No. 19-1298

In the United States Court of Appeals
for the Sixth Circuit

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

GUN OWNERS OF CALIFORNIA, INC.,
MOVANT-APPELLANT,

V.

WILLIAM P. BARR, U.S. Attorney General, in his official capacity as Attorney General of the United States, U.S. DEPARTMENT OF JUSTICE, BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES, THOMAS E. BRANDON, in his official capacity as Acting Director, Bureau of Alcohol, Tobacco, Firearms, and Explosives,
Defendants-Appellees.

EMERGENCY MOTION FOR A STAY OF AGENCY ACTION

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March 22, 2019

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 19-1298 Case Name: Gun Owners of America v. Barr

Name of counsel: Robert J. Olson

Pursuant to 6th Cir. R. 26.1, Gun Owners of America, Inc., et al.
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on March 22, 2019 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Robert J. Olson
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This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

INTRODUCTION

This Emergency Motion for a Stay stems from a decision issued yesterday evening March 21, 2019, by the U.S. District Court for the Western District of Michigan, denying Appellants' motion for a preliminary injunction. Docket No. 18-1429, ECF #48. Since the district court's decision had not been forthcoming, and there remained only a week before implementation of ATF's final rule challenged here. This past Tuesday, March 19, 2019, Appellants filed in this Court an original action seeking a writ of mandamus and stay of agency action. In Re Gun Owners of America, et al., Case No. 19-1268. A few hours ago, this Court found that, because of the district court's order, it lacked jurisdiction to further consider Appellants' petition and motion. Case 19-1268, Document 17-2. Thus, this Court denied Appellants' motion for stay pending appeal, "without prejudice to the plaintiffs' right to move for a stay in an appeal from the denial of a preliminary injunction." *Id.* at 2.

Appellants now move for such relief on an expedited basis. Appellants hereby submit this Emergency Motion for Stay. Since there remain just three full days (one business day) before implementation of the Final Rule, **Appellants respectfully request that this Court rule on their emergency motion as soon as**

possible, taking into consideration the Appellees' previously filed Response without further briefing.

Pursuant to Rule 8 of the Federal Rules of Appellate Procedure, Appellants request that this Court stay implementation of the Final Rule pending appeal of the district court's order below, and the issuance of a final unappealable decision on Appellants' complaint. Pursuant to FRAP 8(a)(2)(A)(ii), Appellants assert that they have requested a preliminary injunction from the district court, which denied their motion, and that it would be impracticable (nor is there time) to request a stay from the district court.[1]

BACKGROUND

This case involves a challenge by Gun Owners of America, *et al.* ("Appellants") to the Bureau of Alcohol, Tobacco, Firearms, and Explosives' ("ATF"), *et al.* ("Defendants") Final Rule classifying so-called "bump fire stocks" as machineguns, banning their private possession, and ordering their destruction. 83 Fed. Reg. 66514. There now remain only three full days until ATF's Final Rule becomes effective next Tuesday, March 26, 2019. Prior to that date,

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[1] Should this Court believe that the more appropriate relief would be to issue an injunction of the Defendants' regulation pending review of the district court's order denying a preliminary injunction, Appellants ask this Court to consider this motion as one seeking an injunction pending appeal for the reasons argued to the district court below.

hundreds of thousands of law-abiding gun owners have been ordered to destroy over $100 million of lawfully owned property or risk felony prosecution. That simply cannot be allowed to happen. Appellants raise serious questions as to whether the district court below erred in both fact and law. Moreover, serious legal issues remain unaddressed. Significant and serious irreparable harm will result without a stay. Finally, Appellants have shown that they are entitled to a stay because they have a strong likelihood of succeeding on the merits of their claims, despite the district court's conclusions to the contrary.

JURISDICTIONAL STATEMENT

This Petition arises from Gun Owners of America, *et al.* v. William P. Barr, *et al.*, Docket No. 18-1429. The district court had jurisdiction over this action pursuant to 5 U.S.C. § 702 and 28 U.S.C. § 1331. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1292(a)(1), and over the relief requested herein pursuant to 5 U.S.C. §§ 705 and 706.

ISSUE PRESENTED

Whether the Court should stay implementation of that final agency rule, pending appeal of Appellants' claims, where Appellants raise serious and substantial legal questions on appeal, have demonstrated a likelihood of success on the merits of their claim, and where the agency has arbitrarily ordered the

wholesale destruction of over $100 million of property, owned by hundreds of thousands of law-abiding Americans, by March 26, 2019?

BACKGROUND & SUMMARY OF ARGUMENT

On December 26, 2018, Defendants published in the Federal Register a Final Rule purporting to further define the statutory definition as to what constitutes a machinegun. 83 Fed. Reg. 66514. The Final Rule also states specifically that popular firearm accessories known as "bump fire stocks" are now considered machineguns and thus banned for sale and possession under federal law. In reclassifying bump stocks as machineguns, the Final Rule reverses over a decade of prior and repeated ATF classifications of bump stocks as mere firearm accessories (entirely unregulated by federal law). Under the Final Rule, the owners of what Defendants estimate to be 520,000 bump stocks (Appellants estimate the actual number to be far higher) are required to destroy or surrender their lawfully owned property (valued at over $100 million) before March 26, 2019, or else face criminal penalties of up to 10 years' imprisonment and a $250,000 fine.

On December 26, 2018 (the day after Christmas, and during the government shutdown), the Final Rule was officially published in the Federal Register. Appellants filed their complaint and motion for preliminary injunction on the very

same day. *See* ECF # 1, 9, 10. Appellants' complaint challenged the Final Rule as being contrary to a clear and unambiguous statute, and thus outside ATF's authority to promulgate under the Administrative Procedures Act ("APA").[2] On March 6, 2019, the district court heard oral argument on the matter. On Thursday, March 21, 2019, the district court below denied Appellants' motion. This appeal followed.

ARGUMENT

1. A Stay of ATF's Regulation Pending Appeal Is the Appropriate Remedy Here.

In other bump stock challenges pending in the U.S. Court of Appeals for the District of Columbia, the government challenged the Appellants' request for expedited briefing, arguing that "the proper procedural mechanism ... is to file an emergency motion for injunctive relief pending appeal." Guedes v. ATF, USCA D.C. Cir. Case #19-5042, Document #1775047, pp. 1, 4. In those cases, the government had objected to an expedited appellate briefing schedule, noting that the "extremely compressed timeline" requested by the Appellants would require briefing, argument, and decision by the court to occur within a period of 27 days.

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[2] Appellants also brought a due process claim and a takings claim, but did not brief those claims at the preliminary injunction stage.

Id. at 1-2. Appellants seek that relief here, as there is certainly no way to brief and argue this case in three days before the Final Rule takes effect.

2. Appellants Meet the Criteria for a Stay Pending Appeal.

This Court has noted that it "examines four factors when considering a stay pending appeal under Federal Rule of Appellate Procedure 8(a): (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay." Northeast Ohio Coalition for the Homeless v. Husted, 2012 U.S. App. LEXIS 26926, *2 (6th Cir. 2012). These are "'not prerequisites that must be met, but are interrelated considerations that must be balanced together.'" *Id.* at *6.

The inquiry on a motion for stay pending appeal is similar to the inquiry on a motion for preliminary injunction. However, while there is "substantial overlap" between the standards, they are not identical. Nken v. Holder, 556 U.S. 418, 434 (2009). Appellants understand the threshold for stay pending appeal to be less demanding than on a motion for preliminary injunction in the district court. For example, "[t]o justify the granting of a stay ... a movant need not always establish a high probability of success on the merits. ... The probability of success that must

be demonstrated is inversely proportional to the amount of irreparable injury Appellants will suffer absent the stay. *Id.* Simply stated, more of one excuses less of the other." Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog, 945 F.2d 150, 153 (6th Cir. 1991). Additionally, in focusing on the likelihood of success, courts look not at whether the Appellants will actually prevail, but at whether they "have strong arguments" and whether their "argument ... has merit." Husted at *6, 11.

Appellants clearly meet that test. Appellants have raised significant questions of law and fact that are undoubtedly serious enough to warrant a stay of agency action in this case until this Court has properly heard their appeal. In fact, the district court below expressly found Appellants' reading of the statute to be both "reasonable" and supported by case law. ECF #48 at 14. Moreover, significant and irreparable harm undoubtedly will occur before and when the Final Rule goes into effect on March 26, 2019. A stay is unquestionably necessary to avoid that harm.

a. Appellants' Appeal Raises Serious Questions of Law, and They Have a Strong Likelihood of Success on the Merits.

1. The Statute is Unambiguous, and it Was Clear Error for the District Court to Conclude Otherwise.

Appellants have presented a strong likelihood of success of their challenge to the Final Rule. *See* ECF # 10, 37. Federal law, in pertinent part, 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).

Here, Defendants have admitted that definition is clear and unambiguous. 83 Fed. Reg. 66527; Brief for Appellees in Guedes v. ATF, 19-5042, Doc. # 1777426 (D.D.C.), p. 37. However, rather than simply "applying the definition to [bump stocks]," (U.S. v. TRW Rifle, 447 F.3d 686, 689 n.4 (9th Cir. 2006), Defendants seek to further "interpret" that unambiguous statute, and thereby 'define the definition' of a machinegun. Admitting that a bump stock does not fire more than one round by "a single function of the trigger," Defendants concede they have rewritten the statute to be "single pull of the trigger," an "expanded" standard they then argue (incorrectly) covers bump stocks. ECF #37, pp. 1-2. As Appellants point out, however, bump stocks do not even fire more than a single round by a "single pull of the trigger." ECF # 10, p. 7.

As Appellants have noted, both parties have repeatedly declared the statutory text to be unambiguous. Petition for Mandamus in Docket No. 19-1269 at 11. The district court, however, disagreed with both parties, finding that "the statutory terms are ambiguous." ECF #48 at 1.

First, the district court found that "**the word** 'automatically'[3] ... is ambiguous" as to "whether **the word** 'automatically' precludes any and all application of non-trigger, manual forces in order for multiple shots to occur."[4] *Id.* at 12-13 (emphasis added). But the issue is not whether **the word** "automatically"

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[3] Defendants have created a definition of "automatically" that does not encompass bump stocks. The Final Rule alleges a bump stock is a machinegun because it "harness[es] ... recoil energy...." 83 Fed. Reg. 66554. But, unable to counter Appellants claims that bump stocks are incapable of harnessing energy, Defendants then argued only that a bump stock "helps a shooter channel recoil energy" — less than the Final Rule requires. ECF #34, p. 23. Later still, Defendants sought only to demonstrate that bump stocks "channel recoil energy" — something entirely different than "harness," as Appellants pointed out. ECF #37, p. 8.

Defendants also argue that "automatically" means "functioning as the result of a self-acting or self-regulating mechanism." 83 Fed. Reg. 66553. But they admit that a bump stock doesn't act by itself, but rather because of the shooter: "in conjunction with the shooter's maintenance of pressure...." *Id.* at 66516. And Defendants do not claim that a bump stock is the actual "mechanism" which channels energy, but rather incomprehensibly that the "empty space" behind the bump stock is the "mechanism." ECF #37 p. 8.

[4] The Court correctly frames the issue as "whether the forward pressure exerted by the shooter using the non-trigger hand requires the conclusion that a bump stock does not shoot automatically." ECF # 48 at 12.

might be ambiguous when extracted from the statute in this way. Fortunately, Congress used **many words** to define a machinegun. Indeed, that is how individual words together gain unambiguous meaning. As Justice Cardozo once explained, "the meaning of a statute is to be looked for, not in any single section [or word], but in all the parts together...." Panama Ref. Co. v. Ryan, 293 U.S. 388, 439 (1935) (Cardozo, J., dissenting). As Appellants have argued, the statutory context makes clear **precisely how much human input is permitted** while still rendering a firearm a machinegun — "automatically ... by a single function of the trigger." Petition at 12. The district court correctly recognized that bump stocks require more human input than "a single function of the trigger" (ECF #48 at 13), yet its atextual analysis of "automatically" reads that limitation out of the statute. Contrary to the district court's conclusion below, it is not up to agencies to decide what "automatically" means in the statute, and it is error for courts to defer to them.

Second, the district court found "ambigu[ity] with respect to the phrase 'single function of the trigger.'" ECF # 48 at 13. The court concluded that "[t]he statute does not make clear whether function refers to the trigger as a mechanical device [as Appellants argued] or whether function refers to the impetus for action that ensues [as the government argued]. **Both interpretations are reasonable**."

ECF #38 at 13-14 (emphasis added). The district court looked to legal precedents and dictionary definitions in an attempt to decide. *Id.* at 14. However, it does not appear that the court began with the statute itself. Clearly and unambiguously, "function of the trigger" refers to the mechanical process through which the trigger goes — and, while it is depressed, activates repeated shots automatically. It certainly does not refer to the biological process of setting a mechanical process into motion. The court erred by failing to consider the statute on its own. **Most importantly, however, the district court never concludes that — much less explains how — a bump stock fires even "by a single pull of the trigger."**[5] As Appellants have explained, the trigger is both "functioned" and "pulled" separately, each time a shot is bump fired. The district court offers no way around this reality.

Finally, at oral argument on March 6, 2019, the district court asked the government about Appellants' assertion that, if a previously-unambiguous statute is now declared ambiguous, it must be declared **void for vagueness**. The court queried as to the implications for criminal prosecutions that previously have relied on an unambiguous criminal statute. Yet the district court does not wrestle with

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[5] Appellants' made additional arguments that the district court did not address, yet are fatal to the government's case. Many are briefly summarized in their Motion filed Tuesday.

those serious issues here. Thus, this Court must carefully consider the ramifications of a declaration that a criminal statute is suddenly ambiguous, after 85 years of being unambiguous.

Indeed, for decades, courts consistently concluded that the statute was unambiguous. *See, e.g.*, U.S. v. Williams, 364 F.3d 556, 558 (4th Cir. 2004); U.S. v. TRW Rifle 7.62x51mm Caliber, One model 14 Serial 593006, 447 F.3d 686, 689 n. 4 (9th Cir. 2006); U.S. v. Olofson, 563 F.3d 652, 660 (7th Cir. 2009); U.S. v. Fleischli, 305 F.3d 643, 655 (7th Cir. 2002). Suddenly now, our separate and jealously independent third branch of government is consistently concluding that the statute is ambiguous. ECF # 48; Guedes v. ATF, 18-cv-2988 (D.D.C.); Codrea v. ATF, 18-cv-3086; Aposhian v. Barr, 19-cv-37 (D.Utah) (the Utah court does not explicitly find the statute ambiguous, but nevertheless permits the government to "interpret undefined statutory terms," something that would be entirely unnecessary if the statute were unambiguous). In the future, when otherwise-law-abiding bump stock owners inevitably are prosecuted for possession of unregistered machineguns, will the courts flip back, and conclude that the statute is again unambiguous?

2. The Government is Entitled to No Deference Here, and It Was Clear Error for the District Court to Conclude Otherwise.

In the two related D.C. bump stock cases (currently pending in the circuit court), Judge Friedrich issued an opinion on February 25, 2019, which began and ended with Chevron deference. ECF # 22 in 18-cv-3086-DLF (D.D.C.). Ignoring the fact that the government had never asked for Chevron deference in its interpretation of this criminal statute, the D.C. court nevertheless found ATF entitled to it.

Recognizing the manifest error in the D.C. opinion, the government immediately filed a Notice of Supplemental Authority in the district court below. ECF # 38. In it, the government expressly disclaimed Chevron deference, and argued that the ATF is not entitled to "any deference" in this matter. *Id.* at 2.

Ignoring the government's pleas not to base its opinion on Chevron deference, the district court below doubled down, claiming that "[w]hile the parties might like to avoid *Chevron* ... this Court cannot." ECF 48 at 10. Rejecting Appellants' argument that it is the duty of the court — not the agency — to determine the meaning of the statute and thereby to "say what the law is," the district court deferred entirely to the agency, even though it admitted Appellants'

understanding of the statute is both "reasonable" and supported by case law. *Id.* at 14.[6]

Appellants have raised a serious question whether Chevron deference — indeed, deference of any kind — applies here. If this Court were to conclude it does not, then the district court's opinion is a nullity. That is a matter this Court should address before more than a half million bump stocks are ordered destroyed.

3. The District Court Ratified ATF's Factual Errors.

Appellants time and again have made clear that the government's factual claims about how a bump stock operates are untrue. Appellants have explained the numerous and repeated factual errors in Defendants' Final Rule and in their briefing, wherein Defendants now suddenly claim bump stocks in 2019 somehow function precisely the opposite than they did a decade before. ECF #37, p. 6, *et seq.* ATF has changed not only its interpretation of the law, but its fundamental recitation of the facts — all designed to reach the result it wishes.

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[6] Defendants in this case have expressly disclaimed that they are entitled to any deference under Chevron v. Nat. Res. Def. Council, 467 U.S. 837 (1984), in interpreting this criminal statute, pursuant to United States v. Apel, 571 U.S. 359 (2014). ECF # 38. As Appellants explained at oral argument, Apel applies not only to Chevron deference, but to the same "arbitrary and capricious" deference accorded under the APA, 5 U.S.C. § 706. In other words, it is up to the courts to determine what the statute means. And the government has conceded that the statute as written is unambiguous and does not apply to bump stocks. Appellants should prevail on that basis alone.

In its opinion below, the district court adopted some of those incorrect factual statements. If this Court were to rely on these untrue statements of fact, then it cannot possibly apply the law correctly, because a proper understanding of the actual operation of bump stocks is the lynchpin of this case. When confronted on its factual errors, the government seeks to redirect, talking about how its past "interpretations **of the [law]**" do not prohibit its taking a new position now. Response to Petition for Mandamus ("Resp.") at 18-19 (emphasis added). Appellants offered the district court exhibits, evidence, videos, personal shooting experience of their counsel, and an expert affidavit, all explaining that the government's current statements as to how bump stocks operate are untrue.[7] The government never engages Appellants on this point, instead hoping its avoidance of the issue will be overlooked.

Ironically, the district court stated that, "[t]o appreciate how the new interpretation of the definition of machine gun implicates bump-stock devices, one must understand how the device works." ECF # 48 at 7. Yet the court immediately makes clear that it **does not understand** how bump stocks operate.

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[7] For example, the government cannot explain away this simple distinction between a machinegun and a semi-automatic firearm equipped with a bump stock: While an untrained shooter can fire a machinegun with one hand and no practice, no person could bump fire a semi-automatic weapon with just one hand (the government admits this), and not effectively without significant practice.

The court adequately describes what a bump stock **is**, but not how it **works**. The court claims that a "bump stock ... **harnesses** the rearward recoil energy from the shot **causing** the weapon to slide back...." *Id*. (emphasis added). Not only is this untrue, it doesn't make any sense. Recoil is explained by physics — Newton's Third Law of Motion. When a round is fired from a rifle, the rifle "slides back" into the bump stock all on its own — not because the bump stock "harnesses" the energy or serves any function at all in the process, but simply because that's the direction recoil (and thus the rifle) moves.

The district court also adopts the government's assertion that a bump stock somehow "initiat[es] [a] firing sequence" — as if this sequence is automatic and without additional shooter input. *Id.* at 7. Yet as Appellants have explained, bump fire — with or without a bump stock — is nothing more than rapidly-occurring, semi-automatic fire, that requires constant and varying degrees of

human input in order to continue.[8] Bump fire is a technique that depends on human skill and practice — not on the presence or absence of a plastic stock.

c. Irreparable Harm.

As noted above, Defendants has conceded that irreparable harm will result in this case. ECF #34, p. 27 n. 16.

d. Public Interest/Public Safety.

Finally, as Appellants explained in their briefing and at oral argument, there is no public safety concern here. First, Defendants have offered no concrete evidence that bump stocks have ever been used in any crime, including the Las Vegas shooting. Second, Defendants offer no conceivable explanation how banning bump stocks would prevent crime, when all sorts of other devices, techniques, and firearms remain on the market, offering identical (if not more effective) results. Even when expressly given the opportunity, the government still refuses to claim that bump stocks were used in the Las Vegas shooting.

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[8] The government has admitted that "[t]his litigation involves 'bump stock-type' devices — which '[s]hooters use ... to **mimic automatic fire**...." Resp. 3 (emphasis added). Indeed, the government admits that a bump stock does no more than "allow[] '**rapid fire**' operation **of the semiautomatic** firearm to which [it is] affixed." Resp. 8 (emphasis added). But just because something quacks like a duck does not make it a machinegun. ECF # 10 p. 17. The statute clearly contains a mechanical/scientific definition, not a results-oriented one. Congress never banned fast shooting; it banned machineguns. Regardless, it is not up to the ATF to outlaw things that are **like** machineguns — that is for Congress to decide.

Rather, obviously playing to emotions, they claim only that the Las Vegas shooter was "armed with" weapons outfitted with bump stocks, not that he actually used those weapons or the bump stocks attached to them. The government maligns Petitioners for an alleged "baseless assertion" that bump stocks **were not used**. Resp. to Petition for Mandamus 20. Petitioners never said that bump stocks were not used. All Petitioners did was point out the **government has provided no evidence** that bump stocks were used. That simple fact remains true.

In response, the government simply provides generic, nonspecific, and unsubstantiated allegations that police officers will start falling dead in the streets if this Court takes a short while to properly consider this case. Resp. 19-20. But again, even when challenged, the government can provide **no evidence** that any bump stock has ever been used in any crime.

Rather, as Appellants explained, "[i]t is in the public interest for ... an agency to implement properly the statute it administers." Mylan Pharms., Inc. v. Shalala, 81 F. Supp. 2d 30, 45 (D.D.C. 2000).

CONCLUSION

The government has failed to contest two of Petitioners' basic pronouncements in this matter, which must prove fatal to the government's case as a matter of law. First, the government admits the statutory definition of a

machinegun is clear and unambiguous. *See* Mandamus Petition 11. Second, the government admits this unambiguous definition does not apply to bump stocks, at least in part because rifles equipped with bump stocks fire only one shot for every "single function of the trigger." *Id.*

Nevertheless, the government wishes to "expand" the statute. ECF #37 p. 2. The government claims it irrelevant that, for well over a decade, ATF concluded bump stocks were perfectly legal under federal law, nothing more than unregulated firearm accessories. Suddenly now, the government insists that this Court must quickly adopt the agency's **current** interpretation on bump stocks, order all bump stocks be destroyed by this coming Tuesday, and sweep all other concerns under the rug. This, because the government believes its current understanding is the "best interpretation" of the statute — an interpretation that somehow has remained hidden for 85 years.

Yet the government cannot "interpret" a statute unless the statute is ambiguous. The government never argued that the statute was ambiguous here, yet the district court jumped to the rescue, declaring the statutory definition unclear. Likewise, the government's tortured and atextual understanding of the statutory terms cannot prevail unless significant deference is afforded the agency. The government argued it should receive no deference, but once again the district

court stood ready to defer completely to the agency. Finally, the government's case must fail unless it is permitted to twist the facts, because the operation of bump stocks (properly understood) do not fit even with the regulatory definitions ATF has promulgated. For the reasons above (and others there is simply no time to brief), the district court's opinion below is in clear error, both factually and legally, and this further weighs in favor of the granting of a stay, so that the Court has the time to properly consider Appellants' appeal.

Appellants respectfully request that this Court rule on their motion as soon as possible, in order to avoid the otherwise irreparable and nationwide destruction of property that no doubt will occur in the last few days before the Final Rule becomes effective.

Respectfully submitted,

/s/ Robert J. Olson

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

IT IS HEREBY CERTIFIED:

1. That the foregoing Emergency Motion for a Stay of Agency Action, complies with the type-volume limitation of Rule 27(d)(2)(A), Federal Rules of Appellate Procedure, because this petition contains 4,388 words, excluding the parts of the petition exempted by Rule 32(f).

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

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

Dated: March 22, 2019

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing Emergency Motion for a Stay of Agency Action, was made, this 22nd day of March 2019, by the Court's Case Management/Electronic Case Files system upon all parties or their counsel of record.

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

ADDENDUM

United States District Court for the Western

District of Michigan

GUN OWNERS OF AMERICA, INC., et al.

Plaintiff,

vs. Case No. 1:18-cv-01429

WILLIAM P. BARR, et al.

Defendant.

NOTICE OF APPEAL

Notice is hereby given that Plaintiffs Gun Owners of America, et al.,
Name all parties taking the appeal

hereby appeal to the United States Court of Appeals for the Sixth Circuit from

Opinion and Order Denying Plaintiffs' Motion for a Preliminary Injunction
The final judgment, from an order describing it

entered in this action on the 21st day of March, 2019.

(s) Kerry L. Morgan

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Attorney for Gun Owners of America, Inc., et al

Note to inmate filers: If you are an inmate confined in an institution and you seek the timing benefit of Fed. R. App. P. 4(c)(1), complete Form 7 (Declaration of Inmate Filing) and file that declaration along with this Notice of Appeal.

cc: Opposing Counsel ☑
Court of Appeals ☑

6CA-3
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

GUN OWNERS OF AMERICA, et al., Plaintiffs,	)	
	)	No. 1:18-cv-1429
-v-	)	
	)	Honorable Paul L. Maloney
WILLIAM P. BARR, et al., Defendants.	)	

OPINION AND ORDER DENYING PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

On December 26, 2018, the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), a part of the Department of Justice, published a Final Rule re-interpreting undefined terms found in the statutory definition of the word "machinegun." 83 Fed. Reg. 66514 (Dec. 26, 2018). As a result of the new interpretation, devices commonly known as "bump stocks" fall under the statutory definition of "machinegun." Members of the public are not allowed to possess machine guns manufactured after 1986. The Final Rule requires bump stock owners to dispose of their devices by March 26, 2019. After March 26, people who possess a bump stock can be charged with a felony.

Plaintiffs filed a lawsuit challenging the Final Rule. Along with their complaint, Plaintiffs filed a motion for a preliminary injunction (ECF No. 9) asserting a likelihood of success on their asserted violations of the Administrative Procedures Act (APA). Because Congress has not spoken on the matter and the statutory terms are ambiguous, Plaintiffs have not demonstrated a likelihood of success on the merits of their administrative law claims and their motion for a preliminary injunction must be denied.

I.

After Plaintiffs filed their motion for a preliminary injunction (ECF No. 9), Defendants filed a response (ECF No. 34) and Plaintiffs filed a reply (ECF No. 37). Defendants subsequently filed a Notice of Supplemental Authority. (ECF No. 38.) On February 25, 2019, Judge Dabney Friedrich of the District Court for the District of Columbia issued a memorandum opinion denying a motion for a preliminary injunction in the first-filed action challenging the Final Rule. *See Guedes v. AFT*, 356 F. Supp. 3d 109 (D.D.C. Feb. 25, 2019).[1] The Court takes judicial notice of Judge Jill Parrish's decision to deny a preliminary injunction in another challenge to the Final Rule, which was filed in the United States District Court in Utah. *See Aposhian v. Barr*, No. 2:19-cv-37, 2019 WL 1227934 (D. Utah Mar. 19, 2019). The Court held a hearing on this motion in this case on March 6, 2019.

The standards for a preliminary injunction are well-settled. Preliminary injunctions are governed by Rule 65. The decision to grant or deny a preliminary injunction falls within the district court's discretion. *McGirr v. Rehme*, 891 F.3d 603, 610 (6th Cir. 2018). A court considers four factors when deciding whether to issue an injunction: (1) the moving party's chances of success on the merits; (2) the irreparable harm to the moving party without an injunction; (3) the substantial harm to the public were an injunction granted; and (4) whether an injunction would serve the public's interest. *Id.* (citing *S. Glazer's Distrib. of Ohio, LLC v. Great Lakes Brewing Co.*, 860 F.3d 844, 849 (6th Cir. 2017)). Each of the four factors is

[1] As of the date of this Opinion, Westlaw had not yet included page numbers to Judge Friedrich's decision. Where necessary, this Court cites to the page numbers in the slip opinion.

not a prerequisite for an injunction, rather, courts must balance the factors when deciding whether to issue an injunction. *Great Lakes Brewing*, 860 F.3d at 849. When the government is a party, the final two factors for a preliminary injunction merge. *Nken v. Holder*, 556 U.S. 418, 435 (2009) (involving a request for a stay); *Osorio-Martinez v. Attorney Gen. of the United States*, 893 F.3d 153, 178 (3d Cir. 2018) (involving a request for a preliminary injunction).

The Supreme Court has cautioned that a "preliminary injunction is an extraordinary remedy never awarded as of right" and that courts "'must balance the competing claims of injury and must consider the effect on each party with the granting or withholding of the requested relief.'" *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008) (citation omitted). Where a plaintiff has no likelihood of success on the merits, a preliminary injunction should be denied. *Great Lakes Brewing*; *see Gonzales v. Nat'l Bd. of Med. Examiners*, 225 F.3d 620, 625 (6th Cir. 2000) ("Although no one factor is controlling, a finding that there is simply no likelihood of success on the merits is usually fatal.").

II.

A.

With the framework for the relief requested in Plaintiffs' motion in mind, the Court considers the historical and statutory backdrop for this dispute.

Prohibition, the "noble experiment," lasted from 1920 to 1933. The criminalization of intoxicating liquors created a lucrative, illegal market for alcoholic beverages. During these years, local gangs evolved and organized into criminal enterprises to exploit the demand for illegal alcohol. As these criminal organizations expanded, so too did the danger those

organizations posed to each other and the public. Among the weapons adopted and used by these criminal organizations were rapid-fire, hand-held guns, like the Thompson sub-machine gun, a weapon that began production in the 1920s and could fire several hundred rounds a minute. In 1929, Tommy guns were used in the infamous St. Valentine's Day Massacre, an incident where members of one Chicago gang dressed like police officers killed seven members of a rival gang. On February 20, 1933, Congress proposed the Twenty-First Amendment, which was adopted by the required number of States on December 5, and the experiment with prohibition ended. The threat to the public from criminal organizations, however, remained.

Congress began to address the threat that rapid-fire weapons pose to the public, an effort that has continued for decades. A year after Prohibition ended, Congress enacted the National Firearms Act (NFA) as an attempt to protect the public from the dangers posed by military-type weapons likely to be used for criminal purposes. *See United States v. Thompson/Ctr. Arms Co.*, 504 U.S. 505, 517 (1992) ("It is of course clear from the face of the Act that the NFA's object was to regulate certain weapons likely to be used for criminal purposes, ..."); *United States v. Peterson*, 476 F.2d 806, 810 (9th Cir. 1973) ("We have concluded from a perusal of the legislative history of the act that Congress was well aware of the rampant destruction of property and dangers to life and limb faced by the public through the use of converted military type weaponry and the street variety of homemade instruments and weapons of crime and violence."). Congress imposed a tax on both the making and the transfer of NFA firearms. Following the assassinations of Senator Robert Kennedy and Dr. Martin Luther King, in 1968 Congress amended the NFA by enacting the Gun Control Act

(GCA), which, among other things, expanded the NFA's definition of "machinegun." Finally, in 1986, Congress enacted the Firearm Owners Protection Act (FOPA), which makes it "unlawful for any person to transfer or possess" a newly manufactured machine gun. 18 U.S.C. § 922(c). The FOPA references the NFA's definition of machine gun. *Id.* § 921(a)(23). When ATF issued its Final Rule in December 2018, Congress defined "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. The term shall also include the frame or receiver of such weapon, any part designed and intended solely and exclusively, or combination of parts designed an 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 possession or under the control of a person.

26 U.S.C. § 5845(b).

Congress has identified the Attorney General of the United States as the officer responsible for the administration and enforcement of Chapter 53 of Title 26 of the United States Code. 26 U.S.C. § 7801(2)(A)(i). The definition of "machinegun" is located in Chapter 53. Congress has also authorized the Attorney General to promulgate rules and regulations necessary to carry out the provisions of Chapter 44 of Title 18, the portion of the United States Code concerning the unlawful acts involving firearms. 18 U.S.C. § 926(a). In turn, the Attorney General has identified the Direction of the Bureau of Alcohol, Tobacco, Firearms and Explosives as responsible for administering, enforcing, and exercising the functions and powers of the Attorney General with respect to Title 18 Chapter 44 and Title 26 Chapter 53. 28 U.S.C. § 0.130(A)(1) and (2).

Exercising this delegated authority, ATF has provided both formal and informal guidance concerning firearm devices. In a few instances, ATF has promulgated Final Rules concerning a firearm device. *See, e.g.,* ATF Rul. 2006-2 (Final Rule determining the Akins Accelerator bump stock was a machine gun). More commonly, ATF issues informal letters. ATF encourages, but does not require, manufacturers to seek informal rulings or classification letters prior to offering devices for sale. *See Sig Sauer, Inc. v. Jones*, 133 F. Supp. 3d 364, 367 n.2 (D.N.H. 2015). Both regulatory actions—Final Rules and informal letters—have been challenged in federal courts. *E.g., Akins v. United States*, 312 F. App'x 197 (11th Cir. 2009) (per curiam) (affirming Final Rule); *Sig Sauer, Inc. v. Brandon*, 826 F.3d 598 (1st Cir. 2016) (affirming classification letter).

B.

As occurred in the 1930s and then again in the 1960s, a well-publicized shooting provided the impetus for further review of federal restrictions on firearms. On October 1, 2017, a gunman in Las Vegas, Nevada, fired over one thousand rounds of ammunition into a crowd gathered for a concert. Fifty-eight people died and several hundred were wounded by the gunfire. The gunman reportedly employed bump-stock devices on several of his weapons. Following this tragic event, members of Congress, a number of non-governmental organizations, and eventually the President of the United States urged AFT to re-examine its prior considerations of bump stocks.

On December 26, 2017, the Department of Justice published an advanced notice of proposed rulemaking concerning bump-stock devices. On March 29, 2018, the Department published a notice of proposed rulemaking. The Department received over 185,000

comments, with the comments supporting the proposed rules exceeding those opposing the proposed rules at about a two-to-one ratio.

To appreciate how the new interpretation of the definition of machine gun implicates bump-stock devices, one must understand how the device works. The stock of a rifle is the portion of the weapon behind the trigger and firing mechanism and extends rearward towards the shooter. The forward part of the stock just behind the trigger provides a grip for the shooting hand. The rear end of the stock rests against the shooter's shoulder. A bump stock replaces the standard stock on a rifle. Bump stocks include an extension ledge or finger rest on which the shooter places his or her trigger finger where it is stabilized. 83 Fed. Reg. at 66516. The shooter then exerts a constant forward pressure on the barrel of the rifle using the non-trigger hand. *Id.* As the rifle is pushed forward, the shooter also pulls the trigger, initiating the firing sequence. *Id.* at 66532. The bump stock then harnesses the rearward recoil energy from the shot causing the weapon to slide back into shooter's shoulder separating the trigger finger resting on the ledge and the trigger itself. The constant forward pressure exerted by the non-trigger hand on the barrel then pushes the weapon forward "bumping" the weapon against the stationary trigger finger. The back-and-forth sequence allows a shooter to fire a semiautomatic rifle at rates similar to automatic rifles.

In the Final Rule, the ATF amended its regulations to clarify that bump-stock devices are machine guns, as that term is defined in the National Firearms Act and the Gun Control Act "because such devices allow a shooter of a semiautomatic firearm to initiate a continuous firing cycle with a single pull of the trigger." 83 Fed. Reg. at 66515. The Final Rule advances two definitions, both interpreting portions of the statutory definition of machine gun. First,

the Final Rule interprets the phrase "single function of the trigger" to mean "single pull of the trigger." *Id.* at 66518. Second, the Final Rule interprets the term "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." *Id.* at 66519. Based on the two interpretations, the Final Rule clarifies that the term "machinegun" extends to devices like bump stocks that permit a semiautomatic weapon to shoot more than one shot with a single pull of the trigger "by harnessing the recoil energy" "so that the trigger resets and continues firing without additional physical manipulation of the trigger by the shooter." *Id.*

III.

A.

To prevail on this motion for a preliminary injunction, Plaintiffs must demonstrate a likelihood of success on the merits. Accordingly, the Court considers what Plaintiffs must prove to prevail on the alleged violations of the APA.

The APA authorizes federal courts to review agency decisions and set aside those agency actions that are arbitrary and capricious or are in excess of the agency's statutory authority. 5 U.S.C. § 706(2)(A) and (C); *see Tennessee Hosp. Ass'n. v. Azur*, 908 F.3d 1029, 1037 (6th Cir. 2018). The Sixth Circuit has instructed that when an agency's decision depends on its construction of a federal statute, courts must determine what level of deference to afford that decision and then whether the decision exceeded the agency's statutory authority. *See Atrium Med. Ctr. v. United States Dept. of Health and Human Servs.*, 766 F.3d 560, 566 (6th Cir. 2014). If necessary, courts then evaluate the agency's reasoning to determine if the decision was arbitrary and capricious. *Id.*

The level of deference a court must afford to the agency's decision depends on whether "Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law[.]" *United States v. Mead*, 533 U.S. 218, 229 (2001); *see Atrium Med. Ctr.*, 766 F.3d at 566-67; *United States v. One TRW, Model M14, 7.62 Caliber Rifle*, 441 F.3d 416, 419-20 (6th Cir. 2006); *accord Sierra Club v. United States Army Corps of Eng'rs*, 909 F.3d 635, 643 (4th Cir. 2018). Following *Chevron, U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), agency decisions that meet a two-part test are afforded deference if the decision is "permissible," meaning that the decision is "within the bounds of reasonable interpretation." *Id.* at 842-43; *see Arangure v. Whitaker*, 911 F.3d 333, 338 (6th Cir. 2018); *Tennessee Hosp. Ass'n.*, 908 F.3d at 1037-38. But, when Congress did not expect the agency's decision to carry the force of law, the decision is afforded deference only to the extent of its persuasiveness, *i.e., Skidmore* deference. *Mead*, 533 U.S. at 228; *see Atrium Med. Ctr.*, 766 F.3d at 566-67.

Neither party attempts to navigate the hazardous waters of *Chevron/Skidmore*.[2] The two recent denials of motions for preliminary injunctions referenced above both afforded AFT deference, one relying on *Chevron* and the other relying on a *Skidmore*-like approach.[3] Here, both parties merely refer the Court to the statutory language of the APA. Defendants have explicitly stated that they do not contend that this Court should apply *Chevron*

[2] The Sixth Circuit recently described the status of *Chevron* as "already-questionable," *Arangure*, 911 F.3d at 338, and noted that "[m]any members of the Supreme Court have called *Chevron* into question, *id.* at n.3.

[3] In *Guedes*, Judge Friedrich discusses "the familiar *Chevron* framework," *slip op.* at 13-15, and then applied *Chevron*, *id.* at 18-25. In *Aposhian*, Judge Parris found that the Final Rule was "interpretive" 2019 WL 1227934, at *3, and concluded that the Final Rule reached the "best interpretation, *Id.* at *4 and *5.

deference to the Final Rule. (ECF No. 38 Notice of Supplement Authority PageID.302.) In their brief, Defendants simply defend ATF's interpretations as reasonable. Plaintiffs rely on the standard set forth in the APA and cite *Radio Association on Defending Airway Rights v. United States Department of Transportation*, 47 F.3d 794, 802 (6th Cir. 1995). *Radio Association* cites and relies on *Motor Vehicle Manufacturers Association of the United States v. State Farm Mutual Automobile Insurance Company*, 463 U.S. 29, 43 (1983). Problematic for Plaintiffs, *Motor Vehicle Manufacturers* was published a year before *Chevron*. While the parties might like to avoid *Chevron/Skidmore*, this Court cannot. This Court must apply the law as it is set forth by the Supreme Court and the Sixth Circuit, both of which have set forth guidelines for determining when *Chevron* or *Skidmore* applies to challenges brought under the APA.

Should any deference be afforded to the interpretation in the Final Rule, *Chevron* not *Skidmore* would apply. The statutory scheme suggests that Congress intended the ATF speak with the force of law when addressing ambiguity or filling a space in the relevant statutes. Federal courts must follow the *Chevron's* framework if "'Congress delegated authority to the agency generally to make rules carrying the force of law' *and* agency interpretation was 'promulgated in the exercise of that authority.'" *Atrium Med. Ctr.*, 766 F.3d at 566. Congress has delegated the authority to administer and enforce the statutes to the Attorney General, including the authority to prescribe necessary rules and regulations. 18 U.S.C. § 926(a)26 U.S.C. § 7801(A)(2)(A); *Akins*, 312 F. App'x at 198; *Freedom Ordnance Mfg., Inc.*, No. 3:16-cv-243, 2018 WL 7142127, at *5 n.6 (S.D. Ind. Mar. 27, 2018). The Attorney General then delegated the authority to ATF. 28 C.F.R. §0.130(a).

Using the formal rulemaking process, ATF reviewed the statute and promulgated both new interpretations and new regulations. The use of formal rulemaking procedures further suggests the Court should apply the *Chevron* analysis. *See Mead*, 533 U.S. at 229-30. And, although not determinative, ATF interpreted the NFA and GCA as containing a congressional delegation of authority. 83 Fed. Reg. at 66527.

When applying *Chevron*, courts perform a two-step test. *Arangure*, 911 F.3d at 337 (citing *City of Arlington v. F.C.C.*, 569 U.S. 290, 296 (2013)). First, the court must determine whether "Congress has directly spoken to the precise question at hand." *Chevron*, 467 U.S. at 842. Second, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. As part of the second step, courts consider whether the agency's rule is arbitrary or capricious or contrary to the statute. *Mayo Found. for Med. Educ. and Research v. United States*, 562 U.S. 44, 53 (2011).

For the first step, the Court determines any ambiguity in the statute by applying the ordinary tools of statutory construction. *Arangure*, 911 F.3d at 337. A statute is ambiguous when "to give th[e] phrase meaning requires a specific factual scenario that can give rise to two or more different meanings of the phrase." *All. for Cmty. Media v. F.C.C.*, 529 F.3d 763, 777 (6th Cir. 2008) (quoting *Beck v. City of Cleveland, Ohio*, 390 F.3d 912, 920 (6th Cir. 2004)). The statutory language must be viewed in context, not in isolation. *Id.* Although Congress defined the term "machinegun," it did not further define words or phrases used in that that definition. More specifically, Congress did not further define either the word "automatically" or the phrase "single function of the trigger." But, the lack of a definition does

not necessarily mean that Congress was silent on the specific issue. *Arangure*, 911 F.3d at 337 n.2. And, the lack of a definition does not require the conclusion that the statute is ambiguous. *Id.* at 338.

The Court concludes that Congress has not directly addressed the precise question at issue. Congress has not indicated whether bump stocks are included in the statutory definition of machine gun. *See e.g., Mayo Found.*, 562 U.S. at 52 ("The statute does not define the term "student," and does not otherwise attend to the precise question whether medical residents are subject to FICA.").

B.

When applied to bump stocks, the precise question at hand, the statutory definition of machine gun is ambiguous with respect to the word "automatically." When bump stocks are considered, the phrase "shoots . . . automatically more than one shot, without manual reloading, by a single function of the trigger," has more than one possible meaning. In the statute, "automatically" functions as an adverb modifying the verb "shoots." Relying on definitions from the 1930s, the ATF, 83 Fed. Reg. at 66519, and Defendants interpret the word to mean "the result of a self-acting or self-regulating mechanism." Citing contemporary definitions, Plaintiffs contend the term automatically means the device works "by itself with little or no direct human control."

Fairly summarized, the parties' dispute 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. The statutory definition of machine gun does not answer this specific question. Dictionaries contemporary with the enactment of the NFA do not conclusively

resolve the issue. The statute is ambiguous as to whether the word "automatically" precludes any and all application of non-trigger, manual forces in order for multiple shots to occur. Read in context, a weapon is a machine gun when more than one shot occurs without manual reloading. Putting forward pressure on the barrel with the non-trigger hand is not manual reloading. Judge Friedrich observed, many "automatic" devices require some degree of manual input. *Guedes*, *slip op.* at 22. And, as Judge Parrish noted, machine guns which indisputably shoot automatically often require physical manipulation by the shooter, including constant rearward pressure on the trigger. *Aposhian*, 2019 WL 1227934, at *5. Accordingly, the Court concludes, with respect to the word "automatically," the statutory definition of machine gun is ambiguous.

AFT's interpretation of the word "automatically" is a permissible interpretation. The interpretation is consistent with judicial interpretations of the statute. *See United States v. Olofson*, 563 F.3d 652, 658 (7th Cir. 2009). And, Plaintiffs have not established that ATF's interpretation exceeds the agency's statutory authority. Accordingly, ATF's interpretation is entitled to *Chevron* deference.

C.

When applied to bump stocks, the statutory definition of machine gun is ambiguous with respect to the phrase "single function of the trigger." Within the statutory context, the phrase can have more than one meaning. Defendants and ATF define "single function of the trigger" as "single pull of the trigger." Their interpretation considers the external impetus for the mechanical process. Plaintiffs define the phrase as the mechanical process which causes each shot to occur. The statute does not make clear whether function refers to the

trigger as a mechanical device or whether function refers to the impetus for action that ensues. Both interpretations are reasonable under the statute. And, dictionaries from the 1930s provide no helpful guidance. *See Guedes*, *slip op.* at 19-20.

Courts interpreting the statute reinforce the conclusion that the disputed phrase is ambiguous. In a footnote in *Staples v. United States*, 511 U.S. 600, 602 n.2 (1994), the Supreme Court described automatic weapons as a weapon that "fires repeatedly with a single pull of the trigger." In *United States v. Fleischli*, 305 F.3d 643, 655 (7th Cir. 2002), the Seventh Circuit rejected, as "puerile," the defendant's argument that his minigun did not have a trigger, another term not defined in the statute. The court joined other circuits "in holding that a trigger is a mechanism used to initiate a firing sequence." *Id.* (collecting cases). The two interpretations are not mutually exclusive. ATF's interpretation finds support in *Staples* while Plaintiffs' interpretation finds support in *Fleischli*. And, in *Fleischli*, the court noted that dictionary definitions of "trigger" include both the mechanism itself and the act or event that serves as impetus for the ensuing action. *Id.* at 656.

ATF's interpretation of the phrase "single function of the trigger" is a permissible interpretation. It is consistent with judicial opinions interpreting the statute. Plaintiffs have not established that ATF exceeded its authority. ATF has been interpreting the disputed phrase in a similar manner at least since 2006. *See* ATF Rul. 2006-2; *Akins*, 312 F. App'x at 200.

IV.

Because this Court is bound to follow *Chevron*, and because this Court has concluded that the interpretations in the Final Rule must be afforded deference, the Court considers

Plaintiffs' arguments that the interpretations are, nevertheless, arbitrary and capricious.[4] The Court finds ATF's interpretations are not arbitrary and capricious.

A.

Plaintiffs argue that rubber bands and belt loops can be used to accomplish the same bump-fire sequence as bump stocks.

ATF's interpretations are not arbitrary and capricious because rubber bands and belt loops could be used to increase the rate of fire in a semiautomatic weapon. ATF specifically addressed this argument in the Final Rule. 83 Fed. Reg. at 66532-33. Rubber bands and belt loops are not parts or devices "designed and intended" as parts for a firearm. And, as ATF points out, rubber bands and belt loops do not harness the recoil energy when a shot is fired. The final phrase in the definition of machine gun does include the words "combination of parts from which a machinegun can be assembled." 28 U.S.C. § 5845(b). Plaintiffs' fear is not well-founded. AFT's interpretations of the statute—the definitions of "automatically" and "single function the trigger"—which extends to devices specially designed and marketed for the purpose of increasing the rate of fire of a semiautomatic weapon will not pose a danger of prosecution to individuals who own a semiautomatic weapon and also happen to own pants or elastic office supplies. "[N]othing is better settled than that statutes

[4] For one of its arguments, Plaintiffs contend the new interpretation is arbitrary and capricious because it will allow semiautomatic weapons to be classified as machine guns. In this section, II(E), Plaintiffs pose at least eight rhetorical questions. Many of the questions assume that one person owns both a semiautomatic weapon and a bump stock. But, after March 26, no one is supposed to own a bump stock. Therefore, the premise of those questions is flawed. Plaintiffs also asks whether future administrations might ban semiautomatic weapons. Plaintiffs have advanced a "slippery slope," a logical fallacy that avoids the question presented and shifts to a more extreme hypothetical.

should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid unjust or an absurd conclusion[.]" *In re Chapman*, 166 U.S. 677, 680 (1897).

B.

Plaintiffs assert the new interpretation is arbitrary and capricious because ATF previously concluded that bump stocks were not machine guns.

The United States Supreme Court has rejected a rule that changes in statutory interpretations by agencies are necessarily arbitrary and capricious. *See Motor Vehicle Mfgs. Ass'n*, 463 U.S. at 42. Rules promulgated by agencies do not "last forever" and agencies have "ample latitude" to establish rules in response to changing times and circumstances. *Id.* (citation omitted). The standard for reviewing an agency's rule or interpretation of a statute does not change just because the agency reversed course and altered its prior interpretation. *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 514-15 (2009). When an agency changes an earlier rule it must "provide [a] reasoned explanation for its action" and it must "display [an] awareness that it *is* changing positions." *Id.* at 515. The agency must always set forth good reasons for a new rule. *Id.* But, when the agency departs from a prior rule, it need not explain why the "reasons for the new policy are *better* than the reasons for the old one." *Id.* ATF has met its burden. ATF acknowledged how it previously treated bump stocks. 83 Fed. Reg. at 66517. Among other reasons, ATF concluded that its prior considerations "did not provide substantial or consistent legal analysis regarding the meaning of the term 'automatically[.]'" *Id.* at 66518. ATF then set forth sufficient reasons for its new interpretations.

V.

The Court concludes that Plaintiffs have not demonstrated a likelihood of success on the merits of their APA challenges to ATF's Final Rule. With this determination, Plaintiffs' motion for a preliminary injunction will be denied. Defendants concede that Plaintiffs will suffer irreparable harm without an injunction. (Pl. Resp. at 27 n.16 PageID.279.) The two remaining factors do not weigh heavily in favor of Plaintiffs, if at all. Congress restricts access to machine guns because of the threat the weapons pose to public safety.[5] Restrictions on bump stocks advance the same interest. All of the public is at risk, including the smaller number of bump stock owners.

Most of Plaintiffs' arguments on the final two elements are merely extensions of the first and second elements of a preliminary injunction. Plaintiffs identify the adverse impact on the liberty and property interests of bump-stock owners as supporting the public's interest in a preliminary injunction. The property interest identified overlaps completely with the second element for a preliminary injunction, irreparable harm. Plaintiffs contend that the Final Rule jeopardizes a bump-stock owner's right to bear arms. That assertion overlaps with the merits element; Plaintiffs' assume bump stocks are protected by the right to bear arms. At least one circuit court, post *Heller*, has found that machine guns are not protected bearable arms under the Second Amendment. *Hollis v. Lynch*, 827 F.3d 436, 451 (5th Cir. 2016). Plaintiffs also assert that the public has an interest in the proper exercise of legislative

[5] ATF did not "waive" this justification in the Final Rule. ATF made several references to public safety as a justification for the interpretation in the portion of the Final Rule addressing the public's comments. *See* 83 Fed. Reg. at 66520 and 66529.

power and that the Final Rule exceeds ATF's statutory authority. Again, that interest overlaps entirely with the merits of Plaintiffs' claim.

Accordingly, the balance of the four factors weighs against Plaintiffs and the Court declines to issue a preliminary injunction.

ORDER

For the reasons provided in the accompanying Opinion, Plaintiffs' motion for a preliminary injunction (ECF No. 9) is **DENIED.**

IT IS SO ORDERED.

Date: March 21, 2019

/s/ Paul L. Maloney
Paul L. Maloney
United States District Judge