

IN THE SUPREME COURT OF THE UNITED STATES

No. 18A963

GUN OWNERS OF AMERICA, INC., ET AL. APPLICANTS,

v.

WILLIAM P. BARR, ATTORNEY GENERAL, ET AL.

ON APPLICATION FOR A STAY PENDING APPEAL
BEFORE THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MEMORANDUM FOR RESPONDENTS IN OPPOSITION

The Solicitor General, on behalf of respondents, respectfully files this memorandum in opposition to the application for a stay of the Department of Justice rule, Bump-Stock-Type Devices, 83 Fed. Reg. 66,514 (Dec. 26, 2018) (Rule), pending the disposition of applicants' appeal before the United States Court of Appeals for the Sixth Circuit.

STATEMENT

1. Over the last century, Congress has imposed increasingly strict regulations on the manufacture, sale, and possession of machine guns. The National Firearms Act, 26 U.S.C. 5801 et seq., imposes various requirements on persons who manufacture, possess,

or engage in the business of selling particular "firearm[s]" (including machine guns), such as requiring that each maker of a regulated firearm shall "obtain authorization" before manufacture. 26 U.S.C. 5841(c).

The National Firearms Act 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). Since 1968, the statute has also applied to parts that can be used to convert a weapon into a "machinegun." See Gun Control Act of 1968, Pub. L. No. 90-618, § 201, 82 Stat. 1231. The definition thus includes "the frame or receiver of any such weapon, any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun." 26 U.S.C. 5845(b).

In 1986, Congress largely banned machine guns as part of the Firearms Owners' Protection Act, Pub. L. No. 99-308, 100 Stat. 449. Under 18 U.S.C. 922(o) it is generally "unlawful for any [private] person to transfer or possess a machinegun."

The Attorney General has authority to prescribe rules and regulations to enforce the National Firearms Act and subsequent legislation. 18 U.S.C. 926(a); 26 U.S.C. 7805(a); see 26 U.S.C. 7801(a) (2) (A).

2. Since Congress prohibited machine guns, "inventors and manufacturers [have] develop[ed] firearms, triggers, and other devices that permit shooters to use semiautomatic rifles to replicate automatic fire." 83 Fed. Reg. at 66,515-66,516. This litigation involves "bump-stock-type devices." A bump stock is an apparatus used to replace the standard stock on a semiautomatic firearm. Unlike a regular stock, a bump stock channels the recoil from the first shot into a defined path, allowing the contained weapon to slide back a short distance -- approximately an inch and a half -- and shifting the trigger away from the shooter's trigger finger. Id. at 66,532. This separation allows the firing mechanism to reset. Ibid. When the shooter maintains constant forward pressure on the weapon's barrel-shroud or fore-grip, the weapon slides back along the bump stock, causing the trigger to "bump" the shooter's stationary finger and fire another bullet. Ibid. Each successive shot generates its own recoil, which in turn causes the weapon to slide along the bump stock in conjunction with forward pressure, returning to "bump" the shooter's trigger finger each time, initiating another cycle in turn. To assist the shooter in holding a stationary position with the trigger finger and sustain the firing process, bump stocks are fitted with an "extension ledge." Id. at 66,516, 66,532. The shooter maintains constant rearward pressure on the extension ledge, ensuring that

the trigger finger is positioned to be "bumped" with each successive cycle. Id. at 66,532. This continuous cycle of fire-recoil-bump-fire lasts until the shooter releases the trigger, the weapon malfunctions, or the ammunition is exhausted. Id. at 66,518.

The Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) first encountered this type of device in 2002, when it received a classification request for the "Akins Accelerator." 83 Fed. Reg. at 66,517. The Akins Accelerator, which attached to a standard semiautomatic rifle, used a spring to harness the recoil energy of each shot, causing "the firearm to cycle back and forth, impacting the trigger finger" repeatedly after the first pull of the trigger. Ibid. Thus, by pulling the trigger once, the shooter "initiated an automatic firing sequence" that was advertised as firing "approximately 650 rounds per minute." Ibid. Although ATF initially opined that the prototype it tested was not a machine gun, ATF revisited its determination in 2006 and concluded that "the best interpretation of the phrase 'single function of the trigger' includes a 'single pull of the trigger.'" Ibid. The Eleventh Circuit affirmed this understanding, holding that interpreting "'single function of the trigger'" as "'single pull of the trigger' is consonant with the statute and its legislative

history.” Akins v. United States, 312 Fed. Appx. 197, 200 (per curiam), cert. denied, 567 U.S. 942 (2009).

When it reclassified the Akins Accelerator, ATF advised that “removal and disposal of the internal spring * * * would render the device a non-machinegun under the statutory definition,” because the device would no longer operate “automatically.” 83 Fed. Reg. 66,517. ATF soon received classification requests for other bump-stock-type devices that did not include internal springs. In a series of classification decisions between 2008 and 2017, ATF concluded that such devices were not machine guns based on an erroneous belief that in the absence of mechanical parts that would channel recoil energy, the bump stocks did not enable a gun to fire “automatically.” See ibid.

3. In 2017, a shooter armed with semiautomatic weapons and bump stock devices killed 58 people and wounded 500 more during a concert in Las Vegas, Nevada. 83 Fed. Reg. at 66,516. At the urging of members of Congress and other non-governmental organizations, the Department of Justice decided to revisit its prior analysis of the terms used to define “machinegun” in 26 U.S.C. 5845(b). The Department of Justice published an advance notice of proposed rulemaking in the Federal Register. Application of the Definition of Machinegun to “Bump Fire” Stocks and Other Similar Devices, 82 Fed. Reg. 60,929 (Dec. 26, 2017).

In February 2018, the President issued a memorandum concerning bump stocks that instructed the Department of Justice, working within established legal protocols, "to dedicate all available resources to complete the review of the comments received [in response to the advanced notice], 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, 83 Fed. Reg. 7949 (Feb. 23, 2018).

On March 29, 2018, the Department of Justice published a notice of proposed rulemaking, proposing changes to the regulations in 27 C.F.R. 447.11, 478.11, and 479.11 that would interpret the meaning of the terms "single function of the trigger" and "automatically." See Bump-Stock-Type Devices, 83 Fed. Reg. 13,442. 13,457. The final rule was published on December 26, 2018. 83 Fed. Reg. at 66,514.

The Rule sets forth the agency's interpretations of the terms "single function of the trigger" and "automatically," clarifies for members of the public that bump stocks are machine guns, and overrules ATF's prior, erroneous classification decisions treating certain bump stocks as unregulated firearms parts. See 83 Fed. Reg. at 66,514, 66,516, 66,531. The Rule further instructs "current possessors" of bump stocks "to undertake destruction of

the devices” or to “abandon [them] at the nearest ATF office” by the Rule’s effective date. Id. at 66,549. Current owners of bump stocks therefore had until March 26, 2019, to comply with the Rule in order to “avoid criminal liability.” Id. at 66,530.

4. Applicants challenged the Rule and sought a preliminary injunction. See Appl. 1. On March 21, 2019, the district court denied a preliminary injunction. As the court explained, “the parties’ dispute” in this case “is whether the forward pressure exerted by the shooter using the non-trigger hand requires the conclusion that a bump stock does not shoot automatically.” D. Ct. Doc. 48, at 12 (Mar. 21, 2019). Applying deference under Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984), the court concluded that the “ATF’s interpretation” of the terms “automatically” and “single function of the trigger” in the statute was consistent with the statute and “with judicial interpretations of the statute.” D. Ct. Doc. 48, at 13-14. Although the court recognized that “Defendants concede that Plaintiffs will suffer irreparable harm without an injunction,” it determined that the two other preliminary-injunction factors did not weigh in applicants’ favor: “Congress restricts access to machine guns because of the threat the weapons pose to public safety. Restrictions on bump stocks advance the same interest.” Id. at 17 (footnote omitted).

Applicants moved for a stay pending appeal in the court of appeals. On March 25, 2019, the court of appeals denied applicants' request. Appl. App. 1-3. The court explained that applicants had not demonstrated a likelihood of success on the merits of their claim that the district court erred in denying preliminary relief, observing that "two other district courts have denied preliminary relief enjoining the Final Rule." Id. at 2. With respect to the other equities, the court acknowledged that applicants would suffer irreparable harm through deprivation of their bump stocks, but explained that "the public interest in safety supports the denial of a stay pending appeal," ibid., and therefore, "[b]alancing the[] factors," the court concluded that a stay pending appeal was not warranted, id. at 3.

5. The Rule was also challenged in district courts nationwide. The United States District Court for the District of Columbia denied a request for a preliminary injunction, see Guedes v. ATF, No. 18-cv-2988, 2019 WL 922594 (Feb. 25, 2019), appeal pending Nos. 19-5042, 19-5043, 19-5044 (D.C. Cir. filed Feb. 26, 2019); the plaintiffs in that case appealed on an expedited schedule, and oral argument was heard before the D.C. Circuit on March 22, 2019. On March 23, 2019, the D.C. Circuit granted a temporary stay of enforcement of the Rule as to the parties before it (later clarified to include all current bona fide members of

the organizational plaintiffs) to permit it to resolve the plaintiffs' appeal. Earlier today, this Court denied the Guedes plaintiffs' application for a stay in this Court as to "supporters" of the organizational plaintiffs.

In addition, on March 15, 2019, the United States District Court for the District of Utah denied a similar request for a preliminary injunction. See Aposhian v. Barr, No. 19-cv-37, 2019 WL 1227934, at *6, appeal pending, No. 19-4036 (10th Cir. filed Mar. 18, 2019). The individual plaintiff in that case requested an injunction pending appeal from the Tenth Circuit, which granted a temporary administrative stay as to the plaintiff pending full briefing and resolution of his motion.

ARGUMENT

Applicants ask this Court to grant an order staying the effective date of the Rule. A stay application on a matter pending before the court of appeals requires consideration of three factors: (1) "whether four Justices would vote to grant certiorari should the Court of Appeals affirm the District Court order without modification"; (2) whether this Court would then reverse; and (3) the "balance" of "the so-called 'stay equities.'" San Diegans for the Mt. Soledad Nat'l War Mem'l v. Paulson, 548 U.S. 1301, 1302 (2006) (Kennedy, J., in chambers) (citation omitted). Applicants

have not carried their burden of showing that those factors justify a stay here.

1. Although they do not directly address this Court's stay standard, applicants contend (Appl. 4-12) that the district court erred in denying their request for a preliminary injunction. As an initial matter, every court to rule on a request to preliminarily enjoin the Rule has determined that a preliminary injunction is unwarranted, and it is therefore particularly unlikely that this Court would grant a writ of certiorari given the absence of a divide in authority. In any event, the district court did not err in denying applicants' motion for a preliminary injunction.

a. Federal law bans the possession and transfer of "machinegun[s]," 18 U.S.C. 922(o), defined in the National Firearms Act as "any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger." 26 U.S.C. 5845(b). The statute also applies to parts that can be used to convert a weapon into a "machinegun." The definition thus includes "the frame or receiver of any such weapon, any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun." Ibid.

A bump stock is an apparatus used to replace the standard stock on a semiautomatic firearm that is designed "for the express purpose of allowing 'rapid fire' operation of the semiautomatic firearm to which [it is] affixed," 83 Fed. Reg. at 66,518, and converts an ordinary semiautomatic rifle into a weapon capable of firing at a rate of hundreds of bullets per minute with a single pull of the trigger. A bump stock channels the recoil from the first shot into a defined path, shifting the trigger away from the shooter's trigger finger and allowing the firing mechanism to reset. Id. at 66,532. When the shooter maintains constant forward pressure on the weapon's barrel-shroud or fore-grip, the weapon slides back along the bump stock, causing the trigger to "bump" the shooter's stationary finger and fire another bullet. Ibid. By maintaining forward pressure and keeping the trigger finger in a stationary position, the shooter is able to maintain a continuous firing cycle that lasts until the shooter releases the trigger, the weapon malfunctions, or the ammunition is exhausted. Id. at 66,518.

The parties do not dispute this basic description of how a bump stock operates, but they disagree on whether a bump stock converts a semiautomatic firearm into a "machinegun" by enabling a shooter to initiate and maintain a continuous process that

"automatically" fires more than one shot by a "single function of the trigger." 26 U.S.C. 5845(b).

b. Applicants erroneously suggest (Appl. 6) that the statutory term "single function of the trigger" is concerned only with "the mechanical process through which the trigger goes" and not the "process of setting a mechanical process in motion." But the "function" of the trigger is "to initiate the firing sequence" of a weapon. United States v. Jokel, 969 F.2d 132, 134-135 (5th Cir. 1992) (per curiam); see United States v. Olofson, 563 F.3d 652, 658 (7th Cir.) (noting that "a single function of the trigger" "set[s] in motion" the automatic firing of more than one shot), cert. denied, 558 U.S. 948 (2009); United States v. Carter, 465 F.3d 658, 664-665 (6th Cir. 2006) (per curiam), cert. denied, 550 U.S. 964 (2007); United States v. Evans, 978 F.2d 1112, 1113 n.2 (9th Cir. 1992) ("'[B]y a single function of the trigger' describes the action that enables the weapon to 'shoot * * * automatically * * * without manual reloading,' not the 'trigger' mechanism.") (citation omitted), cert. denied, 570 U.S. 821 (1993). And on a rifle equipped with a bump stock, a shooter need only take one step -- pulling the trigger to fire the first shot -- to initiate a cycle of continuous fire that produces "automatically more than one shot, without manual reloading." 26 U.S.C. 5845(b). A bump stock therefore enables the user to "fire[] repeatedly with a

single pull of the trigger," Staples v. United States, 511 U.S. 600, 602 n.1 (1994) (describing "machineguns"), and is prohibited under 18 U.S.C. 922(o).

In accord with this understanding of the term, ATF has recognized for over a decade that the phrase "single function of the trigger" means a "single pull of the trigger" for most weapons. See 83 Fed. Reg. at 66,517. ATF applied this definition to classify the "Akins Accelerator," an early bump-stock-type device, as a machine gun. Ibid. In rejecting a challenge to that classification decision, the Eleventh Circuit observed that "[t]he plain language of the statute defines a machinegun as any part or device that allows a gunman to pull the trigger once and discharge the firearm repeatedly." Akins v. United States, 312 Fed. Appx. 197, 201 (2009). As the Eleventh Circuit also recognized, this conclusion is "consonant with the statute and its legislative history." Id. at 200-201; see H.R. Rep. No. 1780, 73d Cong.. 2d Sess. 2 (1934) (stating that the National Firearms Act "contains the usual definition of machine gun as a weapon designed to shoot more than one shot without reloading and by a single pull of the trigger").

Applicants do not grapple with ATF's longstanding interpretation of the phrase "single function of the trigger" or with the precedent from the courts of appeals, instead pressing a

definition of "single function of the trigger" that would lead to the conclusion that no aftermarket device could convert an AR-15 or similar semiautomatic rifle into a "machinegun," as long as it permits the weapon's trigger mechanism to operate as originally designed. See Appl. 6-7. A rifle equipped with the Akins Accelerator, for example, would no longer qualify as a machine gun, despite the Eleventh Circuit's contrary ruling. Akins, 312 Fed. Appx. at 200. And even a motorized device that mechanically and automatically pulled and released the part originally designed as the trigger on a rifle at the flip of a switch would not qualify as a machine gun, because the internal mechanical operation would be unchanged. See United States v. Camp, 343 F.3d 743, 745 (5th Cir. 2003).

That a shooter produces a continuous firing cycle by taking only step, such as pulling the trigger or pushing a button, is entirely irrelevant under applicants' theory. Yet the courts of appeals have regularly recognized that the statutory term "function" means that inventive individuals cannot engineer around the restrictions of the National Firearms Act "simply by using weapons that employ a button or switch mechanism for firing." United States v. Fleischli, 305 F.3d 643, 655 (7th Cir. 2002) (quoting Evans, 978 F.2d at 1113 n.2); accord Aposhian v. Barr, No. 19-cv-37, 2019 WL 1227934, at *5 (D. Utah Mar. 15, 2019)

(observing that "it makes little sense that Congress would have zeroed in on the mechanistic movement of the trigger in seeking to regulate automatic weapons"); see 83 Fed. Reg. at 66,517-66,518 & n.4 (describing devices that assist shooters in creating and sustaining a continuous firing cycle that ATF has classified as "machineguns").

c. Applicants similarly contend (Appl. 6) that a weapon fires "automatically" only if it requires no human input beyond "a single function of the trigger." Yet this interpretation is inconsistent with the plain language of the statute, renders the term "automatically" superfluous, and conflicts with precedent from the courts of appeals.

As the Rule explains, "'automatically' is the adverbial form of 'automatic,' meaning '[h]aving a self-acting or self-regulating mechanism that performs a required act at a predetermined point in an operation.'" 83 Fed. Reg. at 66,519 (quoting Webster's New International Dictionary 187 (2d ed. 1934); citing 1 Oxford English Dictionary 574 (1933) (defining "automatic" as "[s]elf-acting under conditions fixed for it, going of itself"). And the Rule straightforwardly adopts this definition, stating that a weapon fires "automatically" when it fires "as the result of a self-acting or self-regulating mechanism that allows the firing of multiple rounds." 83 Fed. Reg. at 66,554. The definition also

corresponds with the Seventh Circuit's decision in Olofson, which relied on the same sources to conclude that "automatically" in Section 5845(b) means "as the result of a self-acting mechanism." 563 F.3d at 658. Thus, as two district courts have held in denying a preliminary injunction against the Rule, the Rule's definition of "automatically" "correctly" defines the term and is "[c]onsistent with these contemporaneous dictionary definitions and the Seventh Circuit's decision in Olofson." Guedes v. ATF, No. 18-cv-2988, 2019 WL 922594. At *10 (D.D.C. Feb. 25, 2019); see Aposhian, 2019 WL 1227934, at *5.

In arguing that the Rule's interpretation of "automatically" is erroneous, applicants primarily contend that a weapon can only be firing "automatically" only if it fires by "a single function of the trigger." Appl. 6. But this reads the term "automatically" out of the statute: on applicants' reading, the only relevant question would be whether a gun fires "more than one shot" by "a single function of the trigger." By conflating "automatically" with their erroneous understanding of "single function of the trigger," applicants render "automatically" superfluous. See Duncan v. Walker, 533 U.S. 167, 174 (2001) ("It is our duty to give effect, if possible, to every clause and word of a statute.") (quoting United States v. Menasche, 348 U.S. 528, 538-39 (1955)).

There is likewise no merit to applicants' contention that a weapon cannot operate "automatically" if it involves further human input beyond pulling the trigger. Appl. 6. As district courts have observed in denying injunctive relief against the Rule, a device need not "operate spontaneously without any manual input" to properly be described as operating "automatically." Guedes, 2019 WL 922594, at *11; see Aposhian, 2019 WL 1227934, at *5 ("[E]ven weapons uncontroversially classified as machine guns require at least some ongoing effort by an operator."). Rather, a device is ordinarily described as operating "automatically" where it "perform[s] parts of the work formerly or usually done by hand" or "produce[s] results otherwise done by hand." Guedes, 2019 WL 922594, at *10 (quoting Webster's New International Dictionary (1933) and 1 Oxford English Dictionary (1933), respectively). And this understanding is reflected in ordinary usage: "[a]n automatic sewing machine, for example, still requires the user to press a pedal and direct the fabric." Id. at *11. Because a bump stock performs "two tasks the shooter would ordinarily have to perform manually" -- "control[ing] the distance the firearm recoils and ensur[ing] that the firearm moves linearly" -- a bump stock allows for an automatic continuous firing cycle. Ibid.

As the Rule explains, a rifle equipped with a bump stock fits comfortably within the plain and ordinary meaning of

"automatically." The bump stock "performs a required act at a predetermined point" in the firing sequence by "directing the recoil energy of the discharged rounds into the space created by the sliding stock," ensuring that the rifle moves in a "constrained linear rearward and forward path[]" to enable continuous fire. 83 Fed. Reg. at 66,532. This process is also "[s]elf-acting under conditions fixed for it." Ibid. The shooter's maintenance of continuous pressure on the extension ledge with the trigger finger and on the barrel-shroud or fore-stock with the other hand provides the conditions necessary for the bump stock to repeatedly perform its basic purpose: "to eliminate the need for the shooter to manually capture, harness, or otherwise utilize th[e] [recoil] energy to fire additional rounds." Id. at 66,532.

d. Applicants advance a hodgepodge of other arguments in support of a stay, but none advances their position. Applicants contend, for example, that the government and the district court made unspecified "factual" errors. Appl. 10-11. Applicants do not identify the "incorrect factual statements" that the district court "adopted," nor do they explain how any such factual errors would be relevant to determining whether a bump stock meets the statutory definition of a "machinegun." The most applicants offer is a single footnote pointing to the undisputed fact that some machine guns can be fired with one hand, and that, generally, a

bump stock requires two hands. See Appl. 10 n.7. Yet applicants do not explain the legal significance of this fact. The statute nowhere states that “automatically” means “one-handed” (a definition that would be inconsistent with the ordinary meaning of “automatically”). And, indeed, heavy machine guns may require more than one person to operate.

Nor is a stay justified because in evaluating the Rule, the district court analyzed the rule through the Chevron framework. See Appl. 8-9. Neither this Court nor the court of appeals defers to the district court in its review of the Rule and its interpretation of the statute, and, as explained, the Rule provides the best interpretation of the statute.

There is similarly no merit to applicants’ suggestion that the Rule presents separation-of-powers concerns because “the agency has created a new crime.” Appl. 5. To the contrary, as explained, the Rule overruled prior classification decisions relying on the agency’s erroneous interpretation of “automatically” and it provided the public with notice of the agency’s interpretation of the statute and plans to begin enforcing the statute with respect to bump stocks.

2. The unlikelihood that this Court would grant certiorari and reverse means that a stay is unwarranted, particularly where applicants have not explained how the equities favor a stay. See

Stephen M. Shapiro et al., Supreme Court Practice § 17.13(b), at 903 (10th ed. 2013) (citing cases).

In any event, the equities support denial of a stay here. The protection of the public and law enforcement officers from the proliferation of prohibited firearms is a bedrock foundation of federal firearms legislation, including the National Firearms Act, the Gun Control Act, and the Firearm Owners Protection Act. Implementation of the Rule promotes that public interest by protecting the public from the dangers posed by machine guns prohibited by federal law. See 83 Fed. Reg. at 66,520 (“[T]his rule reflects the public safety goals of the [National Firearms Act] and [Gun Control Act.]”). In addition, implementation of the Rule reflects a particularized interest in advancing the safety of law-enforcement personnel because “[a] ban [on bump stocks] * * * could result in less danger to first responders when responding to incidents.” 83 Fed. Reg. at 66551. The public interest in the safety of law enforcement officials is “both legitimate and weighty.” Pennsylvania v. Mimms, 434 U.S. 106, 110 (1977) (per curiam). As with the interest in public safety, this interest would be disserved by an injunction, and this further tips the balance of the equities against the grant of injunctive relief.

CONCLUSION

The application for a stay of the Rule should be denied.

Respectfully submitted.

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Solicitor General
Counsel of Record

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