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IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

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GUN OWNERS OF AMERICA, INC.,  
GUN OWNERS FOUNDATION,  
VIRGINIA CITIZENS DEFENSE LEAGUE,  
MATT WATKINS, TIM HARMSSEN, and  
RACHEL MALONE,

Plaintiffs,

v.

CASE NO: 1:18-CV-1429

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

Defendants.

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HEARING on PLAINTIFFS' MOTION  
FOR PRELIMINARY INJUNCTION

\* \* \* \*

BEFORE: THE HONORABLE PAUL L. MALONEY  
United States District Judge  
Kalamazoo, Michigan  
March 6, 2019

1 APPEARANCES:

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3 APPEARING ON BEHALF OF THE PLAINTIFFS:

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11 APPEARING ON BEHALF OF THE DEFENDANTS:

11

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1 Kalamazoo, Michigan

2 March 6, 2019

3 at approximately 9:10 a.m.

4 PROCEEDINGS

09:10:18 5 THE COURT: This is File Number 18-1249; Gun Owners  
6 of America, Incorporated, et al. vs. The Bureau of Alcohol,  
7 Tobacco, Firearms and Explosives, et al.

8 This matter is before the Court on plaintiffs'  
9 motion for a preliminary injunction, which is ECF Number 9.

09:10:42 10 The record should reflect that Attorneys Olson and  
11 Morgan represent the plaintiffs. Attorneys Soskin and  
12 Glover represent the defendants.

13 The Court is ready to proceed. Mr. Olson, you may  
14 proceed, sir.

09:10:55 15 MR. OLSON: Yes, sir. Good morning, your Honor.

16 THE COURT: Good morning, sir.

17 MR. OLSON: We are, as the Court is aware, here  
18 to -- for the Court to decide whether 20 days from today an  
19 estimated 500,000 Americans, if not many more, are going to  
09:11:19 20 be required to destroy or surrender property that they have  
21 lawfully owned and the ATF for 10 to 15 years has stated is  
22 perfectly lawful to own, and now has suddenly decided  
23 constitutes a machinegun under federal law. And, your  
24 Honor, I believe that there are two important reasons here  
09:11:40 25 that not only weigh heavily in favor of granting the

1 preliminary injunction, but actually require it in this  
2 case.

3 The first one is it's been our position since the  
4 filing of our Complaint that the federal statute defining a  
09:11:53 5 machinegun is clear and unambiguous, and the government  
6 actually agrees. If you look at final rule, I'm looking at  
7 Page 66527 of the Federal Register, they say even if the  
8 statute is unambiguous -- and they say this two or three  
9 times, so they are -- they clearly believe the statute is  
09:12:13 10 unambiguous -- and they say even if it's not, and they make  
11 their other argument, but and I think that sort of  
12 forecloses everything else because the Supreme Court has  
13 held, and I'm reading from Connecticut National Bank vs.  
14 Tremain, this is Justice Thomas speaking, he says, "When the  
09:12:28 15 words of a statute are unambiguous, the judicial inquiry is  
16 complete." The Ninth Circuit in TRW Rifle, it's in our  
17 reply brief, they say, "If the statute is unambiguous,  
18 courts simply follow the standard course of applying the  
19 definition to the facts."

09:12:45 20 ATF does not want this Court, your Honor, to apply  
21 the definition to the facts because as ATF admits, and this  
22 is their words, "Absent the revised definition, ATF could  
23 not restrict bump stocks." And one of the reasons that that  
24 is the case is because bump stocks do not fire more than one  
09:13:05 25 round by a single function of the trigger, and that's a

1 statutory term, and we have made that argument a half dozen  
2 times and it has never been contested by the government,  
3 your Honor. And again, using their words, the only way to  
4 get bump stocks to fall within the statute is to "expand the  
09:13:24 5 definition to include language that would then cover bump  
6 stocks." Of course, the Supreme Court has held, we've cited  
7 this case, the Digital Realty Trust case in our brief. They  
8 cite, the definition -- "An unambiguous definition precludes  
9 the agency from more expansively interpreting the term."

09:13:42 10 And that's honestly what they admit they are doing here.  
11 They are expanding the definition to include bump stocks.  
12 And if the definition, if your Honor finds the definition to  
13 be ambiguous, then I think that raises questions whether  
14 there is a void for vagueness argument there then. It's not  
09:13:59 15 clear what statutes a machinegun, and Congress has then  
16 failed its duty to clearly define what constitutes a crime.

17 THE COURT: Well, there have been multiple people  
18 prosecuted under the statute criminally, correct, and those  
19 convictions were upheld, right?

09:14:14 20 MR. OLSON: Certainly. I think--

21 THE COURT: So the statute, if it meets the  
22 threshold of criminal prosecutions, doesn't that implicate  
23 that argument here?

24 MR. OLSON: I think that's been based on the  
09:14:28 25 assumption that since 1934 the statute has been unambiguous,

1 and Courts have had no problem interpreting it and implying  
2 it in cases. Suddenly now in 2018, it's ambiguous according  
3 to the government. They have never seen fit to change the  
4 definition in all of these years until ordered to do so  
09:14:48 5 essentially by President Trump, and to reach a particular  
6 conclusion, which their briefing admits that they set out  
7 with this particular intent and purpose in mind and then  
8 crafted a regulation that would meet the intended result.

9 What ATF --

09:15:06 10 THE COURT: What rule of statutory construction do  
11 you rely on to assert that the statute is unambiguous? I  
12 don't think that's clear from your briefing.

13 MR. OLSON: I guess that automatically at least we  
14 would argue the plain meaning, single function of the  
09:15:26 15 trigger as we argued you would -- we argued that you  
16 ordinarily would use the plain meaning, but in this case,  
17 it's clear from that language and, as the government points  
18 out, Congress didn't use the ordinary language, they didn't  
19 use pulling the trigger, which is what people ordinarily  
09:15:42 20 would talk about when discussing shooting a gun. They used  
21 function of the trigger, and I think there is a reason for  
22 that, and it's very clear that Congress meant this term to  
23 have a technical sort of scientific definition, and that's  
24 what ATF says that their specialty is, is in technical  
09:15:58 25 analysis, not in what they have now shifted the statute to.

1 Single pull of the trigger looks at the subjective intent of  
2 the shooter and what the shooter is doing, how the shooter  
3 is interacting with the gun. And we get into intent and  
4 subconscious thinking, and certainly the ATF is no expert at  
09:16:15 5 any of that, your Honor.

6 THE COURT: Go ahead. Thank you.

7 MR. OLSON: In this case, it's interesting to look,  
8 because ATF doesn't ever say we are defining machinegun,  
9 because Congress has defined a machinegun, it's given a  
09:16:30 10 multi-part fairly lengthy definition. So what ATF says  
11 they're doing, and again, their words, they say the terms  
12 contained in the definition are undefined. Of course, they  
13 are undefined, because Congress doesn't define definitions  
14 and then define the definitions of the definitions, and it  
09:16:47 15 just goes on, but that's what ATF purports to do here. And  
16 that's the only way you would get to the result they want is  
17 you take machinegun, and for example, one of the elements is  
18 that it fires automatically, and that is the definition.  
19 But now they want to define automatically as a self-acting  
09:17:02 20 or self-regulating mechanism, and then we talk about a  
21 mechanism. So in their brief in opposition on Page 21, we  
22 actually get into a discussion and argument about what a  
23 mechanism is. And so now we are three iterations away from  
24 what the statute says.

09:17:19 25 When it comes to the other elements, the single

1 function, they have defined it for a number of years as a  
2 single pull of the trigger, not a single function of the  
3 trigger. But now in the final rule, they move from single  
4 pull of the trigger to single pull of the trigger and  
09:17:35 5 analogous motions, because they realize there is a problem  
6 with single pull and it doesn't encompass everything, all  
7 the ways a trigger could be activated. And now in their  
8 briefing, they have a whole list of analogous motions that  
9 they want to be covered under single pull. And as we point  
09:17:51 10 out in our briefing, if you just go with single function,  
11 that covers all of the ways a trigger could be activated,  
12 covers pulls and pushes and switches and paddles. And I  
13 think Congress recognized that. Clearly they had  
14 machineguns back in 1934 that were activated by paddles or  
09:18:08 15 different things that weren't a typical trigger, and so  
16 Congress used that terminology so you would look at the  
17 trigger and look at its function.

18 So we keep ATF, in order to get where they want,  
19 they keep getting further and further away from what the  
09:18:24 20 statute and what the definition in the statute actually  
21 says, and it sort of begs the question how many iterations  
22 you need to have of defining definitions of definitions, and  
23 it seems like the answer is as many as it takes until bump  
24 stocks are machineguns, your Honor.

09:18:38 25 One of the issues that I wanted to raise was



1 something that the Court's no doubt familiar with, the  
2 government's recent filing just last week, the Notice of  
3 Supplemental Authority discussing Judge Friedrich's opinion  
4 in DC and the issue of deference. And in our initial  
09:18:59 5 briefing, we had argued there is no Chevron deference in a  
6 determination like this.

7 THE COURT: You don't get Chevron deference if the  
8 statute is--

9 MR. OLSON: Certainly, certainly. Even if the  
09:19:11 10 Court decided the statute were ambiguous, ATF has now  
11 disclaimed any deference at all. They say -- They cite the  
12 Apel decision, the 2014 Supreme Court Apel decision, and  
13 there the Court says we have never held that the  
14 government's reading of a criminal statute is entitled to  
09:19:28 15 any deference. And certainly that means Chevron deference,  
16 your Honor. I think the government admits that. But the  
17 other thing I think that that forecloses is --

18 THE COURT: Well, wasn't the critical word you just  
19 spoke, the criminal context or criminal --

09:19:43 20 MR. OLSON: Criminal statute.

21 THE COURT: -- as opposed to this is something  
22 different, right?

23 MR. OLSON: This case, your Honor?

24 THE COURT: Well, this is not a criminal  
09:19:51 25 prosecution. There are certain rules of statutory

1 construction as it relates to criminal statutes which the  
2 context is totally different here, right?

3 MR. OLSON: This is not a criminal prosecution,  
4 your Honor, but this is a criminal statute that was enacted,  
09:20:06 5 reenacted as Title 2 of the Gun Control Act in 1968. It's  
6 interspersed and intermingled. The gun Control Act relies  
7 on the NFA definition. Just because we are not here in a  
8 criminal matter doesn't mean this should be a different  
9 rule, I would think for this case, and then if six months  
09:20:25 10 down the line ATF chooses to prosecute someone, the statute  
11 has to mean the same thing in both contexts, I would think.  
12 And the government has admitted that they are due no  
13 deference here.

14 And so I think the important thing is that, you  
09:20:39 15 know, if Chevron is out, that also means that 706 deference  
16 is out under the APA, your Honor, because that discusses  
17 arbitrary and capricious and those sorts of concepts. And  
18 as Judge Friedrich mentioned in her DC opinion, and every  
19 other case that I've read on this, it says that Chevron  
09:21:01 20 deference and 706(a) -- or 706 deference, they overlap, the  
21 analysis is basically the same. Because in Chevron you're  
22 asking whether something is arbitrary and capricious, and in  
23 706 you're asking if something is arbitrary and capricious.  
24 So the deference, in Apel says, any deference, it doesn't  
09:21:18 25 say Chevron deference. We have held that the government's

1 reading of criminal statute is not entitled to any  
2 deference. I would argue that forecloses 706 deference as  
3 well, that it's not just as the government argues, that they  
4 had a reasonable interpretation of the statute, that there  
09:21:36 5 was nothing foreclosing their argument or anything like  
6 that, that it's actually a function for this Court to itself  
7 determine what the statute actually means, not so long as  
8 ATF has a reasonable interpretation of the statute, we'll go  
9 with that, if that makes sense.

09:21:56 10 As we cited in Abramski, the Abramski decision  
11 which was decided a few months of after Apel, the Court went  
12 even further and they were actually dealing with the case  
13 where ATF was a party and they were dealing with an ATF  
14 interpretation of the statute, and they said, "ATF's old  
09:22:12 15 position is no more relevant than its current one, which is  
16 to say not relevant at all. When the government interprets  
17 a criminal statute too broadly, as it sometimes does, or too  
18 narrowly, as ATF used in that case, a Court has an  
19 obligation to correct its error." So I would say that even  
09:22:27 20 if this Court found the statute to be ambiguous, that it's  
21 almost a de novo review of what the statute means, and there  
22 is no deference to the government any more than there is  
23 deference to the plaintiffs. It's all just the power to  
24 persuade of the briefs.

09:22:43 25 Your Honor, there is one other thing that I wanted

1 to discuss that we mentioned briefly in our opening brief,  
2 and it came up in both oral arguments in DC in front of  
3 Judge Friedrich, and that was ATF's, their application of  
4 the final rule to rubber bands. And if you look at  
09:23:17 5 Page 66551 of the final rule, they say that, "Individuals  
6 wishing to replicate the effects of bump stock type devices  
7 could also use rubber bands, belt loops or otherwise train  
8 their trigger finger to fire more rapidly, this would be  
9 their alternative to using bump stock type devices." And  
09:23:36 10 that has not always been ATF's position. They have had  
11 opinion letters over the years where they have said if a  
12 rubber band is affixed to a rifle in a certain way, that it  
13 might make it a machinegun. And so they are basically  
14 counseling people to tread lightly here because we haven't  
09:23:52 15 determined this, but it could be. But in the final rule,  
16 your Honor, the ATF puts its rubber stamp on rubber bands.  
17 They say go to town.

18 THE COURT: Rubber stamp on rubber bands. Go  
19 ahead.

09:24:06 20 MR. OLSON: Sorry.

21 So you look at a rubber band, your Honor, and you  
22 look at the -- I would obviously argue that under the  
23 statute, a rubber band hooked around the trigger of an AR-15  
24 wrapped around the front of the magazine well and back  
09:24:25 25 around the trigger that provides some forward assistance for

1 the trigger reset, and then when coupled with recoil of the  
2 firearm, those two forces together are enough to articulate  
3 the trigger, to reset the trigger, and then the shooter  
4 would press the trigger and fire another round. Under the  
09:24:41 5 statute, the way it's written, I would say it's still not a  
6 machinegun, because it's still firing one round for every  
7 mechanical function of the trigger. You have a trigger  
8 break and a trigger reset, one function of the trigger. But  
9 even if you look at ATF's definition that they have  
09:24:56 10 constructed and you apply it to a rubber band, a rubber  
11 band, it fires, it works automatically, it elongates and it  
12 compresses, and doing that is certainly harnessing recoil  
13 energy, and it's certainly self-acting and self-regulating.  
14 These are all the concepts that ATF throws around in its  
09:25:17 15 final rule.

16 And if you -- if just for the sake of argument we  
17 go with single pull of the trigger, when you're firing an  
18 AR-15, say, with a rubber band, the trigger finger never  
19 physically separates from that trigger, so it could be  
09:25:34 20 understood to be a single pull of the trigger. So a rubber  
21 band, your Honor, meets every single one of the criteria  
22 that ATF itself has established for a machinegun, yet here  
23 they say use your rubber bands, don't use your bump stock.  
24 A bump stock fits none of the criteria that we've argued  
09:25:51 25 under ATF's constructive definition, and yet they're saying

1 bump stocks are machineguns.

2 One of the other things that we have pointed to is  
3 semi-automatic firearms themselves, that there is a danger  
4 here that, left unchecked and given this new authority to  
09:26:09 5 expand the definition and thus expand the statute that a  
6 future administration, a future ATF could come in and apply  
7 this definition of machineguns to semi-automatic firearms,  
8 which everyone hopefully knows are completely different  
9 things. But under the way they have written this final  
09:26:28 10 regulation is, you know, a semiautomatic firearm, when you  
11 pull the trigger and discharge a round, you set into motion  
12 a series of events. The bolt or slide comes to the rear,  
13 the spent casing is ejected, the bolt with a spring assisted  
14 goes back forward, strips another round off, and puts it  
09:26:47 15 into the chamber, and all the trigger components reset.  
16 Your Honor, all of that happens automatically once you have  
17 a trigger break. And all of that happens, it's a  
18 self-acting, self-regulating mechanism, and it all happens  
19 by harnessing the recoil energy of the fired shot.

09:27:05 20 And what is also interesting is in basic shooting  
21 instruction, and when you get into this a little bit, one of  
22 the things that shooters are taught is that when you're  
23 firing a semi-automatic multiple rounds, you have trigger  
24 slack and then you get to sort of a wall, and you have a  
09:27:24 25 trigger break, where there would be a 3, 4 or 5 whatever

1 poundage, it is necessary to then discharge the trigger.  
2 When that happens, the novice shooter, the instinct is to  
3 have their finger jump back off the trigger and lose contact  
4 with the trigger, but shooters are taught to just release  
09:27:45 5 the trigger enough to allow the trigger to reset. So if you  
6 have that slack and that take-up of the trigger, you don't  
7 let off, you don't release all of your pressure on the  
8 trigger, so you work in this very small space of trigger  
9 break, trigger reset, trigger break, trigger reset, so I  
09:28:03 10 would clearly argue against it in such a case, but I could  
11 see a scenario where, in the future, ATF could say that's a  
12 single pull of the trigger, because your finger never leaves  
13 the trigger and it's constantly exerting force on that  
14 trigger. So in that sense, once again, bump stocks fit none  
09:28:18 15 of their criteria, and semi-automatics, at least the  
16 argument could be made that fit every single one of their  
17 criteria, and that's a very dangerous road to go down to  
18 adopt a regulation that could be used in the future to ban  
19 semi-automatic firearms as a class.

09:28:35 20 THE COURT: ATF has been consistent since 2006 on  
21 the issue of single pull, right?

22 MR. OLSON: With the Akins accelerator, yes, your  
23 Honor. Well, I would say they've been consistent on single  
24 pull, but now they have moved from single pull to single  
09:28:50 25 pull and analogous motion. So now they wish to change that

1 further. The Court in Akins never upheld the additional  
2 language, never looked at that, never realized that when you  
3 move from single function to single pull, and then there's  
4 other ways to pull a trigger, that that creates a whole host  
09:29:08 5 of problems that you then have to fix. So that's one of the  
6 two problems we see with Akins, your Honor. The other  
7 being, if you look at Akins, and I'm reading on Page -- I'm  
8 not seeing a page cite here that's easily determinable, but  
9 it says, under the APA, "We defer to the agency unless it  
09:29:32 10 acts arbitrary and capriciously on the other elements." So  
11 they are saying we are giving deference to the agency.  
12 Under Akins and Abramski -- Akins was in 2009, your Honor.  
13 I'm sorry, a lot of cases that begin with A here. Under  
14 Apel and Abramski, I think that's foreclosed any sort of  
09:29:49 15 deference. I actually think Akins has not been overruled,  
16 but the basis for the decision has been overruled, your  
17 Honor, the deference. I don't even think that the Eleventh  
18 Circuit's opinion still governs in the Eleventh Circuit  
19 after those two cases.

09:30:05 20 Your Honor, if you have any questions, I would be  
21 happy to try to address them. I don't know that I have  
22 anything further at this time.

23 THE COURT: All right. Thank you. I'll come back  
24 to you, I'm sure.

09:30:20 25 Mr. Soskin, go ahead, sir.



1 MR. SOSKIN: Good morning, your Honor.

2 THE COURT: Morning.

3 MR. SOSKIN: Thank you for having us out in defense  
4 of the Department of Justice's bump stock rule. Today I am  
09:30:32 5 joined by Mr. Glover who will be addressing issues including  
6 the preliminary injunction factors and the department's  
7 change of position as far as this final rule. I'll be  
8 addressing the rules, interpretations and applications to  
9 the bump stock.

09:30:50 10 And before I go further, I would just like to thank  
11 the local U.S. Attorney's Office, which was immensely  
12 helpful in this process. Ryan Cobb couldn't be here today,  
13 but he and his colleagues have been tremendous assistance  
14 and they would have done a fine job here had the wheels of  
09:31:09 15 bureaucracy not dictated for me and Mr. Glover to come out  
16 ourselves.

17 So let's start here. What is --

18 THE COURT: We created this weather just for you,  
19 Mr. Soskin.

09:31:22 20 MR. SOSKIN: Well, thank you. It feels just like  
21 home. I'm originally from South Bend.

22 THE COURT: Are you really?

23 MR. SOSKIN: And we had, you know, plenty of  
24 surprise lake effect days, so.

09:31:31 25 THE COURT: Okay. Did you go to Notre Dame?

1 MR. SOSKIN: I did not. I always thought I would  
2 go to Notre Dame, but ended up going to school out of state.

3 THE COURT: Where did you go to school?

4 MR. SOSKIN: Williams College in Massachusetts.

09:31:44 5 Also plenty of cold weather and snow there.

6 THE COURT: Oh, yes, absolutely.

7 MR. SOSKIN: So what is a bump stock in practical  
8 terms? People use them to be able to shoot faster. It

9 lets, as various videos that you can find on YouTube will

09:32:03 10 demonstrate, lets a shooter of ordinary skill fire a

11 semi-automatic rifle like you might buy at Wal-Mart or

12 Cabela's almost as fast as the world's fastest shooter, but

13 without all of the training and experience and difficulty

14 required to achieve that level. This is a case about

09:32:23 15 whether the Department of Justice's rule recognizing that

16 bump stocks are machineguns is not arbitrary, capricious, in

17 conflict with the statute or based on factors that Congress

18 did not intend in its three components. One, the definition

19 of single function of the trigger as single pull of the

09:32:44 20 trigger, as an ATF did as early as 2006 and courts have

21 subsequently upheld. Two, interpreting the term

22 automatically to mean as the result of a self-acting or

23 self-regulating mechanism that includes human input as a

24 part. And three, applying these definitions to a bump stock

09:33:06 25 type device to conclude a bump stock is a machinegun

1 consistent with how it is used. And because none of those  
2 three elements of the final rule are arbitrary and  
3 capricious, plaintiffs cannot establish a substantial  
4 likelihood of success and are not entitled to their  
09:33:24 5 preliminary injunction.

6 Let's start by looking at the text of the statute.  
7 What is it that we are interpreting here? In the National  
8 Firearms Act, Congress defined a machinegun as any weapon  
9 which shoots, is designed to shoot or can be readily  
09:33:40 10 restored to shoot, automatically more than one shot without  
11 manual reloading by a single function of the trigger. And  
12 that's codified in Section 5845(b) of Title 26. That  
13 definition in turn was incorporated into the Gun Control Act  
14 and into the Firearm Owners Protection Act, which enacted 18  
09:34:02 15 U.S.C. 19220, thereby making -- thereby prohibiting the  
16 possession of newly manufactured machineguns prospectively  
17 from that date. The first element--

18 THE COURT: Is this statute ambiguous or not?

19 MR. SOSKIN: The statute is -- was unambiguous in  
09:34:25 20 its application until we had bump stocks, a new development,  
21 a new type of -- a new type of firearm implement to which  
22 the statute had been applied. So everyone understood what a  
23 machinegun -- that everything that was a machinegun was a  
24 machinegun until this question arose of how do we treat bump  
09:34:47 25 stocks. So you would have to say that at the present time

1 where we live in a world with bump stocks, the statute is  
2 ambiguous as to its application to those devices.

3 THE COURT: What implication does that have for  
4 criminal prosecutions of individuals who, assuming the rule  
09:35:04 5 goes into effect and is, passes muster with the Appellate  
6 Courts, what implication does that position have vis-a-vis a  
7 criminal prosecution of someone under the statute?

8 MR. SOSKIN: Because the final rule now lays out a  
9 clarifying definition, that is sufficient in our view to  
09:35:27 10 close the ambiguity and permit possession of bump stocks to  
11 be prosecuted. There should be no effect on any  
12 conventional device that has always been understood to be a  
13 machinegun.

14 THE COURT: Well, the United States Attorney is not  
09:35:44 15 going to be able to rely on Chevron deference in a criminal  
16 case, right?

17 MR. SOSKIN: Well, that's right, your Honor, and we  
18 are not able to rely on Chevron deference here for the same  
19 reason, your Honor, and that's why we set that out in our  
09:35:59 20 Notice of Supplemental Authority. We are asking -- the  
21 final rule sets forth what must be the interpretation of a  
22 machinegun as it applies to bump stocks, otherwise --  
23 otherwise there will obviously be the challenges that you  
24 are identifying for prosecution of those persons. We can't  
09:36:24 25 order people to surrender their bump stocks unless they are,

1 in fact, covered by the criminal prohibition in 9220.

2 THE COURT: Thank you.

3 MR. SOSKIN: So the subterms within the statute are  
4 left undefined, and contrary to my friend's presentation

09:36:49

5 here, it is not unusual for Congress to promulgate a

6 definition and then promulgate definitions of terms that are  
7 within that definition. If you look at the prohibition, for

8 example, on felon -- what is commonly known as felons in

9 possession of firearms, in 18 U.S.C. 922(g)(1), it relies on

09:37:11

10 a definition that is set forth in I believe 921(a)(20),

11 which in turn relies on the definition of several of those

12 terms in there. And so it is not an extraordinary

13 proposition for the government, where the statutory

14 definition leaves certain terms undefined, to step in as it

09:37:35

15 has done here and say here is the clarified, meaning here is

16 a regulation defining further what those undefined terms

17 mean. And the final rule says that a single function of the

18 trigger is a single pull of the trigger and analogous

19 motions. And that is not an arbitrary and capricious

09:37:55

20 interpretation in light of the significant evidence that

21 supports the appropriateness of this definition.

22 First, of course, is the decade of history of this

23 regulatory interpretation. As plaintiff's counsel

24 acknowledged, this is not something new that the department

09:38:14

25 is applying for the first time in the final rule. To the

1 contrary, ATF began interpreting a single function of the  
2 trigger as a pull in 2006 in the context of the Akins  
3 accelerator device, one of the first bump stock type devices  
4 that ATF was asked to classify, and over which at first it  
09:38:36 5 made an error and classified it as not a machinegun, and  
6 then shortly thereafter reversed its position, classified it  
7 as a machinegun. That issue was litigated, and the District  
8 Court, the Middle District of Florida and the Eleventh  
9 Circuit, ultimately upheld the reclassification of the Akins  
09:38:57 10 device as a machinegun and relied on the interpretation of  
11 single function of the trigger as a single pull of the  
12 trigger.

13 THE COURT: What is new here is pointed out by  
14 Mr. Olson is the analogous motions language. Could you help  
09:39:13 15 me with that?

16 MR. SOSKIN: So the analogous motions language was  
17 a logical outgrowth of the definition set forth in the  
18 proposed rule, and that reflects the agency's efforts to  
19 address the comments that were received in the course of  
09:39:30 20 publishing the notice of proposed rule making, receiving  
21 comments, and then promulgating a final rule. Many of those  
22 comments suggested that the interpretation of single  
23 function of the trigger, just as single pull of the trigger,  
24 may be inconsistent with the operation of some specific  
09:39:52 25 types of machineguns as recognized in -- as recognized in

1 courts. So for example, devices that operate based on a  
2 switch or I think my colleague, my friend was referencing a  
3 paddle, and so those are elements that are analogous, those  
4 are things that are analogous to a pull, and that should  
09:40:17 5 properly be included in the final rules definition.

6 Where did ATF get the equation of single function  
7 to single pull from? Well, it came right from the Supreme  
8 Court's opinion in the Staples case, which in the very first  
9 footnote articulated the distinction that the Supreme Court  
09:40:40 10 was going to apply in that opinion between automatic and  
11 semi-automatic weapons, i.e., between machineguns and not  
12 machineguns. And Justice Thomas wrote, "As used here, the  
13 terms automatic and fully automatic refer to a weapon that  
14 fires repeatedly with a single pull of the trigger." And  
09:41:02 15 then he continued, "Such weapons are machineguns within the  
16 meaning of the act. We use the term semi-automatic to  
17 designate a weapon that fires only one shot with each pull  
18 of the trigger."

19 And therein, the Supreme Court recognized that  
09:41:19 20 function and pull or single function and single pull of the  
21 trigger in this context were synonymous, and that is where  
22 in part the agency drew its 2006 re-- 2006 interpretation  
23 from. Again, in Akins, the District Court and the Eleventh  
24 Circuit affirmed this view.

09:41:43 25 However, it's not just based on that, as our brief

1 explained, understanding single function as single pull is  
2 also consistent with the ordinary meaning. And our brief  
3 has dictionary definitions for pull the trigger and  
4 function. Judge Friedrich's opinion in DC cited to the 1933  
09:42:06 5 Oxford English dictionary definition that was at the time  
6 that the National Firearms Act was promulgated for function.  
7 And a function is the mode of action by which it fulfills --  
8 something fulfills its purpose. Here I think we all  
9 understand that the way a machinegun operates is through the  
09:42:28 10 shooter pulling the trigger, and that pull is a description  
11 of the way of the function by which a machinegun performs  
12 its purpose. And this has been adopted so widely, of  
13 course, that pull the trigger has derivative colloquial  
14 meanings. We think of pull the trigger as being what you do  
09:42:49 15 to initiate a significant decision. You know, Ms. Smith,  
16 are you going to pull the trigger on that home purchase? Or  
17 Mr. Johnson, are you going to pull the trigger on your  
18 engagement proposal to Ms. Smith? That understanding that  
19 "pull the trigger" is how we initiate the firing of a  
09:43:12 20 firearm, helps us make sense out of this definition.

21 Now, plaintiffs object that we have moved from the  
22 mechanics of the trigger to the finger, and that the finger  
23 is not in the statute. But function really is about the  
24 nature of the operation, and that is the finger as much as  
09:43:35 25 it is the trigger. That's what is required to understand



1 cases like Fleischli, your Honor, which is the Seventh  
2 Circuit case the parties have cited about a minigun and  
3 whether a minigun operated by a switch can be conceived of  
4 as a -- is properly classified as a machinegun. The reason  
09:43:56 5 is that it's the nature of the operation, the shooter's  
6 decision to initiate firing.

7 Automatically is the second element in which a  
8 definition is promulgated in the final rule. And the final  
9 rule defines automatically as meaning the result of a  
09:44:18 10 self-acting or self-regulating mechanism that allows the  
11 firing of multiple rounds through a single function of the  
12 trigger or a single pull of the trigger. And this, too, is  
13 not an arbitrary or capricious definition. In fact, it  
14 accords with the plain text, because it's drawn from a 1934  
09:44:39 15 dictionary, again, at the time that the single function of  
16 the trigger definition was adopted. And that means having a  
17 -- and that definition highlights the importance that  
18 something automatic performs a required act at a particular  
19 point in an operation. And that's really important.

09:45:02 20 Something that is automatic doesn't have to automate the  
21 entire process, it needs to automate a step in the process.  
22 And here, the step that is being automated is the direction  
23 by the shooter of recoil in a useful direction, i.e., into  
24 helping reset the trigger and reengage the firearm to fire  
09:45:28 25 another shot.

1           That is also consistent with past judicial  
2           interpretations, your Honor. For example, we've cited the  
3           Olofson case which describes how the discharge of a  
4           machinegun occurs as a self-acting mechanism set in motion  
09:45:47 5           by a single function of the trigger.

6           Plaintiffs are concerned that the inclusion of a  
7           person in this process renders it non-automatic, but I think  
8           that objection is belied by a comparison of a bump stock to  
9           the kind of device that everyone here agrees is a  
09:46:16 10          machinegun, the type of machinegun that has always  
11          unambiguously been understood to be encompassed by the  
12          statute. If you compare a video of an individual firing a  
13          bump stock equipped rifle with an individual firing a  
14          conventional machinegun, what you will see is great  
09:46:35 15          similarities in the degree to which this is an automatic act  
16          and great similarities in the extent to which the shooter  
17          must employ manual measures to maintain control of the  
18          firearm, including the person as a component of the firing  
19          process does not defeat automaticity.

09:46:59 20          The third element of the final rule is the  
21          application of that definition to bump stock devices. And  
22          again here I think it's helpful to return to the big  
23          picture. The incorporation of a bump stock into your  
24          ordinary semi-automatic rifle that tens of millions of  
09:47:25 25          Americans, if not a hundred million Americans own, and that

1 can be purchased, unlike a post-1986 machinegun, which is  
2 illegal, can be purchased almost anywhere.

3 Did Congress intend for a device that allows a  
4 shooter to make a semi-automatic rifle function essentially  
09:47:51 5 as a machinegun to be exempted when it banned newly  
6 manufactured machineguns from private possession? No, it  
7 did not. As our brief explains, Congress was concerned  
8 about preventing the serious law enforcement problems that  
9 would develop if machineguns continued to be promulgated --  
09:48:13 10 continued to be manufactured and sold to anyone who at that  
11 time was willing to pay the small tax. It had become small  
12 over the passage of 60 -- 52 years, I suppose, and be able  
13 to acquire those. That is why the Firearm Owners Protection  
14 Act, which as its name suggests, was largely about shielding  
09:48:44 15 firearm owners from government action, did include this  
16 prohibition. And Congress saw no problem with doing this,  
17 because the only useful advantage that machineguns confer on  
18 a shooter is the rate of fire, and that's not really a  
19 useful self-defense feature, it's not really a useful  
09:49:06 20 hunting feature to be able to fire ammunition at the rate  
21 that a machinegun can do. And so that's why, when you look  
22 and you see that these devices are equivalent in their  
23 function, it confirms that it was not arbitrary and  
24 capricious for the department to adopt this definition.

09:49:29 25 Now, my friend across the aisle here described, I

1 think, well, the manner in which a bump stock equipped rifle  
2 fires. The key elements in the department's application of  
3 the definition to a bump stock are that it allows a shooter  
4 to set up essentially a self-regulating mechanism using his  
09:49:55 5 two hands and his shoulder, and the bump stock device, in  
6 previous arguments like that, a kind of air rifle thing, but  
7 there's really nowhere in my field of fire here where I  
8 wouldn't be aiming at one of the Court's personnel, so I'm  
9 going to refrain from doing that, your Honor. The shooter  
09:50:19 10 shoulders the rifle, places his trigger finger on the ledge  
11 that a bump stock device provides for this purpose, places  
12 the non-trigger hand somewhere else, usually it's on the  
13 barrel shroud or the foregrip of the rifle, and then applies  
14 continuous and appropriate level of forward pressure and  
09:50:42 15 rearward pressure. And within that zone of pressure and  
16 within the space or along the tube provided for the purpose  
17 by the bump stock device, the mechanism, the rifle  
18 reciprocates while the shooter's intent remains to pull the  
19 trigger. The existence of that space and the tube, and/or  
09:51:08 20 the tube, they limit the recoil-induced movement and help  
21 the shooter maintain this reciprocating effect within a  
22 narrow linear zone, and that is why the bump stock equipped  
23 rifle appears to fire no differently than a conventional  
24 machinegun. And it does so easily without all of the  
09:51:34 25 training requirements and experience requirements that are

1 necessary to achieve that result with unassisted bump  
2 firing.

3 Plaintiffs have several objections to this  
4 application. One, which you heard just a few minutes ago,  
09:51:55 5 is that this represents an expansion of the statutory  
6 definition, but it is not an expansion of the text of the  
7 statute. It's an expansion of the unnecessarily narrow way  
8 in which ATF had been interpreting the statute. ATF,  
9 subsequent to the Akins accelerator ruling, had judged the  
09:52:24 10 application of the statute to a device based on whether that  
11 device contained a spring. Why a spring? Because that's  
12 what they had seen before, that's what they were familiar  
13 with before. But nothing in the statutory text as the final  
14 rule explains, requires that there be a spring there.

09:52:44 15 Plaintiffs object, and I addressed this before,  
16 about the change from the trigger to the shooter as  
17 reflected in the change in language or the interpretation of  
18 function as pull. But pull is fundamentally a concept  
19 that's about the human action. What is the shooter doing?  
09:53:09 20 In our brief, I think we used the example of pulling in the  
21 line on a boat as a kind of continuous motion that one would  
22 do, and in -- and which might address the next of  
23 plaintiffs' concern, that someone's finger comes off the  
24 trigger in the course of doing this. But a pull of a rope  
09:53:31 25 illustrates just how one can engage in a single continuous

1 motion with one's hands that does not require continuous  
2 contact or pressure.

3 And plaintiffs make much in their reply brief out  
4 of the distinction in definitions between harness and  
09:53:56 5 channel, but it's not actually as great a difference as they  
6 would suggest. It is true that the rule only uses channel,  
7 and we have argued this in terms of harnessing, but the two  
8 definitions they supplied make clear that these are really  
9 similar and related concepts, that channeling energy is to  
09:54:16 10 direct toward or into some particular course; and harness is  
11 to gain control over for a particular end. These are both  
12 identical concepts essentially in application to the bump  
13 stock where the very purpose of a bump stock. And no one  
14 disputes this, there can be no other purpose to a bump stock  
09:54:40 15 is to assist the shooter in making a bump stock function as  
16 a machinegun, function automatically so that any person who  
17 affixes one to their semi-automatic rifle can achieve the  
18 automatic firing cycle that is described in the final rule.

19 I would like to also address a couple of additional  
09:55:16 20 points that plaintiff raised in this presentation. At one  
21 point, he discussed something labeled as 706 deference, and  
22 suggested that because the department is not relying on  
23 Chevron deference here, that somehow APA 7062 and its  
24 arbitrary and capricious standard does not apply, but that's  
09:55:42 25 not correct, your Honor. This case is before the Court on

1 application of the Administrative Procedure Act.  
2 Plaintiffs' claim is necessarily that the agency violated  
3 that standard, the standard set forth in 7062 against  
4 arbitrary and capricious, or the other components thereof in  
09:56:05 5 its behavior. And so the statutory standards that Congress  
6 has promulgated for review and that degree of statutory  
7 deference, that means, and I think plaintiffs' counsel used  
8 this term, that means the agency is entitled to adopt any  
9 definition that has the power to persuade. That does apply  
09:56:26 10 here, your Honor, regardless of whether Chevron deference  
11 applies or not. There is not a special -- there is not a --  
12 there is not an agency assumption separate from Congress.

13 THE COURT: Was that the position you took before  
14 Judge Friedrich?

09:56:45 15 MR. SOSKIN: Yes, your Honor. Before Judge  
16 Friedrich, the government did not assert that it was  
17 entitled to Chevron deference, and I believe we cited the  
18 same language from Apel or Apple, in that case that we cited  
19 here, your Honor.

09:57:01 20 THE COURT: Her opinion, though, uses Chevron  
21 deference, correct?

22 MR. SOSKIN: Yes, your Honor. And Judge Friedrich  
23 is correct, we think, in the application of -- the  
24 application of principles to reach the conclusion that the  
09:57:19 25 final rule was proper. She's correct as to ambiguity in her

1 opinion, but in our view, whereas here we are interpreting a  
2 criminal statute, the agency's interpretation must be  
3 persuasive, not just permissible.

09:57:38 4 THE COURT: So under no uncertain terms, you're  
5 walking away from Chevron deference on this case?

6 MR. SOSKIN: Yes, your Honor. The Supreme Court  
7 has warned us in the language that plaintiffs' counsel  
8 presented, and this is not a case where what we are doing,  
9 as plaintiffs' counsel highlighted, is telling a half  
09:57:58 10 million owners of bump stocks, that notwithstanding the  
11 letters that they have in their possession that say these  
12 are not regulated by the National Firearms Act, these are  
13 not machineguns, they are now machineguns. The Court needs  
14 to be persuaded that that position is correct and not simply  
09:58:21 15 defer to it as one permissible interpretation among many.

16 THE COURT: Sounds to me like the department is  
17 counting votes on the issue of Chevron deference moving  
18 forward. I mean I'm -- that was cryptic, but I mean there  
19 is a real issue now, is there not, whether there are five  
09:58:43 20 votes for Chevron deference in the Supreme Court?

21 MR. SOSKIN: You're right, your Honor. And you  
22 know, I point you -- Justice Gorsuch wrote about this issue  
23 just this week.

24 THE COURT: Indeed.

09:58:54 25 MR. SOSKIN: I guess you may be familiar with the



1 BNSF Railway opinion. What he highlighted is that in that  
2 opinion, much like here, the parties were not asserting that  
3 their positions were correct primarily as a result of  
4 deference. I think he noted that when they appeared before  
09:59:17 5 the Supreme Court, counsel for BNSF was almost apologetic  
6 about asserting to Chevron.

7 THE COURT: I think there is some description that  
8 it was in the last ten seconds of the argument that there  
9 was a fleeting reference to Chevron and the attorney nearly  
09:59:35 10 apologized for referencing it?

11 MR. SOSKIN: That's right, your Honor. But you  
12 know, that was in a civil case entirely devoid of the  
13 criminal overlay here. The Supreme Court has not accorded  
14 us deference in the past to interpretations of criminal  
09:59:51 15 statutes. And so layering on, you know, various justices'  
16 statements about Chevron deference to try to, for the first  
17 time, obtain deference to an interpretation of a criminal  
18 statute here, you know, that wouldn't make a lot of sense.

19 But importantly, your Honor, there is another issue  
10:00:10 20 here. The final rule makes clear that the department  
21 doesn't need deference to prevail in this case. The final  
22 rule expresses the department's view that this is the best  
23 interpretation of the statute. And deference is a heck of a  
24 lot more important when there are two equally good readings  
10:00:28 25 of the statute, or perhaps when the reading the agency is

1 urging is the least good of multiple readings of the  
2 statute. But here the final rule is premised on this being  
3 the best interpretation of the statute. So there is no  
4 particular reason for us to wade into the judicial murkiness  
10:00:47 5 of Chevron deference.

6 THE COURT: Okay. So that is the best  
7 interpretation in 2019. There was a previous best  
8 interpretation a decade before, correct?

9 MR. SOSKIN: You're right, your Honor. Prior to  
10:01:03 10 2006, the department -- the agency had not confronted, I  
11 suppose it was prior to 2002 when they first saw an Akins  
12 accelerated, but not really confronted this issue of a  
13 device specially designed and crafted to accomplish this  
14 purpose of converting a semi-automatic into a machinegun by  
10:01:27 15 operating in this way, harnessing the recoil energy such as  
16 this. There had been, I think, some issues with rubber  
17 bands in the past, which also left the agency somewhat  
18 unclear how to approach it, but you know, one doesn't go out  
19 to sell rubber bands for the purpose of converting --  
10:01:49 20 converting firearms into machineguns, converting  
21 semi-automatic rifles into machineguns, which are firearms  
22 since the statutory definition of firearm is not what we  
23 always refer to. But, and I should note that, as to the  
24 rubber band issue, plaintiffs' counsel pointed to 66551 in  
10:02:11 25 the final rule. But at 66533 is the department's real

1 understanding of why a rubber band is not a machinegun, and  
2 that is, as I just mentioned, that it is not specifically  
3 designed for this purpose. That is why a box of rubber  
4 bands and a closet full of semi-automatic rifles is not an  
10:02:37 5 arsenal of machineguns. There might, in fact -- It might,  
6 in fact, be that confronted with an appropriate case of a  
7 device designed to, you know, specially attach rubber bands  
8 to a semi-automatic that the conclusion might be a little  
9 different, but 66533 emphasizes the specifically designed  
10:03:00 10 nature of bump stock devices.

11 Two final points, if your Honor has no further  
12 questions for me right now. One issue is the one that  
13 plaintiffs' counsel raised about whether this definition  
14 turns semi-automatics or risks turning semi-automatic rifles  
10:03:31 15 into machineguns. And we addressed this in our brief, but I  
16 would like to highlight this again. There would be a couple  
17 of problems with the department taking that position in the  
18 future. One is that Congress has also promulgated a  
19 definition of semi-automatic rifle. And so principles of  
10:03:51 20 statutory interpretation would suggest that Congress did not  
21 intend that to be subsumed within the definition of  
22 machinegun, or it would not have supplied a separate  
23 definition of semi-automatic rifle. We also highlighted in  
24 our brief that, although plaintiffs have not argued this  
10:04:13 25 case from Second Amendment principles, we think it's likely

1 that any challenge to an interpretation that converted, you  
2 know, commonly available self-defense rifles that a  
3 plurality of American households possess into unlawful  
4 machineguns would almost certainly have to be evaluated in  
10:04:40 5 terms of Heller's understanding of the preexisting Second  
6 Amendment right to prevent the banning of such weapons.

7 And the second item I would note, one of your  
8 questions to plaintiffs' counsel presupposed that ATF has  
9 been consistent on single pull since 2006, and I would  
10:05:06 10 hesitate to use the word "consistent," your Honor. I think  
11 that following Ruling 2006-2, as some of the individual  
12 letters that appear in plaintiffs' exhibits illustrate,  
13 there was not sufficient clarity within ATF of how the  
14 definition of machinegun was to be understood to do so  
10:05:30 15 consistently. And so the rationals in those opinions -- in  
16 those opinion letters are not all consistent with each  
17 other. One reason for adopting the final rule, which as I  
18 note is the best interpretation of machinegun, is to ensure  
19 that within the government there is that consistency as well  
10:05:55 20 as a consistency in its presentation to the public.

21 If you have no further questions. Thank you.

22 THE COURT: Thank you.

23 Go ahead, Mr. Olson.

24 Then I'll call on Mr. Glover.

10:06:12 25 MR. OLSON: Thank you, your Honor.

1           There is a lot there to unpack. I'm going to try  
2 to do my best, if you bear with me.

3           One of the things I wanted to hit on right away was  
4 counsel's contention that rubber bands would not be  
10:06:26 5 machineguns because they are not designed and intended to be  
6 used to construct a machinegun. That was the same point  
7 made at oral argument in DC, and Judge Friedrich jumped all  
8 over that. That's because the statute does not just outlaw  
9 things that are designed and intended. The last section of  
10:06:46 10 the statute says, "any combination of parts from which a  
11 machinegun can be assembled." And Judge Friedrich said why  
12 wouldn't it fall under this? And I think it clearly would,  
13 your Honor.

14           Congress used the term "designed and intended"  
10:06:59 15 three other times in that statute and didn't use it in that  
16 last section, and there is a reason for that. And the  
17 Supreme Court has explained, "Where Congress includes  
18 particular language in one section of the statute but omits  
19 it in another, it is generally presumed that Congress acts  
10:07:14 20 intentionally and purposely in the disparate inclusion or  
21 exclusion. That's King vs. United States, 1993.

22           And ATF, for a number of years, has had this --  
23 it's known as constructive intent, I guess is what it's  
24 called. That if you have a certain set of objects in a  
10:07:35 25 setup so that they are -- and I'll read it the way they say

1 it, "Placed in close proximity in such a way that they serve  
2 no useful purpose other than to make a prohibited item, that  
3 that would be a machinegun." So this idea that because a  
4 rubber band wasn't marketed that way or intended, obviously  
10:07:50 5 no one is saying a rubber band in a desk drawer is a  
6 machinegun, but if someone were to construct a device, I  
7 think ATF would have a hard time trying to figure out what  
8 that is, but the final rule obviously says this is fine, we  
9 put our stamp on that.

10:08:12 10 One of the things I want to circle back to is  
11 counsel's contention that a bump stock permits a person to  
12 shoot faster than without one. Obviously, the government  
13 has admitted that bump fire -- the technique of bump firing  
14 can be accomplished with or without a bump stock. In one of  
10:08:31 15 our footnotes in our brief, we have a video of someone bump  
16 firing a rifle with a bump stock and a video of someone bump  
17 firing a rifle without a bump stock. I haven't tested it to  
18 see, but when you just listen to it, the rate of fire is  
19 identical between the two. Obviously Congress didn't create  
10:08:52 20 a rate of fire.

21 One of the other things that Mr. Soskin alluded to  
22 was that there is great similarity between bump stocks and  
23 machineguns, and no one is disputing that someone who goes  
24 to a range and listens to a bump stock and listens to a  
10:09:07 25 machinegun would think that these are similar things. One

1 of the words the government has used in the past is "mimic."  
2 It mimics a machinegun. As we pointed out, just because it  
3 looks like something doesn't mean that it is something, and  
4 that's sort of where they are going there.

10:09:23 5 One of the other points that was raised was  
6 Congress clearly intended that this sort of rapid fire would  
7 be banned when it enacted the NFA. That may be so, that  
8 might be true, but that's a problem, as we pointed out, for  
9 Congress to solve, because bump stocks were designed, we  
10:09:44 10 admit, to get around the statute the way it's written. And  
11 ATF agreed for a decade and a half that they were  
12 successful. There's other things. There is a, they call it  
13 a wrist brace for people who are disabled, that they can  
14 wrap around their wrist and shoot a pistol version of an  
10:10:03 15 AR-15 or an AK-47. It looks an awful lot like a stock, your  
16 Honor. People use it as a stock, and it sort of gets around  
17 the short-barreled rifle, short barreled shotgun  
18 prohibition. ATF has said that these things are perfectly  
19 fine to own. So there are other things that get around  
10:10:20 20 other statutes, and ATF has said you're right, under the  
21 statute the way it's written, Congress didn't cover this  
22 device. And the same thing is true here. This was  
23 specifically designed to not have the characteristics in the  
24 statute that Congress prohibited.

10:10:37 25 The other thing Mr. Soskin raised was that these

1 things are automatic in that they do something to bump fire  
2 that make it flawless and perfectible and that it doesn't  
3 require technique or practice or anything. I actually had  
4 the opportunity a couple days ago to test fire a bump stock,  
10:10:56 5 and started out trying to just bump fire a rifle, and at  
6 first, it was just one round and one round and then two  
7 rounds, and it took a quite a bit of practice, and I think  
8 the most I was able to get was like a four-round string of  
9 shots. That was it. So it certainly requires a lot of  
10:11:14 10 practice and a skill level. There are people who do it very  
11 well. But then we went and moved on to the bump stocks and  
12 we tried to do that. And I wasn't much more successful. I  
13 think we got seven rounds in a string.

14 In Staples, one of the things that the Court talks  
10:11:31 15 about is that a machinegun continues to fire until the  
16 trigger is released, or the ammunition supply is exhausted.  
17 Well, we couldn't exhaust the ammunition supply. We were  
18 trying. I would have liked to fire all 30 rounds with a  
19 single burst of rapid fire, but I was unable to accomplish  
10:11:46 20 that. So this idea that a bump stock takes away the human  
21 input or takes away the need for technique and practice and  
22 all of those things is demonstrably wrong, your Honor.

23 One of the other things counsel raised is that they  
24 admit that the input on a bump stock, the forward pressure,  
10:12:07 25 Mr. Soskin mentioned a person uses his shoulder, uses his



1 hands, uses the bump stock, all of those things in  
2 combination. The argument is that they are still automatic  
3 enough -- and this was one of the things Judge Friedrich  
4 talked about, and did not have good push back from opposing  
10:12:27 5 counsel, from plaintiff's counsel on that, but as we have  
6 argued, this is not a question of degree, this is not how  
7 much input the Court thinks is enough before it becomes --  
8 and still constitute automatically. The statute is very  
9 clear. The statute says automatically by a single function  
10:12:46 10 of the trigger, not automatically by a single function of  
11 the trigger and forward input and rearward pressure and all  
12 of these other things which government counsel has admitted  
13 transpired. It's just automatically by a single function of  
14 the trigger. If you have to do more to a weapon system to  
10:13:05 15 get it to bump fire, that is too much under the statute,  
16 according to Congress.

17 One of the other concepts raised was that there is  
18 a continuous pressure or constant pressure on a bump stock.  
19 And from my experience, that is also not the case, because  
10:13:23 20 there is a razor edge of how much pressure you can apply to  
21 a bump stock pushing it forward to where you will cause it  
22 to stop cycling in bump fire mode. You have to be right on  
23 that, and it's that between each and every shot, and you  
24 absorb recoil and then you have to apply that pressure. And  
10:13:43 25 once you get it wrong once, the weapon stops firing, the

1 trigger will go dead, you will have an ammunition jam,  
2 something like that. So it's not continuous pressure.  
3 That's the idea that they raise, that it's automatic, the  
4 pressure, that it's just once you dial in your wrist to  
10:13:58 5 whatever the appropriate pressure is and push forward,  
6 everything else just works smoothly, and it's not that way  
7 at all. There is really nothing different about a bump  
8 stock and any of the other forms of bump fire other than a  
9 bump stock makes it a little easier. And I finally figured  
10:14:15 10 out why it makes it easier to bump fire with a bump stock  
11 than without, and it's because if you're bump firing with a  
12 belt loop, you actually have to, you hook your thumb through  
13 the trigger guard and through the belt loop, and that belt  
14 loop provides you a fixed position to hold your finger so  
10:14:32 15 that you can then pull the firearm into it. If you fire  
16 from the shoulder with a bump stock, you have to maintain  
17 that trigger finger in three-dimensional space while the gun  
18 is recoiling and the muzzle is rising, and all of these  
19 things are happening to you. It is very difficult to  
10:14:47 20 maintain that fixed point in space to allow bump fire.

21 With a bump stock, though, it provides that trigger  
22 ledge on the stock, it provides that place that you can put  
23 pressure into your shoulder, on the stock, and grip the hand  
24 guard, and this becomes like a very triangular, fixed,  
10:15:07 25 stable position to then pull the rifle -- I'm sorry, push

1 the rifle forward into the trigger. And that is, I think,  
2 the only difference between a bump stock and any other sort  
3 of bump fire is that it provides that platform for the  
4 stability of your trigger finger.

10:15:23

5 Government counsel has admitted that Chevron  
6 deference is inappropriate here, but then argued that  
7 Section 706, arbitrary and capricious deference, which the  
8 Eleventh Circuit has called deference, is appropriate. But  
9 as Judge Friedrich and numerous other courts have explained,  
10 they are exactly the same analysis. And if they don't get  
11 Chevron deference, I don't see how they get the same  
12 deference under Section 706.

10:15:40

13 You had asked government counsel --

10:15:59

14 THE COURT: Is there any Sixth Circuit law on the  
15 equivalence of 706 deference and Chevron deference that  
16 you're aware of?

10:16:14

17 MR. OLSON: Your Honor, I haven't done an  
18 exhaustive search, but I haven't found anything. I mean  
19 Apel and Abramski were 2014. I don't know that there's been  
20 a whole lot that's happened since then on this front. I  
21 certainly haven't found anything.

22 THE COURT: Okay. Thank you.

10:16:26

23 MR. OLSON: The government -- You had asked  
24 government counsel about a single function becoming single  
25 pull in 2006, 2008, and now becoming single pull on

1 analogous motions and all that goes with it. As we pointed  
2 out in our reply brief, this is a word that encompasses all  
3 of the different ways a trigger can be activated, and that  
4 word is function. I think it is so clear that Congress  
10:16:45 5 intended -- Mr. Soskin said that pull is the colloquial  
6 meaning of function, but pull is not in the statute. It  
7 would have been easy for Congress to use the term "pull."  
8 They chose to use the word "function," and why is that? Why  
9 didn't they use the colloquial term that everyone would  
10:17:02 10 understand? I think the question answers itself.

11 Mr. Soskin noted that the Supreme Court in Staples,  
12 I believe it was Justice Thomas in his footnote, used the  
13 term "single pull." I would chalk that up to not having a  
14 good editor and not being careful and just sort of falling  
10:17:19 15 into that trap of speaking colloquially. It wasn't an issue  
16 in the case, it wasn't briefed or argued.

17 THE COURT: I can't assume that, can I?

18 MR. OLSON: Well, it certainly is dicta, your  
19 Honor. It wasn't necessary to the outcome of the case.

10:17:31 20 THE COURT: I'm not at all sure that a district  
21 judge in the Western District of Michigan can engraft that  
22 sort of intention on, or lack of intention on Justice  
23 Thomas.

24 MR. OLSON: Fair enough. I would say that I don't  
10:17:49 25 think it's -- that that is any sort of binding authority

1 that forecloses any of the arguments that are being made  
2 here that single pull and single function are not the same  
3 thing.

4 THE COURT: Is your definition of function  
10:18:01 5 intention at all with the definition of trigger?

6 MR. OLSON: The definition --

7 THE COURT: Trigger is the mechanism used to  
8 initiate a firing sequence, according to the Fleischli case.

9 MR. OLSON: No. I don't think it's intention at  
10:18:15 10 all, because that still has a trigger mechanical centric  
11 focus of how the firearm is operating mechanically. What  
12 the government wants to do is go and look at how the shooter  
13 is interacting with the weapon. Single pull, single push,  
14 pressure, all of these concepts are undefined, and they are  
10:18:34 15 trying to define them now. But it's not in the statute.  
16 Congress didn't discuss them. This was not discussed in  
17 1934, and I guess I'll --

18 THE COURT: The commencement of a firing sequence  
19 could result in multiple shots being fired, correct?

10:18:52 20 MR. OLSON: Multiple shots semi-automatically being  
21 fired in rapid succession.

22 THE COURT: The initiation of the firing sequence,  
23 which is the first function or the tension on the trigger,  
24 right?

10:19:09 25 MR. OLSON: It's not actually tension on the

1 trigger. It's just keeping your finger on that extension  
2 ledge on the bump stock. The trigger is activated by  
3 forward pressure of the firearm by the support hand, not by  
4 any rearward tugging or pulling or drawing or anything like  
10:19:25 5 that, your Honor.

6 THE COURT: So but if you know how to use the  
7 device, you are going to get multiple shots, right?

8 MR. OLSON: You will get multiple semi-automatic  
9 shots quickly, which is -- it's exactly the same as if you  
10:19:39 10 use your belt loop to do it. It's multiple shots quickly.  
11 Each time a shot is being discharged, the trigger is  
12 breaking to the rear and resetting to the front. It's  
13 functioning one time. And that is the same with all sorts  
14 of bump fire and has nothing to do with a bump stock.

10:19:58 15 Counsel, once again talked about automatically and  
16 the bump stock as being -- as there would be a channeling of  
17 recoil energy to the rear and then back to the front. A  
18 bump stock, as we have pointed out, doesn't do that. I  
19 mean, recoil energy, when you fire a round that way, recoil  
10:20:22 20 goes this way. And when you push the firearm back forward,  
21 it's going that way. Bump stock doesn't change any of this.  
22 There actually are firearms which do have mechanisms that  
23 are self-acting, self-regulating harness recoil energy that  
24 will change the direction of recoil. There's a firearm  
10:20:37 25 called the Chris Vector, I think it's a pistol and a rifle,

1 but the recoil starts to the rear, and there is a mechanism  
2 which then transitions the recoil downward so that you have  
3 less felt recoil and less muzzle rise, and that's not what's  
4 happening here. There is nothing in a bump stock that  
10:20:53 5 channels energy in some direction. It's already going  
6 backwards, it's already going forwards, and the bump stock  
7 certainly doesn't change that at all.

8 The government counsel discussed how they have  
9 transitioned from harnessing recoil energy to then saying  
10:21:10 10 well, we admit it doesn't actually harness recoil energy, it  
11 helps the shooter harness recoil energy. Well, that's not  
12 what the regulation says. The regulation says harnesses.  
13 And then they move to this idea of channeling recoil energy,  
14 and Mr. Soskin says that's basically the same thing. I  
10:21:26 15 think it's entirely different than harnessing, your Honor.  
16 The analogy we used is a ditch channels water while it just  
17 guides it in a particular path, while a damn will harness  
18 water, it will store it up, it will have a capacity of  
19 energy then to be used. And that's, when you look at bump  
10:21:44 20 stocks, even if a bump stock channeled energy, that's not  
21 the language they used. That's not the test they've set up.  
22 It has to harness energy. And as they've admitted, there's  
23 nothing in a bump stock that does that. If you take a rifle  
24 with a bump stock on it and tilt the rifle forward, the bump  
10:22:03 25 stock will just slide forward. If you tilt it backwards,

1 the bump stock slides backwards. There's no -- one of the  
2 other concepts they use is there is space created by the  
3 bump stock. But it's not created by the bump stock, your  
4 Honor, it's created by the shooter applying forward pressure  
10:22:17 5 moving that rifle away from his body to then give it a place  
6 to recoil. It's the same as if you have it on belt loop,  
7 there's empty space behind you, or if you're firing from the  
8 shoulder, you have to hold it away from your shoulder so it  
9 can recoil, and a bump stock doesn't create that space. A  
10:22:31 10 bump stock can't be fired with one hand.

11 If you take a machinegun out, a two year old could  
12 pull the trigger, because all you have to do is articulate  
13 the trigger once, hold it to the rear and the gun will  
14 continue to fire, that hammer will continue to go forward  
10:22:47 15 and fire additional rounds. If you try the same thing with  
16 a bump stock and just rested it on a table and pulled the  
17 trigger once, it's going to fire one round. And that's it.  
18 It requires that added human input of variable pressure  
19 between each shot to keep that sequence going. And that, as  
10:23:04 20 we argued, is more than the statute permits.

21 I think that's all I have at the moment, your  
22 Honor.

23 THE COURT: All right. Thank you.

24 Mr. Soskin, do you want to weigh in as a result of  
10:23:23 25 rebuttal argument? Go ahead, sir.



1 MR. SOSKIN: Just one thing, your Honor. And  
2 that's some two year old who can fire a machinegun and keep  
3 control of it.

4 Your Honor, we also --

10:23:36 5 THE COURT: There was a little bit of hyperbole  
6 there, Mr. Soskin, and I recognized it as such.

7 Go ahead.

8 MR. SOSKIN: Your Honor, we also looked for a Sixth  
9 Circuit case to which we could point to on the appropriate  
10:23:52 10 standard here where Chevron deference is lacking, and we  
11 don't have one to cite to you, but we can give you two  
12 out-of-circuit Court of Appeals cases to look at. I can't  
13 recall if they are cited in our brief here or not, so I want  
14 to highlight them for you. One is Sierra Club vs. Army  
10:24:10 15 Corps of Engineers, it's from the Fourth Circuit last year.  
16 The cite on that is 909 F.3d 635. And it runs through  
17 whether Chevron deference is applicable, whether Skidmore  
18 deference is applicable. And then if neither is applicable,  
19 there's also a DC circuit case, In Re: Polar Bear  
10:24:39 20 Endangered Species Listing, and the cite for that is 709  
21 F.3d 1, it's from 2013. And it explains that an agency  
22 interpretation not entitled to Chevron deference gets only  
23 its power to persuade, which of course is the standard  
24 sometimes labeled as Skidmore deference in which I think  
10:24:56 25 academics have tied themselves in knots trying to understand

1 whether the power to persuade involves deference or is just  
2 essentially the natural function of a brief.

3 So with those in mind, if you would like to hear  
4 from Mr. Glover on any of the other issues, I would turn  
10:25:16 5 things over to him.

6 THE COURT: Okay. Go ahead, Mr. Glover. Thank  
7 you.

8 MR. GLOVER: Thank you, your Honor. And I want to  
9 echo Mr. Soskin's sentiment, we are thankful the Court  
10:25:27 10 invited us here, and really appreciate the U.S. Attorney's  
11 Office and their support.

12 I would just like to touch on a couple points, and  
13 one, Mr. Soskin closed with in his initial argument, which  
14 was that ATF may not have been consistent since the Akins  
10:25:42 15 accelerator. But as the Court knows, an agency is allowed  
16 to change positions in what's called often a State Farm or a  
17 swerve case so long as the agency supplies reasoned decision  
18 making. And the Sixth Circuit has recognized, and we cited  
19 this Metropolitan Hospital case in our brief, that the  
10:25:59 20 understanding of a safety issue is one reason an agency  
21 might change position. Here, the final rule provides such  
22 reason to decision making and provides a straight forward  
23 reason that they looked again at the definitions of single  
24 function of the trigger, it automatically and reversed prior  
10:26:16 25 ATF classifications. You know, the rule states that it was,

1 "enacted pursuant" -- My apologies. My apologies. The  
2 rule states that, "It was enacted to provide the best  
3 definition of those terms and to clarify these undefined  
4 terms."

10:26:34

5 Opposing counsel suggested that the rule making  
6 was, I guess, predetermined or had a political directive to  
7 reach this outcome. But again, the final rule states that  
8 it's trying to provide the best definition, it's trying to,  
9 based on additional experience, look at these terms and

10:26:51

10 provide a definition for automatically in forced single  
11 function of the trigger. The President's directive was to  
12 follow the law. He said he was still adhering to the rule  
13 of law. And we cited in our brief FCC vs. Fox in which the  
14 Supreme Court majority rebutted Justice Breyer, who was in

10:27:09

15 dissent, suggesting that for the FCC, an independent  
16 commission, political branches like Congress and the  
17 President shouldn't be influencing their decision making.  
18 And here, you know, you also have comments from members of  
19 Congress, etcetera, suggesting why don't you look at this

10:27:22

20 again, and we don't have an independent agency, we have a  
21 core executive branch agency, the Department of Justice. So  
22 we think there is nothing wrong with considering public  
23 experience and considering, you know, the request of the  
24 President and the request of members of Congress to look at

10:27:37

25 this.

1 I'd next like to, I guess, talk briefly about the  
2 balance of the equities. I know opposing counsel didn't  
3 raise that. So if the Court is happy with the briefing on  
4 that, I don't need to go into great detail. But we have a  
10:27:57 5 footnote in our brief, I believe it's at Page 11 citing the  
6 Great Lakes Brewing case from the Sixth Circuit discussing  
7 the Winter factors. And our position continues to be that  
8 while the Sixth Circuit said that as long as there is a  
9 likelihood of success on the merits, the factors should be  
10:28:13 10 balanced, and they are not tallied. That requires a  
11 significant showing of likelihood of success on the merits,  
12 not just merely the possibility of success on the merits.  
13 And our position continues to be that the Winter factor, you  
14 know, reading Winter, the Court seems to suggest you need a  
10:28:28 15 significant showing on every single one of these factors.

16 As we made clear in our brief, we concede that they  
17 have shown irreparable harm. But as to the last two  
18 factors, the balance of the equities and the public  
19 interest, these merge when the government is a defendant.  
10:28:44 20 And the government has put forward, I guess, three main  
21 rationals for this rule. First, public safety; the second  
22 being the safety of law enforcement; and the third, carrying  
23 out Congress' intent in the National Firearms Act and the  
24 Gun Control Act in banning machineguns and weapons that fire  
10:29:07 25 at a high rate.

1           They have suggested that the balance of the  
2           equities tips in their favor and the public interest tips in  
3           their favor because there's an interest in requiring the  
4           Department of Justice and ATF to adhere to the language of  
10:29:23 5           the statute, but that merely presumes that they are correct  
6           about the underlying merits of the statute, and any APA  
7           challenge or, I guess, any -- let me back up -- any  
8           preliminary injunction alleging an agency has exceeded  
9           statutory authority would have that same argument. I'm not  
10:29:38 10          aware of the Sixth Circuit saying you automatically win on  
11          these factors merely because you've alleged that the  
12          government has exceeded their statutory authority.

13           I'm happy to address the factors otherwise, but we  
14          would also be happy to rest on our brief. I appreciate the  
10:29:52 15          Court has been very generous with your time.

16           THE COURT: Well, let me hear from Mr. Olson on the  
17          subject, and I may call on you again.

18           Go ahead, Mr. Olson.

19           MR. OLSON: Your Honor, one of the interesting  
10:30:08 20          things here is that the government says they, we presume we  
21          are correct that the statute needs to be interpreted the way  
22          Congress wrote it. But their counter argument is that, as  
23          counsel just stated it, to carry out Congress' intent. And  
24          that has time and again been what ATF claims it's trying to  
10:30:30 25          do in this case is carry out Congressional intent rather

1 than the law. They are trying to expand the statute to  
2 cover devices that were never covered by Congress because  
3 they think that's what Congress would have wanted them to  
4 do. That is not a legitimate government interest here.

10:30:48 5 As for public safety, law enforcement safety, we  
6 have pointed out we have discovery issues pending with the  
7 government about looking at the Las Vegas firearms and their  
8 reports on that. The FBI has never released any detailed  
9 report about the firearms which ones were used, which ones  
10:31:09 10 weren't used, whether some of them were actual machineguns,  
11 had machinegun parts, had auto sears, binary triggers, all  
12 of these things that can make a firearm function rapidly.  
13 ATF, once or twice in their briefing, has suggested that  
14 these rifles with bump stocks were used in the Las Vegas  
10:31:28 15 shooting. We can't find any government source to confirm  
16 that. Judge Friedrich even in her opinion was very careful  
17 to say ATF claims they were used, but we have had three or  
18 four informal confirmations that ATF never has got to  
19 examine these firearms. They have never done a ballistics  
10:31:47 20 test to see which ones were fired, which ones match up with  
21 bullets that were recovered, whether any had been cleaned,  
22 were unfired, whether the bump stocks were in fixed  
23 positions so they would only function semi-automatically.  
24 And the only thing ATF has ever done that we can tell with  
10:32:05 25 these rifles is they had one agent who was allowed in the

1 room when the FBI was there doing their initial examination,  
2 and they said you can't touch them, you can't break them  
3 apart, you can't look at them, you can take a picture of  
4 them, and that's it. So they took a picture, and they have  
10:32:20 5 -- they actually came up with a report. I think they felt  
6 they were obligated, but the report doesn't say anything.  
7 It says -- it uses the term "appears to be" like 15 times.  
8 It says, "this appears to be an AR-15 with what appears to  
9 be bump stock on it." Nothing else, because they have never  
10:32:37 10 examined these things, yet they claim that they're  
11 protecting public safety, and there is zero evidence -- I'm  
12 not saying it's not true, I'm just saying it is an unproven  
13 assertion that these things were used in Las Vegas and that  
14 there's any public safety risk. There's never been any  
10:32:52 15 allegation that bump stocks have ever been used in any crime  
16 anywhere in the country. There is actually two pending FOIA  
17 requests in DC from plaintiffs' counsel in some of the other  
18 bump stock cases seeking that information, and ATF has not  
19 turned over anything, and neither has the FBI to indicate  
10:33:12 20 that there's ever been a crime committed with one of these.

21 And as we pointed out, a rubber band is actually  
22 far more effective at bump firing at -- in rapid trigger  
23 manipulation than a bump stock is. And there's, you know,  
24 you can fire from the hip, you can fire a whole host of  
10:33:27 25 other ways. You can get a binary trigger, or if you're

1 Stephen Paddock, you can buy a legal machinegun. The guy  
2 was reportedly a millionaire and had nothing on his record,  
3 so there's nothing that would have stopped him from doing  
4 what he did if these things had been banned, and there is no  
10:33:43 5 evidence that they have ever been a threat to anyone in any  
6 other context. So I think the public safety, law  
7 enforcement safety rationale there, your Honor, is very  
8 thin.

9 On the other hand, you have a half million  
10:33:58 10 Americans who own these things, have relied on ATF, have  
11 spent their hard earned money to acquire these things, and  
12 as is unfortunately far too common with ATF, they later come  
13 in and say oops, we were just kidding. Now everybody get  
14 rid of them. And I think that certainly weighs in the  
10:34:18 15 balance of the equities in plaintiffs' favor to at least  
16 stop this thing until a decision on the merits can be  
17 reached.

18 Thank you. That's all I have.

19 THE COURT: Thank you.

10:34:28 20 Mr. Glover, go ahead.

21 MR. GLOVER: Just briefly.

22 As to my friend on the other side's discussion of  
23 the Las Vegas shooting, the issue is whether ATF, which  
24 stated in the rule, they were looking at public safety and  
10:34:42 25 concerned about public safety is furthering the public



1 safety, and so there may not have been a number of violent  
2 acts committed with bump stocks, but ATF, in its expertise,  
3 thinks that these are dangerous. One of the things they do,  
4 as Mr. Soskin explained in his opening, is allow an average  
10:34:58 5 person to shoot at a high rate of speed.

6 Now opposing counsel, I think, has experience with  
7 these, and provided some context on that, but that sort of  
8 ability to shoot a high rate of speed allows you to put down  
9 suppressive fire, if you were faced with law enforcement,  
10:35:11 10 and so again, ATF is focused on public safety. They are  
11 focused on protecting law enforcement personnel.

12 Opposing counsel also, I think, pointed out or  
13 complained that the rubber band would be more effective, or  
14 you might be able to buy a legal machinegun, but just  
10:35:28 15 because there are other ways to, you know, assert public  
16 safety or other ways to prevent this sort of rapid fire  
17 doesn't mean that the final rule isn't focused on it and  
18 trying to promote public safety.

19 I'd just like to close by -- or unless the Court  
10:35:43 20 has further questions -- clarifying a point that Mr. Soskin  
21 or an exchange that you had with Mr. Soskin related to  
22 Chevron.

23 My apologies, my notes are all a mess.

24 THE COURT: That's all right. Take your time.

10:35:58 25 MR. GLOVER: You asked Mr. Soskin if we were

1 relying on Chevron here, and he agreed that we were not  
2 relying on Chevron. And I think your phrasing was that the  
3 department seemed to be counting votes on Chevron. I just  
4 wanted to clarify that the solicitor general has to set the  
10:36:14 5 department's policy as to Chevron, and I believe there is a  
6 pending Supreme Court case related to our deference, which  
7 is not directly Chevron, but it may be a species a little  
8 even more differential, I believe it's called Wilke vs.  
9 Department of Veterans Affairs, so the solicitor general's  
10:36:29 10 brief there would be the best place to look for the  
11 department's current thinking on Chevron.

12 THE COURT: Justice Gorsuch's opinion in the  
13 railroad case was, you know, kind of broke new ground, I  
14 think.

10:36:42 15 MR. GLOVER: Absolutely understandable. I didn't  
16 want Mr. Soskin or I to be quoted outside of the court as if  
17 we had changed the department's position or purported to put  
18 it forth.

19 THE COURT: I understand the solicitor general  
10:36:54 20 makes those calls.

21 MR. GLOVER: Thank you, your Honor.

22 THE COURT: Thank you.

23 Mr. Olson, anything further?

24 MR. OLSON: Nothing further, your Honor.

10:37:00 25 THE COURT: All right. Thank you.

1 Well, thank you for your presentations here today,  
2 and I'll get an opinion out as quick as I can. I know we  
3 are up against a late March date, so we will do the best we  
4 can to get it out.

10:37:16

5 Thank you.

6 COURT CLERK: All rise, please.

7 Court is in recess.

8 (At 10:37 a.m. proceedings concluded.)

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C E R T I F I C A T E

I, Kathleen S. Thomas, Official Court Reporter for the United States District Court for the Western District of Michigan, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a true and correct transcript of proceedings had in the within-entitled and numbered cause on the date hereinbefore set forth; and I do further certify that the foregoing transcript has been prepared by me or under my direction.

/s/

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