No.

# In the Supreme Court of the United States

MERRICK B. GARLAND, ATTORNEY GENERAL, ET AL., PETITIONERS

*v.*

SCOTT A. HARDIN

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## PETITION FOR A WRIT OF CERTIORARI


ELIZABETH B. PRELOGAR
*Solicitor General*
*Counsel of Record*
BRIAN M. BOYNTON
*Principal Deputy Assistant Attorney General*
BRIAN H. FLETCHER
*Deputy Solicitor General*
MATTHEW GUARNIERI
*Assistant to the Solicitor General*
MARK B. STERN
MICHAEL S. RAAB
ABBY C. WRIGHT
BRAD HINSHELWOOD
*Attorneys*

*Department of Justice*
*Washington, D.C. 20530-0001*
*SupremeCtBriefs@usdoj.gov*
*(202) 514-2217*

## QUESTION PRESENTED

Since 1986, Congress has prohibited the transfer or possession of any new "machinegun." 18 U.S.C. 922(*o*)(1). The National Firearms Act, 26 U.S.C. 5801 *et seq.*, defines a "machinegun" as "any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger." 26 U.S.C. 5845(b). The statutory definition also encompasses "any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun." *Ibid.*

A "bump stock" is a device designed and intended to permit users to convert a semiautomatic rifle so that the rifle can be fired continuously with a single pull of the trigger, discharging potentially hundreds of bullets per minute. In 2018, after a mass shooting in Las Vegas carried out using bump stocks, the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) published an interpretive rule concluding that bump stocks are machineguns as defined in Section 5845(b). In the decision below, the Sixth Circuit held that the ATF rule was unlawful because the statutory definition of "machinegun" does not encompass bump stocks. The question presented is as follows:

Whether a bump stock device is a "machinegun" as defined in 26 U.S.C. 5845(b) because it is designed and intended for use in converting a rifle into a machinegun, *i.e.*, into a weapon that fires "automatically more than one shot * * * by a single function of the trigger."

## PARTIES TO THE PROCEEDING

Petitioners (defendants-appellees below) are Merrick B. Garland in his official capacity as Attorney General; Steven Dettelbach, in his official capacity as the Director of the Bureau of Alcohol, Tobacco, Firearms and Explosives; the Bureau of Alcohol, Tobacco, Firearms and Explosives; and the United States. Petitioners Garland and Dettelbach were substituted for their predecessors in office during the proceedings below.

Respondent (plaintiff-appellant below) is Scott A. Hardin.

## RELATED PROCEEDINGS

United States District Court (W.D. Ky.):

*Hardin* v. *ATF*, No. 19-cv-56 (Nov. 30, 2020)

United States Court of Appeals (6th Cir.):

*Hardin* v. *ATF*, No. 20-6380 (Apr. 25, 2023)

## TABLE OF CONTENTS



## TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page



Statutes:



Miscellaneous:

Miscellaneous—Continued: Page

# In the Supreme Court of the United States

No.

MERRICK B. GARLAND, ATTORNEY GENERAL, ET AL., PETITIONERS

*v.*

SCOTT A. HARDIN

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Attorney General et al., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

### OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-18a) is reported at 65 F.4th 895. The opinion of the district court (App., *infra*, 19a-38a) is reported at 501 F. Supp. 3d 445.

### JURISDICTION

The judgment of the court of appeals was entered on April 25, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTORY AND REGULATORY PROVISIONS INVOLVED

The National Firearms Act, 26 U.S.C. 5801 *et seq.*, provides in relevant part:

> The term "machinegun" means any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also include the frame or receiver of any such weapon, any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun, and any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person.

26 U.S.C. 5845(b).

Other pertinent statutory and regulatory provisions are reproduced in the appendix to this petition. App., *infra*, 39a-42a.

## STATEMENT

### A. Legal Background

The National Firearms Act, 26 U.S.C. 5801 *et seq.*, defines a "machinegun" as "any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger." 26 U.S.C. 5845(b). Since 1968, the definition has also encompassed parts that can be used to convert a weapon into a machinegun. See Gun Control Act of 1968, Pub. L. No. 90-618, Tit. II, sec. 201, § 5845(b), 82 Stat. 1231. A "machinegun" thus includes "the frame or receiver of any such weapon, any part designed and intended solely and

exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun, and any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person." 26 U.S.C. 5845(b).

Congress first regulated the sale and possession of machineguns in the National Firearms Act of 1934, ch. 757, 48 Stat. 1236. In 1986, Congress amended Title 18 of the U.S. Code to prohibit the sale and possession of new machineguns, making it a crime "to transfer or possess a machinegun" unless a governmental entity is involved in the transfer or possession. Firearms Owners' Protection Act (FOPA), Pub. L. No. 99-308, § 102(9), 100 Stat. 452-453 (18 U.S.C. 922(*o*)). In enacting that criminal prohibition, Congress incorporated the definition of "machinegun" from the National Firearms Act. FOPA § 101(6), 100 Stat. 450 (18 U.S.C. 921(a)(23)). The 1986 amendments responded in part to evidence before Congress of "the need for more effective protection of law enforcement officers from the proliferation of machine guns." H.R. Rep. No. 495, 99th Cong., 2d Sess. 7 (1986).

The Department of Justice regularly issues guidance concerning whether specific weapons or devices constitute machineguns. In particular, the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) encourages manufacturers to submit novel weapons or devices to the agency, on a voluntary basis, for ATF to assess whether the weapon or device should be classified as a machinegun or other registered firearm under the National Firearms Act. See ATF, U.S. Dep't of Justice, *National Firearms Act Handbook* 41 (rev. Apr. 2009) (*NFA Handbook*). The classification process enables ATF to provide manufacturers with "the agency's offi-

cial position concerning the status of the firearms under Federal firearms laws" and thus to assist manufacturers in "avoid[ing] an unintended classification and violations of the law" before a manufacturer "go[es] to the trouble and expense of producing" the weapon or device. *Ibid.*; cf. 26 U.S.C. 5841(c) (requiring manufacturers to "obtain authorization" before making a covered firearm and to register "the manufacture of a firearm"). ATF has made clear, however, that "classifications are subject to change if later determined to be erroneous or impacted by subsequent changes in the law or regulations." *NFA Handbook* 41.

**B. Bump Stock Devices**

1. In 2004, a federal ban on certain semiautomatic "assault weapons" expired.[1] Since that time, ATF has received a growing number of classification requests from inventors and manufacturers seeking to produce "devices that permit shooters to use semiautomatic rifles to replicate automatic fire," but "without converting these rifles into 'machineguns.'" 83 Fed. Reg. 66,514, 66,515-66,516 (Dec. 26, 2018). Whether such devices fall within the statutory definition of a "machinegun" turns on whether they allow a shooter to fire "automatically more than one shot * * * by a single function of the trigger." 26 U.S.C. 5845(b).

One such type of device is generally referred to as a "bump stock." ATF first encountered bump stocks in 2002, when it received a classification request for the "Akins Accelerator." 83 Fed. Reg. at 66,517. The Akins

---

[1] 18 U.S.C. 921(a)(30), 922(v) (2000). Those provisions had been enacted in 1994 with a ten-year sunset provision. See Public Safety and Recreational Firearms Use Protection Act, Pub. L. No. 103-322, Tit. XI, Subtit. A, §§ 110102, 110105, 108 Stat. 1996-1998, 2000.

Accelerator, which attached to a standard semiautomatic rifle, used a spring to harness the recoil energy of each shot, causing "the firearm to cycle back and forth, impacting the trigger finger" repeatedly after the first pull of the trigger. *Ibid.* Thus, by pulling the trigger once, the shooter "initiated an automatic firing sequence" that was advertised as firing "approximately 650 rounds per minute." *Ibid.*

ATF initially declined to classify the Akins Accelerator as a machinegun because the agency "interpreted the statutory term 'single function of the trigger' to refer to a single movement of the trigger." 83 Fed. Reg. at 66,517. In 2006, however, ATF revisited that determination and concluded that "the best interpretation of the phrase 'single function of the trigger' includes a 'single pull of the trigger.'" *Ibid.* The agency explained that the Akins Accelerator created "a weapon that 'with a single pull of the trigger initiates an automatic firing cycle that continues until the finger is released, the weapon malfunctions, or the ammunition supply is exhausted.'" *Ibid.* (brackets and citation omitted). Accordingly, ATF reclassified the device as a machinegun under the statute. See *ibid.*

When the inventor of the Akins Accelerator challenged ATF's classification, the Eleventh Circuit upheld the determination. The court explained that interpreting the phrase "'single function of the trigger'" in Section 5845(b) to mean "'single pull of the trigger' is consonant with the statute and its legislative history," and that "[t]he plain language of the statute defines a machinegun as any part or device that allows a gunman to pull the trigger once and thereby discharge the firearm repeatedly." *Akins* v. *United States*, 312 Fed.

Appx. 197, 200-201 (11th Cir.) (per curiam), cert. denied, 557 U.S. 942 (2009).

In 2006, in anticipation of similar future classification requests, ATF issued a public ruling announcing its interpretation of "single function of the trigger." ATF Ruling 2006-2, at 1 (Dec. 13, 2006). ATF explained that, after reviewing the text of the National Firearms Act and its legislative history, the agency had concluded that the phrase "single function of the trigger" includes a "single pull of the trigger." *Id.* at 2. When ATF reclassified the Akins Accelerator, however, it also advised owners of the device that "removal and disposal of the internal spring * * * would render the device a non-machinegun under the statutory definition," 83 Fed. Reg. at 66,517, on the theory that, without the spring, the device would no longer operate "automatically."

ATF soon received classification requests for bump stock devices that did not include internal springs. Those bump stocks replace the standard stock on an ordinary semiautomatic firearm. Unlike a regular stock, a bump stock channels the recoil from the first shot into a defined path, allowing the weapon contained within the stock to slide back a short distance—approximately an inch and a half—and shifting the trigger away from the shooter's trigger finger. 83 Fed. Reg. at 66,532. This separation allows the firing mechanism to reset. *Ibid.* When the shooter maintains constant forward pressure on the weapon's barrel-shroud or fore-grip, the weapon slides back along the bump stock, causing the trigger to "bump" the shooter's stationary finger and fire another bullet. *Ibid.* In a series of classification letters between 2008 and 2017, ATF concluded that such devices did not enable a gun to fire "'automatically'" and were therefore not "machineguns." *Id.* at 66,517.

2. In 2017, a shooter used semiautomatic weapons equipped with bump stock devices to murder 58 people and wound 500 more in Las Vegas. 83 Fed. Reg. at 66,516. The bump stock devices allowed the shooter to rapidly fire "several hundred rounds of ammunition" into a large crowd attending an outdoor concert. *Ibid.* The Las Vegas mass shooting led ATF to review its prior classifications of bump stock devices. *Ibid.* In December 2017, ATF published an advance notice of proposed rulemaking, seeking public comment on "the scope and nature of the market for bump stock type devices." 82 Fed. Reg. 60,929, 60,930 (Dec. 26, 2017).

On March 29, 2018, ATF published a notice of proposed rulemaking regarding amendments to the definition of "machinegun" in three ATF regulations. See 83 Fed. Reg. 13,442, 13,457 (Mar. 29, 2018). The notice stated that ATF's post-2006 classification letters addressing bump stocks without internal springs did "not reflect the best interpretation of the term 'machinegun.'" *Id.* at 13,443. The notice further stated that ATF had "applied different understandings of the term 'automatically'" over time in reviewing bump stocks and that the agency had "authority to 'reconsider and rectify' potential classification errors." *Id.* at 13,445-13,446 (quoting *Akins*, 312 Fed. Appx. at 200). The notice proposed to "clarify that all bump-stock-type devices are 'machineguns'" under the statutory definition. *Id.* at 13,443. The notice elicited more than 186,000 comments. See 83 Fed. Reg. at 66,519.

ATF published a final rule on December 26, 2018. 83 Fed. Reg. at 66,514. The final rule amended ATF's regulations to address the terms "single function of the trigger" and "automatically" as used in the definition of "machinegun" in order to clarify that bump stock de-

vices are machineguns under Section 5845(b). *Id.* at 66,553-66,554. In the preamble to the rule, the agency stated that it continued to adhere to its previous understanding that the phrase "'single function of the trigger'" includes a "'single pull of the trigger,'" while clarifying that the phrase also includes motions "analogous" to a single pull. *Id.* at 66,515. ATF also determined that, under the "best interpretation of the statute," *id.* at 65,521, the term "automatically" includes functioning "as the result of a self-acting or self-regulating mechanism that allows the firing of multiple rounds through a single pull of the trigger," *id.* at 66,519.

ATF further explained that, notwithstanding its prior classification letters, the agency had concluded that bump stocks "are machineguns" as defined by Congress in Section 5845(b). 83 Fed. Reg. at 66,515. Bump stocks enable a shooter to engage in a continuous firing sequence that occurs "automatically." *Id.* at 66,531. As the shooter's trigger finger remains stationary on the ledge provided by the design of the device and the shooter applies constant forward pressure with the non-trigger hand on the barrel or fore-grip of the weapon, the firearm's recoil energy is directed into a continuous back-and-forth cycle without "the need for the shooter to manually capture, harness, or otherwise utilize this energy to fire additional rounds." *Id.* at 66,532. A bump stock thus constitutes a "self-regulating" or "self-acting" mechanism that allows the shooter to attain continuous firing after a single pull of the trigger and, accordingly, is a machinegun. *Ibid.*; see *id.* at 66,514, 66,518.

ATF rescinded its prior letters concluding that certain bump stocks were not machineguns. See 83 Fed. Reg. at 66,530-66,531. The agency also provided instructions for "[c]urrent possessors" of bump stocks "to

undertake destruction of the devices" or to "abandon [them] at the nearest ATF office" to avoid liability under the statute. *Id.* at 66,530.

**C. The Present Controversy**

1. Respondent purchased three bump stocks in April 2018, during the rulemaking process described above. Am. Compl. ¶ 6. After ATF issued its final interpretive rule, respondent brought this action in the Western District of Kentucky to challenge the rule on various grounds, including on the theory that ATF lacked authority to "expand" the statutory definition of "'machineguns'" to encompass bump stocks. *Id.* ¶ 74.

The district court entered judgment for the government on the administrative record. App., *infra*, 19a-38a. As relevant here, the court rejected respondent's challenge to ATF's "statutory authority." *Id.* at 23a. Following the approach of a then-recent decision by the D.C. Circuit, the district court held that the relevant statutory text—*i.e.*, "single function of the trigger" and "automatically," 26 U.S.C. 5845(b)—is ambiguous as applied to bump stock devices, and that the interpretation ATF had adopted in the final rule was entitled to deference under the *Chevron* framework (which the government had not itself invoked in the litigation). See App., *infra*, 23a-26a (discussing *Guedes* v. *ATF*, 920 F.3d 1, 17-19 (D.C. Cir. 2019) (*Guedes I*) (per curiam), cert. denied, 140 S. Ct. 789 (2020)); see also *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837, 842-845 (1984). The court also rejected respondent's argument that the final rule rested on an arbitrary or capricious understanding of how bump stocks work or how the devices differ from manual bump-firing techniques. App., *infra*, 26a-29a. The court observed that to "bump fir[e]" a semiautomatic rifle "without a bump-stock device," a skilled

shooter "must pull and release the trigger for each shot, whereas bump-stock devices only require the shooter to pull the trigger to fire the first round, after which the shooter need only maintain pressure to fire subsequent rounds." *Id.* at 26a-27a.

2. Respondent appealed. During the appeal, a divided panel of the court of appeals held in a separate case, *Gun Owners of Am., Inc.* v. *Garland*, 992 F.3d 446 (6th Cir. 2021), that "a bump stock does not fall within the statutory definition of a machine gun," *id.* at 469. After the court of appeals voted to rehear *Gun Owners* en banc, it ordered that respondent's appeal be held in abeyance pending the en banc proceedings. See 6/25/21 C.A. Order. The en banc court ultimately divided evenly, which had the effect of affirming a district court's judgment declining to enjoin the final rule. See *Gun Owners of Am., Inc.* v. *Garland*, 19 F.4th 890, 896 (6th Cir. 2021), cert. denied, 143 S. Ct. 83 (2022).

After the en banc decision in *Gun Owners*, the court of appeals lifted the abeyance in this case, heard argument, and reversed and remanded. App., *infra*, 1a-18a. The court observed that the question "[w]hether a bump stock is a machinegun" has divided the courts of appeals, with the D.C. and Tenth Circuits "saying that a bump stock is included within the definition of a machinegun," the Fifth Circuit taking "[t]he opposite view," and the Sixth Circuit itself having "split down the middle." *Id.* at 3a-4a (citing *Cargill* v. *Garland*, 57 F.4th 447 (5th Cir. 2023) (en banc), petition for cert. pending, No. 22-976 (filed Apr. 6, 2023); *Aposhian* v. *Barr*, 958 F.3d 969 (10th Cir.), vacated on reh'g, 973 F.3d 1151 (10th Cir. 2020), reinstated, 989 F.3d 890 (10th Cir. 2021), cert. denied, 143 S. Ct. 84 (2022); and *Guedes I*, *supra* (D.C. Cir.)). By the court's count, the question

has occasioned a "total of 22 opinions * * * which fully explore all aspects of the issue in nearly 350 pages of text." *Id.* at 4a.

In lieu of "repeating the intricacies" of the many opinions already addressing the same issues, the court of appeals wrote briefly to state that it had concluded that the "definition of a machinegun is ambiguous as applied to a bump stock," App., *infra*, 4a-5a (emphasis omitted); that the "particular statutory scheme" at issue here "is not an appropriate one" in which to apply the *Chevron* framework, *id.* at 9a; and that the rule of lenity requires the court to "rule in [respondent's] favor," *id.* at 10a (emphasis omitted). The court thus aligned itself with the en banc Fifth Circuit, which had likewise concluded in *Cargill* that lenity requires construing the definition of "machinegun" not to encompass bump stocks. See *id.* at 11a-12a.

Judge Bush concurred in the judgment. App., *infra*, 13a-18a. He would have held that the statutory definition "clearly" excludes bump stocks. *Id.* at 14a.

3. On remand to the district court, the parties filed a joint motion to stay any further proceedings pending this Court's disposition of the government's pending petition for a writ of certiorari in *Cargill*. D. Ct. Doc. 43, at 2 (June 14, 2023). The court granted the requested stay. 6/22/23 D. Ct. Order 1-2.

## ARGUMENT

The Sixth Circuit invoked the rule of lenity to hold that the National Firearms Act's definition of a "machinegun," 26 U.S.C. 5845(b), does not encompass bump stock devices. App., *infra*, 10a-12a. The Sixth Circuit acknowledged that the question whether bump stocks are machineguns has divided the courts of appeal, and the court explicitly aligned itself with the Fifth Circuit,

which had previously held that bump stocks are not machineguns in a divided en banc decision. See *id.* at 3a-4a; *Cargill* v. *Garland*, 57 F.4th 447, 450 n.* (5th Cir. 2023) (en banc), petition for cert. pending, No. 22-976 (filed Apr. 6, 2023).[2]

For reasons explained in the government's petition for a writ of certiorari in *Cargill*, the decision below is incorrect. See Pet. at 15-26, *Garland* v. *Cargill*, No. 22-976 (Apr. 6, 2023) (*Cargill* Pet.). A rifle modified with a bump stock is a "machinegun" as Congress defined that term because the bump stock creates a weapon that fires "automatically more than one shot * * * by a single function of the trigger." 26 U.S.C. 5845(b). Indeed, a semiautomatic rifle modified with a bump stock is capable of firing hundreds of bullets per minute with a single pull of the trigger. After the shooter pulls the trigger a single time, the device is designed to channel the recoil energy of each shot into a back-and-forth cycle that causes the trigger to bump repeatedly against the shooter's stationary finger, continuously firing until all the ammunition is exhausted. See *Cargill* Pet. at 16-17; 83 Fed. Reg. at 66,516, 66,553-66,554. The Fifth and Sixth Circuits' decisions concluding that bump stocks are not machineguns are at odds with the statutory text, conflict with the results reached by other courts of appeals, and threaten to create a dangerous loophole in

[2] In describing the circuit conflict, the Sixth Circuit cited the D.C. Circuit's decision in *Guedes I*, affirming the denial of a preliminary injunction. See App., *infra*, 4a. On review of a final judgment in the same case, the D.C. Circuit held in *Guedes* v. *ATF*, 45 F.4th 306 (2022) (*Guedes II*), that ATF's final rule reflects "the best interpretation of 'machine gun' under the governing statutes," *id.* at 310. On June 14, 2023, the *Guedes* plaintiffs filed a petition for a writ of certiorari that seeks review of substantially the same question at issue here and in *Cargill*. See Pet. at i, *Guedes* v. *ATF*, No. 22-1222.

the federal prohibition on machineguns. See *Cargill* Pet. at 29-30.

As between the two cases, *Cargill* is the better vehicle in which to address the question presented. In *Cargill*, the district court, the merits panel, and the en banc court all issued comprehensive opinions giving their respective views in full. See *Cargill* Pet. App. at 1a-71a, 72a-91a, 92a-153a. Here, by contrast, the Sixth Circuit declined to "repeat[] the intricacies" of the dispute in light of the many pages of prior judicial writings, including in *Cargill*, already addressing "all aspects of the issue." App., *infra*, 4a-5a. In addition, *Cargill* arises from a bench trial at which the district court heard expert testimony about the design and operation of bump stock devices, whereas the district court here entered judgment in the government's favor on the basis of the administrative record. See *Cargill* Pet. at 9; cf. p. 9, *supra*. Although the question presented is a matter of statutory interpretation, the post-trial findings of fact in *Cargill* may be useful to the Court in understanding how bump stocks work. Accordingly, the Court should grant the petition for a writ of certiorari in *Cargill*, hold the petition in this case pending its disposition of *Cargill*, and then dispose of this petition as appropriate.

## CONCLUSION

The petition for a writ of certiorari should be held pending the Court's disposition of the petition for a writ of certiorari in *Garland* v. *Cargill*, No. 22-976 (Apr. 6, 2023), and then be disposed of as appropriate.

Respectfully submitted.

ELIZABETH B. PRELOGAR
*Solicitor General*
BRIAN M. BOYNTON
*Principal Deputy Assistant Attorney General*
BRIAN H. FLETCHER
*Deputy Solicitor General*
MATTHEW GUARNIERI
*Assistant to the Solicitor General*
MARK B. STERN
MICHAEL S. RAAB
ABBY C. WRIGHT
BRAD HINSHELWOOD
*Attorneys*

JULY 2023

# APPENDIX

## TABLE OF CONTENTS

**APPENDIX A**

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

---

No. 20-6380

SCOTT A. HARDIN, PLAINTIFF-APPELLANT

*v.*

BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, AN AGENCY OF THE DEPARTMENT OF JUSTICE; STEVEN M. DETTELBACH, DIRECTOR BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES; UNITED STATES OF AMERICA; MERRICK B. GARLAND, ATTORNEY GENERAL, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE UNITED STATES, DEFENDANTS-APPELLEES

---

Argued: Jan. 19, 2023
Decided and Filed: Apr. 25, 2023

---

Appeal from the United States District Court
for the Western District of Kentucky at Louisville.
No. 3:19-cv-00056—David J. Hale, District Judge

---

**OPINION**

---

Before: GILMAN, MCKEAGUE, and BUSH, Circuit Judges.

RONALD LEE GILMAN, Circuit Judge. The placement of a bump stock on a semiautomatic rifle causes the rifle to function essentially like a machinegun by dramatically increasing the rate of fire. And the possession of

a machinegun is a criminal offense under the Gun Control Act of 1968. This raises the question of whether a bump stock is a machinegun "part" as defined by the National Firearms Act of 1934. The question is a close one on which reasonable jurists have disagreed, a disagreement caused by ambiguities in how the applicable statute defines the term "machinegun."

An Act of Congress could clear up the ambiguities, but so far Congress has failed to act. The Bureau of Alcohol, Tobacco, Firearms and Explosives (the ATF) has been on both sides of this issue, with its current regulation (the Rule) banning bump stocks as a machinegun part. In this situation, the rule of lenity that is applicable to criminal offenses requires us to rule in favor of Hardin. We therefore **REVERSE** the judgment of the district court and **REMAND** for further proceedings consistent with this opinion.

## I. BACKGROUND

The Gun Control Act provides that "it shall be unlawful for any person to transfer or possess a machinegun." 18 U.S.C. § 922(o)(1). It incorporates by reference (*see id.* § 921(a)(24)) the definition of a machinegun as set forth in the National Firearms Act, which reads as follows:

> The term "machinegun" means any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also include the frame or receiver of any such weapon, any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon

> into a machinegun, and any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person.

26 U.S.C. § 5845(b).

For over a decade, the ATF, to which Congress has delegated the authority to administer the National Firearms Act and the Gun Control Act, maintained that a bump stock is not a machinegun part. But in 2018, after a gunman in Las Vegas, Nevada used bump stocks attached to semiautomatic rifles to kill 58 people and injure roughly 500 more in the span of approximately 10 minutes, the ATF reversed its position by promulgating the Rule. The Rule gave possessors of bump stocks 90 days from its effective date during which to destroy or abandon their bump stocks, after which they would be in violation of the Gun Control Act's prohibition on machineguns and their parts. *See* Bump-Stock-Type Devices, 83 Fed. Reg. 66,514 (Dec. 26, 2018).

The appellant in this case, Scott Hardin, owned several bump stocks. Following the ATF's promulgation of the Rule, Hardin brought an action in the Western District of Kentucky, challenging the Rule as exceeding the ATF's statutory authority. The district court granted the ATF's motion for judgment on the administrative record. Hardin now appeals.

## II. ANALYSIS

Whether a bump stock is a machinegun part depends on how one interprets the definition of a machinegun as set forth in the National Firearms Act. In particular, the dispute focuses on the words "automatically" and "a single function of the trigger." Those courts of appeals that have faced the issue are divided on the answer, and

the Supreme Court has not weighed in. On one side, saying that a bump stock is included within the definition of a machinegun, are the Tenth Circuit and the D.C. Circuit. *See Aposhian v. Barr*, 958 F.3d 969 (10th Cir. 2020), *aff'g* 374 F. Supp. 3d 1145 (D. Utah 2019), *en banc reh'g order vacated as improvidently granted*, 989 F.3d 890 (10th Cir. 2021) (en banc), *cert. denied*, 143 S. Ct. 84 (2022); *Guedes v. Bureau of Alcohol, Tobacco, Firearms and Explosives*, 920 F.3d 1 (D.C. Cir. 2019) (per curiam), *aff'g* 356 F. Supp. 3d 109 (D.D.C. 2019), *cert. denied*, 140 S. Ct. 789 (2020). The opposite view is taken by the Fifth Circuit. *See Cargill v. Garland*, 57 F.4th 447 (5th Cir. 2023) (en banc), *rev'g* 20 F.4th 1004 (5th Cir. 2021), *and Cargill v. Barr*, 502 F. Supp. 3d 1163 (W.D. Tex. 2020), *petition for cert. filed* (Apr. 7, 2023). And our own circuit is split down the middle, with eight judges voting to uphold the Rule and eight judges voting to strike it down. *See Gun Owners of Am., Inc. v. Garland*, 19 F.4th 890 (6th Cir. 2021) (en banc), *vacating by an equally divided court* 992 F.3d 446 (6th Cir. 2021), *and aff'g by an equally divided court Gun Owners of Am., Inc. v. Barr*, 363 F. Supp. 3d 823 (W.D. Mich. 2019), *cert. denied*, 143 S. Ct. 83 (2022).

A total of 22 opinions are set forth in the above-cited cases, which fully explore all aspects of the issue in nearly 350 pages of text. We therefore have the benefit of being able to draw our own conclusions from these erudite opinions without having to repeat them verbatim.

**A. The weight of authority concludes that the definition of a machinegun is ambiguous as applied to a bump stock**

Hardin argues that the statutory definition of a machinegun unambiguously excludes bump stocks, whereas

the ATF argues that the best reading of the statute compels the opposite conclusion. Without repeating the intricacies of those positions here, there can be no doubt that a significant number of reasonable jurists have reached diametrically opposed conclusions as to whether the definition of a machinegun includes a bump stock.

The viability of competing interpretations is exemplified not only by the myriad and conflicting judicial opinions on this issue, but also by the ATF's own flip-flop in its position. And because the statute is "subject to more than one reasonable interpretation," it is ambiguous. *See Donovan v. FirstCredit, Inc.*, 983 F.3d 246, 256 (6th Cir. 2020) (quoting *N. Fork Coal Corp. v. Fed. Mine Safety & Health Comm'n*, 691 F.3d 735, 740 (6th Cir. 2012)); *see also N. Fork Coal Corp.*, 691 F.3d at 740 ("Although both parties argue that the statutory language is plain and unambiguous, both also argue that the plain meaning supports their interpretation. This indicates ambiguity. Furthermore, the existence of divergent court opinions also suggests ambiguity." (quoting *Pugliese v. Pukka Dev., Inc.*, 550 F.3d 1299, 1304 (11th Cir. 2008))).

**B. The *Chevron* doctrine is inapplicable in the present case**

Under what has become known as *Chevron* deference, "a court review[ing] an agency's construction of the statute which it administers . . . is confronted with two questions." *Chevron, USA, Inc. v. NRDC*, 467 U.S. 837, 842 (1984):

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give

> effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

*Id.* at 842-43. Having determined that the statutory language is ambiguous, we would typically apply *Chevron* deference to uphold the Rule so long as it was not "arbitrary, capricious, or manifestly contrary to the statute." *See id.* at 844.

But both parties urge us to determine the legality of the Rule without relying on *Chevron* deference. The government has not invoked *Chevron* deference, believing that "it is unnecessary to consider what level of deference, if any, the rule should be accorded." And Hardin's view is, first, that the government has waived the application of *Chevron* deference and, alternatively, that *Chevron* deference is inapplicable when the underlying statute carries the possibility of criminal sanctions. We need not resolve the question of whether the government can waive the application of *Chevron* deference because we conclude that the statutory scheme before us is one that does not warrant the application of such deference.

The Supreme Court has not clearly identified the bounds of *Chevron* deference with respect to an agency's construction of a statute with criminal applications. To be sure, *Chevron* itself involved a statute whose violation could incur criminal penalties. *See id.* at 840; 42 U.S.C.

§ 7413(c)(1) (1982). And in *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, 515 U.S. 687 (1995), the Supreme Court applied *Chevron* deference to the agency's statutory interpretation notwithstanding the challengers' argument that such deference was inappropriate because the statute included criminal penalties for certain violations. *See id.* at 703-704 & 704 n.18.

The Supreme Court, however, has "never held that the Government's reading of a criminal statute is entitled to any deference." *United States v. Apel*, 571 U.S. 359, 369 (2014). This language was repeated in *Abramski v. United States*, 573 U.S. 169, 191 (2014), where the Supreme Court further noted that "criminal laws are for courts, not for the Government, to construe."

The reasons to exercise caution in applying *Chevron* deference to an agency's construction of a statute with criminal applications are persuasive. Among the primary rationales for *Chevron* deference are: (1) "that agencies are more likely to get the answer right, given their expertise," *Arangure v. Whitaker*, 911 F.3d 333, 341 (6th Cir. 2018), and (2) "that 'policy choices' should be left to Executive Branch officials 'directly accountable to the people,'" *Epic Sys. Corp. v Lewis*, 138 S. Ct. 1612, 1630 (2018) (quoting *Chevron*, 467 U.S. at 865).

These rationales, however, have less force in the context of laws imposing criminal sanctions. "[B]ecause of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures . . . should define criminal activity." *United States v. Bass*, 404 U.S. 336, 348 (1971). Moreover, we "feel deep discomfort at allowing an agency to define the very criminal rules it will

enforce." *Aposhian v. Wilkinson*, 989 F.3d 890, 900 (10th Cir. 2021) (Tymkovich, J., dissenting from the denial of rehearing en banc). Such a scheme "raises serious constitutional concerns by making [the] ATF the expositor, executor, *and* interpreter of criminal laws." *Id.* (emphasis in original).

On the other hand, "we must interpret [a] statute consistently, whether we encounter its application in a criminal or noncriminal context." *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004); *see also, e.g.*, *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 517-18 (1992) (applying a rule of statutory construction that is ordinarily applicable only in criminal cases to a tax statute because the statute, which also had criminal applications, had to be interpreted consistently across both the civil and criminal domains). A bright-line rule that *Chevron* deference cannot be applied to agency constructions of statutes with criminal consequences would therefore preclude the application of *Chevron* deference to "statutes that bear both civil and criminal applications," "[a] category that covers a great many (most?) federal statutes today." *See Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1156 (10th Cir. 2016) (Gorsuch, J., concurring); *see also Gun Owners of Am., Inc. v. Garland*, 19 F.4th 890, 924-25 (6th Cir. 2021) (en banc) (Murphy, J., in support of striking down the Rule) ("[A]ny distinction between 'pure' criminal laws and 'hybrid' civil-criminal laws is a mirage."). In light of the "one statute, one interpretation rule" gleaned from *Leocal* and *Thompson*, as well as the Supreme Court's lack of clarity with respect to the application of *Chevron* deference to statutes that carry criminal penalties, we decline to adopt such bright-line rules in either direction.

Instead, we conclude that the particular statutory scheme before us is not an appropriate one to apply *Chevron* deference. We so hold because the statutory scheme is predominantly criminal in scope and because of the nature of the actions that it criminalizes.

First, the Gun Control Act prohibits anyone from transferring or possessing a machinegun. 18 U.S.C. § 922(o)(1). A knowing violation of this provision is punishable by up to 10 years of imprisonment. *Id.* § 924(a)(2). The civil implications of the Rule are, by contrast, "quite limited." *Aposhian*, 989 F.3d at 905 (Eid, J., dissenting from the denial of rehearing en banc):

> The [Gun Control Act's] prohibition on "machineguns" is subject to only two extremely limited exceptions, for "machineguns" (1) "transfer[red] to or by, or possess[ed] by or under the authority of" the federal or a state government, [18 U.S.C.] § 922(o)(2)(A), or (2) lawfully possessed before the prohibition went into effect, *id.* § 922(o)(2)(B). Only "machineguns" that fall within these narrow exceptions are subject to civil consequences, and even then, the civil consequences are limited—the chief consequence is a registration requirement. *See* 26 U.S.C. §§ 5841, 5845(a), (b).

*Id.* (second and third alterations in original). Thus, "[g]iven the breadth of the criminal prohibition and the limited nature of the exceptions giving rise to civil ramifications," *id.*, we conclude that the statutory scheme has a predominantly criminal scope.

Second, we perceive of no special expertise possessed by the ATF with respect to the construction of this statutory scheme that the judiciary lacks:

> The special deference required by *Chevron* is based on the expertise of an administrative agency in a complex field of regulation with nuances perhaps unfamiliar to the federal courts. Unlike environmental regulation or occupational safety, criminal law and the interpretation of criminal statutes is the bread and butter of the work of federal courts.

*Dolfi v. Pontesso*, 156 F.3d 696, 700 (6th Cir. 1998) (citation omitted). As noted by our colleague Judge White, "we have highly technical and complex securities, tax, workplace safety, and environmental-law regimes in which the applicable agency exercises delegated authority to promulgate regulations fleshing out statutory provisions—regulations that have both civil and criminal applications." *Gun Owners of Am., Inc.*, 19 F.4th at 902 (White, J., in support of upholding the Rule). But unlike securities, tax, workplace safety, and environmental-law regimes, which include criminal penalties for uniquely regulatory crimes, there is nothing highly technical or complex about condemning, for example, the distribution of dangerous drugs, the commission of violent acts, or, as relevant here, the possession of deadly weapons. These are areas in which the courts are well-equipped to operate, and we see no reason why we should abdicate our interpretive responsibility in such instances. We therefore decline to afford *Chevron* deference to the ATF's construction of the term "machinegun."

**C. The rule of lenity requires us to rule in Hardin's favor**

This brings us to the rule of lenity, under which "penal statutes are to be construed strictly." *FCC v. Am. Broad. Co.*, 347 U.S. 284, 296 (1954). Therefore, when *Chevron* deference is not warranted and standard principles of statutory interpretation "fail to establish that

the Government's position is unambiguously correct[,] we apply the rule of lenity and resolve the ambiguity in [the criminal defendant's] favor." *United States v. Granderson*, 511 U.S. 39, 54 (1994). "In sum, it is not enough to conclude that a criminal statute *should* cover a particular act. The statute must *clearly* and *unambiguously* cover the act." *Cargill v. Garland*, 57 F.4th 447, 473 (5th Cir. 2023) (en banc) (Ho, J., concurring) (emphases in original).

Judge Ho's concurrence in *Cargill* directs our attention to two persuasive analogies. *See id.* at 473-74, 478. The first concerns designer drugs, which, although "just as lethal" as drugs prohibited by the Controlled Substances Act of 1970, "differed in chemical composition." *Id.* at 473. "Yet all three branches agreed that existing law did not ban designer drugs," requiring Congress to enact the Controlled Substance Analogue Enforcement Act of 1986. *Id.* at 473-74. The second analogy concerns the facts of *United States v. Wiltberger*, 18 U.S. 76 (1820). *See Cargill*, 57 F.4th at 478 (Ho, J., concurring). In that case, the Supreme Court "unanimously construed a statute that punished manslaughter on the 'high seas' not to apply to an identical act on a river. The Court noted that it was 'extremely improbable' Congress would want to treat upstream manslaughter differently from manslaughter committed downstream, past the river's mouth." *Id.* (quoting *Wiltberger*, 18 U.S. at 103-06). Even so, the Supreme Court ruled in the criminal defendant's favor on the basis that "probability is not a guide which a court, in construing a penal statute, can safely take." *Wiltberger*, 18 U.S. at 105.

"Bump stocks may well be indistinguishable from automatic weapons for all practical purposes. But . . .

'[i]t would be dangerous . . . to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated.'" *Cargill*, 57 F.4th at 478 (Ho, J., concurring) (second ellipses in original) (quoting *Wiltberger*, 18 U.S. at 96). Because the relevant statutory scheme does not clearly and unambiguously prohibit bump stocks, we are bound to construe the statute in Hardin's favor.

## III. CONCLUSION

For all of the foregoing reasons, we **REVERSE** the judgment of the district court and **REMAND** for further proceedings consistent with this opinion.

---

**CONCURRING IN THE JUDGMENT**

---

JOHN K. BUSH, Circuit Judge, concurring in the judgment. I agree that the district court's judgment should be reversed. At a minimum, as the majority opinion holds, the National Firearms Act of 1934 admits of an interpretation that excludes a bump stock from the definition of a "part" of a "machinegun" under that statute. Indeed, this is the *original* interpretation that the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) gave to the statute. *See* ATF Rule 2006-2 at 2; 27 C.F.R. §§ 478.11 (2014), 479.11 (2016). That ATF later changed its views in order to ban bump stocks does not render unreasonable the ATF's first reading of the statute. Indeed, the ATF's first take aligns with the views of numerous judges on this court and elsewhere who have considered the relevant statutory text. *See, e.g.*, *Gun Owners of Am., Inc. v. Garland*, 19 F.4th 890, 910 (6th Cir. 2021) (Murphy, J., dissenting), *cert. denied*, 143 S. Ct. 83 (2022); *Cargill v. Garland*, 57 F.4th 447 (5th Cir. 2023) (en banc), *petition for cert. filed* (April 7, 2023). Therefore, even accepting (as does the majority opinion) that the statute could reasonably be read either way as to the legality of bump stocks, the statute *must* be read under the rule of lenity to exclude a bump-stock rifle from the definition of a machinegun. *See United States v. Granderson*, 511 U.S. 39, 54 (1994); *Jones v. United States*, 529 U.S. 848, 858 (2000) (if there are two possible "readings of what conduct Congress has made a crime," the "harsher alternative" reading should be rejected because "Congress should have spoken in language that is

clear and definite") (quoting *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-22 (1952)). That is the import of the majority's reasoning.

But I would go further. As explained by Judge Murphy in *Gun Owners of America, Inc. v. Garland*, the best reading of the statute is that Congress never gave the ATF "the power to expand the law banning machine guns through [the] legislative shortcut" of the ATF's rule at issue in this appeal, *see* Bump-Stock-Type Devices, 83 Fed. Reg. 66,514 (Dec. 26, 2018) (the Rule). *See* 19 F.4th at 910 (Murphy, J., dissenting). Simply put, under the statute as it currently reads, the addition of a bump stock to a rifle clearly does not make it a machinegun.

Though my reasoning differs somewhat from the majority opinion, all judges on this panel agree on this point: it is up to Congress, not the ATF, to change the law if bump stocks are to be made illegal.

**I.**

This case turns on whether a bump stock is a "part" of a "machinegun" as used in the National Firearms Act. The relevant statutory provision reads:

> The term "machinegun" means any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also include the frame or receiver of any such weapon, any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun, and any combination of parts from

> which a machinegun can be assembled if such parts are in the possession or under the control of a person.

26 U.S.C. § 5845(b). Under this definition, a bump stock cannot be a machinegun part because a bump stock by itself cannot increase the rate of fire of a rifle, nor does it change the mechanics of a "single function of the trigger."

The ATF's brief provides clarity on how bump stocks operate. A "bump stock channels the recoil from the first shot into a defined path, allowing the contained weapon to slide back a short distance . . . shifting the trigger away from the shooter's trigger finger." Appellee's Br. at 18 (citing 83 Fed. Reg. at 66,532 (Dec. 26, 2018)). "This separation allows the firing mechanism to reset." *Id.* The shooter must also "maintain constant forward pressure on the weapon's barrel-shroud or fore-grip . . . causing the trigger to 'bump' the shooter's stationary finger and fire another bullet." *Id.* This explanation reveals a couple of reasons why a bump stock does not transform a rifle into a machinegun.

First, a bump stock does not create all of the above-described effects itself—one still needs to maintain constant forward pressure on the weapon's barrel-shroud or fore-grip. Thus, a semiautomatic rifle does not shoot automatically and thereby become a machinegun, simply by having a bump stock. When the National Firearms Act was enacted, the word "automatically" meant "[h]aving a self-acting or self-regulating mechanism that performs a required act at a predetermined point in an operation[.]" *Webster's New International Dictionary* (2d ed. 1934). While the bump stock might be a self-acting mechanism to allow the rifle to slide back, it is not a self-acting mechanism to maintain the forward pressure.

Without that added technique, the bump stock would not increase the rate of fire, and the rifle therefore cannot be considered a machinegun because of the addition of a bump stock.

Second, the "single function of a trigger" on a rifle with a bump stock engages the internal firing mechanism to shoot only one shot, in contrast with the definition of a machinegun "automatically [shooting] more than one shot." 26 U.S.C. § 5845(b). Once a trigger is pulled, the hammer strikes the firing pin to shoot one bullet. *See Cargill v. Garland*, 57 F.4th at 452. Then, the hammer is thrusted backward by the bolt into the disconnector. *Id.* The hammer will stay in the disconnector until the trigger is reset to its original position. *Id.* This means that the "single function of the trigger" will only release one bullet because the trigger must reset each time before it can engage the hammer to strike the firing pin to release another bullet. In contrast, an automatic gun will continue to reset the hammer and release the hammer without the trigger resetting to its original position, so a "single function of a trigger" can lead to the shooting of multiple shots. *See id.* A bump stock does nothing to impact the internal mechanics of a rifle to circumvent the need for the trigger to reset between every shot, so a bump-stock-equipped rifle is still capable of shooting only one shot with each function of the trigger.

**II.**

The ATF attempts to replace "single function of the trigger," as the definition reads in the National Firearms Act, with "single pull of the trigger." 83 Fed. Reg. at 66,518. This new agency-created definition, announced after high-profile statements from President Trump and

others in response to the Las Vegas shooting,[1] is an about-face from the ATF's original interpretation of the statute. ATF Rule 2006-2 at 2; 27 C.F.R. §§ 478.11 (2014), 479.11 (2016). There were no changes in the relevant facts or law that led to the ATF making a 180-degree change of statutory interpretation to ban what once was legal. There was only a profound change in political pressure.

Even if the ATF had adopted its current view from the get-go, that interpretation fits poorly with the statutory text. The ATF substitutes "pull" for "function" to argue that there is a single "pull" from the shooter's perspective. But the statutory definition defines "function" not with reference to the shooter but to the firearm, given the use of the word "trigger," which is a mechanical feature. From the firearm's mechanical perspective, the trigger must fully reset and be "pulled" every single time another shot is fired, so substitution of the ATF's new word, "pull" for "function," does not make a bump-stock rifle a machinegun. Even with the bump stock, the trigger of the rifle still must be pulled—that is, the trigger finger must move against the trigger while the shooter maintains forward pressure on the weapon's barrel-shroud or fore-grip—for each shot the weapon fires. *See Gun Owners of Am., Inc.*, 19 F.4th at 913-14, 926-27

---

[1] Presidential Memorandum on the Application of the Definition of Machinegun to "Bump Fire" Stocks and Other Similar Devices, President Donald Trump (Feb. 20, 2018) (on file with the White House Archives); Lindsey McPherson, *Pelosi Optimistic About Gun Control Bill Short of Assault Weapons Ban*, ROLL CALL, Mar. 1, 2018; Statement on Regulation to Ban Bump Stocks, Senator Dianne Feinstein (Dec. 18, 2018); Department of Justice Announces Bump-Stock-Type Devices Final Rule Press Release, Department of Justice Office of Public Affairs (Dec. 18, 2018).

(Murphy, J., dissenting). To be sure, the bump stock allows for multiple shots to occur more rapidly, but that consequence does not change the dispositive fact that each pull of the trigger fires only one shot. Because a single function of the trigger using a bump stock cannot fire more than one bullet, a bump-stock rifle is not a machinegun.

I therefore concur in reversing the district court judgment because the best reading of the statute is that bump stocks are legal. The statutory text confirms that the ATF correctly interpreted the statute the first time. It is the job of Congress, not the ATF, to decide whether the law should change in this area.

**APPENDIX B**

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

---

Civil Action No. 3:19-cv-56-DJH-RSE

SCOTT A. HARDIN, PLAINTIFF

*v.*

BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, ET AL., DEFENDANTS

---

Filed: Nov. 20, 2020

---

**MEMORANDUM OPINION AND ORDER**

---

Following the 2017 tragic mass shooting in Las Vegas, when a shooter armed with bump-stock devices opened fire on an outdoor concert, the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) revisited its classification of bump-stock devices under federal firearm laws. *See Bump-Stock-Type Devices*, 83 Fed. Reg. 66,514, 66,516 (Dec. 26, 2018) (the Rule); (*see* D.N. 29, PageID # 186) ATF ultimately issued a final rule that classified bump stocks as "machineguns" and outlawed their continued sale and possession. *Id.* Plaintiff Scott Hardin, a bump-stock owner (*see* D.N. 3, PageID # 59), filed this action challenging the Rule as exceeding ATF's statutory authority and violating the Administrative Procedure Act and the Constitution. (*Id.*, PageID # 58) The parties have filed cross-motions for judg-

ment on the administrative record. (D.N. 29; D.N. 30) For the reasons set forth below, the Court will grant the Defendants' motion.

**I.**

Congress regulates firearms through three statutes: The National Firearms Act of 1932, codified as amended at 26 U.S.C. §§ 5801-72; the Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213; and the Firearm Owners Protection Act of 1986, Pub. L. 99-308, 100 Stat. 449. The NFA operates pursuant to Congress's taxing authority and imposes a tax on the manufacture and transfer of firearms as well as registration requirements. *See* 26 U.S.C. §§ 5801-41. Through the GCA, firearm regulation entered the criminal code—among other provisions, the GCA made it a criminal offense for anyone except for licensed importers, manufacturers, dealers, or collectors to transport machineguns "except as specifically authorized by the [Attorney General] consistent with public safety and necessity." Gun Control Act § 102 (amending 18 U.S.C. § 922). FOPA amended the GCA to further tighten access to machineguns, making it "unlawful for any person to transfer or possess a machinegun" not lawfully possessed before FOPA's enactment. Firearm Owners Protection Act § 102 (amending 18 U.S.C. § 922). Congress gave the Attorney General the authority to promulgate rules and regulations necessary to enforce the provisions of the NFA and GCA. *See* 26 U.S.C. § 7805(a);[1] 18 U.S.C. § 926(a). The Attor-

[1] NFA provisions still refer to the "Secretary" (of the Treasury) rather than the Attorney General, but the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002), transferred ATF from the Department of the Treasury to the Department of Justice. *See* Homeland Security Act § 1111.

ney General has delegated this authority to ATF. *See* 28 C.F.R. § 0.130.

The NFA and the GCA, as amended by FOPA, use the definition of "machinegun" set out in the NFA: "any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger." 26 U.S.C. 5845(b). The term "machinegun" also includes "the frame or receiver of any such weapon" and any part or combination of parts which can convert a firearm into a machinegun. *Id.* The statute does not define the terms "automatically" or "single function of the trigger." *Id.*

"A 'bump stock' is a device that replaces the standard stationary stock of a semiautomatic rifle—the part of the rifle that typically rests against the shooter's shoulder—with a non-stationary, sliding stock that allows the shooter to rapidly increase the rate of fire, approximating that of an automatic weapon." *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 920 F.3d 1, 7 (D.C. Cir. 2019), *judgment entered*, 762 F. App'x 7 (D.C. Cir. 2019), *cert. denied*, 140 S. Ct. 789 (2020) (*Guedes II)*. Although in 2006 ATF concluded that certain bump-stock devices qualified as machineguns under the NFA and GCA, between 2008 and 2017 it issued a series of classification decisions concluding that other bump-stock devices did not qualify because they did not fire "automatically." *See* 83 Fed. Reg at 66,516.

After the Las Vegas shooting, ATF decided to revisit this series of decisions in order to clarify the meaning of the terms "automatically" and "single function of the trigger," particularly as they pertained to bump stocks. *Id.* On December 26, 2017, ATF published an advance

notice of proposed rulemaking (ANPRM) in the Federal Register. *Id.* The public comment period for the ANPRM ran until January 25, 2018, during which time ATF received over 115,000 comments. *Id.* On March 29, 2018, ATF published a notice of proposed rulemaking (NPRM) defining the statutory term "single function of the trigger" to mean "a single pull of the trigger," and "automatically" to mean "as a result of a self-acting or self-regulating mechanism that allows the firing of multiple rounds through a single pull of the trigger." *Id.* at 66,517-19. The NPRM also clarified that under these interpretations, all bump-stock devices would now qualify as machineguns. *Id.* at 66,519. ATF received over 186,000 comments in response to the NPRM. *Id.* On December 26, 2018, ATF published the final rule, which adopted these definitions and had an effective date of March 26, 2019. *Id.* at 66,514. The Rule gave possessors of bump stocks ninety days during which to destroy or abandon their devices. *Id.*

**II.**

"The court's function in reviewing final agency action following informal rulemaking is prescribed by the [Administrative Procedure Act]. [The Court] review[s] the administrative record, appl[ies] the standards set forth in section 706 of the APA, 5 U.S.C. § 706, and must set aside agency action that is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Simms v. Nat'l Highway Traffic Safety Admin.*, 45 F.3d 999, 1003 (6th Cir. 1995) (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 414 (1971)).

"On a motion for judgment on the administrative record, the summary judgment standard set forth in Rule

56 'does not apply because of the limited role of the court in reviewing the administrative record.'" *Vaught v. Fed. Deposit Ins. Corp.*, No. 3:16-CV-507, 2018 WL 5098531, at *6 (E.D. Tenn. Apr. 4, 2018) (quoting *N.C. Fisheries Ass'n, Inc. v. Gutierrez*, 518 F. Supp. 2d 62, 79 (D.D.C. 2007)). The district court must only "determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did." *Id.* (quoting *Sierra Club v. Mainella*, 459 F. Supp. 2d 76, 90 (D.D.C. 2006)). "Summary judgment thus serves as the mechanism for deciding, as a matter of law, whether the agency action is supported by the administrative record and otherwise consistent with the APA standard of review." *Id.* (quoting *Stuttering Found. of Am. v. Springer*, 498 F. Supp. 2d 203, 207 (D.D.C. 2007)).

**A. Statutory Authority**

Hardin argues that ATF exceeded its statutory authority by redefining "machinegun" to include bump-stock devices. (D.N. 30, PageID #700-01) To address this claim, the Court must first determine by which standard to assess ATF's conclusion in light of the statutory definition. The critical question is whether *Chevron* deference applies. Under *Chevron*'s two-step framework, courts first "determine whether the statute is ambiguous." *Arangure v. Whitaker*, 911 F.3d 333, 337 (6th Cir. 2018). If the statute is unambiguous, the inquiry ends and the court applies the statute "as-written"; but if it is ambiguous, the court proceeds to step two and "defer[s] to the agency's construction if it is 'permissible'"—i.e., "within the bounds of reasonable interpretation." *Id.* at 337-38 (quoting *City of Arlington v. FCC*, 569 U.S. 290, 296 (2013)). Absent *Chevron* def-

erence, agency interpretations may "merit some deference" depending on "agency expertise and the value of uniformity in interpreting . . . the law." *Rhinehimer v. U.S. Bancorp Investments, Inc.*, 787 F.3d 797, 809 (6th Cir. 2015) (quoting *U.S. v. Mead Corp.*, 533 U.S. 218, 234 (2001)). The substantial difference between the deference these standards give to agency interpretation makes the applicability of *Chevron* highly significant.

"*Chevron* only applies if 'Congress delegated authority to the agency generally to make rules carrying the force of law' *and* the agency interpretation was 'promulgated in the exercise of that authority.'" *Atrium Med. Ctr. v. U.S. Dep't of Health & Human Servs.*, 766 F.3d 560, 566 (6th Cir. 2014) (quoting *Mead Corp.*, 533 U.S. at 226-27). Although the parties here have not thoroughly addressed *Chevron*'s applicability to the Rule, both assert that it does not apply. Hardin states that deference is unwarranted because the statutory definition is clear, (*see* D.N. 30, PageID # 708); and ATF refers to the Rule as "an interpretive rule" (D.N. 29, PageID # 205-06), which typically would not receive *Chevron* review, *see Mead Corp.*, 533 U.S. at 232 ("interpretive rules . . . enjoy no *Chevron* status as a class"), and states that "deference to the agency is not required to resolve this case." (D.N. 31, PageID # 737)

Although the Sixth Circuit has not analyzed *Chevron*'s applicability to the Rule,[2] the D.C. Circuit recently ad-

[2] It is worth noting that while the Sixth Circuit has not analyzed *Chevron*'s applicability to the Rule, a district court in the circuit has. *See Gun Owners of Am. v. Barr*, 363 F. Supp. 3d 823, 830 (W.D. Mich. 2019). The court concluded that *Chevron* applies to the Rule, the terms "automatically" and "single function of the trigger" render the

dressed this precise issue. *Guedes II*, 920 F.3d at 17. The plaintiffs in *Guedes* challenged ATF's statutory authority to promulgate the Rule. *Id.* The parties in *Guedes* did not present arguments for applying the *Chevron* framework, and the court therefore conducted its own extensive analysis of whether the Rule qualifies for *Chevron* deference. *Id.* at 17-21. The court first concluded, based on the Rule's effect, the language used by ATF in the Rule, and the Rule's publication in the Code of Federal Regulations, that "the Rule confirms . . . in numerous ways, that it intends to speak with the force of law," and therefore the *Chevron* framework applies. *Id.* at 18-19. Applying *Chevron*, the D.C. Circuit found that two components of the statutory definition of "machinegun"—the phrase "single function of the trigger," and the word "automatically"—render the definition ambiguous. *Id.* at 29. Finally, the D.C. Circuit concluded that ATF had reasonably interpreted these ambiguous terms and therefore "the [Rule] sets forth a permissible interpretation of the statute's ambiguous definition of 'machinegun'" and consequently merits deference. *Id.* at 31-32.

In the absence of contrary precedent from the Sixth Circuit, the Court will follow the D.C. Circuit's well-reasoned analysis. Thus, for the reasons identified in

---

statutory definition of machinegun ambiguous, and ATF's interpretation of the definition deserved deference. *Id.* at 830-33. The plaintiffs appealed and filed a motion to stay pending appeal. *Gun Owners of Am., Inc. v. Barr*, No. 19-1298, 2019 WL 1395502, at *1 (6th Cir. Mar. 25, 2019). The Sixth Circuit denied the motion to stay in part because the plaintiffs did not show "the likelihood [that the district court] abuse[d] [its] discretion." *Id.* Following the Sixth Circuit's denial, the Supreme Court also denied the stay. *Gun Owners of Am., Inc. v. Barr*, 139 S. Ct. 1406 (2019).

*Guedes*, the Court finds that *Chevron* applies to the Rule, the statute is ambiguous, and ATF reasonably interpreted the definition of "machinegun." *See id.* at 17-20, 28-32; *see also Gun Owners of Am.*, 363 F. Supp. 3d at 830-33. ATF therefore did not exceed its statutory authority in promulgating the Rule.

**B. Arbitrary and Capricious Review**

"Even if an agency's statutory interpretation is permissible under *Chevron*, it may still be 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Atrium*, 766 F.3d at 567 (citing 5 U.S.C. § 706(2)(A)). Agency action qualifies as arbitrary or capricious if "the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). "This is not an invitation for judicial second-guessing . . . [s]o long as the agency 'examine[d] the relevant data and articulate[d] a satisfactory explanation for its action,' [the court] will not set aside its decision." *Ky. Coal Ass'n, Inc. v. Tenn. Valley Auth.*, 804 F.3d 799, 801 (6th Cir. 2015) (quoting *State Farm*, 463 U.S. at 43).

Hardin argues that the Rule is arbitrary and capricious for several reasons. (D.N. 30, PageID # 696-699). None convince the Court.

**1. Bump-Firing Technique**

Hardin first argues that the fact that bump firing can be produced without a bump-stock device undermines

the validity of the Rule. (D.N. 30, PageID # 698-99) Bump firing "is a technique that any shooter can perform with training or with everyday items such as a rubber band or belt loop." 83 Fed. Reg. at 66,532. According to Hardin, this fact necessarily leads to "one of only two untenable conclusions": ATF approves of such techniques, which would undercut the need to regulate bump stocks at all, or ATF intends to regulate all manipulations that cause bump firing, which would "lead[] to the absurd result" of people being charged with illegal machinegun possession for using a bump-firing technique. (D.N. 30, PageID # 699)

ATF squarely addressed this issue in the Rule, concluding that bump-stock devices "are objectively different" from other items "designed for a different primary purpose," which do not qualify as automatic. 83 Fed. Reg. at 66,533. ATF additionally found bump firing through use of an everyday item such as a belt loop to be "more difficult than using a bump-stock-type device." *Id.* Finally, ATF noted a "fundamental distinction between skilled shooters and those employing bump-stock-type devices," which left skilled shooters "unaffected by the proposed rule"—skilled shooters must pull and release the trigger for each shot, whereas bump-stock devices only require the shooter to pull the trigger to fire the first round, after which the shooter need only maintain pressure to fire subsequent rounds. *Id.* Because ATF "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action," the Court does not find the Rule to be arbitrary and capricious on this ground. *Ky. Coal Ass'n*, 804 F.3d at 801 (alterations in original) (quoting *State Farm*, 463 U.S. at 43).

**2. Bump-Stock Operation**

Hardin next argues that "all the *known* evidence runs directly counter" to the conclusion that bump stocks qualify as machineguns because "the shooter must still separately pull the trigger to fire each successive shot." (D.N. 30, PageID # 698) In support of this claim, Hardin offers an affidavit from a former ATF employee who asserts that a "bump-stock[] device requires additional physical manipulation of the trigger by the shooter . . . [because] the trigger must be released, reset, and fully pulled rearward before the subsequent round can be fired." (D.N. 3-1, PageID # 91-92)

Hardin's emphasis on trigger mechanics is misplaced. In determining that bump stocks operate with a single pull of the trigger, ATF focused not on the movement of the trigger but on the action of the shooter in pulling the trigger. *See* 83 Fed. Reg. at 66,532. Specifically, ATF concluded that bump stocks enable shooters to discharge multiple rounds by "maintaining the trigger finger on the device's extension ledge with constant rearward pressure." 83 Fed. Reg. at 66,532 (quoting *NPRM*, 83 Fed. Reg 13442, 13443 (March 29, 2018)). In other words, "[a]lthough operating a bump stock may cause slight movements of the trigger finger, it does not require a shooter to consciously and repeatedly exert force to depress the trigger multiple times"; instead, "[a]fter the initial exertion of force, a shooter is able to discharge multiple rounds by maintaining constant pressure on the trigger." *Guedes v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 356 F. Supp. 3d 109, 132 (D.D.C.), *aff'd*, 920 F.3d 1 (D.C. Cir. 2019) (*Guedes I*). ATF's focus on the movement of the shooter's finger—rather than the trigger's movement—accords with its permissible

definition of "single function of the trigger" as meaning "single pull of the trigger." *See supra* at part II(A). Hardin's challenge to the Rule on this ground therefore fails.

**3. Input from Elected Officials**

Hardin also suggests that President Trump's outspoken support of the Rule prior to its enactment renders the Rule arbitrary and capricious. (D.N. 30, Page ID # 696) The Rule itself acknowledges the President's involvement, noting that he "directed the Department of Justice, working within established legal protocols, 'to dedicate all available resources to complete the review of the comments received [in response to the ANPRM], and, as expeditiously as possible, to propose for notice and comment a rule banning all devices that turn legal weapons into machineguns.'" 83 Fed. Reg. at 66,516-17 (quoting *Application of the Definition of Machinegun to "Bump Fire" Stocks and Other Similar Devices*, 83 Fed. Reg. 7949 (Feb. 20, 2018)). Additionally, in the wake of the Las Vegas shooting "ATF received correspondence from members of the United States Congress, as well as nongovernment organizations, requesting that ATF [re]examine its past classifications." *Id.* at 66,516.

Any impact these political forces may have had on the creation of the Rule does not raise concern. The Supreme Court has held that agency policy change may properly be "spurred by significant political pressure from Congress." *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 523 (2009). And "[p]residential administrations are elected to make policy." *Guedes II*, 920 F.3d at 34. "[A]n agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incum-

bent administration's views of wise policy to inform its judgments." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984).

Hardin further asserts that the President's directive was "without consideration for the legal authority of ATF to regulate bump-stock devices or the public, including Plaintiffs, being afforded an unbiased review of their comments." (D.N. 30, PageID # 696) The record does not support this claim. Over twenty-five pages, the Rule systematically documents and responds to each category of public comment received. *See* Fed. Reg. at 66,519-44. Rather than jumping to a preordained result as Hardin implies, the agency "articulate[d] a satisfactory explanation for its actions." *State Farm*, 463 U.S. at 43; s*ee also Guedes II*, 920 F.3d at 34 ("[T]he administrative record reflects that the agency kept an open mind throughout the notice-and-comment process and final formulation of the Rule."). Absent actual evidence of misconduct, which Hardin does not provide, the Court "accords the Bureau a 'presumption of regularity' in its promulgation of the Rule.'" *Guedes II*, 920 F.3d at 34 (quoting *Overton Park*, 401 U.S. at 415); *see also Simms*, 45 F.3d at 1003 ("[T]he agency head's decision is entitled to a presumption of regularity.").

**4. Change in Policy**

When an agency action changes a prior policy, the agency must demonstrate "that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which [a] conscious change of course adequately indicates." *Fox*, 556 U.S. at 515. It must also explain "factual findings that contradict those which underlay its prior policy" and acknowledge "serious reliance interests." *Id.* The

Court asks only "whether 'there are good reasons for the new policy.'" *Ky. Coal*, 804 F.3d at 806 (quoting *Fox* at 515). "Once the agency has satisfied this obligation, 'it need not [also] demonstrate to [the Court's] satisfaction that the reasons for the new policy are *better* than the reasons for the old one.'" *Id.*

Hardin suggests that ATF's decision to change course and classify bump stocks as machineguns was arbitrary and capricious. (D.N. 30, PageID # 684 ("ATF's abrupt about-face on this issue . . . inherently wreaks [sic] of agency abuse of discretion, and arbitrary and capricious conduct.") But ATF met all the requirements for implementing a change in policy. First, as previously discussed, ATF has the authority to define these terms and did so reasonably, *see supra* at part II(A), making the new definitions "permissible under the statute." *Fox*, 556 U.S. at 515. Second, the Rule acknowledged its change in course, *see* 83 Fed. Reg. at 66,516, and explained that ATF found the changes necessary because it believes that the revised definitions best interpret the statutory text. *See id.* at 66,521. Finally, ATF assessed reliance interests in its calculation of the Rule's costs. *See id.* at 66,515 (considering, e.g., costs of loss of property and foregone future production and sales). For these reasons, ATF's change in policy regarding the classification of bump stocks was not arbitrary and capricious. *See Fox*, 556 U.S. at 515; *Ky. Coal*, 804 F.3d at 806.

**C. Comment Period and Procedural Irregularities**

The Gun Control Act requires ninety days' public notice and the opportunity for hearing before the Attorney General can prescribe rules and regulations. *See* 18 U.S.C. § 926(b). ATF published the NPRM on March

29, 2018, which started the ninety-day clock. *See* 83 Fed. Reg 13,442. Hardin claims that procedural irregularities invalidated a portion of this ninety-day period and that ATF therefore did not meet its statutory requirement. (D.N. 30, PageID # 695) Specifically, Hardin points to the following facts: an advisory incorrectly indicating that the comment period was closed appeared on federalregister.gov on the day that ATF published the NPRM (ATF removed it five days later); and information on federalregister.gov incorrectly identified the Rule's docket number. (D.N. 30, PageID # 693-94) The Rule itself acknowledges these incidents, although with differences as to some of the details. 83 Fed. Reg. at 66,542.

Even assuming Hardin's account of the procedural irregularities to be true, these glitches did not shorten the comment period itself. Commenters who may have been confused by the incorrect advisory on the federal register website had the option to comment by fax or mail. *See* 83 Fed. Reg. at 13,442 (explaining how to submit comments by fax or mail). Additionally, despite the confusion, commenters did actually have the ability to submit electronic comments during the entire ninety-day period—"a simple search for 'bump stock' in the main search bar on Regulations.gov during this time would have displayed the link for the new NPRM Docket ID, which was active and accepting comments." 83 Fed. Reg. at 66,542.

When reviewing agency action, the Court applies the "harmless-error rule," meaning "a mistake that has no bearing on the ultimate decision or causes no prejudice shall not be the basis" for invalidating agency action. *ECM BioFilms, Inc. v. Fed. Trade Comm'n*, 851 F.3d

599, 612 (6th Cir. 2017). Hardin states that the incorrect advisory made it "likely that numerous individuals . . . were led to believe that they were unable to submit comments in relation to this rulemaking and were therefore deprived of an opportunity to be heard." (D.N. 30, PageID# 693) But Hardin identifies no specific instances of such deprivation, and the evidence in the administrative record points the other way: ATF did in fact receive "numerous comments from the very beginning of the comment period." 83 Fed. Reg. at 66,542; (*see* D.N. 29-2, PageID # 297-313) Moreover, Hardin acknowledges that ATF corrected the mistake after five days (D.N. 30, PageID # 693), meaning that any potentially confused commenters had eighty-five days to return to the website and try again. Given that ATF received more than 186,000 comments, *see* 83 Fed. Reg. at 66,519, including hundreds within the first two days (*see* D.N. 29-2, PageID # 297-313), the Court has no reason to conclude that the technical problems prejudiced commenters. The harmless-error rule therefore precludes invalidation of the Rule on this ground. *See ECM BioFilms*, 851 F.3d at 612.

**D. Constitutional Claims**

**1. Contracts Clause**

Hardin argues that the Rule violates the Contracts Clause (D.N. 30, PageID # 706-07), which provides that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts." U.S. Const. art. I, § 10, cl. 1. But "[t]he plain language of the Contracts Clause itself affirms that it applies only if a *state or local law* interferes with existing contracts." *United States v. May*, 500 F. App'x 458, 465 (6th Cir. 2012). The Rule is a federal regulation. *See* 83 Fed. Reg. 66,514. Be-

cause "the Contracts Clause does not apply to the federal government," Hardin's Contracts Clause claim necessarily fails. *Id.*

**2. Ex Post Facto Clause**

The Ex Post Facto Clause provides that "[n]o . . . ex post facto Law shall be passed." U.S. Const. art. I, § 9, cl. 3. This ensures that "legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed." *Weaver v. Graham*, 450 U.S. 24, 28-29 (1981). "To fall within the *ex post facto* prohibition, a law must be retrospective—that is, it must apply to events occurring before its enactment." *Lynce v. Mathis*, 519 U.S. 433, 441 (1997) (citing *Weaver*, 450 U.S. at 29).

Hardin claims that the Rule violates the Ex Post Facto Clause because it "shackle[s] everyone affected by [it]." (D.N. 30, PageID # 705) But this does not establish an ex post facto violation. The Rule contained a ninety-day delay between its date of publication and its date of implementation, *see* 83 Fed. Reg. at 66,514, giving possessors of bump stocks three months to destroy or relinquish their devices and thereby come into compliance with the Rule by its effective date. The Rule therefore "cannot be characterized as retroactive . . . [because] the Rule itself made clear that the possession of bump stocks would become unlawful only after the effective date." *Guedes II*, 920 F.3d at 35. Hardin's ex post facto claim therefore fails. *See Samuels v. McCurdy*, 267 U.S. 188, 193 (1925) (rejecting Ex Post Facto Clause challenge to statute that prohibited the post-enactment possession of liquor, even when applied to liquor lawfully acquired before the statute's enactment).

**3. Takings Clause**

The Takings Clause of the Fifth Amendment prohibits government seizure of private property "for public use, without just compensation." U.S. Const. amend. V. Takings Clause challenges fall into two categories:

> challenges to the public-use requirement and challenges to the just-compensation requirement. Public-use challenges assert that in effecting the taking, the government exceeded its permissible scope of authority under the Constitution; the action is invalid regardless of whether compensation is provided. Just-compensation challenges concede that the government acted within the scope of its authority and assert that the government must provide the affected party with "just compensation."

*Wilkins v. Daniels*, 744 F.3d 409, 417 (6th Cir. 2014).

Hardin seeks compensation for the loss of his bump stocks (D.N. 30, PageID # 704), so his claim falls into the second category. But it fails at the threshold, because Hardin does not "concede that the government acted within the scope of its authority," *Wilkins*, 744 F.3d at 417—instead, Hardin asserts that "ATF has not and evidently cannot put forth legitimate support for [its] core conclusion" that bump stocks qualify as machineguns. (D.N. 30, PageID # 704) Hardin cannot challenge the lawfulness of the Rule while simultaneously bringing a Takings Clause claim for compensation. *See Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005) (explaining that the Takings Clause "is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking.") (quoting

*First English Evangelical Lutheran Church of Glendale v. Cnty. of Los Angeles*, 482 U.S. 304, 315 (1987))).

**4. Vagueness**

Hardin argues that "[a]llowing . . . ATF to re-evaluate the definition of 'machinegun,' as it has done in this case, depending on the prevailing political winds, renders Congress'[s] definition of 'machinegun' under the NFA a moving target, and thus by definition, constitutionally vague." (D.N. 30, PageID # 708-09) Hardin rests this claim on the assertion that ATF does not have the statutory authority to redefine "machinegun." (*Id.* at PageID # 708) But as discussed above, *see supra* at part II(A), ATF does have such authority. Moreover, Hardin's premise fails: a law is not made vague simply because it has changed, but only when it "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *United States v. Zobel*, 696 F.3d 558, 576 (6th Cir. 2012). Hardin does not argue that the Rule's definition of "machinegun" or its application to bump stocks is unclear. Nor could he, as his APA claims rest on disputing the clearly defined terms and applicability of the Rule. *See supra* at part II(B). Hardin's vagueness challenge therefore fails.

**E. Other Claims**

**1. Internal Revenue Code Violation**

Hardin claims that 26 U.S.C. § 7805 prevents the Rule from being implemented or enforced against "devices manufactured or assembled before the date of the NPRM publication." (D.N. 30, PageID # 702) Section 7805(b) prevents "regulation[s] relating to the inter-

nal revenue laws" from being "appl[ied] to any taxable period ending before the earliest of . . . (A) [t]he date on which such regulation is filed with the Federal Register . . . (B) [for a] final regulation, the date on which any proposed or temporary regulation to which such final regulation relates was filed with the Federal Register . . . [or] (C) [t]he date on which any notice substantially describing the expected contents of any temporary, proposed, or final regulation is issued to the public." 26 U.S.C. § 7805(b).

The statutory language does not support Hardin's claim. The regulation at issue requires the destruction or abandonment of all bump-stock devices within ninety days of the publication of the Rule. 83 Fed. Reg. at 66,514. The regulation plainly "does not apply to any taxable period" ending before March 29, 2018,[3] because the regulation does not apply retroactively. *See U.S. v. Dodson*, 519 F. App'x 344, 349 (6th Cir. 2013) ("ATF may retroactively exempt certain weapons from tax and regulation requirements, [but] it cannot exempt those same weapons from prospective application of the law."). "While § 7805 is meant to limit retroactive application of the law to prefiling *time periods*, it is not meant to exempt pre-filing *items* (whether manufactured or acquired before the regulation)." *Id.* Hardin thus has not shown any violation of § 7805.

---

[3] The government argues that the "relevant date is December 26, 2017, the date on which the Federal Register published the ANPRM," rather than the date of the Rule's publication. (D.N. 31, PageID # 733) The Court need not resolve this issue because Hardin's claim fails even under the later date he uses. (*See* D.N. 30, PageID # 702)

**2. Failure to Consider Cost**

Hardin argues that "ATF flat out ignored any analysis in relation to a cost impact, as the proposed rule fails to provide information on how the Government will fulfill its obligation to compensate affected individuals for the taking." (D.N. 30, PageID # 695) But as discussed above, *supra* at part II(D)(3), the Rule does not violate the Takings Clause, and therefore the agency owes no compensation. Moreover, although ATF was not required to consider the cost of compensation, the agency did in fact do a thorough cost-benefit analysis of the Rule. *See* 83 Fed Reg. 66515, 66538-39, 66543-44. Hardin's final claim therefore fails.

**III.**

For the reasons set forth above, and the Court being otherwise sufficiently advised, it is hereby

**ORDERED** as follows:

(1) Defendants' motion for judgment on the administrative record (D.N. 29) is **GRANTED**. A separate judgment will be entered this date.

(2) Hardin's motion for judgment on the administrative record (D.N. 30) is **DENIED**.

/s/ DAVID J. HALE
DAVID J. HALE, Judge
United States District Court

## APPENDIX C

1. 18 U.S.C. 921(a)(24) provides:

(24) The term "machinegun" has the meaning given such term in section 5845(b) of the National Firearms Act (26 U.S.C. 5845(b)).

2. 18 U.S.C. 922(*o*) provides:

(*o*)(1) Except as provided in paragraph (2), it shall be unlawful for any person to transfer or possess a machinegun.

(2) This subsection does not apply with respect to—

(A) a transfer to or by, or possession by or under the authority of, the United States or any department or agency thereof or a State, or a department, agency, or political subdivision thereof; or

(B) any lawful transfer or lawful possession of a machinegun that was lawfully possessed before the date this subsection takes effect.

3. 26 U.S.C. 5845(b) provides:

**(b) Machinegun**

The term "machinegun" means any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also include the frame or receiver of any such weapon, any part designed and intended solely and ex-

clusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun, and any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person.

4. 27 C.F.R. 447.11 provides in pertinent part:

**Meaning of terms.**

*Machinegun.* A "machinegun", "machine pistol", "submachinegun", or "automatic rifle" is a firearm which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also include the frame or receiver of any such weapon, any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun, and any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person. For purposes of this definition, the term "automatically" as it modifies "shoots, is designed to shoot, or can be readily restored to shoot," means functioning as the result of a self-acting or self-regulating mechanism that allows the firing of multiple rounds through a single function of the trigger; and "single function of the trigger" means a single pull of the trigger and analogous motions. The term "machinegun" includes a bump-stock-type device, *i.e.*, a device that allows a semi-automatic firearm to shoot more than one shot with a single pull of the trigger by harnessing the recoil energy of the semi-automatic firearm to which it is affixed so that the trigger resets and continues

firing without additional physical manipulation of the trigger by the shooter.

5. 27 C.F.R. 478.11 provides in pertinent part:

**Meaning of terms.**

*Machine gun.* Any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also include the frame or receiver of any such weapon, any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machine gun, and any combination of parts from which a machine gun can be assembled if such parts are in the possession or under the control of a person. For purposes of this definition, the term "automatically" as it modifies "shoots, is designed to shoot, or can be readily restored to shoot," means functioning as the result of a self-acting or self-regulating mechanism that allows the firing of multiple rounds through a single function of the trigger; and "single function of the trigger" means a single pull of the trigger and analogous motions. The term "machine gun" includes a bump-stock-type device, *i.e.*, a device that allows a semi-automatic firearm to shoot more than one shot with a single pull of the trigger by harnessing the recoil energy of the semi-automatic firearm to which it is affixed so that the trigger resets and continues firing without additional physical manipulation of the trigger by the shooter.

6. 27 C.F.R. 479.11 provides in pertinent part:

**Meaning of terms.**

*Machine gun.* Any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also include the frame or receiver of any such weapon, any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machine gun, and any combination of parts from which a machine gun can be assembled if such parts are in the possession or under the control of a person. For purposes of this definition, the term "automatically" as it modifies "shoots, is designed to shoot, or can be readily restored to shoot," means functioning as the result of a self-acting or self-regulating mechanism that allows the firing of multiple rounds through a single function of the trigger; and "single function of the trigger" means a single pull of the trigger and analogous motions. The term "machine gun" includes a bump-stock-type device, *i.e.*, a device that allows a semi-automatic firearm to shoot more than one shot with a single pull of the trigger by harnessing the recoil energy of the semi-automatic firearm to which it is affixed so that the trigger resets and continues firing without additional physical manipulation of the trigger by the shooter.