IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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

PLAINTIFF-APPELLANT'S REPLY BRIEF

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

September 16, 2019

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ATF's Final Rule, *Bump-Stock-Type Devices*, 83 Fed. Reg. 66514, 66553-54 (Dec. 26, 2018), is an invalid attempt to rewrite an unambiguous criminal law in such a way as to impose retroactive criminal liability on more than half a million Americans. ATF understands that the Final Rule is unlawful as written. Its only hope of salvaging the rule is to recast it as something other than what it actually is—a mere interpretive gloss that should have no binding effect on anyone. Even then, ATF insists its new interpretation of the statute is the *only* possible one, despite the fact that such a position is contrary to what ATF has said for more than a decade. ATF's Potemkin village is not reality and the Final Rule tries to do what ATF agrees that it may not—legislate in Congress' stead. It is therefore invalid and unenforceable.

I. BECAUSE ATF HAS CONCEDED THAT IT LACKS THE POWER TO ISSUE *ANY* LEGISLATIVE BUMP STOCK RULE, THE FINAL RULE IS VOID

The Final Rule is void as a matter of law because, as ATF has conceded, it lacked "the authority to engage in 'gap-filling' interpretations of what qualifies as a 'machinegun'" under the Gun

Control and National Firearms Acts. (*See* Appellees' Br. at 41.) The Final Rule, however, was designed to do just that—expand the definition of a "machinegun" to now include bump stocks, with such new legislative regulations taking effect only "*after* the effective date of th[e] regulation." Final Rule, 83 Fed. Reg. 66523 (emphasis added). The Final Rule is therefore invalid and unenforceable.

Recognizing that it has the lawful authority to issue legislative rules *only if* there is a statutory ambiguity, ATF concedes that "the Rule's application of the terms used to define 'machinegun' in the National Firearms Act is correct, and there is no ambiguity[.]" (Appellees' Br. at 35-36.) ATF then goes one step further and concedes that *it has no legislative rulemaking authority* at all. (Appellees' Br. at 40.) ATF agrees that "Congress did not expressly task the Attorney General with determining the scope of the criminal prohibition on machinegun possession" and that "statutory scheme does not … appear to provide the Attorney General the authority to engage in 'gap-filling' interpretations of what qualifies as a 'machinegun[.]'" (Appellees' Br. at 40-41.) ATF then argues that the Final Rule is an "interpretive" rule that does nothing more than provide "the best interpretation of the

statute" that bump stocks "were machineguns at the time of classification[.]" (Appellees' Br. at 36, 38, 40-41.) ATF has thus staked out the untenable position that the Bump Stock Final Rule is valid, *only* because it represents nothing more than a mere interpretation of an already unambiguous statutory prohibition.

This means that ATF agrees that the district court committed legal error. After all, the district court upheld the Final Rule only after concluding that "the Attorney General has been implicitly delegated interpretive authority to define ambiguous words or phrases in the NFA and the GCA" and that the term "machinegun" was ambiguous. (Aplt. App. at A133.) ATF's present defense of the Final Rule therefore tries to make up for what it agrees was the district court's erroneous legal analysis. (*See* Appellees' Br. at 35-36, 40-41.)

Beyond showing its disagreement with the district court, ATF's present argument also mean that if this Court decides that the Final Rule is *legislative*, ATF has conceded that is was promulgated without any lawful "authority" and is therefore void. (*See* Appellees' Br. at 40.) Looking to the text of the Final Rule, there is no doubt that it was meant to be a legislative rule with the full force of law and criminal

consequences. It is therefore "invalid and unenforceable" pursuant to the ATF's own analysis. *See New Mexico v. Dep't of Interior*, 854 F.3d 1207, 1221 (10th Cir. 2017).

No agency has the inherent power to make law. "[A]n agency literally has no power to act … unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). An agency may only "fill [] statutory gap[s]" left by "ambiguities in statutes within an agency's jurisdiction to administer" to the extent Congress "delegated" such responsibility to the agency. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005).

Even when such authority has been delegated, an agency is limited to filling in the "gaps" (if any) in a statute. "If the statute is not ambiguous" any further attempt to define its terms is "invalid and unenforceable." *New Mexico*, 854 F.3d at 1221; *see also Kisor v. Wilkie*, 139 S. Ct. 2400, 2414 (2019). "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).

ATF admits that Congress never granted to it the legislative authority to "determine[] the scope of the criminal prohibition on

machinegun possession" in the first place. (Appellees' Br. at 41.) This concession is well-taken. As Mr. Aposhian argued to the district court, "neither the Attorney General nor [] ATF has any substantive rulemaking authority" under either the Gun Control Act or National Firearms Act because the only rulemaking authority given to these entities was related to "administration and enforcement" or "interpretation" of the statutory terms. (Aplt. App. at A47 (citing 18 U.S.C. § 926(a), 26 U.S.C. § 7801(a)(2)(A), 7805(a)).) ATF has cited to those exact statutory provisions when acknowledging that it cannot change the definition of what is a prohibited "machinegun." (Appellees' Br. at 41 (citing § 926(a); 26 U.S.C. § 7805(a)).)

Mr. Aposhian also agrees with ATF that "there is no ambiguity" in the "terms used to define 'machinegun' in the National Firearms Act" and, as such, ATF had no authority to issue any legislative rules. (*See* Appellees' Br. at 35-36.) As Mr. Aposhian explained in his opening brief, and as numerous other courts have recognized, Congress "clearly cho[]se 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." (Appellant's Br. at 35.) After all, "DOJ successfully argued for decades that the precise terms it now seeks to redefine were not ambiguous." (Appellant's Br. at 32 (collecting cases).)

The only way the Final Rule could survive in any form is if it were recognized as being an interpretive rule—one that is designed to "advise the public of how the agency understands" the law. *Kisor*, 139 S. Ct. at 2420 (internal quotations omitted). However, mere interpretive rules "do *not* have the force of law" and can "never form[] the basis for an enforcement action." *Id*. (internal quotations omitted)

The Final Rule, by its own terms, operates as something that is substantially different than the minimal interpretation that ATF has the power to issue. Thus, while the Court of Appeals for the District of Columbia Circuit has upheld the Final Rule on other (highly contestable) grounds, it had no difficulty rejecting ATF's argument that the rule was a mere interpretation. According to the court: "All pertinent indicia of agency intent confirm that the Bump-Stock Rule is a legislative rule." *Guedes v. ATF*, 920 F.3d 1, 18 (D.C. Cir. 2019). As applied here, that conclusion is fatal to ATF's position.

Agency statements usually take one of two forms: "interpretive rules" or "legislative rules." *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1204, 1206 (2015). A "legislative rule," is "issued by an agency pursuant to statutory authority and has the force and effect of law." *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 139 S. Ct. 2051, 2055 (2019) (internal quotations omitted). A legislative rule "creates new law or imposes new rights or duties." *Sorenson Commc'ns, Inc. v. FCC*, 567 F.3d 1215, 1222 (10th Cir. 2009). An "interpretive rule," "simply advises the public of the agency's construction of the statutes and rules which it administers and lacks the force and effect of law." *Id*. "The agency's own label for its action is not dispositive." *Id*. at 1223.

The *Guedes* court recognized that three factors conclusively established that the Final Rule is a legislative rule. *See* 920 F.3d at 18-19. First, the Final Rule "unequivocally bespeaks an effort by the Bureau to adjust the legal rights and obligations of bump-stock owners—*i.e.*, to act with the force of law. The Rule makes clear throughout that possession of bump-stock devices *will become unlawful*

only as of the Rule's effective date, not before." *Id.* at 18 (emphasis added). Indeed:

> the Rule informs bump-stock owners that their devices '*will be prohibited when* this rule becomes effective.' 83 Fed. Reg. at 66,514 (emphasis added). It correspondingly assures bump-stock owners that '[a]nyone currently in possession of a bump-stock-type device *is not acting unlawfully unless* they fail to relinquish or destroy their device after the effective date of this regulation.' *Id.* at 66,523 (emphasis added). And the Rule 'provides specific information about acceptable methods of disposal, as well as the timeframe under which disposal must be accomplished *to avoid violating* 18 U.S.C. § 922(o).' *Id.* at 66,530 (emphasis added). Reinforcing the point, the Rule says it will '*criminalize only future conduct, not past possession* of bumpstock-type devices that ceases by the effective date.' *Id.* at 66,525 (emphasis added).

Id.

Second, "[t]he Rule's publication in the Code of Federal Regulations also indicates that it is a legislative rule." *Id.* at 19. By statute, publication in the Code of Federal Regulations is limited to rules "having general applicability and *legal effect*." 44 U.S.C. § 1510 (emphasis added). The Final Rule also purports to amend three sections of the code, 27 C.F.R. §§ 447.11, 478.11, 479.11. 83 Fed. Reg. at 66519. "Those sorts of amendments would be highly unusual for a mere interpretive rule." *Guedes*, 920 F.3d at 19.

Third, "the agency has explicitly invoked its general legislative authority" by "invoking two separate delegations of legislative authority." *Id*. The Final Rule cites to 18 U.S.C. § 926(a) and 26 U.S.C. § 7805(a) and claims that these provisions vest "the responsibility for administering and enforcing the NFA and GCA" in the Attorney General. 83 Fed. Reg. at 66515.

"In short, the Rule confirms throughout, in numerous ways, that it intends to speak with the force of law." *Guedes*, 920 F.3d at 19.

While ignoring the *Guedes* court's comprehensive rejection of ATF's effort to classify the rule as being merely legislative, ATF insists that the Final Rule's inclusion of an "effective date" was just an effort "to help the public avoid the unlawful possession of a machinegun." (Appellees' Br. at 38 (quoting 83 Fed. Reg. 66523).) ATF also claims the Final Rule "clearly recognized that those devices were machineguns at the time of classification." (Appellees' Br. at 38.)

But the *Guedes* court thoroughly deconstructed that argument as well. As the court said, ATF's position "that bump-stock owners have always been felons—is incompatible with the Rule's terms." 920 F.3d at 20. The Final Rule "establishes an effective date, *after* which (and only

after which) bump-stock possession will be prohibited." *Id.* (quoting 83 Fed. Reg. 66523). Moreover, ATF's suggestion that the Final Rule merely marks the end of a period of discretionary withholding of enforcement is contradicted by the rule, which "announces that a person 'in possession of a bumpstock type device *is not acting unlawfully* unless they fail to relinquish or destroy their device *after* the effective date of this regulation.'" *Id.* (quoting 83 Fed. Reg. at 665230). "That is the language of a legislative rule establishing when bump-stock possession will become unlawful, not an interpretive rule indicating it has always been unlawful." *Id.*

ATF also weakly points to what it calls the Final Rule's "interpretive character," because, while it "could have revoked its prior classification letters through a letter ruling," it chose "a more public process to raise awareness of its corrected interpretation." (Appellees' Br. at 38.) That might be a nice sentiment if it were remotely faithful to the language of the Final Rule. It is not simply the fact that the Final Rule was issued through the notice-and-comment process that makes it legislative. It is that the Final Rule, on its own terms, purports to be a legislative rule, creating new criminal liability that did not exist before,

set out in the Code of Federal Regulations, pursuant to an alleged grant of rulemaking power, following the notice-and-comment process. The "agency's intent when issuing" the Final Rule, not "counsel's description of the rule during subsequent litigation," "is unmistakable: the Bump-Stock rule is a legislative rule." *Guedes*, 920 F.3d at 20.

We have now come full circle: ATF has conceded that it had no legal authority to issue a legislative rule to categorize a bump stock as a "machinegun." Having no legal authority to issue such a rule, its efforts in that regard are void as a matter of law. (*See* Appellees' Br. at 37, 40-41.)

II. THIS COURT SHOULD NOT APPLY *CHEVRON* DEFERENCE TO SAVE THE FINAL RULE FROM ATF'S CONCESSIONS

ATF's concession that it has no legal authority to issue *any* legislative rules is dispositive of this case, and warrants reversal of the district court's decision. Should this Court reject ATF's concession, and attempt to follow the *Guedes* path of deciding the matter in spite of ATF's arguments, recent Supreme Court precedent and this Court's own binding authority foreclose reliance on *Chevron* deference.

ATF clearly recognizes the pitfalls of attempting to shoehorn this case into the *Chevron*-deference framework. It attempts to avoid that

mistake by stating throughout its brief that "*Chevron* deference has no bearing on the disposition of this suit," and noting that the district court "determined that deference is unnecessary" to resolve this case. (*See* Appellees' Br. at 16, 37.)

ATF's explanation as to why *Chevron* does not apply exposes the flaws in its arguments as well as the flaws in the district court's decision. ATF first acknowledges that "*Chevron* deference applies where Congress has delegated to an agency the authority to fill gaps in a statute or engage in interpretations that will have the force of law." It then concedes that the "statutory scheme does not … appear to provide the Attorney General the authority to engage in 'gap-filling' interpretations of what qualifies as a 'machinegun.'" (Appellees' Br. at 39, 40-41.) ATF also repeats its earlier concession that "criminal laws are for courts, not for the Government, to construe." (Appellees' Br. at 40 (quoting *Abramski v. United States*, 134 S. Ct. 2259, 2274 (2014)).)

To summarize: (1) *Chevron* only applies to "gap filling"; (2) there are no gaps to fill; and (3) the relevant statutory scheme does not give the Attorney General (hence the ATF) the authority to define what is a "machinegun." That should end the discussion.

Despite this rather simple situation, ATF is cagey about whether it wants this Court to rescue it from its professed *Chevron* waiver and apply deference anyway. ATF contradicts its own earlier positions by arguing that its "agency determinations," even those creating criminal liability, "receive deference no less than agency determinations reached in purely civil contexts." (Appellees' Br. at 40 (citing *Babbitt v. Sweet Home Chapter of Cmtys. for a Greater Or.*, 515 U.S. 687, 704 n.18 (1995); *Guedes*, 920 F.3d at 24-27).) ATF also invites this Court to follow suit and disregard its previous acknowledgement that it lacks the authority to issue legislative regulations, obliquely suggesting that this Court could determine that the Final Rule "at a minimum reflects a *permissible* reading of the statutory terms." (Appellees' Br. at 42.) This is a conclusion, however, that could have any legal significance *only if* this Court first invoked *Chevron* deference.

Regardless of what litigating position ATF is taking now, this Court simply cannot apply *Chevron* deference here. There are several reasons why such deference is inappropriate, including the fact that ATF has formally waived that argument, the statute was not

ambiguous and thus deference is not applicable, and the rule of lenity requires a contrary interpretation of the statute.

A. ATF Has Waived *Chevron* Deference

First, ATF's present equivocation cannot control this issue. As the district court noted, ATF and DOJ "repeatedly stressed that they neither request, nor believe their interpretations are entitled to, any measure of deference" in this case. (Aplt. App. at A133 n. 8). The district court accepted that waiver and accordingly decided it "need not confront" what it termed a "deference dilemma." (Aplt. App. at A133 n. 8). As explained by Mr. Aposhian in his opening brief, ATF affirmatively waived any reliance on deference and is bound by that waiver on appeal. (*See* Appellant's Br. at 43.)

Nothing in ATF's most recent filing can change that conclusion. The government is like any other litigant, and its "failure to address an issue in its opening brief results in that issue being deemed waived." *United States v. Walker*, 918 F.3d 1134, 1151 (10th Cir. 2019). "This briefing-waiver rule applies equally to arguments that are inadequately presented in an opening brief." *Id*. (internal quotation omitted). The government's waiver of a non-jurisdictional argument generally

precludes appellate review entirely. (*See* Appellant's Br. at 43 (citing *United States v. DeVaughn*, 694 F.3d 1141, 1158 (10th Cir. 2012)).)

ATF does not now directly disclaim its waiver. ATF has also failed to challenge Mr. Aposhian's arguments about this Court being precluded from reviewing the deference issue given ATF's waiver. ATF does not dispute the fact that *Chevron* deference is an exercise of delegated authority that an agency may waive. (*See* Appellant's Br. at 42-43.) Indeed, it has not presented any adequate argument or reason in its filing to suggest that this Court should intervene in or rule in a manner that is contrary to ATF's litigating position. (*See* Appellees' Br. at 42.) Having fought hard against the application of *Chevron* deference throughout this case, ATF's inexplicable citation to the *Guedes* majority on this point is hardly sufficient to alter ATF's strategy now. (*See* Appellees' Br. at 42.)

B. The Statute Is Not Ambiguous

Second, even if ATF wanted to change its argument (and withdraw its *Chevron* waiver), ATF has already agreed "there is no ambiguity" in the statutory definition of a machinegun. (Appellees' Br. at 35.) "If uncertainty does not exist, there is no plausible reason for

deference. The regulation then just means what it means—and the court must give it effect, as the court would any law." *Kisor*, 139 S.Ct. at 2415. Indeed, "if the law gives an answer—if there is only one reasonable construction of a regulation—then a court has no business deferring to any other reading, no matter how much the agency insists it would make more sense." *Id*. Because the parties agree that there was no ambiguity in the statutory definition of a "machinegun" for ATF to explicate when it comes to bump stocks, there can be no occasion to defer to ATF's interpretation, and "*Chevron* deference has no bearing on the disposition of this suit[.]" (Appellees' Br. at 16.)

C. The Rule of Lenity Supersedes *Chevron*

Finally, the rule of lenity, which this Court, sitting *en banc*, has recognized still applies even when deference doctrines have been invoked, commands 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 NLRB v. Oklahoma Fixture Co.*, 332 F.3d 1284, 1287, 1287 n. 5 (10th Cir. 2003) (en banc) (agency rules with criminal consequences must be interpreted to not be "in conflict with interpretive norms regarding criminal statutes,"

including that "criminal statutes must be construed narrowly"). Moreover, as amicus curiae Due Process Institute has compellingly argued, "the only approach that preserves the separation of powers and ensures fair warning to criminal defendants" is for the rule of lenity to prevail when in conflict with *Chevron* deference. (DPI Br. at 2.) Thus, even if this Court were to conclude the statute is ambiguous, it must be read to avoid criminal liability; it cannot be read to expand the scope of criminal conduct through a newly discovered agency definition of a "machinegun."

ATF argues against the rule of lenity because it thinks "there is no ambiguity" in the term "machinegun." (Appellees' Br. at 35.) ATF then impliedly suggests that even if there were such an ambiguity, the rule of lenity might not apply in administrative contexts. (Appellees' Br. at 35, 40.) On the latter point, ATF cites to *United States v. Atandi*, 376 F.3d 1186 (10th Cir. 2004) for the proposition that this Court might owe "some deference" to ATF's interpretation of an ambiguous statute. ATF also relies upon *Babbitt v. Sweet Home Chapter of Cmtys. for a Greater Or.*, 515 U.S. 687, 704 n.18 (1995), to suggest that *Chevron* deference

applies to regulations with criminal consequences. (Appellees' Br. at 40, 40 n. 5.)

Mr. Aposhian of course agrees with ATF's initial sentiment that the statute is not ambiguous. It therefore follows that the Final Rule is an invalid and void effort at legislative rulemaking.

Even setting that point aside, ATF's half-hearted attack on the rule of lenity must be rejected. This Court gives "some deference" to regulations with criminal consequences, *but* it also tempers that deference by "interpretive norms for criminal statutes." *Atandi*, 376 F.3d at 1189. These norms include the rule of lenity. *See Oklahoma Fixture Co.*, 33s F.3d at 1292 (Briscoe, J., concurring) (describing the "rule of lenity" as one applicable interpretive norm). This Court's precedent therefore requires the application of the rule of lenity, at least in some respect.

Even if this Court were writing on a clean slate, "*Babbitt's* 'drive-by'" footnote 18 has also been widely critiqued, because it (1) "contradicts the many cases before and since holding that, if a law has both criminal and civil applications, the rule of lenity governs its interpretation in both settings," and (2) subverts the rule of lenity's

guarantee of "fair warning" and "the principle that only the *legislature* may define crimes and fix punishments." *Whitman v. United States*, 135 S.Ct. 352, 353-54 (2014) (Scalia, J., statement regarding denial of certiorari, joined by Thomas, J.); *see also* DPI Br. at 6 n. 5 (collecting cases). The rule of lenity is constitutionally required in this context and may not be discarded out of reflexive deference to an agency.

D. This Court Cannot Rely on the D.C. Circuit's Analysis

This leaves only ATF's "Hail-Mary pass" that perhaps this Court should, after all, resolve this appeal in line with the *Guedes* majority decision. (*See* Appellees' Br. at 40, 42.) The D.C. Circuit in that case was able to uphold the Final Rule only because it in the end refused to accept ATF's affirmative waiver of *Chevron* deference. It then applied such deference to what it had perfunctorily decided was a statutory ambiguity, thereby squaring the circle to support its conclusion that the rule was "a permissible interpretation" of the definition of "machinegun." *Guedes*, 920 F.3d at 23, 31-32. The court also refused to apply the rule of lenity which, while perhaps consistent with its own precedent, is contrary to the precedent in this Court. *Id*. at 28.

This Court should not fall into the same trap, as such an approach conflicts with this Court's binding authority. This Court, sitting en banc, has confirmed that a litigant can disclaim *Chevron* deference. *See Hydro Res., Inc. v. E.P.A.*, 608 F.3d 1131, 1146 (10th Cir. 2010) (en banc) (when an agency "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.'") (quoting *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 477 (1992)). This Court should not reach a different conclusion here in order to invoke deference on ATF's behalf.

Furthermore, the *Guedes* court's ambiguity analysis conflicted with the requirements set out by the Supreme Court. The court determines the statute was ambiguous, first because the plaintiffs had failed to show that ATF's reading of the phrase "single function of the trigger" completely foreclosed and rendered "*impermissible*" ATF's interpretation. *Guedes*, 920 F.3d at 29-30. The court also said that "the statutory term 'automatically' admits of multiple interpretations," which was enough for the majority to pronounce the statute ambiguous. *Id.* at 30. But this analysis is not in line with a court's duty to "exhaust

all the traditional tools of construction" before "wav[ing] the ambiguity flag." *Kisor*, 139 S.Ct. at 2415 (internal quotation omitted). "[O]nly when that legal toolkit is empty and the interpretive question still has no single right answer can a judge conclude that it is more one of policy than of law." *Id*. (internal quotation omitted). The *Guedes* court did not exhaust all interpretive tools—it just concluded that it was not *impermissible* to read the statute in more than one way. *See* 920 F.3d at 30. That is not ambiguity—that is changing the rules of the game to reach a particular outcome. As recently explained by the Supreme Court, "[d]eference in that circumstance would permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation." *Kisor*, 139 S.Ct. at 2415 (internal quotation omitted).

Finally, and to repeat, the D.C. Circuit's rejection of the rule of lenity in the administrative context is not in line with this Court's authority. *See Oklahoma Fixture Co.*, 332 F.3d at 1287, 1287 n. 5. This Court simply cannot save the Final Rule using the D.C. Circuit's analysis.

III. THE FINAL RULE IS NOT THE BEST INTERPRETATION OF WHAT THE STATUTE HAS ALWAYS MEANT

ATF's argument that the Final Rule "reflects the best interpretation" of what the statute has *always* meant also fails. (*See* Appellees' Br. at 16.) While the ATF may now believe that bump stocks are machineguns (and that they always have been so, despite the fact that it never considered them as such before), it is not clear why ATF thinks this is true.

ATF's first line of argument focuses on how a bump stock works, and why, in ATF's estimation, a bump stock allows a semiautomatic weapon to fire multiple shots from a single pull of the trigger. (*See* Appellees' Br. at 19-21.) By statute, a "machinegun" is "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) (emphasis added). By contrast, a semiautomatic weapon "fires only one shot with each pull of the trigger." *Staples v. United States*, 511 U.S. 600, 602 n. 1 (1994).

ATF has no real dispute with this statutory distinction, it simply argues that, somehow, Bump Stocks allow multiple shots with only a single pull of the trigger. (*See* Appellees' Br. at 19, 21.) According to

ATF, "[t]he relevant question is whether the shooter initiates automatic firing with a single pull of the trigger, not whether the trigger continues to move automatically after that single pull." (Appellees' Br. at 15.) ATF still agrees, however, that a bump stock can function *only if* the shooter's finger loses contact with the trigger so that the "separation allows the firing mechanism to reset." (Appellees' Br. at 7.) Each shot requires the shooter to engage the trigger a separate time. (Appellees' Br. at 7-8.) ATF also agrees that the phrase "single function of the trigger" encompasses any "analogous" movement that engages the trigger mechanism, "like flipping a switch or pushing a button." (Appellees' Br. at 28.) ATF believes, for some inexplicable reason, that *bumping* a trigger mechanism does not count, whereas every other motion does.

ATF is unable to remain consistent in this argument throughout its brief, arguing that unlike a machinegun, the defining characteristic of a semiautomatic weapon is that "[f]or a subsequent shot, the shooter must release his pull on the trigger so that the hammer can reset." (Appellees' Br. at 23.) This, however, is precisely the action that *ATF itself* has described as being critical to a bump stock's operation. ATF

agrees that a bump stock can only function if the shooter's finger loses contact with the trigger so that the "separation allows the firing mechanism to reset." (Appellees' Br. at 7.) ATF's inconsistent and variable position hardly presents the most compelling version of what the statute has always meant.

In her dissenting opinion in the *Guedes* case, Judge Karen LeCraft Henderson elegantly and summarily cut through the smoke and disposed of ATF's argument by rightly noting that "a semiautomatic rifle equipped with a bump stock *cannot* fire more than one round with a *single* function of the trigger" as "the trigger of a semiautomatic rifle must release the hammer for each individual discharge." 920 F.3d at 47. ATF has sought to complicate this issue in order to criminalize bump stocks—despite what the *statute* at issue actually says. This argument is not about "interpretation" or the "mechanisms" of how the bump stock operates; it is a means to ATF's end.

ATF also focuses on the term "automatically," and claims a bump stock allows a semiautomatic weapon to become a "self-acting or self-regulating" weapon even though "the shooter applies continuous pressure to the front of the weapon to enable continuous 'bumping' of

the stationary trigger finger." (Appellees' Br. at 29-30.) To defend this line of reasoning ATF says that "many weapons require a shooter to use their off hand to bear the weight of the weapon or otherwise exert pressure on the gun while firing, and no one contends that a weapon is not a machinegun because of that manual input." (Appellees' Br. at 30.) ATF implies that 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," require no more input than simply holding a weapon. *See* 83 Fed. Reg. at 66518, 66533. That is not the case.

The complex operation of a bump stock is hardly analogous to simply holding a weapon or a trigger. Even if it were, such operation does not comport with the settled meaning of an "automatic" weapon. A machinegun fires automatically because it does not require input between shots. It can even operate on its own. *See 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 Final Rule, however, defines

"'automatically' [as] a single pull of the trigger **AND THEN SOME** (that is, [] 'constant forward pressure with the non-trigger hand')." *Guedes*, 920 F.3d at 44 (Henderson, J., dissenting). "[T]he combination of 'automatically' and 'by a single pull' explains how the shooter accomplishes the firing sequence of a 'machinegun.' … '[A]utomatically' excludes a 'machinegun' that uses a self-acting firing sequence effected by action in addition to a single pull of the trigger." *Id*. at 45.

As Judge Henderson so eloquently explained, ATF's reading does not follow

> the common sense meaning of the language used. Suppose an advertisement declares that a device performs a task 'automatically by a push of a button.' I would understand the phrase to mean pushing the button activates whatever function the device performs. It would come as a surprise, I submit, if the device does not operate until the button is pushed and some other action is taken—a pedal pressed, a dial turned and so on. Although the device might be 'automatic' under some definition, it would not fit the advertised definition of 'automatic': by a push of a button period.

Id. at 44.

ATF's tortuous interpretation is not the "best reading" of an unambiguous statute. It is a transparent effort to reach a specific

outcome (it was ordered to reach) through any means possible. This Court should reject ATF's ploy and strike down the Final Rule.

IV. THE REMAINING FACTORS WARRANT A PRELIMINARY INJUNCTION

ATF's pretense finally collapses entirely when discussing the remaining preliminary injunction factors. ATF concedes that Mr. Aposhian suffered irreparable harm from the deprivation of his lawfully-acquired bump stock. (Appellees' Br. at 44; *see also* Aplt. App. at A106 (ATF "acknowledges that the irreparable harm prong of the preliminary injunction test is met here").)[1] It merely seeks to outweigh this harm through its claim that "[i]mplementation of the Rule

[1] ATF does dispute that Mr. Aposhian's harm is constitutional, claiming that his "challenge to the Rule presents only a question of statutory interpretation," but saying the "Supreme Court has rejected 'the proposition that every action by the President, or by another executive official, in excess of his statutory authority is *ipso facto* in violation of the Constitution.'" (Appellees' Br. at 43-44 (quoting *Dalton v. Specter*, 511 U.S. 462, 472 (1994)).) On the contrary, Mr. Aposhian's claim is that the Final Rule was issued in violation of Articles I, § 1, I, §7, and II, § 3, on theories related to the vesting clauses, bicameralism and presentment, non-divestment and separation of powers principles. (*See* Aplt. App. A25-A32) A plaintiff's claim that because government defendants "did not have statutory authority to [act], they acted in violation of constitutional separation of powers principles because [they] lack any background constitutional authority" makes the "claim fundamentally a constitutional one" and not barred by *Dalton*. *Sierra Club v. Trump*, 929 F.3d 670, 696-97 (9th Cir. 2019).

promotes the public interest by protecting the public from the danger posed by machine guns prohibited by federal law." (Appellees' Br. at 43.)

ATF's claim is undermined by the foundational position that it took in order to try to save the Final Rule. As discussed in detail above, in order to first establish that the Final Rule is "interpretive" rather than "legislative," ATF must argue that the Final Rule does nothing more than educate the public about existing legal obligations through an "interpretive" rule. (Appellees' Br. at 38.) Taking ATF at its word, it therefore has *no* interest in making sure its purported best and obvious interpretation of the statute is written down in the Code of Federal Regulations because the interpretation would apply with or without the rule. The "public interest" as defined by ATF is implicated only if ATF is allowed to *change* the definition of a "machinegun."

ATF has tried mightily to avoid the fact that the Final Rule is legislative because it has no authority to issue a legislative rule on the definition of "machinegun." Further, ATF has no legitimate interest in enforcing a regulation it had no authority to issue. *See K.A. ex rel. Ayers*

v. Pocono Mountain Sch. Dist., 710 F.3d 99, 114 (3d Cir. 2013) ("the enforcement of an unconstitutional law vindicates no public interest").

In any event, ATF's unfounded fear that allowing Mr. Aposhian alone to possess his lawfully-acquired property would somehow expose law enforcement to the dangers of machineguns has no basis in reality. Mr. Aposhian does not pose a threat to anyone, and, indeed, during the pendency of the appeal has surrendered his bump stock to the ATF in compliance with this Court's orders.

CONCLUSION

This case is *not* about whether bump stocks should be outlawed. It is about whether ATF has statutory authority to ban them on its own.

ATF's tepid and contorted defense of the Final Rule must be rejected. ATF has defended its rule only as a mere interpretation of an unambiguous statute. The Final Rule contradicts that argument, being clearly intended to have the force of law. *Chevron* deference cannot be relied upon to save the day. All of the factors weigh in favor of Mr. Aposhian in terms of granting the preliminary injunction as requested. ATF's untenable position should be rejected, and this Court should

reverse the district court in order to restore Mr. Aposhian's constitutional rights.

September 16, 2019

Respectfully,

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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 6154 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.

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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 September 16, 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.

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