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UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21-5045

[Filed August 9, 2022]

DAMIEN GUEDES, ET AL.,
APPELLANTS

FIREARMS POLICY COALITION, INC.,
APPELLEE

v.

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

Appeal from the United States District Court
for the District of Columbia
(No. 1:18-cv-02988)

Argued March 8, 2022 —
Decided August 9, 2022

Erik S. Jaffe argued the cause for appellants. With him on the briefs were *Joshua G. Prince, Adam Kraut,* and *Joshua J. Prince.*

John Cutonilli, pro se, was on the brief for *amicus curiae* John Cutonilli in support of appellants.

Mark B. Stern, Attorney, U.S. Department of Justice, argued the cause for appellees. With him on the brief were *Brian M. Boynton*, Acting Assistant Attorney General, and *Michael S. Raab, Abby C. Wright, Brad Hinshelwood,* and *Kyle T. Edwards,* Attorneys.

Ian Simmons, Jonathan Lowy, and *Eric Tirschwell* were on the brief for *amici curiae* Giffords Law Center to Prevent Gun Violence, and Brady and Everytown for Gun Safety in support of appellees.

Before: SRINIVASAN, *Chief Judge*, WILKINS, *Circuit Judge*, and EDWARDS, *Senior Circuit Judge*.

Opinion for the court filed by *Circuit Judge* WILKINS.

WILKINS, *Circuit Judge*: Is a bump stock device a "machine gun" within the meaning of federal law? We are tasked with answering that question definitively. Following the 2017 mass shooting in Las Vegas in which 58 people were killed and approximately 500 were wounded—the deadliest in modern American history—the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF" or the "Bureau") promulgated a rule

classifying "bump stocks" as machine guns.[1] A bump stock, like those used by the Las Vegas shooter, replaces a rifle's stationary stock with a sliding stock. It thereby enables the weapon to slide back and forth against the shooter's shoulder, "bumping" the shooter's trigger finger repeatedly and rapidly firing the weapon. The Bureau's new rule instructed individuals with bump stocks to either destroy them, abandon them at the nearest ATF facility, or face criminal penalties.

The Bureau interpreted "machine gun," as defined in the National Firearms Act and Gun Control Act, to extend to bump stocks. Plaintiffs initially moved for a preliminary injunction to stop the rule from taking effect, which the District Court denied, and a panel of this Court affirmed. At the merits stage, the District Court again rejected Plaintiffs' challenges to the rule under the *Chevron* framework. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The central question on appeal is whether the Bureau had the statutory authority to interpret "machine gun" to include bump stocks. Employing the traditional tools of statutory interpretation, we find that the disputed rule is consistent with the best interpretation of "machine gun" under the governing statutes. We therefore affirm.

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[1] We follow the previous panel's example and use the two-word spelling of "machine gun" except when directly quoting sources. *Guedes v. ATF*, 920 F.3d 1, 6 n.1 (D.C. Cir. 2019).

I.

A.

Congress enacted the National Firearms Act in 1934 to regulate the sale of particular firearms, including machine guns. Initially, the Act defined a "machine gun" 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." Pub. L. No. 73-474, § 1(b), 48 Stat. 1236, 1236 (1934). In 1968, Congress removed "or semiautomatically" and expanded the definition to include:

> the frame or receiver of any such weapon, any 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.

Pub. L. 90-618, 82 Stat. 1213, 1231 (1968). Congress charged the Attorney General with enforcement of the National Firearms Act, who in turn delegated enforcement authority to the Bureau. 26 U.S.C. § 7801(a); 28 C.F.R. § 0.130(a).

With the Gun Control Act of 1968, Congress incorporated the National Firearms Act's definition of "machinegun" and strengthened its prohibitions on firearm sales and licensing. 18 U.S.C. § 922(a)(4). As amended by the Firearm Owners' Protection Act of 1986, the Gun Control Act prohibits the transfer of or possession of machine guns, excluding those authorized to possess such weapons by the state or federal government or those who possessed them before the

law took effect. 18 U.S.C. § 922(o). The Gun Control Act's enforcement scheme is identical to that of the National Firearms Act. Congress empowered the Attorney General to "prescribe only such rules and regulations as are necessary to carry out the provisions of this chapter," who delegated this authority, in turn, to the Bureau. *Id.* § 926(a); 28 C.F.R. § 0.130(a)(6).

In 2006, the Bureau determined that certain bump stock devices—ones that harnessed energy from an internal spring's recoil, like an Akins Accelerator—qualified as machine guns under both Acts. *See* ATF Rul. 2006-2. Between 2008 and 2017, however, the Bureau issued ten letter rulings in which it concluded that devices relying on both the recoil energy and the shooter's constant forward pressure were not machine guns. These weapons fired multiple shots with a "single pull of the trigger," but in the Bureau's view did not operate "automatically," though the Bureau did not engage with the meaning of the term. *Id.* at 66,518.[2]

In the aftermath of the Las Vegas shooting, then-President Trump and Congress urged the Bureau to revisit its position on bump stocks. *Department of Justice Announces Bump-Stock-Type Devices Final Rule*, DEP'T OF JUST. (Dec. 18, 2018), https://www.justice.gov/opa/pr/department-justice-announces-bump-stock-typedevices-final-rule, J.A. 21–22. Following a notice of proposed rulemaking, *see Bump-Stock-Type Devices*, 83 Fed. Reg. 13,442 (Mar. 29, 2018), the

[2] These devices included one from the manufacturer of at least one of the bump stock devices used in the Las Vegas shooting. *Id.* at 66,516.

Bureau issued a final rule reversing its earlier position that only bump stocks with internal springs qualified as machine guns under the National Firearms Act and Gun Control Act. *Bump-Stock-Type Devices*, 83 Fed. Reg. 66,514, 66,514–15 (Dec. 26, 2018) ("Bump Stock Rule" or "Rule"). Under the Rule, "bump-stock-type devices are 'machineguns' as defined by the National Firearms Act and Gun Control Act because such devices allow a shooter of a semiautomatic firearm to initiate a continuous firing cycle with a single pull of the trigger." *Id.* at 66,515. These devices, whether operated by an internal spring or manual pressure, "convert an otherwise semiautomatic firearm into a machinegun." *Id.*

The Rule defined "single function of the trigger" as a "'single pull of the trigger' and analogous motions" and "automatically" 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.* Individuals currently in possession of bump stocks were directed to either destroy them or abandon them at an ATF facility prior to the rule taking effect on March 26, 2019. *Id.* at 66,514, 66,515.

B.

In December 2018, pursuant to the Bureau's notice of final rulemaking, Plaintiffs sought a preliminary injunction to prevent the rule from taking effect. The District Court denied that request, finding the Bureau's interpretation of the relevant statutory terms—"single function of the trigger" and "automatically"—reasonable under *Chevron*. *Guedes v. ATF*, 356 F. Supp. 3d 109 (D.D.C. 2019) ("*Guedes I*").

We affirmed the District Court's decision on the same basis. *Guedes v. ATF*, 920 F.3d 1, 6 (D.C. Cir. 2019) (per curiam) ("*Guedes II*"). In our view, the *Chevron* framework applied, notwithstanding Plaintiffs' objections, because the rule was legislative in character; the government could not waive *Chevron* deference; and *Chevron* applies in equal force to provisions with criminal penalties. *Id.* at 17–28. Because we found "single function of the trigger" and "automatically" ambiguous under the National Firearms Act and Gun Control Act and the agency's interpretations reasonable, we ruled in the Bureau's favor.

The Supreme Court denied Plaintiffs' petition for certiorari. *Guedes v. ATF*, 140 S. Ct. 789 (2020) (Mem.). In a separate statement, Justice Gorsuch articulated his view that *Chevron* did not apply because of the government's express waiver of the doctrine and the statute's criminal penalties. *Id.* at 790. He nevertheless concurred in the petition's denial, finding that the government's position could be substantiated at the merits stage and noting that other courts of appeals were currently considering challenges to the Rule. *Id.* at 791.

Now before us is the District Court's grant of the government's motion for summary judgment and denial of Plaintiffs' cross-motion for summary judgment. *Guedes v. ATF*, 520 F. Supp. 3d 51, 58 (D.D.C. 2021) ("*Guedes III*"). For the same reasons discussed in *Guedes I* and *II*, the District Court found the Bureau reasonably construed the statute under *Chevron* and rejected Plaintiffs' challenges on the merits. *Id.* at 65.

II.

We have jurisdiction over this appeal under 28 U.S.C. § 1291, and we review a grant or dismissal of a motion for summary judgment de novo. *Baylor v. Mitchell Rubenstein & Assocs., P.C.*, 857 F.3d 939, 944 (D.C. Cir. 2017).

III.

A.

The government urges us to decide this appeal based on the law of the case doctrine, which instructs that "the *same* issue presented a second time in the *same case* in the *same court* should lead to the *same result*." *LaShawn A. v. Barry*, 87 F.3d 1389, 1393 (D.C. Cir. 1996). The doctrine is a discretionary prudential doctrine, not a jurisdictional bar, and we decline to apply it here. *Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735, 739–40 (D.C. Cir. 1995). This is not a situation in which we are reaching a different result on the same legal issue in the same case, which could require showing "extraordinary circumstances." *Sherley v. Sebelius*, 689 F.3d 776, 781 (D.C. Cir. 2012) (quoting *LaShawn A.*, 87 F.3d at 1393). Rather, we ultimately reach the "*same result*" as the *Guedes II* panel, *id.*, in that we likewise sustain the Bump Stock Rule.

If we were reaching a different result, we would assess our discretionary decision to do so under "the preliminary injunction exception to the law-of-the-case doctrine." *Sherley*, 689 F.3d at 781. We need not fit within that exception, though, in circumstances in which we reach the same result. To be sure, we reach that result via a different path. But we are unaware of

any decision saying that the pursuit of a different path—as opposed to the reaching of a different result—requires fitting within an exception to the law-of-the-case doctrine or a showing of extraordinary circumstances, especially when we have no need here to revisit the reasoning of the *Guedes II* panel. And we explain next why we opt to sustain the validity of the Bump Stock Rule in a different way than did that panel.

B.

The threshold question is whether to treat this case as a matter of pure statutory interpretation or to apply the *Chevron* framework. Both parties advocate for the former. Plaintiffs argue that *Chevron* does not apply for a multitude of reasons: the rule is interpretive in nature; the government waived *Chevron* deference; the Court may not apply *Chevron* to a statute with criminal penalties; and the rule of lenity must supersede *Chevron* in the criminal context. The Bureau also characterizes the Rule as interpretive, and it likewise urges us to analyze the Rule under a statutory interpretation framework.

The *Guedes II* panel employed the *Chevron* framework—just as the District Court had done—in denying the motion for preliminary injunction. The panel concluded that the Bump Stock Rule was a legislative rule; the Bureau explicitly relied on *Chevron* in crafting it; the government cannot recharacterize a rule as legislative or interpretative during litigation; and the government cannot waive *Chevron*. 920 F.3d at 18, 21–23.

Ultimately, we need not wrestle with the *Chevron* framework here. Rather, the parties have asked us to dispense with the *Chevron* framework, and in this circumstance, we think it is appropriate to do so. *See Am. Hosp. Ass'n v. Becerra*, 142 S. Ct. 1896 (2022) (rejecting agency's interpretation "after employing traditional tools of statutory interpretation," rather than inquiring into the interpretation's reasonableness under *Chevron*). Using a statutory interpretation lens, we decide that the Bureau offered the best construction of the statute without wading into the subsidiary questions that the *Chevron* analysis poses.

This approach also comports with how the Bureau engaged in the rulemaking exercise. The Bureau repeatedly described what it was doing as seeking to arrive at the "best interpretation" of the statutory text, and it relied principally on that reasoning during the rulemaking. *Bump Stock Rule*, 83 Fed. Reg. at 66,514, 66,517, 66,518, 66,521. This is also the Bureau's principal position on appeal. Appellee Br. 28. While the Bureau contended that it would reach the same result using a *Chevron* framework, that argument served as its fallback position. 83 Fed. Reg. at 66,527 (explaining 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," but that "even if those terms are ambiguous, this rule rests on a reasonable construction of them"). This jurisprudential approach thus allows us to address the issues as the parties have principally framed them for resolution. If we are able to uphold the Bureau's definition based on its primary line of argument, there is no reason to reach its

secondary one. *See HollyFrontier Cheyenne Ref., LLC v. Renewable Fuels Ass'n*, 141 S. Ct. 2172, 2180 (2021) (declining to consider whether *Chevron* deference was due where government did not invoke it).

Finally, there is no need to decide what deference, if any, a regulation should receive where we can conclude that the agency's interpretation of the statute is the best one. Our decision to forgo engaging with questions of *Chevron*'s applicability is consistent with how courts have approached agency interpretation issues in the past. As the Supreme Court explained in *Edelman v. Lynchburg College*, "there is no need to resolve any question of deference," where the agency regulation is "not only a reasonable one, but the position we would adopt even if there was no formal rule and we were interpreting the statute from scratch." 535 U.S. 106, 114 (2002). That is not to say that the agency's rule must be the only "permissible" interpretation of the statute, but only that it must be the best construction. *Id.* at 114 & n.8. *See also Washington Reg'l Medicorp v. Burwell*, 813 F.3d 357, 362 (D.C. Cir. 2015) (finding no need to engage in deference analysis where agency's interpretation is both reasonable and the best interpretation of the statute); *Am. Hosp. Ass'n v. Becerra*, 142 S. Ct. at 1896 (employing "traditional tools of statutory interpretation" to analyze an agency rule, without resort to *Chevron* or any other form of deference to the agency); *Becerra v. Empire Health Found.*, 142 S. Ct. 2354, 2368 (2022) (same).

So too here, in relying on the ordinary tools of statutory interpretation—"text, structure, purpose, and

legislative history," *see Pharm. Rsch. & Mfrs. of Am. v. Thompson*, 251 F.3d 219, 224 (D.C. Cir. 2001)—we find that the Bureau has provided the best reading of the statute and that the statutory definition of machine gun as articulated in 26 U.S.C. § 5845(b) extends to bump stocks.

(i)

Recall the National Firearms Act and Gun Control Act's definition of "machinegun":

> 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). Whether this definition encompasses bump stocks depends on how we interpret two of its interior phrases—"single function of the trigger" and "automatically"—and how those phrases relate to one another.

Starting with "single function of the trigger," the Bureau interprets it as a "'single pull of the trigger' and analogous motions." *Bump Stock Rule*, 83 Fed. Reg. at 66,515. The phrase "analogous motions" includes "other methods of initiating an automatic firing sequence that

do not require a pull," like a push of a button or voice command. 83 Fed. Reg. at 66,515, 66,534–35. The Bureau's interpretation of "single function of the trigger" thus both defines a "function" of the trigger as a "pull" of the trigger and clarifies that a "pull" of the trigger is a shooter's volitional action that initiates an automatic firing sequence.

The Bureau offers the best reading of the statutory phrase in light of the plain language and purpose of the statute, particularly as compared to Plaintiffs' unworkable definition. To begin, the Bureau recognized that it was not interpreting "single function of the trigger" on a blank slate. In *Staples v. United States*, the Supreme Court referred to an "automatic" or "fully automatic" weapon under the National Firearms Act as one "that fires repeatedly with a *single pull* of the trigger," in contrast to one "that fires only one shot with each pull of the trigger." 511 U.S. 600, 602 n.1 (1994) (emphasis added). Further, in *Akins v. United States*, 312 Fed. App'x 197, 200 (11th Cir. 2009) (per curiam), the Eleventh Circuit found the Bureau's interpretation of "single function" as a "single pull of the trigger" to be consistent "with the statute and its legislative history." The Bureau explicitly drew upon both interpretations in crafting its own. *See Bump Stock Rule*, 83 Fed. Reg. at 66,518, 66,527 (quoting *Staples*, 511 U.S. at 602 n.1; *Akins*, 312 Fed. App'x at 200). *See also United States v. Camp*, 343 F.3d 743, 745 (5th Cir. 2003) (using "pull" and "function" synonymously in classifying weapon as a machine gun).

Such an interpretation is also consonant with the ordinary meaning of "function" at the time of the

statute's enactment. *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995) ("When terms used in a statute are undefined, we give them their ordinary meaning.").[3] In 1934, "function" was defined as "to perform, execute" or an "activity; doing; performance." *Function*, WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d ed. 1934). With respect to the statute, the shooter's pull is the single "activity" or "performance" of the trigger that causes the gun to shoot automatically more than one shot. (Where a different activity causes the trigger to shoot, like the flip of a switch, the regulation accounts for it through the inclusion of "and analogous motions.").

Indeed, as early as Congress began discussing restrictions on machine guns through the National Firearms Act, a "single function of the trigger" was understood to mean a "single pull." Congress initially proposed a definition of "machine gun" based on a weapon's capability to fire multiple shots, specifically a firearm that could automatically or semiautomatically shoot "twelve or more shots without

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[3] Plaintiffs rely on the 1968 dictionary definitions of these terms, arguing that Congress "narrowed" the definition of machine gun that year in enacting the Gun Control Act. Appellants' Opening Br. 23, 27. But "unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning at the time Congress enacted the statute." *Amoco Prod. Co. v. S. Ute Indian Tribe*, 526 U.S. 865, 874–75 (1999) (internal quotation marks and citation 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."). Given that Congress enacted the National Firearms Act in 1934, we look to dictionary definitions at that time.

reloading." *See National Firearms Act: Hearings Before the Comm. on Ways and Means, H.R., on H.R. 9066*, 73d Cong. 1 (1934). Testifying before Congress, President of the National Rifle Association Karl T. Frederick advocated for an alternative definition that omitted the number of shots required and incorporated the "single function of the trigger" language. *Id.* at 40. Mr. Frederick further explained that "[t]he distinguishing feature of a machine gun is that by a single pull of the trigger the gun continues to fire as long as there is any ammunition in the belt or in the magazine." *Id.*[4] Roughly one month later, Congress adopted Frederick's definition word for word. *Id.* at 83. *See also* H.R. Rep. No. 73-1780, at 2 (1934) (noting the bill's "usual definition of machine gun as a weapon designed to shoot more than one shot without reloading and by a single pull of the trigger"). Reading "single function" to mean a "single pull" thus reflects the term's contemporaneous understanding.

This definition also aligns with Congress's purpose in enacting federal legislation on machine guns to "[s]trictly regulate the manufacture, sale, transfer and possession of destructive devices" and to "combat the

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[4] Frederick also testified that an automatic Colt pistol would not be a machine gun under his proposed definition because it "require[d] a separate pull of the trigger for every shot fired." *Id.* at 41. (The name of this weapon is deceptive, given that the ATF classified an automatic Colt Pistol as a semiautomatic firearm. *See* ATF, NEWS MEDIA GUIDE TO FIREARMS 5–6 (1978)). Frederick's testimony on this score supports the Bureau's interpretation that an automatic gun requires a single pull to set off a sequence of multiple shots, whereas a semiautomatic gun requires a distinct pull for each shot. Appellee Br. 47–48.

spiralling increase in serious crime in the United States." S. Rep. No. 90-1097, at 2,290 (1968); *see also Huddleston v. United States*, 415 U.S. 814, 824 (1974) ("principal purpose" of the Gun Control Act was to reduce crime) (quoting *id.* at 2,113–14). Congress's concern for the danger posed by machine guns centered on their destructive potential and exacerbation of serious crime. Bump stocks present a heightened capacity for lethality as well; they are estimated to fire between 400 and 800 bullets per minute, as compared to a semiautomatic weapon's 180 bullets per minute. Amicus Br. for Appellee at 19–20. It is therefore consistent with congressional purpose to define "single function" with a focus on the weapon's ease of use.

Turning to "automatically," the statutory text similarly favors the Bureau's definition. The Bureau defines "automatically" as "the result of a self-acting or self-regulating mechanism that allows the firings of multiple rounds." *Bump Stock Rule*, 83 Fed. Reg. at 66,554. This definition pulls directly from dictionaries of the 1930s, which defined "automatic" as "having a self-acting or self-regulating mechanism that performs a required act at a predetermined point in an operation;—said esp. of machinery or devices which perform work formerly or usually done by hand." *Bump Stock Rule*, 83 Fed. Reg. at 66,519; *Automatic*, WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d ed. 1934). The term speaks of a mechanized process that requires less human exertion than an activity "usually done by hand."

The Bureau's prior interpretation of "automatically" focused more on the "self-acting" portion of the

definition. 83 Fed. Reg. at 66,517–18. It previously concluded that a device must contain a spring or similar self-acting mechanism in order to operate "automatically"—therefore, bump stocks did not operate "automatically" because they required some manual input. *Id.* In the current rulemaking, the Bureau correctly recognized not only that "self-acting" can admit of some human input, but also that the word "automatically" encompasses devices that are "self-regulating." *Id.* at 66,519.

This definition has found approval in past judicial interpretations. In *United States v. Olofson*, the Seventh Circuit concluded that under the National Firearms Act, "the adverb 'automatically' . . . delineates how the discharge of multiple rounds from a weapon occurs: as the result of a self-acting mechanism. That mechanism is one that is set in motion by a single function of the trigger and is accomplished without manual reloading." 563 F.3d 652, 658 (7th Cir. 2009).

Statutory context also helps guide our interpretation here, given that "automatic" cannot be read in isolation. The statute defines a machine gun as a weapon that shoots "automatically more than one shot, without manual reloading, *by* a single function of the trigger." 26 U.S.C. § 5845(b) (emphasis added). Equally important is the term "by," defined as "through the means of; in consequence of;—indicating that which is instrumental; as, to take *by* force; to win regard *by* showing kindness; to teach *by* example." *By*, WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d ed. 1934). As used in the statute, a machine gun is a weapon that automatically shoots more than one shot "through the

means of" or "in consequence of" a single function of the trigger.

Rather than limiting the term "automatically," the phrase "by a single function" clarifies it. With the use of "by," "single function" is best understood as the antecedent to "automatically"—the initiating human action that sets off a self-regulating sequence of events. *See United States v. Evans*, 978 F.2d 1112, 1113 n.2 (9th Cir. 1992) ("'by a single function of the trigger' describes the action that enables the weapon to 'shoot . . . automatically . . . without manual reloading,' not the trigger mechanism."). The statute does not suggest that human involvement is confined to the "predetermined point" of the operation. Instead, "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." *Guedes II*, 920 F.3d at 31.

In sum, under the National Firearms Act and Gun Control Act, a "single function" of the trigger is best understood as a "single pull of the trigger" and "analogous motions," while automatically is best understood to mean a "result of a self-acting or self-regulating mechanism." 83 Fed. Reg. at 66,514. Taken together, these interpretations provide the best definition of a machine gun.

(ii)

The best definition of machine gun settled, we turn to whether a bump stock fits within it. In terms of how

a bump stock operates, the District Court found as follows: "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, 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 harnesses and directs 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 pulls of the trigger." *Guedes III*, 520 F. Supp. 3d at 58, J.A. 43–44. Plaintiffs conceded that they were not challenging any of the District Court's factual findings. *See* Appellants' Opening Br. 20 ("there is no confusion or dispute whatsoever regarding *how* a bump stock physically works"); Oral Arg. Tr. at 83–84 (answering "no" to the question of whether Appellants contended that the "District Court erroneously found a fact to be undisputed that was actually disputed"). Based on these facts, a bump stock is a machine gun under the best interpretation of the statute.

It bears noting that these factual findings correspond with the Bureau's statement of undisputed facts submitted in support of a motion for summary judgment, which cited evidence in the record in support of each statement. *See* Dkt. 61-3 ¶¶ 70–73 ("[u]sing a bump stock as designed and intended, a shooter does not need to pull the trigger more than once to produce more than one shot"). Plaintiffs did not properly dispute these facts, because their opposition failed to

cite any evidence, as required by the federal and local rules. *See* Dkt. 63-1 ¶¶ 70–73; Fed. R. Civ. P. 56(c)(1)(A); Local Rule 7(h)(1).[5] "While the local rules provide the mechanics, the Federal Rules of Civil Procedure explicitly require a party opposing summary judgment to support an assertion that a fact is genuinely disputed with materials in the record." *Oviedo v. Washington Metro. Area Transit Auth.*, 948 F.3d 386, 396 (D.C. Cir. 2020). *See also Bush v. D.C.*, 595 F.3d 384, 387 (D.C. Cir 2010); *Jackson v. Finnegan, Henderson, Farabow, Garrett & Dunner*, 101 F.3d 145, 150–51 (D.C. Cir. 1996).

Analyzing the District Court's factual findings under the Bump Stock Rule, we conclude that they are consistent with the best interpretation of the statute. First, as the District Court explained, a shooter operates a bump stock by a single pull, eliminating the need for additional pulls. *Guedes III*, 520 F. Supp. 3d at 58, J.A. 44. The shooter pulls the trigger once and his finger rests against the extension ledge, or the edge of the bump stock device. *See* J.A. 35.[6] After the first pull

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[5] For example, in response to the Bureau's description of the trigger pull initiating a firing sequence, Plaintiffs responded, "In dispute as to the phrasing of multiple portions of the statement; which are attempts to draw legal conclusions, not accurately describe facts." Dkt. 63-1 ¶ 71.

[6] Plaintiffs entered a video into the record demonstrating how a bump stock operates. J.A. 35 (citing Patton Media & Consulting, LLC, *Bump Stock Analytical Video FPC/FICG*, YOUTUBE (June 14, 2018), https://youtu.be/1OyK2RdO63U). The attached appendix includes still photographs taken from that video, depicting the function of the trigger.

of the trigger, the stock moves repeatedly back-and-forth, causing the trigger to "bump" against the stationary finger. Thus, only a single "function" or "pull" of the trigger by the shooter activates the multiple-shot sequence; no further pulls are needed. Put differently, using a bump stock, a single pull of the trigger propels the trigger against the stationary finger and causes the subsequent shots through the force of recoil from firing the first bullet. Following the initial pull of the trigger, if nothing changes (i.e., the shooter maintains forward pressure on the barrel), the firearm will continue to fire additional shots continuously. As found by the District Court, the shooter is "able to reengage the trigger without additional pulls of the trigger." 520 F. Supp. 3d at 58, J.A. 44.

Second, a bump stock functions automatically because it is self-regulating. The bump stock "harnesses and directs the firearm's recoil energy" along a linear path, "thereby forcing the firearm to shift back and forth." *Guedes III*, 520 F. Supp. 3d at 58, J.A. 43–44. That process will not conclude until the shooter releases forward pressure on the barrel, the weapon runs out of ammunition, or it malfunctions. In other words, a bump stock regulates the weapon's back-and-forth movement after a predetermined point in an operation—the shooter's pull of the trigger—and remains self-regulating as long as the shooter maintains pressure on the barrel.

Looking to the specific bump stock devices at issue, even the manufacturer's description admits of this interpretation of "automatic." Plaintiff Damien Guedes purchased his bump stock device from Bump Fire

Systems, while Plaintiff Shane Roden purchased a Slide Fire bump stock device. *See* Am. Compl. at 19–20, *Guedes I* (No.18-cv-02988). In an explanation of firing with a bump stock, the manufacturer Bump Fire Systems described it as a legal method of "full-auto firing." Administrative Record 840. According to the description, the shooter operates the bump stock "by gripping the fore-end of the barrel and pulling it forward," allowing him "to recreate the feeling of automatic firing." *Id.* This description confirms what the Bureau sets forth: a bump stock enables a shooter to engage in automatic firing by pulling the trigger and maintaining pressure on the stock.

This interpretation of "automatically" also comports with how the United States Patent and Trademark Office ("USPTO") interprets the term with respect to firearms. During the rulemaking process, the Bureau observed that Slide Fire, the manufacturer of the bump stocks used in the Las Vegas shooting, "has obtained multiple patents for its designs, and has rigorously enforced the patents to prevent competitors from infringing them." 83 Fed. Reg. at 13,443; *see also* 83 Fed. Reg. at 66,538, 66,545 (discussing patents); J.A. 32, Dkt. 61-1 at 16 (discussing patent application); Dkt. 61-3 ¶ 42 (referring to patents); Administrative Record 382–90 (patent application); *id.* at 834 (referring to patents). The USPTO has classified three different Slide Fire bump stock patents as primarily within the subclass 89/140,[7] which is used for weapons that are "[c]onvertible to full automatic," meaning

[7] U.S. Patent No. 8,356,542, at [52]; U.S. Patent No. 8,176,835, at [52]; U.S. Patent No. 8,127,658, at [52].

"[g]uns wherein the firing device is selectively operable either full-automatic or semi-automatic." Class 89 Ordnance, *Classification Resources*, USPTO, https://bit.ly/ 3c92Dyd.[8] The USPTO further explains that "[t]he terms 'full-automatic' or 'automatic' are applied to firing devices which effect continuous fire as long as the trigger is retracted and ammunition is supplied to the gun." *Id.* While not dispositive, it is nonetheless significant that the USPTO classifies the bump stock as a device that enables a semiautomatic weapon to operate in a manner functionally equivalent to that of a fully automatic weapon.[9]

Accordingly, under the best interpretation of the statute, a bump stock is a self-regulating mechanism that allows a shooter to shoot more than one shot through a single pull of the trigger. As such, it is a machine gun under the National Firearms Act and Gun Control Act.

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[8] In the USPTO classification system, "[s]ubclasses delineate processes, structural features, and functional features of the subject matter encompassed within the scope of a class." *Amgen Inc. v. F. Hoffman-La Roche, Ltd.*, 580 F.3d 1340, 1347 n.1 (Fed. Cir. 2009).

[9] What's more, all three patents describe a key feature of the bump stock as directing the recoil force along a "constrained linear path," *see* '542 Patent col. 3, l. 23; '835 Patent col. 7, l. 51; '658 Patent col. 3, l. 49–50, which is the "self-regulating" (i.e. automatic) feature that enables the recoil of the weapon to propel the trigger repeatedly into the stationary finger, resulting in the continuous firing of the weapon. *See supra* at 19.

(iii)

Unlike the Bureau, Plaintiffs have failed to show that their "machine gun" definition is workable. *See United States v. California*, 381 U.S. 139, 165 (1965) ("we best fill our responsibility of giving content to the words which Congress employed by adopting the best and most workable definitions available"). With regard to "single function of the trigger," Plaintiffs argue for a trigger-focused, rather than a shooter-focused, interpretation. In their view, the statutory language refers to the mechanical action of the trigger itself. *See* Appellants' Opening Br. 23–24 ("'function' thus most reasonably refers to the mechanical action of the trigger" and "the function of the trigger is complete when the hammer is released, and a shot is fired"). Drawing upon the Sixth Circuit's now-overturned opinion, they contend that this phrase "necessarily refers to the *trigger* and not to the shooter or the shooter's act of pulling." Appellants' Opening Br. 23 (quoting *Gun Owners of America, Inc. v. Garland*, 992 F.3d 446, 471 (6th Cir. 2021), *vacated*, 19 F.4th 890 (6th Cir. 2021) (en banc)). Thus, "[a]ny subsequent bump, pull, or other interaction between the shooter's finger and the trigger . . . causes a second or subsequent function of the trigger, not a continuation of the initial completed function." *Id.* at 24. Because a semiautomatic gun outfitted with a bump stock releases the hammer for each discharge, they assert that it does not fire more than one round via a single function of the trigger.

Yet, when asked at oral argument whether a hypothetical invention—a mechanical hand with a fast,

continuously moving trigger finger that could be attached to a semiautomatic gun and operated by a push of a button—qualified as a machine gun, Plaintiffs answered in the affirmative. Oral Arg. Tr. at 81–83; *see also id.* at 56 for earlier discussion. According to Plaintiffs, we could redefine the trigger in this scenario to the button being pressed, rather than the internal trigger mechanism. But this reasoning diverges from Plaintiffs' definition of "single function of the trigger" as a mechanistic act of the conventional firearm trigger itself. There are no two ways about it: either the trigger is the lever that releases the hammer and discharges a bullet, or it is not. J.A. 71. Such a concession shows that Plaintiffs' definition is unworkable, internally inconsistent, and counterintuitive.

By contrast, the Bump Stock Rule's definition would encompass this mechanical hand device. In response to comments about different trigger activation methods, the Bureau added the phrase "and analogous motions" to the final rule, thereby including devices that function via "a push or other method of initiating the firing cycle." 83 Fed. Reg. at 66,534–35. In this scenario, pushing the button neatly qualifies as an "analogous motion."

Even assuming, moreover, that it were appropriate to reconceive of the trigger on the firearm with the mechanical hand device to be the button that activates the mechanical hand's trigger finger, imagine another type of firearm that contains no such button but only a standard trigger, and that operates such that the shooter's pull of the trigger causes an internal motor to

initiate a repeated movement of the trigger back and forth—with a release of the hammer each time—producing a continuous, automatic series of shots. Suppose that the weapon's trigger would automatically move back and forth after the shooter's initial pull of the trigger until the ammunition is spent, even if the shooter removes his trigger finger from the weapon during the firing sequence. Indeed, suppose that the shooter can *stop* the automatic firing sequence, should he so choose, by placing his trigger finger back on the weapon and contacting the automatically moving trigger.

Under Plaintiffs' strict understanding of the "single function of the trigger" to mean the mechanistic movement of the trigger itself, this weapon would evade classification as a machine gun even though the shooter's initial pull of the trigger causes an automatic series of trigger movements and a resulting automatic series of shots, without any further input by the shooter whatsoever. The weapon is similar to the Akins Accelerator, *see* 83 Fed. Reg. at 66,517, except that the hypothetical weapon involves an internal motor that causes the trigger to automatically move back and forth after the initial pull, as opposed to an internal spring that causes the barrel to automatically move back and forth into a stationary trigger finger after the initial pull: in either case, the trigger continues to move, and shots continue to fire, without any additional input from the shooter.

Plaintiffs believe that the Akins Accelerator was mistakenly dubbed a machine gun because it, like a bump stock device, fires only one round with each

mechanical movement of the trigger. *See* Appellants' Opening Br. 8 n.2. The same is true of the hypothetical weapon described here. And insofar as Plaintiffs might nonetheless attempt to draw a distinction between the two, it is hard to see how one would involve a "single function of the trigger" and the other would not: with both, the shooter's initial pull of the trigger initiates an automatic sequence (caused by an internal motor, on one hand, and an internal spring, on the other) whereby the weapon's trigger then continuously moves back and forth, causing additional shots to fire, without any further input by the shooter. And with both, that automatic sequence continues until ammunition is exhausted; the weapon malfunctions; or the shooter takes a new action to stop that sequence. In sum, Plaintiffs' proffered interpretation of "single function of the trigger" is unsound.

Plaintiffs' interpretation of "automatically" is no less problematic. They interpret "automatically" as "self-acting" or requiring only "the expressly specified initiating action" before operating on its own. Appellants' Opening Br. 27–28. In their view, bump stocks do not operate automatically because the shooter must maintain constant forward pressure on the bump stock with his non-trigger hand to continue firing. This definition would remove what Plaintiffs would describe as a prototypical machine gun from the realm of "automatic," as the shooter must both pull the trigger and keep his finger depressed on the trigger to continue firing. Once the force is removed from the trigger, firing ceases. Per Plaintiffs' definition, only a gun that required no human input to fire more than a single shot would qualify as a machine gun. By this logic, we

would no longer characterize even the prototypical machine gun as a "machine gun," given the extent of rearward pressure on the trigger required to operate it. That cannot be right.

Plaintiffs also point to Congress's decision to remove "or semiautomatically" from the definition of machine gun in the 1968 Gun Control Act as evidence that "automatically" must be interpreted narrowly in their favor. Appellants' Opening Br. 30–32. According to Plaintiffs, the significance of this erasure is linked to the Treasury Department's 1955 ruling that crank-operated Gatling guns were not machine guns. *See* Revenue Ruling 55-528, 1955 WL 9410, at *1 (Jan. 1, 1955). Taken together, Plaintiffs argue that Congress indicated its approval of this ruling by removing "or semiautomatically" from the statute, thus advancing a narrow interpretation of the statute. Yet, Plaintiffs have not offered any evidence of the link between the 1955 ruling and Congress's 1968 definition amendment. Moreover, the exclusion of semiautomatic weapons from the Gun Control Act is not implicated here; we are concerned only with the conversion of semiautomatic weapons to fully automatic firearms.

Finally, Plaintiffs' fear that all semiautomatic weapons will be subject to regulation because they can be modified with everyday items, like belt loops, to fire automatically is unfounded. Unlike a bump stock, a rubber band or belt loop is not automatic because it is not self-regulating. Rather than harnessing the firearm's recoil energy from a rubber band or belt loop in a linear path to engage in a continuous firing sequence, the shooter must harness and direct the

recoil energy himself. *Bump Stock Rule*, 83 Fed. Reg. at 66,533. As the Bureau explained, "the belt loop or 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.* Harnessing the recoil energy without an automatic device requires a great deal of skill and renders it exponentially more difficult to bump fire. These everyday devices are "objectively different" from bump stocks and do not qualify as machine guns under the Bureau's interpretation. *Id.*

IV.

Plaintiffs also urge us to apply the rule of lenity. The rule of lenity instructs courts to resolve ambiguity in favor of a criminal defendant, but it "only applies if, after considering text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the statute that the Court must simply guess at what Congress intended." *Maracich v. Spears*, 570 U.S. 48, 76 (2013). *See also Staples*, 511 U.S. at 619 n.17 (applying rule of lenity was unnecessary where meaning could be derived through interpretive tools).

It is only where the Court has exhausted "everything from which aid can be derived" that lenity plays a role. *Muscarello v. United States*, 524 U.S. 125, 138 (1998) (internal quotation marks and citations omitted). For example, in *United States v. Bass*, the Court applied the rule of lenity where it could not decisively interpret the prosecution's evidentiary burden from Title VII of the Omnibus Crime Control and Safe Streets Act of 1968. 404 U.S. 336, 337–38, 347. Given the lack of clear statutory language,

legislative history, and a clear statement of congressional purpose, the Court resorted to lenity to approve a narrower construction in this instance. *Id.* at 347–50. *See also United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221 (1952) (turning to lenity in Fair Labor Standards Act case where "literal reading" of text did not illuminate statutory construction). Fortunately, we are not left to "guess at" the meaning of the text at issue here, *see Maracich*, 570 U.S. at 76, given the array of tools at our disposal, including the statute's plain language, prior case law, contemporaneous understandings, and congressional purpose. As a result, we are not left with the type of "grievous ambiguity," *see id.*, that would require the rule of lenity's application here.

To be sure, the Bureau's interpretation is not the only possible interpretation of the statute. But most importantly, the task before us is to find the best interpretation of the statute, which does not mean that it is the only "permissible" or reasonable interpretation. *See Edelman*, 535 U.S. at 114 & n.8 (internal quotation marks omitted). Further, the predominant concern among those skeptical of upholding the Bureau's interpretation is their view that it is inappropriate to use the *Chevron* framework to uphold the regulation, which is not at issue here. *See Guedes v. ATF*, 140 S. Ct. 789, 789–91 (2020) (Mem.) (Gorsuch, J., concurring in denial of certiorari) (questioning application of *Chevron* deference to the rule before us); *Gun Owners of America, Inc. v. Garland*, 19 F. 4th 890, 925 (6th Cir. 2021) (Murphy, J., dissenting) (critiquing circuit courts for failing to interpret statute before turning to *Chevron*); *Aposhian v. Wilkinson*, 989 F.3d

890, 894–96 (2021) (Mem.) (Tymkovich, J., dissenting) (same). And it is worth noting that every circuit to have considered this question has so far upheld the Bump Stock Rule. *See Cargill v. Garland*, 20 F.4th 1004 (5th Cir. 2021), *vacated and en banc granted*, -- F.4th -- (2022); *Gun Owners v. Garland*, 19 F.4th 890 (6th Cir. 2021) (en banc); *Aposhian v. Barr*, 958 F.3d 969 (10th Cir. 2020), *en banc granted but previous order reinstated*, 989 F.3d 890 (Mem.).

The manufacturer of one of the bump stock devices owned by Plaintiffs once promoted that its product enabled "Spraying 900 rounds in 60 seconds." *What is Bump Fire*, BUMP FIRE SYS., https://bit.ly/3PdRTNH. We join those circuits in concluding that these devices, which enable such prodigious rapid-fire capability upon a pull of the trigger, fall within the definition of "machine gun" in the National Firearms Act and Gun Control Act. For the foregoing reasons, the District Court's judgment is affirmed.

So ordered.

APPENDIX

Figure 1: The shooter pushes the firing unit so that it slides forward inside the bump stock and he pulls the trigger.

Figure 2: After the first shot, the shooter's finger rests against the extension ledge of the bump stock, which "constrains" the recoil and the opposing forward force so that the firing unit slides in a linear direction, propelling the firing unit against the stationary finger, causing the firing cycle to repeat.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Filed February 19, 2021]

No. 18-cv-2988 (DLF)

DAMIEN GUEDES, *et al.*,
Plaintiffs,

v.

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

No. 18-cv-3086 (DLF)

DAVID CODREA, *et al.*,
Plaintiffs,

v.

MONTY WILKINSON,[1] Acting Attorney

[1] Matthew G. Whitaker was the Acting Attorney General when this suit was filed; Monty Wilkinson, the current Acting Attorney General, was automatically substituted in the case caption. *See* Fed. R. Civ. P. 25(d).

General, *et al.*,)
Defendants.)
_____)

MEMORANDUM OPINION

On October 1, 2017, a lone gunman opened fire on a concert in Las Vegas, killing 58 people and injuring hundreds more. He used weapons equipped with bump stocks, which allow a semiautomatic gun to fire at a faster rate. Following this tragedy, the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) promulgated a rule that classifies weapons equipped with bump stocks as machineguns under the National Firearms Act, 26 U.S.C. §§ 5801–5872, thus rendering them unlawful to possess. *See* Bump-Stock-Type Devices, 83 Fed. Reg. 66,514 (Dec. 26, 2018). The plaintiffs brought suit, in separate cases, to enjoin the rule. This Court held a hearing on their motion for a preliminary injunction and denied the injunction, *see Guedes v. ATF*, 356 F. Supp. 3d 109 (D.D.C. 2019) ("*Guedes I*"); the D.C. Circuit affirmed, *see Guedes v. ATF*, 920 F.3d 1 (D.C. Cir. 2019) ("*Guedes II*"). Now before the Court are the defendants' Motions for Summary Judgment, Dkt. 38 (*Codrea*); Dkt. 61 (*Guedes*), and the plaintiffs' Cross Motions for Summary Judgment, Dkt. 44 (*Codrea*), Dkt. 62 (*Guedes*).[2] For the same reasons articulated in the

[2] The parties filed identical briefs in each of the above-captioned cases. *See* Defs.' Mot. for Summ. J., Dkt. 38 at 1 n.1 (*Codrea*) (noting the parties' agreement to file identical motions and responses in each case). Accordingly, the Court addresses the motions together. In the interest of clarity, the Court will note the

Court's previous Memorandum Opinion and by the D.C. Circuit, the Court will grant the defendants' motions for summary judgment and deny the plaintiffs' cross-motions.

I. BACKGROUND

The Court previously recounted in detail the facts and regulatory history underlying this lawsuit. *See Guedes I*, 356 F. Supp. 3d at 119–26. To summarize, the central legal question in this dispute is whether the National Firearm Act's definition of "machinegun" can encompass 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, 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 harnesses and directs the firearm's recoil energy, thereby forcing the firearm to shift back and forth, each time "bumping" the shooter's stationary trigger finger. The shooter is thus able to reengage the trigger without additional pulls of the trigger.

The relevant statutes at issue are the National Firearms Act of 1934 (NFA) and the Firearm Owners Protection Act of 1986 (FOPA). The NFA provides the following definition for the term "machinegun":

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accompanying case name in a parenthetical following the citation of a docket entry.

> 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). The FOPA 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).

On March 29, 2018, ATF proposed the rule banning bump stocks 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). 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. 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 *Guedes* plaintiffs filed their complaint and moved for a preliminary injunction on December 18, 2018. *See* No. 18-cv-2988, Dkt. 1, 2. The *Codrea* plaintiffs filed their complaint on December 27, 2018, *see* No. 18-cv-3086, Dkt. 1, and likewise moved for a preliminary injunction on January 18, 2019. *See* Dkt. 5 (*Codrea*). Following hearings on February 6, 2019 (*Guedes*) and February 19, 2019 (*Codrea*), the Court denied the motions for a preliminary injunction because the plaintiffs lacked a reasonable likelihood of success on the merits of their legal theories. *See Guedes I*, 356 F. Supp. 3d 109 (D.D.C. 2019). The D.C.

Circuit affirmed. *See Guedes II*, 920 F.3d 1. In relevant part, the D.C. Circuit held that the bump stock rule was a legislative rule, that *Chevron* deference was proper, and that ATF reasonably interpreted the ambiguous statute. *See generally id.* The plaintiffs then petitioned the Supreme Court of the United States for a writ of certiorari, which the Court denied. *See Guedes v. ATF*, No. 19-296, 140 S. Ct. 789 (Mar. 2, 2020).[3] The cross-motions for summary judgment in the two cases are now ripe for review.

II. LEGAL STANDARDS

A court grants summary judgment if the moving party "shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986). A "material" fact is one with potential to change the substantive outcome of the litigation. *See id.* at 248; *Holcomb v. Powell*, 433 F.3d 889, 895 (D.C. Cir. 2006). A dispute is "genuine" if a reasonable jury could determine that the evidence warrants a verdict for the nonmoving party. *See Liberty Lobby*, 477 U.S. at 248; *Holcomb*, 433 F.3d at 895.

In an Administrative Procedure Act case, summary judgment "serves as the mechanism for deciding, as a matter of law, whether the agency action is supported by the administrative record and otherwise consistent with the APA standard of review." *Sierra Club v.*

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[3] Justice Gorsuch filed a Statement with the denial of certiorari explaining his view that *Chevron* deference is inappropriate in this case. 140 S. Ct. 789 (Statement of Justice Gorsuch).

Mainella, 459 F. Supp. 2d 76, 90 (D.D.C. 2006). The Court will "hold unlawful and set aside" agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A), "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," *id.* § 706(2)(C), or "unsupported by substantial evidence," *id.* § 706(2)(E).

In an arbitrary and capricious challenge, the core question is whether the agency's decision was "the product of reasoned decisionmaking." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983); *see also Nat'l Telephone Coop. Ass'n v. FCC*, 563 F.3d 536, 540 (D.C. Cir. 2009) ("The APA's arbitrary-and-capricious standard requires that agency rules be reasonable and reasonably explained."). The court's review is "fundamentally deferential—especially with respect to matters relating to an agency's areas of technical expertise." *Fox v. Clinton*, 684 F.3d 67, 75 (D.C. Cir. 2012) (quotation marks and alteration omitted). The court "is not to substitute its judgment for that of the agency." *State Farm*, 463 U.S. at 43. "Nevertheless, the 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.* (internal quotation marks omitted). When reviewing that explanation, the court "must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Id.* (internal quotation marks omitted). For example, an agency action is arbitrary and capricious if the agency "entirely failed to consider

an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before [it], or [the explanation] is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id.* The party challenging an agency's action as arbitrary and capricious bears the burden of proof. *Pierce v. SEC*, 786 F.3d 1027, 1035 (D.C. Cir. 2015).

To the extent that an agency action is based on the agency's interpretation of a statute it administers, the court's review is governed by the two-step *Chevron* doctrine. At Step One, a court must determine "whether Congress has directly spoken to the precise question at issue" or instead has delegated to an agency the legislative authority to "elucidate a specific provision of the statute by regulation." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842, 843–44. If the latter, a court must reach Step Two, which asks whether the agency action "is based on a permissible construction of the statute" or instead is "manifestly contrary to the statute." *Id.* at 843, 844.

III. ANALYSIS

The plaintiffs bring several claims under the Administrative Procedure Act (APA), 5 U.S.C. § 551 *et seq*. *See generally* Compl. Dkt. 1 (*Codrea*); Compl. Dkt. 1 (*Guedes*). 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). The plaintiffs principally argue that the bump stock rule cannot be squared with the statutory definition of a machinegun, that ATF

lacked statutory authority to promulgate the rule as it did, that ATF arbitrarily drew lines in distinguishing bump stocks from other devices, that ATF should have held a public hearing, that ATF improperly changed its previous position, and that ATF was unduly influenced by political actors. *See generally* Am. Memo. in Supp. of Pls.' Cross Mot. for Summ. J., Dkt. 41 (*Codrea*). In addition to the APA claims, the plaintiffs also bring due process, separation of powers, and takings claims.[4] *Id.*

A. The APA Claims

1. *ATF's Statutory Interpretation*

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 result 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,

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[4] At the preliminary injunction stage, the plaintiffs also brought a statutory and constitutional challenge to Matthew Whitaker's designation as Acting Attorney General. "This case no longer presents a challenge to the validity of the designation of former Acting Attorney General Matthew Whitaker," however, as that question "has already been litigated to dismissal in a separate case before this Court." Defs.' Mot. for Summ. J. at 8 n.6 (citing *Firearms Policy Coal. v. Barr*, 419 F. Supp. 3d 118 (D.D.C. 2019)); *see generally* Am. Memo. in Supp. of Pls.' Cross Mot. for Summ. J. (not raising the Whitaker issue on summary judgment).

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.

a. Whether the *Chevron* Doctrine Applies

Because ATF interpreted a statute in promulgating the bump stock rule, the threshold question is whether the *Chevron* doctrine applies. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). The plaintiffs argue that *Chevron* deference does not apply because 1) ATF waived *Chevron*, 2) the rule of lenity should prevent the application of *Chevron*, and 3) *Chevron* is unconstitutional. The first two arguments have already been addressed in detail by the D.C. Circuit in *Guedes II*, which held that the application of *Chevron* deference in this case was proper, 920 F.3d at 17–22, and the third argument is foreclosed by binding precedent. The Court will address each in turn.

First, as to waiver,[5] the D.C. Circuit held that "an agency's lawyers . . . cannot waive *Chevron* if the underlying agency action 'manifests its engagement in the kind of interpretive exercise to which review under Chevron generally applies.'" *Id.* at 23 (citing *SoundExchange, Inc. v. Copyright Royalty Bd.*, 904 F.3d 41, 54 (D.C. Cir. 2018)). It further held that "[i]n this case, the Bump-Stock Rule plainly indicates the

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[5] It is not entirely clear that the defendants waived *Chevron* deference before this Court, even if such a waiver were possible. In the rulemaking itself, ATF explicitly relied on *Chevron*, invoking the doctrine by name and applying traditional two-step *Chevron* analysis. *Guedes II*, 920 F.3d at 8, 19 (noting that ATF "elaborate[ed] at length as to how *Chevron* applies to the Rule"). When the Court raised the issue of *Chevron* at the preliminary injunction hearing, *see* Transcript of Preliminary Injunction Hearing at 57:12-13, Dkt. 25 (*Codrea*), counsel for the plaintiffs responded that none of the parties had briefed the issue, *id.* at 57:18-20, and counsel for the defendants did not address the issue during the hearing, *see generally id.* Now, at the summary judgment stage the defendants argue that if the Court *were* to apply *Chevron*, the rule *should* be upheld on that basis. Defs.' Reply, Dkt. 42 at 17–18 (*Codrea*). At oral argument before the Court of Appeals, however, government counsel informed the Court that "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." *Guedes II*, 920 F.3d at 21. These mixed signals leave some question as to whether the defendants waived *Chevron* deference. *Wood v. Milyard*, 566 U.S. 463, 470 n.4 (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."); *see also Guedes II*, 920 F.3d at 22 (noting that the D.C. Circuit has already held that an agency cannot *forfeit Chevron* deference if the forfeiture is not consistent with the agency's underlying actions). Ultimately, though, the D.C. Circuit's clear holding on waiver in *Guedes II* renders the question academic.

agency's view that it was engaging in a rulemaking entitled to Chevron deference." *Id.* For example, the agency specifically referenced the *Chevron* doctrine in its rulemaking. *See id.* ("[A]nother 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."); 83 Fed. Reg. at 66,527 (invoking *Chevron*). Accordingly, any supposed waiver cannot overcome this conclusion.[6] Second, the argument that the rule of lenity should precede *Chevron* deference, or more broadly, that *Chevron* should not apply in cases involving criminal penalties, is foreclosed by the weight of precedent to the contrary. As the D.C. Circuit discussed at length, the Supreme Court has repeatedly applied *Chevron* to regulations with criminal

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[6] For this same reason, any argument that ATF was operating under the mistaken assumption that it lacked discretion to interpret the statutory text does not accord with the administrative record. *See* Am. Memo. in Supp. of Pls.' Cross Mot. for Summ. J. at 36. In truth, "[t]he agency plainly believed it was acting in a manner warranting *Chevron* treatment given that it expressly invoked the *Chevron* framework in the Rule." *Guedes II*, 920 F.3d at 21. For example, in response to comments, ATF explained that it "ha[d] the authority to interpret elements of the definition of 'machinegun' like 'automatically' and 'single function of the trigger,'" and that its "*construction* of those terms is *reasonable* under *Chevron*." 83 Fed. Reg. at 66,526–27 (emphasis added); *see Guedes II*, 920 F.3d at 23. Though ATF also emphasized that the rule's interpretations were consistent with the plain meaning of those terms, *id.* at 66527, it concluded that, "even if those terms are ambiguous, this rule rests on a reasonable construction of them." *Id.* That ATF believed (and continues to believe) that its interpretation accords with the best reading of the text does not mean that the agency labored under an incorrect assumption requiring remand.

implications. *Guedes II*, 920 F.3d at 24 (listing examples). Indeed, in the case of *Chevron v. NRDC* itself, the regulation in controversy contained a criminal penalty of up to one year of imprisonment. *Id.* The securities laws, which frequently receive *Chevron* deference despite the criminal implications of securities regulations, provide another compelling example. *Id.* (collecting cases).

To be sure, the Supreme Court has stated that "criminal laws are for courts, not for the Government, to construe." *Abramski v. United States*, 573 U.S. 169, 191 (2014). Yet despite this principle, the Supreme Court has never held—in the face of the many examples to the contrary—that *Chevron* does not apply in cases with criminal implications, or that the rule of lenity subsumes *Chevron*. *Guedes II*, 920 F.3d at 27. In fact, as to lenity, "the [Supreme] Court squarely rejected the argument that 'the rule of lenity should foreclose any deference to' the agency's interpretation of a statute simply 'because the statute includes criminal penalties.'" *See id.* at 27 (citing *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 704 n.18, (1995)). And the D.C. Circuit, relying on *Babbitt*, has done the same. *Competitive Enter. Inst. v. United States Dep't of Transportation*, 863 F.3d 911, 915 n.4 (D.C. Cir. 2017) ("We apply the *Chevron* framework to this facial challenge even though violating § 41706 can bring criminal penalties.") (citing *Babbitt*, 515 U.S. at 704 n.18)). Finally, as for the argument that *Chevron* deference violates the Constitution, this Court is bound by the precedent of *Chevron v. NRDC*, 467 U.S. 837, and must apply the doctrine as precedent dictates.

b. Whether ATF Is Entitled to *Chevron* Deference

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. of Or. v. Jewell*, 830 F.3d 552, 558 (D.C. Cir. 2016) (citing *Chevron*, 467 U.S. 837). "[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). 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. 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." *Loving v. IRS*, 742 F.3d 1013, 1016 (D.C. Cir. 2014). 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*, 138 S. Ct. 2067, 2070 (2018) (internal quotation marks and alteration 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.").

The first question, then, is whether the statutory language at issue here is ambiguous. Both this Court at the preliminary injunction stage and the D.C. Circuit on appeal determined that the statutory

language was ambiguous. *See Guedes II*, 920 F.3d at 28–30; *Guedes I*, 356 F. Supp. 3d at 130–32. In particular, this Court recognized that although "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,'" *Guedes I*, 356 F. Supp. 3d at 120 (quoting 26 U.S.C. § 5845(b)), "it did not further define the terms single function of the trigger or automatically." *Id.* (internal quotation marks omitted). This Court went on to employ the ordinary tools of statutory interpretation, including contemporaneous dictionary definitions, to find that the terms "single function of the trigger" and "automatically" in this context are ambiguous. *Guedes I*, 356 F. Supp. 3d at 130–32. The D.C. Circuit likewise held that "the statutory phrase 'single function of the trigger' admits of more than one interpretation." *Guedes II*, 920 F.3d at 29. "It could mean a mechanical act of the trigger," *id.* at 29 (internal quotation marks omitted), an interpretation that would "tend to exclude bump-stock devices," *id.*, *or* it could mean "a single pull of the trigger from the perspective of the shooter," *id.*, which "would tend to include bump-stock devices." *Id.* In other words, the statutory language remains ambiguous.[7]

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[7] The plaintiffs attempt to overcome this conclusion by arguing that Congress "ratified" their interpretation of the statutory language to exclude bump stocks. *See* Am. Memo. in Supp. of Pls.' Cross Mot. for Summ. J. at 24 (referencing Pub. L. 90-618, 48 Stat. 1213, 1231 (Oct. 22, 1968)). By way of background, in 1955, ATF interpreted the NFA's definition of machinegun to include some Gatling guns while excluding others. Revenue Ruling 55-528, 1955

Thus, the next step is to determine whether or not ATF's interpretation of the statutory language is reasonable. "This inquiry, often 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." (internal quotation marks and alteration omitted)).

The interpretation of the phrase "single function of the trigger" is reasonable. *See Guedes II*, 920 F.3d at 31. Courts have often used the word "pull" when

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WL 9410 (Jan. 1, 1955). Thirteen years later, in 1968, Congress reenacted the NFA's definition of machinegun with one change—it removed the phrase "or semiautomatically" from the first sentence. *See* Pub. L. 90-618, 48 Stat. 1213, 1231 (Oct. 22, 1968). The plaintiffs contend that this congressional action implies that bump stocks cannot be included in the current definition. *See* Am. Memo. in Supp. of Pls.' Cross Mot. for Summ. J. at 24. No doubt, "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute *without change*." *Lorillard v. Pons*, 434 U.S. 575, 580 (1978). But that is not the case here. In fact, Congress reenacted the statute (over a decade later) with a major change entirely unrelated to ATF's interpretation on Gatling guns. Further, the plaintiffs point to no evidence that ATF's interpretation on Gatling guns so settled the definition of "machinegun" that it implicitly bound the future Congress. *See Bragdon v. Abbott*, 524 U.S. 624, 645 (1998) ("When administrative and judicial interpretations have *settled* the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well.") (emphasis added). In sum, this argument is unpersuasive.

discussing the statutory definition of "machinegun." The Supreme Court, for example, 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 (1994) (emphasis added). The Court then contrasted automatic machineguns 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.* And the Eleventh Circuit adopted a similar interpretation when it upheld ATF's decision to treat Akins Accelerators as machineguns 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 v. United States*, 312 F. App'x 197, 200 (11th Cir. 2009). 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 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). In sum, 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.

The interpretation of the word "automatically" in this context is also reasonable. *See Guedes II*, 920 F.3d

at 31. ATF reasoned that a bump stock permits 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). It is true that 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 the definition of "automatically" does not mean that an automatic device must operate without *any* manual input. *See Guedes II*, 920 F.3d at 30 ("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." (internal quotation marks omitted)); *Guedes I*, 356 F. Supp. 3d at 131, 133. As ATF explained, without a bump stock, the shooter would have to "manually capture, harness, or otherwise utilize th[e] [recoil] energy to fire additional rounds" and "bump fire" a gun. 83 Fed. Reg. at 66532. 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 bump stock creates a "self-acting mechanism" that permits "the discharge of multiple rounds" with "a single function of the trigger . . . without manual

reloading." *United States v. Olofson*, 563 F.3d 652, 658 (7th Cir. 2009) (defining the term "automatically" in the NFA's definition of "machinegun"). In conclusion, ATF reasonably interpreted an ambiguous statute, and its interpretation is entitled to deference.

2. *ATF's Authority to Promulgate the Bump Stock Rule*

For many of the same reasons, the plaintiffs' argument that ATF lacked the authority to state that the NFA's definition of "machinegun" includes bump stocks is unavailing. *See* Am. Memo. in Supp. of Pls.' Cross Mot. for Summ. J. at 39. 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 (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*, 742 F.3d at 1016. Courts 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 (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." (internal quotation marks and alterations omitted)).

It follows that 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 machinegun); *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 machinegun); *cf. Brady*, 914 F.2d at 480 (holding that ATF has discretion to define the term "business premises" in another firearms statute). The same is true here—the plaintiffs have not established that ATF lacked authority to promulgate the bump stock rule.

3. *ATF's Procedures and Evaluation of the Evidence*

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 *State Farm*, 463 U.S. at 43). 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. Fed. Commc'ns Comm'n, 921 F.3d 1102, 1110 (D.C. Cir. 2019) (quoting *State Farm*, 463 U.S. at 43).

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 omitted) (quoting *Judulang v. Holder*, 565 U.S. 42, 52 n.7 (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)).

First, the plaintiffs take issue with how ATF distinguished between bump stocks and other devices or techniques. The plaintiffs note, for example, that "[o]ther simple physical aids, like a belt-loop, a rubber band, any fixed stock itself, or a padded shooting jacket, likewise facilitate bump firing by constraining movement of the firearm, maintaining linearity during recoil, controlling the distance of recoil, and myriad other things a shooter otherwise would have do through greater manual effort." Am. Memo. in Supp. of Pls.' Cross Mot. for Summ. J. at 23. But ATF properly considered (and ultimately rejected) this argument raised in the comment period with a response in the rule itself. *See* 83 Fed. Reg. at 66,532–34; *see also*

Guedes II, 920 F.3d at 32. The rule explained that these other physical aids are distinct from bump stocks because they involve no "self-acting or self-regulating mechanism," 83 Fed. Reg. at 66,532–34, and are not "designed to be affixed" to a semiautomatic weapon. *Id.* at 66516. "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.'" *Guedes II*, 920 F. 3d at 32 (citing 83 Fed. Reg. at 66,533). So too, ATF adequately considered and responded to the argument that binary trigger guns are arbitrarily excluded from the rule's purview. A binary trigger gun shoots two rounds—one after the initial pull of the trigger and one when the trigger is released. *See* 83 Fed. Reg. at 66,534. The Rule explains that these firearms are not machineguns under ATF's definition because the second round is "the result of a separate function of the trigger." *Id.*; *see Guedes II*, 920 F.3d at 33 ("the Rule reasonably distinguishes binary-trigger guns on the ground that they require a second act of volition with the trigger finger") (emphasis omitted); *Guedes I*, 356 F. Supp. 3d at 136 ("ATF adequately and reasonably responded to comments arguing that the 'proposed regulatory text encompasses . . . binary triggers'").

Second, the plaintiffs argue that ATF impermissibly relied on political pressure, namely from the President, to promulgate the bump stock rule. Am. Memo. in Supp. of Pls.' Cross Mot. for Summ. J. at 37. There is no doubt that one impetus for the rule was the political outcry following the Las Vegas mass shooting. *See Guedes II*, 920 F.3d at 34. "But that is hardly a reason

to conclude that the Rule is arbitrary." *Id.* "Presidential administrations are elected to make policy. And as 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." *Id.* (internal quotation marks omitted). In any case, "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." *Id.*

Finally, for the reasons discussed in the Court's previous Memorandum Opinion, ATF was not required to hold a formal public hearing (in addition to its notice-and-comment procedures). *See Guedes I*, 356 F. Supp. 3d at 136–137. And ATF's decision not to extend the comment period an extra five days after some users reported initial difficulties in submitting comments (but were eventually successful) was harmless error, at most. *See id.* (citing *United States v. Fla. E. Coast Ry. Co.*, 410 U.S. 224, 239 (1973)); *see also PDK Labs. v. DEA*, 362 F.3d 786, 799 (D.C. Cir. 2004) ("If [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.").

4. *ATF's Change in Position*

The agency's change in position on the question of whether a bump stock is a machinegun does not render its position arbitrary and capricious. *See Guedes I*, at 133–34. 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*, 921 F.3d at 1111 (internal quotation marks and alteration 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).

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*, 921 F.3d at 1111 (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.").

Here, ATF acknowledged 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. 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 machineguns. *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. Thus, ATF satisfied its obligation to "reasonably explain[]" its change of position. *New England Power Generators Ass'n*, 879 F.3d at 1201.

B. The Takings Claim

The plaintiffs assert that the bump stock rule violates the Takings Clause because it fails to provide compensation to bump stock owners who must destroy or abandon their weapons. They seek injunctive relief or, in the alternative, compensatory damages. Am. Memo. in Supp. of Pls.' Cross Mot. for Summ. J. at 41–42.

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 (1987). "[I]n 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 omitted) (quoting *United States v. Riverside Bayview Homes*, 474 U.S. 121, 127–28 (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 (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). Because the plaintiffs have made no showing

that a suit for compensation is inadequate to satisfy the demands of the Fifth Amendment—or that any other doctrinal exception applies, injunctive relief is unavailable.

The plaintiffs also are not entitled to compensatory damages. In particular, they have not shown that bump stocks "were taken for a public use" rather than "seized or retained pursuant to a valid exercise of the government's police power." *Modern Sportsman, LLC v. United States*, 145 Fed. Cl. 575, 581 (2019). It is well settled that a "prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit." *Mugler v. Kansas*, 123 U.S. 623, 668–69 (1887). After all, "[t]he exercise of the police power by the destruction of property which is itself a public nuisance . . . is very different from taking property for public use, or from depriving a person of his property without due process of law." *Id.* at 669.

It is for this reason that "[t]he government may not be required to compensate an owner for property which it has already *lawfully* acquired under the exercise of governmental authority other than the power of eminent domain." *Bennis v. Michigan*, 516 U.S. 442, 452 (1996) (emphasis added). And as discussed above, the bump stock rule was promulgated according to ATF's valid authority under the relevant statutes and in light of the ambiguous statutory text. *See supra* at 13. So too, the bump stock rule exercises the federal government's limited police power as it relates to public

safety. *See Acadia Tech., Inc. v. United States*, 65 Fed. Cl. 425, 429 (2005) ("[I]f [property] is taken to prevent public harm, the government action may be an exercise of police power."), *aff'd*, 458 F.3d 1327, 1332 (Fed. Cir. 2006); *Modern Sportsman*, 145 Fed. Cl. at 582 (noting that "where the purpose of a regulation which causes interference with property rights is to prevent injury to the public welfare as opposed to merely bestowing upon the public a nonessential benefit, compensation under the fifth amendment is not required"). "The ATF regulation at issue here was promulgated pursuant to statutory authority and consistent with our nation's 'historical tradition of prohibiting [] dangerous and unusual weapons.'" *McCutchen v. United States*, 145 Fed. Cl. 42, 52 (2019) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 627 (2008) (internal quotation marks omitted)). Thus, this case evinces the "paradigmatic example of the exercise of the government's police power, which defeats any entitlement to compensation under the Takings Clause." *Id.* at 52.

Based on these well-settled precedents, every Court to have considered a takings challenge in response to bump stock rules has rejected the claim. *See, e.g.*, *Maryland Shall Issue, Inc. v. Hogan*, 963 F.3d 356 (4th Cir. 2020); *Modern Sportsman*, 145 Fed. Cl. 575 (2019); *McCutchen*, 145 Fed. Cl. 42 (2019); *see also Akins v. United States*, 82 Fed. Cl. 619, 622 (2008) (holding that ATF's revision of its interpretation to include bump stocks did not give rise to a compensable taking because "[p]roperty seized and retained pursuant to the police power is not taken for a public use in the context

of the Takings Clause" (internal quotation marks omitted)). This Court will do the same.

C. The Remaining Claims

Finally, the plaintiffs raise two additional claims: first, that the bump stock rule violates the Ex Post Facto Clause; and second, that the underlying statutes are void for vagueness.[8]

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[8] The plaintiffs also reference briefly, in one short paragraph, an argument about the separation of powers and the non-delegation doctrine as those doctrines relate to *Chevron*. *See* Am. Memo. in Supp. of Pls.' Cross Mot. for Summ. J at 39 (noting that these counts "exist . . . to ensure that an actual ruling on the constitutional questions is made and thus to facilitate further review"). Although the plaintiffs do not expound on the substance of their argument, the Court interprets this reference to relate to the plaintiffs' earlier argument about the relationship between the rule of lenity and *Chevron* deference, and the argument that *Chevron* violates the Constitution. *See id.* at 34 (arguing that *Chevron* "deference, particularly in the context of a statute defining crimes, violates the separation of powers [and] the anti-delegation doctrine"). As discussed above, this Court is bound by the precedent of *Chevron* and its progeny. *See supra* at 10. The plaintiffs also made the additional argument in their complaint "that the Attorney General allow for an amnesty so as to register these devices as machineguns under the National Firearms Act," Sec. Am. Compl. ¶ 43 (*Codrea*). The plaintiffs appear to have abandoned this argument on summary judgment, however, as they submit no discussion on amnesty and merely reference it once in a sub-heading list with other topics. *See* Am. Memo. in Supp. of Pls.' Cross Mot. for Summ. J. at 39 ("Guedes Count I – Lack of Statutory Authority to Alter Definition Established by Congress (APA and Article I); Codrea Counts I, II, III, V & VII – Ultra Vires, APA Violation and Amnesty.").

1. *The Ex Post Facto Clause*

The plaintiffs assert that the bump stock rule is unlawfully retroactive. *See* U.S. Const., art. I § 9, cl. 3 ("No . . . ex post facto Law shall be passed."). The D.C. Circuit recognized that the plaintiffs forfeited this argument by failing to raise it before this Court in the initial proceedings. *Guedes II*, 920 F.3d at 35. Even if the argument were properly raised, though, the text of the rule itself forecloses this argument. The rule establishes that anyone "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 (emphasis added). And the effective date was March 26, 2019, a full ninety days after the rule was promulgated. 83 Fed. Reg. at 66,514. To alleviate any lingering doubt about the rule's application, ATF made clear that "criminal liability" attached "only for possessing bump-stock-type devices *after* the effective date of regulation, not for possession before that date." *Id.* at 66,525 (emphasis added); *Guedes II*, 920 F.3d at 8–9. In conclusion, the rule poses no retroactivity issue.

2. *Void for Vagueness*

"The Due Process Clause 'requires the invalidation of laws [or regulations] that are impermissibly vague.'" *United States Telecom Ass'n v. FCC*, 825 F.3d 674, 734 (D.C. Cir. 2016) (quoting *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012)). The plaintiffs do not brief this argument in detail, but instead conclude that "[i]f the statute is vague enough for *Chevron*, then it is vague enough to require lenity or simply to be void." Am. Memo. in Supp. of Pls.' Cross

Mot. for Summ. J. at 41. The D.C. Circuit addressed this argument, holding that "Codrea's challenge is misconceived," as the notice-and-comment procedures provided fair notice of what conduct was prohibited. *Guedes II*, 920 F.3d at 28.

And with good reason. There is much daylight between the statutory ambiguity required to trigger *Chevron* deference and the vagueness required to invalidate a statute or regulation under the Due Process Clause. *See United States v. National Dairy Products Corp.*, 372 U.S. 29, 32 (1963) ("The strong presumptive validity that attaches to an Act of Congress has led this Court to hold many times that statutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language."). Were this not the case, every regulation entitled to *Chevron* deference would be summarily voided for vagueness. Rather, the void for vagueness doctrine applies where a "conviction or punishment fails to comply with due process [because] the statute or regulation under which it is obtained fails to provide a person of ordinary intelligence *fair notice* of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *Fox Television Stations*, 567 U.S. at 253 (emphasis added) (internal quotation marks omitted). Here, by contrast, ATF's formal notice-and-comment procedures, as well the final rule itself, provide ample notice of what conduct is prohibited. *See Guedes II*, 920 F.3d at 28 (holding that "the promulgation of the Bump-Stock Rule through notice-and-comment procedures afforded

fair notice of the prohibited conduct" (internal quotation marks omitted)).

CONCLUSION

For the reasons stated above, and explained further in the Court's earlier Memorandum Opinion in this case, the defendants' Motion for Summary Judgment is granted. An order consistent with this decision accompanies this memorandum opinion

/s/ Dabney L. Friedrich
DABNEY L. FRIEDRICH
United States District Judge

February 19, 2021

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Filed February 19, 2021]

No. 18-cv-2988 (DLF)

DAMIEN GUEDES, *et al.*,
Plaintiffs,

v.

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

No. 18-cv-3086 (DLF)

DAVID CODREA, *et al.*,
Plaintiffs,

v.

MONTY WILKINSON, Attorney General, *et al.*,
Defendants.

ORDER

For the reasons stated in the accompanying Memorandum Opinion, it is

ORDERED that the defendants' Motions for Summary Judgment, Dkt. 38 (*Codrea*), Dkt. 61 (*Guedes*), are **GRANTED**. It is further

ORDERED that the plaintiffs' Cross Motions for Summary Judgment, Dkt. 44 (*Codrea*), Dkt. 62 (*Guedes*), are **DENIED.**

The Clerk of Court is directed to close this case.

/s/ Dabney L. Friedrich
DABNEY L. FRIEDRICH
United States District Judge

February 19, 2021

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21-5045

[Filed May 2, 2023]

DAMIEN GUEDES, ET AL.,	)
APPELLANTS	)
	)
FIREARMS POLICY COALITION, INC.,	)
APPELLEE	)
	)
v.	)
	)
BUREAU OF ALCOHOL, TOBACCO,	)
FIREARMS AND EXPLOSIVES, ET AL.,	)
APPELLEES	)
	)

Appeal from the United States District Court
for the District of Columbia
(No. 1:18-cv-02988)

On Petition for Rehearing En Banc

Before: SRINIVASAN, *Chief Judge*; HENDERSON***, MILLETT**, PILLARD, WILKINS**, KATSAS*, RAO*, WALKER****, CHILDS, and PAN*, *Circuit Judges*

ORDER

Appellants' petition for rehearing en banc and the response thereto were circulated to the full court, and a vote was requested. Thereafter, a majority of the judges eligible to participate did not vote in favor of the petition. Upon consideration of the foregoing, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Daniel J. Reidy
Deputy Clerk

* Circuit Judges Katsas, Rao, and Pan did not participate in this matter.

** A statement by Circuit Judge Wilkins, joined by Circuit Judge Millett, concurring in the denial of rehearing en banc, is attached.

*** Circuit Judge Henderson would grant the petition for rehearing en banc. A statement by Circuit Judge Henderson, dissenting from the denial of rehearing en banc, is attached.

**** Circuit Judge Walker would grant the petition for rehearing en banc. A statement by Circuit Judge Walker, dissenting from the denial of rehearing en banc, is attached.

WILKINS, *Circuit Judge*, with whom MILLETT, *Circuit Judge*, joins, concurring in the denial of the petition for rehearing en banc: Petitioners raised two arguments as reasons of "exceptional importance" for granting the petition, *see* Fed. R. App. P. 35(a)(2), namely (1) whether the interpretation of the statutory terms defining a "machine gun" to include bump stocks by the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF" or the "Bureau") is the best reading of the statute, and (2) whether the purported ambiguity in the statutory definition compels an interpretation in their favor pursuant to the rule of lenity. The panel opinion thoroughly addressed both arguments, *see Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 45 F.4th 306 (D.C. Cir. 2022), and neither merit further review by our court.

I write only to clarify a couple of matters and to respond to some of the points made in the rehearing petition and by my dissenting colleagues.

I.

First, I must address some misconceptions about the legislative and regulatory history.

"Representing the first major federal attempt to regulate firearms, the [National Firearms Act of 1934] concentrated on particularly dangerous weapons and devices such as machine guns, sawedoff shotguns and silencers." *Lomont v. O'Neill*, 285 F.3d 9, 11 (D.C. Cir. 2002). *See* Pub. L. No. 73-474, 48 Stat. 1236 (1934). As originally conceived, the Act and its implementing regulations did not ban the possession of machine guns outright; instead, they required a person seeking to

obtain a machine gun to file an application with the Treasury Department, pay a hefty transfer tax, and submit a photograph, fingerprints, and a certificate from a local law enforcement official attesting their belief that the person intended to use the firearm for lawful purposes. *Lomont*, 285 F.3d at 11–12. If the Treasury Department granted the application, the person's name and address, along with the serial number of the machine gun, were placed in a registry. *Id*. The Act made the manufacture, transfer, or possession of a machine gun without Treasury approval and payment of applicable taxes unlawful. *See* 26 U.S.C. § 5861. In 1986, Congress prohibited the transfer or possession of machine guns, except by authorized military or governmental officials, unless the person lawfully possessed the machine gun prior to May 19, 1986. *See* Act of May 19, 1986, Pub. L. No. 99-308, § 102, 100 Stat. 449 (1986); *see also* 18 U.S.C. § 922(o).

As drafted in 1934, the National Firearms Act defined a "machine gun" as follows:

> The term "machine gun" means 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.[1]

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[1] As my dissenting colleagues point out, *see* Walker Op. 2 n.1; *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 920 F.3d 1, 44–45 (D.C. Cir. 2019) (Henderson, J., concurring in part and dissenting in part), Congress amended the definition of machine gun in 1968. The amendment deleted the words "or semiautomatically" from the above-quoted sentence. Pub. L.

Pub. L. No. 73-474, § 1(b), 48 Stat. 1236, 1236 (1934). Petitioners and my dissenting colleague complain that the panel's conclusion that "a 'single function of the trigger' is best understood as a 'single pull of the trigger' and 'analogous motions'" is somehow novel. Pet. at 11 (quoting *Guedes*, 45 F.4th at 315, 317); Walker Op. 6–7. Not so.

Both the Senate and House reports on the National Firearms Act explained that the bill "contains the usual definition of machine gun as a weapon designed to shoot more than one shot without reloading and *by a single pull of the trigger*." S. Rep. No. 73-1444, at 2 (1934) (quoting H.R. Rep. No. 73-1780 (1934)) (emphasis added). Immediately following the Act's passage, the Treasury Department published a letter

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No. 90-618, 82 Stat. 1213, 1231 (1968). The 1968 Act also added a second sentence specifying that "the frame or receiver" of the weapon, or "any combination of parts designed and intended" to convert a weapon into a machine gun or to assemble a machine gun, also qualified as a machine gun. *Id.* The legislative history clearly indicates that Congress did not consider the deletion of "or semiautomatically" to be a substantive change, because Congress stated "[t]his subsection defines the term 'machinegun' and the first sentence is existing law." S. Rep. No. 90-1501, at 45 (1968) (section-by-section analysis of the bill); *see also Federal Firearms Legislation, Hearings before the Senate Judiciary Committee, Juvenile Delinquency Subcommittee*, 90th Cong. 135 (1968) (quoting from section-by-section analysis submitted to Congress by Hon. Sheldon S. Cohen, Commissioner of Internal Revenue) ("This subsection defines the term 'machine gun' and the first sentence is existing law."). Accordingly, attempts to rely upon the 1968 deletion of "or semiautomatically" to narrow the reach of the text, *see* Pet. at 12; Walker Op. 8–9; *Guedes*, 920 F.3d at 44–45 (Henderson, J., concurring in part and dissenting in part), are without merit.

ruling defining a machine gun as "a semiautomatic pistol or an autoloading pistol when converted into a weapon which shoots automatically, that is, one capable of discharging the entire capacity of its magazine *with one pull of the trigger*. . . ." Rev. Rul. XIII-38-7035, S.T. 772, 13-2 C.B. 433–34 (Jul.-Dec. 1934) (emphasis added).[2] Thus, "single function of the trigger" was construed as equivalent to "single pull" of the trigger at the outset.

Significantly, the 1934 Treasury letter ruling defines machine gun consistent with how a bump stock operates, because it is a device that is "capable of discharging the entire capacity of its magazine with one pull of the trigger." 13-2 C.B. at 434. As the District Court found, "[o]nce the shooter pulls the trigger, a bump stock harnesses and directs the firearm's recoil energy, thereby forcing the firearm to shift back and forth, each time 'bumping' the shooters stationary trigger finger. The shooter is thus able to reengage the trigger *without additional pulls of the trigger*." *Guedes v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 520 F. Supp. 3d 51, 58 (D.D.C. 2021) (emphasis added). Petitioners did not properly challenge the predicate for these factual findings when proposed by the government at the summary judgment stage, and they did not challenge the District Court's factual findings as clearly erroneous on appeal. *See Guedes*, 45 F.4th at 317–18. Petitioners' attempt to wriggle out of these

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[2] This 1934 letter ruling was not cited in the briefing or in the panel opinion. I found it when performing subsequent research after the rehearing petition was filed.

findings at the rehearing stage, *see* Pet. at 10 n.2, comes way too late and is at least doubly forfeited.

I refer to this 1934 letter ruling not because its interpretation is binding upon or must be deferred to by this Court. Instead, it bears mention because it refutes Petitioners' contention that the 2018 bump stock rule "contradicts eight decades of interpretations by the Treasury Department and the ATF." Pet. at 15; *see also Guedes*, 920 F.3d at 46–47 (Henderson, J., concurring in part and dissenting in part). To the extent the relative gravitas of the various letter rulings is relevant to the debate, I note that the 1934 letter ruling was public, issued by the Acting Commissioner of Internal Revenue, and approved by the Secretary of the Treasury, s*ee* 13-2 C.B. at 440, whereas the bump stock letter rulings issued between 2008 and 2017 cited by Petitioners and the dissent were all private, rather than public, and issued by subordinate Bureau officials, *see* Administrative Record ("A.R.") 424–84. *See* 26 C.F.R. § 601.601(d)(2)(v)(d) ("Revenue Rulings published in the Bulletin do not have the force and effect of [regulations], but are published to provide precedents to be used in the disposition of other cases, and may be cited and relied upon for that purpose. No unpublished ruling or decision will be relied on, used, or cited, by any officer or employee of the Service as a precedent in the disposition of other cases."). Further, the suggestion by Petitioners and the dissent that purchasers of bump stocks were entitled to rely on the 2008-2017 private letter rulings is wholly without merit. *See id.*; *see also McCutchen v. United States*, 14 F.4th 1355, 1368–70 (Fed. Cir. 2021), *cert. denied*, 143 S. Ct. 422 (2022) (holding that bump stock private

letter rulings did not establish a property right because the Bureau's handbook, "which is public, states that a [firearm] classification provided by letter is 'subject to change if later determined to be erroneous,'" and also because the letter rulings were informal, unpublished, and not issued through rulemaking); *Hanover Bank v. Comm'r*, 369 U.S. 672, 686 (1962) ("[P]etitioners are not entitled to rely upon unpublished private rulings which were not issued specifically to them[.]").

Relatedly, the dissent's characterization of the 2018 Rule as Executive overreach ignores the constitutional and statutory context and exaggerates what happened here. Walker Op. 1, 10–16. As we have previously held, Congress explicitly gave the Secretary of Treasury "interpretative rulemaking power" in the National Firearms Act. *See Lomont*, 285 F.3d at 16 (citing 26 U.S.C. § 7805(a)). Thus, the statute, and the Executive's power to "take Care that the Laws be faithfully executed," U.S. CONST. art. II, § 3, made it perfectly appropriate for the Bureau to issue a rule explaining what it believed the statute meant and how it would enforce the law going forward. The 2018 Rule was not an extraconstitutional "power grab[]," Walker Op. 1, but rather a fitting response to many reasonable questions about the Executive's view of the scope of the statutory machine gun prohibition and how it would be enforced following a national tragedy. And while the Executive can pronounce its statutory interpretation consistent with the constitutional order, the judicial branch has the power and responsibility to render the authoritative interpretation of the statute. There is no constitutional crisis.

II.

As the panel explained, "a 'single function' of the trigger is best understood as a 'single pull of the trigger' and 'analogous motions,' while automatically is best understood to mean a 'result of a self-acting or self-regulating mechanism.'" *Guedes*, 45 F.4th at 317. I will let the panel opinion speak for itself. I add only that the 1934 letter ruling, issued by the Commissioner and adopted by the Secretary, is consistent with the panel's interpretation, and thus corroborates that the panel interpretation is the best reading of the statute.

As the 1934 Cumulative Bulletin indicates, none other than Robert H. Jackson—as Assistant General Counsel of the Bureau of Internal Revenue—authored over two dozen regulations, letter rulings, and opinion letters that were published contemporaneously with the 1934 machine gun letter ruling. 13-2 C.B., *passim*. We do not know whether then-Mr. Jackson drafted or approved the 1934 machine gun letter ruling, though it is probable. But we do know that, a few years later, then-Justice Jackson warned that "if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact." *Terminiello v. City of Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting). The 58 people killed and approximately 500 wounded in Las Vegas by a shooter using bump stock devices behoove us to heed Justice Jackson's prescient admonition. Where we can employ tools of statutory interpretation to derive a reasonable interpretation of the statute, we should not find a "grievous ambiguity" to rule in Petitioners' favor pursuant to the rule of lenity.

Maracich v. Spears, 570 U.S. 48, 76 (2013). One of the manufacturers of bump stocks bragged on its website, "Did you know that you can do full-auto firing and it is absolutely legal?" A.R. 840. We do not have to "guess as to what Congress intended," *Maracich*, 570 U.S. at 76, to determine whether text prohibiting "any weapon which shoots . . . automatically more than one shot, without manual reloading, by a single function of the trigger," 26 U.S.C. § 5845(b), covers a device that concededly replicates "full-auto firing," A.R. 840. "There is no war between the Constitution and common sense." *Mapp v. Ohio*, 367 U.S. 643, 657 (1961).

The petition for rehearing en banc is properly denied.

KAREN LECRAFT HENDERSON, *Circuit Judge*, dissenting from the denial of rehearing en banc: For the reasons explained at the preliminary injunction stage in my separate panel opinion, which is hereby incorporated by reference thereto, *Guedes v. ATF*, 920 F.3d 1, 35–49 (D.C. Cir. 2019) (Henderson, J., concurring in part and dissenting in part), I dissent from the denial of rehearing en banc. And I echo Judge Walker's view that the case presents "question[s] of exceptional importance." D.C. Cir. R. 35(a)(2); *see infra* at 11–16 (Walker, J., dissenting from denial of rehearing en banc).

WALKER, *Circuit Judge*, dissenting from the denial of rehearing en banc: Congress recently considered at least five bills restricting or banning bump stocks. None passed. Yet bump stocks are illegal anyway.

That's because the Bureau of Alcohol Tobacco, Firearms, and Explosives stepped into Congress's shoes and criminalized owning a bump stock.

Like other power grabs by impatient agencies, the Bureau decided Congress was taking too long. So it relied on a misguided reading of an old statute to solve the problem itself. According to the agency, that old statute had banned bump stocks all along.

The Bureau's overreach is troubling because it turns law-abiding Americans into criminals. Before the Bureau issued its rule, it spent a decade telling the public that bump stocks were legal. After the rule, bump-stock owners who relied on that advice are felons if they do not discard their devices.

Congress makes the laws — especially the criminal laws. The executive branch does not. To reestablish that principle, I would grant rehearing en banc.

I

Relying on a strained reading of an old statute, the Bureau banned bump stocks. But no statute gives it that authority.

A

The Firearms Owners' Protection Act of 1986 "effectively banned private ownership of machine guns." *Guedes v. ATF*, 920 F.3d 1, 35 (D.C. Cir. 2019) (*Guedes I*) (Henderson, J., concurring in part and dissenting in part) (citing Pub. L. No. 99-308, 100 Stat. 449). The Act made it a crime to "transfer or possess a machinegun" that was not "lawfully possessed" before

1986. 18 U.S.C. § 922(o)(1), (2)(B). To define "machinegun," the Act drew on a long-standing definition in the National Firearms Act of 1934, as amended in 1968: a "machinegun" is a "weapon which shoots . . . automatically more than one shot . . . by a single function of the trigger." 26 U.S.C. § 5845(b).[1]

For decades, the government interpreted that definition to exclude guns that fire only a single bullet each time the trigger moves. In 1955, for instance, the government said that a crank-operated gatling gun was not a machinegun because it was "not designed to shoot automatically . . . more than one shot with a single function of the trigger." Rev. Rul. 55-528, 1955 WL 9410. The crank just let the user fire the gun more quickly.

Fast forward to 2008. The Bureau relied on similar reasoning to find that a bump stock did not turn a semiautomatic gun into a machinegun. A bump stock replaces the standard stock of a semiautomatic rifle. When a shooter fires the rifle, it naturally recoils backwards into the shooter's shoulder. The bump stock captures that recoil energy, returning the rifle forward. When that happens, the trigger bumps into the shooter's stationary trigger finger, firing the weapon. The rifle will keep firing as long as the shooter keeps forward pressure on the bump stock. In "ten letter rulings between 2008 and 2017," the Bureau said

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[1] The Act originally defined a machinegun as "any weapon which shoots, or is designed to shoot, automatically *or semiautomatically*, more than one shot." Pub. L. No. 73-474, 48 Stat. 1236 (emphasis added). The Gun Control Act of 1968 deleted the words "or semiautomatically." Pub. L. No. 90-618, 82 Stat. 1231.

"bump-stock-type devices" did not "qualify as machineguns" because they do not work "automatically." 83 Fed. Reg. 66,514, 66,517 (Dec. 26, 2018). Instead, they require "the maintenance of pressure by the shooter" to work. *Id.* at 66,518.

Then in 2017, a gunman using a bump stock killed 58 people and wounded 500 others in Las Vegas. In the wake of that tragedy, Congress considered legislation to ban or restrict bump stocks. *See, e.g.*, H.R. 4168, 115th Cong. (2017); S. 1916, 115th Cong. (2017); S. 2475, 115th Cong. (2018); H.R. 4594, 116th Cong (2019); H.R. 5427, 117th Cong. (2021). Yet for better or worse, those bills did not become laws.

In our system of separated powers, that should have been the end of the story. Congress alone makes the laws. U.S. Const., Art. I. And Congress has not yet decided to ban bump stocks. If that is bad policy, Americans can show their disapproval at the ballot box by voting out their representatives.

But instead of letting the democratic process play out, the Bureau took matters into its own hands. While legislative efforts were ongoing, the Bureau issued a rule reinterpreting the statutory definition of "machinegun" to include bump stocks. 83 Fed. Reg. at 66,514. In doing so the Bureau reversed the interpretation of the statute it had stuck to for a decade. *Id.* at 66,517.

The Bureau also went *further* than some of the proposals Congress rejected. For instance, the proposed Closing the Bump-Stock Loophole Act would have required bump-stock owners to "register" their devices

with the Bureau. H.R. 4168, 115th Cong. (2017). The Bureau eschewed all such half measures; its reinterpretation of the statute banned bump stocks altogether.

After the Bureau's interpretive about-face, Damien Guedes and several other plaintiffs brought a challenge under the Administrative Procedure Act. *See Guedes v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 520 F. Supp. 3d 51 (D.D.C. 2021). Guedes argued that the Bureau lacked statutory authority to ban bump stocks because they are not covered by the National Firearms Act's definition of "machinegun." *Id.* at 61. The district court rejected that argument and a panel of this court affirmed. *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 45 F.4th 306, 317 (D.C. Cir. 2022) (*Guedes II*). Guedes now petitions for rehearing en banc.

B

The Bureau's rule misreads the National Firearms Act. Under the Act, a "machinegun" must "shoot[ ] . . . automatically more than one shot . . . by a single function of the trigger." 26 U.S.C. § 5845(b). A bump stock neither lets a shooter "automatically [fire] more than one shot" nor lets him do so by "a single function of the trigger." *Id.* So Congress's ban on machineguns unambiguously does not cover them.

1

Start with the phrase "single function of the trigger."

In 1934, when the statutory definition of "machinegun" became law, "function" meant the "natural and proper action" of a thing. *Webster's New International Dictionary* 876 (2d ed. 1933). Something's "function" was "[t]he special kind of activity proper to [it]; the mode of action by which it fulfills its purpose." 4 *Oxford English Dictionary* 602 (1933); *see also Wisconsin Central Ltd. v. United States*, 138 S. Ct. 2067, 2070 (2018) (courts should "interpret the words consistent with their ordinary meaning at the time Congress enacted the statute" (cleaned up)).

So here, we must ask whether the "natural and proper action" of the trigger lets a rifle modified by a bump stock fire "more than one shot." 26 U.S.C. § 5845(b). It does not. When shooting with a bump stock, only one shot fires each time the trigger moves. *See Guedes II*, 45 F.4th at 320 ("a bump stock device[ ] fires only one round with each mechanical movement of the trigger"). "The trigger . . . must necessarily 'pull' backwards and release the rifle's hammer . . . every time that the rifle discharges . . . . The rifle cannot fire a second round until both the trigger and hammer reset." *Aposhian v. Barr*, 958 F.3d 969, 995 (10th Cir.) (Carson, J., dissenting). Every shot requires a new movement of the trigger. If a gun fitted with a bump stock fires *more* than one round with a single movement of the trigger, it has malfunctioned.

The Bureau avoids that conclusion by rewriting "single function of the trigger" as "single *pull* of the trigger." 83 Fed. Reg. at 66,514, 66,518. Because a shooter firing with a bump stock need pull the trigger only once to start firing, the Bureau says that a bump

stock counts as a machinegun under the statute. *Id.* at 66,514. After that initial pull, the bump stock repeatedly pushes the trigger into the shooter's stationary finger, firing additional shots. No additional pulls are required.

But the Bureau provides scant evidence to support its edit of the statute. Relying on a footnote from *Staples v. United States*, 511 U.S. 600, 602 n.1 (1994), and a snippet of testimony from a congressional hearing, the Bureau claims that its interpretation is "consonant with the statute and its legislative history." 83 Fed. Reg. at 66,518 (quoting *Akins v. United States*, 312 F. App'x 197, 200 (11th Cir. 2009)).

That is a flimsy foundation for reading the word "function" to mean something different. True, in *Staples*, the Supreme Court described an automatic weapon as one that "fires repeatedly with a single pull of the trigger." 511 U.S. at 602 n.1. But it did so in a footnote describing background facts, not when definitively interpreting the National Firearms Act. *See United States v. Olofson*, 563 F.3d 652, 657 (7th Cir. 2009) (the *Staples* footnote "was providing a glossary for terms frequently appearing in the opinion" and not "interpreting a statute").

That leaves the agency with a solitary sentence from a committee hearing on the 1934 National Firearms Act to support its interpretation. There, the National Rifle Association's then-president testified that a machinegun is a weapon "capable of firing more than one shot by a single pull of the trigger, a single function of the trigger." 83 Fed. Reg. at 66,518 (quotation marks omitted). But legislative history is

notoriously unreliable. The text of the statute controls, not a throw-away line cherry-picked from the 170-page record of a congressional hearing. *See National Firearms Act: Hearings Before the Committee on Ways and Means*, H.R. 9066, 73rd Cong. (1934); *see also Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1631 (2018) (warning against "divin[ing] messages from congressional commentary").[2]

Perhaps realizing that the agency's argument is weak, the panel offered a different explanation for why "function" really means "pull." It reasoned that "function" means an "activity; doing; [or] performance," and "the shooter's pull is the single 'activity' or 'performance' of the trigger that causes the gun to shoot automatically more than one shot." *Guedes II*, 45 F.4th at 315 (quotation marks omitted). But that focuses on the reason why the trigger moves, not, as the statute requires, on how often the trigger moves. That gets it backwards. The statute is indifferent about *why* the trigger moves — pull, bump, or otherwise — it

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[2] To the agency's evidence, Judge Wilkins's eagle-eyed research adds a 1934 tax ruling. Wilkins Op. 3. There, the Treasury said a "semiautomatic" or "autoloading" pistol becomes a "machine gun" when converted to "discharg[e] the entire capacity of its magazine with one pull of the trigger." Rev. Rul. XIII-38-7035, S.T. 772, 13-2 C.B. 433–34 (Jul.-Dec. 1934). True, that ruling is probative of the original public meaning of the Act. But tax rulings can be mistaken, even when they may have been written by Robert Jackson. *Cf.* Horace, *Ars Poetica* ("sometimes even good Homer nods off"). And here, for the reasons explained above, strong textual clues counsel against equating, as the Treasury did, "single function of the trigger" with "one pull of the trigger."

looks only to how many shots are fired each time the trigger moves.

Plus, reading "function" as "pull" ignores the fact that Congress knows how to write "single pull of the trigger" when it wants to. Indeed, the National Firearms Act's definition of "rifle" uses that phrase. *See* 26 U.S.C. § 5845(c) (a rifle "fire[s] only a single projectile through a rifled bore for each single pull of the trigger"); *see also* 18 U.S.C. § 921(a)(5) (a shotgun "fire[s] through a smooth bore either a number of ball shot or a single projectile for each single pull of the trigger"). Yet the panel's interpretation of "function" gives no meaning to Congress's decision to use "single function" in one place and "single pull" in another. *Cf.* Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 170 (2012) (courts should pay attention to meaningful variation in statutory language).

Even if the agency is right that "function" means "pull," it is *still* not clear that the statute covers bump stocks. The agency claims, and the panel accepts, that a "pull" of the trigger can include other "analogous" ways of "activat[ing] . . . a trigger" like a "push, or some other action." 83 Fed. Reg. at 66,515, 66,518 n.5; *see also Guedes II*, 45 F.4th at 311 (the statute covers a "single pull of the trigger and analogous motions."). Here, it is undisputed that a bump stock works by bumping the trigger into the shooter's stationary finger, thus firing the weapon. So why does that not count as a motion that is analogous to a "pull of the trigger"? The agency has no answer. And if a bump *is* analogous to a pull, then rifles fitted with bump stocks

are not machineguns under the National Firearms Act. Each bump, like each pull, fires one bullet. A single action never causes the rifle to fire more than one shot.

2

A bump stock is not a "machinegun" for a second reason. A machinegun must "shoot[ ] *automatically* more than one shot." 26 U.S.C. § 5845(b) (emphasis added). A bump stock does not.

In 1934, "automatically" meant "having a self-acting or self-regulating mechanism," *Webster's New International Dictionary* 187 (2d ed. 1934), or "[s]elf-acting under the conditions fixed for it, going of itself." 1 *Oxford English Dictionary* 574 (1933).

A mechanism cannot be self-acting or self-regulating if it requires user input to keep working. And a bump stock needs constant input from the shooter if a gun is to keep firing. He must keep forward pressure on the bump stock for it to work. If he does not, the weapon will fire only one shot. So firing with a bump stock requires "skill[ ] and coordination," as explained in comments on the Bureau's proposed rule. 83 Fed. Reg. at 66,531–32.

Rather than grappling with that inconvenient fact, the Bureau largely ignores it. It says that a bump stock lets a shooter fire more than one shot automatically because "the device harnesses the firearm's recoil energy in a continuous back-and-forth cycle that allows the shooter to attain continuous firing after a single pull of the trigger." *Id.* at 66,519. That is true enough. But it does not account for the undisputed fact that a shooter must maintain "forward pressure on the barrel"

for a bump stock to let him fire more than one shot. *Guedes II*, 45 F.4th at 318. And tellingly, the Bureau reached a different conclusion for years, finding that bump stocks require "multiple inputs by the user for each successive shot." Letter from Richard W. Marianos, ATF Assistant Director Public and Governmental Affairs, to Rep. Ed Perlmutter, at 1–2 (Apr. 16, 2013), https://perma.cc/46VL-J88S.

Even worse, the agency's reading of the statute elides an important distinction between automatic and semiautomatic guns. In 1934, the "difference between an 'automatic' and a 'semiautomatic' gun depended on whether the shooter played a manual role in the loading and firing process." *Guedes I*, 920 F.3d at 45 (Henderson, J., concurring in part and dissenting in part). A semiautomatic gun is one "in which part, but not all, of the operations involved in loading and firing are performed automatically." *Id.* (quoting *Webster's New International Dictionary* 187 (2d ed. 1934)). By contrast, after the first shot is fired, an automatic gun reloads and fires automatically, so long as the shooter keeps his finger on the trigger. *Id.* A gun modified by a bump stock works *semi*automatically: the shooter plays a manual role in the firing process because he must keep constant pressure on the bump stock.

If Congress had wanted to call a semiautomatic weapon a machinegun, it could have. In fact, in 1934, it did. Originally, the National Firearms Act defined machinegun to cover both guns that fire more than one shot "semiautomatically" and those that do so "automatically." Pub. L. No. 73-474, 48 Stat. 1236. But in 1968, Congress deleted the word

"semiautomatically" from the statutory definition. Pub. L. No. 90-618, 82 Stat. 1213. The Bureau's rule essentially writes it back in.

To make matters worse, the Bureau's rule has no grandfather clause. That means that hundreds of thousands of law-abiding Americans who *legally* bought bump stocks before 2018 now possess *illegal* property. What are they to do? According to the Bureau, they should "destroy or abandon their devices." 83 Fed. Reg. at 66,530.

That suggestion is startling. For one thing, many bump-stock owners purchased their devices in reliance on the Bureau's assurance that they were not prohibited. *See* 83 Fed. Reg. at 66,517. For another, when Congress passed its ban on machineguns in 1986, it grandfathered in "machinegun[s] that w[ere] lawfully possessed before" the ban became effective. 18 U.S.C. § 922(o)(2)(B). It is hard to imagine that a Congress that sought to *protect* lawful gun owners when it passed the ban would have sanctioned the Bureau's subsequent bait and switch.

* * *

To sum up, a gun fitted with a bump stock is not a machinegun because it does not automatically fire more than one shot each time the trigger moves.

In reaching that conclusion, I join other judges who have persuasively explained why the Act does not ban bump stocks. *See Cargill v. Garland*, 57 F.4th 447 (5th Cir. 2023) (en banc); *Guedes I*, 920 F.3d at 35 (Henderson, J., concurring in part and dissenting in part); *Gun Owners of America v. Garland*, 19 F.4th

890, 910 (6th Cir. 2021) (en banc) (Murphy, J., dissenting); *Aposhian v. Wilkinson*, 989 F.3d 890, 896 (10th Cir. 2021) (Tymkovich, C.J., dissenting from vacatur of en banc order).

II

If this were an ordinary case about statutory interpretation, I would not call for rehearing en banc, even if I disagreed with the panel's analysis. En banc review is reserved for "question[s] of exceptional importance." D.C. Cir. R. 35(a)(2).

But the bump stock ban is not ordinary. It's the source of a circuit split. It's the product of an agency's impatience with Congress. And it's an affront to 800 years of Anglo-American legal history restricting the executive's power to create new crimes.

In short, even in an era of aggressive executive rulemaking, the bump stock ban is a bridge too far.

A

En banc rehearing is often appropriate when a panel opinion conflicts with other circuit-court decisions. *Sweet Home Chapter of Communities for a Great Oregon v. Babbitt*, 30 F.3d 190, 195 (D.C. Cir. 1994) (Silberman, J., dissenting from denial of rehearing en banc) ("[T]he issue would seem of sufficient importance, particularly in light of the circuit split."); *cf.* D.C. Cir. R. 35(b)(1)(B) (litigants should flag circuit splits in their en banc petitions).

Here, circuits are split on the best reading of the National Firearms Act's definition of "machinegun."

The Fifth and Sixth Circuits have held, as I would, that the Act does not let the Bureau ban bump stocks. *See Cargill*, 57 F.4th at 447; *Hardin v. Bureau of Alcohol, Tobacco, Firearms and Explosives*, 2023 WL 3065807 (6th Cir. 2023). The Tenth Circuit upheld the Bureau's rule, as did this Court. *Aposhian*, 958 F.3d at 989; *Guedes II*, 45 F.4th at 310.

B

Two further factors weigh in favor of reconsideration en banc.

1

The bump-stock ban is a glaring example of an increasingly common story:

1. Congress considers a highly controversial solution to a modern problem that attracts great public attention.

2. Despite that attention, Congress does not pass legislation addressing it.

3. The executive then finds within an old statute the power to address the problem that Congress did not.

That is also what happened with student loan forgiveness. *Compare* H.R. 6800, 116th Cong. (2020) *with Loan Forgiveness Fact Sheet*, White House (Aug. 24, 2022). And the COVID vaccine mandate. *NFIB v. OSHA*, 142 S. Ct. 661, 662 (2022). And the COVID eviction moratorium. *Alabama Association of Realtors v. HHS*, 141 S. Ct. 2485, 2486 (2021). And an attempted nationwide shift away from coal-fired power

stations. *West Virginia v. EPA*, 142 S. Ct. 2587, 2614 (2022). And efforts to build a wall at our southern border. *See* Proclamation 9844, 84 Fed. Reg. 4949 (Feb. 15, 2019) (declaring an emergency at the southern border to get more funding than Congress had appropriated). And net neutrality. *United States Telecom Association v. FCC*, 855 F.3d 381, 476 (D.C. Cir. 2017) (Kavanaugh, J, dissenting from denial of rehearing en banc) ("Congress has debated net neutrality for many years, but Congress has never enacted net neutrality legislation or clearly authorized the FCC to impose common-carrier obligations on Internet service providers.").

The point is not that any of those policies is good or bad. The point is that the executive branch is acting when Congress does not. That intrudes on Congress's constitutionally-assigned role and disincentivizes it from legislating in the future. Why would Congress bear the political costs of passing laws when it can let bureaucrats shoulder them instead? *See* Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2255–56 (2001) (Congress sometimes enacts "open-ended grants of power" in order to "pass on to another body politically difficult decisions").

I will not rehash here all the reasons why lawmaking by the executive is problematic. I've written about it before. *American Lung Association v. EPA*, 985 F.3d 914, 996–97 (D.C. Cir. 2021) (Walker, J. concurring in part and dissenting in part), *overruled by West Virginia*, 142 S. Ct. at 2614. So have many of our nation's finest judges and scholars. *See, e.g.*, *Baldwin v. United States*, 140 S. Ct. 690, 691 (2020) (Thomas, J.,

dissenting from denial of certiorari); Steven G. Calabresi et al., *The Rise and Fall of the Separation of Powers*, 106 Nw. L. Rev. 527, 545–46 (2012). And Madison before them. *The Federalist* No. 48 (J. Madison). And Montesquieu before him. 1 Montesquieu, *The Spirit of the Laws* 151–62 (Thomas Nugent trans. 1777).

2

The Bureau's rule turns law-abiding bump-stock owners into criminals. But the Anglo-American legal system has long restricted the executive branch's power to create new crimes. Crimes are made by legislation, not executive fiat.

That principle has its roots in Magna Carta. After King John used "summary process" to "arrest and imprison[ ]" Englishmen on "administrative order[s]," English Barons forced him to agree to a new set of limits on his power. J.C. Holt, *Magna Carta* 276 (3d ed. 2015). Chief among those limits was a commitment that "[n]o free man shall be arrested or imprisoned . . . except by the lawful judgment of his peers or *by the law of the land*." *Magna Carta*, Ch. 39 (1215). After 1215, the King could not punish an Englishman "without the application of general rules to the case by a tribunal of [his] peers." Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 Yale L.J. 1672, 1682 (2012). Those "general rules" were the "law of the land," the "standing law that governed all of the King's subjects in England." *Id.* No longer could the King impose criminal punishment whenever it suited his whims.

Hard-won by the English Barons, that right was cherished by the American colonists. It was their inheritance as Englishmen. And when they enumerated the limits of a central government in their new nation, the founders guaranteed that "life, liberty, or property" may not be taken "without due process of law." U.S. Const. Amend. V.

That means that "our Government [must] proceed . . . according to written constitutional and statutory provisions . . . before depriving someone of life, liberty, or property." *Nelson v. Colorado*, 581 U.S. 128, 150 n.1 (2017) (Thomas, J., dissenting) (quotation marks omitted); *see also Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 28 (1991) (Scalia, J., concurring) (noting that the phrase "due process of law" meant "law of the land"). In other words, the executive branch may prosecute only those criminal offenses that Congress has authorized by law. The Due Process Clause "was a separation-of-powers concept designed as a safeguard against unlicensed executive action, forbidding only deprivations not authorized by legislation or common law." *United States v. Vaello Madero*, 142 S. Ct. 1539, 1545 (2022) (Thomas, J., concurring) (quotation marks omitted).

To Magna Carta's guarantee of due process, the Constitution added a second safeguard — an independent legislature, beholden in no way to the Executive. Article I's Vesting Clause makes clear that Congress alone has the "legislative power." U.S. Const. Art. I, § 1.

"Perhaps the most important consequence of th[at] assignment concerns the power to punish. Any new

national laws restricting liberty require the assent of the people's representatives and thus input from the country's 'many parts, interests and classes.'" *Wooden v. United States*, 142 S. Ct. 1063, 1083 (2022) (Gorsuch, J., concurring) (quoting *The Federalist* No. 51 (J. Madison)). Indeed, since 1812, the Supreme Court has said that Congress alone defines crimes and fixes punishments. *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812) ("The legislative authority of the Union must . . . make an act a crime [and] affix a punishment to it."); *see also United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820) (Marshall, C.J.) ("[T]he power of punishment is vested in the legislative . . . department. It is the legislature . . . which is to define a crime, and ordain its punishment.").

Today, those safeguards are not what they used to be. In the early 1900s, Congress began to delegate open-ended powers to executive agencies. Kagan, *supra*, at 2255. And by the late 1940s, the Supreme Court would uphold any delegation if Congress provided an intelligible principle to guide the agency. *American Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946); *see also J.W. Hampton Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928) (coining the "intelligible principle" phrase). Under the Supreme Court's light-touch nondelegation doctrine, it has upheld as a valid delegation a statute "endow[ing] the nation's chief prosecutor with the power to write his own criminal code governing the lives of a half-million citizens." *Gundy v. United States*, 139 S. Ct. 2116, 2131 (2019) (Gorsuch, J., dissenting); *cf. Touby v. United States*, 500 U.S. 160, 165–66 (1991) (it is an open

question whether "something more than an 'intelligible principle' is required when Congress authorizes another Branch to promulgate regulations that contemplate criminal sanctions").

Whatever the merits of that development, one safeguard has not loosened. When Congress *does* delegate rulemaking authority, the executive branch must remain faithful to the statutory text. It may not use creative interpretations to grab for itself even more power. But the Bureau's rule does just that, stretching the text of the National Firearms Act to criminalize conduct that Congress has not.

* * *

The day before the Bureau's rule, owning a bump stock was legal. The day after, it carries a ten-year prison sentence — all without Congress lifting a finger.

I would grant rehearing en banc to reestablish that the power to make crimes stays where the Constitution put it — with Congress.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19-5042

[Filed April 1, 2019]

DAMIEN GUEDES, ET AL.,	)
APPELLANTS	)
	)
v.	)
	)
BUREAU OF ALCOHOL, TOBACCO,	)
FIREARMS AND EXPLOSIVES, ET AL.,	)
APPELLEES	)
	)

Consolidated with 19-5044

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

Argued March 22, 2019 —
Decided April 1, 2019

Erik S. Jaffe argued the cause for appellants Damien Guedes, *et al*. With him on the briefs were *Joshua Prince* and *Adam Kraut*.

Stephen D. Stamboulieh and *Alan Alexander Beck* were on the brief for appellants David Codrea, *et al*.

Ilya Shapiro was on the brief for *amicus curiae* Cato Institute in support of appellants.

Conor Shaw and *Nikhel S. Sus* were on the brief for *amici curiae* Citizens for Responsibility and Ethics in Washington and Former Government and Ethics Officials in support of appellants.

Steven M. Simpson was on the brief for *amici curiae* The New Civil Liberties Alliance and W. Clark Aposhian in support of appellants.

J. Carl Cecere, Jr. was on the brief for *amicus curiae* Morton Rosenberg in support of reversal.

Bradley Hinshelwood, Attorney, and *Hashim M. Mooppan*, Deputy Assistant Attorney General, U.S. Department of Justice, argued the causes for appellees. With them on the brief were *Matthew J. Glover*, Counsel to the Assistant Attorney General, and *Scott R. McIntosh*, *Michael S. Raab*, and *Abby C. Wright*, Attorneys.

Ian Simmons, *Matt Schock*, and *Anthony G. Beasley* were on the brief for *amicus curiae* Giffords Law Center to Prevent Gun Violence in support of appellees.

Before: HENDERSON, SRINIVASAN and MILLETT, *Circuit Judges*.

Opinion for the Court filed PER CURIAM.

Opinion concurring in part and dissenting in part filed by *Circuit Judge* HENDERSON.

PER CURIAM: 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 "machinegun[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). 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

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

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 expressly 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 bump-stock 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 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 prior 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 [bump-stock-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 (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); *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* 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 bump-stock-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 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 (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 (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; *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 (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 ("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. United 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 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 (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.*, 137 S. Ct. 929, 934 (2017); *Buckley v. Valeo,* 424 U.S. 1, 132 (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*, 137 S. Ct. 929 (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, "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).

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 (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 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*, 138 S. Ct. 1532, 1540 (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

(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*." *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 (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 (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 (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 Attorney General, or even the President of the United States. Under the

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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 Coop. 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.").

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; *see City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278, 284 n.1 (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 (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 (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 (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]

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*, 137 S. Ct. 2012, 2019 n.1 (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 bump-stock 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 (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 (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 (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 (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 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*, 136 S. Ct. 2117, 2122 (2016). Interpretive 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 (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 bump-stock-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 (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 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, 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 conveys 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 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 bump-stock 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 (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 (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 is charged with administering." *City of Arlington v. FCC*, 569 U.S. 290, 306 (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 (2011) (quoting *Mead*, 533 U.S. at 229).

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. 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 (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 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. 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 (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 (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. 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 (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. 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 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*, 135 S. Ct. 1199, 1206 (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 (2014). And the plaintiffs are not the only parties who question *Chevron*'s salience in

the criminal context. The government's 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. 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 knowingly 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 (1997) (citing *Chevron*, 467 U.S. at 844). 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 (quoting *Chevron*, 467 U.S. at 844).

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 (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. 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 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); *see id.* at 921 (Kavanaugh, J., concurring) ("I join the 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). 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).

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; *see also United States v. Apel*, 571 U.S. 359, 369 (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. In *Abramski*, the Court declined to extend deference to informal guidance documents published by the Bureau. *See* 573 U.S. at 191. 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. 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.

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 (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 (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 (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. 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 (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 (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. The Court held that, in the criminal context, as in all contexts, the separation of powers "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 (alterations omitted) (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (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 (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. 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.

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).

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 (1961). Accordingly, the rule of lenity applies only "when the ordinary canons of statutory construction have revealed no satisfactory construction." *Lockhart v. United States*, 136 S. Ct. 958, 968 (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.

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 (1971) (internal quotation 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. 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.

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. 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. 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*, 138 S. Ct. 1204, 1223 (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. 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. At that stage, "the task that confronts us is to decide, not whether [the agency's interpretation is] the best interpretation of the statute, but whether it represents a reasonable one." *Atl. Mut. Ins. Co. v. Comm'r*, 523 U.S. 382, 389 (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" 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.

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 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. Here, we think the answer is no.

Nor does *Staples v. United States*, 511 U.S. 600 (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. 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. 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 (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. *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. 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 *United States v. Akins*, 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 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. 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 (1983). Here, the plaintiffs claim that, for various reasons, the Rule is arbitrary in applying the statutory definition of "machinegun" to 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 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. 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 (2009)). But the only reliance interest identified by Codrea is the pecuniary interest of current possessors of bump-stock 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 (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. We ordinarily do so, however, by examining whether the agency has "articulate[d] a satisfactory explanation for its actions." *Id.* at 43. 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 (1971).

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 non-profit 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 input. The statute specifies a single function; the Rule specifies a single function *plus*. "Whether the

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

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 (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 defined 'firearms.'" *Staples v. United States*, 511 U.S. 600, 602 (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. 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

[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).

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 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 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

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

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 bump-stock-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 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 device is attached is able to produce automatic fire with a single pull of the trigger." *Id.*

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[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.

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 Clause. Finally, the plaintiffs contend that former Acting Attorney General Matthew Whitaker was not properly appointed to his position and thus lacked authority to approve the Rule. The plaintiffs separately moved for preliminary injunctive relief.

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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).

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 (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 (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 (2014) ("[W]e have never held that the Government'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,"

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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 26–28, 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).

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. 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]

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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 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

enforcement 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 (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 n.18. The Supreme Court deferred to the Secretary of the Interior's interpretation under *Chevron*. *Id.* at 703–04. 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 36–40; *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]

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

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).

(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; 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; *Abramski*, 573 U.S. at 191. 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 (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 (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 holding 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

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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 32–36; *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.

> 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. 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 *Chevron* 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 (2000). Statutory ambiguity, if it exists, does not necessarily constitute an implicit delegation. *King v. Burwell*, 135 S. Ct. 2480, 2488–89 (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 (2014) (quotation marks omitted). There is good reason to believe that a similar clear-statement rule 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 (1971); *United States v. Grimaud*, 220 U.S. 506, 519, 522 (1911); *United States v. Eaton*, 144 U.S. 677, 688 (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*, 135 S. Ct. 352, 354 (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. The Congress has made no such clear statement; instead the ATF relies solely on its general rulemaking power

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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 (1997) (Securities Exchange Act of 1934); *Touby v. United States*, 500 U.S. 160, 165–69 (1991) (Controlled Substances Act).

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; *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). 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.*

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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")

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. 358, 386 (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, as illustrated by the lost 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

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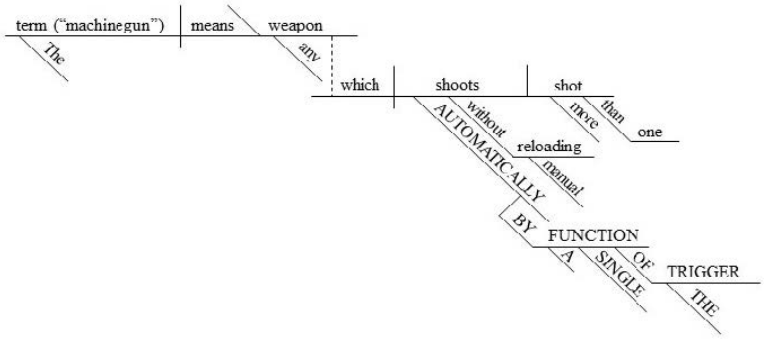
[13] Section 5845(b) can be diagrammed as follows:



without manual reloading.[14] The statutory definition of "machinegun" 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

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[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.

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 "automatic" and "semiautomatic" 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 (2009) (alteration in original) (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (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]

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 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 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

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

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*:

> [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 fore-grip 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*."

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 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

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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.

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 function 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 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

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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.'").

66,534 ("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

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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.

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 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.

APPENDIX

Photograph One: Trigger separates from stationary index finger.

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

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Filed February 25, 2019]

No. 18-cv-2988 (DLF)

DAMIEN GUEDES, *et al.*,
Plaintiffs,
v.

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

No. 18-cv-3086 (DLF)

DAMIEN CODREA, *et al.*,
Plaintiffs,
v.

WILLIAM P. BARR,[1] Attorney General, *et al.*,
Defendants.

[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).

MEMORANDUM OPINION

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 Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF), the gunman used multiple "bump stocks" in the attack, which increased 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' arguments 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 (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 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. 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]

> 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

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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. 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.

475, 478 (4th Cir. 1990) (discussing the statutory change). The key question here is whether the NFA's definition of "machinegun" encompasses 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 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 refused 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.*, 137 S. Ct. 929, 934 (2017).

In 1868, Congress enacted the first Vacancies Act, a predecessor to the Federal Vacancies Reform Act (FVRA). Act of July 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 Acting 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 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 (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). "[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). 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. "This inquiry, often 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 (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, 2019 WL 405020, at *5 (D.C. Cir. Feb. 1, 2019) (quoting *State Farm*, 463 U.S. at 43).

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 (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*, 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 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

result 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 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 (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 (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 authority 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." *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*, 138 S. Ct. 2067, 2070 (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 of a statute. *See MCI Telecomms. Corp. v. AT&T*, 512 U.S. 218, 228 (1994); *PHH Corp. v. CFPB*, 881 F.3d 75, 130 (D.C. Cir. 2018) (en banc) (Griffith, J., concurring

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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 (1994).

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 (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 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). Consistent 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.

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 permits 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 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). But in addition to the substantive reasonableness already addressed, the arbitrary 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*, 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*, 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 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 rulemaking 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 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 demonstrating 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]

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

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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).

[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."

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

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 (1973); *see also id.* at 241–42. 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; *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 harmless. 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, 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 (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 (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 (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 Amendment—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 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]

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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

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 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

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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).

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 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 (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 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]

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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

The statutory structure of the FVRA further confirms this interpretation. *See Util. Air Regulatory Grp.*, 573 U.S. at 320 (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 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 . . .

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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

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 (1987); *see also Murphy v. Smith*, 138 S. Ct. 784, 789 (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 Deputy 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 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 (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 (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 (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 (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 applies 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 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 (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. 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," 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.

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]

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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

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 constitutionally 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*, 138 S. Ct. 830, 842 (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

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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).

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 advice 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*, 138 S. Ct. 2044, 2051 & n.3 (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 (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.

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 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 disagree 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

[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.

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 available 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 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

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[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).

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 (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. 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, and charged him "with the duty of temporarily performing the functions of the consular office," *id.* at 343. 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.

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. 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 (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. 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 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.

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.

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 (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).

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 (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, it did not disturb *Eaton*'s 99-year-old holding approving temporary, acting service during a principal office vacancy, *see id.* at 661.[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

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 (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

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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). 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) (Kavanaugh, J., dissenting) (emphasis omitted) (citing *Eaton*, 169 U.S. at 343), *aff'd in part, rev'd in part, and remanded*, 561 U.S. 477 (2010).

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 perform 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 (1999) (internal quotation marks omitted)); *see also Golan v. Holder*, 565 U.S. 302, 321 (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 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 (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—and not the identity of the acting official—that makes such service constitutional. *See United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 327–28 (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 (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).

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 (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 Secretary 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]

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 ("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)

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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 (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").

(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 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

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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.

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 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 (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, 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

[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).

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 responsibilities 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

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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.

officials already serving in a Senate-confirmed role). Moreover, the "special and temporary conditions" that *Eaton* requires are no mere formality. 169 U.S. at 343. 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; *see also Morrison*, 487 U.S. at 672; *Edmond*, 520 U.S. at 661. 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 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 (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. 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. "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 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.

/s/ Dabney L. Friedrich
DABNEY L. FRIEDRICH
United States District Judge

February 25, 2019

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Filed February 25, 2019]

No. 18-CV-2988 (DLF)

DAMIEN GUEDES, *et al.*,
Plaintiffs,

v.

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

No. 18-cv-3086 (DLF)

DAMIEN CODREA, *et al.*,
Plaintiffs,

v.

WILLIAM P. BARR,[1] Attorney General, *et al.*,
Defendants.

[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).

ORDER

For the reasons stated in the accompanying memorandum opinion, it is

ORDERED that plaintiff Damien Guedes's Motion for a Preliminary Injunction, Dkt. 2, No. 18-cv-2988, is **DENIED**;

ORDERED that plaintiff Firearms Policy Coalition's Motion for a Preliminary Injunction, Dkt. 2, No. 18-cv-3083, is **DENIED**; and

ORDERED that plaintiff David Codrea's Motion for a Preliminary Injunction, Dkt. 5, No. 18-cv-3086, is **DENIED**.

/s/ Dabney L. Friedrich
DABNEY L. FRIEDRICH
United States District Judge

February 25, 2019

APPENDIX H

Regulatory Provisions

1. **27 C.F.R. § 447.11** provides:

Meaning of terms.

When used in this part and in forms prescribed under this part, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof, terms shall have the meanings ascribed in this section. Words in the plural form shall include the singular, and vice versa, and words imparting the masculine gender shall include the feminine. The terms "includes" and "including" do not exclude other things not enumerated which are in the same general class or are otherwise within the scope thereof.

* * * *

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

it modifies "shoots, is designed to shoot, or can be readily restored to shoot," means functioning as the result of a self-acting or self-regulating mechanism that allows the firing of multiple rounds through a single function of the trigger; and "single function of the trigger" means a single pull of the trigger and analogous motions. The term "machinegun" includes a bump-stock-type device, *i.e.,* a device that allows a semi-automatic firearm to shoot more than one shot with a single pull of the trigger by harnessing the recoil energy of the semi-automatic firearm to which it is affixed so that the trigger resets and continues firing without additional physical manipulation of the trigger by the shooter.

2. **27 U.S.C. § 478.11** provides:

Meaning of terms.

When used in this part and in forms prescribed under this part, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof, terms shall have the meanings ascribed in this section. Words in the plural form shall include the singular, and vice versa, and words importing the masculine gender shall include the feminine. The terms "includes" and "including" do not exclude other things not enumerated which are in the same general class or are otherwise within the scope thereof.

* * * * *

Machine gun. Any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also

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

3. **27 C.F.R. § 479.11** provides:

Meaning of terms.

When used in this part and in forms prescribed under this part, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof, terms shall have the meanings ascribed in this section. Words in the plural form shall include the singular, and vice versa, and words importing the masculine gender shall include the feminine. The terms "includes" and "including" do not exclude other things not enumerated

which are in the same general class or are otherwise within the scope thereof.

* * * * *

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