TABLE OF CONTENTS

APPENDIX A

920 F.3d 1

United States Court of Appeals,
District of Columbia Circuit.

Damien GUEDES, et al., Appellants

v.

BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, et al., Appellees

No. 19-5042

Consolidated with 19-5044

Argued March 22, 2019

Decided April 1, 2019

Before: Henderson, Srinivasan and Millett, Circuit Judges.

Opinion

Opinion concurring in part and dissenting in part filed by Circuit Judge Henderson.

Per Curiam:

***6** In October 2017, a lone gunman armed with bump-stock-enhanced semiautomatic weapons murdered 58 people and wounded hundreds more in a mass shooting at a concert in Las Vegas, Nevada. In the wake of that tragedy, the Bureau of Alcohol, Tobacco, Firearms and Explosives ("Bureau") promulgated through formal notice-and-comment proceedings a rule that classifies bump-stock devices as machine guns under the National Firearms Act, 26

U.S.C. §§ 5801–5872. *See* Bump-Stock-Type Devices, 83 Fed. Reg. 66,514 (Dec. 26, 2018) ("Bump-Stock Rule"). The then-Acting Attorney General Matthew Whitaker initially signed the final Bump-Stock Rule, and Attorney General William Barr independently ratified it shortly after taking office. Bump-stock owners and advocates filed separate lawsuits in the United States District Court for the District of Columbia to prevent the Rule from taking effect. The district court denied the plaintiffs' motions for a preliminary injunction to halt the Rule's effective date. *Guedes v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 356 F.Supp.3d 109 (D.D.C. 2019). We affirm the denial of preliminary injunctive relief.

I

A

The National Firearms Act (i) regulates the production, dealing in, possession, transfer, import, and export of covered firearms; (ii) creates a national firearms registry; and (iii) imposes taxes on firearms importers, manufacturers, and dealers, as well as specified transfers of covered firearms. 26 U.S.C. §§ 5801–5861. Failure to comply with the National Firearms Act's requirements results in penalties and forfeiture, and subjects the violator to the general enforcement measures available under the internal revenue laws. *Id*. §§ 5871–5872.

The firearms subject to regulation and registration under the National Firearms Act include "ma-

chinegun[s]." 26 U.S.C. § 5845(a).[1] The statute 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). ***7** The definition also covers "the frame or receiver of any such weapon," as well as "any part" 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" as long as those "parts are in the possession or under the control of a person." *Id.*

Congress expressly charged the Attorney General with the "administration and enforcement" of the National Firearms Act, 26 U.S.C. § 7801(a)(1), (a)(2)(A), and provided that the Attorney General "shall prescribe all needful rules and regulations for the enforcement of" the Act," *id.* § 7805; *see id.* § 7801(a)(2)(A).

The Gun Control Act of 1968, 18 U.S.C. § 921 *et seq.*, as amended by the Firearm Owners' Protection Act, Pub. L. No. 99-308, 100 Stat. 449 (1986), imposes both a regulatory licensing scheme and criminal prohibitions on specified firearms transactions. *See* 18 U.S.C. § 923 (licensing scheme); *id.* § 922 (criminal prohibitions). The Gun Control Act incorporates by reference the definition of machine gun in the National Firearms Act, 26 U.S.C. § 5845(b). *See* 18 U.S.C. § 921(a)(23). The Gun Control Act also ex-

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[1] Except when quoting sources, we use the two-word spelling of machine gun.

pressly delegates administrative and rulemaking authority to the Attorney General to "prescribe only such rules and regulations as are necessary to carry out the provisions of this chapter." *Id.* § 926(a).

The Attorney General has delegated the responsibility for administering and enforcing the National Firearms Act and the Gun Control Act to the Bureau. *See* 28 C.F.R. § 0.130(a).

B

1

Machine guns are generally prohibited by federal law. *See* 18 U.S.C. § 922(o). On the other hand, many firearms that require a distinct pull of the trigger to shoot each bullet are lawful. *See generally id.* § 922; 26 U.S.C. § 5845.

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. 83 Fed. Reg. at 66,516. A bump stock does so by channeling and directing the recoil energy from each shot "into the space created by the sliding stock (approximately 1.5 inches) in constrained linear rearward and forward paths." *Id.* at 66,518. In so doing, the bump stock "harnesses the firearm's recoil energy as part of a continuous back-and-forth cycle that allows the shooter to attain continuous firing" following a single pull of the trigger. *Id.* at 66,533. That design allows the shooter, by maintaining constant backward pressure on the trigger as well as

forward pressure on the front of the gun, to fire bullets continuously and at a high rate of fire to "mimic" the performance of a fully automatic weapon. *Id*. at 66,516.

Exercising his regulatory authority, the Attorney General first included a bump-stock type device within the statutory definition of "machinegun" in 2006. *See* ATF Ruling 2006-2; *see also Akins v. United States*, 312 F. App'x 197, 199 (11th Cir. 2009) (summary order). In later years, some other bumpstock devices were not categorized as machine guns. 83 Fed. Reg. at 66,514.

2

On October 1, 2017, a shooter used multiple semiautomatic rifles equipped with bump stocks to fire several hundred rounds of ammunition into a crowd of concert ***8** attendees within a roughly ten-minute span of time. The " 'rapid fire' operation" of the shooter's weapons enabled by the bump stocks left 58 dead and approximately 500 wounded. 83 Fed. Reg. at 66,516.

The Las Vegas massacre prompted an immediate outcry from the public and members of Congress. *See Guedes*, 356 F.Supp.3d at 120, 123. In response, President Trump "direct[ed] the Department of Justice, * * * as expeditiously as possible, to propose for notice and comment a rule banning all devices that turn legal weapons into machineguns." Application of the Definition of Machinegun to "Bump Fire" Stocks and Other Similar Devices, 83 Fed. Reg. 7,949, 7,949 (Feb. 20, 2018). The Bureau then revisited the status of bump stocks and addressed the variation in its pri-

or positions. 83 Fed. Reg. at 66,516–66,517. On March 29, 2018, then-Attorney General Sessions issued a Notice of Proposed Rulemaking that suggested "amend[ing] the Bureau of Alcohol, Tobacco, Firearms, and Explosives regulations to clarify that [bumpstock-type devices] are 'machineguns' " under 26 U.S.C. § 5845(b). *See* Bump-Stock-Type Devices, 83 Fed. Reg. 13,442 (March 29, 2018).

The Bureau promulgated its final rule on December 26, 2018. With respect to the statutory definition of machine gun, the Bump-Stock Rule provided that the National Firearms Act's use of "the term 'automatically' as it modifies 'shoots, is designed to shoot, or can be readily restored to shoot,' " 26 U.S.C. § 5845(b), "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." 83 Fed. Reg. at 66,553–66,554 (codified at 27 C.F.R. §§ 447.11, 478.11, 479.11). The Rule further defined "single function of the trigger," 26 U.S.C. § 5845(b), to mean "a single pull of the trigger and analogous motions." 83 Fed. Reg. at 66,553–66,554 (codified at 27 C.F.R. §§ 447.11, 478.11, 479.11).

In light of those definitions, the Bump-Stock Rule concluded that the statutory term " 'machinegun' includes a bump-stock-type device"—that is, "a device that allows a semiautomatic firearm to shoot more than one shot with a single pull of the trigger by harnessing the recoil energy of the semiautomatic firearm to which it is affixed so that the trigger resets and continues firing without additional physical manipulation of the trigger by the shooter." 83 Fed. Reg.

at 66,553–66,554 (codified at 27 C.F.R. §§ 447.11, 478.11, 479.11).

In adopting the Bump-Stock Rule, the Bureau relied on both the "plain meaning" of the statute and the agency's charge to implement the National Firearms Act and the Gun Control Act. 83 Fed. Reg. at 66,527 (citing and invoking *Chevron, U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)). The Bureau explained that the Bump-Stock Rule both "accord[s] with the plain meaning" of the statute, and "rests on a reasonable construction of" any "ambiguous" statutory terms. *Id.* In the Bureau's view, by not further defining the terms "automatically" and "single function of the trigger," Congress "left it to the [Attorney General] to define [them] in the event those terms are ambiguous." *Id*. (citing *Chevron*, 467 U.S. at 844, 104 S.Ct. 2778); *see also id*. at 66,515 (citing delegations of regulatory authority under 26 U.S.C. §§ 7801(a)(2)(A), 7805(a), and 18 U.S.C. § 926(a)).

The Bureau was explicit that the Bump-Stock Rule would only become "effective" on March 26, 2019, ninety days after promulgation. 83 Fed. Reg. at 66,514. The Bureau further assured that individuals would be subject to "criminal liability only for possessing bump-stock-type devices *after* ***9** the effective date of regulation, not for possession before that date." *Id*. at 66,525; *see also id*. (providing that the Rule "criminalize[s] only future conduct, not past possession of bump-stock-type devices that ceases by the effective date"); *id*. at 66,539 ("To the extent that owners timely destroy or abandon these bumpstock-type devices, they will not be in violation of the

law[.]"). Bump-stock owners were directed to destroy their devices or leave them at a Bureau office by March 26, 2019. *Id.* at 66,514.

Although most of the rulemaking process occurred during the tenure of Attorney General Jefferson Sessions, he resigned his office on November 7, 2018. The President then invoked the Federal Vacancies Reform Act of 1998 ("Reform Act"), 5 U.S.C. § 3345(a)(3), to designate Matthew Whitaker, who had been Sessions' chief of staff, "to perform the functions and duties of the office of Attorney General, until the position is filled by appointment or subsequent designation." Memorandum from President Donald Trump to Matthew George Whitaker, Chief of Staff, Department of Justice (Nov. 8, 2018), J.A. 277. The final Bump-Stock Rule was signed by then-Acting Attorney General Whitaker. Whitaker served as the Acting Attorney General for 98 days, until William Barr was sworn in as the Attorney General on February 14, 2019. *See* Bump-Stock-Type Devices, 84 Fed. Reg. 9,239, 9,240 (March 14, 2019).

On March 11, 2019, Attorney General Barr announced that he had "independently reevaluate[d]" the Bump-Stock Rule and the "underlying rulemaking record." 94 Fed. Reg. at 9,240. "[H]aving reevaluated those materials without any deference to [Whitaker's] earlier decision," Attorney General Barr "personally c[a]me to the conclusion that it is appropriate to ratify and affirm the final rule," and did so. *Id.*

C

Three groups of bump-stock owners and advocates filed suit in the United States District Court for the

District of Columbia to prevent the Bump-Stock Rule from taking effect. *See Damien Guedes v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, No. 18-cv-2988; *David Codrea v. William P. Barr*, No. 18-cv-3086; *Firearms Policy Coalition, Inc. v. William P. Barr*, No. 18-cv-3083. As relevant here, the Guedes plaintiffs ("Guedes") and the Codrea plaintiffs ("Codrea") argued that the Bureau promulgated the Bump-Stock Rule in violation of the Administrative Procedure Act, 5 U.S.C. § 500 *et seq*. Also, the Firearms Policy Coalition ("Coalition") and Codrea argued that Acting Attorney General Whitaker lacked the legal authority to promulgate the Rule because his designation as Acting Attorney General violated the Attorney General Act, 28 U.S.C. § 508, and the Appointments Clause of the Constitution, Article II, Section 2, Clause 2.

The district court denied all three motions for a preliminary injunction. *Guedes*, 356 F.Supp.3d at 119. The district court concluded that Guedes, Codrea, and the Coalition had not demonstrated a likelihood of success on the merits. The court first held that "[m]ost of the plaintiffs' administrative law challenges are foreclosed by the *Chevron* doctrine," and the Rule "adequately explained" the agency's decision to classify bump-stock-type devices as machine guns. *Id*. at 120. As to the challenges to Whitaker's authority, the district court held that the Reform Act permits the President to deviate from the line of succession that the Attorney General Act provides, subject to certain statutory limitations that indisputably were satisfied with Whitaker's appointment. *Guedes*, 356 F.Supp.3d at 120–121. The court also rejected the

Coalition's and Codrea's Appointments ***10** Clause challenge as "foreclosed by Supreme Court precedent and historical practice." *Id*. at 121.

Guedes, Codrea, and the Coalition all appealed. But none of them sought a stay or an injunction pending appeal. They chose instead to seek highly expedited disposition, which this court granted. While the appeal was pending, Attorney General Barr ratified and individually endorsed the final Bump-Stock Rule. At the post-argument request of the Coalition, we voluntarily dismissed its appeal. Order, *Guedes v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, No. 19-5042, 2019 WL 1398194 (March 23, 2019) (per curiam). But because Codrea presses the same challenge to Whitaker's authority to promulgate the Rule as the Coalition had raised, Codrea Br. 20–21, that issue remains before us in reviewing the district court's denial of a preliminary injunction.

II

A preliminary injunction is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008). The plaintiffs bear the burden of persuasion in seeking preliminary relief. *Cobell v. Norton*, 391 F.3d 251, 258 (D.C. Cir. 2004). Specifically, Guedes and Codrea must establish that: (1) they are "likely to succeed on the merits"; (2) they are "likely to suffer irreparable harm in the absence of preliminary relief"; (3) the "balance of equities" tips in their favor; and (4) "an injunction is

in the public interest." *Winter*, 555 U.S. at 20, 129 S.Ct. 365; *accord Aamer v. Obama*, 742 F.3d 1023, 1038 (D.C. Cir. 2014). The last two factors "merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435, 129 S.Ct. 1749, 173 L.Ed.2d 550 (2009).

We review a district court's denial of a preliminary injunction for an abuse of discretion, but in doing so we review the district court's legal conclusions *de novo* and any findings of fact for clear error. *Serono Labs., Inc. v. Shalala*, 158 F.3d 1313, 1318 (D.C. Cir. 1998).

III

A foundational requirement for obtaining preliminary injunctive relief is that the plaintiffs demonstrate a likelihood of success on the merits. *See Nken*, 556 U.S. at 434, 129 S.Ct. 1749 ("The first two factors of the traditional standard [*i.e.*, likelihood of success on the merits and irreparable injury] are the most critical."); *Sherley v. Sebelius*, 644 F.3d 388, 393 (D.C. Cir. 2011) (raising the possibility that "likelihood of success is an independent, free-standing requirement for a preliminary injunction") (quoting *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1296 (D.C. Cir. 2009) (Kavanaugh, J., concurring)).

Neither the challenge to Acting Attorney General Whitaker's authority nor the objections to the substantive validity of the Bump-Stock Rule clears that hurdle. And because the plaintiffs have shown no likelihood of success on the merits, we choose not to "proceed to review the other three preliminary injunction factors." *Arkansas Dairy Coop. Ass'n v. Unit-*

ed States Dep't of Agric., 573 F.3d 815, 832 (D.C. Cir. 2009).

A

Codrea levels a broadside attack on the rule as categorically invalid because Acting Attorney General Whitaker allegedly lacked the legal authority to approve the Bump-Stock Rule's issuance. Specifically, Codrea argues that Whitaker's designation ***11** to serve as Acting Attorney General violated both the Attorney General Act, 28 U.S.C. § 508, and the Constitution's Appointments Clause, U.S. Const. Art. II, § 2, cl. 2. Whether or not those arguments would otherwise have had merit (something we do not decide), Codrea has no likelihood of success on this claim because the rule has been independently ratified by Attorney General William Barr, whose valid appointment and authority to ratify is unquestioned.

The Appointments Clause requires that "all * * * Officers of the United States" be appointed by the President "by and with the Advice and Consent of the Senate." U.S. Const. Art. II, § 2, cl. 2. This requirement is the "default manner of appointment," *Edmond v. United States*, 520 U.S. 651, 660, 117 S.Ct. 1573, 137 L.Ed.2d 917 (1997), with the only exception being that Congress may vest the appointment of "inferior Officers" in "the President alone," "Courts of Law," and "the Heads of Departments," U.S. Const. Art. II, § 2, cl. 2.

One stark consequence of this scheme is that "the responsibilities of an office * * * [can] go unperformed if a vacancy arises and the President and Senate cannot promptly agree on a replacement." *National*

Labor Relations Bd. v. SW Gen., Inc., —— U.S. ——, 137 S.Ct. 929, 934, 197 L.Ed.2d 263 (2017); *Buckley v. Valeo,* 424 U.S. 1, 132, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) (per curiam) ("[A]ll officers of the United States are to be appointed in accordance with the Clause."). "Since the beginning of the nation," Congress has addressed this problem through "vacancy statutes" that grant the President the authority to designate acting officials to "keep the federal bureaucracy humming." *SW General, Inc. v. National Labor Relations Bd.*, 796 F.3d 67, 70 (D.C. Cir. 2015) (quotation marks omitted), *aff'd*, —— U.S. ——, 137 S.Ct. 929, 197 L.Ed.2d 263 (2017).

The Reform Act is the most recent iteration of that interbranch accommodation. It provides for three options whenever a Senate-confirmed officer "dies, resigns, or is otherwise unable to perform the functions and duties of the office[.]" 5 U.S.C. § 3345(a). The default is for the "first assistant" to take the helm. *Id.* § 3345(a)(1). But the Reform Act allows the President to choose another person instead, as long as that person is either a Senate-confirmed appointee, *id.* § 3345(a)(2), or an employee within the same agency, subject to certain duration-of-service and pay-scale requirements, *id.* § 3345(a)(3). Mr. Whitaker was designated under the latter option, since his service as chief of staff comported with the Reform Act's duration-of-service and pay grade requirements. *Guedes*, 356 F.Supp.3d at 138 ("The parties do not dispute that Whitaker satisfies the eligibility criteria in the [Reform Act.]").

Congress broadly designated the Reform Act to be the "exclusive means for temporarily authorizing an

acting official to perform the functions and duties of any" Executive office that would otherwise require Senate confirmation. 5 U.S.C. § 3347(a). But there is an "unless"—Congress crafted exceptions to that exclusivity. *Id*. As relevant here, Section 3347(a) does not control if another "statutory provision expressly * * * designates an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity[.]" *Id*. § 3347(a)(1)(B).

The Attorney General Act, 28 U.S.C. § 508, is one of those office-specific vacancy statutes. That statute specifies a line of succession for a vacancy in the Office of the Attorney General. First in line is the Deputy Attorney General, who "may exercise all the duties of th[e] office" and who, ***12** "for the purpose of section 3345 of [the Reform Act]," is deemed "the first assistant to the Attorney General." 28 U.S.C. § 508(a). If the Deputy Attorney General is unavailable, the Attorney General Act directs that "the Associate Attorney General shall act as Attorney General," and "[t]he Attorney General may designate the Solicitor General and the Assistant Attorneys General, in further order of succession, to act as Attorney General." *Id*. § 508(b).

Codrea and the Department have battled at length over the interaction between the Reform Act and the Attorney General Act in the event of a vacancy in the position of the Attorney General. The Government maintains, and the district court agreed, that the two statutes provide the President with alternative means of designating an acting replacement. *Guedes*, 356 F.Supp.3d at 139; Gov't Br. 40–58. Codrea, by comparison, reads the Attorney General Act as the

exclusive path for designating an acting Attorney General, with the Reform Act available only after the line of succession in the Attorney General Act has been exhausted. Codrea Br. 20–21 (incorporating Coalition Br. 6). Codrea also argues that the designation of a mere employee to perform the duties of a principal office like that of the Attorney General, even on an acting basis, raises substantial constitutional questions, at least when no exigency requires that designation. *Id.* (adopting Coalition Reply Br. 15).

We need not wade into that thicket. While this appeal was pending, Attorney General Barr independently "familiarized [him]self with the rulemaking record [and] * * * reevaluated those materials without any deference to [Whitaker's] earlier decision." 84 Fed. Reg. at 9,240. Following this "independent[ ] reevaluat[ion] [of] the * * * rule and the underlying rulemaking record," Attorney General Barr "personally c[a]me to the conclusion that it [wa]s appropriate to ratify and affirm the final rule." *Id.*

Codrea accepts the validity of Attorney General Barr's ratification as to both his statutory and his Appointments Clause claims. Codrea Br. 20–21 (adopting Coalition Reply Br. 22); *see also* 5 U.S.C. § 3348(d)(1)–(2) (only prohibiting the ratification of nondelegable duties); 28 U.S.C. § 510 (authorizing delegation of "any function of the Attorney General"). And with that act of ratification and the concession, Codrea's likelihood of success on the merits of his challenge to the rule based on Acting Attorney General Whitaker's role in its promulgation reduces to zero.

Codrea insists otherwise. He argues that Attorney General Barr's ratification does not moot the claim because of the mootness doctrine's exceptions for a defendant's voluntary cessation of challenged conduct or for acts capable of repetition yet evading review. Codrea Br. 20–21 (adopting Coalition Reply Br. 17). That argument fails because ratification is generally treated as a disposition on the legal merits of the appointments challenge and, in any event, no mootness exception applies in this case.

1

The mootness doctrine "ensures compliance with Article III's case and controversy requirement by 'limit[ing] federal courts to deciding actual, ongoing controversies.' " *Aref v. Lynch*, 833 F.3d 242, 250 (D.C. Cir. 2016) (quoting *American Bar Ass'n v. FTC*, 636 F.3d 641, 645 (D.C. Cir. 2011)). A case is moot if our decision will neither "presently affect the parties' rights nor have a more-than-speculative chance of affecting them in the future." *Id.* (internal quotation marks omitted) (quoting *American Bar Ass'n*, 636 F.3d at 645).

***13** We have repeatedly held that a properly appointed official's ratification of an allegedly improper official's prior action, rather than mooting a claim, resolves the claim on the merits by "remedy[ing] [the] defect" (if any) from the initial appointment. *Wilkes-Barre Hosp. Co. v. National Labor Relations Bd.*, 857 F.3d 364, 371 (D.C. Cir. 2017). This is so regardless of whether "the previous [officer] was" or was not "validly appointed under either the Vacancies Act or the Appointments Clause." *Intercollegiate Broad. Sys.*

Inc. v. Copyright Royalty Bd., 796 F.3d 111, 119 n.3 (D.C. Cir. 2015) (ratification defeats Appointments Clause challenge) (citing *Doolin Sec. Sav. Bank, F.S.B. v. Office of Thrift Supervision*, 139 F.3d 203, 205, 207, 212–214 (D.C. Cir. 1998), *superseded by statute on other grounds*, Federal Vacancies Reform Act of 1998, Pub. L. No. 105-277, 122 Stat. 2681, *as recognized in SW Gen., Inc.*, 796 F.3d at 70–71); *FEC v. Legi-Tech, Inc.*, 75 F.3d 704, 706, 708–710 (D.C. Cir. 1996) (similar).

In *Doolin*, we treated the curative effects of ratification as analogous to rendering any defect in the agency's action "harmless error" under the Administrative Procedure Act, 5 U.S.C. § 706. 139 F.3d at 212. So viewed, ratification purges any residual taint or prejudice left over from the allegedly invalid appointment. *Legi-Tech,* 75 F.3d at 708 n.5 ("[T]he issue is not whether *Legi-Tech* was prejudiced by the original [decision], which it undoubtedly was, but whether, given the FEC's remedial actions, there is sufficient remaining prejudice to warrant dismissal."); *Intercollegiate Broad.*, 796 F.3d at 124 (citing *Legi-Tech* for the same proposition). When viewed as analogous to harmless-error analysis, ratification is treated as resolving the merits of the challenger's claim in the agency's favor. *Cf. Doolin*, 139 F.3d at 212; *Combat Veterans for Cong. Political Action Comm. v. FEC*, 795 F.3d 151, 157 (D.C. Cir. 2015) (rejecting a procedural challenge to a Federal Election Commission fine on the merits because the alleged infirmity produced no "prejudice").

Those cases' treatment of ratification as resolving the merits of a claimed appointment flaw parallels

how this court analyzes the agency practice of post-promulgation notice and comment. When an agency "issues final regulations without the requisite comment period and then tries to *cure* that Administrative Procedure Act violation by holding a post-promulgation comment period," we have repeatedly held that the agency prevails on the merits as long as it can demonstrate that it has kept an "open mind" throughout the subsequent comment period. *See*, *e.g.*, *Intermountain Ins. Serv. of Vail v. Commissioner,* 650 F.3d 691, 709 (D.C. Cir. 2011) (emphasis added), *vacated and remanded on other grounds*, 566 U.S. 972, 132 S.Ct. 2120, 182 L.Ed.2d 865 (2012), *dismissed on unopposed motion*, No. 10-1204, 2012 WL 2371486, at *1 (D.C. Cir. June 11, 2012); *Advocates for Highway & Auto Safety v. Federal Highway Admin.,* 28 F.3d 1288, 1291–1293 (D.C. Cir. 1994) (same).

Codrea points to *Landry v. FDIC*, 204 F.3d 1125 (D.C. Cir. 2000), in which this court resolved the merits of an Appointments Clause challenge to an administrative law judge's decision, notwithstanding the subsequent *de novo* review and affirmance of that decision by the agency itself, *id.* at 1131. That case is of no help to Codrea. *Landry* carved out a narrow exception to ratification's curative effect for Appointments Clause challenges to the acts of "purely decision recommending employees." *Id.* at 1131–1132. This court explained that, if ratification were an escape hatch in those cases, "then all such arrangements would escape judicial review" because the challenged ALJ action would never obtain judicial review without first ***14** exhausting that ratifying internal agency review process. *Id.* Only when that particular "catch-22" is

present does the *Landry* approach apply. *Id.*; *accord Intercollegiate Broad.*, 796 F.3d at 124 (distinguishing *Landry* on that basis). The succession of a Presidentially appointed and Senate-confirmed Attorney General does not remotely implicate the *Landry* scenario.

2

Codrea argues that we should analyze the effect of ratification through the lens of mootness rather than treating ratification as resolving the case on the merits. Codrea Br. 20–21 (adopting Coalition Reply Br. 16–17).

Codrea notes that all of our prior ratification cases dealt with appointments challenges that arose as defenses to enforcement actions that were being prosecuted by a properly appointed official, but that were allegedly "tainted" by some preceding action of an unlawfully appointed official. Codrea Br. 20–21 (adopting Coalition Reply Br. 20); *see, e.g.*, *Intercollegiate Broad.*, 796 F.3d at 124 (raising Appointments Clause defense in a "subsequent proceeding" based on the "continuing taint arising from the first" proceeding); *Doolin*, 139 F.3d at 212 (raising Appointments Clause challenge to officer who issued the initial "Notice of Charges" to collaterally attack the ultimate cease-and-desist order issued by a validly appointed officer).

In that scenario, Codrea reasons, the appointment issue arose only as an affirmative defense; no act intervened during litigation to eliminate the factual basis for an affirmative claim for relief in a way that generally would trigger mootness analysis. Here, by

contrast, Codrea has raised as a plaintiff an independent, pre-enforcement challenge to an agency rule in an attempt to avert a present duty to comply, and he filed suit at a time when the allegedly improperly appointed official was still in office and enforcing his own challenged decision. For that reason, the effect of Attorney General Barr's intervening ratification must be guided not by a merits analysis, but rather by mootness. Codrea Br. 20–21 (adopting Coalition Reply Br. 17); *see, e.g.*, *EEOC v. First Citizens Bank of Billings*, 758 F.2d 397, 399–400 (9th Cir. 1985) (treating congressional ratification as causing mootness); *see also Thomas v. Network Solutions, Inc.*, 176 F.3d 500, 506 (D.C. Cir. 1999) (assuming that congressional ratification mooted an unauthorized-tax claim).

The problem for Codrea is that, even if we were to adopt his proposed analytical approach, his claim still lacks any discernible likelihood of success on the merits because no exception to mootness fits this scenario.

First, this case does not implicate the exception to mootness for cases that are "capable of repetition, yet evading review." *United States v. Sanchez-Gomez*, —– U.S. ——, 138 S.Ct. 1532, 1540, 200 L.Ed.2d 792 (2018). For a controversy to be "capable of repetition," Codrea bears the burden of showing that (i) the challenged action is "in its duration too short to be fully litigated prior to its cessation or expiration," and (ii) there is a "reasonable expectation that the same complaining party will be subject to the same action again." *Davis v. FEC*, 554 U.S. 724, 735, 128 S.Ct. 2759, 171 L.Ed.2d 737 (2008) (citations omitted);

Honeywell Int'l, Inc. v. Nuclear Regulatory Comm'n, 628 F.3d 568, 576 (D.C. Cir. 2010) (party asserting capable of repetition bears burden of proof) (citing *Southern Co. Servs., Inc. v. FERC*, 416 F.3d 39, 43 (D.C. Cir. 2005)). Under that test, "[t]he 'wrong' that is, or is not, 'capable of repetition' must be defined in terms of the *precise controversy it spawns*." ***15** *People for Ethical Treatment of Animals, Inc. v. Gittens*, 396 F.3d 416, 422 (D.C. Cir. 2005) (emphasis added). This demand for particularity ensures "that courts resolve only continuing controversies between the parties." *Id.*

Here, Codrea has wholly failed to show that appointments claims like his are too short-fused to obtain judicial resolution, or that there is anything more than the most remote and "theoretical[ ] possib[ility]" of repetition, *Nelson v. Miller*, 570 F.3d 868, 882 (7th Cir. 2009). For Codrea's legal injury to recur, (i) the Attorney General would have to leave office; (ii) the President would then have to appoint a mere employee in his stead (something Codrea argues has not happened more than a "handful" of times in history (Codrea Br. 20–21 (adopting Coalition Br. 38; Coalition Reply Br. 15–16)); (iii) that the new Acting Attorney General would then have to promulgate a legislative rule; and (iv) by sheer coincidence, that rule would have to adversely affect Codrea or his co-plaintiffs' legal rights. It takes more than such quixotic speculation to save a case from mootness, even when the Executive continues to defend its prerogatives in litigation. *See Larsen v. United States Navy*, 525 F.3d 1, 4 (D.C. Cir. 2008).

Second, Codrea's invocation of the rule that a defendant's voluntary cessation of challenged activity will not moot a case fares no better. *See Friends of the Earth, Inc. v. Laidlaw Environmental Servs.*, 528 U.S. 167, 189, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000). The voluntary-cessation rule is designed to deter the wrongdoer who would otherwise "engage in unlawful conduct, stop when sued to have the case declared moot, then pick up where he left off, repeating this cycle until he achieves all his unlawful ends." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91, 133 S.Ct. 721, 184 L.Ed.2d 553 (2013). For that reason, a party's voluntary cessation of challenged conduct will not moot a case unless it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Laidlaw Environmental Servs.*, 528 U.S. at 189, 120 S.Ct. 693 (internal quotation marks omitted).[2]

The voluntary-cessation doctrine has no apparent relevance here. That is because the power to effect the legally relevant ratification by a duly installed Attorney General—the supposed source of "cessation"—lies beyond the unilateral legal authority of any of the named defendants, the Office of the Attor-

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[2] It bears noting that the merits-based analysis of prejudice that Codrea seeks to avoid includes a somewhat analogous exception for a defendant's strategic manipulation of the process to avoid judicial review. *See Sugar Cane Growers Co-op. of Fla. v. Veneman*, 289 F.3d 89, 96 (D.C. Cir. 2002) ("[I]f the government could skip [the APA's rulemaking] procedures, engage in informal consultation, and then be protected from judicial review unless a petitioner could show a new argument—not [already] presented informally," then the APA's prescribed rulemaking process "obviously would be eviscerated.").

ney General, or even the President of the United States. Under the peculiar circumstances of this case, where the ratification was a result of the combined actions of a presidential nomination and an independent Senate confirmation, the "voluntariness" in "voluntary cessation" is not implicated.

Aimed as it is at party manipulation of the judicial process through the false pretense of singlehandedly ending a dispute, the voluntary-cessation exception presupposes that the infringing party voluntarily exercises its own unilateral power not only to terminate the suit and evade judicial review, but also to "pick up where he left off" and complete the devious "cycle" after the litigation is dismissed. *Already, LLC*, 568 U.S. at 91, 133 S.Ct. 721; ***16** *see City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278, 284 n.1, 121 S.Ct. 743, 148 L.Ed.2d 757 (2001) (explaining that the "rule traces to the principle that *a party* should not be able to evade judicial review, or to defeat a judgment, by temporarily altering questionable behavior") (emphasis added); *Knox v. Service Emps. Int'l Union*, 567 U.S. 298, 307, 132 S.Ct. 2277, 183 L.Ed.2d 281 (2012) (voluntary cessation concerns a defendant's "*resumption* of * * * challenged conduct as soon as the case is dismissed") (emphasis added); *United States v. W.T. Grant Co.*, 345 U.S. 629, 632, 73 S.Ct. 894, 97 L.Ed. 1303 (1953) (voluntary-cessation doctrine rooted in concern over leaving a "defendant * * * free to return to his old ways").

That framework ill fits a situation where, as here, the intervening acts of independent third parties are essential to accomplish a legally relevant change in circumstances. Here, ratification materially changed

the circumstances of the litigation only because it was undertaken by a validly appointed Attorney General whose authority to act Codrea does not challenge. Codrea Br. 20–21 (adopting Coalition Reply Br. 22) ("Plaintiff assumes that the ratification was not tainted by Mr. Whitaker's actions in promulgating the Rule in the first place."). That "cessation" of the legal challenge was outside the hands of the named defendants—then-Acting Attorney General Whitaker, the Bureau of Alcohol, Tobacco, Firearms and Explosives, Acting Bureau Director Thomas Brandon, and Attorney General William Barr. The essential predicate for that legally relevant form of cessation was the (non-defendant) President's nomination and the (non-defendant) Senate's independent confirmation of a new Attorney General, and their endowment of him with the authority to "cease" the litigation by way of ratification.

In other words, the defendants in this case lacked the unilateral power, or the power at all, to voluntarily cease and restart the conduct complained of—having a Reform-Act-appointed Acting Attorney General promulgate or enforce a rule adversely affecting Guedes and Codrea. Without such power, the risk of manipulating the litigation process evaporates. In addition, the deliberative burdens of the Senate's intervening and independent advice-and-consent role extinguish the strategic concerns animating the voluntary-cessation doctrine in the first place. *Cf. Clarke v. United States*, 915 F.2d 699, 705 (D.C. Cir. 1990) (en banc) (raising "serious doubts" about "applying the doctrine to Congress" because, "in the absence of overwhelming evidence (and perhaps not then), it

would seem inappropriate for the courts either to impute such manipulative conduct to a coordinate branch of government, or to apply against that branch a doctrine that appears to rest on the likelihood of a manipulative purpose"); *United States Dep't of the Treasury v. Galioto*, 477 U.S. 556, 560, 106 S.Ct. 2683, 91 L.Ed.2d 459 (1986) (analyzing the mooting effects of Congressional amendment without reference to voluntary cessation). At the very least, Codrea has a vanishingly low likelihood of prevailing on that theory.[3]

***17** In sum, because Codrea has shown no likelihood of success on his appointment-based challenges due to Attorney General Barr's independent and unchallenged ratification of the Bump-Stock Rule, the district court did not abuse its discretion in denying a preliminary injunction based on those statutory and constitutional claims.

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[3] This case does not present, and we need not decide, whether the President's unilateral designation of a different *acting* Attorney General would have implicated the voluntary-cessation doctrine. *See Trinity Lutheran Church of Columbia, Inc. v. Comer*, —— U.S. ——, 137 S.Ct. 2012, 2019 n.1, 198 L.Ed.2d 551 (2017) (no mootness when Governor ordered state Department of Natural Resources to rescind challenged policy, where there was no evidence the Department "could not revert to its policy of excluding religious organizations"); *cf. Doe v. Harris*, 696 F.2d 109, 113 (D.C. Cir. 1982) (applying the capable of repetition doctrine to "different official actors" within the same U.S. Attorney's Office). What matters in this case is not that the Bump-Stock Rule was ratified by someone other than Acting Attorney General Whitaker, but that it was ratified by someone whose authority to undertake such a ratification—by virtue of Presidential nomination and Senate confirmation—Codrea admits he cannot challenge.

B

We next consider the plaintiffs' contention that the Bureau lacked statutory authority to promulgate the Bump-Stock Rule. Specifically, Guedes and Codrea argue that the statutory definition of "machinegun" cannot be read to include bumpstock devices. Guedes and Codrea have not demonstrated a substantial likelihood of success on that claim.

1

At the outset, we must determine the standard by which to assess the Rule's conclusion that bump-stock devices amount to "machineguns" under the statutory definition. In particular, should we examine the Rule's conclusion to that effect under the *Chevron* framework, or is *Chevron* inapplicable?

If *Chevron* treatment is in order, we first ask if the statute is ambiguous concerning whether bump-stock devices can be considered "machineguns"; and if so, we sustain the Rule's conclusion that bump-stock devices are machine guns as long as it is reasonable. *See*, *e.g.*, *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 218, 129 S.Ct. 1498, 173 L.Ed.2d 369 (2009). Crucially, at this second step under *Chevron*, an "agency need not adopt * * * the best reading of the statute, but merely one that is permissible." *Dada v. Mukasey*, 554 U.S. 1, 29 n.1, 128 S.Ct. 2307, 171 L.Ed.2d 178 (2008). Conversely, if *Chevron*'s two-step framework is inapplicable, we accept the agency's interpretation only if it is the best reading of the statute.

Much, then, can turn on whether an agency's interpretation merits treatment under *Chevron*. For

that reason, and because none of the parties presents an argument for applying the *Chevron* framework (the plaintiffs contend that *Chevron* is inapplicable and the government does not argue otherwise), we devote considerable attention to the question of *Chevron*'s applicability to the Bump-Stock Rule. We conclude that the Rule warrants consideration under *Chevron*.

a

The applicability of *Chevron* materially depends on what kind of rule the Bump-Stock Rule represents. There is a "central distinction" under the Administrative Procedure Act between legislative rules and interpretive rules. *Chrysler Corp v. Brown*, 441 U.S. 281, 301, 99 S.Ct. 1705, 60 L.Ed.2d 208 (1979); *see* 5 U.S.C. § 553(b), (d). And that distinction centrally informs the applicability of *Chevron*. "Legislative rules generally receive *Chevron* deference," *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 251 (D.C. Cir. 2014), whereas "interpretive rules * * * enjoy no *Chevron* status as a class," *United States v. Mead Corp.*, 533 U.S. 218, 232, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001); *see also Nat'l Mining Ass'n*, 758 F.3d at 251 (observing that interpretive rules "often do not" receive *Chevron* deference).

Legislative rules result from an agency's exercise of "delegated legislative ***18** power" from Congress. *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1109 (D.C. Cir. 1993). Accordingly, legislative rules have the "force and effect of law." *Encino Motorcars, LLC v. Navarro*, —— U.S. ——, 136 S.Ct. 2117, 2122, 195 L.Ed.2d 382 (2016). Inter-

pretive rules, on the other hand, are "issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers." *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 99, 115 S.Ct. 1232, 131 L.Ed.2d 106 (1995). Because they are not an exercise of delegated legislative authority, interpretive rules "do not have the force and effect of law and are not accorded that weight in the adjudicatory process." *Id.* While legislative rules generally require notice and comment, interpretive rules need not issue pursuant to any formalized procedures. *See* 5 U.S.C. § 553(b).

To determine whether a rule is legislative or interpretive, we ask whether the agency "intended" to speak with the force of law. *Encino Motorcars*, 136 S.Ct. at 2122; *Am. Mining Cong.*, 995 F.2d at 1109. Central to the analysis is the "language actually used by the agency." *Cmty. Nutrition Inst. v. Young*, 818 F.2d 943, 946 (D.C. Cir. 1987) (per curiam). We also consider "whether the agency has published the rule in the Code of Federal Regulations" and "whether the agency has explicitly invoked its general legislative authority." *Am. Mining Cong.*, 995 F.2d at 1112.

All pertinent indicia of agency intent confirm that the Bump-Stock Rule is a legislative rule. The Rule unequivocally bespeaks an effort by the Bureau to adjust the legal rights and obligations of bump-stock owners—i.e., to act with the force of law. The Rule makes clear throughout that possession of bump-stock devices will become unlawful only as of the Rule's effective date, not before.

To that end, the Rule informs bump-stock owners that their devices "*will be prohibited when* this rule becomes effective." 83 Fed. Reg. at 66,514 (emphasis added). It correspondingly assures bump-stock owners that "[a]nyone currently in possession of a bump-stock-type device *is not acting unlawfully unless* they fail to relinquish or destroy their device after the effective date of this regulation." *Id.* at 66,523 (emphasis added). And the Rule "provides specific information about acceptable methods of disposal, as well as the timeframe under which disposal must be accomplished *to avoid violating 18 U.S.C. § 922(o)*." *Id.* at 66,530 (emphasis added). Reinforcing the point, the Rule says it will "*criminalize only future conduct, not past possession* of bumpstock-type devices that ceases by the effective date." *Id.* at 66,525 (emphasis added).

Those statements, and others like them in the Rule, embody an effort to "directly govern[ ] the conduct of members of the public, affecting individual rights and obligations." *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 172, 127 S.Ct. 2339, 168 L.Ed.2d 54 (2007) (internal quotation marks omitted). That is powerful evidence that the Bureau "intended [the Rule] as a binding application of its rulemaking authority." *Id.*

The Bureau further evinced its intent to exercise legislative authority by expressly invoking the *Chevron* framework and then elaborating at length as to how *Chevron* applies to the Rule. The Rule observes that, "[w]hen a court is called upon to review an agency's construction of the statute it administers, the court looks to the framework set forth in *Chevron*

U.S.A., Inc. v. Natural Resources Defense Council, Inc." 83 Fed. Reg. at 66,527. The Rule then contains several paragraphs of ***19** analysis describing the application of each of *Chevron*'s two steps to the Rule. That discussion is compelling evidence that the Bureau did not conceive of its rule as merely interpretive. Because "interpretive rules * * * enjoy no *Chevron* status as a class," *Mead*, 533 U.S. at 232, 121 S.Ct. 2164, the Bureau's exegesis on *Chevron* would have served no purpose unless the agency intended the Rule to be legislative in character.

Other evidence of agency intent points to the same conclusion. One consideration under our decisions is "whether the agency has explicitly invoked its general legislative authority." *Am. Mining Cong.*, 995 F.2d at 1112. The Rule does exactly that, invoking two separate delegations of legislative authority. *See* 83 Fed. Reg. at 66,515. The first is 18 U.S.C. § 926(a), which empowers the Attorney General to "prescribe only such rules and regulations as are necessary to carry out the provisions of [the Gun Control Act]." The second is 26 U.S.C. § 7805(a), which grants the Attorney General authority to "prescribe all needful rules and regulations" for the enforcement of the National Firearms Act. *See* 26 U.S.C. § 7801(a)(2)(A). Both of those provisions, the Rule states, vest "the responsibility for administering and enforcing the NFA and GCA" in the Attorney General. 83 Fed. Reg. at 66,515.

The Rule's publication in the Code of Federal Regulations also indicates that it is a legislative rule. *See Am. Mining Cong.*, 995 F.2d at 1112. By statute, publication in the Code of Federal Regulations is limited

to rules "having general applicability and *legal effect*." 44 U.S.C. § 1510 (emphasis added). The Bump-Stock Rule amends three sections of the Code, modifying the regulatory definition of "machine gun" and "adding a sentence to clarify that a 'machine gun' includes * * * a bump-stock-type device." 83 Fed. Reg. at 66,519 (amending 27 C.F.R. §§ 447.11, 478.11, 479.11). Those sorts of amendments would be highly unusual for a mere interpretive rule.

In short, the Rule confirms throughout, in numerous ways, that it intends to speak with the force of law. It contained all of those indicia uniformly conveying its intended legislative character when Acting Attorney General Whitaker issued it. And it still contained those indicia when Attorney General Barr subsequently ratified it.

Notwithstanding all of that, the government's litigating position in this case seeks to reimagine the Rule as merely interpretive. The government's briefing says that the Rule is "not an act of legislative rulemaking," and that the Rule instead only "sets forth the agency's interpretation of the best reading of the statutory definition of 'machinegun.' " Gov't Br. 38.

The government's position to that effect has highly significant implications for owners of bump-stock devices. Whereas a legislative rule, as an exercise of delegated lawmaking authority, can establish a new legal rule going forward, an interpretive rule by nature simply communicates the agency's interpretation of what a statute has always meant. So here, if the Bump-Stock Rule is merely interpretive, it con-

veys the government's understanding that bump-stock devices have always been machine guns under the statute. The government says exactly that in its brief, observing that, per the interpretation set out in the Rule, "any bump stock made after 1986 has *always* been a machinegun." Gov't Br. 38.

That in turn would mean that bump-stock owners have been committing a felony for the entire time they have possessed the devices. Under 18 U.S.C. § 922(o)(1), it is "unlawful for any person to transfer or possess a machinegun," and violators "shall be fined [or] imprisoned not more ***20** than 10 years, or both," *id.* § 924(a)(2). As the government acknowledges, under the view it espouses in its brief that the Rule is interpretive, the possession of bump stocks "has *always* been banned." Gov't Br. 38. And that would be so notwithstanding a number of prior contrary interpretations by the agency. *See* 83 Fed. Reg. at 13,444–13,446.

The government's account of the Rule in its brief—including its position that bump-stock owners have always been felons—is incompatible with the Rule's terms. The Rule gives no indication that bump stocks have always been machine guns or that bump-stock owners have been committing a felony for the entire time they have possessed the device. The Rule in fact says the opposite. After all, it establishes an effective date, *after* which (and only after which) bump-stock possession will be prohibited. 83 Fed. Reg. at 66,523. A future effective date of that kind cannot be reconciled with a supposed intent to convey that bump-stock possession "has *always* been banned." Gov't Br. 38.

The government now characterizes the Rule's effective date as merely marking the end of a period of discretionary withholding of enforcement, in that the Rule informs the public that the Department will "not pursue enforcement action against individuals who sold or possessed bump stocks prior to the effective date." *Id.* at 38–39. Once again, that is not what the Rule says. The government engages in enforcement discretion when it voluntarily refrains from prosecuting a person *even though he is acting unlawfully*. The Rule, by contrast, announces that a person "in possession of a bumpstock type device *is not acting unlawfully* unless they fail to relinquish or destroy their device *after* the effective date of this regulation." 83 Fed. Reg. at 66,523 (emphases added). That is the language of a legislative rule establishing when bump-stock possession will become unlawful, not an interpretive rule indicating it has always been unlawful.

In short, the government cannot now, in litigation, reconceive the Bump-Stock Rule as an interpretive rule. The character of a rule depends on the agency's intent when issuing it, not on counsel's description of the rule during subsequent litigation. *See Encino Motorcars*, 136 S.Ct. at 2122; *cf. SEC v. Chenery Corp.*, 318 U.S. 80, 87–88, 63 S.Ct. 454, 87 L.Ed. 626 (1943). Here, that intent is unmistakable: the Bump-Stock rule is a legislative rule.

b

Ordinarily, legislative rules receive *Chevron* deference. *See Nat'l Mining Ass'n*, 758 F.3d at 251. This legislative rule is no different.

The Supreme Court has established that we afford *Chevron* deference if we determine (i) "that Congress delegated authority to the agency generally to make rules carrying the force of law," and (ii) "that the agency interpretation claiming deference was promulgated in the exercise of that authority." *Mead*, 533 U.S. at 226–227, 121 S.Ct. 2164 (2001). Here, both are true.

First, we know Congress intended a delegation of legislative authority to the agency because Congress made the relevant delegations express. As noted, the Attorney General has the power to prescribe "such rules and regulations as are necessary to carry out the provisions of" the Gun Control Act. 18 U.S.C. § 926(a). And the Attorney General "shall prescribe all needful rules and regulations for the enforcement of" the National Firearms Act. 26 U.S.C. § 7805(a); *see id.* § 7801(a)(2)(A). "[A] general conferral of rulemaking authority" of that variety "validate[s] rules for *all* the matters the agency ***21** is charged with administering." *City of Arlington v. FCC*, 569 U.S. 290, 306, 133 S.Ct. 1863, 185 L.Ed.2d 941 (2013). The Supreme Court has said exactly that for § 7805(a), one of the delegations of authority at issue. Specifically discussing that very provision, the Court explained that it has "found such 'express congressional authorizations to engage in the process of rulemaking' to be 'a very good indicator of delegation meriting *Chevron* treatment.' " *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 57, 131 S.Ct. 704, 178 L.Ed.2d 588 (2011) (quoting *Mead*, 533 U.S. at 229, 121 S.Ct. 2164).

Second, we know that the Bureau promulgated the Bump-Stock Rule "in the exercise of that authority" to "make rules carrying the force of law" because that criterion is the defining characteristic of a legislative rule. *Mead*, 533 U.S. at 227, 121 S.Ct. 2164. And we have already determined that the Rule is legislative in character. We are then firmly within *Chevron*'s domain.

Nonetheless, the parties protest the applicability of *Chevron* on several grounds. The plaintiffs first argue that *Chevron* deference has been waived or forfeited by the government. Next, the parties (including the government) submit that *Chevron* deference is inapplicable in the context of criminal statutes. And finally, Guedes contends that *Chevron* deference for criminal statutes is displaced by the rule of lenity. None of those objections to applying *Chevron*, we conclude, is likely to succeed in the context of the Bump-Stock Rule.

(i)

The agency plainly believed it was acting in a manner warranting *Chevron* treatment given that it expressly invoked the *Chevron* framework in the Rule. The plaintiffs assert that the government nonetheless has forfeited, or even waived, the application of *Chevron* deference by declining to argue for it in this litigation. And while the government has not taken a definitive position before us on whether *Chevron* can be waived or forfeited, it has declined to invoke *Chevron* throughout the course of the litigation.

In particular, in its briefing before the district court, the government expressly disclaimed any entitlement to *Chevron* deference. And after the district court nonetheless relied on *Chevron* to affirm the Rule, the government filed notices in other pending challenges to the Rule, stating that it "ha[s] not contended that the deference afforded under *Chevron* * * * applies in this action.'" *E.g.*, Notice of Supplemental Authority at 2, *Gun Owners of Am., Inc. v. Barr*, No. 1:18-cv-1429 (W.D. Mich. Feb. 27, 2019), ECF No. 38. Now, in this appeal, the government affirmatively disclaims any reliance on *Chevron*. *See* Gov't Br. 37. And at oral argument, the government went so far as to indicate that, while it believes the Rule should be upheld as the best reading of the statute without any need for *Chevron* deference, if the Rule's validity turns on the applicability of *Chevron*, it would prefer that the Rule be set aside rather than upheld under *Chevron*. Oral Argument at 42:38–43:45.

To the extent *Chevron* treatment can be waived, we assume that the government's posture in this litigation would amount to a waiver rather than only a forfeiture. *See Wood v. Milyard*, 566 U.S. 463, 470 n.4, 132 S.Ct. 1826, 182 L.Ed.2d 733 (2012) ("A waived claim or defense is one that a party has knowingly and intelligently relinquished; a forfeited plea is one that a party has merely failed to preserve."). But our court has yet to address whether, when an agency promulgates a rule that would otherwise plainly occasion the application of *Chevron*, agency counsel could nonetheless opt to effect a waiver of *Chevron* treatment ***22** when later defending against a challenge to the rule.

We have, however, held that an agency's lawyers cannot *forfeit* the applicability of *Chevron* deference unless the underlying agency action fails to "manifests its engagement in the kind of interpretive exercise to which review under *Chevron* generally applies—i.e., interpreting a statute it is charged with administering in a manner (and through a process) evincing an exercise of its lawmaking authority." *SoundExchange, Inc. v. Copyright Royalty Bd.*, 904 F.3d 41, 54 (D.C. Cir. 2018). We grounded our holding in the principle that "it is the expertise of the agency, not its lawyers," that underpins *Chevron*. *Id.* (quoting *Peter Pan Bus Lines, Inc. v. Fed. Motor Carrier Safety Admin.*, 471 F.3d 1350, 1354 n.3 (D.C. Cir. 2006)); *see also Chenery*, 318 U.S. at 87–88, 63 S.Ct. 454. We see no reason that the same limitations on forfeiture of *Chevron* should not also govern waiver of *Chevron*.

Forfeiture and waiver involve, respectively, a failure to invoke, or an affirmative decision not to invoke, a party's "right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). But *Chevron* is not a "right" or "privilege" belonging to a litigant. It is instead a doctrine about statutory meaning—specifically, about how courts should construe a statute.

If a statute contains ambiguity, *Chevron* directs courts to construe the ambiguity as "an implicit delegation from Congress to the agency to fill in the statutory gaps." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000). If there is ambiguity, the meaning of the statute becomes whatever the agency decides to fill

the gaps with, as long as the agency's interpretation is reasonable and "speak[s] with the force of law." *Mead*, 533 U.S. at 229, 121 S.Ct. 2164. And insofar as *Chevron* concerns the meaning of a statute, it is an awkward conceptual fit for the doctrines of forfeiture and waiver.

We, for example, would give no mind to a litigant's failure to invoke interpretive canons such as *expressio unius* or constitutional avoidance even if she intentionally left them out of her brief. "[T]he court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99, 111 S.Ct. 1711, 114 L.Ed.2d 152 (1991). The "independent power" to identify and apply the correct law presumably includes application of the *Chevron* framework when determining the meaning of a statute.

Allowing an agency to freely waive *Chevron* treatment in litigation also would stand considerably in tension with basic precepts of administrative law. As we have explained, a legislative rule qualifying for *Chevron* deference remains legislative in character even if the agency claims during litigation that the rule is interpretive: *Chenery* instructs that the proper subject of our review is what the agency actually did, not what the agency's lawyers later say the agency did. *See* 318 U.S. at 87–88, 63 S.Ct. 454. Accordingly, we have held that a particular rule is legislative rather than interpretive over the protestations of the agency. *See, e.g.*, *Cmty. Nutrition Inst.*, 818 F.2d at 946. And once we conclude that a rule is legislative, it

follows that we generally review the rule's validity under the *Chevron* framework. *See Nat'l Mining Ass'n*, 758 F.3d at 251.

A waiver regime, moreover, would allow an agency to vary the binding nature of a legislative rule merely by asserting in litigation that the rule does not carry the ***23** force of law, even though the rule speaks to the public with all the indicia of a legislative rule. Agency litigants then could effectively amend or withdraw the legal force of a rule without undergoing a new notice-and-comment rulemaking. That result would enable agencies to circumvent the Administrative Procedure Act's requirement "that agencies use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance." *Perez v. Mortg. Bankers Ass'n*, —— U.S. ——, 135 S.Ct. 1199, 1206, 191 L.Ed.2d 186 (2015). And an agency could attempt to secure rescission of a policy it no longer favors without complying with the Administrative Procedure Act, or perhaps could avoid the political accountability that would attend its own policy reversal by effectively inviting the courts to set aside the rule instead.

We thus conclude, consistent with *SoundExchange*'s approach to forfeiture of *Chevron*, that an agency's lawyers similarly cannot waive *Chevron* if the underlying agency action "manifests its engagement in the kind of interpretive exercise to which review under *Chevron* generally applies." *SoundExchange*, 904 F.3d at 54. In that event, we "apply *Chevron* * * * even if there is no invocation of *Chevron* in the briefing in our court." *Id.*

In this case, the Bump-Stock Rule plainly indicates the agency's view that it was engaging in a rulemaking entitled to *Chevron* deference. That observation naturally follows from the Rule's legislative character, which generally yields treatment under *Chevron*. *See Nat'l Mining Ass'n*, 758 F.3d at 251. And for this Rule in particular, another telltale sign of the agency's belief that it was promulgating a rule entitled to *Chevron* deference is the Rule's invocation of *Chevron* by name. To be sure, an agency of course need not expressly invoke the *Chevron* framework to obtain *Chevron* deference: "*Chevron* is a standard of *judicial* review, not of *agency* action." *SoundExchange*, 904 F.3d at 54. Still, the Bureau's invocation of *Chevron* here is powerful evidence of its intent to engage in an exercise of interpretive authority warranting *Chevron* treatment.

The Bureau, in rejecting objections that the agency's interpretation "would not be entitled to deference under *Chevron*," 83 Fed. Reg. at 66,526, specifically invoked the *Chevron* framework and marched through its two-step analysis, *id.* at 66,527. At step one, the agency explained that its interpretation "accord[ed] with the plain meaning" of the statute. And at step two, the agency explained that it "ha[d] the authority to interpret elements of the definition of 'machinegun' like 'automatically' and 'single function of the trigger,' " concluding that its "construction of those terms is reasonable under *Chevron* [Step Two]." *Id*.

The Rule expressly defends the agency's reading of the statute as an interpretive exercise implicating *Chevron*. Agency counsel's later litigating decision to

refrain from invoking *Chevron* thus affords no basis for our denying the Rule *Chevron* status.

(ii)

Next, the plaintiffs submit that *Chevron* deference has no application to regulations interpreting statutes like the National Firearms Act and the Gun Control Act because they impose criminal penalties on violators. *Chevron* deference in the context of such statutes, the plaintiffs urge, would flout an understanding that "criminal laws are for courts, not for the Government, to construe." *Abramski v. United States*, 573 U.S. 169, 191, 134 S.Ct. 2259, 189 L.Ed.2d 262 (2014). And the plaintiffs are not the only parties who question *Chevron*'s salience in the criminal context. The government's ***24** decision to refrain from invoking *Chevron* in this litigation appears to stem from the same concerns. *See* Gov't Br. 36–37.

Guedes and Codrea, however, have failed to demonstrate a likelihood of success in establishing a general rule against applying *Chevron* to agency interpretations of statutes that have criminal-law implications. To the contrary, precedent says otherwise.

Start with *Chevron* itself. At issue in *Chevron* was the meaning of the term "stationary source" in the Clean Air Act. *See Chevron*, 467 U.S. at 840, 104 S.Ct. 2778. The scope of that term defined the statutory obligation of private parties, under state implementation plans, to obtain permits for the construction and operation of "new or modified major stationary sources of air pollution." 42 U.S.C. § 7502(a)(1), (b)(6) (1982). But at the time, any person who know-

ingly violated any requirement of a state implementation plan (after notice from the EPA) faced a fine of $25,000 a day or imprisonment for up to a year, or both. *See id.* § 7413(c)(1) (1982). Nevertheless, the *Chevron* Court established the decision's namesake deference.

For another example, consider the securities laws. The SEC's interpretation of those laws regularly receives *Chevron* treatment, *e.g.*, *Nat'l Ass'n of Mfrs. v. SEC*, 748 F.3d 359, 366 (D.C. Cir. 2014); *Am. Equity Inv. Life Ins. Co. v. SEC*, 613 F.3d 166, 172–173 (D.C. Cir. 2010); *Markowski v. SEC*, 274 F.3d 525, 528–529 (D.C. Cir. 2001), even though their violation often triggers criminal liability. The Securities Exchange Act, for instance, imposes criminal sanctions for willful violations of "any provision" of the Act or "any rule or regulation thereunder the violation of which is made unlawful." 15 U.S.C. § 78ff(a). Yet in *United States v. O'Hagan*—a criminal case—the Supreme Court accorded *Chevron* deference to an SEC rule that interpreted a provision of the Act in a manner rendering the defendant's conduct a crime. 521 U.S. 642, 667, 673, 117 S.Ct. 2199, 138 L.Ed.2d 724 (1997) (citing *Chevron*, 467 U.S. at 844, 104 S.Ct. 2778). The Court noted that Congress had authorized the Commission "to prescribe legislative rules," and held that the rule in question, issued in an exercise of that authority, should receive "controlling weight" under *Chevron*. *Id.* at 673, 117 S.Ct. 2199 (quoting *Chevron*, 467 U.S. at 844, 104 S.Ct. 2778).

While the Court in *O'Hagan* applied *Chevron* in a criminal case, it (like *Chevron* itself) did not specifically address whether the criminal context should

have afforded a basis for denying deference to the agency's interpretation. But the Court engaged with that precise issue in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 115 S.Ct. 2407, 132 L.Ed.2d 597 (1995). There, the Court reviewed a regulation interpreting the term "take" in the Endangered Species Act. The challengers argued that *Chevron* deference was inappropriate because the Endangered Species Act included criminal penalties for certain violations. *See id.* at 704 n.18, 115 S.Ct. 2407. The Court disagreed, holding that, notwithstanding the statute's criminal penalties, it would defer "to the Secretary's reasonable interpretation" under *Chevron*. *See id.* at 703–704 & 704, 115 S.Ct. 2407 n.18.

Our circuit precedent is in accord. Recently, in *Competitive Enterprise Institute v. United States Department of Transportation*, 863 F.3d 911 (D.C. Cir. 2017), we explained that "[w]e apply the *Chevron* framework * * * even though violating [the statute] can bring criminal penalties," *id.* at 915 n.4 (citing *Babbitt*, 515 U.S. at 704 n.18, 115 S.Ct. 2407); *see id.* at 921 (Kavanaugh, J., concurring) ("I join the ***25** majority opinion[.]"). That precedent is controlling here. *See also Humane Society v. Zinke*, 865 F.3d 585, 591, 595 (D.C. Cir. 2017) (applying *Chevron* even though the challenged rule interpreted the Endangered Species Act, the violation of which results in "criminal sanctions").

Also, at least twice before, we afforded *Chevron* deference to an agency's construction of a statute in the criminal context over the express objection of a defendant. In *United States v. Kanchanalak*, 192

F.3d 1037 (D.C. Cir. 1999), the defendants "argue[d] that this court should not give *Chevron* deference to the FEC's interpretation of an ambiguous statute in a criminal proceeding," *id.* at 1047 n.17. We disagreed: "That criminal liability is at issue does not alter the fact that reasonable interpretations of the act are entitled to deference." *Id.* (citing *Babbitt*, 515 U.S. at 703–705, 115 S.Ct. 2407). And in *In re Sealed Case*, 223 F.3d 775 (D.C. Cir. 2000), we again declined to forgo *Chevron* in a criminal context, holding that "[d]eference is due as much in a criminal context as in any other," *id.* at 779 (citing *Babbitt*, 515 U.S. at 703–705, 115 S.Ct. 2407).

To be sure, the Supreme Court has signaled some wariness about deferring to the government's interpretations of criminal statutes. *See Abramski*, 573 U.S. at 191, 134 S.Ct. 2259; *see also United States v. Apel*, 571 U.S. 359, 369, 134 S.Ct. 1144, 186 L.Ed.2d 75 (2014) ("[W]e have never held that the Government's reading of a criminal statute is entitled to any deference."). But those statements were made outside the context of a *Chevron*-eligible interpretation—that is, outside the context of an agency "speak[ing] with the force of law." *Mead*, 533 U.S. at 229, 121 S.Ct. 2164. In *Abramski*, the Court declined to extend deference to informal guidance documents published by the Bureau. *See* 573 U.S. at 191, 134 S.Ct. 2259. And in *Apel*, the Court declined to defer to an interpretation contained in "Executive Branch documents" that were "not intended to be binding." 571 U.S. at 368, 134 S.Ct. 1144. When directly faced with the question of *Chevron*'s applicability to an agency's interpretation of a statute with criminal applications through a

full-dress regulation, the Court adhered to *Chevron*. *See Babbitt*, 515 U.S. at 704 n.18, 115 S.Ct. 2407.

That holding, and our court's precedents, govern us here and call for the application of *Chevron*. The parties have identified no distinction between the provision at issue in this case and the provisions with criminal penalties to which *Chevron* deference has been applied. The briefing contains nary a word suggesting any distinction between this case and prior decisions applying *Chevron* in criminal contexts. And neither Guedes nor counsel for the government offered any distinction even when specifically asked at oral argument. *See* Oral Argument at 6:08–7:15, 45:45–49:00.

Nothing in the relevant statutory delegations of authority, moreover, suggests a basis for denying *Chevron* treatment for agency actions with criminal implications The Supreme Court has instructed that the inquiry turns on whether the "language of the delegation provision" is sufficiently "broad" such that it is "clear * * * the statute gives [the] agency * * * power to enforce *all* provisions of the statute." *Gonzales v. Oregon*, 546 U.S. 243, 258, 126 S.Ct. 904, 163 L.Ed.2d 748 (2006) (emphasis added). In *Gonzales*, for example, the Court found that the Attorney General lacked power to interpret a particular criminal provision of the Controlled Substances Act because the delegation of rulemaking authority was too narrow and "did not delegate to the Attorney General authority to carry out or effect *all* provisions of the CSA." *Id.* at 259, 126 S.Ct. 904 ***26** (emphasis added). By contrast, the two pertinent delegation provisions in this case are framed in broad terms. *See* 18 U.S.C.

§ 926(a) (delegating to Attorney General the power to prescribe "such rules and regulations as are necessary to carry out the provisions of [the Gun Control Act]"); 26 U.S.C. § 7805(a) (delegating to Attorney General, *see id.* § 7801(a)(2)(A), the power to "prescribe all needful rules and regulations for the enforcement of [the National Firearms Act]").

The statutory context bolsters the inference that Congress intended those delegations to encompass regulations with criminal implications. The Gun Control Act, found at Chapter 44 of Title 18, is a purely criminal statute. *See* 18 U.S.C. § 924(a)(2). Yet § 926(a) expressly delegates to the Attorney General the power to promulgate "such rules and regulations as are necessary to carry out the provisions of th[at] chapter." Similarly, the National Firearms Act, found at Chapter 53 of Title 26, has criminal applications. *See* 18 U.S.C. § 924(a)(2); *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 517, 112 S.Ct. 2102, 119 L.Ed.2d 308 (1992). The penalty for "fail[ing] to comply with any provision of th[at] chapter" is a fine of up to $10,000, or imprisonment for up to 10 years, or both. 26 U.S.C. § 5871. And yet § 7801(a)(2)(A) tasks the Attorney General with "[t]he administration and enforcement of * * * Chapter 53," including "prescrib[ing] all needful rules and regulations for * * * enforcement." *Id.* § 7805(a).

The plaintiffs rely on *United States v. Thompson/Center Arms Co.*, in which the Supreme Court applied the rule of lenity to an ambiguous provision of the National Firearms Act. 504 U.S. at 517–518, 112 S.Ct. 2102. But *Babbitt* later made clear that the Court in *Thompson/Center* had no occasion to apply

Chevron: *Thompson/Center*, the *Babbitt* Court explained, "rais[ed] a narrow question concerning the application of a statute that contain[ed] criminal sanctions * * * *where no regulation was present*." *Babbitt*, 515 U.S. at 704 n.18, 115 S.Ct. 2407 (emphasis added). If anything, then, *Babbitt* implies that *Chevron* should apply in a case—like this one—involving an interpretation of the National Firearms Act where a regulation *is* present.

The plaintiffs also cite *United States v. McGoff*, 831 F.2d 1071 (D.C. Cir. 1987), a pre-*Babbitt* decision that interpreted the statute-of-limitations provision of the Foreign Agents Registration Act. We observed in passing that, "[n]eedless to say, in this criminal context, we owe no deference to the Government's interpretation of the statute." *Id.* at 1080 n.17. As in *Thompson/Center*, however, the *McGoff* Court had no occasion to apply *Chevron* because the government never asserted reliance on a regulation or other *Chevron*-eligible instrument. *See id.*

At oral argument, the plaintiffs suggested that permitting an agency's interpretation to carry the force of law in the criminal context would infringe the separation of powers. *See* Oral Argument 6:51–6:58. That suggestion is difficult to square with the Supreme Court's decision in *Touby v. United States*, 500 U.S. 160, 111 S.Ct. 1752, 114 L.Ed.2d 219 (1991). There, the Court upheld a delegation of legislative authority to the Attorney General to schedule substances under the Controlled Substances Act against a challenge under the nondelegation doctrine. *Id.* at 164, 111 S.Ct. 1752. The Court held that, in the criminal context, as in all contexts, the separation of pow-

ers "does not prevent Congress from seeking assistance * * * from its coordinate Branches" so long as Congress "lays down by legislative act an intelligible principle to which the person or body authorized to act is directed to conform." *Id.* at 165, 111 S.Ct. 1752 (alterations ***27** omitted) (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409, 48 S.Ct. 348, 72 L.Ed. 624 (1928)). And no party suggests that such an intelligible principle is lacking in this case.

In short, Congress delegated authority to administer the National Firearms Act and the Gun Control Act to the Attorney General, and the Attorney General promulgated a legislative rule in the exercise of that authority. Under binding precedent, Guedes and Codrea have failed to demonstrate a likelihood of success on their claim that the Rule is invalid just because of its criminal-law implications.

(iii)

Relatedly, Guedes argue that *Chevron* is inapplicable because a different canon of interpretation, the rule of lenity, should control instead. Under the rule of lenity, "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Rewis v. United States*, 401 U.S. 808, 812, 91 S.Ct. 1056, 28 L.Ed.2d 493 (1971). Guedes reasons that because *Chevron* is premised on the existence of statutory ambiguity, and because the rule of lenity resolves ambiguity in favor of the defendant, there is no remaining ambiguity to which *Chevron* can apply.

It is true that the rule of lenity generally applies to the interpretation of the National Firearms Act and

the Gun Control Act. But in circumstances in which *both Chevron* and the rule of lenity are applicable, the Supreme Court has never indicated that the rule of lenity applies first. In fact, the Court has held to the contrary. In *Babbitt*, the Court squarely rejected the argument that "the rule of lenity should foreclose any deference to the Secretary's interpretation of the ESA because the statute includes criminal penalties." 515 U.S. at 704 n.18, 115 S.Ct. 2407. The Court observed that it had "never suggested that the rule of lenity should provide the standard for reviewing facial challenges to administrative regulations whenever the governing statute authorizes criminal enforcement." *Id.* The Court proceeded to apply *Chevron* deference. *Id.* at 703, 115 S.Ct. 2407.

Our precedent takes the same tack. In *Kanchanalak*, we expressly rebuffed the argument that Guedes now presses: "To argue, as defendants do, that the rule of lenity compels us to reject the FEC's otherwise reasonable interpretation of an ambiguous statutory provision [under *Chevron*] is to ignore established principles of law." 192 F.3d at 1050 n.23 (citing *Babbitt*, 515 U.S. at 704 n.18, 115 S.Ct. 2407).

Those precedents are in line with the Supreme Court's characterization of the rule of lenity as a canon of "last resort." The Court has instructed that "[t]he rule comes into operation at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers." *Callanan v. United States*, 364 U.S. 587, 596, 81 S.Ct. 321, 5 L.Ed.2d 312 (1961). Accordingly, the rule of lenity applies only "when the ordinary canons of statutory construction

have revealed no satisfactory construction." *Lockhart v. United States*, —— U.S. ——, 136 S.Ct. 958, 968, 194 L.Ed.2d 48 (2016). And *Chevron* is a rule of statutory construction, insofar as it is a doctrine that "construe[s] what Congress has expressed." *Callanan*, 364 U.S. at 596, 81 S.Ct. 321.

Finally, our approach coheres with the rule of lenity's purposes. The doctrine serves to ensure that "legislatures and not courts [are] defin[ing] criminal activity" and to secure "fair warning" about the content of criminal law. *United States v. Bass*, 404 U.S. 336, 348, 92 S.Ct. 515, 30 L.Ed.2d 488 (1971) (internal quotation ***28** marks omitted). *Chevron* deference vindicates both purposes.

First, *Chevron* is consistent with the separation of powers, including for regulations defining criminal activity, because delegations of legislative authority in the criminal sphere are constitutional. *See Touby*, 500 U.S. at 165, 111 S.Ct. 1752. The parties would have us disregard Congress's textual delegations to the agency and do the interpretive work instead. That course, though, would not respect the notion that "legislatures and not courts" should take the lead. *Bass*, 404 U.S. at 348, 92 S.Ct. 515.

Second, *Chevron* promotes fair notice about the content of criminal law. It applies only when, at Congress's direction, agencies have followed "relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force." *Mead*, 533 U.S. at 230, 121 S.Ct. 2164. Importantly, such procedures, which generally include formal public notice and publication

in the Federal Register, do not "provide such inadequate notice of potential liability as to offend the rule of lenity." *Babbitt*, 515 U.S. at 704 n.18, 115 S.Ct. 2407. Tellingly, there is no suggestion of inadequate notice here. Rather, if the Rule is a valid legislative rule, all are on notice of what is prohibited.

For substantially the same reasons, plaintiffs' challenge under the Due Process Clause cannot succeed. To apply *Chevron*, Codrea notes, we must first determine that the statute is ambiguous, but that, in Codrea's view, would imply that the statute is facially void for vagueness. Codrea's challenge is misconceived. A criminal statute is void for vagueness if it fails to provide ordinary people "fair notice" of the conduct it proscribes. *Sessions v. Dimaya*, —— U.S. ——, 138 S.Ct. 1204, 1223, 200 L.Ed.2d 549 (2018). But the promulgation of the Bump-Stock Rule through notice-and-comment procedures afforded "fair notice" of the prohibited conduct.

2

Having concluded that the *Chevron* framework is applicable, we now proceed to examine the Bump-Stock Rule under it. We first ask whether the agency-administered statute is ambiguous on the "precise question at issue." *Chevron*, 467 U.S. at 842, 104 S.Ct. 2778. If the statute's meaning is unambiguous, then we need go no further. But if we find ambiguity, we proceed to the second step and ask whether the agency has provided a "permissible construction" of the statute. *Id.* at 843, 104 S.Ct. 2778. At that stage, "the task that confronts us is to decide, not whether [the agency's interpretation is] the best interpreta-

tion of the statute, but whether it represents a reasonable one." *Atl. Mut. Ins. Co. v. Comm'r*, 523 U.S. 382, 389, 118 S.Ct. 1413, 140 L.Ed.2d 542 (1998).

The National Firearms Act and the Gun Control Act both define "machinegun" to mean "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); *see* 18 U.S.C. § 921(a)(23). The definition of "machinegun" also includes "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).

The Bump-Stock Rule determines that semiautomatic rifles equipped with bump-stock-type devices are "machineguns" ***29** because they "function[ ] 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." 83 Fed. Reg. at 66,553. Applying *Chevron*, we determine that the statutory definition of "machinegun" is ambiguous and the Bureau's interpretation is reasonable. The plaintiffs therefore are unlikely to succeed on the merits of their claim that the Rule is out of step with the statutory definition.

a

At *Chevron*'s first step, two features of the statutory definition of "machinegun" render it ambiguous.

The first is the phase "single function of the trigger." The second is the word "automatically." We discuss them in that order.

(i)

As the district court recognized, the statutory phrase "single function of the trigger" admits of more than one interpretation. It could mean "a mechanical act of the trigger." *Guedes*, 356 F.Supp.3d at 130. Or it could mean "a single pull of the trigger from the perspective of the shooter." *Id.*

The first interpretation would tend to exclude bump-stock devices: while a semiautomatic rifle outfitted with a bump stock enables a continuous, high-speed rate of fire, it does so by engendering a rapid bumping of the trigger against the shooter's stationary finger, such that each bullet is fired because of a distinct mechanical act of the trigger. The second interpretation would tend to include bump-stock devices: the shooter engages in a single pull of the trigger with her trigger finger, and that action, via the operation of the bump stock, yields a continuous stream of fire as long she keeps her finger stationary and does not release it. *See* 83 Fed. Reg. at 66,519.

Neither of those interpretations is compelled (or foreclosed) by the term "function" in "single function of the trigger." The word "function" focuses our attention on the "mode of action," 4 Oxford English Dictionary 602 (1933), or "natural * * * action," Webster's New International Dictionary 876 (1933), by which the trigger operates. But the text is silent on the crucial question of *which perspective* is relevant.

A mechanical perspective, for instance, might focus on the trigger's release of the hammer, which causes the release of a round. From that perspective, a "single function of the trigger" yields a single round of fire when a bump-stock device moves the trigger back and forth. By contrast, from the perspective of the shooter's action, the function of pulling the trigger a single time results in repeated shots when a bump-stock device is engaged. From that perspective, then, a "single function of the trigger" yields multiple rounds of fire.

In light of those competing, available interpretations, the statute contains a "gap for the agency to fill." *Chevron*, 467 U.S. at 843, 104 S.Ct. 2778.

Guedes argues that the phrase "single function of the trigger" unambiguously compels a focus on the trigger's mechanical operation. He contends, for example, that "[r]egardless of the mechanism by which the shooter acts * * * it is the movement of the trigger releasing the hammer * * * that define[s] the boundaries of two distinct 'single' functions of the trigger." Guedes Br. 12–13. That argument begs the crucial question of perspective. It may be reasonable to take the view, as Guedes does, that the mechanical operation of the trigger is the lens through which to view its function. But to establish a likelihood of success on the merits, Guedes ***30** and Codrea would have to establish that reading the statute to mean a "single pull of the trigger" by the shooter is *impermissible*. They have not done so.

At *Chevron*'s first step, we do not ask which of those interpretations is the better reading of the

statute. Rather, we ask whether either of those interpretations is unambiguously "compel[led]" by the statute, to the exclusion of the other one. *Chevron*, 467 U.S. at 860, 104 S.Ct. 2778. Here, we think the answer is no.

Nor does *Staples v. United States*, 511 U.S. 600, 114 S.Ct. 1793, 128 L.Ed.2d 608 (1994), compel a particular interpretation of "single function of the trigger." There, in a footnote, the Court observed that a weapon is "automatic" if it "fires repeatedly with a single pull of the trigger"—"[t]hat is, [if] once its trigger is depressed, the weapon will automatically continue to fire until its trigger is released or the ammunition is exhausted." *Id.* at 602 n.1, 114 S.Ct. 1793. The Court's description, then, speaks both in terms of a "single *pull* of the trigger" and a "release[ ]" of the trigger, *id.* (emphasis added), which ultimately sheds limited light on the choice between the two competing understandings of "function of the trigger" that are at issue here. Regardless, the precise definition of "single function of the trigger" was not at issue in *Staples*. *See id.* at 602, 114 S.Ct. 1793. And the Court did not purport to exclude any interpretation as foreclosed by the statute. *Cf. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 996, 125 S.Ct. 2688, 162 L.Ed.2d 820 (2005).

(ii)

Similarly, the statutory term "automatically" admits of multiple interpretations. The statute speaks in terms of a "weapon which shoots * * * automatically more than one shot, without manual reloading, by a single function of the trigger." 26 U.S.C. § 5845(b);

see 18 U.S.C. § 921(a)(23). The term "automatically" does not require that there be *no* human involvement to give rise to "more than one shot." Rather, the term can be read to require only that there be *limited* human involvement to bring about more than one shot. *See, e.g.*, Webster's New International Dictionary 157 (defining "automatically" as the adverbial form of "automatic"); *id.* at 156 (defining "automatic" as "self-acting or self-regulating," especially applied to "machinery or devices which perform *parts* of the work formerly or usually done by hand" (emphasis added)). But how much human input in the "self-acting or self-regulating" mechanism is too much?

The plaintiffs would read the phrase "by a single function of the trigger" to provide "the starting and the ending point of just how much human input is allowable." Codrea Br. 14. In their view, then, a gun cannot be said to fire "automatically" if it requires both a single pull of the trigger *and* constant pressure on the gun's barrel, as a bump-stock device requires. We are unpersuaded. After all, a quite common feature of weapons that indisputably qualify as machine guns is that they require both a single pull of the trigger *and* the application of constant and continuing pressure on the trigger after it is pulled. We know, therefore, that the requirement of some measure of additional human input does not render a weapon nonautomatic. To purloin an example from the district court: an "automatic" sewing machine still "requires the user to press a pedal *and* direct the fabric." *Guedes*, 356 F.Supp.3d at 131 (emphasis added).

That workaday example illustrates another, perhaps more natural, reading of "automatically": the "automatic[ ]" mechanism need only be "*set in motion*" by a single function of the trigger. ***31** *United States v. Olofson*, 563 F.3d 652, 658 (7th Cir. 2009) (emphasis added); *see also United States v. Evans*, 978 F.2d 1112, 1113 n.2 (9th Cir. 1992) (" '[B]y a single function of the trigger' describes the action that enables the weapon to 'shoot automatically without manual reloading, not the 'trigger' mechanism." (ellipses omitted)). That is, rather than reading the phrase "by a single function of the trigger" to mean "by *only* a single function of the trigger," the phrase can naturally be read to establish only the preconditions for setting off the "automatic" mechanism, without foreclosing some further degree of manual input such as the constant forward pressure needed to engage the bump stock in the first instance. And if so, then the identified ambiguity endures. How much further input is permitted in the mechanism set in motion by the trigger? The statute does not say.

In sum, the statutory definition of "machinegun" contains two central ambiguities, both of which the agency has attempted to construe. We therefore proceed to *Chevron*'s second step.

b

At the second step, "the question for the court is whether the agency's [construction] is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843, 104 S.Ct. 2778. Guedes and Codrea are not likely to succeed in showing that the agency has impermissibly interpreted both ambiguities.

The Bureau's interpretation of "single function of the trigger" to mean "single pull of the trigger" is a permissible reading of the statute. The Bureau is better equipped than we are to make the pivotal policy choice between a mechanism-focused and shooter-focused understanding of "function of the trigger." And the Bureau's interpretation comports with how some courts have read the statute, which is a strong sign of reasonableness. In *Akins v. United States*, 312 F. App'x 197 (11th Cir. 2009), for example, the Eleventh Circuit held that the Bureau's reading of "single function of the trigger" to mean "single pull of the trigger" was "consonant with the statute and its legislative history." *Id.* at 200. The court relied on that definition to conclude that an "Accelerator"—a type of bump stock—was reasonably classified as a machine gun. *Id.* And "single pull of the trigger" has been the definition the agency has employed since 2006. *See* 83 Fed. Reg. at 66,543. The Rule's interpretation also accords with how the phrase "single pull of the trigger" was understood at the time of the enactment of the National Firearms Act. *See* 83 Fed. Reg. at 66,518. The Rule cites a congressional hearing for the National Firearms Act in which the then-president of the National Rifle Association testified that the term "machine gun" included any gun "capable of firing more than one shot by a single pull of the trigger, a single function of the trigger." 83 Fed. Reg. 66,518. And the House Report accompanying the bill that eventually became the National Firearms Act states that the bill "contains the usual definition of a machine gun as a weapon designed to shoot more than one shot * * * by a single pull of the trigger." H.R. Rep. No. 73-1780, at 2 (1934).

The Bureau's interpretation of "automatically" is permissible too. The Rule's requirement of a "self-acting or self-regulating mechanism" demands a significant degree of autonomy from the weapon without mandating a firing mechanism that is completely autonomous. That definition accords with the everyday understanding of the word "automatic." And it focuses the inquiry about what needs to be automated right where the statute does: the ability of the trigger function to produce "more than ***32** one shot, without manual reloading." 26 U.S.C. § 5845(b). It also tracks the interpretation reached by the Seventh Circuit in *United States v. Olofson*, 563 F.3d 652 (7th Cir. 2009), in which the court interpreted the term to require a "self-acting mechanism" without requiring more, *id.* at 658.

The plaintiffs argue that the Bureau's definition of "machinegun" is unreasonable because it has the effect of reaching all semiautomatic rifles. Because "virtually all" semiautomatic rifles can be "bump-fired" with the use of common household items, the plaintiffs contend, the Bureau's definition covers even unmodified semiautomatic rifles, which renders it unreasonable. Guedes Br. 18.

The Rule explains why the plaintiff's understanding is incorrect, and the Rule's explanation in that regard is reasonable. *See* 83 Fed. Reg. at 66,532–66,534. The Bureau acknowledges that bump firing—a technique using a stable point like a belt loop to approximate the function of a bump stock—is possible with semiautomatic weapons. *See id.* at 66,533. But even when a semiautomatic weapon is bump fired using an object like a belt loop or a rubber band,

the Bureau explained, the weapon does not fire "automatically" because there is no "self-acting or self-regulating mechanism." Rubber bands and their ilk do not "capture and direct the recoil energy" to "harness[ ] [it] as part of a continuous back-and-forth cycle." *Id.* at 66,533. Rather, "the shooter must do so" herself. *Id.* Bump firing without the aid of a bump-stock-type device is therefore "more difficult" because it relies solely on the shooter "to control the distance that the firearm recoils and the movement along the plane on which the firearm recoils." *Id.*

Bump stocks, on the other hand, are specifically designed to "direct[ ] the recoil energy of the discharged rounds * * * in constrained linear rearward and forward paths." *Id.* at 66,532. By capturing the recoil energy of the gun and directing it through a specified "distance" and along a specified "plane," bump stocks "incorporate[ ] a self-acting or self-regulating component" that would otherwise be absent. *Id.* at 66,533. Thus, belt loops, unlike bump stocks, do not transform semiautomatic weapons into statutory "machineguns." Or so the Bureau reasonably concluded in the Rule.

"If a statute is ambiguous, and if the implementing agency's construction is reasonable, *Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation." *Brand X*, 545 U.S. at 980, 125 S.Ct. 2688. Here, the Bump-Stock Rule sets forth a permissible interpretation of the statute's ambiguous definition of "machinegun." It therefore merits our deference.

C

In addition to their argument that the Rule is incompatible with the statutory definition of a machine gun, the plaintiffs also contend that the Rule is arbitrary and capricious. Agency action is 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, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983). Here, the plaintiffs claim that, for various reasons, the Rule is arbitrary in applying the statutory definition of "machinegun" to ***33** bump stocks. None of their claims is likely to succeed.

First, the plaintiffs argue that the Rule fundamentally mischaracterizes the operation of bump-stock devices. In their view, the Rule disregards that, for each shot, "the shooter must manually and volitionally *push* the trigger into [a] stationary finger." Guedes Br. 24. It is true that, for a bump-stock-equipped device to repeatedly fire, the shooter must keep the bumpstock engaged by maintaining constant forward pressure on the gun. But in the Rule, the Bureau correctly describes the operation of bump-stock-equipped devices: the shooter must "maintain[ ] constant forward pressure [on the gun] with the non-trigger hand" in order to maintain continuous fire. 83 Fed. Reg. at 66,532. The bump stock takes advantage of the gun's recoil, channeled into a linear back-and-

forth cycle, to permit the shooter to fire continuously by maintaining steady forward pressure on the gun. There is thus no disagreement about the basic mechanics of bump-stock devices.

Guedes takes particular issue with the Rule's characterization of recoil. He argues that bump-stock-equipped devices cannot "harness[ ] the recoil energy of the firearm" because they do not use "a device such as a spring or hydraulics * * * [to] automatically absorb the recoil and use this energy to activate itself." Guedes Br. 16–17. But the Rule does not adopt such an impoverished definition of "automatically." The Rule requires only that the recoil be used in service of a "self-acting or self-regulating mechanism." A bump stock "direct[s] the recoil energy of the discharged rounds * * * in constrained linear rearward and forward paths," 83 Fed. Reg. at 66,518 (quoting 83 Fed. Reg. at 13,443), which qualifies as a "self-regulating mechanism."

Second, the plaintiffs assert that the Rule is arbitrary because its definition encompasses all semiautomatic weapons. That argument is largely redundant of the plaintiffs' *Chevron* step two argument to the same effect, which we have already addressed. We dispose of this iteration of the same argument on the same grounds: Bump stocks, unlike commonplace household objects, are specifically designed to "direct[ ] the recoil energy of the discharged rounds * * * in constrained linear rearward and forward paths." *Id.* Bump stocks, unlike household objects, are machine guns because they alone involve a "self-acting or self-regulating mechanism." *Id.*

Third, the plaintiffs submit that the Rule arbitrarily excludes binary-trigger guns from its definition of "machinegun." Binary-trigger guns shoot one round when the trigger is pulled and another round when the trigger is released. 83 Fed. Reg. at 66,534. The Rule concludes that such devices are not machine guns because the second shot is "the result of a separate function of the trigger." *Id.* The plaintiffs argue that if the release of the trigger is a separate function, the operation of a bump stock—which requires the shooter to keep the trigger finger stationary while steadily pushing the gun forward into the finger—must also involve multiple functions of the trigger. But the Rule reasonably distinguishes binary-trigger guns on the ground that they require a second act of volition *with the trigger finger*. The release of a trigger is a volitional motion. But merely holding the trigger finger stationary—which is what operation of a bump stock entails—is not.

Fourth, Guedes contends that the Rule is arbitrary because its definition of "automatically" is ambiguous. The Rule's definition, Guedes notes, does not specify how much manual input is too much. But ***34** the existence of latent ambiguity does not render an interpretation arbitrary or capricious. Agencies are permitted to promulgate regulations interpreting ambiguous statutes without having to resolve *all* possible ambiguity.

Fifth, Codrea argues that the Rule arbitrarily failed to consider reliance interests, "an important aspect of the problem." *State Farm*, 463 U.S. at 43, 103 S.Ct. 2856. It is true that "the APA requires an agency to provide more substantial justification when

* * * its prior policy has engendered serious reliance interests that must be taken into account." *Perez*, 135 S.Ct. at 1209 (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515, 129 S.Ct. 1800, 173 L.Ed.2d 738 (2009)). But the only reliance interest identified by Codrea is the pecuniary interest of current possessors of bumpstock devices. *See* Codrea Br. 19–20 & 19 n.4; Comment of Maryland Shall Issue at 6. And in the Rule, the Bureau engaged in a cost-benefit analysis that considered, among other things, the cost incurred by owners of bump-stock devices. *See* 83 Fed. Reg. at 66,546.

Finally, Guedes argues that the Rule is arbitrary because it is the product of "naked political desire." Guedes Br. 18. Insofar as Guedes means to claim that the Rule arises from political considerations, he is surely right. All would agree that the Bureau enacted this Rule in response to the urging of "the President, Members of Congress, and others," as part of an "immediate and widespread" outcry in the wake of the 2017 mass shooting in Las Vegas. *Guedes*, 356 F.Supp.3d at 120, 123. The Rule itself describes its origins in a memorandum issued by President Trump to then–Attorney General Sessions "direct[ing] the Department of Justice * * * '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 66,516–66,517 (quoting Application of the Definition of Machinegun to 'Bump Fire' Stocks and Other Similar Devices, 83 Fed. Reg. 7,949 (Feb. 23, 2018)). But that is hardly a reason to conclude that the Rule is arbitrary. Presidential administrations are elected to make policy. And "[a]s

long as the agency remains within the bounds established by Congress, it is entitled to assess administrative records and evaluate priorities in light of the philosophy of the administration." *Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1043 (D.C. Cir. 2012) (quoting *State Farm*, 463 U.S. at 59, 103 S.Ct. 2856 (Rehnquist, J., concurring in part and dissenting in part)).

Guedes might instead mean to contend that the Bureau was so eager to enact the policy preferences of the President that it failed to engage in reasoned consideration of the issues. The central purpose of arbitrary or capricious review is to assure that the agency has engaged in "reasoned decisionmaking." *State Farm*, 463 U.S. at 52, 103 S.Ct. 2856. We ordinarily do so, however, by examining whether the agency has "articulate[d] a satisfactory explanation for its actions." *Id.* at 43, 103 S.Ct. 2856. Here, the agency *has* articulated a satisfactory explanation for the Bump-Stock Rule. And the administrative record reflects that the agency kept an open mind throughout the notice-and-comment process and final formulation of the Rule. *See Air Transp. Ass'n of Am. v. Nat'l Mediation Bd.*, 663 F.3d 476, 487–488 (D.C. Cir. 2011); *C&W Fish Co. v. Fox*, 931 F.2d 1556, 1564–1565 (D.C. Cir. 1991). In the absence of any actual evidence of delinquent conduct, we accord the Bureau a "presumption of regularity" in its promulgation of the Rule. *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971).

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D

Finally, Codrea argues that the Rule must be vacated because it is impermissibly retroactive, violating both 26 U.S.C. § 7805(b)'s bar on retroactive rulemaking and the Ex Post Facto Clause. That claim has been forfeited because the plaintiffs failed to raise it in the district court. The Rule, at any rate, cannot be characterized as retroactive: As we have explained, the Rule itself made clear that the possession of bump stocks would become unlawful only after the effective date.

Further, it matters not that the government's *post hoc* litigation strategy has been to characterize the Rule as merely interpretive and, consequently, backward looking. Irrespective of that litigating position, the Rule is legislative in character and therefore purely prospective. Any criminal consequences did not attach until the Rule's effective date. And notice to the public has been clear and explicit.

* * * * *

The plaintiffs have failed to establish a likelihood of success both for their challenge to Acting Attorney General Whitaker's appointment and for their objections to the substantive validity of the Rule. For the foregoing reasons, we affirm the district court's denial of a preliminary injunction.

So ordered.

Karen Lecraft Henderson, Circuit Judge, concurring in part and dissenting in part:

Federal law makes it a crime to possess or transfer a "machinegun." 18 U.S.C. § 922(o)(1). This case is about a Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) regulation that reinterprets the statutory definition of "machinegun" and applies it to all bump stock type devices. *Bump-Stock-Type Devices*, 83 Fed. Reg. 66,514 (Dec. 26, 2018) (Bump Stock Rule or Rule). Individual firearms owners and nonprofit groups sued the ATF, seeking preliminary injunctive relief to stop the Bump Stock Rule from going into effect. The issue before us on this expedited appeal of the district court's denial of preliminary injunctive relief, *Guedes v. ATF*, 356 F.Supp.3d 109 (D.D.C. 2019), is whether the plaintiffs are likely to succeed on the merits of their challenge to the Bump Stock Rule as contrary to the statutory definition of "machinegun." Unlike my colleagues, I believe the Bump Stock Rule does contradict the statutory definition and, respectfully, part company with them on this issue.[1]

A "machinegun" is a firearm "which shoots ... automatically more than one shot, without manual reloading, by a single function of the trigger." 26 U.S.C. § 5845(b). In my view, the Rule impermissibly adds to the language "automatically ... by a single function of the trigger," including within its definition a firearm that shoots more rapidly only by a single function of the trigger *and* the shooter's additional manual in-

[1] I concur in Parts II and III.A of the majority opinion.

put. The statute specifies a single function; the Rule specifies a single function *plus*. "Whether the Government interprets a criminal statute too broadly (as it sometimes does) or too narrowly," we have "an obligation to correct its error." *Abramski v. United States*, 573 U.S. 169, 191, 134 S.Ct. 2259, 189 L.Ed.2d 262 (2014).

I. BACKGROUND

A. Statutory Framework

The National Firearms Act of 1934, Pub. L. No. 73-474, 48 Stat. 1236, "imposes strict registration requirements on statutorily ***36** defined 'firearms.' " *Staples v. United States*, 511 U.S. 600, 602, 114 S.Ct. 1793, 128 L.Ed.2d 608 (1994). In the 1934 legislation, the Congress defined "machinegun" as a specific type of "firearm." The original text defined a "machinegun" as "any weapon which shoots, or is designed to shoot, automatically *or semiautomatically*, more than one shot, without manual reloading, by a single function of the trigger." National Firearms Act § 1(b) (emphasis added). A few decades later, the Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213, amended the definition in two key ways, deleting the phrase "or semiautomatically" and including "parts" designed and used to "convert a weapon into a machinegun."[2] Gun Control Act, tit. II, § 201, 82 Stat.

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[2] It thus extends to "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).

at 1231 (codified at 26 U.S.C. § 5845(b)). The definition of "machinegun" in effect today includes "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 Firearms Owners' Protection Act of 1986 (Act), Pub. L. No. 99-308, 100 Stat. 449, effectively banned private ownership of machine guns. Firearms Owners' Protection Act, § 102(9) (codified at 18 U.S.C. § 922(o)(1)). The Act makes it "unlawful for any person to transfer or possess a machinegun," 18 U.S.C. § 922(o)(1), and "machinegun" has "the meaning given ... in section 5845(b) of the National Firearms Act," *id.* § 921(a)(3). A person who "knowingly" violates the ban can be "fined ... [or] imprisoned not more than 10 years, or both." *Id.* § 924(a)(2). The ban has two exceptions: one for "a transfer to or by, or possession by or under the authority of" the federal government or a state government, *id.* § 922(o)(2)(A), and the other grandfathers any "machinegun" lawfully possessed before the Act went into effect, *id.* § 922(o)(2)(B).

B. History of Bump Stock Regulation

Firearms manufacturers have created various devices that allow a lawful semiautomatic rifle to perform more rapidly. A bump stock is one such device. It replaces the standard stock of a rifle—the part that rests against the shooter's shoulder. A bump stock "free[s] the weapon to slide back and forth rapidly." *Bump-Stock-Type Devices*, 83 Fed. Reg. at 66,516. The sliding motion allows a shooter to increase his

rate of fire. A rifle produces recoil energy upon firing. The bump stock helps direct the firearm's recoil and convert the recoil energy into rapidly firing rounds. It works like this: the shooter pulls the trigger; the recoil causes the firearm to slide backward; the shooter maintains backward pressure on the trigger with the index finger of his shooting hand and forward pressure on the barrel with his other hand. *Id.* This process causes the firearm to slide back and forth rapidly, bumping the shooter's stationary trigger finger and thereby firing additional rounds. *Id.*

Some bump stock devices use only the shooter's physical pressure to channel the recoil energy and do not include springs or mechanical parts. *Id.* For these devices, a single pull of the trigger alone—without the shooter's additional forward pressure—does not cause the firearm to shoot more than one round. Video evidence in ***37** the record makes this clear.[3] In the video, the shooter fires a rifle equipped with a non-mechanical bump stock. The shooter holds the rifle with one hand, the trigger hand. He then pulls the trigger and the rifle fires a single shot. Without his other hand's forward pressure on the barrel, the rifle equipped with a non-mechanical bump stock fires only a single round with each pull of the trigger.

The ATF first classified a bump stock type device in 2002, concluding that it was not a "machinegun." *Id.* at 66,517. The classification involved a product called the Akins Accelerator, a bump stock that used internal springs. "To operate the device, the shooter

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[3] The declaration of Rick Vasquez, a former senior ATF Technical Expert, attests to the accuracy of the video evidence.

initiated an automatic firing sequence by pulling the trigger one time, which in turn caused the rifle to recoil within the stock, permitting the trigger to lose contact with the finger and manually reset." *Id.* "Springs in the Akins Accelerator then forced the rifle forward, forcing the trigger against the finger, which caused the weapon to discharge the ammunition." *Id.* The ATF interpreted the statutory language "single function of the trigger" to mean a "single movement of the trigger." *Id.* A semi-automatic rifle fires only a single round each time the trigger is pulled and reset. According to the ATF, because the Akins Accelerator did not modify how a semiautomatic rifle's trigger "moves" with each shot, it was not a "machinegun."

In 2006, the ATF reclassified the Akins Accelerator as a "machinegun." It reinterpreted the phrase "single function of the trigger" from "single movement of the trigger" to "single pull of the trigger." *Id.* The reinterpretation made all the difference. Once a shooter pulls and maintains pressure on the trigger, the internal springs of the Akins Accelerator start an automatic sequence that keeps the rifle firing until the shooter removes his finger or depletes the ammunition. The firing of multiple rounds based on a single continuous pull of the trigger made the device a "machinegun" under the ATF's reinterpretation. The Akins Accelerator inventor challenged the ATF's changed reading in federal district court (M.D. Fla.), arguing that the Agency misinterpreted the statutory definition of "machinegun." The district court upheld the ATF's determination and the Eleventh Circuit affirmed. *Akins v. United States*, 312 F. App'x 197 (11th Cir. 2009). The appellate court concluded that "the

interpretation by the Bureau that the phrase 'single function of the trigger' means a 'single pull of the trigger' is consonant with the [National Firearms Act] and its legislative history." *Id.* at 200 (quoting 26 U.S.C. § 5845(b)).

"In ten letter rulings between 2008 and 2017, ATF applied the 'single pull of the trigger' interpretation to other bumpstock-type devices" and determined that none qualified as a "machinegun." *Bump-Stock-Type Devices*, 83 Fed. Reg. at 66,517. Although each device fired more than one round with a single pull of the trigger, the ATF concluded that none was a "machinegun" because the firing sequence did not occur "automatically." Unlike the Akins Accelerator, the devices did not rely on springs or mechanical parts. In order to use them, "the shooter [had to] apply constant forward pressure with the non-shooting hand and constant rearward pressure with the shooting hand." Joint Appendix (J.A.) at 278. Thus, the ATF drew a distinction between a bump stock with mechanical parts like springs that cause a more rapid firing sequence and a bump ***38** stock that uses both of the shooter's hands to do the same. *E.g.*, Letter from Richard W. Marianos, Assistant Dir. Pub. and Governmental Affairs, to Congressman Ed Perlmutter (April 16, 2013), *reprinted at* J.A. 281–82.

C. The Bump Stock Rule

In October 2017, a gunman armed with several semiautomatic rifles killed 58 people and wounded 500 more in Las Vegas, Nevada. The rifles were equipped with bump stock devices, which "were readily available in the commercial marketplace through

online sales directly from the manufacturer, and through multiple retailers." *Bump-Stock-Type Devices*, 83 Fed. Reg. at 66,514. Using these devices, the gunman was able to fire hundreds of rounds in a matter of minutes. Within months, the ATF began to promulgate a regulation to classify any bump stock type device as a "machinegun." President Trump directed the DOJ to "dedicate all available resources to ... propos[ing] for notice and comment a rule banning all devices that turn legal weapons into machineguns." *Application of the Definition of Machinegun to "Bump Fire" Stocks and Other Similar Devices*, 83 Fed. Reg. 7,949 (Feb. 20, 2018).

In December 2018, the ATF promulgated the Bump Stock Rule.[4] *Bump-Stock-Type Devices*, 83 Fed. Reg. at 66,514. It declares that all bump stock type devices "are 'machineguns' as defined by the National Firearms Act of 1934 and the Gun Control Act of 1968 because such devices allow a shooter of a semiautomatic firearm to initiate a continuous firing cycle with a single pull of the trigger." *Id.* According to the Rule, the "devices convert an otherwise semiautomatic firearm into a machinegun by functioning as a self-acting or self-regulating mechanism that harnesses the recoil energy of the semiautomatic firearm in a manner that allows the trigger to reset and continue firing without additional physical manipulation *of the trigger* by the shooter." *Id.* (emphasis added). Thus, "a semiautomatic firearm to which a bump-stock de-

[4] The Rule amends three separate regulations, 27 C.F.R. §§ 447.11, 478.11, 479.11, reinterpreting with identical language the statutory definition of "machinegun" in each.

vice is attached is able to produce automatic fire with a single pull of the trigger." *Id.*

The Bump Stock Rule was scheduled to go into effect on March 26, 2019.[5] There were then an estimated 280,000 to 520,000 previously legal bump stocks in circulation in the United States. *See Bump-Stock-Type Devices,* 83 Fed. Reg. 13,442, 13,451 (March 29, 2018). Under the Rule, "[b]ump-stock-type devices ... possessed by individuals [had] to be destroyed or abandoned" before March 26. *Bump-Stock-Type Devices* 83 Fed. Reg. at 66,546. Anyone who possesses or transports the device after that date faces criminal liability. 18 U.S.C. § 922(o)(1).

D. Procedural History

The plaintiffs, five individual firearms owners and four non-profit organizations, challenge the Bump Stock Rule's legality on several grounds. Their primary challenge is that the Rule misinterprets the statutory definition of "machinegun" and mistakenly extends that definition to cover bump stock type devices. They also attack the Rule for alleged procedural gaps in the rulemaking process and for taking property without just compensation in violation of the Fifth Amendment's Due Process ***39** Clause. Finally, the plaintiffs contend that former Acting Attorney General Matthew Whitaker was not properly appointed to his position and thus lacked authority to

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[5] After hearing argument on March 22, 2019, we issued an administrative order staying the Rule's effective date but only as to the plaintiffs. Per Curiam Order, *Guedes v. ATF*, No. 19-5042 (D.C. Cir. March 23, 2019).

approve the Rule. The plaintiffs separately moved for preliminary injunctive relief.

The district court consolidated and denied the motions. "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008). The district court determined that the Rule reasonably interprets "machinegun" to include bump stock devices. It also rejected the plaintiffs' other challenges either as unlikely to succeed on the merits or as unsuitable for equitable relief. Accordingly, the district court denied relief without reaching the other three preliminary-injunction factors. The plaintiffs then filed a timely interlocutory appeal. *See* 28 U.S.C. § 1292(a)(1).

II. ANALYSIS

A. STANDARD OF REVIEW

The district court's denial of preliminary injunctive relief rests on its legal determination that the Bump Stock Rule does not misinterpret or misapply the statutory definition of "machinegun." Our review is therefore *de novo*. *City of Las Vegas v. Lujan*, 891 F.2d 927, 931–32 (D.C. Cir. 1989) (*de novo* review of denial of preliminary injunctive relief where "district judge did not make any factual determinations ... since he was sitting in appellate review of agency action" and "denied the preliminary injunction because, and only because, he believed the [agency] was likely

to succeed on the merits"); *see also Athens Cmty. Hosp., Inc. v. Shalala*, 21 F.3d 1176, 1178 (D.C. Cir. 1994) ("Upon the issue whether an administrative regulation is lawful, we do not defer to the judgment of the district court.").

Despite the parties' agreement that the *de novo* standard of review applies, my colleagues, like the district court, *see Guedes*, 356 F.Supp.3d at 126–27, nonetheless review the ATF's interpretation under the two-step framework set out in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).[6] But the United States Supreme Court has recently clarified whether the *Chevron* framework applies to a statute—and, by extension a rule—enforced by a criminal sanction. *United States v. Apel*, 571 U.S. 359, 369, 134 S.Ct. 1144, 186 L.Ed.2d 75 (2014) ("[W]e have never held that the Govern-

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[6] Even under *Chevron*, "[a]n agency construction of a statute cannot survive judicial review if a contested regulation reflects an action that exceeds the agency's authority." *Aid Ass'n for Lutherans v. U.S. Postal Serv.*, 321 F.3d 1166, 1174 (D.C. Cir. 2003). Because the Bump Stock Rule exceeds the ATF's authority by veering from the plain meaning of the statute, I would reach the same conclusion whether *Chevron* step one or *de novo* review applies.

In reply to my colleagues' insistence that, at the rulemaking stage, the ATF emphasized its reliance on *Chevron*, Maj. Op. at 18–19, I would note that the ATF in fact declared that the Rule's interpretations of "single function of the trigger" and "automatically" "accord with the *plain meaning* of those terms." *Bump-Stock-Type Devices*, 83 Fed. Reg. at 66,527 (emphasis added). Its "fallback" position at that stage was "*even if* those terms are ambiguous, this rule rests on a reasonable construction of them." *Id.* (emphasis added).

ment's reading of a criminal statute is entitled to any deference."). In another recent decision, *Abramski v. United States*, the ATF had taken one view of 18 U.S.C. § 922(a)(6) for "almost two decades," ***40** concluding that a straw purchaser's "misrepresentation" counted as "material" under the statute notwithstanding the true buyer could legally possess a gun. 573 U.S. at 191, 134 S.Ct. 2259. The defendant pointed out that the ATF had until 1995 taken the opposite position, requiring the true buyer to be ineligible to possess a gun in order to make the straw purchaser's misrepresentation "material." *Id.* The Supreme Court responded that the "ATF's old position [is] no more relevant than its current one—which is to say, not relevant at all." *Id.* Indeed, "[w]hether the Government interprets a criminal statute too broadly (as it sometimes does) or too narrowly (as the ATF used to in construing § 922(a)(6)), a court has an obligation to correct its error." *Id.* In its *Apel* and *Abramski* decisions, then, "[t]he Supreme Court has expressly instructed us *not* to apply *Chevron* deference when an agency seeks to interpret a criminal statute." *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1156 (10th Cir. 2016) (Gorsuch, J., concurring).

My colleagues believe that this case is different because the 26 U.S.C. § 5845(b) definition of "machinegun" has both civil[7] and criminal[8] enforcement

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[7] *See* 26 U.S.C. § 5872(a) ("Any firearm involved in any violation of the provisions of this chapter shall be subject to seizure and forfeiture, and (except as provided in subsection (b)) all the provisions of internal revenue laws relating to searches, seizures, and forfeitures of unstamped articles are extended to and

implications. They reach their conclusion regarding the applicable standard of review based in part on a footnote in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 115 S.Ct. 2407, 132 L.Ed.2d 597 (1995). That case involved a regulation interpreting the definition of "harm" under the Endangered Species Act, a regulation with both criminal and civil enforcement implications. *Id.* at 704, 115 S.Ct. 2407 n.18. The Supreme Court deferred to the Secretary of the Interior's interpretation under *Chevron*. *Id.* at 703–04, 115 S.Ct. 2407. The majority reads *Babbitt*—and some of our precedent—to establish a bright-line rule that any regulation with both civil and criminal enforcement provisions merits *Chevron* deference. Maj. Op. at 23–25; *see In re Sealed Case*, 223 F.3d 775, 779 (D.C. Cir. 2000); *United States v. Kanchanalak*, 192 F.3d 1037, 1047 n.17 (D.C. Cir. 1999).[9]

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made to apply to the articles taxed under this chapter, and the persons to whom this chapter applies.").

[8] *See* 18 U.S.C. § 922(o)(1) ("[I]t shall be unlawful for any person to transfer or possess a machinegun."); 18 U.S.C. § 921(a)(23) ("The term 'machinegun' has the meaning given such term in section 5845(b) of the National Firearms Act (26 U.S.C. 5845(b))."); 18 U.S.C. § 924(a) (establishing penalties for "knowing[ ]" or "willful[ ]" violation of, *inter alia*, section 922(o)(1)'s ban on machinegun possession or transfer).

[9] One post-*Apel* and *Abramski* Circuit decision applies the *Chevron* framework to a regulation with criminal and civil enforcement provisions. *Competitive Enter. Inst. v. U.S. Dep't of Transp.*, 863 F.3d 911, 915 (D.C. Cir. 2017). But only one judge signed on to that view; one dissented and another wrote separately to explain that he would reach the same result under *de novo* review, which made *Chevron*'s applicability *vel non* unnecessary to his vote, *id.* at 921 (Kavanaugh, J., concurring).

With respect, I am not convinced that my colleagues' reading of *Babbitt* as the last word on this topic is correct. *See Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 n.8, 121 S.Ct. 675, 148 L.Ed.2d 576 (2001) (declining, post-*Babbitt*, to address relationship between *Chevron* and agency regulation interpreting statute with criminal sanction). The Supreme Court's most recent decisions indicate, as the ATF and the plaintiffs argue here, Government Br. 36–37; ***41** Codrea Opening Br. at 9–11, that *Chevron* review does not apply to a statute/rule with criminal sanctions.[10] *Apel*, 571 U.S. at 369, 134 S.Ct. 1144; *Abramski*, 573 U.S. at 191, 134 S.Ct. 2259. And if *Chevron* review does not apply to a statute/rule with criminal sanctions, *Chevron* cannot apply to a statute/rule with *both* criminal *and* civil sanctions. *See Clark v. Martinez*, 543 U.S. 371, 380, 125 S.Ct. 716, 160 L.Ed.2d 734 (2005) (a statute can have only a single meaning and "[t]he lowest common denominator, as it were, must govern"); *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8, 125 S.Ct. 377, 160 L.Ed.2d 271 (2004) ("[W]e must interpret [a] statute consistently, whether we encounter its application in a criminal or noncriminal context."). Again, with respect, the majority may misread *Babbitt*, which itself includes language that can allow its hold-

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[10] I leave for another day whether the Government can "waive" *Chevron* review, as my colleagues view the ATF's stance here. Maj. Op. at 21–23; *but see Glob. Tel*Link v. FCC*, 866 F.3d 397, 417 (D.C. Cir. 2017) ("it would make no sense for this court to determine whether" agency action "warrant[s] *Chevron* deference" if the agency "no longer seeks deference"). I view the ATF's stance to be that *Chevron* is inapplicable—period. Government Br. 36–37.

ing to be reconciled with recent Supreme Court decisions:

> We have never suggested that the rule of lenity should provide the standard for reviewing facial challenges to administrative regulations whenever the governing statute authorizes criminal enforcement. Even if there exist regulations whose interpretations of statutory criminal penalties provide such inadequate notice of potential liability as to offend the rule of lenity, the "harm" regulation, which has existed for two decades and gives a fair warning of its consequences, cannot be one of them.

515 U.S. at 704 n.18, 115 S.Ct. 2407. Footnote 18 suggests, I submit, that a regulation with a criminal sanction *can* violate the rule of lenity but concluded that the regulation at issue, with its longstanding definition of "harm," did not do so. *Id.* My reading allows *Babbitt* to be harmonized with more recent decisions: *Chevron* does not apply to a regulation enforced both civilly and criminally unless the regulation gives fair warning sufficient to avoid posing a rule of lenity problem. The ATF's interpretation of "machinegun" gives anything but fair warning—instead, it does a *volte-face* of its almost eleven years' treatment of a non-mechanical bump stock as not constituting a "machinegun."

Although I do not dispute that the ATF has been delegated general rulemaking authority to implement section 5845(b), *inter alia*, I am less certain than my colleagues that we owe deference to the ATF's interpretation of section 5845(b). "Deference under *Chev-*

ron to an agency's construction of a statute that it administers is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000). Statutory ambiguity, if it exists, does not necessarily constitute an implicit delegation. *King v. Burwell*, —– U.S. ——, 135 S.Ct. 2480, 2488–89, 192 L.Ed.2d 483 (2015); *United States Telecom Ass'n v. FCC*, 855 F.3d 381, 419–24 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc). The Congress must, for instance, "speak clearly if it wishes to assign to an agency decisions of vast economic and political significance." *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324, 134 S.Ct. 2427, 189 L.Ed.2d 372 (2014) (quotation marks omitted). There is good reason to believe that a similar clear-statement rule ***42** applies in the criminal law context. Under longstanding separation-of-powers principles, the Congress defines the criminal law and must speak distinctly to delegate its responsibility.[11] *United States v. Bass*, 404 U.S. 336, 348, 92 S.Ct. 515, 30 L.Ed.2d 488 (1971); *United States v. Grimaud*, 220 U.S. 506, 519, 522, 31 S.Ct. 480, 55 L.Ed. 563 (1911); *United States v. Eaton*, 144 U.S. 677, 688,

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[11] The Supreme Court has upheld executive branch interpretations of the criminal law based on *express* delegations of interpretive authority. *See United States v. O'Hagan*, 521 U.S. 642, 667, 117 S.Ct. 2199, 138 L.Ed.2d 724 (1997) (Securities Exchange Act of 1934); *Touby v. United States*, 500 U.S. 160, 165–69, 111 S.Ct. 1752, 114 L.Ed.2d 219 (1991) (Controlled Substances Act).

12 S.Ct. 764, 36 L.Ed. 591 (1892). Unlike with civil statutes, then, ambiguity in the criminal law is presumptively for the Congress—not the ATF—to resolve. *Whitman v. United States*, —— U.S. ——, 135 S.Ct. 352, 354, 190 L.Ed.2d 381 (2014) (Scalia, J., statement respecting denial of certiorari) ("Congress cannot, through ambiguity, effectively leave that function to the courts—much less to the administrative bureaucracy."). Accordingly, I would treat an ambiguous criminal statute to be of "vast economic and political significance" and apply *Chevron* only if the Congress expressly delegates its lawmaking responsibility. *See Util. Air Regulatory Grp.*, 573 U.S. at 324, 134 S.Ct. 2427. The Congress has made no such clear statement; instead the ATF relies solely on its general rulemaking power and statutory ambiguity. 18 U.S.C. § 926(a); 26 U.S.C. §§ 7801(a)(2)(A), 7805(a). *Chevron* is inapplicable. *See King*, 135 S.Ct. at 2489.

I believe the applicable standard of review is *de novo* and therefore we should go "the old-fashioned" route and "decide for ourselves the best reading" of "machinegun." *Miller v. Clinton*, 687 F.3d 1332, 1342 (D.C. Cir. 2012) (quoting *Landmark Legal Found. v. IRS*, 267 F.3d 1132, 1136 (D.C. Cir. 2001)). As is always the case in construing a statute, the inquiry focuses on "the plain meaning of the text, looking to the 'language itself, the specific context in which that language is used, and the broader context of the statute as a whole.' " *Blackman v. District of Columbia*, 456 F.3d 167, 176 (D.C. Cir. 2006) (quoting *United States v. Barnes*, 295 F.3d 1354, 1359 (D.C. Cir. 2002)). The Bump Stock Rule declares that any bump stock

device qualifies as a "machinegun." Although the Rule—in my view—correctly interprets "single function of the trigger," it misreads "automatically." Moreover, it misapplies its interpretation of "single function of the trigger" to bump stock type devices.

B. "Single Function of the Trigger"

The Rule determines that "single function of the trigger" within the statutory definition of "machinegun" means "single pull of the trigger and analogous motions." *Bump-Stock-Type Devices*, 83 Fed. Reg. at 66,554. To me, the "function" of the trigger means "action" of the trigger. Webster's New International Dictionary 1019 (2d ed. 1934). According to the section 5845(b) definition, the trigger function "shoots" the firearm. 26 U.S.C. § 5845(b) ("The term 'machinegun' means any weapon which shoots ... automatically more than one shot, without manual reloading, by a single function of the trigger."); *see also Fortier v. Olin Corp.*, 840 F.2d 98, 101 (1st Cir. 1988) (discussing mechanics of lever-action rifle). "Pull of the trigger," then, describes *how* the trigger works. *See Staples*, 511 U.S. at 602 n.1, 114 S.Ct. 1793; *United States v. Camp*, 343 F.3d 743, 745 (5th Cir. 2003) (using trigger "pull" and "function" interchangeably); *United States v. Oakes*, 564 F.2d 384, 388 (10th Cir. 1977) (same). ***43** The Rule recognizes that not all firearms feature a pull trigger; some involve "fire initiated by voice command, electronic switch, swipe on a touchscreen or pad, or any conceivable number of interfaces." *Bump-Stock-Type Devices*, 83 Fed. Reg. at 66,534; *see also United States v. Fleischli*, 305 F.3d 643, 655–56 (7th Cir. 2002) (minigun fired by "electronic switch" is machinegun).

To include these non-pull methods used to shoot a firearm, the Rule includes the phrase "and analogous motions." *Bump-Stock-Type Devices*, 83 Fed. Reg. at 66,553.

The plaintiffs claim that the Rule's interpretation of "single function" impermissibly shifts the *statutory* focus from the *trigger*'s action to the *trigger finger*'s action. But the Rule defines "single function" to mean "single pull of the trigger and analogous motions." The Rule's definition describes the "motion" of the trigger, not of the trigger finger. *Id.* at 66,554. Indeed, nothing in the Rule's definition refers to a shooter's finger or a volitional action. *Id.* The plaintiffs challenge the Rule because the ATF determines therein that a bump stock device allows the firearm to shoot more than one shot with only a single pull. But that is a question of application, not definition. As for the definition, I believe the Rule correctly reads "function" by focusing on how the trigger acts—that is, through a pull.

C. "Automatically"

The Bump Stock Rule defines "automatically" to mean "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. The plaintiffs challenge this definition because it does not account for the additional physical input the shooter must provide in the firing sequence to make a firearm with a bump stock shoot more rapidly. That "pull plus" action, they say, invalidly expands the statutory text: a " 'single function of the trigger' is the

starting and the ending point of [making] a firearm automatic." Codrea Br. at 14. I agree.[12]

The Rule's fatal flaw comes from its "adding to" the statutory language in a way that is—at least to me—plainly *ultra vires*. 1A Sutherland Statutory Construction § 31.02, at 521 (4th ed. 1985) ("The legislative act is the charter of the administrative agency and administrative action beyond the authority conferred by the statute is ultra vires."); *see Burnet v. Marston*, 57 F.2d 611, 612 (D.C. Cir. 1932) ("While the [agency] was clothed with authority to promulgate regulations, [it] was not authorized to add to or take from the plain language of the statute, for, 'where the intent is plain, nothing is left to construction.' " (quoting *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 386, 2 L.Ed. 304 (1805))). "Automatically" cannot be read in isolation. On the contrary, it is modified—that is, limited—by the clause "by a single function of the trigger." 26 U.S.C. § 5845(b); Webster's New International Dictionary 307 (2d ed. 1934) (defining "by" as "through the means of"). Section 5845(b)'s awkward syntax does not equal ambiguity,

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[12] A portion of the Bump Stock Rule's definition of "automatically" strikes me as unobjectionable. It adopts the phrase "functioning as the result of a self-acting or self-regulating mechanism" as a substitute for "automatically." *Bump-Stock-Type Devices*, 83 Fed Reg. at 66,554. It does so because dictionaries in use at the time the 1934 Act was enacted defined "automatically" that way. *Id.* at 66,519; *see also* Webster's New International Dictionary 187 (2d ed. 1934) ("automatic" means "[h]aving a self-acting or self-regulating mechanism that performs a required act at a predetermined point in an operation").

as illustrated by the lost ***44** art of diagramming.[13] "Automatically ... by a single function of the trigger" is the sum total of the *action necessary* to constitute a firearm a "machinegun." 26 U.S.C. § 5845(b). A "machinegun," then, is a firearm that shoots more than one round by a single trigger pull without manual reloading.[14] The statutory definition of "machinegun"

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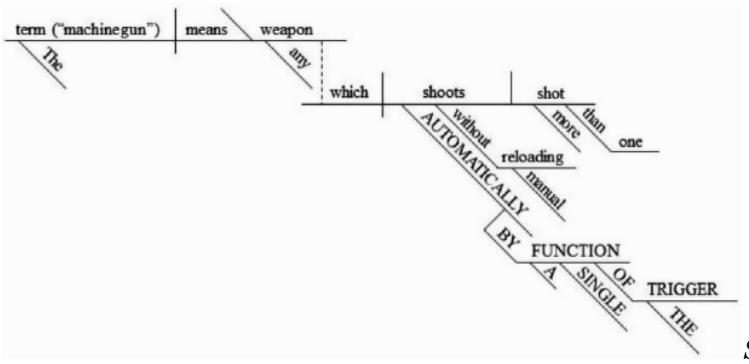
[13] Section 5845(b) can be diagrammed as follows:



See generally Marye Hefty et al., *Sentence Diagramming* 7–11, 17–20, 24–25, 30–31, 33, 49 (2008).

[14] In *United States v. Olofson*, 563 F.3d 652 (7th Cir. 2009), the Seventh Circuit discussed the meaning of "machinegun." It explained that " 'automatically' is the adverbial form of 'automatic,' " meaning "[h]aving a self-acting or self-regulating mechanism." *Id.* at 658 (alteration in original) (quoting Webster's New International Dictionary 187 (2d ed. 1934)). It then read section 5845(b)'s "automatically" as follows: "the adverb 'automatically,' as it modifies the verb 'shoots,' delineates how the discharge of multiple rounds from a weapon occurs: as the result of a self-acting mechanism." *Id.* My rejection of the Bump Stock Rule creates no tension with *Olofson*. That court did not consider whether additional manual input from the non-shooting hand—"pull plus"—takes a device outside section 5845(b)'s definition of "automatically." Nor did *Olofson* consider whether "pull" refers to how the trigger works or to the movement of the shooter's trigger finger.

does not include a firearm that shoots more than one round "automatically" by a single pull of the trigger **AND THEN SOME** (that is, by "constant forward pressure with the non-trigger hand"). *Bump-Stock-Type Devices*, 83 Fed. Reg. at 66,532. By including more action than a single trigger pull, the Rule invalidly expands section 5845(b), as the ATF itself recognized in the rulemaking. *See id.* (shooter "maintain[s] constant forward pressure with the non-trigger hand on the barrel-shroud or fore-grip of the rifle," *and* "maintain[s] the trigger finger on the device's extension ledge with constant rearward pressure.").

My reading of the statute comports with the common sense meaning of the language used. Suppose an advertisement declares that a device performs a task "automatically by a push of a button." I would understand the phrase to mean pushing the button activates whatever function the device performs. It would come as a surprise, I submit, if the device does not operate until the button is pushed *and* some other action is taken—a pedal pressed, a dial turned and so on. Although the device might be "automatic" under some definition, it would not fit the advertised definition of "automatic": by a push of a button period.

More importantly, my reading of the statute—unlike the ATF's reading—maintains the longstanding distinction between ***45** "automatic" and "semi-automatic" in the firearms context. The original definition of "machinegun" in the 1934 Act included a firearm that shoots more than one round "automatically or semiautomatically." 26 U.S.C. § 2733(b) (1940). At the time, an "automatic gun" was understood to be "[a] firearm which, after the first round is

exploded, by gas pressure or force of recoil automatically extracts and ejects the empty case, loads another round into the chamber, fires, and repeats the above cycle, until the ammunition in the feeding mechanism is exhausted, or pressure on the trigger is released." Webster's New International Dictionary 187 (2d ed. 1934). A "semiautomatic gun" was (and is) "[a] firearm in which part, but not all, of the operations involved in loading and firing are performed automatically, as when the recoil is used to open the breech and thus prepare for reloading by hand." Webster's New International Dictionary 187 (2d ed. 1934). At the time of the 1934 Act's enactment, then, the difference between an "automatic" and a "semiautomatic" gun depended on whether the shooter played a manual role in the loading and firing process. My interpretation fits the historical context by limiting "automatic[ ]" to a firearm that shoots more than one round by a single trigger pull with no additional action by the shooter. By contrast, the Bump Stock Rule reinterprets "automatically" to mean what "semiautomatically" did in 1934—a pull of the trigger *plus*. The Congress deleted "semiautomatically" from the statute in 1968 and the ATF is without authority to resurrect it by regulation.

The ATF insists that my interpretation renders "automatically" superfluous—a result inconsistent with the well-established principle that " '[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.' " *Corley v. United States*, 556 U.S. 303, 314, 129 S.Ct. 1558, 173 L.Ed.2d 443 (2009) (alteration in original) (quoting

Hibbs v. Winn, 542 U.S. 88, 101, 124 S.Ct. 2276, 159 L.Ed.2d 172 (2004)). Not even close. "[A]utomatically" means that the firearm shoots more than one shot as the result of a self-acting mechanism effected by a single pull of the trigger. Thus, the combination of "automatically" and "by a single pull" explains *how* the shooter accomplishes the firing sequence of a "machinegun." Under my reading, "automatically" *excludes* a "machinegun" that uses a self-acting firing sequence effected by action in addition to a single pull of the trigger.

Finally, the ATF, as well as the district court, posits that the Bump Stock Rule meets one ordinary meaning of "automatically"—that is, "perform[s] parts of the work formerly or usually done by hand." Webster's New International Dictionary 187 (2d ed. 1934). Both believe that a bump stock "makes it easier to bump fire because it controls the distance the firearm recoils and ensures that the firearm moves linearly—two tasks the shooter would ordinarily have to perform manually." *Guedes*, 356 F.Supp.3d at 132. Maybe so. But the Rule does not use the "formerly done by hand" meaning of "automatically." *Bump-Stock-Type Devices*, 83 Fed. Reg. at 66,519. It defines "automatically" to mean "as the result of a self-acting or self-regulating mechanism." *Id.* Whether *that* definition is consistent with section 5845(b)'s definition is the question before us.[15]

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[15] I am not quibbling about semantics. The two definitions of "automatically" have different aims: one refers to a self-acting object; the other refers to automating a formerly "by-hand" task. Webster's Third New International Dictionary 148 (1993). The "formerly by-hand" definition would shift the focus from wheth-

***46 D. Is a Bump Stock a "Machinegun?"**

Having interpreted "automatically" and "single function of the trigger," the Rule declares that a " 'machinegun' includes a bump-stock-type device, i.e., a device that allows a semiautomatic firearm to shoot more than one shot with a single pull of the trigger by harnessing the recoil energy of the semiautomatic firearm to which it is affixed so that the trigger resets and continues firing without additional physical manipulation of the trigger by the shooter." *Id.* at 66,553–54. There are at least two defects in this classification. It ignores the fact that a non-mechanical bump stock—a type of bump stock device covered by the Rule—does not allow the firearm to shoot more rapidly with a single pull of the trigger because the shooter must provide "constant forward pressure with the non-trigger hand" for the device to function. *Id.* at 66,532. It also erroneously determines that a bump stock allows a semiautomatic rifle to fire more than one round with a single pull of the trigger. For these reasons, I agree with the plaintiffs that a bump stock is not a "machinegun."

First, a firearm equipped with a non-mechanical bump stock does not fire "automatically" because the shooter must also provide constant forward pressure with his non-shooting hand. The Rule's very description of a non-mechanical bump stock manifests that its proscription is *ultra vires*:

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er a bump stock provides a self-acting mechanism to fire multiple rounds to whether a bump stock automates any action in the firing sequence.

> [Bump stock] devices replace a rifle's standard stock and free the weapon to slide back and forth rapidly, harnessing the energy from the firearm's recoil either through a mechanism like an internal spring or *in conjunction with the shooter's maintenance of pressure* (typically constant forward pressure with the non-trigger hand on the barrel-shroud or foregrip of the rifle, *and* constant rearward pressure on the device's extension ledge with the shooter's trigger finger).

Id. at 66,516 (emphases added). This description covers two types of bump stocks, one that includes a mechanism like an internal spring and the other that requires the shooter to maintain pressure with his non-trigger hand. *Id.* The first type, including the original Akins Accelerator, has been classified as a "machinegun" and hence illegal since 2006. *Id.* at 66,517. The Rule must—and does—aim at the second type—the non-mechanical bump stock—which operates only in conjunction with the shooter's added physical pressure.[16] But that added physical pressure is inconsistent with the statutory definition of a "machinegun," which fires multiple rounds with a self-acting mechanism effected through a single pull of the trigger *simpliciter*. In short, the statute uses "pull" and the Rule—invalidly—uses "pull *plus*."

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[16] At oral argument, the ATF asserted that the non-trigger hand's "additional forward pressure" is part of the "automatic" firing process. Transcript of Oral Argument 73–74. "Automatic" means "self-acting or self-regulating." *Bump-Stock-Type Devices*, 83 Fed. Reg. at 66,553. The non-trigger hand's constant forward pressure requires physical, not automatic, action.

Other parts of the Rule expose the ATF's error. In discussing its interpretation of "automatically," the ATF gave the following explanation: "[s]o long as the firearm is capable of producing multiple rounds with a single pull of the trigger until [1] the trigger finger is removed, [2] the ammunition supply is exhausted, or [3] the firearm malfunctions, the firearm shoots 'automatically' irrespective of why ***47** the firing sequence ultimately ends." *Id.* at 66,519. Yet elsewhere the ATF describes the firing process of a firearm with a bump stock as follows: "the shooter 'pulls' the trigger once and allows the firearm and attached bump-stock-type device to operate until the shooter releases the trigger finger *or* the constant forward pressure with the non-trigger hand." *Id.* at 66,532 (emphasis added). In my view, this assertion is an explicit recognition that a bump stock device *does not* continue shooting rounds with a single trigger pull if the shooter does not maintain "constant forward pressure with the non-trigger hand." *Id.* at 66,532.

Moreover, I find it difficult to ignore the ATF's repeated earlier determinations that non-mechanical bump stocks do not initiate an automatic firing sequence. Three ATF determination letters from 2010 to 2013 explained why non-mechanical bump stocks are not "machineguns":

> [Our] evaluation confirmed that the submitted stock (see enclosed photos) does attach to the rear of an AR-15 type rifle which has been fitted with a sliding shoulder-stock type buffer-tube assembly. The stock has no automatically functioning mechanical parts or springs and performs no automatic mechanical func-

> tion when installed. In order to use the installed device, the shooter must apply constant forward pressure with the non-shooting hand and constant rearward pressure with the shooting hand.

Determination Letter signed by John R. Spencer, Chief, Firearms Tech. Branch, ATF (June 7, 2010), *reprinted at* J.A. 278; *see also* Determination Letter signed by John R. Spencer, Chief, Firearms Tech. Branch, ATF (April 2, 2012), *reprinted at* J.A. at 279–80; Letter from Richard W. Marianos, Assistant Dir. Pub. and Governmental Affairs, to Congressman Ed Perlmutter (April 16, 2013), *reprinted at* J.A. 281–82. The Rule does not fairly treat the ATF's repeated determinations that a non-mechanical bump stock "performs no automatic mechanical function when installed." J.A. 278. Instead, it rejects its previous reading as based on an incomplete *legal* definition of "automatically." *Bump-Stock-Type Devices*, 83 Fed. Reg. at 66,521.[17] But those determinations made *factual findings* that the non-mechanical bump stock operates only if the shooter applies "constant forward pressure with the non-shooting hand and constant

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[17] During the rulemaking, the ATF repeatedly declared that its earlier determinations "did not include extensive legal analysis of the statutory terms 'automatically' or 'single function of the trigger.' " *Bump-Stock-Type Devices*, 83 Fed. Reg. at 66,516; *see also id.* at 66,514, 66,521, 66,528, 66,531. I defy a careful reader of the rulemaking to find *any* legal, as opposed to functional, analysis of a bump stock device, much less substantial legal analysis. *Id.* at 66,518 ("[P]rior ATF rulings concerning bump-stock-type devices did not provide substantial or consistent legal analysis regarding the meaning of the term 'automatically.' ").

rearward pressure with the shooting hand." Determination Letter signed by John R. Spencer, Chief, Firearms Tech. Branch, ATF (June 7, 2010). And those factual findings dictate that a non-mechanical bump stock is not a "machinegun" under section 5845(b).

Second, a semiautomatic rifle equipped with a bump stock *cannot* fire more than one round with a *single* function of the trigger. The plaintiffs argue—and the ATF does not dispute—that the trigger of a semiautomatic rifle must release the hammer for each individual discharge. Nor is there any dispute that a semiautomatic rifle cannot fire again until the trigger is released, which causes the hammer to reset. The Rule refers to the release of the trigger as a "separate" function. *Bump-Stock-Type Devices*, 83 Fed. Reg. at 66,534 ***48** ("While semiautomatic firearms [equipped with certain devices] may shoot one round when the trigger is pulled, the shooter must release the trigger before another round is fired. Even if this release results in a second shot being fired, it is as the result of a separate function of the trigger."). Once the trigger shoots, it must be released to reset the hammer and the trigger must be pulled again for each subsequent shot. Verified Declaration of Richard (Rick) Vasquez, former Acting Chief of the Firearms Tech. Branch of ATF, at 4 (with bump stock, "after the first shot is discharged, the trigger must be released, reset, and pulled completely rearward, before the subsequent round is discharged"), *reprinted at* J.A. 275. Thus, a semiautomatic rifle equipped with a

bump stock cannot shoot more than one round with a single pull of the trigger.[18]

Still, the ATF insists that a bump stock allows a firearm to shoot multiple shots with a single pull. *Bump-Stock-Type Devices*, 83 Fed. Reg. at 66,553–54. The ATF focuses on whether the shooter must pull his index finger more than once to fire multiple shots. Because a bump stock allows the firearm to fire more than once with a single pull of the index finger, the ATF concludes that a bump stock is a "machinegun." Remember, however, section 5845(b) uses "single function of the trigger," not single function of the shooter's trigger finger.

If the focus is—as it must be—on the trigger, a bump stock does not qualify as a "machinegun." A semiautomatic rifle shoots a single round per pull of the trigger and the bump stock changes only *how* the pull is accomplished. Without a bump stock, the shooter pulls the trigger with his finger for each shot. With a bump stock, however, the shooter—after the initial pull—maintains backward pressure on the trigger and puts forward pressure on the barrel with

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[18] Record evidence supports my point. As discussed earlier, the record includes a video of a shooter firing a rifle equipped with a bump stock. The video is in slow motion and focuses on the trigger. For each shot the rifle fires, the trigger is pulled by the shooter's stationary trigger finger. The trigger is then released between each shot. And the trigger is pulled again for the next shot. This trigger movement confirms that a bump stock does not allow a rifle to shoot more than one round with *only* a single pull of the trigger. Attached as an appendix are photographs, taken from the video, that illustrate the trigger's movement during the bump stock's firing sequence.

his non-shooting hand; these manual inputs cause the rifle to slide and result in the shooter's *stationary* finger pulling the trigger. *Bump-Stock-Type Devices*, 83 Fed. Reg. at 66,533 ("The constant forward pressure with the non-trigger hand pushes the firearm forward, again pulling the firearm forward, engaging the trigger, and firing a second round."). The bump stock therefore affects whether the shooter *pulls* his trigger finger or keeps it *stationary*. It does not change the movement of the trigger itself, which "must be released, reset, and fully pulled rearward before [a] subsequent round can be fired." Verified Declaration of Richard (Rick) Vasquez, former Acting Chief of the Firearms Tech. Branch of ATF, at 3–4.

Like countless other Americans, I can think of little legitimate use for a bump stock. That thought, however, has nothing to do with the legality of the Bump Stock Rule. For the reasons detailed *supra*, I believe the Bump Stock Rule expands the statutory definition of "machinegun" and is therefore *ultra vires*. In my view, the plaintiffs are likely to succeed on the merits of their challenge and I would grant them preliminary injunctive relief.

Accordingly, I respectfully dissent.

*49 APPENDIX

Photograph One: Trigger separates from stationary index finger.

Photograph Two: Trigger comes into contact with stationary index finger.

APPENDIX B

[Excerpts]

83 FR 66514-01, 2018 WL 6738526(F.R.)

RULES and REGULATIONS

DEPARTMENT OF JUSTICE

Bureau of Alcohol, Tobacco, Firearms, and Explosives

27 CFR Parts 447, 478, and 479

[Docket No. 2018R-22F; AG Order No. 4367-2018]

RIN 1140-AA52

Bump-Stock-Type Devices

Wednesday, December 26, 2018

AGENCY: Bureau of Alcohol, Tobacco, Firearms, and Explosives; Department of Justice.

***66514** ACTION: Final rule.

* * *

I. Executive Summary

A. Summary of the Regulatory Action

The current regulations at §§ 447.11, 478.11, and 479.11 of title 27, Code of Federal Regulations (CFR), contain definitions for the term "machinegun." [FN1][1]

[1] Regulations implementing the relevant statutes spell the term "machine gun" rather than "machinegun." E.g., 27 CFR

The definitions used in 27 CFR 478.11 and 479.11 match the statutory definition of "machinegun" in the National Firearms Act of 1934 (NFA), as amended, and the Gun Control Act of 1968 (GCA), as amended. Under the NFA, 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." 26 U.S.C. 5845(b). The term "machinegun" also includes "the frame or receiver of any such weapon" or any part 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." Id. This definition uses the key terms "single function of the trigger" and "automatically," but these terms are not defined in the statutory text.

The definition of "machinegun" in 27 CFR 447.11, promulgated pursuant to the portion of section 38 of the Arms Export Control Act (AECA) (22 U.S.C. 2778) delegated to the Attorney General by section 1(n)(ii) of Executive Order 13637 (78 FR 16129), is similar. Currently, the definition of "machinegun" in § 447.11 provides that a "'machinegun', 'machine pistol', 'submachinegun', or 'automatic rifle' is a firearm originally designed to fire, or capable of being fired fully automatically by a single pull of the trigger."

478.11, 479.11. For convenience, this notice uses "machinegun" except when quoting a source to the contrary.

In 2006, ATF concluded that certain bump-stock-type devices qualified as machineguns under the NFA and GCA. Specifically, ATF concluded that a device attached to a semiautomatic firearm that uses an internal spring to harness the force of a firearm's recoil so that the firearm shoots more than one shot with a single pull of the trigger is a machinegun. Between 2008 and 2017, however, ATF also issued classification decisions concluding that other bump-stock-type devices were not machineguns, primarily because the devices did not rely on internal springs or similar mechanical parts to channel recoil energy. Decisions issued during that time did not include extensive legal analysis relating to the definition of "machinegun." ATF undertook a review of its past classifications and determined that those conclusions did not reflect the best interpretation of "machinegun" under the NFA and GCA.

ATF decided to promulgate a rule that would bring clarity to the definition of "machinegun"—specifically with respect to the terms "automatically" and "single function of the trigger," as those terms are used to define "machinegun." As an initial step in the process of promulgating a rule, on December 26, 2017, the Department of Justice (Department) published in the Federal ***66515** Register an advance notice of proposed rulemaking titled "Application of the Definition of Machinegun to 'Bump Fire' Stocks and Other Similar Devices." 82 FR 60929. Subsequently, on March 29, 2018, the Department published in the Federal Register a notice of proposed rulemaking (NPRM) titled "Bump-Stock-Type Devices." 83 FR 13442.

The NPRM proposed to amend the regulations at 27 CFR 447.11, 478.11, and 479.11 to clarify that bump-stock-type devices are "machineguns" as defined by the NFA and GCA because such devices allow a shooter of a semiautomatic firearm to initiate a continuous firing cycle with a single pull of the trigger. Specifically, these devices convert an otherwise semiautomatic firearm into a machinegun by functioning as a self-acting or self-regulating mechanism that harnesses the recoil energy of the semiautomatic firearm in a manner that allows the trigger to reset and continue firing without additional physical manipulation of the trigger by the shooter. Hence, a semiautomatic firearm to which a bump-stock-type device is attached is able to produce automatic fire with a single pull of the trigger. 83 FR at 13447-48.

The NPRM proposed regulatory definitions for the statutory terms "single function of the trigger" and "automatically," and amendments of the regulatory definition of "machinegun" for purposes of clarity. Specifically, the NPRM proposed to amend the definitions of "machinegun" in §§ 478.11 and 479.11, define the term "single function of the trigger" to mean "single pull of the trigger," and define the term "automatically" to mean "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." 83 FR at 13447-48. The NPRM also proposed to clarify that the definition of "machinegun" includes a device that allows a semiautomatic firearm to shoot more than one shot with a single pull of the trigger by harnessing the recoil energy of the semiautomatic firearm to

which it is affixed so that the trigger resets and continues firing without additional physical manipulation of the trigger by the shooter (commonly known as bump-stock-type devices). Id. at 13447. Finally, the NPRM proposed to harmonize the definition of "machinegun" in § 447.11 with the definitions in 27 CFR parts 478 and 479, as those definitions would be amended. Id. at 13448.

The goal of this final rule is to amend the relevant regulatory definitions as described above. The Department, however, has revised the definition of "single function of the trigger" to mean "single pull of the trigger" and analogous motions, taking into account that there are other methods of initiating an automatic firing sequence that do not require a pull. This final rule also informs current possessors of bump-stock-type devices of the proper methods of disposal, including destruction by the owner or abandonment to ATF.

B. Summary of Costs and Benefits

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II. Background

A. Regulatory Context

The Attorney General is responsible for enforcing the NFA, as amended, and the GCA, as amended.[FN2][2] This responsibility includes the authority

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[2] NFA provisions still refer to the "Secretary of the Treasury." 26 U.S.C. ch. 53. However, the Homeland Security Act of 2002, Public Law 107-296, 116 Stat. 2135, transferred the functions of ATF from the Department of the Treasury to the Department of

to promulgate regulations necessary to enforce the provisions of the NFA and GCA. See 18 U.S.C. 926(a); 26 U.S.C. 7801(a)(2)(A), 7805(a). The Attorney General has delegated the responsibility for administering and enforcing the NFA and GCA to the Director of ATF, subject to the direction of the Attorney General and the Deputy Attorney General. See 28 CFR 0.130(a)(1)-(2). Accordingly, the Department and ATF have promulgated regulations implementing both the NFA and the GCA. See 27 CFR parts 478, 479. In particular, ATF for decades promulgated rules governing "the procedural and substantive requirements relative to the importation, manufacture, making, exportation, identification and registration of, and the dealing in, machine guns." 27 CFR 479.1; see, e.g., United States v. Dodson, 519 F. App'x 344, 348-49 & n.4 (6th Cir. 2013) (acknowledging ATF's role in interpreting the NFA's definition of "machinegun"); F.J. Vollmer Co. v. Higgins, 23 F.3d 448, 449-51 (D.C. Cir. 1994) (upholding an ATF determination regarding machinegun receivers). Courts have recognized ATF's leading regulatory role with respect to firearms, including in the specific context of classifying devices as machineguns under the NFA. See, e.g., York v. Sec'y of Treasury, 774 F.2d 417, 419-20 (10th Cir. 1985).

Justice, under the general authority of the Attorney General. 26 U.S.C. 7801(a)(2); 28 U.S.C. 599A(c)(1). Thus, for ease of reference, this notice refers to the Attorney General.

The GCA defines "machinegun" by referring to the NFA definition,[FN3][3] which includes "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" or any part, 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. Id. With limited exceptions, the GCA prohibits the transfer or possession of machineguns under 18 U.S.C. 922(o).

In 1986, Congress passed the Firearms Owners' Protection Act (FOPA), Public Law 99-308, 100 Stat. 449, which included a provision that effectively froze the number of legally transferrable machineguns to those that were registered before the effective date of the statute. 18 U.S.C. 922(o). Due to the fixed universe of "pre-1986" machineguns that may be lawfully transferred by nongovernmental entities, the value of those machineguns has steadily increased over time. This price premium on automatic weapons has spurred inventors and manufacturers to develop firearms, triggers, and other devices that permit shooters to use semiautomatic rifles to replicate ***66516** automatic fire without converting these rifles into "machineguns" under the NFA and GCA. ATF began

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[3] 18 U.S.C. 921(a)(23).

receiving classification requests for such firearms, triggers, and other devices that replicate automatic fire beginning in 1988. ATF has noted a significant increase in such requests since 2004, often in connection with rifle models that were, until 2004, defined as "semiautomatic assault weapons" and prohibited under the Public Safety and Recreational Firearms Use Protection Act, 18 U.S.C. 921(a)(30) (sunset effective Sept. 13, 2004).

ATF received classification requests pertaining to bump-stock-type devices. Shooters use bump-stock-type devices with semiautomatic firearms to accelerate the firearms' cyclic firing rate to mimic automatic fire. These devices replace a rifle's standard stock and free the weapon to slide back and forth rapidly, harnessing the energy from the firearm's recoil either through a mechanism like an internal spring or in conjunction with the shooter's maintenance of pressure (typically constant forward pressure with the non-trigger hand on the barrel-shroud or fore-grip of the rifle, and constant rearward pressure on the device's extension ledge with the shooter's trigger finger).

In 2006, ATF concluded that certain bump-stock-type devices qualified as machineguns under the NFA and GCA. Specifically, ATF concluded that devices attached to semiautomatic firearms that use an internal spring to harness the force of the recoil so that the firearm shoots more than one shot with a single pull of the trigger are machineguns. Between 2008 and 2017, however, ATF also issued classification decisions concluding that other bump-stock-type

devices were not machineguns, including a device submitted by the manufacturer of the bump-stock-type devices used in the 2017 Las Vegas shooting discussed below. Those decisions indicated that semiautomatic firearms modified with these bump-stock-type devices did not fire "automatically," and thus were not "machineguns," because the devices did not rely on internal springs or similar mechanical parts to channel recoil energy. (For further discussion of ATF's prior interpretations, see Part III.A.) Because ATF has not regulated these certain types of bump-stock-type devices as machineguns under the NFA or GCA, they have not been marked with a serial number or other identification markings. Individuals, therefore, have been able to legally purchase these devices without undergoing background checks or complying with any other Federal regulations applicable to firearms.

B. Las Vegas Shooting

On October 1, 2017, a shooter attacked a large crowd attending an outdoor concert in Las Vegas, Nevada. By using several AR-type rifles with attached bump-stock-type devices, the shooter was able to fire several hundred rounds of ammunition in a short period of time, killing 58 people and wounding approximately 500. The bump-stock-type devices recovered from the scene included two distinct, but functionally equivalent, model variations from the same manufacturer. These types of devices were readily available in the commercial marketplace through online sales directly from the manufacturer, and through multiple retailers.

The Las Vegas bump-stock-type devices, as well as other bump-stock-type devices available on the market, all utilize essentially the same functional design. They are designed to be affixed to a semiautomatic long gun (most commonly an AR-type rifle or an AK-type rifle) in place of a standard, stationary rifle stock, for the express purpose of allowing "rapid fire" operation of the semiautomatic firearm to which they are affixed. They are configured with a sliding shoulder stock molded (or otherwise attached) to a pistol-grip/handle (or "chassis") that includes an extension ledge (or "finger rest") on which the shooter places the trigger finger while shooting the firearm. The devices also generally include a detachable rectangular receiver module (or "bearing interface") that is placed in the receiver well of the device's pistol-grip/handle to assist in guiding and regulating the recoil of the firearm when fired. Bump-stock-type devices, including those with the aforementioned characteristics, are generally designed to channel recoil energy to increase the rate of fire of a semiautomatic firearm from a single trigger pull. Accordingly, when a bump-stock-type device is affixed to a semiautomatic firearm, the device harnesses and directs the firearm's recoil energy to slide the firearm back and forth so that the trigger automatically re-engages by "bumping" the shooter's stationary finger without additional physical manipulation of the trigger by the shooter.

Following the mass shooting in Las Vegas, ATF received correspondence from members of the United States Congress, as well as nongovernmental organizations, requesting that ATF examine its past classi-

fications and determine whether bump-stock-type devices available on the market constitute machineguns under the statutory definition. Consistent with its authority to "reconsider and rectify" potential classification errors, Akins v. United States, 312 F. App'x 197, 200 (11th Cir. 2009) (per curiam), ATF reviewed its earlier determinations for bump-stock-type devices issued between 2008 and 2017 and concluded that those determinations did not include extensive legal analysis of the statutory terms "automatically" or "single function of the trigger." The Department decided to move forward with the rulemaking process to clarify the meaning of these terms, which are used in the NFA's statutory definition of "machinegun."

C. Advance Notice of Proposed Rulemaking

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III. Notice of Proposed Rulemaking

On March 29, 2018, the Department published in the Federal Register a notice of proposed rulemaking (NPRM) titled "Bump-Stock-Type Devices," 83 FR 13442 (ATF Docket No. 2017R-22), proposing changes to the regulations in 27 CFR 447.11, 478.11, and 479.11. The comment period for the proposed rule concluded on June 27, 2018.

A. Prior Interpretations of "Single Function of the Trigger" and "Automatically"

In the NPRM, the Department reviewed ATF's history of classifying bump-stock-type devices through agency rulings and relevant litigation. In particular, it described how ATF published ATF Rul-

ing 2006-2, "Classification of Devices Exclusively Designed to Increase the Rate of Fire of a Semiautomatic Firearm." The ruling explained that ATF had received requests from "several members of the firearms industry to classify devices that are exclusively designed to increase the rate of fire of a semiautomatic firearm." ATF Ruling 2006-2, at 1. Prior to issuing ATF Ruling 2006-2, ATF had examined a device called the "Akins Accelerator." To operate the device, the shooter initiated an automatic firing sequence by pulling the trigger one time, which in turn caused the rifle to recoil within the stock, permitting the trigger to lose contact with the finger and manually reset. Springs in the Akins Accelerator then forced the rifle forward, forcing the trigger against the finger, which caused the weapon to discharge the ammunition. The recoil and the spring-powered device thus caused the firearm to cycle back and forth, impacting the trigger finger without further input by the shooter while the firearm discharged multiple shots. The device was advertised as able to fire approximately 650 rounds per minute. See id. at 2.

ATF initially reviewed the Akins Accelerator in 2002 and determined it not to be a machinegun because ATF interpreted the statutory term "single function of the trigger" to refer to a single movement of the trigger. But ATF undertook further review of the device based on how it actually functioned when sold and later determined that the Akins Accelerator should be classified as a machinegun. ATF reached that conclusion because the best interpretation of the phrase "single function of the trigger" includes a

"single pull of the trigger." The Akins Accelerator qualified as a machinegun because ATF determined through testing that when the device was installed on a semiautomatic rifle (specifically a Ruger Model 10-22), it resulted in 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." Akins v. United States, No. 8:08-cv-988, slip op. at 5 (M.D. Fla. Sept. 23, 2008) (internal quotation marks omitted).

When issuing ATF Ruling 2006-2, ATF set forth a detailed description of the components and functionality of the Akins Accelerator and devices with similar designs. The ruling determined that the phrase "single function of the trigger" in the statutory definition of "machinegun" was best interpreted to mean a "single pull of the trigger." ATF Ruling 2006-2, at 2 (citing National Firearms Act: Hearings Before the Comm. on Ways and Means, House of Representatives, Second Session on H.R. 9066, 73rd Cong., at 40 (1934)). ATF further indicated that this interpretation would apply when the agency classified devices designed to increase the rate of fire of semiautomatic firearms. Thus, ATF concluded in ATF Ruling 2006-2 that devices exclusively designed to increase the rate of fire of semiautomatic firearms were machineguns if, "when activated by a single pull of the trigger, [such devices] initiate[ ] an automatic firing cycle that continues until either the finger is released or the ammunition supply is exhausted." Id. at 3. Finally, because the "single pull of the trigger" interpreta-

tion constituted a change from ATF's prior interpretations of the phrase "single function of the trigger," ATF Ruling 2006-2 concluded that "[t]o the extent previous ATF rulings are inconsistent with this determination, they are hereby overruled." Id.

Following its reclassification of the Akins Accelerator as a machinegun, ATF determined and advised owners of Akins Accelerator devices that removal and disposal of the internal spring—the component that caused the rifle to slide forward in the stock—would render the device a non-machinegun under the statutory definition. Thus, a possessor could retain the device by removing and disposing of the spring, in lieu of destroying or surrendering the device.

In May 2008, the inventor of the Akins Accelerator filed a lawsuit challenging ATF's classification of his device as a machinegun, claiming the agency's decision was arbitrary and capricious under the Administrative Procedure Act (APA). Akins v. United States, No. 8:08-cv-988, slip op. at 7-8 (M.D. Fla. Sept. 23, 2008). The United States District Court for the Middle District of Florida rejected the plaintiff's challenge, holding that ATF was within its authority to reconsider and change its interpretation of the phrase "single function of the trigger" in the NFA's statutory definition of "machinegun." Id. at 14. The court further held that the language of the statute and the legislative history supported ATF's interpretation of the statutory phrase "single function of the trigger" as synonymous with "single pull of the trigger." Id. at 11-12. The court concluded that in ATF Ruling 2006-2, ATF had set forth a "reasoned analy-

sis" for the application of that new interpretation to the Akins Accelerator and similar devices, including the need to "protect the public from dangerous firearms." Id. at 12.

The United States Court of Appeals for the Eleventh Circuit affirmed the district court's decision, holding that "[t]he interpretation by the Bureau that the phrase 'single function of the trigger' means a 'single pull of the trigger' is consonant with the statute and its legislative history." Akins, 312 F. App'x at 200. The Eleventh Circuit further concluded that "[b]ased on the operation of the Accelerator, the Bureau had the authority to 'reconsider and rectify' what it considered to be a classification error." Id.

In ten letter rulings between 2008 and 2017, ATF applied the "single pull of the trigger" interpretation to other bump-stock-type devices. Like the Akins Accelerator, these other bump-stock-type devices allowed the shooter to fire more than one shot with a single pull of the trigger. However, ATF ultimately concluded that these devices did not qualify as machineguns because, in ATF's view, they did not "automatically" shoot more than one shot with a single pull of the trigger. ATF also applied its "single pull of the trigger" interpretation to other trigger actuators, two-stage triggers, and other devices submitted to ATF for classification. Depending on the method of operation, some such devices were classified to be machineguns that were required to be registered in the National Firearms Registration and Transfer Record (NFRTR) and could not be transferred or pos-

sessed, except in ***66518** limited circumstances, under 18 U.S.C. 922(o).[FN4][4]

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[4] Examples of recent ATF classification letters relying on the "single pull of the trigger" interpretation to classify submitted devices as machineguns include the following:

• On April 13, 2015, ATF issued a classification letter regarding a device characterized as a "positive reset trigger," designed to be used on a semiautomatic AR-style rifle. The device consisted of a support/stock, secondary trigger, secondary trigger link, pivot toggle, shuttle link, and shuttle. ATF determined that, after a single pull of the trigger, the device utilized recoil energy generated from firing a projectile to fire a subsequent projectile. ATF noted that "a 'single function of the trigger' is a single pull," and that the device utilized a "single function of the trigger" because the shooter need not release the trigger to fire a subsequent projectile, and instead "can maintain constant pressure through a single function of the trigger."

• On October 7, 2016, ATF issued a classification letter regarding two devices described as "LV-15 Trigger Reset Devices." The devices, which were designed to be used on an AR-type rifle, were essentially identical in design and function and were submitted by the same requester (per the requester, the second device included "small improvements that have come as the result of further development since the original submission"). The devices were each powered by a rechargeable battery and included the following components: A self-contained trigger mechanism with an electrical connection, a modified two-position semiautomatic AR-15 type selector lever, a rechargeable battery pack, a grip assembly/trigger guard with electrical connections, and a piston that projected forward through the lower rear portion of the trigger guard and pushed the trigger forward as the firearm cycled. ATF held that "to initiate the firing . . . a shooter must simply pull the trigger." It explained that although the mechanism pushed the trigger forward, "the shooter never releases the trigger. Consistent with [the requester's] explanation, ATF demonstrated that the device fired multiple projectiles with a

In the NPRM, the Department also noted that prior ATF rulings concerning bump-stock-type devices did not provide substantial or consistent legal analysis regarding the meaning of the term "automatically," as it is used in the NFA and GCA. For example, ATF Ruling 2006-2 concluded that devices like the Akins Accelerator initiated an "automatic" firing cycle because, once initiated by a single pull of the trigger, "the automatic firing cycle continues until the finger is released or the ammunition supply is exhausted." ATF Ruling 2006-2, at 1. In contrast, other ATF letter rulings between 2008 and 2017 concluded that bump-stock-type devices that enable a semiautomatic firearm to shoot more than one shot with a single function of the trigger by harnessing a combination of the recoil and the maintenance of pressure by the shooter do not fire "automatically." Of the rulings issued between 2008 and 2017, ATF provided different explanations for why certain bump-stock-type devices were not machineguns, but none of them extensively examined the meaning of "automatically." For instance, some letter rulings concluded that certain devices were not machineguns because they did not "initiate[ ] an automatic firing cycle that continues until either the finger is released or the ammunition supply is exhausted," without further defining the term "automatically." E.g., Letter for Michael Smith from ATF's Firearm Technology Branch Chief (April 2, 2012). Other letter rulings concluded that

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"single function of the trigger" because a single pull was all that was required to initiate and maintain a firing sequence.

certain bump-stock-type devices were not machineguns because they lacked any "automatically functioning mechanical parts or springs and perform[ed] no mechanical function[s] when installed," again without further defining the term "automatically" in this context. E.g., Letter for David Compton from ATF's Firearm Technology Branch Chief (June 7, 2010).

B. Re-Evaluation of Bump-Stock-Type Devices

In the NPRM, the Department reviewed the functioning of semiautomatic firearms, describing that ordinarily, to operate a semiautomatic firearm, the shooter must repeatedly pull and release the trigger to allow it to reset, so that only one shot is fired with each pull of the trigger. 83 FR at 13443. It then explained that bump-stock-type devices, like the ones used in Las Vegas, are designed to channel recoil energy to increase the rate of fire of semiautomatic firearms from a single trigger pull. Id. Shooters can maintain a continuous firing cycle after a single pull of the trigger by directing the recoil energy of the discharged rounds into the space created by the sliding stock (approximately 1.5 inches) in constrained linear rearward and forward paths. Id. These bump-stock-type devices are generally designed to operate with the shooter shouldering the stock of the device (in essentially the same manner a shooter would use an unmodified semiautomatic shoulder stock), maintaining constant forward pressure with the non-trigger hand on the barrel-shroud or fore-grip of the rifle, and maintaining the trigger finger on the device's ledge with constant rearward pressure. Id. The de-

vice itself then harnesses the recoil energy of the firearm, providing the primary impetus for automatic fire. Id.

In light of its reassessment of the relevant statutory terms "single function of the trigger" and "automatically," the NPRM stated ATF's conclusion that bump-stock-type devices are "machineguns" as defined in the NFA because they convert an otherwise semiautomatic firearm into a machinegun by functioning as a self-acting or self-regulating mechanism that, after a single pull of the trigger, harnesses the recoil energy of the semiautomatic firearm in a manner that allows the trigger to reset and continue firing without additional physical manipulation of the trigger by the shooter. Hence, a semiautomatic firearm to which a bump-stock-type device is attached is able to produce automatic fire with a single pull of the trigger.

C. Proposed Definition of "Single Function of the Trigger"

The Department proposed to interpret the phrase "single function of the trigger" to mean "a single pull of the trigger," as it considered it the best interpretation of the statute and because it reflected ATF's position since 2006. The Supreme Court in Staples v. United States, 511 U.S. 600, 602 n.1 (1994), indicated that a machinegun within the NFA "fires repeatedly with a single pull of the trigger." This interpretation is also consistent with how the phrase "single function of the trigger" was understood at the time of the NFA's enactment in 1934. For instance, in a congres-

sional hearing leading up to the NFA's enactment, the National Rifle Association's then-president testified that a gun "which is capable of firing more than one shot by a single pull of the trigger, a single function of the trigger, is properly regarded, in my opinion, as a machine gun." National Firearms Act: Hearings Before the Committee on Ways and Means, H.R. 9066, 73rd Cong., 2nd Sess., at 40 (1934). Furthermore, and as noted above, the Eleventh Circuit in Akins concluded that ATF's interpretation of "single function of the trigger" to mean a "single pull of the trigger" "is consonant with the statute and its legislative history." 312 F. App'x at 200. No other court has held otherwise.[FN5][5]

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[5] The NPRM also explained that the term "pull" can be analogized to "push" and other terms that describe activation of a trigger. For instance, ATF used the term "pull" in classifying the Akins Accelerator because that was the manner in which the firearm's trigger was activated with the device. But the courts have made clear that whether a trigger is operated through a "pull," "push," or some other action such as a flipping a switch, does not change the analysis of the functionality of a firearm. For example, in *United States v. Fleischli*, 305 F.3d 643, 655-56 (7th Cir. 2002), the Seventh Circuit rejected the argument that a switch did not constitute a trigger for purposes of assessing whether a firearm was a machinegun under the NFA, because such an interpretation of the statute would lead to "the absurd result of enabling persons to avoid the NFA simply by using weapons that employ a button or switch mechanism for firing." See also *United States v. Camp*, 343 F.3d 743, 745 (5th Cir. 2003) (" 'To construe "trigger" to mean only a small lever moved by a finger would be to impute to Congress the intent to restrict the term to apply only to one kind of trigger, albeit a very common kind. The language [in 18 U.S.C. 922(o)] implies no intent to so restrict the meaning[.]' " (quoting *United States v. Jokel*,

66519 *D. Proposed Definition of "Automatically"

The Department also proposed to interpret the term "automatically" to mean "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." That interpretation reflects the ordinary meaning of that term at the time of the NFA's enactment in 1934. The word "automatically" is the adverbial form of "automatic," meaning "[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 187 (2d ed. 1934); see also 1 Oxford English Dictionary 574 (1933) (defining "Automatic" as "[s]elf-acting under conditions fixed for it, going of itself.").

Relying on these definitions, the United States Court of Appeals for the Seventh Circuit interpreted the term "automatically" as used in the NFA as "delineat[ing] how the discharge of multiple rounds from a weapon occurs: As the result of a self-acting mechanism . . . set in motion by a single function of the trigger and . . . accomplished without manual reloading." United States v. Olofson, 563 F.3d 652, 658 (7th Cir. 2009). So long as the firearm is capable of producing multiple rounds with a single pull of the trigger until the trigger finger is removed, the ammuni-

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969 F.2d 132, 135 (5th Cir. 1992) (emphasis removed))). Examples of machineguns that operate through a trigger activated by a push include the Browning design, M2 .50 caliber, the Vickers, the Maxim, and the M134 hand-fired Minigun.

tion supply is exhausted, or the firearm malfunctions, the firearm shoots "automatically" irrespective of why the firing sequence ultimately ends. Id. ("[T]he reason a weapon ceased firing is not a matter with which § 5845(b) is concerned."). *Olofson* thus requires only that the weapon shoot multiple rounds with a single function of the trigger "as the result of a self-acting mechanism," not that the self-acting mechanism produces the firing sequence without any additional action by the shooter. This definition accordingly requires that the self-acting or self-regulating mechanism allows the firing of multiple rounds through a single function of the trigger.

E. Proposed Clarification That the Definition of "Machinegun" Includes Bump-Stock-Type Devices

The Department also proposed, based on the interpretations discussed above, to clarify that the term "machinegun" includes a device that allows a semiautomatic firearm to shoot more than one shot with a single pull of the trigger by harnessing the recoil energy of the semiautomatic firearm to which it is affixed so that the trigger resets and continues firing without additional physical manipulation of the trigger by the shooter. The Department explained that when a shooter who has affixed a bump-stock-type device to a semiautomatic firearm pulls the trigger, that movement initiates a firing sequence that produces more than one shot. And that firing sequence is "automatic" because the device harnesses the firearm's recoil energy in a continuous back-and-forth cycle that allows the shooter to attain continuous fir-

ing after a single pull of the trigger, so long as the trigger finger remains stationary on the device's ledge (as designed). Accordingly, these devices are included under the definition of "machinegun" and, therefore, come within the purview of the NFA.

F. Amendment of 27 CFR 479.11

The regulatory definition of "machine gun" in 27 CFR 479.11 matches the statutory definition of "machinegun" in the NFA. The definition includes the terms "single function of the trigger" and "automatically," but those terms are not defined in the statutory text. The NPRM proposed to define these terms in order to clarify the meaning of "machinegun." Specifically, the Department proposed to amend the definition of "machine gun" in 27 CFR 479.11 by:

1. Defining the term "single function of the trigger" to mean "single pull of the trigger";

2. defining the term "automatically" to mean "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"; and

3. adding a sentence to clarify that a "machine gun" includes a device that allows a semiautomatic firearm to shoot more than one shot with a single pull of the trigger by harnessing the recoil energy of the semiautomatic firearm to which it is affixed so that the trigger resets and continues firing without additional physical manipulation of the trigger by the shooter (commonly known as a bump-stock-type device).

G. Amendment of 27 CFR 478.11

The GCA and its implementing regulations in 27 CFR part 478 reference the NFA's definition of machinegun. Accordingly, the NPRM proposed to make the same amendments in 27 CFR 478.11 that were proposed for § 479.11.

H. Amendment of 27 CFR 447.11

The Arms Export Control Act (AECA), as amended, does not define the term "machinegun" in its key provision, 22 U.S.C. 2778.[FN6][6] However, regulations in 27 CFR part 447 that implement the AECA include a similar definition of "machinegun," and explain that machineguns, submachineguns, machine pistols, and fully automatic rifles fall within Category I(b) of the U.S. Munitions Import List when those defense articles are permanently imported. See 27 CFR 447.11, 447.21. Currently, the definition of "machinegun" in § 447.11 provides that "[a] 'machinegun', 'machine pistol', 'submachinegun', or 'automatic rifle' is a firearm originally designed to fire, or capable of being fired fully automatically by a single pull of the trigger." The NPRM proposed to harmonize the AECA's regulatory definition of machinegun with the definitions in 27 CFR parts 478 and 479, as those definitions would be amended by the proposed rule.

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[6] Under the AECA, the President has the authority to designate which items are controlled as defense articles for purposes of importation and exportation. 22 U.S.C. 2778(a)(1). The President has, in turn, delegated to the Attorney General the authority to promulgate regulations designating the defense articles controlled for permanent importation, including machineguns.

IV. Analysis of Comments and Department Responses for Proposed Rule

In response to the NPRM, ATF received over 186,000 comments. Submissions came from individuals, including foreign nationals, lawyers, and government officials, as well as various interest groups. Overall, 119,264 comments expressed support for the proposed rule, 66,182 comments expressed opposition, and for 657 comments, the commenter's position could not be determined. The commenters' grounds for support and opposition, along with specific concerns and suggestions, are discussed below.

A. Comments Generally Supporting the Rule

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B. Particular Reasons Raised in Support of the Rule

1. Threat to Public Safety

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2. Unnecessary for Civilians to Own

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3. Consistent With the Intent of the National Firearms Act

Comments Received

More than 27,000 of the supporting comments urged issuance of the final rule because bump-stock-type devices and other similar conversion devices were meant to circumvent the restrictions of the NFA and GCA, as bump-stock-type devices enable shooters

to transform their guns into automatic weapons. Some commenters asserted that it is useless to have a law against automatic weapons yet allow manufacturers to legally produce and sell an item with the sole purpose of turning a firearm into an automatic weapon. Many of these commenters also stated that bump-stock-type devices violate the spirit of the law and that this loophole should be closed by ATF as quickly as possible. Further, at least 1,675 of the supporting comments stated that the proposed rule is consistent with the purposes of the NFA and the intent of Congress. Specifically, these commenters opined that the regulation "enforces machinegun laws that date back many decades" and that "it will have the same dramatic benefit originally intended by those foundational laws."

Department Response

The Department acknowledges supporters' comments that bump-stock-type devices were meant to circumvent the restrictions of the NFA and GCA. Prior to this rule, ATF issued classification letters that determined that some bump-stock-type devices were not "machineguns" as defined by the NFA. Those decisions, however, did not include extensive legal analysis, as described in Part III. Upon reexamining these classifications, this final rule promulgates definitions for the terms "single function of the trigger" and "automatically" as those terms are used in the statutory definition of "machinegun." ATF believes these definitions represent the best interpretation of the statute. Therefore, recognizing that a bump-stock-type device used with a semiautomatic firearm

enables a shooter to shoot automatically more than one shot by a single function of the trigger, the purpose of this rule is to clarify that such devices are machineguns under the NFA.

4. Constitutional Under the Second Amendment

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5. Absence of Congressional Action

Comments Received

Over 1,500 comments in support urged action on this final rule by invoking popular support for responsible gun limitations. Many of these commenters stated this measure would be a sensible first step for gun safety and that ATF should act where Congress has not acted. One gun safety organization noted that while congressional measures have stalled, ATF is doing what it can to refine rules. At least 1,300 commenters indicated that ATF should choose saving children and the public welfare over the interests of the gun industry and pro-gun organizations, naming in particular the NRA. One commenter wrote, "It's time we quit cow-towing [sic] to the NRA and considered all the rest of us and our children especially. Being afraid to go to school is unAmerican which is what the insistence by the NRA on no gun control is—unAmerican." Many supporting commenters echoed these sentiments.

Department Response

In light of the legal analysis of the term "machinegun" set forth above, the Department agrees

with commenters that it is necessary to clarify that the term "machinegun" includes bump-stock-type devices. Congress granted the Attorney General authority to issue rules to administer the NFA and GCA, and the Attorney General has delegated to ATF the authority to administer and enforce these statutes and to implement the related regulations accordingly. The Department and ATF have initiated this rulemaking to clarify the regulatory interpretation of the NFA and GCA.

C. Comments Generally Opposing the Rule

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D. Specific Issues Raised in Opposition to the Rule

1. Constitutional and Statutory Arguments

a. Violates the Second Amendment

* * *

b. Violates the Fifth Amendment

i. Violates Due Process Clause—Entrapment

Comments Received

At least one commenter, a gun-rights nonprofit organization, argued that ATF's change of position constitutes unconstitutional entrapment. It maintained that ATF's past classification letters, which informed the public that certain bump-stock-type devices were not subject to the NFA or GCA, invited the public to rely on its consistent decisions and acquire such items. With the sudden change of position, the organ-

ization asserted, ATF seeks to entrap citizens who have simply purchased a federally approved firearm accessory. Citing Sherman v. United States, 356 U.S. 367, 376 (1958), the organization argued that it is "unconstitutional for the Government to beguile an individual 'into committing crimes which he otherwise would not have attempted.' " Further, it argued that at least some 520,000 law-abiding citizens could be criminals who could face up to ten years' imprisonment "without even receiving individual notice of ATF's reversal of position."

Department Response

The Department disagrees that the final rule amounts to entrapment. Entrapment is a complete defense to a criminal charge on the theory that "Government agents may not originate a criminal design, implant in an innocent person's mind the disposition to commit a criminal act, and then induce commission of the crime so that the Government may prosecute." Jacobson v. United States, 503 U.S. 540, 548 (1992). A valid entrapment defense has two related elements: (1) Government inducement of the crime, and (2) the defendant's lack of predisposition to engage in the criminal conduct. Mathews v. United States, 485 U.S. 58, 63 (1988).

As described above, ATF has now concluded that it misclassified some bump-stock-type devices and therefore initiated this rulemaking pursuant to the requirements of the APA. An agency is entitled to correct its mistakes. See Williams Gas Processing-Gulf Coast Co. v. FERC, 475 F.3d 319, 326 (D.C. Cir.

2006) ("[I]t is well understood that [a]n agency is free to discard precedents or practices it no longer believes correct. Indeed we expect that an [ ] agency may well change its past practices with advances in knowledge in its given field or as its relevant experience and expertise expands. If an agency decides to change course, however, we require it to supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored."). This rulemaking procedure is specifically designed to notify the public about changes in ATF's interpretation of the NFA and GCA and to help the public avoid the unlawful possession of a machinegun. It is important to note that at no time did ATF induce any member of the public to commit a crime. The ANPRM, NPRM, and this final rule have followed the statutory process for ensuring that the public is aware of the correct classification of bump-stock-type devices under the law, and that continued possession of such devices is prohibited. Anyone currently in possession of a bump-stock-type device is not acting unlawfully unless they fail to relinquish or destroy their device after the effective date of this regulation.

ii. Violates Takings Clause and Due Process Clause

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c. Violates Ex Post Facto Clause and Bill of Attainder Clause

Comments Received

Numerous commenters asserted that the proposed rule would violate article I, section 9, clause 3 of the Constitution, which states, "No Bill of Attainder or ex post facto Law shall be passed." One gun-rights nonprofit organization, quoting United States v. O'Neal, 180 F.3d 115, 122 (4th Cir. 1999), stated that even though this is a regulatory action, the "sanction or disability it imposes is 'so punitive in fact' that the law 'may not legitimately be viewed as civil in nature.' "

Another commenter, the Maryland Shall Issue organization, argued that ATF's reliance on 18 U.S.C. 922(o) creates an impermissible ex post facto law because current owners and manufacturers of bump-stock-type devices "became felons as of the date and time they took possession of a bump stock, even though such possession and manufacture was then expressly permitted by prior ATF interpretations." The commenter cited Calder v. Bull, 3 U.S. (3 Dall.) 386, 390 (1798), and Peugh v. United States, 569 U.S. 530 (2013), to support its arguments. It argued that the ex post facto issue can be avoided by holding that the exemption in 18 U.S.C. 922(o)(2)(A) applies where bump-stock-type devices are possessed under "the authority" of prior ATF rulings. Furthermore, the commenter, citing Bowen v. Georgetown University Hospital, 488 U.S. 204, 208 (1988), stated that the Supreme Court has held that an agency cannot engage in retroactive rulemaking without specific congressional authorization. Relying on Fernandez-Vargas v. Gonzales, 548 U.S. 30, 36 (2006), the commenter stated there is no question that the proposed rule has

a retroactive effect because the rule would "affect" existing rights and impose new liabilities on the past and continued possession of bump-stock-type devices.

* * *

Department Response

The Department disagrees that the proposed rule violates the Ex Post Facto or Bill of Attainder Clauses. The rule would criminalize only future conduct, not past possession of bump-stock-type devices that ceases by the effective date of this rule. In Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798), the Supreme Court set out four types of laws that violate the Ex Post Facto Clause:

* * *

This rule brings clarity to the meaning of "machinegun," and makes clear that individuals are subject to criminal liability only for possessing bump-stock-type devices after the effective date of regulation, not for possession before that date. No action taken before the effective date of the regulation is affected under the rule. Although regulating past possession of a firearm may implicate the Ex Post Facto Clause, regulating the continued or future possession of a firearm that is already possessed does not. See Benedetto v. Sessions, No. CCB-17-0058; 2017 WL 4310089, at *5 (D. Md. Sept. 27, 2017) ("Whether a gun was purchased before the challenged law was enacted . . . is immaterial to whether the challenged law regulates conduct that occurred before or after its enactment."); see also Samuels v. McCurdy, 267 U.S.

188, 193 (1925) (rejecting Ex Post Facto Clause challenge to statute that prohibited the post-enactment possession of intoxicating liquor, even when the liquor was lawfully acquired before the statute's enactment). For this reason, the Department disagrees with commenters' assertions that the rule violates the Ex Post Facto Clause.

Relatedly, the Department also disagrees with the view that 18 U.S.C. 922(o)(2)(A) provides the authority to permit continued possession of bump-stock-type devices "under the ***66526** authority" of prior ATF rulings. Section 922(o)(2)(A) is inapplicable because, among other reasons, ATF's letter rulings regarding bump-stock-type devices did not purport to authorize the possession of devices qualifying as machineguns under section 922(o)(1); instead, ATF advised individuals that certain devices did not qualify as machineguns in the first place, a position that ATF has now reconsidered. Furthermore, section 922(o)(2)(A) does not empower ATF to freely grant exemptions from section 922's general prohibition of machineguns.

* * *

d. Violates Fourth Amendment

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e. Violates Ninth and Tenth Amendments

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f. Lack of Statutory Authority

Comments Received

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In addition, numerous commenters argued that, as the term "machinegun" is already clearly defined in the NFA, only Congress can make changes to the definition and regulate bump-stock-type devices. Furthermore, commenters stated that the agency's interpretation of the term "machinegun" would not be entitled to deference under Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837 (1984).

***66527 Department Response**

The Attorney General is responsible for enforcing the NFA, as amended, and the GCA, as amended. This includes the authority to promulgate regulations necessary to enforce the provisions of these statutes. See 18 U.S.C. 926(a); 26 U.S.C. 7801(a)(2)(A), 7805(a). The statutory provision cited by some commenters, 6 U.S.C. 531, is the provision of the Homeland Security Act of 2002, Public Law 107-296, 116 Stat. 2135, that transferred the powers the Secretary of the Treasury had with respect to ATF to the Attorney General when ATF was transferred to the Department of Justice. Accordingly, the Attorney General is now responsible for enforcing the NFA and GCA, and he has delegated the responsibility for administering and enforcing the NFA and GCA to the Director of ATF, subject to the direction of the Attorney General and the Deputy Attorney General. See 28 CFR 0.130(a)(1)-(2).

"Because § 926 authorizes the [Attorney General] to promulgate those regulations which are 'necessary,' it almost inevitably confers some measure of

discretion to determine what regulations are in fact 'necessary.'" Nat'l Rifle Ass'n v. Brady, 914 F.2d 475, 479 (4th Cir. 1990). In the original GCA implementing regulations, ATF provided regulatory definitions of the terms that Congress did not define in the statute. 33 FR 18555 (Dec. 14, 1968). Since 1968, ATF has occasionally added definitions to the implementing regulations. See, e.g., 63 FR 35520 (June 30, 1998). Similarly, 26 U.S.C. 7805(a) states that "the [Attorney General] shall prescribe all needful rules and regulations for the enforcement of this title." As is the case with the GCA, ATF has provided regulatory definitions for terms in the NFA that Congress did not define, such as "frame or receiver" and "manual reloading." See, e.g., 81 FR 2658 (Jan. 15, 2016). These definitions were necessary to explain and implement the statute, and do not contradict the statute. Federal courts have recognized ATF's authority to classify devices as "firearms" under Federal law. See, e.g., Demko v. United States, 44 Fed. Cl. 83, 93 (1999) (destructive device); Akins v. United States, 312 F. App'x 197 (11th Cir. 2009) (per curiam) (machinegun).

This rule is based upon this authority. Further, ATF has provided technical and legal reasons why bump-stock-type devices enable automatic fire by a single function of the trigger, and thus qualify as machinegun conversion devices, not mere "accessories." ATF has regularly classified items as machinegun "conversion devices" or "combinations of parts," including auto sears (ATF Ruling 81-4) and the Akins Accelerator (ATF Ruling 2006-2).

The Department agrees that regulatory agencies may not promulgate rules that conflict with statutes. However, the Department disagrees that the rule conflicts with the statutes or is in contravention of administrative-law principles. The rule merely defines terms used in the definition of "machinegun" that Congress did not—the terms "automatically" and "single function of the trigger"—as part of implementing the provisions of the NFA and GCA.

When a court is called upon to review an agency's construction of the statute it administers, the court looks to the framework set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). The first step of the *Chevron* review is to ask "whether Congress has directly spoken to the precise question at issue." Id. at 842. "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 question for the court is whether the agency's answer is based on a permissible construction of the statute." Id. at 842-43 (footnote omitted).

The Department believes that this rule's interpretations of "automatically" and "single function of the trigger" in the statutory definition of "machinegun" accord with the plain meaning of those terms. Moreover, even if those terms are ambiguous, this rule rests on a reasonable construction of them. Although Congress defined "machinegun" in the NFA, 26 U.S.C. 5845(b), it did not further define the compo-

nents of that definition. See, e.g., United States v. One TRW, Model M14, 7.62 Caliber Rifle, 441 F.3d 416, 419 (6th Cir. 2006) (noting that the NFA does not define the phrases "designed to shoot" or "can be readily restored" in the definition of "machinegun"). Congress thus implicitly left it to the Department to define "automatically" and "single function of the trigger" in the event those terms are ambiguous. See Chevron, 467 U.S. at 844. Courts have appropriately recognized that the Department has the authority to interpret elements of the definition of "machinegun" like "automatically" and "single function of the trigger." See York v. Sec'y of Treasury, 774 F.2d 417, 419-20 (10th Cir. 1985); United States v. Dodson, 519 F. App'x 344, 348-49 & n.4 (6th Cir. 2013); cf., e.g., Firearms Import/Export Roundtable Trade Grp. v. Jones, 854 F. Supp. 2d 1, 18 (D.D.C. 2012) (upholding ATF's interpretation of 18 U.S.C. 925(d) to ban importation of certain firearm parts under Chevron "step one"); Modern Muzzleloading, Inc. v. Magaw, 18 F. Supp. 2d 29, 35-36 (D.D.C. 1998) ("since the ATF's classification of [a firearm as not antique] 'amounts to or involves its interpretation' of the GCA, a statute administered by the ATF, we review that interpretation under the deferential standard announced in Chevron").

Second, the Department's construction of those terms is reasonable under *Chevron*. As explained in more detail in Part III, the Department is clarifying its regulatory definition of "automatically" to conform to how that word was understood and used when the NFA was enacted in 1934. See Olofson, 563 F.3d at

658. And the Department is reaffirming that a single pull of the trigger is a single function of the trigger, consistent with the NFA's legislative history, ATF's previous determinations, and judicial precedent. See, e.g., Akins, 312 F. App'x at 200. This rule is therefore lawful under the NFA and GCA even if the operative statutory terms are ambiguous.

g. Violation of the Americans With Disabilities Act

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2. Politically Motivated and Emotional Response

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3. Not Used in Criminal Activity

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Department Response

The Department disagrees that ATF seeks to regulate bump-stock-type devices merely because they were, or have the potential to be, used in crime. The NPRM stated that the Las Vegas shooting made "individuals aware that these devices exist—potentially including persons with criminal or terrorist intentions—and made their potential to threaten public safety obvious." 83 FR at 13447. But the NRPM also provided a detailed analysis explaining that bump-stock-type devices must be regulated because they satisfy the statutory definition of "machinegun" as it is defined in the NFA and GCA. Id. at 13447-48.

Commenters conflate the legal basis for ATF's regulation of bump-stock-type devices with the background information that was provided as context for the reason ATF revisited its previous classifications. In the NPRM, ATF explained that the tragedy in Las Vegas gave rise to requests from Congress and non-governmental organizations that ATF examine its past ***66529** classifications and determine whether bump-stock-type devices currently on the market constitute machineguns under the statutory definition. Id. at 13446. While part of the Department's mission is to enhance public safety, the impetus for the change in classification was not, as commenters argued, that the device may potentially pose a public safety threat but because, upon review, ATF believes that it satisfies the statutory definition of "machinegun." This rule reflects the public safety objectives of the NFA and GCA, but the materials and evidence of public safety implications that commenters seek have no bearing on whether these devices are appropriately considered machineguns based on the statutory definition.

In Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29 (1983), the Supreme Court wrote that an "agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.' " Id. at 43 (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)). However, that case involved a Federal agency that rescinded a final rule—based on data and pol-

icy choices—shortly after publication, arguing that that rule was no longer necessary for a multitude of reasons, including that the costs outweighed the safety benefits. See id. at 38-39. The Supreme Court recognized that any change requires a reasoned basis, noting that "[i]f Congress established a presumption from which judicial review should start, that presumption—contrary to petitioners' views—is not against safety regulation, but against changes in current policy that are not justified by the rulemaking record." Id. at 42. However, the revocation in that case involved a discretionary policy decision, and did not depend solely upon statutory construction. The bump-stock-type device rule is not a discretionary policy decision based upon a myriad of factors that the agency must weigh, but is instead based only upon the functioning of the device and the application of the relevant statutory definition. Therefore, the Department does not believe that this rule conflicts with State Farm.

4. Will Not Enhance Public Safety

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Department Response

The Department agrees with the commenters that the existing laws should be enforced, and the Department is committed to addressing significant violent crime problems facing our communities. No law or regulation entirely prevents particular crimes, but the Las Vegas shooting illustrated the particularly destructive capacity of bump-stock-type devices when used in mass shooting incidents. In any event, the

impetus for this rule is the Department's belief, after a detailed review, that bump-stock-type devices satisfy the statutory definition of "machinegun." Through the NFA and GCA, Congress took steps to regulate machineguns because it determined that machineguns were a public safety threat. ATF must therefore classify devices that satisfy the statutory definition of "machinegun" as machineguns. The proposed rule is thus lawful and necessary to provide public guidance on the law.

5. Punishes Law-Abiding Citizens

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6. Other Priorities and Efficiencies

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7. Enforcement and Compliance

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8. Lack of Consistency

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Department Response

The Department acknowledges comments regarding the inconsistency in ATF's previous classifications of some bump-stock-type devices as machineguns and others as non-machineguns. As described in Part III, upon review, ATF recognized that the decisions issued between 2008 and 2017 did not provide consistent or extensive legal analysis regarding the term "automatically" as that term applies to bump-stock-type devices. Consistent with its authori-

ty to reconsider and rectify its past classifications, the Department accordingly clarifies that the definition of "machinegun" in the NFA and GCA includes bump-stock-type devices because they convert an otherwise semiautomatic firearm into a machinegun by functioning as a self-acting or self-regulating mechanism that harnesses the recoil energy of the semiautomatic firearm in a manner that allows the trigger to reset and continue firing without additional physical manipulation of the trigger by the shooter. The Supreme Court has made clear that this sort of regulatory correction is permissible. An agency ***66531** may change its course as long as it "suppl[ies] a reasoned analysis for the change," which the Department has done at length in the NPRM and this final rule. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42 (1983). And the agency bears no heightened burden in prescribing regulations that displace inconsistent previous regulatory actions. FCC v. Fox Television Stations, Inc., 556 U.S. 502, 514-15 (2009).

9. Earlier Determinations Correct

Comments Received

Over 1,500 commenters opposed to the rule maintained that ATF's earlier classifications determining certain bump-stock-type devices not to be subject to the NFA or GCA were correct and should not be reversed. These commenters stated that reversing this position is unnecessary and unlawful. To make the point that ATF is bound by its prior determinations, many commenters submitted ATF's own classifica-

tion letters and highlighted the Department's arguments made in litigation as evidence that the rule on bump-stock-type devices is an arbitrary decision. In particular, commenters cited the Department's arguments made in litigation with Freedom Ordnance Manufacturing, Inc. ("Freedom Ordnance"), No. 3:16-cv-243 (S.D. Ind. filed Dec. 13, 2016). There, the Department defended its decision to classify Freedom Ordnance's Electronic Reset Assistant Device (ERAD) as a machinegun. In responding to Freedom Ordnance's argument that the ERAD was a bump-stock-type device and not subject to regulation, the Department stated such stocks were not machineguns because "[b]ump firing requires the shooter to manually and simultaneously pull and push the firearm in order for it to continue firing." Brief for ATF in Support of Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment, ECF No. 28, at 21 (July 27, 2017). These prior decisions and admissions, commenters argued, preclude the Department from suddenly reversing its decision.

Department Response

The Department acknowledges that ATF previously determined that certain bump-stock-type devices were not "machineguns" under the law. The Department notes, however, that a great deal of its analysis in the Freedom Ordnance litigation was fully consistent with its position in this rule. For example, the Department adhered to its view that a single pull is a "single function" of the trigger, see id. at 13-14, and it argued that a device that relieves the shooter from having to "pull and release the trigger for each indi-

vidual, subsequent shot" converts the firearm into a machinegun, id. at 22. While the Department accepted the previous classification of some bump-stock-type devices as non-machineguns, it relied on the mistaken premise that the need for "shooter input" (i.e., maintenance of pressure) for firing with bump-stock-type devices means that such devices do not enable "automatic" firing, see id. at 21—even though Freedom Ordnance's ERAD also required maintenance of pressure by the shooter, see id. at 20.

In any event, as explained in the NPRM, the Department believes that ATF clearly has authority to "reconsider and rectify" its classification errors. Akins, 312 F. App'x at 200; see also Fox, 556 U.S. at 514-15; Hollis v. Lynch, 121 F. Supp. 3d 617, 642 (N.D. Tex. 2015) (no due process violation in ATF's revocation of mistaken approval to manufacture a machinegun). In the NPRM, the Department noted that "ATF has reviewed its original classification determinations for bump-stock-type devices from 2008 to 2017 in light of its interpretation of the relevant statutory language, namely the definition of 'machinegun.' " 83 FR at 13446. The NPRM explained that "ATF's classifications of bump-stock-type devices between 2008 and 2017 did not include extensive legal analysis of these terms in concluding that the bump-stock-type devices at issue were not 'machineguns.' " Id. Specifically, some of these rulings concluded that such devices were not machineguns because they did not "'initiate [ ] an automatic firing cycle that continues until either the finger is released or the ammunition supply is exhausted,' " but did not

provide a definition or explanation of the term "automatically." Id. at 13445. This is precisely the purpose of this rule. As explained in more detail in Part III, the Department has determined that bump-stock-type devices enable a shooter to initiate an automatic firing sequence with a single pull of the trigger, making the devices machineguns under the NFA and GCA. Consistent with the APA, this rule is the appropriate means for ATF to set forth its analysis for its changed assessment. See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 57 (1983).

10. Bump Firing and Bump-Stock-Type Device Operation

a. Bump-Stock-Type Device Operation

* * *

b. Bump-Stock-Type Device Firing Technique

Comments Received

Thousands of commenters objected to the proposed rule on grounds that bump-stock-type devices are novelty items that assist with bump firing, which is a technique that any shooter can perform with training or with everyday items such as a rubber band or belt loop. Many commenters stated that all semiautomatic firearms can be bump fired by a shooter simply holding the trigger finger stationary and pushing the weapon forward until the trigger is depressed against it to the point of ***66533** firing, and that use of bump-stock-type devices makes using the bump-fire shooting technique safer for the shooter and those around

the shooter. Some commenters also gave examples of extremely skilled and fast shooters who do not need any assistive device or item to fire a semiautomatic firearm at a rapid rate. Commenters therefore argued that if the Department proceeds to prohibit possession of bump-stock-type devices they must also ban rubber bands, belt loops, string, or even people's fingers.

Department Response

The Department disagrees with commenters' assessments and believes that bump-stock-type devices are objectively different from items such as belt loops that are designed for a different primary purpose but can serve an incidental function of assisting with bump firing. To bump fire a firearm using a belt loop or a similar method without a bump-stock-type device, a shooter must put his thumb against the trigger and loop that thumb through a belt loop. With the non-trigger hand, the shooter then pushes the firearm forward until the thumb engages the trigger and the firearm fires. The recoil pushes the firearm backwards as the shooter controls the distance of the recoil, and the trigger resets. The constant forward pressure with the non-trigger hand pushes the firearm forward, again pulling the firearm forward, engaging the trigger, and firing a second round.

This rule defines the term "automatically" to mean "functioning as the result of a self-acting or self-regulating mechanism." Bump-stock-type devices enable semiautomatic firearms to operate "automatically" because they serve as a self-acting or self-

regulating mechanism. An item like a belt loop is not a "self-acting or self-regulating mechanism." When such items are used for bump firing, no device is present to capture and direct the recoil energy; rather, the shooter must do so. Conversely, bump-stock-type devices are specifically designed to capture the recoil energy, a force that initiates a firing sequence that ultimately produces more than one shot. That firing sequence is "automatic" because the device harnesses the firearm's recoil energy as part of a continuous back-and-forth cycle that allows the shooter to attain continuous firing after a single pull of the trigger.

Bump firing utilizing a belt loop or similar method of maintaining tension on the firearm is thus more difficult than using a bump-stock-type device. In fact, the belt-loop method provides a stabilizing point for the trigger finger but relies on the shooter—not a device—to harness the recoil energy so that the trigger automatically re-engages by "bumping" the shooter's stationary trigger finger. Unlike a bump-stock-type device, the belt loop or a similar manual method requires the shooter to control the distance that the firearm recoils and the movement along the plane on which the firearm recoils.

ATF's previous bump-stock-type device classifications determined that these devices enable continuous firing by a single function of the trigger. Other firing techniques may do the same because they rely on a single "pull." However, as ATF has made clear, a determining factor is whether the device operates or functions automatically. The proposed and final rules make clear that if a device incorporates a self-acting

or self-regulating component for the firing cycle, the firearm equipped with the device operates automatically. Again, this differs from traditional semiautomatic firearms because the trigger must be repeatedly manipulated by the shooter to fire additional rounds, whereas a bump-stock-type device allows for a single pull, and the self-acting or self-regulating device automatically re-engages the trigger finger.

Further, while skilled shooters may be able to fire more rapidly than a shooter employing a bump-stock-type device on a semiautomatic firearm, they do so by pulling and releasing the trigger for each shot fired. This is a fundamental distinction between skilled shooters and those employing bump-stock-type devices. Bump-stock-type devices require that a shooter pull the trigger to fire the first round and merely maintain the requisite pressure to fire subsequent rounds. This is the purpose of a bump-stock-type device—to make rapid firing easier without the need to pull and release the trigger repeatedly. This shows that skilled shooters would be unaffected by the proposed rule and counters commenters' arguments that the rule is "arbitrary and capricious" on these grounds.

11. Proposed Definitions

a. Vagueness—Rate of Fire

* * *

Department Response

The Department has neither proposed the rate of fire as a factor in classifying machineguns, nor uti-

lized this as the applicable standard in the proposed rule. The Department disagrees with any assertion that the rule is based upon the increased rate of fire. While bump-stock-type devices are intended to increase the rate at which a shooter may fire a semiautomatic firearm, this rule classifies these devices based upon the functioning of these devices under the statutory definition. The Department believes that bump-stock-type devices satisfy the statutory definition of "machinegun" because bump-stock-type devices utilize the recoil energy of the firearm to create an automatic firing sequence with a single pull of the trigger. The rate of fire is not relevant to this determination.

The Department also agrees with commenters that the standard rate of fire of a semiautomatic firearm or machinegun is a characteristic that is not dependent upon the individual shooter. Any reference to the "increased" rate of fire attributable to bump-stock-type devices refers only to the increased rate of fire that a particular shooter may achieve. Further, the Department agrees that there is no rate of fire that can identify or differentiate a machinegun from a semiautomatic firearm. This is because the statutory definition alone determines whether a firearm is a ***66534** machinegun. The Department believes that the final rule makes clear that a bump-stock-device will be classified as a machinegun based only upon whether the device satisfies the statutory definition.

b. Vagueness—Impact on Semiautomatic Firearms and Other Firearm Accessories

Comments Received

More than 56,000 commenters, including those submitting through the three main form letters opposing the rule and the NAGR submission, indicated that the proposed rule would set a dangerous precedent because a future "anti-gun Administration" will use it to confiscate millions of legally owned semiautomatic firearms as well as firearm components and accessories.

Commenters opposed to the rule broadly argued that by classifying bump-stock-type devices as machineguns, AR-15s and other semiautomatic firearms also may be classified as machineguns. In particular, commenters stated that under the GCA, rifles and shotguns are defined using a "single pull of the trigger" standard, in contrast to machineguns, which are defined by a "single function of the trigger" standard under the NFA. Commenters argued that by defining "single function of the trigger" to mean "single pull of the trigger," the rule will bring all semiautomatic rifles and shotguns currently regulated under the GCA under the purview of the NFA. Commenters also argued that the proposed regulatory text encompasses a number of commercially available items, such as Gatling guns, competition triggers, binary triggers, Hellfire trigger mechanisms, or even drop-in replacement triggers. One commenter pointed out that the language "firing without additional physical manipulation of the trigger by shooter" would apply, for instance, to Model 37 pump shotguns made by Ithaca.

Several commenters said that the proposed rule should be more narrowly tailored so that it applies to bump-stock-type devices only. For instance, one commenter proposed that the following be added to the definition of bump-stock-type device: "A single accessory capable of performing the roles of both a pistol grip and a shoulder stock." Another commenter suggested that, at most, one sentence could be added at the end of the definition of "machinegun":

For purposes of this definition, the term "automatically" as it modifies "shoots, is designed to shoot, or can be readily restored to shoot," means a device that—(1) attaches to a semiautomatic rifle (as defined in section 921(a)(28) of title 18, United States Code); (2) is designed and intended to repeatedly activate the trigger without the deliberate and volitional act of the user pulling the trigger each time the firearm is fired; and (3) functions by continuous forward pressure applied to the rifle's fore end in conjunction with a linear forward and backward sliding motion of the mechanism utilizing the recoil energy when the rifle is discharged.

One commenter suggested that, instead of trying to define a bump-stock-type device, it would be better to issue a rule stating that one cannot modify or replace the current style of stock with one that contains other features, with exceptions for adjusting the length of the stock or having a cheek rest.

Department Response

The Department disagrees that other firearms or devices, such as rifles, shotguns, and binary triggers,

will be reclassified as machineguns under this rule. Although rifles and shotguns are defined using the term "single pull of the trigger," 18 U.S.C. 921(a)(5), (7), the statutory definition of "machinegun" also requires that the firearm "shoots automatically more than one shot, without manual reloading," by a single function of the trigger, 26 U.S.C. 5845(b). While semiautomatic firearms may shoot one round when the trigger is pulled, the shooter must release the trigger before another round is fired. Even if this release results in a second shot being fired, it is as the result of a separate function of the trigger. This is also the reason that binary triggers cannot be classified as "machineguns" under the rule—one function of the trigger results in the firing of only one round. By contrast, a bump-stock-type device utilizes the recoil energy of the firearm itself to create an automatic firing sequence with a single pull of the trigger. The Department notes that ATF has already described a "single pull of the trigger" as a "single function of the trigger." See ATF Ruling 2006-2.

Further, while the phrase "firing without additional physical manipulation of the trigger by the shooter" would apply to firearms like the Model 37 pump shotguns made by Ithaca, that firearm could not be classified as a machinegun under the rule. The Model 37 permits a shooter to pull the trigger, hold it back, and pump the fore-end. The pump-action ejects the spent shell and loads a new shell that fires as soon as it is loaded. While this operates by a single function of the trigger, it does not shoot "automatically," and certainly does not shoot "without manual re-

loading." 26 U.S.C. 5845(b). In fact, the pump-action design requires that the shooter take action to manually load the firearm for each shot fired.

The Department disagrees that "automatically" should be defined using the more extensive definition quoted above. Whereas analysis as to what constitutes a "single function of the trigger" is separate from whether a firearm shoots automatically, the commenter's proposed definition merges the two issues. The Department believes that this may lead to confusion, further complicate the issue, and result in further questions that require clarification.

c. Concerns Raised by Equating "Function" and "Pull"

Comments Received

One commenter said drafters of the NFA chose the term "function" intentionally and that by proposing to equate "function" with "pull," a whole new fully automatic non-machinegun market will be opened because "fire initiated by voice command, electronic switch, swipe on a touchscreen or pad, or any conceivable number of interfaces [does] not requir[e] a pull." The commenter suggested that "single function of a trigger" be defined to include but not be limited to a pull, as that would include bump-stock-type devices without opening a "can of worms."

Department Response

The proposed addition to the regulatory definition of machinegun includes this statement: "For purposes of this definition, the term 'single function of the trig-

ger' means a 'single pull of the trigger.' " The Department believes that the commenter is correct—this proposed definition may lead to confusion. The proposed definition suggests that only a single pull of the trigger will qualify as a single function. However, it is clear that a push or other method of initiating the firing cycle must also be considered a "single function of the trigger." Machineguns such as the M134 Minigun utilize a button or an electric switch as the trigger. See 83 FR at 13447 n.8 (explaining that other methods of trigger activation are analogous to pulling a trigger).

Therefore, the Department concurs with the commenters and has modified the proposed definition so that in this final rule the regulatory text will state that "single function of the trigger" means a "single pull of the trigger" and analogous motions rather than a "single pull of the trigger." Although the case law establishes that a "single pull" is a ***66535** "single function," those cases were addressing devices that relied on a single pull of the trigger, as opposed to some other single motion to activate the trigger. The term "single function" is reasonably interpreted to also include other analogous methods of trigger activation.

E. ATF Suggested Alternatives

1. General Adequacy of ATF Alternatives

* * *

2. First ATF Alternative—No Regulatory Action

Comments Received

Commenters opposed to the regulation implicitly agreed with the first alternative listed by ATF, which is for the Department not to take any action. They argued that attention should be devoted to improving the background check system, that ATF should concentrate on enforcing the existing gun laws, or that if there is to be change, that change should be made by Congress or the States. One commenter argued ATF failed to properly analyze this alternative.

Department Response

As explained above, Part IV.D.4, the Department has concluded that the NFA and GCA require regulation of bump-stock-type devices as machineguns, and that taking no regulatory action is therefore not a viable alternative to this rule.

3. Second ATF Alternative—Shooting Ranges

Comments Received

Commenters who suggested that bump-stock-type devices be used in a controlled setting, or be available only at shooting ranges, were largely in support of the rule rather than viewing it as a complete alternative to taking no regulatory action.

Department Response

The Department acknowledges comments on the potential use of bump-stock-type devices in a controlled setting, such as a shooting range. As stated above, the Department believes that such items satisfy the statutory definition of "machinegun," and

therefore it is promulgating this rule to clarify the definition. ATF has previously held that the on-premises rental of NFA firearms is permitted. However, whereas machineguns that are currently available for rental at shooting ranges are lawfully registered in the NFRTR if they may be lawfully possessed under 18 U.S.C. 922(o)(2)(B), bump-stock-type devices cannot be registered because none were in existence when section 922(o) was enacted in 1986.

4. Third ATF Alternative—Use Other Means

* * *

F. Other Alternatives

1. Allow Registration or Grandfathering of Bump-Stock-Type Devices Under NFA

* * *

2. Licensing and Background Checks

* * *

Department Response

The Department acknowledges these suggested alternatives but does not have the authority to add a new class of firearms to the statutory scheme or impose licensing requirements to acquire a firearm. Such changes would require legislation. Further, the definition of "any other weapon" in the NFA does not apply to bump-stock-type devices. Because bump-stock-type devices are properly classified as "machineguns" under the NFA and GCA, the Department believes that ATF must regulate them as such, and

that the recommended alternatives are not possible unless Congress amends the NFA and GCA.

3. Remuneration

*** * ***

4. Medical Exemption

Comments Received

Some commenters suggested that Department amend the proposed rule so it would provide an exemption for "medical necessity," thereby allowing certain individuals, such as those with nerve damage or one functional arm, to possess bump-stock-type devices. Similarly, commenters suggested bump-stock-type devices should only be available for people who are physically unable to pull a trigger for hunting or target practice.

Department Response

The Department does not have authority to create a medical exemption for the possession of machineguns. Pursuant to the NFA and GCA, for private possession of machineguns to be lawful, they must have been lawfully possessed before the effective date of 18 U.S.C. 922(o).

5. Allow Removal of Trigger Ledge

Comments Received

One commenter suggested that "ATF could find that bump-stock-type devices with the ledge/rest removed are not affected by any additional regulation." The commenter argued that this would make the

proposed rule "logically consistent with the notion that operators may 'bump fire' with or without a ***66537** bump-stock-type device, as long as they do not utilize a device allowing a fixed trigger finger."

Department Response

The Department does not believe that removing the trigger ledge is sufficient to affect a bump-stock-type device's classification as a machinegun. While the trigger ledge makes it easier to utilize the device, removing the ledge does nothing to prevent the directing of the "recoil energy of the discharged rounds into the space created by the sliding stock (approximately 1.5 inches) in constrained linear rearward and forward paths." 83 FR at 13443. Therefore, even without the trigger ledge, the bump-stock-type device will operate as designed if the shooter simply holds his or her finger in place. As such the bump-stock-type device remains a "machinegun" under the NFA and GCA.

6. Miscellaneous Alternatives To Regulate Bump-Stock-Type Devices

Comments Received

Other miscellaneous comments included suggesting a ban only on future production and commercial sale of such items; enacting a quota on the number of devices that can be produced or possessed; enacting a Pigouvian tax, which is a tax imposed on a good that is calculated to reduce market quantity (and increase market price) in order to achieve the socially optimal level of the good; deferring action until Congress

takes action; leaving the matter for State legislative action; improving security at mass-attended events; and improving law enforcement capabilities.

Department Response

The Department acknowledges comments on alternative suggestions for the regulation of bump-stock-type devices, but it does not have authority to implement many of the suggested alternatives. The Department does not have the authority to restrict only the future manufacture or sale of bump-stock-type devices, nor does it have the authority to remove the general prohibition on the transfer and possession of machineguns that were not lawfully possessed on the effective date of 18 U.S.C. 922(o). In addition, the Department lacks the authority to enact an excise tax on bump-stock-type devices.

As mentioned above, the Department does not agree with commenters that any change needs to be enacted by Congress or should be left to State legislatures. Congress passed both the NFA and GCA, delegating enforcement authority to the Attorney General. Accordingly, the Attorney General has the authority to promulgate regulations necessary to enforce the provisions of the NFA and GCA, and the Department determined that notice-and-comment rulemaking was the appropriate avenue to clarify the definition of "machinegun." In the interest of public safety and in light of the statutory definition of "machinegun," the Department has determined that Federal regulation of bump-stock-type devices is necessary. However, this action does not prevent Congress

from taking action on bump-stock-type devices in the future.

The Department acknowledges comments on improving security at mass-attended events and agrees that it is important to improve law enforcement capabilities. The Department actively works with State and local law enforcement agencies to provide security at mass-attended events, as well as training and equipment for their departments.

G. Proposed Rule's Statutory and Executive Order Review

* * *

H. Affected Population

Comments Received

There were a number of commenters who stated this rule will affect between 200,000 and 500,000 owners. Some commenters suggested that the estimated number of bump-stock-type devices should be higher, potentially over a million, than the estimated amount stated in the NPRM. Some commenters indicated that this would incorporate homemade devices, 3D-printed devices, or other devices made by personal means.

***66538 Department Response**

In the NPRM, ATF did not estimate the number of owners. 83 FR at 13449. The 280,000-520,000 range in the Executive Order 12866 section of the NPRM is the estimated number of bump-stock-type devices in circulation, not the number of owners. While the De-

partment does not know the total number of bump-stock-type devices currently extant, nor the number of owners, the Department's high estimate of 520,000 is still the primary estimate only for devices sold on the market. While it may be possible to make home-made devices, the Department cannot calculate the number of such devices or the likelihood of these devices circulating among the public. The Department is using the best available information, and there is no known information that would allow ATF to estimate such a number, much less achieve the level of accuracy that the public is requesting. Therefore, the estimates provided continue to be based upon the best available information.

I. Costs and Benefits

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J. Regulatory Flexibility Act

* * *

K. Miscellaneous Comments

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L. Comments on the Rulemaking Process

* * *

V. Final Rule

This final rule adopts, with minor changes, the proposed amendments to the definition of "machine gun" in 27 CFR 447.11, 478.11, and 479.11, which include clarification of the meaning of "automatically" and "single function of the trigger" and clarification

that bump-stock-type devices are machineguns. The Department accordingly determined that persons in possession of bump-stock-type devices must destroy or abandon the devices.

In response to comments received and discussed in Part IV, the Department added employees of manufacturers and one additional manufacturer to the populations potentially affected by this rule, and incorporated sales tax of $19.00 per bump-stock-type device as part of the economic analysis. Also, the Department considered additional alternatives and inserted an OMB Circular A-4 Accounting Statement for clarity.

VI. Statutory and Executive Order Review

* * *

Alternatives

Alternative 1—No change alternative. This alternative would leave the regulations in place as they currently stand. Since there would be no changes to regulations, there would be no cost, savings, or benefits to this alternative.

Alternative 2—Patronizing a shooting range. Individuals wishing to experience shooting a "full-auto" firearm could go to a shooting range that provides access to lawfully registered "pre-1986" machineguns to customers, where the firearm remains on the premises and under the control of the shooting range. ATF does not have the information to determine which, where, or how many gun ranges provide such a ser-

vice and is therefore not able to quantify this alternative.

Alternative 3—Opportunity alternatives. Based on public comments, individuals wishing to replicate the effects of bump-stock-type devices could also use rubber bands, belt loops, or otherwise train their trigger finger to fire more rapidly. To the extent that individuals are capable of doing so, this would be their alternative to using bump-stock-type devices.

Public comments from the NPRM suggested other alternatives:

1. Provide amnesty or "grandfathering." This alternative was rejected because since the passage of 18 U.S.C. 922(o), amnesty registration of machineguns is not legally permissible; all devices determined to be machineguns are prohibited except as provided by exceptions established by statute.

2. Provide licensing and background checks. This alternative was rejected because only Congress can add a new class of firearm to the GCA and impose licensing or acquisition requirements on it.

3. Provide compensation for the destruction of the devices. This alternative was rejected because only Congress has the authority to offer monetary compensation.

4. Provide a medical exemption. This alternative was rejected because neither the NFA nor the GCA provides for medical exemptions to acquire an otherwise prohibited firearm. Only Congress can add medical exemptions.

5. Prohibit only future manufacture and sales. This alternative was rejected because ATF does not have the authority to restrict only the future manufacture or sale of bump-stock-type devices.

6. Provide a quota. This alternative was rejected because ATF lacks authority to implement it, as all devices determined to be machineguns are prohibited across the board.

7. Institute a tax. This alternative was rejected because ATF lacks authority to establish excise taxes.

8. Improve security at mass events. This alternative was rejected because improved security must be paired with reasonable regulations to increase public safety and reduce violent crime.

9. Congressional legislation. This alternative was rejected because issuance of this rule will not prevent Congress from taking action on bump-stock-type devices.

10. Leave the issue to the States. This alternative was rejected because ATF is responsible for implementing the NFA and GCA, Federal laws designed to maintain public safety. Issuance of this rule will not ***66552** prevent States from taking action on bump-stock-type devices.

11. Improved law enforcement capabilities. This alternative was rejected because while training and equipment may assist law enforcement efforts, they are not a substitute for the Department's exercise of its public safety responsibility of interpreting the NFA and GCA appropriately.

* * *

Authority and Issuance

Accordingly, for the reasons discussed in the preamble, 27 CFR parts 447, 478, and 479 are amended as follows:

PART 447—IMPORTATION OF ARMS, AMMUNITION AND IMPLEMENTS OF WAR

1. The authority citation for 27 CFR part 447 continues to read as follows:

Authority: 22 U.S.C. 2778, E.O. 13637, 78 FR 16129 (Mar. 8, 2013).

27 CFR § 447.11

2. In § 447.11, revise the definition of "Machinegun" to read as follows:

27 CFR § 447.11

§ 447.11 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 ***66554** 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.

* * *

PART 478—COMMERCE IN FIREARMS AND AMMUNITION

3. The authority citation for 27 CFR part 478 continues to read as follows:

Authority: 5 U.S.C. 552(a); 18 U.S.C. 921-931; 44 U.S.C. 3504(h).

27 CFR § 478.11

4. In § 478.11, revise the definition of "Machine gun" by adding two sentences at the end of the definition to read as follows:

27 CFR § 478.11

§ 478.11 Meaning of terms.

* * *

Machine gun. * * * 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.

* * *

PART 479—MACHINE GUNS, DESTRUCTIVE DEVICES, AND CERTAIN OTHER FIREARMS

5. The authority citation for 27 CFR part 479 continues to read as follows:

Authority: 26 U.S.C. 5812; 26 U.S.C. 5822; 26 U.S.C. 7801; 26 U.S.C. 7805.

27 CFR § 479.11

6. In § 479.11, revise the definition of "Machine gun" by adding two sentences at the end of the definition to read as follows:

27 CFR § 479.11

§ 479.11 Meaning of terms.

* * *

Machine gun. * * * 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.

* * *

Dated: December 18, 2018.

Matthew G. Whitaker,

Acting Attorney General.

[FR Doc. 2018-27763 Filed 12-21-18; 8:45 am]

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APPENDIX C

356 F.Supp.3d 109

United States District Court, District of Columbia.

Damien GUEDES, et al., Plaintiffs,

v.

BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES, et al., Defendants.

David Codrea, et al., Plaintiffs,

v.

William P. Barr,[1] Attorney General, et al., Defendants.

No. 18-cv-2988 (DLF), No. 18-cv-3086 (DLF)

|

Signed 02/25/2019

MEMORANDUM OPINION

DABNEY L. FRIEDRICH, United States District Judge

On October 1, 2017, a lone gunman fired several hundred rounds of ammunition at a crowd gathered for an outdoor concert in Las Vegas, killing 58 people and wounding hundreds more. According to the Bu-

[1] When this suit began, Matthew G. Whitaker was the Acting Attorney General. When William P. Barr became Attorney General, he was automatically substituted. *See* Fed. R. Civ. P. 25(d).

reau of Alcohol, Tobacco, Firearms, and Explosives (ATF), the gunman used multiple "bump stocks" in the attack, which increased ***120** his rate of fire. In response to this tragedy, the President, Members of Congress, and others urged ATF to reconsider its prior position that a bump stock is not a "machinegun" within the meaning of the National Firearms Act of 1934 (NFA). On December 26, 2018, ATF issued a final rule amending the regulatory definition of "machinegun" to include "bump-stock-type devices." As a result, if the rule becomes effective on March 26, 2019, as scheduled, bump stocks will be banned under the Firearms Owners' Protection Act of 1986 (FOPA).

To prevent the rule from taking effect, the plaintiffs—Damien Guedes, the Firearms Policy Coalition, David Codrea, and their co-plaintiffs—filed three motions for a preliminary injunction in which they raised overlapping statutory and constitutional challenges. All of the plaintiffs contend that ATF violated the Administrative Procedure Act (APA) when it promulgated the rule. Guedes also argues that ATF violated certain procedural requirements in 18 U.S.C. § 926(b), which grants the agency rulemaking authority. Codrea further argues that the rule violates the Takings Clause of the Fifth Amendment. And all of the plaintiffs contend that then–Acting Attorney General Matthew Whitaker lacked authority to promulgate the rule under either the Appointments Clause of the Constitution or 28 U.S.C. § 508 (the AG Act), a succession statute specific to the Office of the Attorney General. Because none of the plaintiffs' ar-

guments support preliminary injunctive relief, the Court will deny all three motions.

Most of the plaintiffs' administrative law challenges are foreclosed by the *Chevron* doctrine, which permits an agency to reasonably define undefined statutory terms. *See Chevron v. Nat. Res. Def. Council*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). Here, Congress defined "machinegun" in the NFA to include devices that permit a firearm to shoot "automatically more than one shot, without manual reloading, by a single function of the trigger," 26 U.S.C. § 5845(b), but it did not further define the terms "single function of the trigger" or "automatically." Because both terms are ambiguous, ATF was permitted to reasonably interpret them, and in light of their ordinary meaning, it was reasonable for ATF to interpret "single function of the trigger" to mean "single pull of the trigger and analogous motions" and "automatically" to mean "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." ATF also reasonably applied these definitions when it concluded that bump stocks permit a shooter to discharge multiple rounds automatically with a single function of the trigger. That this decision marked a reversal of ATF's previous interpretation is not a basis for invalidating the rule because ATF's current interpretation is lawful and ATF adequately explained the change in interpretation.

The Court also rejects the plaintiffs' procedural challenges. ATF adequately responded to the objections raised by the plaintiffs during the comment period, and ATF was not required to disclose evidence

on which it did not rely when it promulgated the rule. Nor did ATF violate § 926(b) by refusing to hold an oral hearing. Finally, any error ATF may have committed by failing to extend the comment period by five days because of technical glitches was harmless.

As for the Takings Clause challenge, the plaintiffs have not shown that preliminary injunctive relief rather than future compensation is appropriate.

The plaintiffs' statutory and constitutional challenges to Whitaker's authority fare no better. As a statutory matter, the ***121** plaintiffs argue that the AG Act requires the Deputy Attorney General to serve as Acting Attorney General when there is a vacancy and that nothing in the Federal Vacancies Reform Act (FVRA) empowers the President to change that result. The plain text and structure of both statutes, however, demonstrate that they were intended to coexist: the AG Act provides a line of succession, and the FVRA gives the President discretion to depart from that line, subject to certain limitations met here.

As a constitutional matter, the plaintiffs argue that the Appointments Clause generally requires an acting principal officer to be either the principal officer's first assistant or appointed by the President with the advice and consent of the Senate. But that theory is foreclosed by Supreme Court precedent and historical practice, both of which have long approved temporary service by non-Senate confirmed officials, irrespective of their status as first assistants.

Separately, the plaintiffs argue that the Appointments Clause at a minimum requires the role of an

acting principal officer to be filled by an inferior officer and not a mere employee. Whitaker, the plaintiffs contend, was not an officer because the FVRA did not authorize the President to "appoint" him and because his role as an acting official was temporary. The Court disagrees. Whitaker's designation under the FVRA was a Presidential appointment. And if the temporary nature of Whitaker's service prevented him from becoming an officer, then the President was not constitutionally obligated to appoint him at all.

I. BACKGROUND

A. Procedural History

On December 18, 2018, Guedes, Firearms Policy Coalition (the Coalition), Firearms Policy Foundation, and Madison Society Foundation filed a complaint and a motion for a preliminary injunction. Guedes's Compl., Dkt. 1, No. 18-cv-2988; Guedes's Mot., Dkt. 2, No. 18-cv-2988. Although their complaint contained eight claims, they moved for a preliminary injunction only on the grounds that (1) ATF's rule violated the APA and 18 U.S.C. § 926(b), and (2) Whitaker lacked authority to promulgate the bump stock rule. *Compare* Guedes's Compl., *with* Guedes's Br., Dkt. 2-1, No. 18-cv-2988. At the parties' request, the Court extended the time for briefing and held a hearing on the motion for a preliminary injunction on January 11, 2019. Minute Order, Dec. 21, 2018, No. 18-cv-2988.

Less than a week after filing the motion, Guedes and the Coalition elected to pursue separate lawsuits. On December 26, 2018, the Coalition voluntarily dismissed its claims, Notice of Voluntary Dismissal

at 2, Dkt. 8, No. 18-cv-2988, and Guedes filed an amended complaint that alleged the original eight causes of action minus the challenge to Whitaker's authority, Guedes's Am. Compl., Dkt. 9, No. 18-cv-2988. The Coalition simultaneously filed a new complaint in this District that elaborated on the original challenge to Whitaker's authority and raised several additional claims based on Whitaker's allegedly infirm designation as Acting Attorney General. *See* Firearms Pol'y Coal.'s Compl., Dkt. 1, No. 18-cv-3083. The Coalition also filed a motion for a preliminary injunction. Firearms Pol'y Coal.'s Mot., Dkt. 2, No. 18-cv-3083.

In response to the recent government shutdown, the government filed unopposed motions to stay in each case in late December. *See* Gov't's Mot. for a Stay in *Guedes*, Dkt. 7, No. 18-cv-2988; Gov't's Mot. for a Stay in *Firearms Pol'y Coal.*, Dkt. 8, No. 18-cv-3083. Both motions were granted. ***122** Minute Order in *Guedes*, Dec. 27, 2018, No. 18-cv-2988; Minute Order in *Firearms Pol'y Coal.*, Dec. 27, 2018, No. 18-cv-3083.

On January 3, 2019, *Firearms Policy Coalition* was transferred to the undersigned as a related case and, with the consent of the parties, consolidated with *Guedes*. *See* Reassignment of Civil Case in *Firearms Pol'y Coal.*, Dkt. 12, No. 18-cv-3083; Minute Order in *Guedes*, Jan. 8, 2019, No. 18-cv-2988. A few days later, the Court granted the plaintiffs' motion to lift the stay and set a revised briefing schedule. Minute Order in *Guedes*, Jan. 11, 2019, No. 18-cv-2988.

Meanwhile, on December 27, 2018, Codrea filed yet another action challenging the bump stock rule, and he moved for a preliminary injunction several weeks later on January 18, 2019. *See* Codrea's Compl., Dkt. 1, No. 18-cv-3086; Codrea's Mot., Dkt. 5, No. 18-cv-3086. Like the other plaintiffs, Codrea seeks to enjoin the rule on the grounds that ATF violated the APA and Whitaker lacked authority to promulgate the rule. Codrea's Br. at 13–14, Dkt. 5-1, No. 18-cv-3086. Codrea also argues that a preliminary injunction is appropriate because ATF violated the Takings Clause of the Fifth Amendment. *Id.* at 13. *Codrea* was transferred to the undersigned as a related case, *see* Reassignment of Civil Case in *Codrea*, Dkt. 14, No. 18-cv-3086, but at the request of the parties, the Court did not consolidate *Codrea* with *Guedes*.

On February 6, 2019, the Court held a hearing in *Guedes*. On February 19, 2019, after briefing was complete, the Court held a second hearing in *Codrea*. This opinion resolves all three of the pending motions for a preliminary injunction.

B. The Statutory Framework and Regulatory History of Bump Stock Prohibitions

The National Firearms Act of 1934 (NFA) and the Firearm Owners Protection Act of 1986 (FOPA) provide the statutory basis for the bump stock rule. The NFA provides the following definition for the term "machinegun":[2]

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[2] The U.S. Code uses an uncommon spelling of "machinegun." *See United States v. Carter*, 465 F.3d 658, 661 n.1 (6th Cir.

> 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). Congress later passed the FOPA, which generally makes it "unlawful for any person to transfer or possess" a newly manufactured "machinegun," 18 U.S.C. § 922(o), and incorporates the NFA's definition of that term, 18 U.S.C. § 921(a)(23) ("The term 'machinegun' has the meaning given such term in ... the National Firearms Act."). The FOPA also amended a previous grant of rulemaking authority to provide that "[t]he Attorney General may prescribe only such rules and regulations as are necessary to carry out the provisions of this chapter." 18 U.S.C. § 926(a); *see also Nat'l Rifle Ass'n v. Brady*, 914 F.2d 475, 478 (4th Cir. 1990) (discussing the statutory change). The key ***123** question here is whether the NFA's definition of "machinegun" en-

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2006) (discussing the spelling of machine gun). Except when quoting the relevant statutes, the Court uses the more common, two-word spelling of machine gun.

compasses devices that are colloquially referred to as "bump stocks."

The parties do not dispute the basic mechanics of standard bump stock devices. A bump stock replaces a semiautomatic rifle's standard stock—the part of the rifle that rests against the shooter's shoulder—and enables the shooter to achieve a faster firing rate. To use a bump stock as intended, the shooter must maintain forward pressure on the barrel and, at the same time, pull the trigger and maintain rearward pressure on the trigger. Once the shooter pulls the trigger, a bump stock helps harness and direct the firearm's recoil energy, thereby forcing the firearm to shift back and forth, each time "bumping" the shooter's stationary trigger finger. In this way, the shooter is able to reengage the trigger without additional physical manipulation, though the process may cause small involuntary movements of the trigger finger.

ATF first began to regulate bump stocks in 2006 when it determined that the term "machinegun" encompassed the "Akins Accelerator," a specific bump stock model with an internal spring that pushed the firearm forward after the shooter pulled the trigger. *See Akins v. United States*, 312 F. App'x 197, 198 (11th Cir. 2009) (per curiam). ATF initially determined in 2002 and again in 2004 that the Akins Accelerator did not qualify as a "machinegun" because it did not permit a shooter to discharge multiple rounds with a "single function of the trigger." *Id.* at 199. But the agency reversed course in 2006, when it reinterpreted a "single function of the trigger" to mean a "single pull of the trigger." *Id.* at 200. Under that new

interpretation, ATF determined that the Akins Accelerator qualified as a "machinegun" because the device enabled the shooter to discharge multiple rounds with only one "pull," even though the trigger mechanically reset between rounds. *Id.* The Eleventh Circuit later upheld ATF's decision, reasoning that ATF's interpretation of "single function of the trigger" was "consonant with the [NFA] and its legislative history." *Id.*

For years, ATF declined to classify as "machineguns" other standard bump stock models that did not include an internal spring. 83 Fed. Reg. at 66517. ATF reasoned that, although standard bump stock devices permit a shooter to discharge multiple rounds with a single function of the trigger, they do not operate "automatically." *Id.* But ATF's interpretation of the term "automatically" remained unclear. At times, ATF focused on whether a given bump stock device "initiate[d] an automatic firing cycle that continue[d] until either the finger [wa]s released or the ammunition supply [wa]s exhausted." *Id.* at 66518 (internal quotation marks omitted). Other times, it focused on whether the device had "automatically functioning mechanical parts or springs" or "performed ... mechanical functions when installed." *Id.* (alterations adopted and internal quotation marks omitted).

C. The Final Bump Stock Rule

The call for action in the wake of the 2017 mass shooting in Las Vegas, Nevada was immediate and widespread. Members of Congress and others requested that ATF reconsider its position with respect

to standard bump stock devices. *Id.* at 66516. And after ATF issued an Advance Notice of Proposed Rulemaking, President Trump released a memorandum urging the Attorney General, "as expeditiously as possible, to propose for notice and comment a rule banning all devices that turn legal weapons into machineguns." *Id.* at 66517 (quoting ***124** Application of Machinegun to 'Bump Fire' Stocks and Other Similar Devices, 83 Fed. Reg. 7949 (Feb. 20, 2018)).

On March 29, 2018, ATF proposed the bump stock rule and formally provided the public with 90 days, as required by 18 U.S.C. § 926(b), to submit written comments online, by mail, or by facsimile. Bump-Stock-Type Devices, 83 Fed. Reg. at 13442 (proposed Mar. 29, 2018). The first few days of the comment period did not go smoothly. According to Guedes, several commenters faced technological difficulties that prevented them from submitting online comments. Guedes's Br. at 22–25. Some online users, for example, received a "Comment Period Closed" notification on the proposed rule's FederalRegister.gov page—though the page also included a contradictory notice stating that the proposed rule had a comment period that would end several days in the future. Guedes's Am. Compl. Ex. A, at 14, Dkt. 9-1, No. 18-cv-2988. Meanwhile, a search for "bump stock" on another rulemaking website, Regulations.gov, directed commenters to the correct page, and ATF did in fact receive comments submitted during the first few days of the comment period. 83 Fed. Reg. at 66542. In addition to submitting written comments, a few of the plaintiffs sought an opportunity to participate in a public, oral hearing, Guedes's Br. at 6, but ATF re-

fused those requests, 83 Fed. Reg. at 66542. ATF explained that "a public hearing would [not] meaningfully add data or information" that would assist the agency in drafting the final rule. *Id.*

In the final rule published on December 26, 2018, ATF reversed its earlier position and concluded that a standard bump stock device is a "machinegun" as defined in the NFA. *Id.* at 66543, 66553. Consistent with its 2006 Akins Accelerator determination, ATF interpreted the term "single function of the trigger" to mean a "single pull of the trigger." *Id.* at 66553. ATF also interpreted "automatically" to mean "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.* Based on these definitions, ATF added a sentence to the regulatory definition of "machinegun" to make clear that the term "machinegun" in the NFA includes "bump-stock-type device[s]," which "allow[ ] 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." *Id.* at 66553–54. Under the rule, "current possessors" of bump stocks must either destroy them or abandon them at an ATF office. *Id.* at 66530. The rule is set to become effective on March 26, 2019.

D. The Constitutional and Statutory Framework for the Designation of Acting Attorneys General

The Constitution's Appointments Clause provides that the President "shall appoint ... Officers of the United States" "by and with the Advice and Consent of the Senate," but "the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const. art. II, § 2, cl. 2. The Constitution does not provide clear guidance about whether and when an individual may temporarily serve as an acting principal officer without Senate confirmation. Instead, a series of statutes provide the primary framework for the designation of acting officers. *See NLRB v. SW Gen.*, —— U.S. ——, 137 S.Ct. 929, 934, 197 L.Ed.2d 263 (2017).

In 1868, Congress enacted the first Vacancies Act, a predecessor to the Federal Vacancies Reform Act (FVRA). Act of July ***125** 23, 1868, ch. 227, 15 Stat. 168 (1868). The Vacancies Act, which established the basic statutory framework that continues to operate today, created a default rule that in the case of a vacancy "of the head of any executive department of the government, the first or sole assistant thereof shall ... perform the duties of such head until a successor be appointed, or such absence or sickness shall cease." *Id.* § 1, 15 Stat. at 168. But the Vacancies Act also permitted the President to override that first-assistant default rule and designate another Senate-confirmed official to serve temporarily on an acting basis. *Id.* § 3; *see also SW Gen.*, 137 S.Ct. at 935. Until recently, with the enactment of the modern FVRA, the President could not invoke the override authority established in the Vacancies Act to designate an Act-

ing Attorney General; the first-assistant default rule always applied. 5 U.S.C. § 3347 (1994) (providing that the President's authority to designate acting officials under the FVRA "d[id] not apply to a vacancy in the office of the Attorney General").

In addition to the Vacancies Act, Congress has enacted a series of agency-specific statutes, including the AG Act, 28 U.S.C. § 508. The AG Act provides that "[i]n case of a vacancy in the office of Attorney General, or of his absence or disability, the Deputy Attorney General may exercise all the duties of that office, and for the purpose [of the first-assistant default rule] the Deputy Attorney General is the first assistant to the Attorney General." *Id.* § 508(a). The AG Act then provides a further order of succession: "When by reason of absence, disability, or vacancy in office, neither the Attorney General nor the Deputy Attorney General is available to exercise the duties of the office of Attorney General, the Associate Attorney General shall act as Attorney General," and "[t]he Attorney General may designate the Solicitor General and the Assistant Attorneys General, in further order of succession, to act as Attorney General." *Id.* § 508(b).

In 1998, Congress enacted the FVRA. Like the earlier Vacancies Act, the FVRA includes a first-assistant default rule, but it permits the President to override that rule in one of two ways. 5 U.S.C. § 3345(a)(1). First, "the President ... may direct a person who serves in an office for which appointment is required to be made by the President, by and with the advice and consent of the Senate, to perform the functions and duties of the vacant office temporarily."

Id. § 3345(a)(2). Second, "the President ... may direct an officer or employee of such Executive agency to perform the functions and duties of the vacant office temporarily" if that individual has served in the agency for at least 90 days in the 365–day period preceding the vacancy in a position that receives pay "equal to or greater than the minimum rate of pay payable for a position at GS-15 of the General Schedule." *Id.* § 3345(a)(3). In a break from the earlier Vacancies Act, the FVRA also eliminated the exception for the Office of the Attorney General, so the President can override the first-assistant default rule even for that Office. *Compare* 5 U.S.C. § 3347 (1994), *with* 5 U.S.C. § 3347 (2018). And the FVRA increased the amount of time during which an acting official may serve to 210 days, subject to certain statutory exceptions. *See id.* § 3346; *see also SW Gen.*, 137 S.Ct. at 935–36.

The FVRA includes an exclusivity provision that explains how the FVRA interacts with agency-specific statutes like the AG Act. Under § 3347(a), the FVRA is "the exclusive means for temporarily authorizing an acting official to perform the functions and duties of any office of an Executive agency ... for which appointment is required to be made by the President, by ***126** and with the advice and consent of the Senate, unless ... a statutory provision expressly" either "authorizes the President, a court, or the head of an Executive department, to designate an officer or employee" to serve in an acting capacity or "designates an officer or employee" to serve in an acting capacity. 5 U.S.C. § 3347(a).

E. The Designation of Matthew Whitaker to Serve as Acting Attorney General

On November 7, 2018, the Attorney General, Jefferson B. Sessions, III, resigned. Guedes's Compl. ¶ 50–51. The next day, the President invoked his authority under the FVRA and "directed" Whitaker, then the Attorney General's Chief of Staff, to "perform the functions and duties of the office of Attorney General, until the position is filled by appointment or subsequent designation." Firearms Pol'y Coal.'s Mot. App. A, Dkt. 2-2, No. 18-cv-3083. Whitaker served as Acting Attorney General until Barr was confirmed as Attorney General on February 15, 2019. *See* 165 Cong. Rec. S1397 (daily ed. Feb. 14, 2019). While serving as Acting Attorney General, Whitaker issued the bump stock rule at issue here. *See* 83 Fed. Reg. at 66554.

II. LEGAL STANDARDS

A. Preliminary Injunctions

A preliminary injunction is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Sherley v. Sebelius*, 644 F.3d 388, 392 (D.C. Cir. 2011) (quoting *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 22, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008)). To prevail, a party seeking preliminary relief must make a "clear showing that four factors, taken together, warrant relief: likely success on the merits, likely irreparable harm in the absence of preliminary relief, a balance of the equities in its favor, and accord with the public interest." *League of Women Voters v. Newby*, 838 F.3d 1, 6 (D.C. Cir. 2016) (internal quotation

marks omitted). If the plaintiff fails to establish a likelihood of success on the merits, the court "need not proceed to review the other three preliminary injunction factors." *Ark. Dairy Coop. Ass'n v. U.S. Dep't of Agric.*, 573 F.3d 815, 832 (D.C. Cir. 2009). The plaintiff cannot prevail without a "substantial indication of likely success on the merits." *Archdiocese of Wash. v. Wash. Metro. Area Transit Auth.*, 281 F.Supp.3d 88, 99 (D.D.C. 2017) ("[A]bsent a substantial indication of likely success on the merits, there would be no justification for the Court's intrusion into the ordinary processes of administration and judicial review." (internal quotation marks omitted)), *aff'd*, 897 F.3d 314 (D.C. Cir. 2018).

B. Judicial Review of Agency Action

The APA provides that a court must "hold unlawful and set aside agency action, findings, and conclusions found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2). Under the familiar *Chevron* framework, "[i]f Congress has directly spoken to [an] issue, that is the end of the matter." *Confederated Tribes of Grand Ronde Cmty. v. Jewell*, 830 F.3d 552, 558 (D.C. Cir. 2016) (discussing *Chevron*, 467 U.S. 837, 104 S.Ct. 2778). "[T]he court, as well [as] the agency, must give effect to the unambiguously expressed intent of Congress." *Lubow v. U.S. Dep't of State*, 783 F.3d 877, 884 (D.C. Cir. 2015) (quoting *Chevron*, 467 U.S. at 842–43, 104 S.Ct. 2778). But if the text is silent or ambiguous, courts must "determine if the agency's interpretation is permissible, and if so, defer to it." *Confederated Tribes of Grand Ronde Cmty.*, 830 F.3d at 558. ***127** "This inquiry, of-

ten called *Chevron* Step Two, does not require the best interpretation, only a reasonable one." *Van Hollen, Jr. v. FEC*, 811 F.3d 486, 492 (D.C. Cir. 2016) (internal quotation marks omitted); *see also id.* ("We are bound to uphold agency interpretations regardless [of] whether there may be other reasonable, or even more reasonable, views." (alteration adopted and internal quotation marks omitted)).

Further, even when an interpretation is reasonable under *Chevron*, "agency action is always subject to arbitrary and capricious review under the APA." *Confederated Tribes of Grand Ronde Cmty.*, 830 F.3d at 559. An interpretation is arbitrary and capricious if the agency "relied on factors that Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation" 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." *Agape Church v. FCC*, 738 F.3d 397, 410 (D.C. Cir. 2013) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983)). Put simply, "[t]he agency must 'articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.' " *Nat'l Lifeline Ass'n v. FCC*, No. 18-1026, 915 F.3d 19, 27, 2019 WL 405020, at *5 (D.C. Cir. Feb. 1, 2019) (quoting *State Farm*, 463 U.S. at 43, 103 S.Ct. 2856).

Often the inquiry under *Chevron* Step Two overlaps with arbitrary and capricious review because "under *Chevron* step two, the court asks whether an agency interpretation is arbitrary and capricious in

substance." *Agape Church*, 738 F.3d at 410 (alteration adopted) (quoting *Judulang v. Holder*, 565 U.S. 42, 52 n.7, 132 S.Ct. 476, 181 L.Ed.2d 449 (2011)). At bottom, a reviewing court must decide whether an agency action is "within the scope of [the agency's] lawful authority" and supported by "reasoned decisionmaking." *Tripoli Rocketry Ass'n v. ATF*, 437 F.3d 75, 77 (D.C. Cir. 2006) (internal quotation marks omitted); *see also id.* ("Not only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational." (internal quotation marks omitted)).

When an agency changes its position, it must "display awareness" of the change, but it is not required to meet a "heightened standard for reasonableness." *Mary V. Harris Found. v. FCC*, 776 F.3d 21, 24 (D.C. Cir. 2015) (internal quotation marks omitted). "A reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Nat'l Lifeline Ass'n*, 915 F.3d at 28, 2019 WL 405020, at *6 (alteration adopted and internal quotation marks omitted). But "[s]o long as any change is reasonably explained, it is not arbitrary and capricious for an agency to change its mind in light of experience, or in the face of new or additional evidence, or further analysis or other factors indicating that [an] earlier decision should be altered or abandoned." *New England Power Generators Ass'n v. FERC*, 879 F.3d 1192, 1201 (D.C. Cir. 2018). Put differently, the agency need only "show 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" than the previous policy. *Mary V. Harris Found.*, 776 F.3d at 24–25 (emphasis and internal quotation marks omitted).

III. ANALYSIS

None of the plaintiffs' challenges merit preliminary injunctive relief: the plaintiffs ***128** are unlikely to succeed on the merits of their administrate law challenges; preliminary injunctive relief is not available for Codrea's Takings Clause challenge; and the plaintiffs are unlikely to succeed on the merits of their statutory and constitutional challenges to the authority of then–Acting Attorney General Whitaker.

A. Likely Success on the Merits of the Plaintiffs' Administrative Law Challenges

The Court considers and rejects each of the plaintiffs' administrative law challenges in turn. First, it determines that ATF reasonably interpreted and applied the NFA's definition of "machinegun." Second, it explains that the agency did not violate the APA either by reversing its previous position that bump stocks were not machine guns or by failing to provide its previous interpretations in the rulemaking docket. Third, it explains that ATF did not deny commenters a meaningful opportunity to comment or adequate responses to their comments. Finally, it concludes that ATF did not violate 18 U.S.C. § 926(b) by refusing to hold an oral hearing and that any error it may have made by refusing to extend the comment period by five days was harmless.

1. *ATF's Interpretation of the NFA's Definition of "Machinegun"*

As noted, the NFA defines "machinegun" 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) (emphases added). Congress did not shed further light on the definition of "machinegun" in 1934, when it enacted the NFA, or in 1986, when it incorporated the NFA's definition into the FOPA, *see* 18 U.S.C. § 921(a)(23) ("The term 'machinegun' has the meaning given such term in ... the National Firearms Act.").

Invoking its general rulemaking authority under § 926(a), ATF promulgated the bump stock rule based on its interpretation of "single function of the trigger" and "automatically," two terms that Congress left undefined. ATF defined the phrase "single function of the trigger" to mean a "single pull of the trigger and analogous motions." 83 Fed. Reg. at 66553. And it defined "automatically" to mean "functioning as the re-

sult of a self-acting or self-regulating mechanism that allows the firing of multiple rounds through a single function of the trigger." *Id.* Applying these definitions, it added a sentence to the regulatory definition of "machinegun" that explicitly states that the term "includes a bump-stock-type device," which "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." *Id.* at 66553–54.

The plaintiffs suggest that ATF lacked the authority to state explicitly that the NFA's definition of "machinegun" includes bump stocks, and they take particular issue with the possibility that ***129** policy considerations may have influenced ATF's legal interpretation. Guedes's Br. at 17; Guedes's Reply at 3–5, Dkt. 5-1, No. 18-cv-2988; Codrea's Br. at 4; Codrea's Reply at 6–7, Dkt. 18, No. 18-3086. But these arguments are premised on a misunderstanding of the *Chevron* doctrine. Under *Chevron*, courts "presume that when an agency-administered statute is ambiguous with respect to what it prescribes, Congress has empowered the agency to resolve the ambiguity." *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 315, 134 S.Ct. 2427, 189 L.Ed.2d 372 (2014). Agencies are therefore entitled to deference when they reasonably define ambiguous terms—including ambiguous terms in a statutory definition—and apply those terms to new circumstances. *See Loving v. IRS*, 742 F.3d 1013, 1016 (D.C. Cir. 2014) ("Under *Chevron*, we must accept an agency's authoritative

interpretation of an ambiguous statutory provision if the agency's interpretation is reasonable."); *see also, e.g., Whitaker v. Thompson*, 353 F.3d 947, 950–52 (D.C. Cir. 2004) (deferring to the Food and Drug Administration's interpretation of statutory definitions in the Federal Food, Drug, and Cosmetic Act). Courts must defer even when agencies "make policy choices in interpreting [a] statute," "as long as [they] stay[ ] within [Congress'] delegation [of authority]." *Arent v. Shalala*, 70 F.3d 610, 615 (D.C. Cir. 1995); *see also Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 55–56, 131 S.Ct. 704, 178 L.Ed.2d 588 (2011) ("*Chevron* recognized that the power of an administrative agency to administer a congressionally created program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." (alterations adopted and internal quotation marks omitted)).

That is why courts have regularly recognized ATF's authority to interpret and apply the statutes that it administers, including the NFA's definition of "machinegun." *See, e.g., Akins*, 312 F. App'x at 200 (deferring to ATF's decision to classify the Akins Accelerator as a machine gun); *see also York v. Sec'y of Treasury*, 774 F.2d 417, 419–20 (10th Cir. 1985) (upholding ATF's decision to classify a particular firearm as a machine gun); *cf. Brady*, 914 F.2d at 480 (holding that ATF has discretion to define the term "business premises" in another firearms statute).

The question is therefore not whether ATF considered the policy implications when it formulated the bump stock rule, but whether ATF exceeded its au-

thority by either contravening the plain meaning of the NFA under Step One of the *Chevron* doctrine or adopting an unreasonable interpretation of ambiguous terms under Step Two.[3]

To determine "whether a statute is ambiguous" and "ultimately ... whether [an] agency's interpretation is permissible or instead is foreclosed by the statute," courts "employ all the tools of statutory interpretation." ***130** *Loving*, 742 F.3d at 1016. Most importantly, courts "interpret the words [of a statute] consistent with their ordinary meaning at the time Congress enacted the statute." *Wisconsin Cent. Ltd. v. United States*, —— U.S. ——, 138 S.Ct. 2067, 2070, 201 L.Ed.2d 490 (2018) (alteration adopted and internal quotation marks omitted); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 78 (2012) ("Words must be given the meaning they had when the text was adopted."). Generally, courts rely on dictionaries from the time statutes became law to interpret the words

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[3] Despite ATF's clear authority to interpret and administer the NFA and the FOPA, Guedes suggests that the congressional findings in the FOPA limit ATF's authority to interpret the definition of "machinegun." Guedes's Br. at 14–15. The general findings to which Guedes refers do not come close to stripping ATF of its authority to define terms included in the statutory definition of "machinegun"—a type of firearm expressly banned with few exceptions by the FOPA. 18 U.S.C. § 922(o). And even if the findings were more concrete and specific to the issues presented here, a "statement of congressional findings is a rather thin reed upon which to base a requirement ... neither expressed nor ... fairly implied in the operative sections of [a statute]." *Nat'l Org. for Women v. Scheidler*, 510 U.S. 249, 260, 114 S.Ct. 798, 127 L.Ed.2d 99 (1994).

of a statute. *See MCI Telecomms. Corp. v. AT & T*, 512 U.S. 218, 228, 114 S.Ct. 2223, 129 L.Ed.2d 182 (1994); *PHH Corp. v. CFPB*, 881 F.3d 75, 130 (D.C. Cir. 2018) (en banc) (Griffith, J., concurring in the judgment) (collecting cases demonstrating that the Supreme Court "generally begins [an interpretive task] with dictionaries").

a. A "Single Function of the Trigger"

Unfortunately, dictionaries from the time of the NFA's enactment are of little help in defining a "single function of the trigger." The 1933 version of *Webster's New International Dictionary* defines "function" as "[t]he natural and proper action of anything." *Webster's New International Dictionary* 876 (1933). Similarly, the 1933 *Oxford English Dictionary* defines the term to mean "[t]he special kind of activity proper to anything; the mode of action by which it fulfills its purpose." 4 *Oxford English Dictionary* 602 (1933). Neither definition sheds any light on the key question here: whether, as the plaintiffs argue, a "single function of the trigger" means a mechanical act of the trigger, or whether, as ATF argued in the rule, a "single function of the trigger" means a single pull of the trigger from the perspective of the shooter. Under the first interpretation, each trigger function ends when the trigger resets. Under the second interpretation, a single act by the shooter—a single pull—is a "function." Because the statute does not provide any additional guidance on the correct interpretation, the Court concludes that the term is ambiguous.

The question then becomes whether ATF's interpretation was reasonable. To be sure, the interpretation offered by the plaintiffs is reasonable. But the same is true of ATF's interpretation. Indeed, in 2009, the Eleventh Circuit upheld ATF's decision to treat Akins Accelerators as machine guns because "a single application of the trigger by a gunman"—a single pull—caused the gun with the affixed bump stock to "fire continuously ... until the gunman release[d] the trigger or the ammunition [wa]s exhausted." *Akins*, 312 F. App'x at 200.

Tellingly, courts have instinctively reached for the word "pull" when discussing the statutory definition of "machinegun." The Supreme Court, for example, has explained that the statutory definition encompasses a weapon that "fires repeatedly with *a single pull of the trigger*," meaning "once its trigger is depressed, the weapon will automatically continue to fire until its trigger is released or the ammunition is exhausted." *Staples v. United States*, 511 U.S. 600, 602 n.1, 114 S.Ct. 1793, 128 L.Ed.2d 608 (1994) (emphasis added). The Court then contrasted automatic machine guns with semiautomatic weapons that "fire[ ] only one shot with each pull of the trigger" and "require[ ] no manual manipulation by the operator to place another round in the chamber after each round is fired." *Id.* Likewise, the Tenth Circuit has held that a uniquely designed firearm was "a machine gun within the statutory definition" because "the shooter could, *by fully pulling the* ***131** *trigger*, and it only, at the point of maximum leverage, obtain automation with a single trigger function." *United*

States v. Oakes, 564 F.2d 384, 388 (10th Cir. 1977) (emphasis added).

Based on the above contemporaneous dictionary definitions and court decisions, the Court concludes that ATF acted reasonably in defining the phrase "single function of the trigger" to mean a "single pull of the trigger and analogous motions." 83 Fed. Reg. at 66553.

b. "Automatically"

Dictionary definitions of "automatically" are only marginally more helpful. The 1933 *Webster's New International Dictionary* provides that "automatically" is the adverbial form of "automatic," *Webster's New International Dictionary, supra*, at 157, and it defines the related, adjectival form as "self-acting or self-regulating," especially as applied "to machinery or devices which perform parts of the work formerly or usually done by hand," *id.* at 156. The 1933 *Oxford English Dictionary* likewise defines "automatic" as "[s]elf-acting under conditions fixed for it, going of itself," especially as applied to "machinery and its movements, which produce results otherwise done by hand." 1 *Oxford English Dictionary, supra*, at 574. Applying these definitions to the NFA's definition of "machinegun," the Seventh Circuit concluded that the "adverb 'automatically,' as it modifies the verb 'shoots,' delineates how the discharge of multiple rounds from a weapon occurs: as the result of a self-acting mechanism ... that is set in motion by a single function of the trigger and is accomplished without manual reloading." *United States v. Olofson*, 563 F.3d 652, 658 (7th Cir. 2009) (footnote omitted). Con-

sistent with these contemporaneous dictionary definitions and the Seventh Circuit's decision in *Olofson*, ATF correctly defined "automatically" to mean "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." 83 Fed. Reg. at 66553.

But even this definition retains a key ambiguity: how much of the "work formerly or usually done by hand" must be performed by the "self-acting or self-regulating device" for the automatic label to apply? *Webster's New International Dictionary, supra*, at 156. According to *Webster's New International Dictionary*, the "automatic" label applies when a device performs only "parts"—not all—of the work otherwise performed by hand. *Id.* And that definition comports with everyday experience. Automatic devices regularly require *some* degree of manual input. An automatic sewing machine, for example, still requires the user to press a pedal and direct the fabric. Because the statute does not specify how much manual input is too much, the Court concludes that the term "automatically" is ambiguous, with or without the gloss added by the rule. And as discussed below, ATF reasonably interpreted this ambiguous term to describe bump stocks.

c. ATF's Application of the NFA's Definition of "Machinegun" to Bump Stocks

After defining a "single function of the trigger" to mean a "single pull of the trigger" and "automatically" to mean "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," 83 Fed. Reg. at 66553, ATF added a sentence to the regulatory definition of "machinegun" to clarify that ATF considered bump stocks to be machine guns, *id.* at 66553–54. The plaintiffs advance two primary arguments to attack the reasonableness of this interpretation. Neither is persuasive.

***132** *First*, the plaintiffs suggest that bump stocks do not operate with a "single function of the trigger" because a shooter must still "manipulate" the trigger to discharge multiple rounds. Unless the trigger makes repeated contact with the shooter's finger, they assert, the firearm will not reset between rounds and fire multiple times. Guedes's Reply at 14; *see also id.* at 12; Codrea's Br. at 16. Repackaging the same argument, Guedes further argues that ATF's interpretation would bring all "semiautomatic" rifles, as that term is defined by statute, within the NFA's definition of "machinegun." Guedes's Reply at 5–6. In support, Guedes cites the Crime Control Act of 1990, which defines "semiautomatic rifle" to mean "any repeating rifle which utilizes a portion of the energy of a firing cartridge to extract the fired cartridge case and chamber the next round, and which requires a separate pull of the trigger to fire each cartridge." Pub. L. No. 101-647, § 2204(a)(28), 104 Stat. 4789, 4857 (Nov. 29, 1990) (codified at 18 U.S.C. § 921(a)(28)).

The Court concludes that it was reasonable for ATF to determine that a bump stock operates with a single "pull" of the trigger because a bump stock permits the shooter to discharge multiple rounds by, among other things, "maintaining the trigger finger

on the device's extension ledge with constant rearward pressure." 83 Fed. Reg. at 66532 (internal quotation marks omitted). Although 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. After the initial exertion of force, a shooter is able to discharge multiple rounds by maintaining constant pressure on the trigger. And contrary to Guedes's claim, ATF's determination will not bring all semiautomatic rifles within the NFA's definition of "machinegun" because, without a bump stock or similar device attached, semiautomatic rifles *do* "require[ ] a separate pull of the trigger to fire each cartridge." 18 U.S.C. § 921(a)(28).

Second, the plaintiffs argue that ATF acted unreasonably because a bump stock does not operate "automatically." *See, e.g.*, Codrea's Reply at 12–13. Although this is a closer question, the Court also concludes that it was reasonable for ATF to determine that a bump stock relieves a shooter of enough of the otherwise necessary manual inputs to warrant the "automatic" label. To be sure, a firearm with an affixed bump stock requires *some* manual inputs: the shooter must "maintain[ ] constant forward pressure with the non-trigger hand on the barrel-shroud or fore-grip of the rifle, and maintain[ ] the trigger finger on the device's extension ledge with constant rearward pressure." 83 Fed. Reg. at 66532 (internal quotation marks omitted). But as noted, the definition of "automatically" does not mean that an automatic device must operate spontaneously without any manual input. ATF reasoned that a bump stock per-

mits a firearm to function automatically by "directing the recoil energy of the discharged rounds into the space created by the sliding stock ... in constrained linear rearward and forward paths" so that the shooter can maintain a "continuous firing sequence." *Id.* at 66532 (internal quotation marks omitted). And it explained that "without [such a] device," the shooter would have to "manually capture, harness, or otherwise utilize th[e] [recoil] energy to fire additional rounds" and "bump fire" a gun. *Id.* In other words, the bump stock makes it easier to bump fire because it controls the distance the firearm recoils and ensures that the firearm moves linearly—two tasks the shooter would ordinarily have to perform manually. In this way, a ***133** bump stock creates a "self-acting mechanism" that permits "the discharge of multiple rounds" with "a single function of the trigger ... without manual reloading." *Olofson*, 563 F.3d at 658 (defining the term "automatically" in the NFA's definition of "machinegun").

Of course, even if an interpretation is reasonable under *Chevron*, all final agency actions must still survive review under the APA's arbitrary and capricious standard. *See Confederated Tribes of Grand Ronde Cmty.*, 830 F.3d at 559. Often, "[t]he analysis of disputed agency action under *Chevron* Step Two and arbitrary and capricious review is ... 'the same, because under *Chevron* [S]tep [T]wo, the court asks whether an agency interpretation is arbitrary or capricious in substance.' " *Agape Church*, 738 F.3d at 410 (alteration adopted) (quoting *Judulang*, 565 U.S. at 52 n.7, 132 S.Ct. 476). But in addition to the substantive reasonableness already addressed, the arbi-

trary and capricious standard also requires an agency to "articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Nat'l Lifeline Ass'n*, 915 F.3d at 27, 2019 WL 405020, at *5. The Court therefore turns to the plaintiffs' remaining challenges to the adequacy of ATF's explanation for the bump stock rule.

2. *ATF's Treatment of Prior Interpretations*

The plaintiffs characterize ATF's new position as an unlawful departure from its previous interpretations, which excluded standard bump stocks from the NFA's definition of "machinegun." *See, e.g.*, Guedes's Br. at 12–14, 19, 26–27, 30–31; Codrea's Reply at 12; *see also generally* Guedes's Compl. Ex. B, Dkt. 22-1, No. 18-cv-2988. Guedes further challenges the lawfulness of ATF's rulemaking process on the ground that ATF failed to make public its previous interpretations. *See* Guedes's Br. at 21; Guedes's Reply at 7–8. Neither argument is persuasive.

It is well established that an agency may change its prior policy if "the new policy [is] permissible under the statute, and the agency ... acknowledge[s] it is changing its policy and show[s] that there are good reasons for the new policy and that the agency believes it to be better, which the conscious change of course adequately indicates." *Nat'l Lifeline Ass'n*, 915 F.3d at 28, 2019 WL 405020, at *6 (emphasis and internal quotation marks omitted); *see also Mary V. Harris Found.*, 776 F.3d at 24 ("What the [agency] did in the past is of no moment ... if its current approach reflects a permissible interpretation of the

statute."). ATF acknowledged in the final rule that it was "reconsider[ing] and rectify[ing]" its previous classification decisions based on its legal analysis of the statutory terms "automatically" and "single function of the trigger." 83 Fed. Reg. at 66516 (quoting *Akins*, 312 F. App'x at 200). It discussed the history of its regulation of Akins Accelerators and the Eleventh Circuit's decision in *Akins*. *Id.* at 66517. It also explained that it had previously determined that "semiautomatic firearms modified with [standard] bump-stock-type devices did not fire 'automatically,' and thus were not 'machineguns.' " *Id.* at 66516. The mass shooting in Las Vegas then prompted ATF to reconsider its prior interpretations, *id.* at 66528–29, none of which provided "extensive legal analysis of the statutory terms 'automatically' or 'single function of the trigger,' " *id.* at 66516. Accordingly, ATF reviewed dictionary definitions of "automatically," relevant judicial decisions—including *Staples, Olofson*, and *Akins*—and the NFA's legislative history to determine whether standard bump stocks constitute machine ***134** guns. *Id.* at 66518–19. It then concluded that its previous interpretations "did not reflect the best interpretation of 'machinegun,' " *id.* at 66514, and that the rule's interpretations of "automatically" and "single function of the trigger" better "accord with the plain meaning of those terms," *id.* at 66527. This record reveals that ATF satisfied its obligation to "reasonably explain[ ]" its change of position. *New England Power Generators Ass'n*, 879 F.3d at 1201.

Guedes's argument that ATF was required to release its previous interpretations as part of the rule-

making process is no more persuasive. True, the APA requires agencies to "ma[k]e public in the proceeding and expose[ ] to refutation" "the most critical factual material that is used to support the agency's position on review." *Chamber of Commerce v. SEC*, 443 F.3d 890, 900 (D.C. Cir. 2006) (internal quotation marks omitted); *see also, e.g., Conn. Light & Power Co. v. Nuclear Regulatory Comm'n*, 673 F.2d 525, 530–31 (D.C. Cir. 1982) ("An agency commits serious procedural error when it fails to reveal portions of the technical basis for a proposed rule in time to allow for meaningful commentary."). But ATF's explanations for its prior legal interpretations are not "critical factual material[s]" that were "used to support the agency's position." *Chamber of Commerce*, 443 F.3d at 900 (internal quotation marks omitted). This case does not turn on any factual dispute; the parties agree about how a bump stock operates. And ATF's prior legal interpretations *contradict* rather than support its current interpretation. Thus, ATF was not required to release its prior opinions during the rulemaking process.

3. *ATF's Responses to Comments and Its Consideration of Other Evidence*

The plaintiffs next raise a series of arguments challenging the transparency of ATF's rulemaking process and ATF's failure to consider other evidence. *First*, they argue that ATF relied on evidence that bump stocks were used in the Las Vegas shooting without releasing that evidence or any other evidence suggesting that bump stocks have been used to commit crimes. *See, e.g.*, Codrea's Reply at 9; Guedes's Br. at 21, 28. As explained, however, the bump stock

rule was based on a legal, rather than a factual, determination; crime statistics did not play any role in ATF's analysis. The Las Vegas attack served as the impetus for ATF's decision to reconsider its legal interpretation of "machinegun," but it did not provide a factual basis for the rule. And under the APA, ATF was required to make public only "critical factual material." *Chamber of Commerce*, 443 F.3d at 900 (internal quotation marks omitted).

Second, Guedes argues that the "underlying premise" of the rule is "completely arbitrary and capricious" because certain "individuals can achieve, with greater accuracy, faster cyclic rates than [other individuals] utilizing bump-stock-devices." Guedes's Br. at 29. As noted, however, the "premise" of the rule was not the relative firing rates of guns with attached bump stocks (or any other factual determination for that matter); the rule change was based on ATF's legal interpretation of the statutory term "machinegun." *See* 83 Fed. Reg. at 66533 ("[ATF] disagrees with any assertion that the rule is based upon the increased rate of fire. While bump-stock-type devices are intended to increase the rate at which a shooter may fire a semiautomatic firearm, this rule classifies these devices based upon the functioning of these devices under the statutory definition."). Moreover, ATF did not represent that bump stocks *always* produce a faster rate of fire; it stated merely that bump ***135** stocks are used by individual shooters to produce a *relatively* faster rate of fire. *Id.*

Third, Guedes takes issue with ATF's failure to respond to statements made by former ATF official Rick Vasquez and to an analytical video demonstrat-

ing how bump stocks operate. Guedes's Reply at 10–13. But although an agency must "respond to relevant and significant public comments," *City of Portland v. EPA*, 507 F.3d 706, 713 (D.C. Cir. 2007) (internal quotation marks omitted), it "is not required to discuss every item of fact or opinion included in the submissions made to it in informal rulemaking," *Pub. Citizen, Inc. v. FAA*, 988 F.2d 186, 197 (D.C. Cir. 1993) (alteration adopted and internal quotation marks omitted). An agency "need only enable [a reviewing court] to see what major issues of policy were ventilated and why the agency reacted to them as it did." *Id.* (alteration adopted and internal quotation marks omitted). The record reveals that ATF adequately addressed Guedes's arguments, including the argument that a bump stock requires the shooter to manipulate the trigger to discharge multiple rounds. For example, ATF explained in the rule that it "disagrees that a shooter repeatedly actuates, functions, or pulls the trigger of a semiautomatic firearm using a bump-stock-type device"; instead, "the shooter 'pulls' the trigger once and allows the firearm and attached bump-stock-type device to operate until the shooter releases the trigger finger or the constant forward pressure with the non-trigger hand." 83 Fed. Reg. at 6532.[4]

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[4] To the extent Guedes argues that Vasquez's views are entitled to special weight because he is a former ATF official, Guedes is incorrect. The deference afforded under *Chevron* extends only to the agency's official interpretations, not to the views of its former officials. *See Via Christi Reg'l Med. Ctr. v. Leavitt*, No. 04-1026, 2006 WL 2773006, at *13 n.3 (D. Kan. Sept. 25, 2006), *aff'd*, 509 F.3d 1259 (10th Cir. 2007).

Fourth, the plaintiffs argue that the agency acted arbitrarily and capriciously because a shooter can also bump fire a gun using a rubber band or a belt loop. Guedes's Br. at 27; *see also* Codrea's Reply at 8.[5] ATF did not specifically include such everyday items in the rule, as it did bump stocks, but it has not yet made a formal determination about whether they fall within the NFA's definition of "machinegun." *See* Feb. 6, 2019 Hr'g Tr. at 30. To the extent the plaintiffs are arguing that the agency failed to respond adequately and reasonably to comments highlighting the similarities between bump stocks and household objects that can be repurposed to facilitate bump firing, the Court disagrees. ATF explained in the rule that bump firing using a rubber band or belt loop does not involve automatic fire because "no device is present to capture and direct the recoil energy; rather, the shooter must do so." 83 Fed. Reg. at 66533. In other words, unlike a bump stock, a "belt loop or a similar manual method requires the shooter to control the distance that the firearm recoils and the movement along the plane on which the firearm recoils." *Id.* Although Guedes and Codrea "attack the merits of [ATF's] responses, [ATF] clearly thought about [their] objections and provided reasoned re-

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[5] Guedes also argues that a shooter can achieve the same effect by "train[ing] [his] trigger finger to fire more rapidly." Guedes's Br. at 27 (internal quotation marks omitted). As discussed above, however, the rates at which a shooter can fire a gun with and without a bump stock are irrelevant. Even the most skilled shooter cannot discharge multiple rounds "automatically" with a "single function of the trigger."

plies," which is "all the APA requires." *City of Portland*, 507 F.3d at 714.

***136** The related argument that ATF unreasonably distinguished between binary triggers and bump stocks, *see, e.g.*, Codrea's Br. at 6–7; Codrea's Reply at 7, fails for a similar reason. As ATF explained, binary triggers discharge one round when the shooter pulls the trigger and another when the shooter releases the trigger. Gov't's Opp'n in *Codrea* at 18, Dkt. 16, No. 18-cv-3086; Codrea's Br. at 6. ATF defined a "single function of the trigger" to mean a pull and analogous motions, such as pushing a button or flipping a switch. 83 Fed. Reg. at 66515, 66534–35, 66553. It then reasonably distinguished binary triggers, which in ATF's view require two functions of the trigger—a pull and a release—to discharge multiple rounds. *See id.* at 66534. In sum, ATF adequately and reasonably responded to comments arguing that the "proposed regulatory text encompasses ... binary triggers." *Id.*

4. *The Length of the Comment Period and the Necessity of a Hearing*

Guedes makes two final procedural arguments based on the text of 18 U.S.C. § 926(b), which provides that "[t]he Attorney General shall give not less than ninety days public notice, and shall afford interested parties opportunity for hearing, before prescribing ... rules and regulations." Guedes argues that ATF violated § 926(b) by failing to provide commenters with a public hearing and by failing to provide an additional five days for public comment after some commenters experienced technical difficulties at the

beginning of the scheduled comment period. Guedes's Br. at 22–25; Guedes's Reply at 8–10. The Court disagrees.

First, Guedes assumes that all "hearings" must be oral hearings, but "[t]he term 'hearing' in its legal context ... has a host of meanings," including the mere opportunity to submit written comments. *United States v. Fla. E. Coast Ry. Co.*, 410 U.S. 224, 239, 93 S.Ct. 810, 35 L.Ed.2d 223 (1973); *see also id.* at 241–42, 93 S.Ct. 810. And it is well established that the requirement for a "hearing," as opposed to a "hearing on the record," generally does not require a formal, oral hearing. *See id.* at 251, 93 S.Ct. 810; *Nat'l Classification Comm'n v. United States*, 765 F.2d 1146, 1150 (D.C. Cir. 1985) ([U]nder *Florida East Coast* there is a strong presumption that the procedural guarantees of [the notice-and-comment provisions] of the APA are sufficient unless Congress specifically indicates to the contrary."); *Mobil Oil Corp. v. Fed. Power Comm'n*, 483 F.2d 1238, 1250 (D.C. Cir. 1973) (Although "[t]here is some danger in according too much weight to magic words such as 'on the record[,]' ... *Florida East Coast* ... emphasized the importance of this phrase and virtually established it as a touchstone test of when [formal, oral] proceedings are required."). Indeed, the Fourth Circuit has held that the hearing requirement in § 926(b) requires only that the Secretary "provide interested parties with the opportunity to submit written comments." *Brady*, 914 F.2d at 485. The Court sees no reason to depart from that interpretation here.

Second, any error ATF may have made by refusing to extend the comment period by five days was harm-

less. Section 706 of the APA requires courts to take "due account ... of the rule of prejudicial error." 5 U.S.C. § 706. The D.C. Circuit has therefore held that "[i]f [an] agency's mistake did not affect the outcome, if it did not prejudice the petitioner, it would be senseless to vacate and remand for reconsideration." *PDK Labs. v. DEA*, 362 F.3d 786, 799 (D.C. Cir. 2004); *see also Ozark Auto. Distributors v. NLRB*, 779 F.3d 576, 582 (D.C. Cir. 2015) ("In administrative law, as in federal civil and criminal litigation, ***137** there is a harmless error rule ...." (internal quotation marks omitted)). Despite the technical difficulties some online commenters faced during the first five days of the comment period, it is undisputed that a search for the term "bump stock" on Regulations.gov brought commenters to the correct web page; some online commenters submitted comments during the first five days; frustrated online users were able to submit comments during the remaining 85 days of the comment period; and finally, commenters were able to submit comments by mail and facsimile throughout the comment period. In light of these undisputed facts, it is unsurprising that Guedes does not even attempt to show that he was prejudiced by the technical problems. Without a showing of prejudice, Guedes's procedural challenge fails.

B. The Availability of Injunctive Relief for Codrea's Takings Clause Challenge

Codrea also asserts that the bump stock rule violates the Takings Clause because it fails to provide compensation to current bump stock owners who must destroy or abandon their property. Codrea's Br. at 17. Regardless of the merits of Codrea's takings

challenge, however, it does not justify preliminary injunctive relief.

The Takings Clause of the Fifth Amendment provides that private property shall not "be taken for public use, without just compensation." U.S. Const. amend. V. It "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." *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304, 315, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987). It follows that, "in general, 'equitable relief is not available to enjoin an alleged taking of private property for a public use, duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to that taking.' " *Bldg. Owners & Managers Ass'n Int'l v. FCC*, 254 F.3d 89, 99 (D.C. Cir. 2001) (alteration adopted) (quoting *United States v. Riverside Bayview Homes*, 474 U.S. 121, 127–28, 106 S.Ct. 455, 88 L.Ed.2d 419 (1985)). Indeed, "the Fifth Amendment does not require that just compensation be paid in advance of or even contemporaneously with the taking." *Preseault v. ICC*, 494 U.S. 1, 11, 110 S.Ct. 914, 108 L.Ed.2d 1 (1990). It requires only "the existence of a reasonable, certain and adequate provision for obtaining compensation at the time of the taking." *Id.* (internal quotation marks omitted). The plaintiffs have made no showing that a suit for compensation under the Tucker Act, 28 U.S.C. § 1491(a)(1), or the Little Tucker Act, 28 U.S.C. § 1346(a)(2), is inadequate to satisfy the demands of the Fifth Amend-

ment—or that any other doctrinal exception applies. Preliminary injunctive relief is therefore unavailable.

C. Likely Success on the Merits of the Challenges to Whitaker's Authority as Acting Attorney General

The plaintiffs, led by the Coalition,[6] conclude by challenging the authority of then–Acting Attorney General Whitaker to promulgate the bump stock rule on statutory and constitutional grounds. The Court divides its analysis of this final challenge into two parts. First, it concludes that the AG Act did not bar Whitaker's selection ***138** under the FVRA. Second, it concludes that the President's designation of Whitaker to serve as Acting Attorney General did not violate the Appointments Clause.[7]

1. *The Statutory Challenge to Whitaker's Designation*

The parties' statutory dispute turns on when the FVRA and the AG Act apply to vacancies in the Office of the Attorney General. The statutory provisions

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[6] Because the Coalition advances the most comprehensive challenge to Whitaker's authority, the Court refers only to the Coalition's arguments in this section.

[7] This Court is not the first to reject a challenge to Whitaker's designation as Acting Attorney General. Three other district courts have already upheld the President's statutory and constitutional authority to designate Whitaker as Acting Attorney General, though those decisions did not consider the precise theories advanced here. *See United States v. Smith*, No. 18-cr-0015, 2018 WL 6834712, at *1–4 (W.D.N.C. Dec. 28, 2018); *United States v. Peters*, No. 17-cr-55, 2018 WL 6313534, at *2–5 (E.D. Ky. Dec. 3, 2018); *United States v. Valencia*, No. 17-cr-882, 2018 WL 6182755, at *2–4 (W.D. Tex. Nov. 27, 2018).

most relevant to this issue are §§ 3345 and 3347 of the FVRA and § 508 of the AG Act.

Section 3345(a) of the FVRA creates a default rule that applies whenever an official otherwise subject to the advice and consent of the Senate "dies, resigns, or is otherwise unable to perform the functions and duties of the office." 5 U.S.C. § 3345(a). In such a case, the FVRA provides that "the first assistant to the office of such officer shall perform the functions and duties of the office temporarily in an acting capacity," subject to certain time limitations. *Id.* § 3345(a)(1). The FVRA further provides that "the President ... may direct an officer or employee of such Executive agency to perform the functions and duties of the vacant office temporarily in an acting capacity" so long as that individual served in the agency for at least 90 days in the 365-day period preceding the vacancy in a position compensated at a rate "equal to or greater than the minimum rate of pay payable for a position at GS-15 of the General Schedule." *Id.* § 3345(a)(3). The same time limitations that govern the default rule also apply here. *Id.*

Section 3347(a) of the FVRA, the Act's "exclusivity" provision, explains how the FVRA interacts with agency-specific statutes: it is the "exclusive means for temporarily authorizing an acting official" to serve in a position otherwise subject to the advice and consent of the Senate "unless ... a statutory provision expressly ... designates an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity." *Id.* § 3347(a).

Section 508(a) of the AG Act, the agency-specific statute for the Department of Justice, provides that "[i]n case of a vacancy in the office of Attorney General, ... the Deputy Attorney General may exercise all the duties of that office." 28 U.S.C. § 508(a). It also provides that when "neither the Attorney General nor the Deputy Attorney General is available ..., the Associate Attorney General shall act as Attorney General," and "[t]he Attorney General may designate the Solicitor General and the Assistant Attorneys General, in further order of succession, to act as Attorney General." *Id.* § 508(b).

The parties do not dispute that Whitaker satisfies the eligibility criteria in the FVRA and that both the FVRA and the AG Act apply to the Office of the Attorney General. They disagree only about *when* each statute applies. The government argues that the statutes operate "alongside" each other: the President may choose to select an Acting Attorney General under the FVRA, or the Deputy Attorney General "may" assume those duties as soon as a vacancy arises. Gov't's Opp'n in *Codrea* at ***139** 24. The government maintains that the President lawfully selected Whitaker under the FVRA, even though the Deputy Attorney General was available to fill the vacancy under the AG Act.

The Coalition, by contrast, argues that the AG Act displaces the FVRA unless and until the line of succession set forth in the AG Act has been exhausted. In the Coalition's view, the President may select an Acting Attorney General under the FVRA, but only if all of the successors listed in the AG Act are "unavailable." Firearms Pol'y Coal.'s Br. at 13, Dkt. 2-1,

No. 18-3083. Under this interpretation, Whitaker could not lawfully assume the responsibilities of Attorney General because the Deputy Attorney General was available to serve as Acting Attorney General.

In determining which party has the better reading of the statutes, the Court begins, as it must, with the text of the FVRA. *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 175, 129 S.Ct. 2343, 174 L.Ed.2d 119 (2009) ("Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." (internal quotation marks omitted)). The plain language of the FVRA, and its exclusivity provision in particular, substantially undercuts the Coalition's exhaustion theory. Under § 3347(a), the FVRA is the "exclusive" means of selecting an acting official "unless" an agency-specific statute designates a successor. 5 U.S.C. § 3347(a). Where, as here, an agency-specific statute designates a successor, the FVRA is no longer the *exclusive* means of filling a vacancy, but it remains *a* means of filling the vacancy. When faced with a vacancy in the Office of the Attorney General, the President may choose to invoke the FVRA and select an Acting Attorney General, or the President may permit the Deputy Attorney General to assume the responsibilities of Attorney General under the AG Act.

This reading of the statute is consistent with the decisions of other courts interpreting the FVRA. *See Hooks v. Kitsap Tenant Support Servs.*, 816 F.3d 550, 556 (9th Cir. 2016) (where the FVRA and an agency-specific statute apply, "the President is permitted to elect between the[ ] two statutory alternatives" to fill

the vacancy); *English v. Trump*, 279 F.Supp.3d 307, 319 (D.D.C. 2018) ("[T]he FVRA's exclusivity provision makes clear that it was generally intended to apply alongside agency-specific statutes, rather than be displaced by them."), *appeal dismissed*, No. 18-5007, 2018 WL 3526296 (D.C. Cir. July 13, 2018).

The Coalition unpersuasively attempts to distinguish *Hooks* and *English* by highlighting insignificant factual distinctions. It argues that *Hooks* is distinguishable because, unlike the AG Act, the agency-specific statute in that case did not designate a first assistant. Firearms Pol'y Coal.'s Br. at 33. The statute stated simply that the President was "authorized" to designate an official to serve in an acting capacity. 29 U.S.C. § 153(d). As a result, the President invoked a different provision of the FVRA, 5 U.S.C. § 3347(a)(1)(A), under which the FVRA is "exclusive ... unless ... a statutory provision expressly ... authorizes the President ... to designate an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity." This authorization provision contrasts slightly with the designation provision at issue here, 5 U.S.C. § 3347(a)(1)(B), under which the FVRA is "exclusive ... unless ... a statutory provision expressly ... designates an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity." But as another judge ***140** on this Court has explained, this subtle difference did not affect the analysis of the *Hooks* court. *See English*, 279 F.Supp.3d at 320 ("[T]here is nothing in *Hooks* to suggest that the court's interpretation of the FVRA would turn on this distinction, nor does the text of

the FVRA provide any reason to think so."). In reaching its conclusion, the *Hooks* court relied instead on the "exclusive ... unless" structure that is common to both provisions of the FVRA. *See Hooks*, 816 F.3d at 556.

As for *English*, the Coalition argues that the factual circumstances of that case were "extremely unusual" and that the court's decision relied on an express-statement requirement in the agency-specific statute at issue. Firearms Pol'y Coal.'s Br. at 33. But the "unusual" facts of *English* did not affect the court's reasoning. Nor did the court's analysis of the agency-specific statute affect the court's analysis of the text of the FVRA. The court made clear that the FVRA's text demonstrates "that it was generally intended to apply alongside agency-specific statutes, rather than be displaced by them." *English*, 279 F.Supp.3d at 319.[8]

The statutory structure of the FVRA further confirms this interpretation. *See Util. Air Regulatory Grp.*, 573 U.S. at 320, 134 S.Ct. 2427 (explaining that it is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall

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[8] As the Coalition notes, Firearms Pol'y Coal.'s Br. at 33, the *English* court acknowledged that the plaintiff there would have had a stronger case for displacement if Congress had used the term "vacancy" in the agency-specific statute at issue, and the court specifically cited the AG Act to show that Congress knew how to use that term, *see English*, 279 F.Supp.3d at 322. But the *English* court did not go so far as to suggest that the AG Act and every other agency-specific statute that uses the term "vacancy" displaces the FVRA.

statutory scheme" (internal quotation marks omitted)). Section 3349c of the FVRA explicitly excludes several offices from the FVRA. It provides, for example, that the FVRA "shall not apply" to certain multi-member commissions and members of the Surface Transportation Board. 5 U.S.C. § 3349c. Congress could have chosen to exclude the Office of the Attorney General by using similar language, but it did not.

Moreover, far from seeking to exclude the Office of the Attorney General from the FVRA's coverage, the statutory history reveals that Congress affirmatively acted to bring the Office *within* the scope of the FVRA. Prior to the FVRA's enactment, § 3347 provided that the President's authority to override the first-assistant default rule "d[id] not apply to a vacancy in the office of the Attorney General." 5 U.S.C. § 3347 (1994). Congress eliminated that restriction when it enacted the FVRA, thus making clear that the President has the authority to override the first-assistant default rule when a vacancy arises in the Office of the Attorney General. The Court will not assume that "Congress ... intend[ed] *sub silentio* to enact statutory language that it ... earlier discarded in favor of other language." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442–43, 107 S.Ct. 1207, 94 L.Ed.2d 434 (1987); *see also Murphy v. Smith*, —— U.S. ——, 138 S.Ct. 784, 789, 200 L.Ed.2d 75 (2018) (similar).

Nothing in the AG Act, which predates the FVRA, suggests otherwise. Indeed, the AG Act includes a cross-reference to the FVRA that suggests that Congress intended the two statutes to operate alongside one another. Specifically, the AG Act provides that, "for the purpose of section 3345 of title 5[,] the Depu-

ty Attorney General is the first assistant to the Attorney General." 28 U.S.C. § 508(a). Under the Coalition's reading, this provision is nonsensical ***141** because the FVRA will only ever apply when the Deputy Attorney General is unavailable. A more sensible reading is that Congress included a cross-reference in the AG Act because it intended the two statutes to operate alongside one another: the FVRA establishes a first-assistant default rule that operates in tandem with the AG Act, but it also permits the President to override the AG Act when a vacancy arises in the Office of the Attorney General by using one of the presidential selection provisions in the FVRA. *See United States v. Jicarilla Apache Nation*, 564 U.S. 162, 185, 131 S.Ct. 2313, 180 L.Ed.2d 187 (2011) ("[W]e are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law." (internal quotation marks omitted)).

Even if the text of the two statutes did not suggest that Congress intended the FVRA and the AG Act to operate alongside each other, the Court has an affirmative duty to adopt such an interpretation because "when two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Howard v. Pritzker*, 775 F.3d 430, 437 (D.C. Cir. 2015) (quoting *J.E.M. Ag Supply v. Pioneer Hi–Bred Int'l,* 534 U.S. 124, 143–44, 122 S.Ct. 593, 151 L.Ed.2d 508 (2001)); *see also id.* ("The courts are not at liberty to pick and choose among congressional enactments." (quoting *Morton v. Mancari,* 417 U.S. 535, 551, 94 S.Ct. 2474, 41

L.Ed.2d 290 (1974))). The AG Act provides that the Deputy Attorney General "may" assume the responsibilities of the Attorney General during a vacancy, not that he "must" or "shall" assume those responsibilities. And "[t]he word 'may' customarily connotes discretion," rather than a mandatory requirement. *Jama v. ICE*, 543 U.S. 335, 346, 125 S.Ct. 694, 160 L.Ed.2d 708 (2005). Although the AG Act states that when "neither the Attorney General nor the Deputy Attorney General is available ..., the Associate Attorney General *shall* act as Attorney General," 28 U.S.C. § 508(b) (emphasis added), that provision by itself does not prove that the two statutes are incapable of coexistence; it merely suggests that if the President does not exercise his authority under the FVRA, then the Associate Attorney General must step in if the Deputy Attorney General is unavailable. And, as discussed, another judge on this Court has held that even an agency-specific statute that provides that the *first*-in-line successor "shall" serve during a vacancy operates alongside the FVRA because that statute's "shall" is "implicitly qualified by the FVRA's 'may.' " *English*, 279 F.Supp.3d at 323. By comparison, the AG Act's use of the word "shall" when listing a *second*-in-line successor provides little reason to adopt a "disfavored construction" of an irreconcilable conflict between the two statutes. *Howard*, 775 F.3d at 437 (internal quotation marks omitted).

Faced with the text and structure of the FVRA and the AG Act, the Coalition cannot argue that the FVRA *never* applies to the Office of the Attorney General. Instead, it argues that the AG Act imposes an exhaustion requirement such that the FVRA ap-

plies if and only if none of the successors identified in the AG Act are available. According to the Coalition, this miniscule role for the FVRA explains why, for example, Congress did not list the Office of the Attorney General in § 3349c, the "applicability" provision that excludes certain offices from the FVRA. But the Coalition's interpretation lacks textual support and relies primarily on inapplicable contextual and substantive canons.

As evidence of textual support, the Coalition stresses that the FVRA's exclusivity ***142** provision, 5 U.S.C. § 3347, includes the word "designates," which means to "choose." Firearms Pol'y Coal.'s Br. at 28 (quoting *Black's Law Dictionary* 541 (10th ed. 2014)). According to the Coalition, the FVRA must be inapplicable because the AG Act automatically "chooses" the acting official. But the Coalition's own theory proves that the word "designates" cannot bear that weight. Under the Coalition's interpretation, the AG Act would always "designate" or "choose" the First Assistant—or another successor listed in the AG Act—and the FVRA would never apply, even when all of the AG Act successors are unavailable. The Coalition concedes that, at least in those circumstances, the text of the FVRA permits the President to select an Acting Attorney General, but it cannot explain why. The more sensible interpretation of § 3347 takes into account the "exclusive ... unless" structure and recognizes that the FVRA is *nonexclusive*, but not *inapplicable*, when read in conjunction with an agency-specific statute, such as the AG Act. The President may elect to fill a vacancy by invoking the FVRA, or,

if he fails to do so, the successors listed in the AG Act may serve as Acting Attorney General.

The Coalition also invokes the "well established canon of statutory interpretation" that "the specific governs the general," *RadLAX Gateway Hotel v. Amalgamated Bank*, 566 U.S. 639, 645, 132 S.Ct. 2065, 182 L.Ed.2d 967 (2012) (internal quotation marks omitted), to support its argument that the AG Act should be given effect over the more general FVRA, Firearms Pol'y Coal.'s Br. at 28. Although this canon is usually applied where a general statute and a specific statute directly contradict each other, "the canon has full application as well to statutes ... in which a general authorization and a more limited, specific authorization exist side-by-side." *RadLAX Gateway Hotel*, 566 U.S. at 645, 132 S.Ct. 2065. In that circumstance, "the canon avoids not contradiction but the superfluity of a specific provision that is swallowed by the general one." *Id.* But here, the AG Act is hardly "swallowed" by the FVRA. Each of the statutes imposes unique requirements that provide alternative mechanisms for filling a vacancy. The AG Act establishes a specific order of succession based on title and does not limit the length of time an individual may serve in an acting capacity. By contrast, the FVRA defines eligibility based on other criteria. For example, under the FVRA, a nominee to fill a vacancy is generally prohibited from serving in an acting capacity, *see* 5 U.S.C. § 3345(b)(1), and any individual appointed under § 3345(a)(3) of the FVRA must have served in the agency for 90 of the preceding 365 days in a position that receives pay equal to or greater than the minimum rate for GS-15 of the General

Schedule. The FVRA also imposes specific time limits on acting service. *See id.* § 3346. As a result, some individuals who are eligible to serve in an acting capacity under the AG Act may not be eligible under the FVRA, and vice versa.

Because "the text is clear," the Court "need not consider [the] extra-textual evidence" cited by the Coalition. *SW Gen.*, 137 S.Ct. at 942. Nevertheless, the Court briefly considers and rejects the Coalition's remaining arguments. The Coalition argues that "there is no serious reason Congress would want to permit the President" to override the AG Act by invoking the FVRA. Firearms Pol'y Coal.'s Br. at 30. It further contends that the "purpose" of the FVRA was to limit the President's authority to select acting officers, not to expand it. *Id.* And it states that had Congress desired to give the President a choice between two statutory schemes "it would have done so expressly," ***143** Firearms Pol'y Coal.'s Reply at 18, Dkt. 17, No. 18-cv-2988, or at least indicated as much in some piece of legislative history, *id.* at 21–23.

Regardless of the myriad policy reasons that might support or oppose the result here, Congress spoke clearly enough in the text of the FVRA. The exclusivity provision and the statutory history of the FVRA show that Congress understood, when it enacted the FVRA, that it was creating a new vacancies statute with its own allowances and restrictions that would apply to the Office of the Attorney General. Moreover, Congress did discuss this very issue in a Senate Report that accompanied a failed 1998 bill that preceded the FVRA. In considering language similar to the current exclusivity provision, the Report stated

that the bill would retain several agency-specific statutes but that "the Vacancies Act would continue to provide an alternative procedure for temporarily occupying the office." S. Rep. No. 105-250, at 17 (1998). The legislative history not only speaks to the issue; it confirms the government's interpretation. Agency-specific statutes like the AG Act were expected to operate alongside the FVRA, not to displace it.

The Coalition accuses the government of misrepresenting the Senate Report because the cited statement refers to what "would" occur if Congress were "to repeal [agency-specific] statutes in favor of the procedures contained in the Vacancies Act." Firearms Pol'y Coal.'s Reply at 23 (quoting S. Rep. No. 105-250, at 17). But the Report explains that "various authorizing committees" might consider whether to repeal the different agency-specific statutes in the future, and that "in any event," the FVRA will "continue to provide an alternative procedure." S. Rep. No. 105-250, at 17. In context, it is clear that the cited statement from the Report refers to the 1998 bill.

The Coalition next cites an introductory section of the Senate Report that refers to a variety of "express exceptions" to the FVRA and states that "current [agency-specific] statutes ... are maintained." *Id.* at 2. The Coalition argues that by referring to these statutes as "exceptions," the Report suggests that the FVRA does not operate alongside agency-specific statutes. Firearms Pol'y Coal.'s Reply at 23. But this interpretation does not even comport with the Coalition's own theory, which purports to retain a role for the FVRA if and when the individuals in the AG Act's

line of succession are unavailable. Regardless, this general and vague discussion is a weak basis for discounting more specific language in the same Report.

[60]In passing, the Coalition also mentions that a footnote from a 2001 White House Counsel memorandum adopted the Coalition's interpretation. *See* Memorandum from Alberto R. Gonzales, Counsel to the President, to the Heads of Fed. Exec. Dep'ts. & Agencies & Units of the Exec. Off. of the President, Re: Agency Reporting Requirements Under the Vacancies Reform Act 2 n.2 (Mar. 21, 2001). In this context, however, as the Coalition itself acknowledges, the legal positions of the Executive Branch are not entitled to deference from this Court, and even if they were, subsequent Office of Legal Counsel opinions reached the opposite conclusion. *See* Firearms Pol'y Coal.'s Reply at 24–25.[9]

***144** The Coalition places the most weight on the constitutional-avoidance canon, arguing that the Court should adopt its interpretation because it is at least doubtful whether the President may constitu-

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[9] For its part, the government places considerable weight on the history of presidential designations under the FVRA, arguing that "Presidents have consistently and explicitly invoked their FVRA authority to make acting-officer designations that would be barred if [agency]-specific statutes were read to set out exclusive, mandatory succession plans." Gov't's Opp'n in *Guedes* at 51. But the FVRA was enacted a mere two decades ago, and the government identifies only a few designations that bypassed a first assistant. *Id.* at 51–52 & n.29. "In this context, Congress's failure to speak up does not fairly imply that it has acquiesced in the [government's] interpretation." *SW Gen.*, 137 S.Ct. at 943 (rejecting a similar argument based on "post-enactment practice" under the FVRA).

tionally designate a non-confirmed official to serve in an acting capacity when a first assistant is available. Firearms Pol'y Coal.'s Br. at 25. The problem for the Coalition, however, is that the government's reading does not raise a "serious doubt" about the FVRA's constitutionality. *Jennings v. Rodriguez*, —— U.S. ——–, 138 S.Ct. 830, 842, 200 L.Ed.2d 122 (2018) (internal quotation marks omitted). As discussed below, the constitutional legitimacy of acting officers has long been settled. And the avoidance canon "comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction." *Id.* (internal quotation marks omitted). As demonstrated above, the Coalition's interpretation is foreclosed by "ordinary textual analysis." *Id.* (internal quotation marks omitted); *see also id.* at 836 ("[A] court relying on [the avoidance] canon still must *interpret* the statute, not rewrite it.").

2. *The Appointments Clause Challenge to Whitaker's Designation*

The Appointments Clause requires the President to "nominate, and by and with the Advice and Consent of the Senate, ... appoint" all "Officers of the United States," but it permits Congress "by Law" to "vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const. art. II, § 2, cl. 2.

For Appointments Clause purposes, federal officials fall into three categories: (1) "principal officers," who must be appointed by the President with the ad-

vice and consent of the Senate; (2) "inferior officers," who, by default, must be appointed by the President with the advice and consent of the Senate, but whose appointment Congress may choose to vest solely in the President, department heads, or courts; and (3) "employees," who can be hired without any particular process mandated by the Appointments Clause. *See Lucia v. SEC*, —— U.S. ——, 138 S.Ct. 2044, 2051 & n.3, 201 L.Ed.2d 464 (2018).

The Appointments Clause "is more than a matter of etiquette or protocol; it is among the significant structural safeguards of the constitutional scheme." *Edmond v. United States*, 520 U.S. 651, 659, 117 S.Ct. 1573, 137 L.Ed.2d 917 (1997) (internal quotation marks omitted). "The Framers envisioned it as 'an excellent check upon a spirit of favoritism in the President' and a guard against 'the appointment of unfit characters from family connection, from personal attachment, or from a view to popularity.' " *SW Gen.*, 137 S.Ct. at 935 (alteration adopted) (quoting The Federalist No. 76, at 457 (Alexander Hamilton) (Clinton Rossiter ed., 1961)). "By requiring the joint participation of the President and the Senate, the Appointments Clause was designed to ensure public accountability for both the making of a bad appointment and the rejection of a good one." *Edmond*, 520 U.S. at 660, 117 S.Ct. 1573.

Yet "[t]he constitutional process of Presidential appointment and Senate confirmation ... can take time." *SW Gen.*, 137 S.Ct. at 935. And neither the President ***145** nor the Senate "may desire to see the duties of [a] vacant office go unperformed in the interim." *Id.* Thus, "[s]ince President Washington's first

term, Congress has given the President limited authority to appoint acting officials to temporarily perform the functions" of offices that otherwise require Senate confirmation. *Id.* Congress provided this limited authority in 1792 and has refined it in various ways through the years, including in 1998, when it enacted the FVRA. *See id.* at 935–36.

The Coalition argues that the Appointments Clause generally prevents the President from designating a non-Senate-confirmed official other than the first assistant to serve as an acting principal officer in the event of a vacancy. *See, e.g.*, Firearms Pol'y Coal.'s Br. at 11–12. Alternatively, the Coalition argues that the Appointments Clause at least requires an acting principal officer to be appointed as an inferior officer and that Whitaker's designation as Acting Attorney General under the FVRA did not qualify as an "appointment." *See, e.g., id.* at 11. The Court considers and rejects each argument in turn.

a. President Trump's Decision to Designate Whitaker Without Obtaining the Advice and Consent of the Senate

Conveniently, both parties agree that the President may sometimes direct a person to perform the duties of a principal office temporarily without first obtaining the Senate's advice and consent. *See* Firearms Pol'y Coal.'s Reply at 12; Gov't's Opp'n in *Guedes* at 53, Dkt. 16, No. 18-cv-3083.[10] But they dis-

[10] The parties also agree that the Office of the Attorney General is a principal office. *See* Firearms Pol'y Coal.'s Br. at 2; Gov't's Opp'n in *Guedes* at 11.

agree about why, and how to reconcile this settled practice with the Appointments Clause.

The government argues that it is the limited *duration* of acting service that makes it permissible under the Appointments Clause. *See, e.g.*, Gov't's Opp'n in *Guedes* at 53. In the government's view, as long as an official performs the duties of a principal office only temporarily, in an acting capacity, the official may do so without actually becoming the principal officer. This understanding, the government argues, is reflected not only in binding Supreme Court precedent but also in the longstanding historical practice of the political branches. *Id.*

The Coalition acknowledges the same precedent and history but seeks to explain it in terms of *supervision*. *See, e.g.*, Firearms Pol'y Coal.'s Br. at 20–21. According to the Coalition, what matters is not how long the temporary service lasts but who performs it. In the Coalition's view, the Appointments Clause does not permit just any individual to serve, even temporarily, as an acting principal officer. Rather, it permits one specific person to do so: the first assistant who is generally supervised by the principal officer and whose pre-defined job responsibilities include stepping in when the principal officer becomes unavailable. *Id.* at 3. Because first assistants are supervised both before and after the principal office is vacant, the Coalition argues, they qualify as "inferior" officers whose inferior status remains unaltered even when their superior is sick or away, or has resigned or died. *Id.* at 21. It follows, according to the Coalition, that the FVRA becomes unconstitutional if and when the President uses it to displace an availa-

ble first assistant and directs someone who is neither a first assistant nor a Senate-confirmed appointee to perform the duties of a principal office. *Id.* at 25.

These competing explanations lead to different results in this case because, although Whitaker's service as Acting Attorney ***146** General was temporary,[11] Whitaker was neither the first assistant to the previous Attorney General nor Senate confirmed at the time of his designation under the FVRA.

Important as this debate may be, it has long been settled by Supreme Court precedent and historical practice. Beginning with precedent, the Supreme Court has repeatedly embraced the government's view that it is the temporary nature of acting duties that permits an individual to perform them without becoming a principal officer under the Appointments Clause. The Court first addressed the constitutionality of acting service in *United States v. Eaton*, 169 U.S. 331, 18 S.Ct. 374, 42 L.Ed. 767 (1898). In *Eaton*, the "consul general" to Siam—a principal officer—had fallen ill and decided to return to America, where he expected to die. *Id.* at 331–32, 18 S.Ct. 374. To "protect the interests of the government during his absence, and until the ... expected arrival" of his replacement, he asked a local missionary, Lewis Eaton, "to take charge of the consulate." *Id.* Less than a month before the consul general left for America, he swore Eaton in as "vice consul general," *id.* at 332, 18 S.Ct. 374, and charged him "with the duty of tempo-

[11] Whitaker's service ended on February 15, 2019 when Barr became the Attorney General. *See* 165 Cong. Rec. S1397 (daily ed. Feb. 14, 2019).

rarily performing the functions of the consular office," *id.* at 343, 18 S.Ct. 374. When the consul general departed a few weeks later, Eaton took over as acting consul for a period of 310 days. *Id.* at 333–34, 18 S.Ct. 374.

In the course of ruling that Eaton was entitled to compensation for that period, the Court determined that his acting service was consistent with the Appointments Clause. *Id.* at 343–44, 18 S.Ct. 374. Specifically, the Court held that a subordinate "charged with the performance of the duty of the superior *for a limited time*, and *under special and temporary conditions* " is not "thereby transformed into the *superior and permanent* official." *Id.* at 343, 18 S.Ct. 374 (emphases added).

In reaching that conclusion, the Court relied on evidence of the prevailing historical practice. It acknowledged that the role of "vice consul" had not always been a temporary position. *Id.* at 344, 18 S.Ct. 374. In "earlier periods of the government," vice consuls "were not *subordinate* and *temporary* "—like Eaton—but were instead "*permanent* and in reality *principal* officials." *Id.* (emphases added). They were therefore appointed with the advice and consent of the Senate. *Id.* But even when "the office of vice consul was considered as an independent and separate function, requiring confirmation by the senate, where a vacancy in a consular office arose by death of the incumbent, and the duties were discharged by a person who *acted temporarily, without any appointment whatever*," the "practice prevailed of paying such officials as de facto officers." *Id.* (emphasis added).

The Court found this historical practice compelling and quoted at length from an opinion by Attorney General Taney on "whether the son of a deceased consul"—who had no apparent government position but had "remained in the consular office, and discharged its duties"—was entitled to compensation for his temporary service. *Id.* Taney concluded that the son "was the de facto consul for the time" and that "[t]he practice of the government sanction[ed]" paying him accordingly. *Id.* (quoting *Provision for Widows of Consuls Who Die in Office*, 2 Op. Att'y Gen. 521, 523 (1832)). After all, Taney observed, "[t]he public interest requires that the duties of the office should be discharged by some ***147** one; and where, upon the death of the consul, a person who is in possession of the papers of the consulate enters on the discharge of its duties, and fulfills them to the satisfaction of the government," there is no reason "why he should not be recognized as consul for the time he acted as such." *Id.* (quoting 2 Op. Att'y Gen. at 524). Relying on this opinion and the historical practice it reflected, the Court adopted "the theory that a vice consul is a mere subordinate official" and upheld the constitutionality of Eaton's service. *Id.*

The Coalition insists that *Eaton* is consistent with its position because the Court merely permitted a first assistant—the "vice consul"—to take on the duties of his superior. *See, e.g.*, Firearms Pol'y Coal.'s Reply at 7, 10–11, 14. But to the extent *Eaton* involved a first assistant at all, it involved one only in the most superficial and formalistic sense. Eaton was a missionary with no evident prior government experience who was sworn in as vice consul for the sole

and express purpose of assuming the consul general's duties when the consul left for America less than a month later. There is no hint in the Court's decision that Eaton was ever subjected to the consul general's direction or control, or that the potential for such supervision played any role in the Court's analysis. Indeed, the Court expressly relied on Attorney General Taney's opinion approving the temporary performance of consular duties by a consul's son, who evidently was *not* the vice consul and whose qualifications consisted of being physically present and "in possession of the papers." *Eaton*, 169 U.S. at 344, 18 S.Ct. 374.

To be sure, the *Eaton* Court did identify the core feature that made vice consuls inferior officers. But it was not their supervision by the consul general or their status as second in command. It was the fact that Congress had chosen to "limit" their "period of duty" and "thereby to deprive them of the character of 'consuls,' in the broader and more permanent sense of that word." *Id.* at 343, 18 S.Ct. 374.

The Supreme Court has since reaffirmed *Eaton*, and each time it has described *Eaton*'s holding in durational terms without ever suggesting that it is limited to first assistants. In *Morrison v. Olson*, the Court expressly weighed the "temporary" duration of the Office of Independent Counsel as a factor in assessing whether the office required Senate confirmation. 487 U.S. 654, 672, 108 S.Ct. 2597, 101 L.Ed.2d 569 (1988). In justifying that approach, the Court cited *Eaton* and described it as approving regulations that permitted executive officials "to appoint a 'vice-consul' during the *temporary* absence of the consul."

Id. (emphasis added). The Court went on to quote *Eaton*'s core holding that a subordinate officer who performs the duties of a principal office "for a limited time and under special and temporary conditions" is not "transformed into the superior and permanent official." *Id.* (quoting *Eaton*, 169 U.S. at 343, 18 S.Ct. 374).

And when the Court later refined the test for identifying principal officers in *Edmond*, it again cited *Eaton* favorably and described it as holding that "a vice consul charged *temporarily* with the duties of the consul" was an inferior officer. 520 U.S. at 661, 117 S.Ct. 1573 (emphasis added). Although the Court clarified that, "[g]enerally speaking," the test for identifying an inferior officer is "whether he has a superior," *id.* at 662, 117 S.Ct. 1573, it did not disturb *Eaton*'s 99-year-old holding approving temporary, acting service during a principal office vacancy, *see id.* at 661, 117 S.Ct. 1573.[12]

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[12] Individual Justices have likewise understood *Eaton* to permit temporary, acting service. In *SW General*, Justice Thomas expressed constitutional concerns with using the FVRA to accomplish effectively permanent appointments. *See* 137 S.Ct. at 946 n.1 (Thomas, J., concurring). But even in that context, he took *Eaton*'s durational holding as a given and took pains to distinguish it, concluding that there was "nothing 'special and temporary' " about the appointment in *SW General*, which had lasted "more than three years in an office limited by statute to a 4-year term." *Id.* (quoting *Eaton*, 169 U.S. at 343, 18 S.Ct. 374). Then-Judge Kavanaugh described *Eaton*'s holding even more unequivocally in *Free Enterprise Fund*, explaining that "[t]he temporary nature of the office is the ... reason that acting heads of departments are permitted to exercise authority without Senate confirmation." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 537 F.3d 667, 708 n.17 (D.C. Cir. 2008) (Ka-

***148** In short, the Supreme Court has held and subsequently reaffirmed that an official designated to perform the duties of a principal office temporarily, on an acting basis, need not undergo Senate confirmation. The Court has never suggested that such temporary service must be performed by a first assistant, if available.

This understanding, binding on this Court, is further confirmed by an unbroken string of legislative enactments. *See NLRB v. Noel Canning*, 573 U.S. 513, 524, 134 S.Ct. 2550, 189 L.Ed.2d 538 (2014) (courts "put significant weight upon historical practice" when interpreting constitutional provisions that concern "the allocation of power" between Congress and the Executive Branch). In 1792, the Second Congress authorized the President to appoint "*any person ... at his discretion* to perform the duties" of the Secretaries of State, Treasury, or War in the event of a death, absence, or illness "until a successor be appointed, or until such absence or inability by sickness shall cease." Act of May 8, 1792, ch. 37, § 8, 1 Stat. 279, 281 (emphasis added). Three years later, in 1795, Congress extended this authority to apply to any "vacancy" in those departments—regardless of the cause—while simultaneously limiting the duration of acting service to six months. Act of Feb. 13, 1795, ch. 21, 1 Stat. 415, 415. Notably absent from these early congressional enactments is any limitation on whom the President could authorize to per-

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vanaugh, J., dissenting) (emphasis omitted) (citing *Eaton*, 169 U.S. at 343, 18 S.Ct. 374), *aff'd in part, rev'd in part, and remanded*, 561 U.S. 477, 130 S.Ct. 3138, 177 L.Ed.2d 706 (2010).

form acting duties—much less any hint that the President was required to choose the first assistant. This early legislative practice, in force from President Washington's first term until the middle of the Civil War, "provide[s] contemporaneous and weighty evidence of the Constitution's meaning." *Alden v. Maine*, 527 U.S. 706, 743–44, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999) (internal quotation marks omitted)); *see also Golan v. Holder*, 565 U.S. 302, 321, 132 S.Ct. 873, 181 L.Ed.2d 835 (2012) ("[T]he construction placed upon the Constitution" by members of the early Congresses, "many of whom were members of the convention which framed [the Constitution], is of itself entitled to very great weight." (internal quotation marks omitted)).

The Coalition minimizes these enactments by suggesting that Congress must have assumed that the President's broad statutory discretion would be narrowed by the Constitution. Firearms Pol'y Coal.'s Reply at 6–7. But if that is true, early courts did not get the message. In the words of one court, "it was doubtless considered when the act of 1792 was passed that it was expedient to allow to the President an unlimited range of selection, and hence the use of the broad and comprehensive language of [the 1792] act." *Boyle v. United States*, 1857 WL 4155, at *4 (Ct. Cl. Jan. 19, 1857). This "unlimited" authority, granted at such an "early day in the ***149** history of the federal constitution," was considered "safely ... entrusted to [the President]" not because it was subject to unspecified further limits under the Appointments Clause but because the President was "in the daily exercise of

higher and much more important powers" and could therefore be trusted to fill temporary vacancies. *Id.*

Eventually, Congress did set limits on whom the President could appoint as an acting principal. But even then, it did not require the President to choose the first assistant. In 1863, Congress narrowed the President's options from "any person," Act of May 8, 1792, § 8, 1 Stat. at 281, to any department head or "other officer" whose "appointment is vested in the President," Act of Feb. 20, 1863, ch. 45, § 1, 12 Stat. 656, 656. Five years later, in 1868, Congress passed the Vacancies Act, which curbed the President's temporary appointment power in significant ways. *See* Act of July 23, 1868, 15 Stat. 168. For vacancies caused by death or resignation, Congress limited the term of acting service to a mere ten days. *Id.* § 3, 15 Stat. at 168. And for the first time, Congress provided that the first assistant would automatically perform the duties of the department head in the event of a vacancy. *See id.* § 1. But like its predecessors, the Vacancies Act still authorized the President to choose someone other than the first assistant if he wished, specifically, any department head or other Senate-confirmed officer. *Id.* § 3.

This new pool of already-confirmed candidates may have been narrow, but the Coalition's theory cannot explain it. Although an officer's prior appointment may have been important to Congress, it would have been irrelevant for purposes of the Appointments Clause unless the officer's new acting duties were somehow "germane to the office[ ] already held." *Shoemaker v. United States*, 147 U.S. 282, 301, 13 S.Ct. 361, 37 L.Ed. 170 (1893). That would plainly

not be the case for department heads tapped to lead other, unrelated departments, which the Vacancies Act expressly allowed. *See* Act of July 23, 1868, § 3, 15 Stat. at 168. Nor could the President's authority to direct department heads to lead other departments be explained in terms of supervision or pre-existing duties. By definition, a department head is not supervised by anyone but the President. And the remote possibility of filling in for a fellow principal officer at the President's request cannot plausibly be considered one of the routine responsibilities of leading a department.

Over the next 130 years, Congress made minor adjustments to the President's temporary appointment authority, for the most part expanding the length of acting service. *See, e.g.*, Act of Feb. 6, 1891, ch. 113, 26 Stat. 733, 733 (extending ten-day limit to thirty days); Presidential Transitions Effectiveness Act, Pub. L. No. 100-398, § 7(b), 102 Stat 985, 988 (1988) (extending limit to 120 days). Finally, in 1998, Congress passed the FVRA, which explicitly authorized the President to designate certain inferior officers and senior employees to serve as acting principal officers. *See* 5 U.S.C. 3345(a)(3).

Thus, from the time of the founding to today, Congress has continuously authorized the President to direct persons who are not first assistants and who lack any constitutionally relevant Senate confirmation to perform the duties of a principal office temporarily on an acting basis. This unbroken legislative practice confirms *Eaton*'s holding that it is the "special and temporary conditions" of acting service, *Eaton*, 169 U.S. at 343, 18 S.Ct. 374—and not the

identity of the acting official—that makes such service constitutional. *See* ***150** *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 327–28, 57 S.Ct. 216, 81 L.Ed. 255 (1936) ("A legislative practice ... marked by the movement of a steady stream for a century and a half of time, goes a long way in the direction of proving the presence of unassailable ground for the constitutionality of the practice.").

This understanding is further confirmed by the longstanding practice of the Executive Branch. *See The Pocket Veto Case*, 279 U.S. 655, 689, 49 S.Ct. 463, 73 L.Ed. 894 (1929) ("Long settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions ...."). As both parties acknowledge, a practice emerged early on in our Nation's history of appointing a non-Senate confirmed "chief clerk" to serve as the Acting Secretary—or Secretary "ad interim"—when the principal Office of Secretary had become vacant. Gov't's Opp'n in *Guedes* at 56–57; Firearms Pol'y Coal.'s Reply at 12; *see also Designating an Acting Attorney General*, 42 Op. Off. Legal Counsel ——, 2018 WL 6131923, at *8 (2018) (reporting over 100 instances of chief clerks serving as acting principal officers from 1809 to 1860).

The Coalition argues that this practice supports its theory because chief clerks were simply the historical analogue to today's first assistants. *See, e.g.*, Firearms Pol'y Coal.'s Reply at 12. But for chief clerks to have functioned as the Coalition maintains first assistants do, it would have to be true that they stepped in for their superiors automatically and subject to a general form of continual supervision. *See*

Firearms Pol'y Coal.'s Br. at 3–4. That description may have been true of some clerks, *see* Firearms Pol'y Coal.'s Reply at 16 (identifying two statutes authorizing the chief clerk to fill in for the principal officer automatically in the event of a vacancy), but it was not true of all of them, or even most of them, *see* 1 *Trial of Andrew Johnson, President of the United States, Before the Senate of the United States, on Impeachment by the House of Representatives for High Crimes and Misdemeanors* 575–81 (1868) (hereinafter *Trial of Andrew Johnson*) (listing dozens of examples of Presidents "appoint[ing]," "authoriz[ing]," or "empower[ing]" chief clerks to perform the duties of a Secretary during a vacancy).

More importantly, the Coalition's account contrasts sharply with how the practice of appointing chief clerks was described and justified at the time. When chief clerks sought compensation for their acting service in federal court, the resulting decisions made clear that the position of Acting Secretary was viewed neither as a continuation of the chief clerk's duties as chief clerk nor as an appointment to become the Secretary, but as a unique and temporary office that arose solely from the President's exercise of discretionary authority under the relevant vacancy statute. *See Boyle*, 1857 WL 4155, at *3–4. As the Court of Federal Claims put it in *Boyle*, "[t]he office of Secretary ad interim" was "a distinct and independent office in itself, when it [wa]s conferred on the chief clerk," and was "so conferred not because it pertain[ed] to him ex officio, but because the President, in the exercise of his discretion, s[aw] fit to appoint him." *Id.* at *4. Thus, while the court explained that

the Secretary ad interim "*may* be the chief clerk," he could also be "*any other person*, at the discretion of the President." *Id.* (emphases added). Although "[e]xperience ha[d] taught" that "this discretion" could "be very judiciously exercised by conferring the appointment on the chief clerk," the "broad terms of the [1792] act would fully warrant the President in selecting *any other person*; and it would, moreover, be his duty to do so, if, in his discretion, he should deem it most expedient." *Id.* (emphasis added).

***151** The reason these discretionary appointments were understood not to violate the Appointments Clause was plain: "[t]he office of Secretary ad interim [wa]s *temporary in its character*, whilst that of Secretary [wa]s of a *more permanent nature*." *Id.* at *3 (emphases added). As a result, "the one" was "considered inferior to the other," and did not require the advice and consent of the Senate. *Id.*

Thus, while it is true that Presidents often directed the chief clerk to serve in the event of a vacancy, Presidents made that decision voluntarily, as an exercise of statutory discretion, and not because the chief clerks' existing duties made such service automatic. Moreover, the contemporaneous justification for this accepted practice was found not in the role of chief clerk but in the role of Acting Secretary and its temporary nature.

Given this understanding, it is no surprise that Presidents frequently looked beyond chief clerks to fill temporary vacancies. Indeed, they regularly designated other cabinet members and department heads as acting principal officers. *See Designating an*

Acting Attorney General, 2018 WL 6131923, at *8 (reporting that during the Washington, Adams, and Jefferson Administrations, other cabinet members and Chief Justice John Marshall "were used as temporary or 'ad interim' officials"); Letter from James Buchanan, President of the United States, to the Senate of the United States (Jan. 15, 1862), in 5 *A Compilation of the Messages and Papers of the Presidents 1789–1902*, at 3191 (James D. Richardson ed., 1902) (describing Presidents' frequent use of department heads, among others, to fill vacancies in other departments); *Trial of Andrew Johnson, supra*, at 575–81 (listing over twenty instances of department heads serving as acting heads of other departments). And again, although these officials had been previously confirmed, their prior confirmations would have been irrelevant for constitutional purposes unless their prior duties were somehow germane to the duties of their new offices. *See Shoemaker*, 147 U.S. at 301, 13 S.Ct. 361 (an existing appointment may authorize additional duties only if those duties are "germane" to the office already held).

In addition, on at least three occasions, a President—each time, President Jackson—authorized someone with no prior government role whatsoever to serve as an acting principal officer. On his first day in office, President Jackson directed James A. Hamilton to "take charge of the Department of State" until then-Governor Martin Van Buren "arrive[d] in the city." *Trial of Andrew Johnson, supra*, at 575; *see also Biographical Directory of the American Congress, 1774–1961*, at 16 (1961). And on two other occasions, he directed William B. Lewis to serve as Acting Sec-

retary of War. *See Trial of Andrew Johnson, supra*, at 575. Although these examples are few, and limited to a single administration, they comport with the understanding articulated in *Boyle* that it is the temporary nature of an acting appointment—and not the former position of the appointee—that makes it unnecessary for the President to obtain the advice and consent of the Senate before filling a vacancy with an acting official.[13]

***152** To be sure, the Coalition's position is not without its virtues. For one, it represents an attempt to reconcile *Eaton*'s focus on duration with the now-dominant criterion of supervision. *See Edmond*, 520 U.S. at 662, 117 S.Ct. 1573 ("Generally speaking, the term 'inferior officer' connotes a relationship with some higher ranking officer or officers below the President."); *see also Free Enter. Fund*, 537 F.3d at 708 n.17 (Kavanaugh, J., dissenting) (explaining that, "for offices that are not temporary," *Edmond* "controls the inferior-officer Appointments Clause analysis," and noting that *Edmond* "expressly purport[ed] to set forth a definitive test for inferior officer status governing future cases"). For another, it

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[13] There appear to be other examples where an individual who was neither the chief clerk nor a Senate-confirmed official stepped in as an acting principal officer. *See Eaton*, 169 U.S. at 344, 18 S.Ct. 374 (describing a consul's son who served temporarily as consul when his father passed); *Boyle*, 1857 WL 4155, at *5 (describing a "navy agent" who served temporarily as an acting "purser"); Firearms Pol'y Coal.'s Br. at 26 n.2 (acknowledging "several instances, when the first assistant was apparently unavailable," in which "the President designated a non-confirmed subordinate to the first assistant or other senior department officer without objection").

offers a clear constitutional boundary that could minimize manipulation by the Executive Branch.

But despite these virtues, the Coalition's theory suffers from fatal flaws. *First*, as already discussed, it cannot account for the Supreme Court's holding in *Eaton*, an unbroken line of congressional enactments, or the longstanding practice of the Executive Branch (as understood at the time).

Second, it rests on a weak conceptual foundation. Doctrinally, it relies on the premise that first assistants are "generally" supervised. *See* Firearm Pol'y Coal.'s Br. at 4, 21. By that, the Coalition appears to mean that they are supervised before and after they serve as acting principal officers.[14] But that is just another way of stating that they are *not* supervised during the one window that counts: when carrying out their acting appointment. Although a loose form of ongoing supervision might be said to apply when the principal officer is merely ill or absent, surely any such supervision ceases when the principal officer dies or resigns. Perhaps in these situations the next principal is able to exercise a form of retroactive supervision by ratifying or rejecting the acting official's

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[14] Of course, Whitaker himself was supervised both before and after his designation, as Chief of Staff to the Attorney General and as Senior Counselor in the Office of the Associate Attorney General. *See Whitaker Remains at Justice Dept. but in Different Role*, Wash. Post (Feb. 15, 2019), https://www.washingtonpost.com/politics/whitaker-remains-at-justice-dept-but-in-different-role/2019/02/15/a332f0da-3142-11e9-8781-763619f12cb4_story.html.

actions after the fact. But if such anticipated, backward-looking supervision could cure a first assistant's temporary service, it could cure anyone's. It therefore provides no basis for distinguishing first assistants from any other person approved for acting service under the FVRA.

Third, the Coalition's position admits of exceptions that lack a coherent or persuasive justification. For example, the Coalition appears to accept that the President can displace an available first assistant with any Senate-confirmed official, *see, e.g., id.* at 5, but it does not explain how that can be the case when the officer's previous position was not "germane" to his new, acting duties, *see Shoemaker*, 147 U.S. at 301, 13 S.Ct. 361 (a prior appointment cannot justify the performance of new responsibilities "dissimilar to, or outside the sphere of" an officer's previous "official duties").[15] In addition, the Coalition appears to suggest that the President may ignore the Appointments Clause altogether if the first assistant is unavailable. *See, e.g.*, Firearms Pol'y Coal.'s Br. at 4, ***153** 12, 25–26 n.2. But, again, it is not clear why. If the legal fiction justifying the first assistant's temporary service is that the temporary service is merely a continuation of the first assistant's existing inferior office, *see id.* at 3–4, that justification vanishes once the President chooses some other subordinate in the same department whose predefined job responsibili-

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[15] If the answer is merely the functional consideration that requiring a previous confirmation ensures some quality control by the Senate, then it is not clear why Whitaker's previous appointment as a United States Attorney would not suffice. *See* 150 Cong. Rec. S6467 (daily ed. Jun. 3, 2004).

ties cannot realistically be stretched to include stepping in as the acting principal in the event of a vacancy. The Coalition suggests that the unavailability of the first assistant triggers an "exigency" that excuses what would otherwise be a constitutional violation, *see id.* at 25–26 n.2, but the Court is hesitant to embrace a freestanding "exigency" exception with no basis in the constitutional text.[16]

The Coalition insists that adopting the government's interpretation will wreak havoc on the Separation of Powers, *see, e.g., id.* at 1–2, but the Court is not persuaded. Congress has set limits on the President's temporary appointment authority, *see* 5 U.S.C. §§ 3345, 3346, and can expand those limits as it sees fit, *see, e.g.*, Act of July 23, 1868, § 3, 15 Stat. at 168 (imposing a ten-day limit on acting appointments and limiting the President's appointment authority to officials already serving in a Senate-confirmed role). Moreover, the "special and temporary conditions" that *Eaton* requires are no mere formality. 169 U.S.

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[16] This "exigency" exception also appears inconsistent with the Coalition's separate argument that an acting principal officer must at least be an inferior officer and not a mere employee. *See* Firearms Pol'y Coal.'s Br. at 25–26 n.2. The Coalition cites with approval examples of the President designating "a non-confirmed subordinate to the first assistant" and of a consul's son taking charge of the consulate upon his father's death. *Id.* at 26 n.2. But the Coalition does not address the possibility that these scenarios involved individuals who were not officers—and, in the case of the consul's son, not even an *employee*—serving in what the Coalition considers a principal office. As far as the Court can discern, the Coalition's position is that all constitutional bets are off as soon as the first assistant is unavailable, both at the employee/officer boundary and the inferior/principal officer boundary.

at 343, 18 S.Ct. 374. At some point, courts can and must play a role in policing "acting" appointments that are effectively permanent. *See SW Gen.*, 137 S.Ct. at 946 n.1 (Thomas, J., concurring) (explaining that a three-year appointment to an office with a four-year term was not "special and temporary" under *Eaton* (internal quotation marks omitted)). This case, however, does not concern the pretextual use of the "temporary" label to circumvent the Senate's advice and consent role, and the Coalition has not argued otherwise.

At any rate, the constitutional rule was laid down in *Eaton* and has since been reaffirmed: an official who is "charged with the performance of the duty of the superior for a limited time, and under special and temporary conditions," need not be appointed by the President with the advice and consent of the Senate. *Eaton*, 169 U.S. at 343, 18 S.Ct. 374; *see also Morrison*, 487 U.S. at 672, 108 S.Ct. 2597; *Edmond*, 520 U.S. at 661, 117 S.Ct. 1573. Whitaker's temporary service as the Acting Attorney General satisfies that test. He served as Acting Attorney General for a mere 100 days during the special circumstance of a vacancy triggered by the resignation of Attorney General Sessions. As a result, he did not become a principal officer under the Appointments Clause.

b. Whitaker's Appointment Under the FVRA

The Coalition makes two additional constitutional arguments based on the implicit premise that the Constitution requires ***154** the Acting Attorney General to be at least an inferior officer, rather than an employee. First, it argues that the text of the FVRA

authorizes the President to "direct" an individual to serve in an acting capacity but does not authorize the President to "appoint" that individual to become an inferior officer. Firearms Pol'y Coal.'s Br. at 17–19.[17] Second, it argues that an employee can never be "appointed" to serve in an acting capacity because an acting position is temporary and an officer must hold a permanent position. *Id.* at 19–20. Neither argument is persuasive.

Assuming without deciding that Whitaker was an employee before his designation and that an employee's service as Acting Attorney General first requires an appointment, the FVRA authorized such an appointment and the President carried it out. As Justice Thomas recently explained, at the time of the framing, "the verb 'appoint' meant 'to establish anything by decree' or 'to allot, assign, or designate.' " *SW Gen.*, 137 S.Ct. at 946 (Thomas, J., concurring) (alterations adopted and internal citations omitted). Therefore, "[w]hen the President 'directs' someone to serve as an officer pursuant to the FVRA, he is 'appointing' that person as an 'officer of the United

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[17] Although the Coalition cites the word "direct" in § 3345(a)(3) in its motion, *see* Firearms Pol'y Coal.'s Br. at 18–19, it appears to shift its focus to the word "designates" in § 3347(a)(1)(b) in its reply, *see* Firearms Pol'y Coal.'s Reply at 5. The Court assumes that the Coalition intended to continue to argue that the word "direct" creates the constitutional problem. In any event, the Court doubts the difference matters since the terms are synonymous in this context. *See SW Gen.*, 137 S.Ct. at 946 (Thomas, J., concurring) ("When the President 'directs' a person to serve as an acting officer, he is 'assigning' or 'designat[ing]' that person to serve as an officer." (alterations adopted)).

States' within the meaning of the Appointments Clause." *Id.* (alterations adopted).

The Supreme Court's decision in *Weiss* is not to the contrary. *See Weiss v. United States*, 510 U.S. 163, 114 S.Ct. 752, 127 L.Ed.2d 1 (1994). In *Weiss*, the Court considered whether military judges assigned to serve as judges by various Judge Advocate Generals under the Uniform Code of Military Justice (UCMJ) were lawfully appointed. The Court reasoned that the military judges involved were "commissioned officers when they were assigned to serve as judges," so "they had already been appointed by the President with the advice and consent of the Senate." *Id.* at 170, 114 S.Ct. 752. It then rejected the petitioners' arguments that "either Congress ha[d], by implication, required a second appointment, or the Appointments Clause, by constitutional command, require[d] one." *Id.* In the course of rejecting the first argument, the Court compared other statutes governing the appointment of military officers to the sections of the UCMJ relating to military judges. It stressed that in the first set of statutes, Congress used the term "appoint," but in "[t]he sections of the UCMJ relating to military judges," it "sp[oke] explicitly and exclusively in terms of 'detail' or 'assign'; nowhere in these sections [wa]s mention made of a separate appointment." *Id.* at 172, 114 S.Ct. 752. "This difference negate[d] any permissible inference that Congress intended that military judges should receive a second appointment, but in a fit of absentmindedness forgot to say so." *Id.*

The Coalition seizes on this case to argue that the FVRA does not permit the appointment of an acting

official because Congress did not use the word "appoint" in the FVRA. *See* Firearms Pol'y Coal.'s Br. at 18–19; Firearms Pol'y Coal.'s Reply at 5. But the discussion in *Weiss* turned on the specific text of various military statutes and placed particular weight on the ***155** use of the words "assigned" and "detailed," neither of which are at issue here. Moreover, the question in *Weiss* was whether Congress intended to impose an additional appointment requirement on military judges, not whether a statute designed to permit such appointments failed because it lacked certain magic words. Congress clearly contemplated that the FVRA would confer appointment authority on the President, and its use of the word "direct" was sufficient to confer that authority.

The Coalition's separate argument that Whitaker cannot be an inferior officer because his duties are only temporary fails for a more elementary reason: if the temporary nature of Whitaker's duties prevented him from becoming an officer, then the temporary nature of his duties also prevented him from needing an appointment at all—under the FVRA or otherwise. The Coalition relies primarily on *Lucia*, in which the Supreme Court explained that "an individual must occupy a 'continuing' position established by law to qualify as an officer." *Lucia*, 138 S.Ct. at 2051. But that decision merely established who *must* be appointed by a President, court, or department head; not who *may* be. In any event, Eaton makes clear that the temporary nature of acting duties cures any constitutional problem; it does not create one. To the extent the Coalition contends that officers must hold permanent positions and that there is no exception

for acting principal officers, then acting officials are not officers and Whitaker did not need to be appointed at all. *Cf. Peters*, 2018 WL 6313534, at *4 n.11 ("[T]he Supreme Court's delineation of constitutional 'Officer' characteristics suggests that an 'Acting' official could be considered a 'lesser functionar[y]' employee for which 'the Appointments Clause cares not a whit about who named them.' " (quoting *Lucia*, 138 S.Ct. at 2051)). For these reasons, the Coalition is unlikely to succeed on these final challenges to the bump stock rule.

CONCLUSION

Because the plaintiffs have not met their burden of showing entitlement to a preliminary injunction, the Court denies their motions.

APPENDIX D

762 Fed.Appx. 7 (Mem)

This case was not selected for publication in West's Federal Reporter.

See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. D.C.Cir. Rule 32.1 and Rule 36.

United States Court of Appeals, District of Columbia Circuit.

Damien GUEDES, et al., Appellants

Firearms Policy Coalition, Inc., CA 18-3083, Appellee

v.

BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, et al., Appellees

No. 19-5042

September Term, 2018

Consolidated with 19-5044

Filed On: April 1, 2019

Appeals from the United States District Court for the District of Columbia (No. 1:18-cv-02988-DLF), (No. 1:18-cv-03086-DLF)

Before: Henderson, Srinivasan and Millett, Circuit Judges

JUDGMENT

Per Curiam

***8** These causes came to be heard on the record on appeal from the United States District Court for the District of Columbia and were argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED** that the District Court's denial of the preliminary injunction appealed from in these causes be affirmed, in accordance with the opinion of the court filed herein this date. It is

FURTHER ORDERED that the administrative stay of the effective date of the Bump Stock Rule, 83 Fed. Reg. 66,514 (Dec. 26, 2018), that was entered on the court's own motion on March 23, 2019, will remain in effect for 48 hours from the time of the issuance of the opinion in this case to allow plaintiffs, if they wish, to seek a stay from the Supreme Court of the United States. Should plaintiffs do so, the administrative stay will remain in effect pending disposition of the stay application. Plaintiffs are directed to notify the court promptly should an application for a stay be filed. It is

FURTHER ORDERED that Codrea plaintiffs-appellants' notice of voluntary dismissal of Whitaker-based claim in ***9** No. 19-5044, construed by the court as a motion for voluntary dismissal, be denied.

The Clerk is directed to withhold issuance of the mandate pending resolution of any stay application filed in the Supreme Court. Plaintiffs are directed to notify the court promptly of the disposition of a stay application. If plaintiffs do not seek a stay from the Supreme Court, the Clerk is directed to issue the mandate 48 hours after the opinion in these consoli-

dated cases issues. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41(a)(1).

Opinion concurring in part and dissenting in part filed by Circuit Judge Henderson.

APPENDIX E

2019 WL 1398194

Only the Westlaw citation is currently available.

United States Court of Appeals, District of Columbia Circuit.

Damien GUEDES, et al., Appellants

Firearms Policy Coalition, Inc., CA 18-3083, Appellee

v.

BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, et al., Appellees

No. 19-5042

Consolidated with 19-5043, 19-5044

September Term, 2018

Filed On: March 23, 2019

1:18-cv-02988-DLF, 1:18-cv-03086-DLF

ORDER

Per Curiam

***1** Plaintiffs in these three consolidated cases challenge a final agency rule banning Bump-Stock-Type Devices, 83 Fed. Reg. 66514 (Dec. 26, 2018) ("Bump-Stock Rule"), which is scheduled to take effect on March 26, 2019. On February 25, 2019, the district court denied the plaintiffs' joint request for a preliminary injunction staying the Bump-Stock Rule's effective date. On March 1, 2019, this court granted the Appellants' joint motion for expedition of this case, in

which they sought resolution of the appeal on a highly expedited basis before the March 26, 2019, effective date. Under that expedited schedule, this case was argued on March 22, 2019. At oral argument, counsel for the government explained that it was now its position that the Bump Stock Rule's March 26, 2019 effective date should be viewed as the date when the government will cease exercising its prosecutorial discretion not to enforce federal law against those who possess or trade in bump-stock-devices covered by the Bump-Stock Rule. Oral Arg. 49:00-51:55. Following oral argument, the Firearms Policy Coalition, Inc. filed a voluntary motion to dismiss its appeal, or in the alternative to stay its appeal, and advised that the government opposes the motion to dismiss. In light of these representations, it is

ORDERED that the motion of the Firearms Policy Coalition, Inc., to dismiss its appeal, No. 19-5043, be granted. Appeal No. 19-5043 is hereby dismissed. It is

FURTHER ORDERED, on the court's own motion, that the effective date of the Bump-Stock Rule, 83 Fed. Reg. 66514 (Dec. 26, 2018), be administratively stayed in its application only as to the named Appellants in appeals Nos. 19-5042 and 19-5044, pending further order of this Court. The purpose of this stay is exclusively to give the Court sufficient opportunity to consider the disposition of this highly expedited appeal, and should not be construed in any way as a ruling on the merits of the appeal. See D.C. Circuit Handbook of Practice and Internal Procedures 33 (2018).

The Clerk is directed to issue the mandate forthwith in No. 19-5043 only.