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March 21, 2019

Ms. Deborah S. Hunt
Clerk, United States Court of Appeals for the Sixth Circuit
540 Potter Stewart U.S. Courthouse
100 E. Fifth Street
Cincinnati, Ohio 45202-3988

Re: In re Gun Owners of America, Inc., *et al.*, No. 19-1268

Dear Ms. Hunt:

Petitioners Gun Owners of America, Inc., *et al.*, hereby submit additional information to the Court regarding the filing that was made in this case in the district court on the evening of March 19 and 20, 2019. The summary nature of Petitioners' communication is dictated by these unique circumstances.

Today, at 5:37 PM EST, the district court for the Western District of Michigan filed an Opinion and Order Denying Plaintiffs' Motion for a Preliminary Injunction. Docket No. 18-cv-1429, ECF # 48. Pending before this Court is Petitioners' Emergency Petition for a Writ of Mandamus and Motion for a Stay of Agency Action, filed this past Tuesday, March 19, 2019, which sought two separate forms of relief from this Court.

Early this evening, the district court issued its order denying Petitioners relief below, thereby mooting their petition for writ of mandamus. However, Petitioners' motion for stay pending appeal, pursuant to FRAP 8, has now been briefed by both parties, and remains pending before this Court for consideration. Petitioners will be promptly filing and perfecting their appeal from the district court's order but, due to time constraints imposed by the district court's late opinion and order, respectfully request that, in the interim, this Court consider Plaintiff-Appellants pending Rule 8 motion.

Practically speaking, there is no time to do otherwise. At this, the eleventh hour — two business days before the final rule is to take effect — Petitioners are unable to properly and fully prepare a brief challenging the district court's decision below. Petitioners have no time to order an appeal transcript of oral argument from the district court, to be used in support of a brief. There is not even time to ask the district court to voluntarily stay its order pending appeal. The district court has foreclosed the luxury of time, leaving Petitioners with no time to do much of anything — to the prejudice not only of Petitioners, but also this Court, which should have the opportunity to properly hear this case without the unfair constraints that have been imposed.[1]

As explained below and in their Tuesday filing, Petitioners 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 Petitioners' appeal. In fact, the district court below expressly found Petitioners' reading of the statute to be both "reasonable," and supported by case law. ECF #48 at 14.

1. The District Court Erred in Finding the Statute Ambiguous.

As Petitioners have noted, both parties have repeatedly declared the statutory text to be unambiguous. Petition 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' … 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."[2] *Id.* at 12-13 (emphasis added). But the issue is not whether **the word**

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[1] Earlier today, another U.S. Court of Appeals granted a stay of the final rule, "for the purpose of giving the court adequate time to properly consider the motion," however crafted the stay to apply only to the Plaintiff in that case. Aposhian v. Barr, 19-4036 (10th Cir.).

[2] 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.

"automatically" 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 Petitioners 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 Petitioners 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."**[3] As Petitioners 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.

[3] Petitioners' 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.

Finally, at oral argument on March 6, 2019, the district court asked the government about Petitioners' 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 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 District Court Erred in Deferring to the Government Under Chevron.

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 Petitioners' 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 Petitioners' understanding of the statute is both "reasonable" and supported by case law. *Id.* at 14.

Petitioners 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.

Ironically, the district court states 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. 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 Petitioners 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. Bump fire is a technique that depends on human skill and practice — not on the presence or absence of a plastic stock.

CONCLUSION

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 Petitioners' appeal.

Respectfully submitted,

/s/ Robert J. Olson

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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing letter, was made, this 21st 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