IN THE
SUPREME COURT OF THE UNITED STATES

No. 18A963

GUN OWNERS OF AMERICA, INC., *et al.*,
Applicants,

v.

WILLIAM P. BARR, Attorney General of the United States, *et al.*,
Respondents

On Application for a Stay Pending Appeal
before the United States Court of Appeals
for the Sixth Circuit

APPLICANTS' MEMORANDUM IN REPLY

Kerry L. Morgan
PENTIUK, COUVREUR & KOBILJAK, P.C.
2915 Biddle Avenue, Suite 200
Wyandotte, MI 48192
(734) 281-7100

Robert J. Olson*
William J. Olson
Jeremiah L. Morgan
Herbert W. Titus
WILLIAM J. OLSON, P.C.
370 Maple Avenue West, Suite 4
Vienna, VA 22180-5615
(703) 356-5070
Fax (703) 356-5085
wjo@mindspring.com

*Counsel of Record for Applicants

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ARGUMENT

1. The Solicitor General's Response filed yesterday completely fails to contest two critical issues in this case. In their Application for Stay, Applicants made two primary and basic claims. First, that "[t]he government has conceded the federal statute defining a machinegun is clear and unambiguous." Gun Owners of America v. Barr, Emergency Application for Stay Pending Appellate Review, Docket No. 18A963 (U.S. Supreme Court) (March 25, 2019) ("Application") at 1. Second, that "[t]he government has also conceded that the definition — as written — does not apply to bump stocks."[1] *Id.* Applicants have made these allegations numerous times — to the district court (both in briefing and at oral argument), to the court of appeals, and now to this Court.[2] The government has been given every possible opportunity to dispute or rebut these assertions. Yet the government has never even attempted to do so.

Applicants should prevail, as a matter of law, on this issue alone. This Court has "stated time and again that … When the words of a statute are unambiguous, [the] first canon

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[1] For example, in one of the D.C. bump stock cases, the government admitted that "[a]bsent the revised definition … ATF could not restrict" bump stocks. Guedes v. ATF, Government Opposition to Motion for Preliminary Injunction, D.D.C., No. 18-2988 (Jan. 22, 2019) at 33. The government argues that "once definitions … have been provided" — but apparently not until then — "the statute is reasonably interpreted to include bump stocks." Brief in Opposition to Plaintiffs' Motion for Preliminary Injunction, No. 18-cv-1429, ECF #34 (W.D. Mich.) (Feb. 11, 2019) ("Brief in Opp.") at 3.

[2] Gun Owners of America v. Barr, Reply Brief in Support of Plaintiffs' Motion for Preliminary Injunction, No. 18-1429, ECF #37 (W.D. Mich.) (Feb. 25, 2019) at 1, 2 ("Dist. Ct. Reply"); In re Gun Owners of America, *et al.*, Emergency Petition for a Writ of Mandamus and Motion for a Stay of Agency Action, No. 19-1268 (6th Cir.) (Mar. 19, 2019) at 11, 13; Reply in Support of Petition for Writ of Mandamus and Motion for Stay of Agency Action, No. 19-1268 (6th Circuit) (Mar. 20, 2019) at 9; Notice of Supplemental Authority, No. 19-1268 (6th Circuit) (Mar. 21, 2019) at 2, 9; Gun Owners of America v. Barr, Emergency Motion for a Stay of Agency Action, No. 19-1298 (6th Circuit) (Mar. 22, 2019) at 10, 11, 16, 21; Application at 4, 12, 13.

is also the last: 'judicial inquiry is complete.'" Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 254 (1992). When a statute is unambiguous — clear on its face — then "the statute governs." Stinson v. United States, 508 U.S. 36, 44 (1993). When a statute is unambiguous, "there is no room for administrative interpretation." Christensen v. Harris County, 529 U.S. 576, 589 (2000). There is "'no gap for the agency to fill.'" United States v. Home Concrete & Supply, LLC, 566 U.S. 478, 487 (2012). It does not even matter "whether a particular agency interpretation is reasonable…."[3] Negusie v. Holder, 555 U.S. 511, 518 (2009). Certainly, a "statute's unambiguous … definition … precludes the [agency] from more expansively interpreting that term." Dig. Realty Trust, Inc. v. Somers, 138 S.Ct. 767, 782 (2018). When a statute is unambiguous, "legislative history … is irrelevant." United Air Lines, Inc. v. McMann, 434 U.S. 192, 199 (1977). The rule of lenity does not apply. Salinas v. United States, 522 U.S. 52, 66 (1997). Chevron deference does not apply. Kingdomware Techs., Inc. v. United States, 136 S.Ct. 1969, 1979 (2016).

In other words, since the parties agree that the statute is unambiguous and does not apply to bump stocks, the government's case that bump stocks are machineguns must be rejected out of hand. Every relevant legal authority mandates this result.[4] Of course, the

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[3] Interestingly enough, the government's Response to this Court no longer even alleges that the agency's interpretation is "reasonable." *Cf.* Brief in Opp. at 17.

[4] The government alleges that Applicants have not proved that "'four Justices would vote to grant certiorari should the Court of Appeals affirm the District court order without modification'" or that "this Court would then reverse…." Solicitor General Response at 9. However, based on the government's concessions outlined above, and the cases cited, Appellants believe it unlikely that this Court would be willing to disregard clearly established authority in order to give the government a victory in this case. Separately, legal circles recently have widely speculated that there may be four or five votes on the Court to reconsider

government does not prefer this result, but at the same time, it hardly can allege that the statute is ambiguous. As Applicants have noted, were the government to claim that the statute is now confusing or unclear, that would conflict with numerous past court opinions that have said otherwise and could put countless past criminal prosecutions in jeopardy. *See* Application at 7.

Thus, the government is left in the awkward position of conceding the statute to be unambiguous, yet nevertheless having been ordered by President Trump to "interpret" the statute to mean something different than it says. Rather than confront this dichotomy head on, the government redirects, claiming that all of its prior interpretations — most issued under the Obama administration — were "erroneous," and assuring this Court that "the Rule provides the best interpretation of the statute." Response at 19. Yet this is an "interpretation" which somehow has remained hidden for 85 years, which reverses over a decade of contrary ATF rulings that were touted as providing the best interpretation, and which the government concedes contradicts the statute.

As Applicants have noted, "[t]he Final Rule is the very embodiment of a violation of the separation of powers — Congressional authority being wielded by an administrative agency." Application at 5. In 2016, then-Judge Gorsuch lamented the cancer-like spread of the administrative state, opining that an agency should not be permitted to "reverse its current view 180 degrees anytime based merely on the shift of political winds…." Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring). In this case, the

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(or abandon) the Chevron doctrine. *See* Application at 8. Indeed, the government has even stated its position that the district court's opinion below — applying Chevron deference — was plain error.

agency has so far overestimated the scope of its own authority that it does not even first declare the statute ambiguous. Rather, according to the government, it is enough that the agency has stated how it believes the statute should operate, regardless of what the statute actually says.

2. From its inception in the district court below, this case has proceeded like a game of Whack-A-Mole. First, the government promulgated the Final Rule during the last year's government shutdown, then purported to wash its hands of the matter, telling the district court that the government could not possibly be required to litigate the issue during a government shutdown. *See* Motion for a Stay of All Proceedings in Light of Lapse of Appropriations, No. 1:18-cv-01429, ECF #16 (W.D. Mich.) (Dec. 28, 2018).

Then, at times, when Applicants have nailed the government down on one issue, it simply talks about an entirely different and unrelated issue. *See, e.g.*, Application at 10 n. 6. Another time, when Applicants cornered the government on certain of its erroneous statements of fact, the government claimed its errors do not matter. *See, e.g.*, Dist. Ct. Reply at 13. Once, the government even defended its mistakes by claiming that "the context makes clear" that the government meant exactly the opposite of what it said. *Id.* at 10.

Although Applicants compiled a lengthy list of factual issues on which the parties disagree — and about many of which the government disagrees with itself (*see* Dist. Ct. Reply at 6) — the government now claims that "[t]he parties do not dispute this basic description of

how a bump stock operates…."[5] Response at 11. This statement is unequivocally false — the facts of this case, specifically the operation of a bump stock, are significantly in dispute.[6]

When Applicants pointed out that the government has never provided any evidence that bump stocks were used in the Las Vegas Mandalay Bay shooting, the government accuses Plaintiffs of alleging that they in fact were not used. *See* Emergency Motion for Stay in 19-1298, ECF #6 at 20. Now, at oral argument in the D.C. Circuit on March 22, 2019, the government changed its most fundamental view of the Final Rule — from being a legislative rulemaking to now an interpretive ruling. *See* Application at 9 n.5.

Together, these deficiencies in the government's argument represent what Applicants described as "a chronic inability to engage with the core of [Applicants'] arguments, along with obfuscation and repeated false statements of fact about the way bump stocks really

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[5] For example, in its description of facts about which the government wrongly claims Applicants agree, the government alleges that "[a] **bump stock channels the recoil** from the first shot into a defined path…." Response at 11 (emphasis added). But take, for example, Applicants' Memorandum in Support of Plaintiffs' Motion for a Preliminary Injunction in the district court, which stated — as an argument heading — "A Bump Stock **Does Not Channel**, Harness, Store, or Transmit Energy." 1:18-cv-01429, ECF #10, p. 14. *See also* Dist. Ct. Reply at 6. Perhaps even more remarkably, the government's Response to this Court contradicts its own allegedly undisputed factual statement, noting that bump stocks were not previously classified as machineguns because of "the absence of mechanical parts that would channel recoil energy." Response at 5. It is entirely unclear why the government believes the parties agree on the facts, when Applicants have repeatedly stated they do not agree, and when the government does not even agree with itself.

[6] For example, the government continues to claim that "[t]his continuous fire-recoil-bump-fire lasts until the shooter releases the trigger…." Response at 4. Yet as Applicants have demonstrated numerous times, bump fire involves a series of semiautomatic shots wherein the trigger is depressed and fully released each time a shot is fired. Indeed, the shooter's finger and the firearm's trigger are physically separated between every shot. *See* Dist. Ct. Reply at 12-13.

operate." Reply in Support of Petition for Writ of Mandamus and Motion for Stay of Agency Action, No. 19-1268 (6th Circuit) (Mar. 20, 2019) at 9.

There are, however, certain aspects of the government's arguments that are clear. In this case, the government has openly admitted that it has "revis[ed]" and "expand[ed]" the statute. Dist. Ct. Reply at 2. The government is clear that it has taken this legislative task upon itself so that bump stocks are not used to "circumvent" or "undercut" the law Congress enacted. *Id.* at 3. The government assumes this task not because it believes bump stocks are **actually** machineguns, but merely because they allegedly "**mimic**" machineguns, and thus they must **become** machineguns. Application at 12 n.8. Of course, that decision is Congress's to make, not unelected and unaccountable bureaucrats.

3. The balance of the equities tips heavily in Applicants' favor. This case represents the single biggest ATF seizure of private property in history, made even more noxious because all existing bump stocks were manufactured and purchased in accordance with ATF rulings approving their sale. The government concedes that Applicants and other Americans will suffer (and indeed have suffered and are suffering) "irreparable harm" (Response at 7), yet does not seem to mind that thousands of persons are likely now exposed to the risk of felony prosecution, even before the court of appeals below has an opportunity to review a district court decision which the government admits is fundamentally flawed.

In response, the government continues its tired mantra that, because this case involves firearm accessories, it thus involves "the protection of the public and law enforcement officers…." Response at 20. Yet, when challenged numerous times to present any colorable explanation of any threat of harm (to anyone), the government punts. Apparently, naked

proclamations of "law enforcement safety" stand on their own, playing to emotion but not based on reason, with no need to explain further. However, as Applicants have noted, the government has provided not a single shred of evidence that a bump stock has ever been used in any crime. Rather, "the government simply provides generic, nonspecific, and unsubstantiated allegations that police officers will start falling dead in the streets if [the courts] take a short while to properly consider this case." Emergency Motion for a Stay of Agency Action, No. 19-1298 (6th Circuit) (Mar. 22, 2019) at 20.

Surely, the bare fact that this case involves gun owners and firearms — without more — cannot be used to declare an existential "public safety" emergency that automatically flips the balance of the equities in the government's favor. If that is the case, then Justice Thomas was certainly correct when he described "a distressing trend: the treatment of the Second Amendment as a disfavored right." Peruta v. California, 137 S.Ct. 1995, 1999 (2017) (Thomas, J., dissenting from denial of certiorari).

4. Two of three courts of appeals to have considered the government's position on bump stocks on appeal have come to the conclusion that the Final Rule must be put on hold pending resolution of the respective appeals. Guedes v. ATF, No. 19-5042 (D.C. Cir.), Order of March 23, 2019; Aposhian v. Barr, No. 19-4036 (10th Cir.), Order of March 21, 2019. The Sixth Circuit below is alone in concluding otherwise.

However, both circuits which have applied their stay orders did so only to the individual plaintiffs in the named cases, along with the organizational plaintiffs' "*bona fide* members" in the D.C. case. Guedes v. ATF, Order of March 25, 2019. This leaves Applicants, their members and supporters, and countless thousands of other bump stock

owners (or now former owners) out in the cold. There is simply no reason that an injunction in an APA challenge should not apply nationwide. Indeed, a claim under the APA is arguably one of the only scenarios in which a nationwide injunction is appropriate. *See* Lujan v. National Wildlife Federation, 497 U.S. 871, 913 (1990) (Blackmun, J., dissenting, but "apparently expressing the view of all nine Justices on this question" (*see* National Mining Ass'n v. United States Army Corps of Eng'rs, 145 F.3d 1399, 1409 (D.C. Cir. 1998)) when he noted that "if the plaintiff prevails [under the APA], the result is that the rule is invalidated, not simply that the court forbids its application to a particular individual."). Nevertheless, the D.C. Circuit went out of its way, "on the court's own motion," to limit the relief it afforded. Guedes v. ATF, Order of March 25, 2019 at 2. In fact, the order by the U.S. Court of Appeals for the District of Columbia Circuit seems to conflict with its own opinions, which require that "[w]hen a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated -- not that their application to the individual petitioners is proscribed." Harmon v. Thornburgh, 878 F.2d 484, 495 (D.C. Cir. 1989). If there are serious enough issues of law remaining to be decided (and Applicants believe they have clearly demonstrated that there are in this case), then law-abiding bump stock owners everywhere should be protected from the government's overreach.

For the foregoing reasons, Applicants hereby respectfully request that this Court grant the relief requested in their Emergency Application for Stay Pending Appellate Review filed March 25, 2019.

Respectfully submitted,

Kerry L. Morgan
PENTIUK, COUVREUR & KOBILJAK, P.C.
2915 Biddle Avenue, Suite 200
Wyandotte, MI 48192
(734) 281-7100

*Counsel of Record for Applicants
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Robert J. Olson*
William J. Olson
Jeremiah L. Morgan
Herbert W. Titus
WILLIAM J. OLSON, P.C.
370 Maple Avenue West, Suite 4
Vienna, VA 22180-5615
(703) 356-5070
Fax (703) 356-5085
wjo@mindspring.com