's newly contrived view of what it means to automatically continue firing cannot be reconciled with the statute. The statute

simply says that a machinegun's fire occurs "automatically" after a "single function of the trigger." 26 U.S.C. § 5845(b). Further, the ordinary definition of the term "automatic," refers only to the series of shots "set in motion." *Olofson*, 563 F.3d 652, 658. If a firearm equipped with a bump stock requires separate physical input for each shot, even if not directed to the trigger mechanism, this still precludes the firing of each successive shot from being "automatic."

Next, the Final Rule improperly disregards "the longstanding distinction between 'automatic' and 'semiautomatic'" firearms, which, at the time of enactment, "depended on whether the shooter played a manual role in the loading and firing process." *Guedes*, 920 F.3d at 45 (Henderson, J., dissenting). Congress deliberately chose to include semiautomatic weapons in the original definition of a machinegun, even though this would encompass "the ordinary repeating rifle" and other weapons that would shoot "only one shot" from each trigger function. *See Hearing on H.R. 9066, House Ways and Means Comm.*, 73rd Cong., 40, 41 (1934) (Testimony of Karl T. Frederick, President National Rifle Association of America). But Congress changed the law in 1968; ever since, semiautomatic weapons have not come under the statute's

prohibition. *See Staples*, 511 U.S. at 602 n. 1. This amendment also coincided with expansion of the statute's prohibition of "destructive devices," which reflected a judgment that semiautomatic weapons were not in the same class as these other weapons. But "the Bump Stock Rule reinterprets 'automatically' to mean what 'semiautomatically' did in 1934—a pull of the trigger *plus*. The Congress deleted 'semiautomatically' from the statute in 1968 and the ATF is without authority to resurrect it by regulation." *Guedes*, 920 F.3d at 45 (Henderson, J., dissenting).

Finally, the new rule conflicts with the statute because it would exclude some actual machineguns by re-defining the phrase "single function of the trigger" to mean only the "deliberate and volitional act of the user pulling the trigger." *Final Rule*, 83 Fed. Reg. at 66534. This new outcome-based interpretation meant to encompass bump stocks would actually undermine prior decisions banning machineguns that initiated automatic fire from other types of triggers that did not require pulling.

The statute focuses on the trigger's "function," which encompasses conduct beyond merely pulling a piece of metal. *See* 26 U.S.C. § 5845(b).

ATF even noted in the Final Rule that "the courts have made clear that whether a trigger is operated through a 'pull,' 'push,' or some other action such as a [*sic*] flipping a switch, does not change the analysis of the functionality of a firearm." *Final Rule*, 83 Fed. Reg. at 66518 n. 5. Courts have emphasized that a trigger's function is defined by how it mechanically operates, not by how the shooter engages it. *See United States v. Camp*, 343 F.3d 743, 745 (5th Cir. 2003) (internal citation and quotation marks omitted) ("single function of the trigger" "implies no intent to restrict" the meaning to only encompass "pulling a small lever," and instead means any action that "initiated the firing sequence"); *United States v. Fleischli*, 305 F.3d 643, 655 (7th Cir. 2002) (minigun was machinegun because it fired automatically following a single activation of an electronic on-off switch).

The new rule, however, elevates one specific movement—a "pull of the trigger"—to a determinate place. If a shooter pulls only once, or perhaps not at all, but merely pushes a firearm with his non-trigger hand in a way that causes the trigger to function more than once, the new rule says he is firing a machinegun. The rule recognizes that bump stocks require the shooter to "re-engage [the trigger] by 'bumping' the

shooter's stationary finger" into the trigger but insists that a "bump" is not a "pull of the trigger" because it is not a backward action on the trigger lever. *Final Rule*, 83 Fed. Reg. at 66516. Whether a trigger is pushed or bumped though, it must move backward to precisely the same point in order to reset the trigger and fire the next shot—except in a real machinegun, where the trigger remains depressed and the trigger never has to move forward and then backward again in order to reset and fire.

iv. The District Court's Interpretation Came at the Expense of the Statutory Text

The district court rejected these arguments because it concluded that the Final Rule's definition appropriately defined "the requisite degree of automaticity." (Aplt. App. at A135.) The district court opined that all automatic weapons "require at least some ongoing effort by an operator," and thus it was "the best interpretation" of the statute for ATF to define automatic operation as excluding both "mechanical movement of the trigger" from "bumping" and any physical input by the shooter to any part of a firearm apart from the "trigger mechanism." (Aplt. App. at A134, A135-36.)

The district court's novel view is hardly the best reading of the statutory text. The line previous courts, and even ATF, have always recognized is that once the trigger is engaged, a machinegun simply keeps firing. And in some instances, this requires no additional physical input. *See Fleischli*, 305 F.3d at 655 (minigun, which operated with an on/off switch, initiated "automatic" fire). ATF's new determination that "automatic" fire can encompass fire that requires shooter input between shots, including repeated input to the trigger itself, runs counter to the understanding of the term that has prevailed for decades and the line that Congress drew. Indeed, the district court's view would mean that a semiautomatic weapon could now be a machinegun.

The district court also reasoned that the "best interpretation" of a "single function of the trigger" reflects a Congressional intent to reject the "mechanistic movement of the trigger in seeking to regulate automatic weapons," and instead was meant to broadly encompass any action that had the "ability to drastically increase a weapon's rate of fire, not the precise mechanism by which that capability is achieved." (Aplt. App. at A134.) That unsupported theory about what Congress might have intended contradicts the statute's actual text and does not

account for the removal of the word "semiautomatic" from the statute in 1968.

The statute never speaks in terms of a "weapon's rate of fire." Instead, Congress carefully chose language that drew a line between weapons that fired once for every trigger function and machineguns. And Congress' decision to eliminate semiautomatic weapons from the definition of machinegun while simultaneously expanding the statute's prohibitions to "destructive devices" evinces, if anything, a judgment that a weapon's rate of fire was *not* the metric it used for prohibition. Hence, it has always been understood that weapons like "Gatling gun[s]" are "not consider[ed] a machine gun," despite their ability to shoot rapidly. *See Fleischli*, 305 F.3d at 655. Even ATF "neither proposed the rate of fire as a factor in classifying machineguns, nor utilized this as the applicable standard in the proposed rule. The Department *disagrees with any assertion that the rule is based upon the increased rate of fire*." *Final Rule*, 83 Fed. Reg. at 66533 (emphasis added).

Moreover, "when the meaning of the statute is clear, it is both unnecessary and improper to resort to legislative history to divine

congressional intent." *Ribas v. Mukasey*, 545 F.3d 922, 929 (10th Cir. 2008). The words Congress actually employed must be respected.

ATF's new rule has obliterated the statutory distinction between automatic and semiautomatic weapons that Congress created. That distinction rests on whether a gun fires one, or more than one, bullet with each reset of the trigger. ATF cannot unilaterally alter the statute to serve its preferred policy objectives. The Final Rule is therefore invalid.

B. The District Court Erroneously Concluded the Statute Was Ambiguous Simply Because It Contained Undefined, but Readily Understood, Terms

The district court next erred when it concluded that ATF had the implicit authority to provide new definitions for any term in the statute left "undefined." (*See* Aplt. App. at A133.) The statute is not ambiguous though, and an agency does not have the implicit power to redefine ordinary words in a statute, particularly in ways that run counter to their plain meaning. ATF therefore had no authority to provide additional definitions through rulemaking.

"In determining whether an agency's regulations are valid under a particular statute," a Court must first ask whether "Congress delegated

authority to the agency generally to make rules carrying the force of law." *New Mexico*, 854 F.3d at 1221. And even if such authority is delegated, it only allows an agency to fill in "gaps" in a statute, and "[i]f the statute is not ambiguous" any further attempt to define its terms is "invalid and unenforceable." *Id.* at 1223-24, 1224, 1231. "If the statute is not ambiguous, [the] inquiry ends there. *Keller Tank Servs. II, Inc. v. Comm'r of Internal Revenue*, 854 F.3d 1178, 1196 (10th Cir. 2017).

Moreover, an agency's attempt to rewrite an unambiguous statute in the face of contrary judicial precedent, comes with dire constitutional consequences. Administrative agencies may "fill [] statutory gap[s]" left by "ambiguities in statutes within an agency's jurisdiction to administer," even at the expense of prior judicial determinations, only to the extent Congress implicitly "delegated" such responsibility to the agency. *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005). But this is only true where there is a genuine ambiguity: "if the prior court decision holds that its construction follows from the unambiguous terms of the statute [it] thus leaves no room for agency discretion." *Id.* at 982. If, however, an agency attempts to "override what a court believes to be the best

interpretation" of an *unambiguous* statute, this would impermissibly make "judicial decisions subject to reversal by executive officers." *Id.* at 983 (quoting dissenting opinion of Scalia, J., 545 U.S. at 1017). Such an outcome would be both "bizarre" and "probably unconstitutional" because "Article III courts do not sit to render decisions that can be reversed or ignored by executive officers." *Id.* at 1017 (Scalia, J., dissenting).

As discussed, the statute 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).

In the course of criminally prosecuting people for violating the statute at issue here, DOJ successfully argued for decades that the precise terms it now seeks to redefine were not ambiguous. *See, e.g.*, *United States v. Williams*, 364 F.3d 556, 558 (4th Cir. 2004) (finding the definition of "machinegun" to be unambiguous). Courts have likewise consistently ruled that the statutory definition of "machinegun" "is unambiguous." *United States v. TRW Rifle 7.62X51mm Caliber, One Model 14 Serial 593006*, 447 F.3d 686, 689 n. 4 (9th Cir. 2006).

Courts also have ruled specifically that the "common meaning of 'automatically' is readily known by laypersons" and "a person of ordinary intelligence would have understood the common meaning of the term—'as the result of a self-acting mechanism.'" *Olofson*, 563 F.3d at 660. Furthermore, the phrase "a single function of the trigger" is "plain enough" that efforts to parse it further become "brazen" and "puerile." *Fleischli*, 305 F.3d at 655.

ATF cannot have it both ways. If the statute is clear enough to allow criminal prosecution for scores of people, it cannot also be so vague that it must be redefined to extend prosecution to bump stock owners. Even if the Final Rule did not conflict with the statute, ATF had no power to issue the Final Rule because there was no statutory ambiguity for it to resolve. *See New Mexico*, 854 F.3d at 1223. And agencies may not reinterpret statutes that Article III courts have previously deemed unambiguous. *See Brand X Internet Servs.*, 545 U.S. at 982.

The district court sidestepped this analysis, concluding that the definition of a machinegun was ambiguous, and thus that the Attorney General had "been implicitly delegated interpretive authority to define

ambiguous words or phrases." (Aplt. App. at A133.) The district court asserted that "when Congress leaves terms in a statute undefined, the agency charged with administering that statute has been implicitly delegated the authority to clarify those terms." (Aplt. App. at A132.) Apparently, unlike previous courts, the court below viewed the terms "automatically" and "single function of the trigger" as ambiguous merely because they were not defined in the statute. (Aplt. App. at A133.)

The district court's logic would necessarily find ambiguity in *every* undefined statutory term. But in construing statutes, courts "give undefined terms their ordinary meanings," and the lack of a statutory definition does not render a statute ambiguous. *In re Taylor*, 899 F.3d 1126, 1129 (10th Cir. 2018); *see also United States v. Theis*, 853 F.3d 1178, 1181 (10th Cir. 2017) (undefined term was not ambiguous after determining term's "plain meaning"); *United States v. Day*, 700 F.3d 713, 725 (4th Cir. 2012) ("It is beyond cavil that a criminal statute need not define explicitly every last term within its text[.]"). If agencies can rewrite statutes by defining every undefined term, Congress cannot control the law. No matter how clear the statute, some term will always

be left undefined—or else the definitions themselves will have undefined terms in them. But "silence does not always constitute a gap an agency may fill"; often it "simply marks the point where Congress decided to stop authorization to regulate." *Oregon Rest. & Lodging Ass'n v. Perez*, 843 F.3d 355, 360, 362 (9th Cir. 2016) (O'Scannlain, J., dissenting from the denial of rehearing en banc on behalf of 10 judges). Indeed, reading Congress' silence as an implicit grant of authority is both "a caricature of *Chevron*" and a "notion [] entirely alien to our system of laws." *Id.* at 359-60; *accord Marlow v. New Food Guy, Inc.*, 861 F.3d 1157, 1163-64 (10th Cir. 2017) ("Were courts to *presume* a delegation of power absent an express withholding of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well.") (internal citation and quotation marks omitted).

While Congress did not necessarily anticipate the development of bump stocks, it did clearly choose to use unambiguous statutory terms to draw a line between weapons that fire one bullet with a single function of the trigger and machineguns, which fire multiple rounds continuously with one function of the trigger. Semiautomatic weapons

existed at the time the NFA was drafted and passed in 1934. Over opposition from the industry, Congress included those weapons under the original prohibition. But Congress then restored that distinction in the 1968 amendments. By restoring the statutory distinction between semiautomatic weapons and machineguns, Congress unmistakably recognized a difference in the internal mechanism that allowed a machinegun to fire multiple rounds continuously with one function of the trigger and a semiautomatic weapon, which fires only one round with each function of the trigger.

The district court may not "manufacture[] an ambiguity" from Congress' failure to define every term in the statute or to "foreclose each exception that could possibly be conjured or imagined." *See Prestol Espinal v. Attorney Gen.*, 653 F.3d 213, 220-21 (3d Cir. 2011). And as ATF insisted for years, Congress' directive was that bump stocks do not meet the unambiguous statutory terms. Because "the statute is not ambiguous" the Final Rule is "invalid and unenforceable." *See New Mexico*, 854 F.3d at 1224, 1231.

In the end, the district court's decision causes the "bizarre" and "probably unconstitutional" result of making the prior judicial decisions

interpreting the precise statutory terms at issue "subject to reversal by executive officers." *See Brand X Internet Servs.*, 545 U.S. at 1017 (Scalia, J., dissenting). Indeed, because Article III courts have previously ruled on the very question of whether these statutory terms were ambiguous, see *Olofson*, 563 F.3d at 660 and *Fleischli*, 305 F.3d at 655, this should "leave[] no room for agency discretion" on this threshold question. *Brand X Internet Servs.*, 545 U.S. at 982. Yet the district court allowed ATF to reverse these prior judicial decisions, and in the process unlawfully expand its implicit delegation of lawmaking authority and create new crimes and new criminals retroactively. This determination was legal error and warrants reversal.

C. Even If the Statute Were Ambiguous, the District Court Erred by Refusing to Apply the Rule of Lenity

The district court compounded its error by construing the statute's purportedly ambiguous terms in favor of the strictest and most punitive possible reading, contrary to the rule of lenity.

The district court determined that ATF only had the power to issue the Final Rule because the "undefined or ambiguous term[s]" in the statute "amount[ed] to an implicit delegation of interpretive power" under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,

467 U.S. 837 (1984). (Aplt. App. at A133, n. 8.) At the same time, however, the district court refused to apply the rule of lenity to resolve this ambiguity, and even questioned whether the rule of lenity would apply in this case in the face of agency deference. The court then adopted ATF's interpretation, even though it would make law-abiding bump stock owners into felons merely for relying on past ATF approval of bump stocks.

The rule of lenity is constitutionally *required* and dictates that any "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Skilling v. United States*, 561 U.S. 358, 410 (2010); *see also United States v. Kozminski*, 487 U.S. 931, 952 (1988). The rule of lenity holds that a law must speak "in language that is clear and definite" if it is to render something a crime. *United States v. Bass*, 404 U.S. 336, 347 (1971) (citation and internal quotation marks omitted). "Application of the rule of lenity ensures that criminal statutes will provide fair warning concerning conduct rendered illegal and strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability." *Liparota v. United States*, 471 U.S. 419, 427 (1985).

This Court has recognized that the rule of lenity applies when confronted with agency rules that have criminal consequences and requires a reviewing court to ensure that such regulations are "not in conflict with interpretive norms regarding criminal statutes." *N.L.R.B. v. Oklahoma Fixture Co.*, 332 F.3d 1284, 1287 (10th Cir. 2003) (en banc). This requirement means this Court must apply the rule of lenity and read the scope of a criminal prohibition "narrowly," and resolve any statutory ambiguities against ATF. *Id*. at 1287 n. 5.

So if there were an ambiguity in the statute, the rule of lenity's "fair warning" requirement would forbid ATF from revising the statutory language through the Final Rule in such an unforeseeable way. It is difficult to imagine a more archetypical scenario than this one for the rule's application. ATF not only repeatedly, formally, and publicly declared bump stocks to be legal, it did so for the type of device that Mr. Aposhian purchased. *See Marianos Letter*, *Slide Fire Approval*. But now, after Mr. Aposhian has relied on ATF's permission, the same prosecutorial agency has declared him to have *always* been a felon for following ATF's advice. ATF did not provide "fair warning;" it set a trap. To avoid the dire constitutional problems that would arise from this

tactic, the rule of lenity requires this Court to "resolve doubts in favor" of Mr. Aposhian and adopt ATF's own prior interpretation. *See Bass*, 404 U.S. at 348.

The district court disregarded the rule of lenity entirely because it determined that the Final Rule was "the best interpretation of the statute," and thus there was neither any ambiguity to resolve in Mr. Aposhian's favor, nor was it necessary to afford ATF deference to its proffered interpretation. (Aplt. App. at A133, n. 8.) But this conclusion is internally inconsistent. If ATF *only* had the authority to issue the Final Rule because the statute was ambiguous, then there necessarily was an ambiguity to be "resolved in favor of lenity." *See Skilling*, 561 U.S. at 410. The court nevertheless (and without saying so) resolved the ambiguity in ATF's favor, despite ATF's own past insistence to Mr. Aposhian himself that the Slide Fire device was not a prohibited item. (Aplt. App. at A133, n. 8.) This determination violates both the constitutional command that the law provide fair warning and that it allow only the *legislature*, not prosecutors or the courts, to define the scope of crimes. *See Liparota*, 471 U.S. at 427. It also amounts to a conclusion that Mr. Aposhian should have known better than to rely on

ATF's definitive past statements about the statute's reach. This legal error warrants reversal.

D. The District Court Erred by Concluding Bump Stocks Have Always Been Machineguns under the Statute

Finally, the district court erred when it insisted that the Final Rule "represents the best interpretation of the statute." (Aplt. App. at A136). For this conclusion to be correct, as ATF has acknowledged, this Court must agree that the statute has always classified bump stocks as machineguns, and ATF itself has always been wrong about its reading of the statute. Or as ATF argued before the D.C. Circuit, "any bump stock made after 1986 has *always* been a machinegun," "notwithstanding a number of prior contrary interpretations by the agency." *Guedes*, 920 F.3d at 20.

But such a conclusion is not faithful to the statute, the rule of lenity, or even to ATF's own understanding of its actions as set out in the Final Rule.

The district court was correct that this issue is resolved by finding the "best interpretation of the statute" using traditional canons of statutory construction. (Aplt. App. at A133 n. 8, A136.) As the parties have agreed, a court owes no deference to a prosecutor's interpretation

of a criminal law. *Abramski v. United States*, 573 U.S. 169, 203 (2014). ATF and DOJ have "repeatedly stressed that they neither request, nor believe their interpretations are entitled to, any measure of deference." (Aplt. App. at A133 n. 8). Therefore, this Court must "proceed to determine the meaning of [the statute] the old-fashioned way: [it] must decide for [itself] the best reading." *Miller v. Clinton*, 687 F.3d 1332, 1342 (D.C. Cir. 2012).

This Court should accept ATF's waiver of reliance on deference, as the district court did, because an agency may always decline to exercise its delegated authority. *Chevron* deference applies, if at all, because Congress has delegated "authority to the agency to elucidate a specific provision of the statute by regulation." *Chevron, U.S.A. Inc.*, 467 U.S. at 843. And when an agency declines to exercise that authority and "doesn't ask for deference to its statutory interpretation, '[the Court] need not resolve the … issues regarding deference which would be lurking in other circumstances.'" *Hydro Res., Inc. v. E.P.A.*, 608 F.3d 1131, 1146 (10th Cir. 2010) (en banc) (quoting *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 477 (1992)). Indeed, other courts have routinely recognized that reliance on *Chevron* deference is a

waivable, non-jurisdictional argument. *See, e.g., Glob. Tel*Link v. F.C.C.*, 866 F.3d 397, 408 (D.C. Cir. 2017) ("[I]t would make no sense for this court to determine whether the disputed agency positions advanced in the Order warrant *Chevron* deference when the agency has abandoned those positions[.]"); *Neustar, Inc. v. F.C.C.*, 857 F.3d 886, 894 (D.C. Cir. 2017) (agency "forfeited any claims to *Chevron* deference" because "*Chevron* deference is not jurisdictional and can be forfeited"); *Albanil v. Coast 2 Coast, Inc.*, 444 F. App'x 788, 796 (5th Cir. 2011) (unpublished) ("Plaintiffs did not raise their *Chevron* argument in the district court … .Thus, they have waived this argument."); *C.F.T.C. v. Erskine*, 512 F.3d 309, 314 (6th Cir. 2008) ("[T]he CFTC waived any reliance on *Chevron* deference by failing to raise it to the district court."). ATF has affirmatively waived reliance on deference both at the district court and in companion litigation, and thus, not only is it unnecessary for this Court to "resolve the … issues regarding deference which would be lurking in other circumstances" *Estate of Cowart*, 505 U.S. at 477, but this Court *cannot* now review that issue. *See United States v. DeVaughn*, 694 F.3d 1141, 1158 (10th Cir. 2012) (government's

waiver of non-jurisdictional argument precluded appellate review of the subject of waiver).

Waiver aside, ATF's rejection of deference in favor of the rule of lenity was required not only by precedent, but by clear constitutional limits on the power of courts to defer to administrative agencies.

"[C]riminal laws are for courts, not for the Government, to construe." *Abramski*, 573 U.S. at 191; *see also United States v. Apel*, 571 U.S. 359, 369 (2014) ("[W]e have never held that the Government's reading of a criminal statute is entitled to any deference.").This is why, as discussed above, this Court, sitting en banc, has recognized that the rule of lenity limits deference to agency interpretation, and has required that agency interpretation not only be reasonable, but also "not in conflict with interpretive norms regarding criminal statutes." *Oklahoma Fixture Co.*, 332 F.3d at 1287. To defer, in such instances, would "upend ordinary principles of interpretation" and allow "federal administrators [to] in effect create (and uncreate) new crimes at will, so long as they do not roam beyond ambiguities that the laws contain." *Whitman v. United States*, 135 S. Ct. 352, 353 (2014) (Scalia, J., statement regarding denial of certiorari, joined by Thomas, J.). The

application of *Chevron* deference in such a setting "threatens a complete undermining of the Constitution's separation of powers, while the application of the rule of lenity preserves them by *maintaining the legislature as the creator of crimes*." *Esquivel-Quintana v. Lynch*, 810 F.3d 1019, 1030 (6th Cir. 2016) (Sutton, J., concurring and dissenting in part) (emphasis added), *reversed on other grounds by* 137 S.Ct. 1562 (2017).

Construing the statute "the old-fashioned way," it is readily apparent the Final Rule does not reflect the best understanding of what the statute has always meant. *See Miller*, 687 F.3d at 1342. The statute and the final rule do not line up—"The statute specifies a single function; the Rule specifies a single function *plus*." *Guedes*, 920 F.3d at 35 (Henderson, J., dissenting). The Final Rule also discards several criteria previously required to deem a firearm a machinegun under the most natural reading of the statute. A firearm is not a machinegun if either [1] the shooter is required to provide additional "manual manipulation" between shots; or [2] the trigger "mechanical[ly] reset[s]" between shots. *Staples*, 511 U.S. at 602 n. 1; *Slide Fire Approval*. A semiautomatic firearm equipped with a bump stock requires both

additional manual manipulation and a mechanical reset of the trigger between shots. The best reading of the statute is the bipartisan one adopted by ATF itself from 2006 until 2018—bump stocks are not machineguns. Only Congress can change that.

Indeed, the Final Rule itself rejects the notion that it reflects what the statute has always meant. As the *Guedes* majority recognized:

> [ATF's] position that bump-stock owners have always been felons—is incompatible with the Rule's terms. The Rule gives no indication that bump stocks have always been machine guns or that bump-stock owners have been committing a felony for the entire time they have possessed the device. The Rule in fact says the opposite. After all, it establishes an effective date, *after* which (and only after which) bump-stock possession will be prohibited. 83 Fed. Reg. at 66,523. A future effective date of that kind cannot be reconciled with a supposed intent to convey that bump-stock possession "has always been banned."

Guedes, 920 F.3d at 20.[2]

ATF's newest position, crafted within this litigation, simply cannot pass muster. Bump stocks have *never* been machineguns, and the district court erred in concluding otherwise.

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[2] Of course, the Final Rule's language is also an acknowledgment of ATF's unconstitutional attempt to "create (and uncreate) new crimes at will," by creating entirely new, and retroactive, criminal prohibitions. *See Whitman*, 135 S. Ct. at 353 (2014) (Scalia, J., statement regarding denial of certiorari, joined by Thomas, J.).

II. THE REMAINING FACTORS WARRANT AN INJUNCTION

While the district court declined to rule on the remaining preliminary injunction factors, this Court has an adequate basis to conclude that they warrant an injunction. As a result, this Court should order the district court to preliminarily enjoin the Final Rule.

A. As the Parties Have Conceded, Mr. Aposhian Will Suffer Irreparable Harm Without Injunctive Relief

Absent an injunction Mr. Aposhian is "likely to suffer irreparable harm before a decision on the merits can be rendered." *Winter*, 555 U.S. at 22. "When an alleged constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary." *Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001) (internal citation and quotation marks omitted). "Any deprivation of *any* constitutional right" "makes an injury 'irreparable'" even without a prior "decision analyzing the specific injury asserted[.]" *Free the Nipple-Fort Collins v. City of Fort Collins, Colorado*, 916 F.3d 792 (10th Cir. 2019) (emphasis added). And the Supreme Court has recognized that individuals have a protectable interest in maintaining the separation of powers. *See Bond v. United States*, 564 U.S. 211, 222 (2011) ("Separation-of-powers principles are intended, in part, to protect each

branch of government from incursion by the others. Yet the dynamic between and among the branches is not the only object of the Constitution's concern. The structural principles secured by the separation of powers protect the individual as well."); *Boumediene v. Bush*, 553 U.S. 723, 742 (2008) (stating that the separation of powers "serves not only to make Government accountable but also to secure individual liberty"); *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring) ("Liberty is always at stake when one or more of the branches seek to transgress the separation of powers."); *I.N.S. v. Chadha*, 462 U.S. 919, 929 (1983) (sustaining individual challenge to Congressional action as being violative of "the constitutional doctrine of separation of power.").

Here, the "parties do not dispute that Mr. Aposhian will experience irreparable harm if the injunction is denied." (Aplt. App. at A131.) Without an injunction, Mr. Aposhian had to surrender his lawfully acquired bump stock, in compliance with a rule that was issued in violation of constitutional limits set out in Articles I, § 1 and II, § 3 of the U.S. Constitution. Mr. Aposhian therefore faces further irreparable

constitutional injury warranting an injunction. *See Kikumura*, 242 F.3d at 963.

B. The Injunction Is Equitable and in the Public Interest

A party seeking an injunction on appeal must demonstrate the injunction will not "substantially injure the other parties interested in the proceeding" and the injunction is in the "public interest." *Nken v. Holder*, 556 U.S. 418, 434 (2009). "These factors merge when the Government is the opposing party." *Id.* at 435.

"[I]t is always in the public interest to prevent the violation of a party's constitutional rights." *Awad v. Ziriax*, 670 F.3d 1111, 1132 (10th Cir. 2012) (internal citation and quotation marks omitted). Moreover, a government's interest in enforcing regulations "pales in comparison" to either a plaintiff's "constitutional" or even "statutory rights." *Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1295 (D. Colo. 2012) (Kane, J.), *aff'd*, 542 F. App'x 706 (10th Cir. 2013). When an injunction "merely delay[s]" the effective date of a regulation, the government is "not prejudiced by a preliminary injunction," and the balance of equities tips in favor of a plaintiff. *Pennsylvania v. Trump*, 281 F.Supp.3d 553, 585 (E.D. Pa. 2017).

The balance of equities tips heavily in favor of the injunction. Mr. Aposhian's interests involve both his constitutional rights to be bound only by laws issued by Congress and statutory limitations on ATF's actions. If the Final Rule remains in effect, he will be forced to abide by a law that is itself unlawful. On the other hand, the government faces only a delay in its Final Rule under the preliminary injunction at issue here, and only with respect to Mr. Aposhian himself, which is a concern that "pales in comparison" to Mr. Aposhian's interests. *See Newland*, 881 F. Supp. 2d at 1295.

Moreover, ATF's argument below that its general interest in "public safety" warrants rejection of the injunction, (Aplt. App. at A106), ignores the scope of the injunction at issue. Mr. Aposhian has not requested a nationwide injunction. ATF's interest in further depriving one citizen of one plastic accessory is minimal. ATF has never suggested he is a danger, and, as a law-abiding citizen who has sought this Court's intervention to affirm the legality of his conduct, ATF cannot plausibly suggest that public safety demands that he be deprived of his device any longer. Thus, this Court should order the district court to enjoin the

Final Rule and ATF to return Mr. Aposhian's device pending the ultimate resolution of this case.

CONCLUSION

The district court was required to issue the preliminary injunction because the Final Rule is invalid. First, the statutory terms are not ambiguous, and ATF therefore had no power to seek to define them further with the Final Rule. Second, if the statute was ambiguous, the Final Rule violates the rule of lenity, and is invalid for this reason as well. Third, the Final Rule conflicts with the statute's plain terms because the rule redefines what it means for a weapon to fire automatically. Fourth, the Final Rule is not the best reading of the statute, and bump stocks have never been machineguns.

REQUEST FOR ORAL ARGUMENT

Oral argument is requested to offer the Court the chance to more fully develop and clarify the issues and facts.

June 12, 2019

Respectfully,

/s/ Caleb Kruckenberg
Caleb Kruckenberg
Litigation Counsel
Harriet Hageman
Steve Simpson
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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I hereby certify that this document complies with Federal Rule of Appellate Procedure 32(a)(7)(B)(ii). It is printed in Century Schoolbook, a proportionately spaced font, and includes 11167 words, excluding items enumerated in Rule 32(a)(7)(B)(iii). I relied on my word processor, Microsoft Word, to obtain the count.

I hereby certify that all required privacy redactions have been made pursuant to 10th Cir. R. 25.5, any required paper copies to be submitted to the Court are exact copies of the version submitted electronically, and the electronic submission was scanned for viruses with the most recent version of a commercial virus scanning program, and is free of viruses.

Respectfully,

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CERTIFICATE OF SERVICE

I hereby certify that the original and 7 copies were mailed by Federal Express, next-day delivery, to the Clerk of the Court at the Byron White U.S. Courthouse, 1823 Stout St., Denver, Colorado 80257 on June 12, 2019. This document was electronically filed using the Tenth Circuit's CM/ECF system, which sent notification of such filing to all counsel of record.

Respectfully,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

W. CLARK APOSHIAN, Plaintiff, v. WILLIAM P. BARR,[1] Attorney General of the United States, *et al.*, Defendants.	**MEMORANDUM DECISION AND ORDER DENYING MOTION FOR PRELIMINARY INJUNCTION** Case No. 2:19-cv-37 District Judge Jill N. Parrish

This matter comes before the court on plaintiff W. Clark Aposhian's Motion for Preliminary Injunction filed on January 17, 2019. (ECF No. 10). Defendants filed an opposition on February 6, 2019, (ECF No. 25), to which Mr. Aposhian replied on February 11, 2019, (ECF No. 26). The court heard oral argument for this motion on February 14, 2019. On the basis of that hearing, the parties' memoranda, a review of relevant law, and for the reasons below, plaintiff's Motion for Preliminary Injunction is denied.

I. BACKGROUND

A. REGULATORY FRAMEWORK OF MACHINE GUNS AND BUMP-STOCK-TYPE DEVICES

Congress began regulating machine guns with its passage of the National Firearms Act of 1934 (the "NFA"). That act defined such weapons as follows:

> The term "machinegun"[2] means any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without

[1] This action was initially commenced against the former Acting Attorney General Matthew Whitaker in his official capacity. By operation of Federal Rule of Civil Procedure 25(d), Mr. Barr was automatically substituted upon his confirmation as Attorney General of the United States.

> 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.

26 U.S.C. § 5845(b). The Gun Control Act of 1968 (the "GCA") incorporated this definition by reference into the criminal code. *See* 18 U.S.C. § 921(23) ("The term 'machinegun' has the meaning given such term in section 5845(b) of the National Firearms Act . . . ."). Today, with limited exceptions, it is "unlawful for any person to transfer or possess a machinegun." 18 U.S.C. § 922(o).

In 2006, the Bureau of Alcohol, Tobacco, Firearms, and Explosives (the "ATF") ruled that a bump-stock-type device[3] called the Akins Accelerator qualified as a machine gun. The Akins Accelerator employed internal springs to harness the weapon's recoil energy to repeatedly force the rifle forward into the operator's finger. In labeling the Akins Accelerator a machine gun, the ATF interpreted the statutory language "single function of the trigger" to mean "single pull of the trigger." The inventor of the Akins Accelerator subsequently challenged this interpretation in federal court. After the district court rejected the challenge, the Eleventh Circuit

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[2] The relevant statutes utilize an outmoded, one-word "machinegun" spelling. Except when quoting statutory language, this order uses the more contemporary, two-word "machine gun" spelling.

[3] "Shooters use bump-stock-type devices with semiautomatic firearms to accelerate the firearms' cyclic firing rate to mimic automatic fire. These devices replace a rifle's standard stock [the component of a rifle that rests against the shooter's shoulder] and free the weapon to slide back and forth rapidly, harnessing the energy from the firearm's recoil either through a mechanism like an internal spring or in conjunction with the shooter's maintenance of pressure (typically constant forward pressure with the non-trigger hand on the barrel-shroud or fore-grip of the rifle, and constant rearward pressure on the device's extension ledge with the shooter's trigger finger). . . . [W]hen a bump-stock-type device is affixed to a semiautomatic firearm, the device 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." 83 Fed. Reg. at 66516.

Court of Appeals affirmed, concluding that the ATF's interpretation was "consonant with the statute and its legislative history." *See Akins v. United States*, 312 F. App'x 197, 200 (11th Cir. 2009).

From 2008 to 2017, the ATF issued ten letter rulings in response to requests to classify bump-stock-type devices. Applying the "single pull of the trigger" interpretation, these rulings found that the devices at issue—including Mr. Aposhian's Slide Fire device—indeed allowed a shooter to fire more than one shot with a single pull of the trigger. However, because the subject devices did not rely on internal springs or other mechanical parts to channel recoil energy like the Akins Accelerator, the ATF concluded that they did not fire "automatically" within the meaning of the statutory definition.

B. THE FINAL RULE

On October 1, 2017, a lone shooter employing multiple semi-automatic rifles with attached bump-stock-type devices fired several hundred rounds of ammunition into a crowd in Las Vegas, Nevada, killing 58 people and wounding roughly 500 more. Following this event, members of Congress urged the ATF to examine whether devices like the one used in the attack were actually machine guns prohibited by law. On December 26, 2017, the Department of Justice (the "DOJ") published an Advanced Notice of Proposed Rulemaking (ANPRM), soliciting comments and manufacturer/retailer data regarding bump-stock-type devices. *See* Application of the Definition of Machinegun to "Bump Fire" Stocks and Other Similar Devices, 82 Fed. Reg. 60929 (Dec. 26, 2017). On February 20, 2018, the President issued a memorandum directing the Attorney General "to dedicate all available resources to complete the review of the comments received, and, as expeditiously as possible, to propose for notice and comment a rule banning all devices that turn legal weapons into machineguns." Application of the Definition of

Machinegun to "Bump Fire" Stocks and Other Similar Devices; Memorandum for the Attorney General, 83 Fed. Reg. 7949 (Feb. 23, 2018).

On March 29, 2018, the DOJ published a notice of proposed rulemaking (NPRM). *See* Bump-Stock-Type Devices, 83 Fed. Reg. 13442 (Mar. 29, 2018). Following a period of public comment, the DOJ issued a Final Rule on December 26, 2018 that (1) formalizes the ATF's longstanding interpretation of "single function of the trigger" to mean "single pull of the trigger"; (2) interprets "automatically" to mean "as the result of a self-acting or self-regulating mechanism that allows the firing of multiple rounds through a single pull of the trigger"; and (3) concluding that bump-stock-type devices are machine guns proscribed by the statutory scheme as interpreted by the Final Rule. *See* Bump-Stock-Type Devices, 83 Fed. Reg. 66514 (Dec. 26, 2018). The Final Rule directs owners of bump-stock-type devices to either destroy or surrender them to the ATF before the Final Rule goes into effect on March 26, 2019. 83 Fed. Reg. 66515.

Mr. Aposhian lawfully purchased and continues to own a Slide Fire bump-stock-type device. On January 16, 2019, Mr. Aposhian filed suit against the Attorney General of the United States, the DOJ, the Director of the ATF, and the ATF. (ECF No. 2). On January 17, 2019, Mr. Aposhian filed this motion for preliminary injunction seeking to enjoin the Final Rule from going into effect on March 26, 2019. (ECF No. 10).

II. PRELIMINARY INJUNCTION STANDARD

To obtain preliminary injunctive relief, a movant must establish: "(1) a substantial likelihood of success on the merits; (2) irreparable harm to the movant if the injunction is denied; (3) the threatened injury outweighs the harm that the preliminary injunction may cause the opposing party; and (4) the injunction, if issued, will not adversely affect the public interest." *Gen. Motors Corp. v. Urban Gorilla, LLC*, 500 F.3d 1222, 1226 (10th Cir. 2007).

III. ANALYSIS

The parties do not dispute that Mr. Aposhian will experience irreparable harm if the injunction is denied.[4] And though they offer short arguments related to the third and fourth prongs of the preliminary injunction analysis, the parties devote the lion's share of their memoranda to the merits prong.

As explained below, Mr. Aposhian has not carried his burden of showing a substantial likelihood of success on the merits. As a result, his motion for a preliminary injunction must be denied.

This court's review of the Final Rule is governed by the Administrative Procedure Act (the "APA), 5 U.S.C. § 706(2)(A)–(C).[5] Under this framework, Mr. Aposhian asserts two general

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[4] They do, however, disagree about what that irreparable harm is. Mr. Aposhian suggests that, absent an injunction, he will be harmed by being forced to comply with a rule that has been promulgated in contravention of constitutional principles of separation-of-powers. Defendants concede only that Mr. Aposhian's harm is the loss of his Slide Fire device, which, they assert, is irreplaceable because no entity presently manufactures such a device. Although it is clearly the case that the threatened infringement of a plaintiff's *individual* constitutional rights will satisfy the irreparable harm prong, the court can find no basis in law for the proposition that a generalized separation-of-powers violation gives rise to an injury on the part of an individual citizen. Regardless, articulating the precise harm becomes necessary only when weighing the threatened injury against the harm caused by the preliminary injunction (*i.e.*, the third prong). Because Mr. Aposhian's motion fails on the first prong—likelihood of success on the merits—the court need not resolve this dispute.

[5] Mr. Aposhian also raises a vague constitutional challenge supported by citations to cases involving the nondelegation doctrine. To the degree that Mr. Aposhian intended to assert a nondelegation challenge, the court can confidently reject any argument that the statutory grant of interpretive authority at issue here is devoid of an intelligible principle upon which the ATF may act. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472–76 (2001). To the extent Mr. Aposhian instead meant to assert a general separation-of-powers challenge to the Final Rule, such a challenge is subsumed by the APA's directive that a reviewing court set aside agency action taken "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." § 706(2)(C).

arguments. First, that Congress has not empowered the Attorney General[6] to interpret the NFA and the GCA. And second, that the Final Rule's interpretations conflict with the statutory language. The court addresses each challenge in turn.

A. Interpretive and Rulemaking Authority

Mr. Aposhian argues that the Final Rule was issued in excess of statutory jurisdiction because the NFA does not vest the Attorney General or the ATF with rulemaking authority. In response, the defendants argue, and the court agrees, that the Final Rule does no more than interpret undefined statutory terms.[7] Although the Attorney General and ATF promulgated their interpretations through the more laborious, formal notice-and-comment process, the use of that procedure does not alter the Final Rule's interpretive character. And Mr. Aposhian does not dispute that the ATF, under the direction of the Attorney General, is empowered to interpret and administer both the NFA and the GCA. *See* Pl.'s Mot. for Prelim. Inj. (ECF No. 10 at 6); 18 U.S.C. § 926(a); 26 U.S.C. § 7801(a)(2); *Guedes v. ATF*, No. 18-cv-2988 (DLF), 2019 WL 922594, at *9 n.3 (D.D.C. Feb. 25, 2019) (rejecting challenges to the Final Rule's interpretations

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[6] The Attorney General has delegated, "[s]ubject to the direction of the Attorney General and Deputy Attorney General," the responsibility for administering and enforcing the NFA and the GCA to the ATF—an agency within the Department of Justice. *See* 28 CFR § 0.130(a)(1)–(3).

[7] Although the Final Rule is merely interpretive in nature, it appears, contrary to Mr. Aposhian's argument, that the Attorney General has indeed been granted rulemaking authority under the NFA. Mr. Aposhian is correct that 26 U.S.C. § 7805(a) declares that "the Secretary [of the Treasury] shall prescribe all needful rules and regulations for the enforcement of this title[.]" But he fails to account for the statutory language in § 7801(a)(2)(A), which functionally substitutes "Attorney General" for "Secretary of the Treasury" in § 7805(a) insofar as the rulemaking at issue relates to, among other weapons, machine guns. § 7801(a)(2)(A), (A)(ii) ("[T]he term 'Secretary' or 'Secretary of the Treasury' shall, when applied to [§ 7805, to the extent § 7805 relates to the enforcement and administration of Chapter 53, governing machine guns], mean the Attorney General . . . ."). And the Attorney General's rulemaking authority under the GCA is beyond question. 18 U.S.C. § 926(a) ("The Attorney General may prescribe only such rules and regulations as are necessary to carry out the provisions of this chapter . . . .").

and the ATF's interpretive authority, noting the "ATF's clear authority to interpret and administer" the relevant statutes).

In addition to his explicit statutory authority, the Attorney General has been implicitly delegated interpretive authority to define ambiguous words or phrases in the NFA and the GCA. Congress did not define "automatically" or "single function of the trigger," and when Congress leaves terms in a statute undefined, the agency charged with administering that statute has been implicitly delegated the authority to clarify those terms.[8]

B. FINAL RULE INTERPRETATIONS

The Final Rule interprets "single function of the trigger" to mean "single pull of the trigger" and analogous motions, and it interprets "automatically" to mean "as the result of a self-acting or self-regulating mechanism that allows the firing of multiple rounds through a single pull of the trigger." 83 Fed. Reg. Having supplied those definitions, the Final Rule clarifies that bump-stock-type devices—like the Slide Fire device owned by Mr. Aposhian—are machine guns proscribed by law. The court examines each interpretation in turn.

[8] The notion that an undefined or ambiguous term amounts to an implicit delegation of interpretive power is borne, unmistakably, from the administrative law doctrine announced by *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). In setting forth this principle in its memorandum in opposition, however, defendants went out of their way to avoid citing *Chevron* and its progeny, and repeatedly stressed that they neither request, nor believe their interpretations are entitled to, any measure of deference. *See* Defs.' Mem. in Opp'n (ECF No. 25 at 29) (citing *United States v. Apel*, 571 U.S. 359, 369 (2014) (remarking that the Supreme Court has never accorded deference to an agency's *internal* reading of a criminal statute)). This opinion is puzzling because it is far from settled that an agency is entitled to no deference when its interpretations implicate criminal liability. *See United States v. White*, 782 F.3d 1118, 1135 n.18 (10th Cir. 2015) (collecting Supreme Court and Tenth Circuit cases applying at least some deference to interpretations that affect criminal penalties). The court need not confront this deference dilemma here because the Final Rule's clarifying definitions reflect the best interpretation of the statute.

1. "Single Function of the Trigger"

The statutory language "single function of the trigger" gives rise to the parties' dispute about what "function" means.[9] Mr. Aposhian contends that "function" refers to the mechanical movement of the trigger, while the Final Rule adopts a shooter-focused interpretation. Because bump-stock-type devices operate through multiple movements of the trigger (by rapidly "bumping" the trigger into the operator's finger), a mechanically-focused interpretation would omit bump-stock-type devices from the statute's definition.

The court finds that "single pull of the trigger" is the best interpretation of "single function of the trigger," a conclusion similarly reached by the Eleventh Circuit Court of Appeals. *See Akins v. United States*, 312 F. App'x 197, 200 (11th Cir. 2009) ("The interpretation by the [ATF] that the phrase 'single function of the trigger' means a 'single pull of the trigger' is consonant with the statute and its legislative history."); *see also Guedes*, 2019 WL 922594, at *10 ("Tellingly, courts have instinctively reached for the word 'pull' when discussing the statutory definition of 'machinegun.'").

Moreover, it makes little sense that Congress would have zeroed in on the mechanistic movement of the trigger in seeking to regulate automatic weapons. The ill sought to be captured by this definition was the ability to drastically increase a weapon's rate of fire, not the precise mechanism by which that capability is achieved. At oral argument, defendants persuasively argued that the unusual choice of "function" is intentionally more inclusive than "pull." Thus,

[9] The court in *Guedes* noted, and this court agrees, that "dictionaries from the time of the NFA's enactment are of little help in defining a 'single function of the trigger.'" *Guedes*, 2019 WL 922594, at *9.

"function" was likely intended by Congress to forestall attempts by weapon manufacturers or others to implement triggers that need not be pulled, thereby evading the statute's reach.[10]

2. "Automatically"

The Final Rule interprets "automatically" to mean "as the result of a self-acting or self-regulating mechanism that allows the firing of multiple rounds through a single pull of the trigger." This interpretive language is borrowed, nearly word-for-word, from dictionary definitions contemporaneous to the NFA's enactment. *See* 83 Fed. Reg. 66519. The 1934 *Webster's New International Dictionary* defines the adjectival form "automatic" as "[h]aving a self-acting or self-regulating mechanism that performs a required act at a predetermined point in an operation[.]" 187 (2d ed. 1934); *see also* 1 *Oxford English Dictionary* 574 (1933) (defining "automatic" as "[s]elf-acting under conditions fixed for it, going of itself").

And as with "a single pull of the trigger," the Final Rule's interpretation of "automatically" accords with past judicial interpretation. *See United States v. Olofson*, 563 F.3d 652, 658 (7th Cir. 2009) (relying on the same dictionary definitions to conclude that "the adverb 'automatically,' as it modifies the verb 'shoots,' delineates how the discharge of multiple rounds from a weapon occurs: as the result of a self-acting mechanism . . . that is set in motion by a single function of the trigger and is accomplished without manual reloading.").

Mr. Aposhian's argument in opposing the propriety of this interpretation is difficult to follow, but it appears to relate to the requisite degree of automaticity. Specifically, he suggests that "[i]f a firearm requires separate physical input, even if not directed to the *trigger mechanism*, this still disrupts the automatic firing of each successive shot." (ECF No. 10 at 9)

[10] The Final Rule's interpretation does use "pull," but avoids the issue above by interpreting "'single function of the trigger' to mean 'single pull of the trigger' *and analogous motions*[.]" 83 Fed. Reg. at 66515 (emphasis added).

(emphasis in original). Because bump-stock-type devices require constant forward pressure by the shooter's non-trigger hand on the barrel or the shroud of the rifle, Mr. Aposhian argues, it does not fire "automatically."

But even weapons uncontroversially classified as machine guns require at least some ongoing effort by an operator. And Mr. Aposhian does not argue that the constant rearward pressure applied by a shooter's trigger finger in order to *continue* firing a machine gun means that it does not fire "automatically." Under Mr. Aposhian's view, it seems, the statute encompasses machine guns that require some, but not too much, ongoing physical actuation. But neither the statute nor the contemporaneous understanding of "automatic" provides any basis for an interpretation that restricts the degree of shooter involvement in an automatic process. As illustrated by the atextual line urged by Mr. Aposhian, any limit on the degree of physical input would invariably be supplied of whole cloth in service of one's desired result.

The Final Rule's interpretation of "automatically" is consistent with its ordinary meaning at the time of the NFA's enactment and accords with judicial interpretation of that language. Thus, it represents the best interpretation of the statute.

3. Classification of Bump-Stock-Type Devices as Machine Guns

Mr. Aposhian does not appear to argue that the interpretations above, if valid, would not permit the classification of his Slide Fire device as a machine gun. He does, however, request more aggressive judicial review of the Final Rule because of its allegedly political impetus, and because it represents a change in the ATF's position (*i.e.*, some devices previously ruled by the ATF to not be machine guns are now brought within the statutory ambit).

But the Supreme Court's modern administrative law jurisprudence expressly rejects both propositions. *See F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 523 (2009) (rejecting argument that heightened scrutiny applies to a "policy change [that] was spurred by significant

political pressure from Congress"); *Lockheed Martin Corp. v. Admin. Review Bd., Dep't of Labor*, 717 F.3d 1121, 1131 (10th Cir. 2013) ("The Supreme Court has rejected the notion that an agency's interpretation of a statute it administers is to be regarded with skepticism when its position reflects a change in policy."). Indeed, an agency's change in position need only be accompanied by the agency's acknowledgement that its position has changed, along with an explanation that "the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates." *F.C.C.*, 556 U.S. at 515 (emphasis in original).

The ATF's change in policy easily meets this standard. The Final Rule unambiguously acknowledges that the ATF is changing its position with respect to certain bump-stock-type devices, and explains that the ATF's prior rulings excluding those devices from the definition of machine gun "did not provide substantial or consistent legal analysis regarding the meaning of the term 'automatically,' as it is used in the NFA and GCA." 83 Fed. Reg. 66518. And the court has already determined that the definitions leading to the classification changes are permissible under, and in fact represent the best interpretation of, the statute. In sum, neither the alleged political genesis of the Final Rule nor the fact that it reflects a change in agency policy serve to undermine the Final Rule's validity.

Having found that each component of the Final Rule represents the best interpretation of the statute, the court cannot find that Mr. Aposhian is likely to succeed on the merits of his challenge to the Final Rule. Absent such a showing, an injunction may not issue.

IV. ORDER

For the reasons articulated, plaintiff's Motion for Preliminary Injunction is **DENIED.**

Signed March 15, 2019

BY THE COURT

Jill N. Parrish
United States District Court Judge