

No. 20-51016

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

MICHAEL CARGILL

Plaintiff-Appellant,

v.

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

Defendants-Appellees.

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

**BRIEF OF AMICUS CURIAE JOHN CUTONILLI
IN SUPPORT OF PLAINTIFFS-APPELLANTS FOR REVERSAL**

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1 August 2022

CERTIFICATE OF INTERESTED PERSONS

Cargill v. Garland, No. 20-51016

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

Plaintiff-Appellant (and Counsel): Michael Cargill (Caleb Kruckenberg, Richard Samp, Mark Chenoweth, Steven M. Simpson, New Civil Liberties Alliance)

Defendants-Appellees (and Counsel): All defendants are governmental (Brian M. Boynton, Ashley C. Hoff, Mark B. Stern, Michael S. Raab, Abby C. Wright, Brad Hinshelwood, Kyle T. Edwards)

Amicus Curiae (and Counsel):

The National Rifle Association of America, Inc. (Michael T. Jean),

Gun Owners of America, Inc., Gun Owners Foundation, Gun Owners of California, Tennessee Firearms Association, Virginia Citizens Defense League, Arizona Citizens Defense League, Grass Roots North Carolina, Rights Watch International, Conservative Legal Defense and Education Fund, and The Heller Foundation (William J. Olson, Robert J. Olson, Jeremiah L. Morgan, David G. Browne, and John I. Harris III)

Pacific Legal Foundation (Glenn E. Roper, Daniel Ortner)

Firearms Policy Coalition And The Center To Keep And Bear Arms (Joseph G.S. Greenlee, George A. Mocsary, Cody J. Wisniewski)

Due Process Institute (John D. Cline)

Cato Institute (Trevor Caldwell Burrus)

John Cutonilli (*pro se*)

John Cutonilli is an amicus representing himself. Amicus John Cutonilli is not a publicly held corporation, and this amicus does not have a parent corporation, and that no publicly held corporation owns 10 percent or more of amicus's stock.

Dated: 1 August 2022

/s/John Cutonilli

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Table of Contents

INTEREST OF AMICUS CURIAE.....5

INTRODUCTION AND SUMMARY OF ARGUMENT.....5

*Argument 1 - A bump stock does not cause a firearm to shoot more than
one shot with a single pull of the trigger.7*

Argument 2 - Bump stocks do not operate “automatically.”13

CONCLUSION.....16

TABLE OF AUTHORITIES

Cases

<i>Cargill v Garland</i> 20 F.4th 1004, 1011 (5th Cir. 2021)	10
<i>Guedes v. ATF</i> , 920 F.3d 1 (D.C. Cir. 2019)	15
<i>United States v. Camp</i> 343 F.3d 743 (5th Cir. 2003)	11, 12
<i>Vermont Yankee Nuclear Power Corp. v. NRDC</i> , 435 U.S. 519, 549 (1978)	11

Statutes

National Firearms Act of 1934, 26 U.S.C. 5845(b)	6, 12
--	-------

Other Authorities

83 Fed. Reg. 66,514 (Dec. 26, 2018)	5, 6, 7, 8, 9, 10, 13, 14
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INTEREST OF AMICUS CURIAE

Cutonilli is a resident of Maryland and is subject to the same final rule in this case; Bump-Stock Type Devices, 83 Fed. Reg. 66,514 (Dec. 26, 2018). The main consideration that this amicus brief brings to light is the contradictory nature of the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) assertions in the record before it and the deviations the Court took from the record. He seeks to provide additional insights about the record in this case that have not been addressed by either party or the panel's decision in this case. His intent is to help this court avoid previous errors so that other fellow Americans are not subject to such unlawful rules. All parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part. Apart from amicus curiae, no person contributed money to fund this brief's preparation and submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case hinges on definitions and specifically on how the ATF has disregarded definitions that are fundamental to the record and made unfounded, arbitrary, and capricious assertions that bump-stock type devices (bump stocks) are machine guns. The District Court also deviated from the record and did not hold

the ATF to the logic of its own reasoning when evaluating their determination that bump stocks are machine guns. Higher standards are needed in both instances.

The National Firearms Act of 1934, 26 U.S.C. 5845(b), defines a “machine gun” 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,” (83 Fed. Reg. 66514 here after referred to as FR page number).

The ATF proposed (FR 66519) and ultimately defined “automatically” to mean “functioning as the result of a self-acting or self-regulating mechanism that allows the firing of multiple rounds through a single function of the trigger,” (FR 66553). This definition of the term “automatically” is consistent with the dictionary definition.

The ATF proposed to interpret the phrase “single function of the trigger” to mean “a single pull of the trigger,” (FR 66518) but ultimately defined it as “a single pull of the trigger and analogous motions,” (FR 66553). The phrase “analogous motions” was added to take into account other methods of initiating the trigger that do not require a pull, (FR 66515).

The ATF concluded that “[t]he term ‘machine gun’ includes a bump-stock-type device, i.e., a device that allows a semi-automatic firearm to shoot more than

one shot with a single pull of the trigger by harnessing the recoil energy of the semi-automatic firearm to which it is affixed so that the trigger resets and continues firing without additional physical manipulation of the trigger by the shooter,” (FR 66553-66554).

Argument 1 - A bump stock does not cause a firearm to shoot more than one shot with a single pull of the trigger.

One of the issues that must be resolved is the meaning of a single pull or single function. While the ATF correctly recognizes that during the operation of a firearm equipped with a bump stock the trigger resets, it incorrectly attributes more than one shot to a single pull. The bump stock operates as follows:

- The firearm shoots one shot from the first pull of the trigger.
- The bump stock steadies the trigger finger.
- The firearm and trigger recoil rearward, causing the rearward force on the trigger (pull) to end and the trigger to reset.
- The second shot is caused by a combination of two simultaneous actions by the shooter: (a) holding the trigger finger in place and (b) pushing the foregrip of the firearm forward, which causes the second rearward force (pull) of the trigger and the second shot.

- Subsequent shots are fired by repeating the two simultaneous actions.

At no time does the firearm shoot more than one shot for each pull of the trigger.

As shown above, the ATF incorrectly argues that multiple shots are fired due to a single function or pull of the trigger without any additional physical manipulation of the trigger by the shooter. The ATF fails to examine whether additional pulls (or functions) of the trigger are in fact responsible for additional shots, which is the only way such additional shots could be produced (physical manipulation), (FR 66532, 66534).

The ATF correctly acknowledges that semiautomatic firearms (which shoot one time when the trigger is pulled in one direction) and binary triggers (which shoot “semiautomatically” when the trigger is pulled and again when the trigger is released) are not “machine guns” because “one function of the trigger results in the firing of only one round.” This is correct because each direction in which the trigger is moved (pull vs. release) can be considered a separate single function of the trigger, (FR 66534).

This movement of the trigger is consistent with the definition of “pull”. The Oxford English Dictionary (see District Court Opinion ¶ 164, p 64) defines “pull” as:

to exert upon (something) a force which tends to draw, drag, or snatch it towards oneself, or away from its present position (whether or not movement takes place as a result); to drag or tug.

The trigger does move back and forth due to the application and removal of a force on the trigger. The ATF's conclusion that there is a single pull is inconsistent with its dictionary definition and indicates another reason why the ATF is acting in an arbitrary and capricious manner with respect to their conclusions.

In the record for this case, the ATF does not explain how the trigger of a firearm equipped with a bump stock remains active or pulled during the reset of the trigger. The ATF simply asserts that a bump stock is a machinegun because it creates "an automatic firing sequence with a single pull of the trigger," (FR 66534). However, as noted above, the ATF itself acknowledges that separate functions of the trigger occur with directional changes of the trigger (whether a pull or a release), and that each function only releases one shot. Its assertion regarding an "automatic firing sequence with a single pull" is both inaccurate and contradictory with the record.

Given these facts, it is clear that the ATF's determination to classify a bump stock as a "machine gun" is arbitrary and capricious and inconsistent with its own definitions and the documentary record in this case. The bump stock does not

change the internal mechanism of the semiautomatic firearm, *which physically prevents the firearm from shooting additional shots without removing/stopping the pull of the trigger (or analogous motions). This removal/stopping of the pull is what causes the resetting of the trigger.*

In addition, the District Court and this Court seek to change the definition of a “single function of the trigger” by linking it inextricably with the “shooter-focused interpretation”, “movement of the trigger finger”, “volition”, or action of the shooter, (see District Court Opinion pg 65 and Appellate Panel Opinion 20 F.4th 1004, 1011 (5th Cir. 2021)). This proposed definitional change is also inconsistent with the record before the Court. The record shows that neither the proposed definition (FR 66518), nor the final definition (FR 66553) contain any references to volitional action. While there was a comment that proposed to use a volitional act as part of the definition of the function of the trigger (FR 66534), the ATF’s response does not address this issue (FR 66534) nor has the ATF changed the final definition to include volition (FR 66553). Neither the Court nor the ATF should change the record before the Court. *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 549 (1978).

The District Court errors in misunderstanding what “single function of the trigger” by misunderstanding the definition of what a pull means. The District Court believes there are not multiple pulls of the trigger while the shooter

maintains constant forward pressure (District Court Opinion pg 64-65). Forward pressure is inconsistent with “pull”, which is defined directionally “towards oneself”. The forward pressure would be considered a push in this instance because the force is away from oneself. Additionally, that forward pressure is not “of the trigger”, it is on the handguard of the firearm. No attempt has been made to define the trigger as anything other than the original trigger of the firearm.

The District Court also believes the dictionary definition of “pull” focuses on a person’s intent because the definition notes that a pull results “whether or not movement takes place as a result” (District Court Opinion pg 64). The problem is that the word “result” is not about intention (an input), but about a consequence, effect or outcome of something. There does not have to be movement for there to be a pull. In a tug-of-war each side pulls even if there is no movement. The winner is the side that pulls with more force to overcome the opponents pulling force.

The Court completely misunderstands a trigger in *United States v. Camp* 343 F.3d 743 (5th Cir. 2003). *Camp* does not reject a mechanistic interpretation; it **defines** a “trigger” as a **mechanism**.

The term "trigger" is not defined by statute. *United States v. Jokel*, 969 F.2d 132, 135 (5th Cir. 1992), defined a trigger, as used in 26 U.S.C. § 5845(d) (shotguns), as any "**mechanism** . . . used to initiate the firing sequence". See also *United States v. Fleischli*, 305 F.3d 643, 655 (7th Cir. 2002) (concerning machine gun, approving of Jokel's definition), cert. denied, ____

U.S. ___, 123 S.Ct. 1923, 155 L.Ed.2d 828 (2003); United States v. Evans, 978 F.2d 1112, 1113 (9th Cir. 1992), cert. denied, 510 U.S. 821, 114 S.Ct. 78, 126 L.Ed.2d 46 (1993) (concerning machine gun, defining trigger as "anything that releases the bolt to cause . . . [the weapon] to fire" (internal quotation omitted; alteration in original)). *Id.* at 745 (emphasis added)

At issue in *Camp* was what the term "trigger" was referring to. The conclusion was that the term "trigger" referred to the **mechanism** (device) that initiated the firing sequence. In *Camp*, a switch was used to initiate the firing sequence, so the switch became the trigger. In a bump stock, the trigger remains the original trigger and no attempt has been made to define the trigger as anything other than the original trigger. The forward pressure on the firearm has no effect on the firing sequence without a pull of the actual trigger. The prior Courts (see *Camp*) recognized the term "trigger" as a mechanism and there is no reason not to use this definition. None of the other Courts to evaluate bump stock cases used this definition of trigger (nor did they reject it either). The ATF did not define "trigger" in the record either.

In its Brief for Appellees (Document 00515854264), the ATF discusses attempts to circumvent firearms being defined as machine guns (eg pg 26). If the ATF does not feel its own definitions adequately cover devices that should be considered machine guns under 26 U.S.C. 5845(b), then it should propose different definitions through its rule making process. The ATF should not endeavor to

change the record in the midst of an active court case. That said, even if the ATF were to change the definition of a “single function of the trigger,” a bump stock would still not be correctly termed a machine gun because it does not operate “automatically,” as is explained below.

Argument 2 - Bump stocks do not operate “automatically.”

The ATF again reveals the arbitrary nature of its assertions in its discussion of “bump firing.” Bump firing is the generic term for describing the sequence of actions that occurs with a bump stock, which can also occur without the use of a bump stock device. The ATF determined that a bump-fired firearm that uses a belt loop or other similar means of steadying the trigger finger is *not* a “self-acting or self-regulating mechanism” because “when such items are used for bump firing, no device is present to capture and direct the recoil energy; rather, the shooter must do so,” (FR 66533). The belt-loop method requires the shooter to supply a “constant forward pressure with the non-trigger hand” to sustain the bump firing, (FR 66533).

Similarly, a bump stock requires the shooter to maintain “constant forward pressure with the non-trigger hand on the barrel-shroud or fore-grip of the rifle,” (FR 66532). The bump stock device lacks any mechanism capable of pushing the firearm forward to create a repetitive cycle. Without the shooter exerting constant forward pressure on the fore grip, the bump stock mechanism would cause the

firearm to recoil backward and simply stop. In both bump-firing (without a bump-stock device) and firing with a bump-stock device, the shooter must manually push the firearm forward to create a repetitive cycle.

The ATF also claims that bump stocks “enable semiautomatic firearms to operate ‘automatically’ because they serve as a self-acting or self-regulating mechanism,” (FR 66533). They state that the bump stock “firing sequence is ‘automatic’ because the device harnesses the firearm's recoil energy as part of a continuous back-and-forth cycle that allows the shooter to attain continuous firing after a single pull of the trigger,” (FR 66533). However, earlier in the record the ATF states that:

The bump-stock-type device captures and harnesses the firearm's recoil to maintain a continuous firing sequence, and thus is properly described as “a self-acting or self-regulating mechanism. The very purpose of a bump-stock-type device is to *eliminate the need for the shooter to manually capture, harness, or otherwise utilize this energy to fire additional rounds*, as one would have to do to “bump fire” without a bump-stock-type device. (FR 66532 emphasis added).

According to the ATF’s own statement above, there is a clear distinction between something that happens “automatically” and something that does not. When the device “eliminate[s] the need for the shooter” to perform a repetitive cycle, the device is considered to operate “automatically.” The ATF has indicated that when “the shooter must do so” the process does not happen “automatically.”

Once again, the ATF has made an arbitrary and capricious decision in reaching two different conclusions with regard to the same manual actions of the shooter.

“Constant forward pressure” of the shooter is necessary *for both* bump firing and to operate a firearm equipped with a bump-stock device, yet the ATF reaches two completely different conclusions with respect to whether the pressure exerted by the shooter renders the mechanism self-acting or self-regulating, and, therefore, whether it is or is not correctly classified as a machine gun. The manual actions of the shooter make bump-fired firearm *not* a machine gun, yet a firearm equipped with a bump stock, which requires *the same type of manual participation of the shooter*, is a machine gun. The ATF cannot have it both ways.

Compounding these issues, the District Court and this Court once again fail to properly apply definitions, in this case the definition of “automatically”. They fail to understand what a “self-acting or self-regulating mechanism” refers to. A machine gun is self-acting or self-regulating because no other external influence is required to continue the firing sequence. In a bump stock, an external influence is required to continue the firing sequence, the forward pressure on the firearm. It should be noted that the trigger, which initiates the mechanism, is not required for the mechanism to be self-acting.

The DC Circuit in *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 920 F.3d 1 (D.C. Cir. 2019), provides an example of a “self-acting or

self-regulating mechanism” with an automatic sewing machine. In this example, the sewing mechanism is automatic. It should be noted that an automatic sewing machine should be contrasted with a manual sewing machine that requires the operator to manually pedal or crank the machine to cause the up-and-down motion of the sewing mechanism. The manual sewing machine has no *self-regulating or self-acting mechanism* to automate this process, just like a bump stock.

It should be noted that the DC Circuit confused the issue by conflating the operating mechanism with how the mechanism is operated. An automatic sewing machine only refers to the automatic operation of the sewing mechanism and not how the machine is operated, which still requires manual operation of the cloth. A machine gun operates automatically with respect to the firing mechanisms but requires manual aiming to operate it effectively.

CONCLUSION

When the Court confines itself to the record, the conclusion is simple. A bump stock device does not create a machine gun based on the definitions supplied by the ATF. There is no need to evaluate this case using *Chevron*. It is clear from the record that the ATF has acted in an arbitrary and capricious manner with respect to the bump stock device determination. The ATF has used its definitions of “single pull of the trigger” and “automatically” in arbitrary ways in an effort to

produce the outcome it desires: the banning of bump stock devices. The court should hold ATF to a higher standard and reject its proposed ban.

The judgment of the District Court should be overturned.

Respectfully submitted,

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1 August 2022

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and 29. It is 2860 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5), and the type style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman type.

Dated: 1 August 2022

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CERTIFICATE OF SERVICE

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