IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In re GUN OWNERS OF AMERICA, INC., *et al.*, Petitioners,	Case No. 19-1268

MOTION OF GUN OWNERS OF AMERICA, INC., ET AL.
FOR LEAVE TO FILE REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS AND MOTION FOR A STAY OF AGENCY ACTION

On the grounds and for the reasons set forth below, Petitioners, through undersigned counsel, pursuant to F.R.App.P. 27, move this Court for leave to file a reply in support of their Petition for Writ of Mandamus and Motion for Stay.

This case involves a regulation that goes in effect on March 26, 2019, that reclassifies popular firearm accessories as machineguns. Hundreds of thousands of Americans possess these accessories, and will be required to destroy them or forfeit them to the ATF before March 26, 2019, or risk felony prosecution.

Petitioners filed their Petition on Tuesday, March 19, 2019, and the government was requested to file a response to the Petition by March 20, 2019 at 5:00 pm, which it did. The government's response raises several issues and makes various statements of fact that are inaccurate, and require a reply. Petitioners are

filing this motion and their reply as soon as possible after the government's response, in order to provide this Court sufficient time to decide the pending petition before the ATF's regulation goes into effect on March 26, 2019.

Given the nationwide significance of this case, and its profound implications for all Americans, Petitioners respectfully request leave to file the accompanying reply in support of their Petition for Writ of Mandamus and Motion for a Stay of Agency Action.

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 Motion of Gun Owners of America, Inc., et al. for Leave to File Reply in Support of Petition for Writ of Mandamus and 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 motion contains 219 words, excluding the parts exempted by Rule 32(f).

2. This motion 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 14.0.0.756 in 14-point Times New Roman.

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

Dated: March 20, 2019

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing Motion of Gun Owners of America, Inc., et al. for Leave to File Reply in Support of Petition for Writ of Mandamus and Motion for a Stay of Agency Action, this 20th 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 Petitioners

No. 19-1268

In the United States Court of Appeals
for the Sixth Circuit

IN RE
GUN OWNERS OF AMERICA, INC., *ET AL.*,

REPLY TO GOVERNMENT'S OPPOSITION TO EMERGENCY PETITION FOR A WRIT OF MANDAMUS AND MOTION FOR A STAY OF AGENCY ACTION

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March 20, 2019

INTRODUCTION

Petitioners have requested leave of Court to file this short reply brief. Petitioners certainly do not wish is to overburden the Court as it considers their emergency petition and motion, but believe certain of the government's statements cannot go unrebutted. The government's reply essentially seeks to litigate the merits of this case, in this court, in a period of three days. Yet that is not what Petitioners are seeking. Rather, Petitioners have asked for relief from this Court that will maintain the status quo until the district court below can consider the merits of their claims (which have been fully briefed and argued **in that court**), and further until this Court has an opportunity to review that decision. Nevertheless, Petitioners briefly address several of the issues raised by the government:

ARGUMENT

1. The government notes that, to obtain a writ of mandamus, Petitioners must show "a clear and indisputable right to the relief they seek...." Resp. 1. However, the government argues this means "petitioners must show that they are likely to succeed on their claim that they have a clear and indisputable right to issuance of an injunction in the district court...." Resp. 7.

The government is confused. Petitioners do not seek a writ of **mandamus** on the theory they eventually will win on the merits of their motion for preliminary injunction. That is why they seek a **stay** from this court. Rather, Petitioners seek **mandamus** because they have not had a ruling on their claims from the district court. Here, the "right to relief" is not the right to an injunction, but the more fundamental **right to a ruling** from the district court on their claims, before the final rule goes into effect. Prompt judicial attention to Petitioners legitimate and timely claims is certainly an "indisputable right."

Petitioners clearly laid out the two factors relevant to consideration of petitions for mandamus. Mandamus Petition at 7. And Petitioners clearly explained why they meet those two tests. *Id.* at 7-8. The government does not counter those claims. After March 25, 2019, the irreparable harm alleged in Plaintiffs' motion for preliminary injunction will have occurred — the nations' bump stock owners will have either destroyed their property, or be in felony possession of unregistered machineguns. This is manifest injustice and deprives Petitioners not only of their lawfully owned property, but also an adjudication on the merits of their claims, and deprives the courts of the chance to properly weigh and measure each sides' arguments.

2. Relatedly, the government argues that, since other district courts in other circuits have denied other relief to other plaintiffs in other cases,[1] that this Court by default should deny these Petitioners the relief they seek in this circuit in this case — all without so much as a ruling from the district court below. Resp. 6, 8. Of course, Petitioners here bring distinct claims, making distinct arguments, applying the law of this Circuit. There is simply no law in this Circuit (or any circuit) stating that it is fine to deny Petitioners their day in court simply because someone else has had theirs.

3. Petitioners time and again have made clear that the government's factual claims about how a bump stock operates are untrue. Mandamus Petition 12-13. 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. Resp. 18-19 (emphasis added). Petitioners have offered the district court exhibits, evidence, videos,

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[1] Interestingly enough, even the government does not agree with Judge Friedrich's Chevron-deference-laden opinion in the D.C. bump stock cases; and, indeed, the government went out of its way to distance itself from that opinion. ECF # 38.

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.[2] The government never engages Petitioners on this point, instead hoping its avoidance of the issue will be overlooked.

4. Once again, 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.[3] Regardless, it is not up to the ATF to outlaw things that are **like** machineguns — that is for Congress to decide.

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[2] 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.

[3] An actual machinegun will repeatedly fire ammunition "by a single function of the trigger." A bump stock, however, does not allow for that, as only one bullet will be fired for each mechanical function of the trigger.

5. The government continues to rely on Akins v. United States, 312 F. App'x 197, 200 (11th Cir. 2009), as support for its "single pull of the trigger" statutory revision. Yet the government has disclaimed it is due any deference in this case. ECF #38. As Petitioners explained at oral argument to the district court on March 6, 2019, that means "no deference" — of any kind. *See* United States v. Apel, 571 U.S. 359 (2014); Abramski v. United States, 573 U.S. 169 (2014). And in Akins, the Eleventh Circuit stated that "**we defer** to the decision of the Bureau...." *Id.* at 200 (emphasis added). The Akins court **never decided** that "single pull of the trigger" is the best or the **correct** interpretation of the statute, only that it was not arbitrary and capricious. Akins is inapplicable here, because the reason for its decision has been overruled by the Supreme Court.

6. Throughout this litigation, the government has argued that the statutory term "single function of the trigger" (focusing on the mechanical movement of the trigger) is better understood to be a "single pull of the trigger" (focusing on the biological action by the shooter). Yet as Plaintiff noted, this causes all sorts of interpretive problems, since triggers not only can be pulled, but also pushed, paddled, switched, etc. ECF #37 p. 5. Thus, ATF has had to further modify its definition to "single pull of the trigger and analogous motions" to encompass other ways triggers can be functioned. Petitioners pointed out that "it is patently

obvious that Congress understood how to clearly define a machinegun in 1934, avoiding the need for the rhetorical games ATF is now playing." ECF #37 p. 5.

The government now agrees that "single function of the trigger" was deliberately chosen by Congress "to capture the full range of possible trigger devices." Resp. 11. The government now argues that "'function' is therefore not constrained to the precise mechanical operation of a specific type of trigger or firearm." Resp. 15. Petitioners agree and, indeed, have argued that all along.

But, inexplicably, the government's answer is not to use "function" — the term Congress deliberately chose — but rather to use "pull," a word it admits falls short of capturing all machineguns. In other words, the government's argument is that **"'function' is clearly the best word, so instead let's use 'pull.'"**

7. The government goes to great lengths to explain how it properly defined the statutory term "automatically" as "having a self-acting or self-regulating mechanism...." Resp. 16.[4] The government notes that, during bump fire, the firearm slides back and forth in the bump stock. Resp. 17. But the government claims that this process is "'self-acting **under the conditions fixed for it**,'" those

[4] Yet as Petitioners pointed out at oral argument in the district court, the government's definition of "automatically" could be applied to ban rubber bands — or even all semi-automatic firearms as a class — but not to bump stocks. In fact, bump stocks fit **none** of the criteria the government sets up.

being "**[t]he 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...." *Id.* Thus, the government argues a bump stock is self-acting because **the shooter** pushes the firearm forward while pulling the bump stock rearward. In other words, a bump stock is self acting — in that it is not at all self-acting. The government may as well have said that a baseball game is "self-acting under the conditions fixed for it," because the pitcher throws a ball, the batter hits it, and the fielders catch it.

8. Even when expressly given the opportunity, the government still refuses to claim that bump stocks were used in the Las Vegas shooting. 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. 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.

CONCLUSION

The government's response filed this afternoon is part-and-parcel of what has become characteristic in this case: a chronic inability to engage with the core of Petitioners' arguments, along with obfuscation and repeated false statements of fact about the way bump stocks really operate.

Moreover, the government has (again) failed to contest two of Petitioners' basic pronouncements, 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. 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.

This Court should not permit such bureaucratic shenanigans. Petitioners deserve a ruling on the merits of their motion, as to whether bump stocks are actually machineguns, before over $100 million of ATF-approved property is arbitrarily destroyed, and/or hundreds of thousands of law-abiding Americans are arbitrarily declared in felony possession of unregistered machineguns.

Respectfully submitted,

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1. That the foregoing Reply to Government's Opposition to Emergency Petition for a Writ of Mandamus and Motion for a Stay of Agency Action, complies with the type-volume limitation of Rule 27(d)(2), Federal Rules of Appellate Procedure, because this petition contains 1,949 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 14.0.0.756 in 14-point Times New Roman.

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

Dated: March 20, 2019

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing Reply to Government's Opposition to Emergency Petition for a Writ of Mandamus and Motion for a Stay of Agency Action, was made, this 20th 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
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