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, AND RACHEL MALONE,
Plaintiffs-Appellants,

GUN OWNERS OF CALIFORNIA, INC.,
Movant-Appellant,

v.

WILLIAM P. BARR, ET AL.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN

REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. THE GOVERNMENT AGREES THAT CHEVRON IS INAPPLICABLE AND THIS COURT MUST DETERMINE WHAT THE STATUTE MEANS.

A. Appellants' Discussion of Deference Is Not "Misplaced."

An unavoidable threshold issue in this case is whether Chevron deference applies to a government regulation purporting to "interpret" an unambiguous statute. The district court concluded that "[w]hile the parties might like to avoid *Chevron/Skidmore*, this Court cannot." Opinion and Order Denying Plaintiffs' Motion for a Preliminary Injunction ("Opinion"), R.48, Page ID#462. Appellants disagree, and have consistently taken the position that deference has no place in this case because the statute is clear on its face that bump stocks are not "machineguns." Brief for Appellants ("App. Br.") at 23, 29. However, the court below made deference an issue, and thus Appellants briefed this threshold matter at length in their opening brief. *Id.* at 9-21.

In its opposition, the government prefers to wish the issue away, strangely claiming that "plaintiffs' extended discussion of *Chevron* deference is misplaced," and leaving discussion of the matter until the very end of its brief. Brief for Appellees ("Resp.") at 30, 33-38. Even then, the government seems generally to agree with Appellants' arguments why deference does not apply. Resp. at 33.

Finally, as a last-ditch fallback argument, the government's brief asserts that, even if this Court finds deference is appropriate, the Final Rule nevertheless

is a "*permissible* reading of the statutory terms."[1] Resp. at 38. But the government never made that argument in the court below — quite to the contrary, the government argued that "[t]he Court needs to be persuaded that ... position is correct and not simply defer to it as one permissible interpretation among many." Transcript, R.56, Page ID#521. Moreover, this statement conflicts directly with the position the government took at oral argument on appeal in the D.C. bump stock case, Guedes v. ATF, that "'if the Rule's validity turns on the applicability of *Chevron*, [the government] would prefer that the Rule be set aside rather than upheld under *Chevron*. Oral Argument at 42:38–43:45.')." Guedes v. ATF, No. 19-296, Petition for Writ of Certiorari ("Guedes Pet.") at 7.

B. The Government's Position Is that the Plain Terms of the Statute Govern, Except to the Extent that they Don't Govern At All.

Although government agencies typically seek, if not demand, deference, this case is quite different. In its opposition, the government has sought to avoid all discussion of ambiguity, Chevron, and deference. *See* App. Br. at 6. Instead, the government advances the inherently strained position that Chevron is inapplicable because "the Rule **properly** interprets the statute" and represents "**the best**

[1] Appellants have explained why the Final Rule is not even a "permissible" reading of the statute. App. Br. at 38, *et seq*.

interpretation of the statute" and "**the correct understanding** of the statutory text." Resp. at 16, 38 (emphasis added).

However, the government does not allege that the statute is ambiguous, but rather alleges that "bump stocks fall within the **plain terms** of the statute."[2] Resp. at 1 (emphasis added). Elsewhere, the government made quite the opposite argument, conceding that "[a]bsent the revised definition ... ATF could not 'restrict [bump stocks].'" Guedes v. ATF, USDC-DC, No. 18-2988, ECF #16 at 33. Likewise, in the district court, the government argued that only "once definitions ... have been provided ... the statute is reasonably interpreted to include bump stocks...."[3] Brief in Opposition, R.34, Page ID#255.

Moreover, the government's new claim that bump stocks fit within the "plain terms" of the statute is self-defeating. If the statutory text — as written — clearly covers bump stocks, then there was no need to promulgate a regulation further explaining and redefining the statutory definitions to include bump stocks. Yet the government now insists it was necessary for it to "interpret" the "plain

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[2] As other litigants have explained, "[t]he Final Rule was a dramatic departure from ATF's repeated and long-standing construction of that statutory term yet was bizarrely defended ... as the term's plain meaning." Guedes Pet. at 5.

[3] Elsewhere, the government explained that it was "expand[ing]" and "revis[ing]" the statutory terms. *See* App. Br. at 22.

terms." If the government's position on this issue seems somewhat confusing, there's a reason for that.

C. The Government Is Boxed in on the Issue of Ambiguity.

Even though "interpreting" and redefining the statute to provide "the correct understanding," the government in its opposition steadfastly refuses to allege that the statute is open to more than one interpretation, because there is no need to interpret an unambiguous statute. Even though Appellants challenged the government to allege ambiguity, its opposition does not do so — and for clear reason. Any allegation that the statute is ambiguous charts a path straight to Chevron, which the government seeks to avoid. Additionally, a finding of ambiguity would jeopardize past criminal prosecutions. *See* App. Br. at 35-38.

But at the same time, the government's opposition did not allege that the statute is unambiguous. First, the government itself has adopted two interpretations of the statute — having espoused, for well over a decade, an interpretation of the statute that is precisely the opposite to the one it takes now. Second, it is axiomatic that there is no room to "interpret" or explain an unambiguous statute, as the government seeks to do here. *See* United States v. TRW Rifle 7.62x51mm Caliber, 447 F.3d 686, 689 n.4 (9th Cir. 2006). Third, the

district court below, along with both D.C. courts, found Appellants' reading (the government's prior reading) of the statute to be reasonable.[4]

The government, then, can no longer adopt *either* the position that the statute is ambiguous *or* that it is unambiguous. Having prevailed in the district court based on the Chevron rationale that the government itself disavows, the government in its brief on appeal is hopelessly confused.[5] Rather, the government punts, simply asserting that Chevron is inapplicable (because the government wants it to be so), and that ATF's new "interpretation" of the "plain terms" of the statute is "best" (because the government today declares it to be so).[6]

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[4] Opinion, R.48, Page ID#465-66; Guedes v. BATFE, 356 F. Supp. 3d 109, 130 (D.D.C. 2019); Guedes v. BATFE, 920 F.3d 1, 29 (D.C. Cir. 2019). The government alleges that "plaintiffs identify no case adopting their reading of the statutory text" (Resp. at 27), apparently forgetting that the district court noted that "Plaintiffs' interpretation finds support in *Fleischli*." Opinion, R.48, Page ID#466.

[5] In oral argument in the district court, the government appeared to argue that the statute **wasn't** ambiguous until bump stocks were invented, then **became** ambiguous, but the final rule "**close[d**] the ambiguity." Transcript, R.56, Page ID#509 (emphasis added). In other words, it's both. And neither. That's not the way statutory ambiguity works.

[6] Neither the district court below nor the D.C. district and circuit courts believed it was possible to sidestep Chevron the way the government asks this Court to do. Instead, it seems clear that all three courts recognized that the only way for ATF to broaden the statutory definition to include bump stocks was to obtain deference under Chevron as a permissible (even if not the best) interpretation of the statute.

II. BUMP STOCKS DO NOT OPERATE AUTOMATICALLY.

A. The Government Overlooked Entire Sections of Appellants' Arguments.

The government claims that "Plaintiffs do not seriously contest that bump stocks fire 'automatically,'" that "Plaintiffs' argument focuses almost exclusively on ... single function of the trigger," and that "Plaintiffs do not seriously urge that the operation of a bump stock falls outside the common understanding of 'automatically.'" Resp. at 1, 19, 29. That is a profound misstatement of Appellants' position. On the contrary, Appellants vigorously argued that bump stocks do not fire automatically, both in the district court and to this Court — often using bold, capitalized headings — such as "**BUMP STOCKS DO NOT FUNCTION AUTOMATICALLY**." Reply Brief in Support of Plaintiffs' Motion for Preliminary Injunction ("Reply"), R.37, Page ID#293. *See also* Memorandum in Support of Plaintiffs' Motion for Preliminary Injunction, R.10, Page ID#178-85; Reply, R.37, Page ID#293-97; App. Br. at 23-29. Indeed, the government previously acknowledged that to be Appellants' argument. *See* Brief in Opposition, R.34, Page ID#271 ("Plaintiffs object that a bump stock does not fire 'automatically'....").

B. A Tree Stump Is Not A Self-Acting Mechanism. Neither Is A Bump Stock.

The government claims that a bump stock operates "automatically" because it is a "'self-acting or self-regulating mechanism,'" in turn because it is "'[s]elf-acting under conditions fixed for it.'" Resp. at 29. The government then explains the "conditions fixed for it," including "[t]he shooter's positioning of the trigger finger on the extension ledge and application of pressure on the barrel-shroud or fore-stock with the other hand provide the conditions necessary...." *Id.* According to the government, then, a bump stock is self-acting, *i.e.,* "acting without external influence or control,"[7] but only "under conditions fixed for it," all of which involve *external influence and control* by the shooter and by the recoil.[8] In other

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[7] Definition of "self-acting," The Oxford Pocket Dictionary of Current English, *Encyclopedia.com* (Sept. 11, 2019).

[8] Paradoxically, the government asserts without explanation that a rubber band is not "self-acting" because it does not "'harness the recoil energy.'" Resp. at 32. Yet every school child knows that a rubber band harnesses energy — by stretching and then rebounding — releasing energy as it shoots across a room. The government's claim — that bump stocks harness, capture, direct, or channel energy, but that rubber bands do not — defies logic.

The government also stumbles in its attempt to address Appellants' argument that all semiautomatic firearms are in danger of becoming machineguns under 83 *Fed. Reg*. 66514 (Dec. 26, 2018) ("Final Rule"). The government again makes the claim that semiautomatics are not "designed and intended" to be machineguns, but Appellants have already explained that the statute does not impose any such limitation. App. Br. at 43-44. The government also claims that "Plaintiffs do not (and cannot) explain how an unmodified semiautomatic rifle

words, a bump stock is self-acting if one first ignores all of the ways it's not self-acting.

The government's argument is well-illustrated with a paraphrase of a famous scene from the movie Office Space:[9]

Q: "Does the bump stock cause the firearm to move rearward?"

A: "Well...no, the recoil does that."

Q: "Well then the bump stock must cause the firearm to move forward?"

A: "Well...no, the shooter does that."

Q: "What ... would you say ... the bump stock *does* here?"

A: "I already told you! It operates automatically!"

As Appellants have explained numerous times, bump stocks don't do anything *automatically*. A bump stock is just a piece of injection molded plastic. Reply, R.37, Page ID#295. As ATF previously ruled, bump stocks "'**lack**[] internal

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could meet the **statutory** definition." Resp. at 33 (emphasis added). The government is playing word games. Indeed, Appellants cannot explain how semiautomatics fall *under the statute*, because semiautomatics *do not meet the statutory* definition that Congress provided. But Appellants are not challenging *the statute*; Appellants are challenging the government's *regulation*. Appellants provided a detailed explanation of how semiautomatics could be considered machineguns *under the regulation*. Memorandum, R.10, Page ID#187-88.

[9] https://www.youtube.com/watch?v=m4OvQIGDg4I

springs or other mechanical parts'" and "perform[] no automatic mechanical function." *Id.* *See also* Exhibit 1, R.1-2, Page ID#30.

Bump fire is not some sort of special experience made possible through use of a bump stock. Rather, bump fire is a shooting technique that can be performed with or without a bump stock,[10] and the process is entirely dependent on the physical manipulation of the firearm and management of recoil by the shooter. The government is correct in now having recognized that the purpose served by a bump stock is "[t]o assist the shooter in holding a stationary position with the trigger finger and sustain the firing process." Resp. at 18; *see also* Transcript, R.56, Page ID#531-32. Just because a tree stump assists a person in holding a branch stable to cut with an axe does not mean the stump is performing an automatic function.

C. A Bump Stock Does Not Operate Automatically Just Because the Government Says So.

The Final Rule defines "automatically" to mean "functioning as the result of a self-acting or self-regulating mechanism...." Final Rule at 66533. The Final Rule claimed that a bump stock meets this standard because it "harness[es] the

[10] The government is on the record not opposing bump fire, including bump fire with rubber bands or other methods — only opposing bump fire with bump stocks. Final Rule at 66532-33.

recoil energy of the semiautomatic firearm to which it is affixed...." *Id.* Appellants countered the notion that a piece of plastic is capable of harnessing energy (App. Br. at 40 n.32), and the government soon abandoned that central factual claim on which the Final Rule was expressly based (Brief in Opposition, R.34, Page ID#272). The fact that the government has conceded that the central assumption undergirding the Final Rule is invalid alone should be enough to invalidate the Final Rule. But rather than take its licks and move on, the government seeks to obfuscate and redirect.

The government explains that the Akins Accelerator "**used a spring** to harness the recoil energy of each shot," and admits that the difference between a bump stock and an Akins Accelerator is that a bump stock **has no spring**. Resp. at 6, 8 (emphasis added). It would seem that one could, then, safely infer that a bump stock does not harness recoil energy like the Akins Accelerator. But instead of reaching that obvious conclusion, the government instead claims that a bump stock nevertheless fires "without 'the need for the shooter to manually capture, harness, or otherwise utilize this energy,'" and that bump stocks "'eliminate the need'" for the shooter to harness energy. Resp. at 10, 29.[11]

[11] Elsewhere, the government contradicts even that statement, admitting that "humans play the primary role in absorbing and releasing the recoil energy." Brief in Opposition, R.34, Page ID#272.

But if, as the government admits, neither the bump stock nor the shooter harnesses energy, then who or what does? The government is caught in its own web. No longer can it assert that a bump stock actually harnesses recoil energy, but neither is it willing to admit the truth that the shooter is the one who harnesses the recoil energy. Apparently, according to the government, the recoil energy is just "harnessed" — in a passive, metaphysical sense — without specifying by whom or by what. All that remains is the government's assertion that a bump stock operates automatically — because the government says so.

Abandoning any pretense that a bump stock "harnesses" energy, the government moved on to claim that "a bump stock **channels** the recoil...." Resp. at 7, 17 (emphasis added). Thus, the government concludes that a shooter doesn't need to **harness** the energy. Resp. at 10, 32. But that's a *non sequitur*. Even if a bump stock **channels** energy (a notion Appellants dispute; *see* Reply, R.37, Page ID#293), meaning directs it on a certain path, that does not mean a shooter is relieved of having to **harness** energy (absorb it and put it to use). Those are different concepts, and one is not a substitute for the other.

D. The Government Fails to Grapple with the Statutory Text, or with Appellants' Arguments Applying the Text.

Appellants have explained that the statutory text "expressly delineates the precise boundaries of th[e] term ... 'automatically.'" App. Br. at 23. Appellants' brief challenged the district court's view that there could be some indeterminate amount of additional physical manipulation(s) of a weapon — more than a "single function of the trigger," and it still be considered "automatic." *Id.* at 25. On the contrary, Appellants explained, the statute is exceedingly clear that a machinegun is one that fires "'automatically ... **by a single function of the trigger**.'" App. Br. at 25. Period.

The government does not directly address this argument in its Response. To be sure, the government clearly believes that bump stocks are machineguns even though they require more physical input than a "single function of the trigger." And the government certainly advocates for a freestanding definition of "automatically," completely untethered from any limits in the statute. Resp. at 28. But the government never explains how the statute's express limiting language can be ignored.

Even so, the government argues that "by a single function of the trigger" allows for additional physical inputs because many machineguns "'require both a

single pull of the trigger *and* the application of constant and continuing pressure on the trigger....'" *Id.* at 27. But those statements are circular to their core. The statute permits *only* a single *trigger* manipulation, yet the court concludes *additional* manipulation is permissible because machineguns require *trigger* manipulation. That makes no sense. A "single pull of the trigger" necessarily requires the "continuing pressure on the trigger," or else it would no longer be a "single pull of the trigger." Stated more simply, if you stop pulling the trigger, then you're not pulling the trigger. True machineguns fire multiple rounds with *only* a single function of the trigger. Bump fire with a bump stock requires far more human input — and multiple functions of the trigger.

E. Bump Stocks — Not So Easy a Cave Man Could Do It.

The government claims that "[i]t is not disputed that by attaching a bump stock to a semiautomatic weapon, a shooter can fire hundreds of bullets per minute simply by pulling the trigger once, stabilizing the trigger finger, and maintaining pressure on the front of the weapon."[12] Resp. at 14. According to the government,

[12] Throughout this litigation, the government has been fixated on the idea that bump stocks permit shooters to fire their semiautomatic firearms rapidly, as if that's the only thing necessary to qualify as a machinegun. *See* Resp. at 1, 7, 14, 17, 39. But as Appellants have explained, Congress didn't ban rapid firing, nor did it ban all devices that help shooters to fire their semiautomatic firearms faster. *See* App. Br. at 50-51 n.39.

then, achieving rapid fire with a bump stock affixed to an AR-15 is no different from or more difficult than holding the trigger to the rear on a fully automatic M16.

Actually, that claim has been and is being disputed — because it is false. In the district court, Appellants noted that "using a bump fire stock requires practice and skill to accomplish rapid, semiautomatic bump fire. By way of contrast, firing a machinegun just requires a shooter [even a novice] to pull and hold the trigger down." Memorandum, R.10, Page ID#179. At oral argument below, Appellants' counsel noted that real-world use disproved the government's theory, and that "this idea that a bump stock takes away the human input or takes away the need for technique and practice and all of those things is demonstrably wrong...." Transcript, R.56, Page ID#529.

Any person with the ability to generate five to eight pounds of pressure can operate the trigger on a machinegun, causing it to fire automatically, even with one hand. Yet one of the greatest shooters in the world was unable to figure out how to operate a bump stock when handling one for the first time.[13] Bump stocks

[13] *See* https://www.youtube.com/watch?v=grgfKJT4Z48. The government never refers to any video, picture, description, or any evidence of any kind, when asserting how bump stocks operate. *See* App. Br. at 42.

simply do not make the entirely human-generated and human-controlled bump fire process automatic.

III. BUMP STOCKS DO NOT FIRE MORE THAN ONE ROUND BY A SINGLE FUNCTION OF THE TRIGGER.

A. The Government on Appeal Reverts to the Statutory Text — Then Immediately Ignores It.

For the first time on appeal, the government has agreed with Appellants, adopting the position that the statutory language provides the best standard by which to understand what constitutes a machinegun. The government's brief states that "Congress used the capacious term 'function' precisely to foreclose this type of attempt to circumvent the statute." Resp. at 1. The government adds that "Congress employed the broad term 'function' [to] sweep[] in the full range of actions a shooter can take to initiate a firing sequence, thus precluding creative attempts to evade the ban on machineguns." Resp. at 15; *see also* Resp. at 22.[14]

But then, in the very next sentence and again just a few pages later, the government abandons its newly adopted fidelity to the statutory text and argues that this Court should substitute "pull" for "function." Resp. at 15, 18. Of course,

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[14] *See also* Brief of the Cato Institute and Firearms Policy Coalition as *Amici Curiae* in Support of Plaintiff-Appellant and Reversal ("Cato Amicus") at 10.

if the government really believed that Congress chose the best word for the job, there would be no reason to offer another word in its place.

B. Appeals to "Common Sense," Legislative History, and Other Newly Contrived Arguments.

The government argues that the "single function of the trigger" language in the statute is best understood to be a "single pull of the trigger" — adding the phrase "and analogous motions." Resp. at 18.

First, the government alleges that its "interpretation" of the statute "reflects the common-sense" and "straightforward understanding of the term" single function[15] — but this "interpretation" requires the statutory term to be discarded and a new term added by ATF. The government never explains why Appellants' interpretation — relying on the clear text of the statute as written — is not the common-sense interpretation, or why any "interpretation" is necessary for a statute which the government believes to have a "plain meaning." *See* Resp. at 36.

Second, to support its "common-sense" theory, the government continues to rely on its view of the legislative history of the National Firearms Act, in order to override the clear meaning of the statutory text. Resp. at 20-21. This is a misuse

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[15] This is a logical fallacy — an appeal to common sense — which "relies on the vague notion of 'obviousness' [and which] is not necessarily supported by evidence or reasoning." https://yandoo.wordpress.com/2014/12/28/common-sense-fallacy/.

of legislative history. Chief Justice Roberts, writing for six of eight justices, recently explained that legislative history is at best a poor guide to determine statutory meaning: "[w]hat Congress ultimately agrees on is the text that it enacts, not the preferences expressed by certain legislators." NLRB v. SW Gen., Inc., 137 S.Ct. 929, 942 (2017). Moreover, the Court explained, when "[t]he text is clear ... we need not consider this extra-textual evidence."[16] *Id*. at 941-42. Yet that is precisely what the government seeks to do in this case, excising a clear but disfavored word from the text of the statute and replacing it with a less "capacious" word plucked from the "legislative history." However, as Appellants have pointed out, the fact that Congress chose to use a technical term rather than "ordinary terminology ... indicates a legislative desire that 'single function of the trigger' describe the operation of the firearm, not the actions of the shooter." Reply, R.37, Page ID#290-91; App. Br. at 31 n.27.

Third, the government's interpretation requires not only that the statute be rewritten from "single function" to "single pull," but also that the phrase "of the trigger" be replaced with "of the shooter." *See* App. Br. at 31 n.27. Indeed, the government now for the first time openly admits that its statutory rewrite is broader than the Final Rule indicated, and alleges that the statute now refers not to

[16] *See also* A. Scalia and B. Garner, Reading Law at 369 (West: 2012).

the function of the trigger but to "**the shooter's single function**." Resp. at 21 (emphasis added). In other words, the government would have this Court conclude that the language "of the trigger" instead actually means "of the shooter," and in fact does not have anything to do with a trigger.

Fourth, the government cites various cases[17] for the proposition that automatic fire can be initiated with a variety of different mechanisms.[18] Resp. at 21-22. But as the government itself admits, all of these cases on which it relies "recogniz[e] that **a trigger serves 'to initiate** the firing sequence' of a weapon, however accomplished." *Id.* at 21 (emphasis added). Yet here, the government's

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[17] For example, the government cites United States v. Evans, 978 F.2d 1112, 1113 (9th Cir. 1992) for the cherry-picked statement that a court should "focus[] on the action that enables a firearm to shoot automatically...." *See* Resp. at 22, 25. Thus, the government claims the Court should focus on "pull" (the physical action) rather than "function" (the mechanical process). There's only one problem. The government's quotation from Evans is taken completely out of context. In Evans, the judge was asked "to define the ... trigger" on a weapon that did not have a traditional trigger, and thus started with the action that caused the weapon to fire and worked backwards to then determine what constituted the physical trigger. But in this case, everyone agrees that a rifle with a bump stock has a perfectly ordinary trigger.

[18] This Court's decision in United States v. Carter, 465 F.3d 658 (6th Cir. 2006) does not help the government. There, ATF was faced with a firearm that "did not have a trigger mechanism," and concluded that the action of pulling the bolt to the rear and releasing it constituted the mechanical action that caused the weapon to fire multiple rounds. *Id.* at 665. Here, however, it is undisputed that a bump stock-equipped firearm still has a standard trigger.

own statements belie its argument because it claims that, with a bump stock, "**the shooter initiates** the automatic firing...." *Id.* (emphasis added). Indeed, each of the cases cited by the government supports precisely the opposite principle than it seeks to establish.

Fifth, the government — *for the first time* — claims that bump stocks "fire more than one shot 'by a single **function** of the trigger.'" Resp. at 22 (emphasis added). The government has never before made this assertion, either in the Final Rule or in the court below. Indeed, Appellants specifically pointed out that "[n]o one has ever disputed Appellants' repeated assertion that a bump stock-equipped rifle fires only a single round 'by a single function of the trigger.'" App. Br. at 32. Rather, the government's argument in the district court was only that bump stocks fire multiple rounds by a "single **pull** of the trigger."

But now, the government claims that, on a rifle with a bump stock, "[o]nce the trigger has performed its function of initiating the firing sequence in response to the shooter's pull, the weapon fires 'automatically....'" Resp. at 23. That statement is demonstrably false.[19] First, the government's very next paragraph contradicts its contention, and explains that, when using a bump stock, "'the

[19] Note that within two pages the government shifts focus back from the shooter performing a function to the trigger performing a function. Cf. Resp. at 21 with Resp. at 23.

trigger ... lose[s] contact with the finger and manually reset[s]'" in between shots (Resp. at 23) — in other words, bump stocks require a "single function of the trigger" for each and every shot.[20] Second, in the district court in D.C., Judge Friedrich recognized that, under the "single function of the trigger" language, "each trigger function ends when the trigger resets," meaning a separate trigger function is required for each shot with a bump stock. Guedes, 356 F. Supp. 3d at 130. Third and finally, all three appellate judges in D.C. — **both the majority and the dissent** — recognized that, when using a bump stock, "each bullet is fired because of a distinct mechanical act of the trigger" and "a bump stock *cannot* fire

[20] The government falsely claims that "**Plaintiffs do not dispute** that the shooter's initial pull of the trigger 'initiate[s] the firing sequence.'" Resp. at 25 (emphasis added). Once again, the government seeks to overcome Appellants' arguments by pretending they do not exist. On the contrary, Appellants have argued that "the shooter must properly absorb the recoil and adjust and apply the appropriate amount of forward pressure for each and every shot." App. Br. at 3. At oral argument, Appellants' counsel noted that "there is a razor edge of how much pressure you can apply to a bump stock pushing it forward to where you will cause it to stop cycling in bump fire mode. You have to be right on that ... between each and every shot, and you absorb recoil and then you have to apply that pressure. And once you get it wrong once, the weapon stops firing...." Transcript, R.56, Page ID#530-31. Finally, as Appellants have repeatedly pointed out, even ATF in the past correctly acknowledged there are "'**continuous multiple inputs** by the user for **each** successive shot.'" App. Br. at 24 n.17. However, ATF now claims that bump stocks operate "'without repeated manual manipulation....'" Resp. at 25.

more than one round with a *single* function of the trigger." Guedes, 920 F.3d at 29, 47; App. Br. at 32-33.

IV. THE GOVERNMENT'S STRAW MAN FALLS FLAT.

The government's brief claims that "Plaintiffs' theory is apparently that no aftermarket device could convert an AR-15 or similar semiautomatic rifle into a 'machinegun,' as long as it permits the weapon's trigger mechanism to operate as originally designed." Resp. at 15, 25-26. The government claims that, under Appellants' theory, "**even a device that mechanically and automatically pulled and released the trigger** on an AR-15 rifle on the shooter's behalf at the flip of a switch would not qualify as a machinegun, because each bullet fired would require that the weapon's original trigger be 'depressed and reset.'" *Id.* at 26. The government then gives numerous examples of trigger-replacement devices that it claims would not be machineguns under what it asserts to be Appellants' theory. *Id.* at 26-27.

The government never bothers to include a citation to where Appellants make this argument, because none exists. Actually, it appears that the government pulled this argument from its brief in Aposhian v. Barr, 19-4036 (10th Cir. 2019), without checking to see if it applied in *this* case. *See* Aposhian, Brief for Appellees at 26-28. In *this* case, Appellants have never disputed the entirely

separate notion (utterly irrelevant to *this* case) that a firearm's trigger can be replaced by another device (like a switch or button), and that the functioning of that separate device would then constitute the actual trigger, in place of the original trigger. But the government has never alleged that the trigger on a bump stock-equipped rifle has been replaced with something else. On the contrary, on a rifle with a bump stock, it is indisputable that the original trigger — not some other button, switch, piston, etc. — remains the part that causes the rifle to fire when it is functioned.

Rather Appellants have argued that, regardless of what constitutes the trigger (a button, switch, lever, etc.), if it "functions" each time a shot is fired, then the firearm is not a machinegun. The government's straw man argument falls flat.

V. THE GOVERNMENT ARGUES IT HAS NOT CHANGED THE FACTS, JUST THE MEANINGS OF WORDS.

The government claims that "ATF's [current] interpretation does not rely on any disputed facts," but merely represents a difference between past and present ATF "conclu[sion]," "determination," "understanding," and "interpretation" of the facts. Resp. at 29-30. That is certainly one way to characterize the matter. Appellants' opening brief provided an extensive list of examples where ATF had made one factual assertion in the past, and now makes a contrary factual assertion.

For example, ATF previously ruled that bump stocks "'**lacked** internal springs or other mechanical parts that channeled recoil energy,'" but ATF now claims that "a bump stock channels the recoil...." App. Br. at 40; Resp. at 7, 17. Also, ATF previously stated that bump stocks require successive inputs by a shooter, yet now claims they require only a single ongoing input. App. Br. at 40.

Those are conflicting factual statements, not merely conflicting interpretations of facts. Bump stocks either *do or do not* have certain parts (an objective physical reality), and bump stocks either *do or do not* channel or harness recoil energy (an objective scientific truth). Bump stocks require *either* a single input by the shooter *or* they require multiple inputs. Both sets of statements cannot simultaneously be true. And they represent conflicting factual statements, not a mere "misappli[cation] [of] the legal standard to the facts of a weapon's operation," as the government characterizes it. Resp. at 31. Judge Henderson, writing in dissent in D.C., was not fooled, noting that ATF's prior classification letters had "*made factual findings*," and "those factual findings dictate that a non-mechanical bump stock is not a 'machinegun'...." Guedes, 920 F.3d at 47.

This Court must apply the statute to bump stocks, not simply defer to the agency's latest opinion.[21] App. Br. at 21. Indeed, if there ever were a case *not* to defer to an agency, this would seem to be it. Nevertheless, the government claims that "[t]he agency's understanding of how a firearm operates is entitled to deference because it reflects the agency's broad experience and technical expertise." Resp. at 31; *see also* at 34. Of course, here, the agency claiming experience and expertise has taken opposing and mutually exclusive positions at various times. In such a case, deference to an agency is impossible. Fortunately, a master's degree in mechanical engineering is not necessary to understand the operation of a bump stock, and it is clear that their operation does not meet the definition of a "machinegun."

[21] The government stands in apparent disbelief "that plaintiffs **actually** intend to contest the Rule's factual statements about how bump stocks operate...." Resp. at 31 (emphasis added). The government claims that "those challenges are without merit." *Id.* The government then provides the one and only reason why Appellants' challenges are without merit — "[t]he agency's understanding of how a firearm operates is entitled to deference...." *Id.* The government provides no other reasons why Appellants are wrong. In other words, "Plaintiffs are wrong **because we said so**."

VI. THE GOVERNMENT OFFERS LITTLE TO DISPUTE THAT APPELLANTS MEET THE OTHER ELEMENTS FOR A PRELIMINARY INJUNCTION.

In the district court below, the government "concede[d] that Plaintiffs have met the irreparable harm prong of the preliminary injunction standard." Brief in Opposition, R.34, Page ID#279. And the government acknowledges that "the district court accepted that plaintiffs could establish irreparable harm...." Resp. at 13. Yet, now on appeal, the government has reversed itself 180 degrees, and claims that Appellants' complaint did not establish irreparable harm and that "plaintiffs muster only the harm of a delay" — the mere "temporary inability to use or obtain a particular device for recreational purposes...." Resp. 16, 40. Irreparable harm is clear.[22]

As for the public harm and public interest prongs, at least the government no longer accuses Appellants of asserting as fact that bump stocks were not used in Las Vegas. App. Br. at 49. Now, the government correctly recognizes only that "Plaintiffs question whether the Las Vegas shooter used bump stocks." Resp. at 39. Indeed they do. That is because the government has danced around that issue and has never provided any evidence that bump stocks were actually used. And

[22] *See also* Brief of the National Association for Gun Rights as *Amicus Curiae*, Doc. No. 26, as to the consequences of rendering legally owned bump stocks contraband.

when ATF was asked directly to identify any crime having ever been committed with a bump stock, it said it knew of none. *See* App. Br. at 49.

With not one crime on which to rely, the government invokes the cliche that there is an "overwhelming interest in protecting the public" and mouths platitudes regarding protecting "law enforcement" and "first responders." Resp. at 16, 39. In other words, don't dwell on the facts, but rather think of the children. But if the government's burden is satisfied when it simply postulates a theoretical connection between weapons and crime (apparently this is self-evident), then the government will always win on these elements, at least in any case involving firearms or the Second Amendment. That cannot be the way preliminary injunction motions are resolved.

CONCLUSION

Even though several courts[23] have upheld the Final Rule,[24] the government in its Response appears to grow increasingly desperate, changing its argument or

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[23] Currently, the two D.C. cases challenging the Final Rule are consolidated on a petition for certiorari in the Supreme Court (No. 19-296), which raises only questions related to Chevron deference. Thus, even if the Supreme Court grants that petition, it will not resolve the central question at issue here — whether bump stocks are machineguns under the statute.

[24] For an explanation of how the ban was the result of naked political agenda "by *discovering* new authority in old statutes," *see* Cato Amicus at 3-8.

adopting entirely new arguments at least a half a dozen times. The government falsely attributes arguments to Appellants that they did not make, and other times falsely claims Appellants didn't make arguments that they clearly did. And, numerous times the government asks this Court to adopt its baseless assertions for no more reason than "because we said so."

The government in this case has misrepresented the facts, twisted the law, and appealed to emotions, all in an effort to obscure what is otherwise a quite simple (albeit technical) issue. The government apparently hopes that the emotion-laden image of the Las Vegas shooting will convince this Court to make the government's legal and factual problems go away.

This Court should not accept the invitation. Bump stocks are not machineguns. They do not operate automatically. They do not fire more than one round by a single function of the trigger, or even by a single pull of the trigger. And they do not change the principles of bump firing — a technique for rapidly discharging a semiautomatic firearm — which the government concedes remains perfectly legal.

The *only purpose served by a bump stock is to provide a stable platform for the shooter's trigger finger*. something which can be accomplished with any

number of a variety of everyday objects, such as a pair of pants[25] or a pipe driven into a piece of wood.[26] The government in this case has repeatedly tried to show that bump stocks create some sort of *special* experience, not achievable through other means. But no matter the device used to bump fire, the physics, the kinesiology, and the mechanics are *exactly the same*. For the reasons above, the district court's decision should be reversed and a preliminary injunction should issue, barring enforcement of the Final Rule.

Respectfully submitted,

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[25] https://www.youtube.com/watch?v=U-nUA52BS3c

[26] https://www.youtube.com/watch?v=ojjcTv3QAbI

CERTIFICATE OF COMPLIANCE

IT IS HEREBY CERTIFIED:

1. That the foregoing Reply Brief complies with the type-volume limitation of Rule 32(a)(7)(B)(i), Federal Rules of Appellate Procedure, because this brief contains 6,482 words, excluding the parts of the brief exempted by Rule 32(f).

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

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Dated: September 12, 2019

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing Reply Brief was made, this 12th day of September 2019, by the Court's Case Management/Electronic Case Files system upon all parties or their counsel of record.

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