ORAL ARGUMENT NOT YET SCHEDULED
No. 21-5045

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

DAMIEN GUEDES, *et al.*,

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

Appeal from the U.S. District Court for the District of Columbia
Civil Case No. 18-cv-2988-DLF (Hon. Dabney L. Friedrich)

APPELLANTS' FINAL REPLY BRIEF

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GLOSSARY

ATF	Bureau of Alcohol, Tobacco, Firearms & Explosives
GCA	Gun Control Act of 1968

INTRODUCTION AND SUMMARY OF ARGUMENT

Bump firing a semi-automatic weapon does not make it a machine gun, with or without external aids to that technique. ATF's claim that the repeated manual engagement of the trigger after it is released constitutes an automatic cycle initiated by the first pull of the trigger robs the statute and its structure of all meaning and would cover every semi-automatic weapon, all of which can be bump fired. While Appellants believe that ATF's reading is facially wrong, it most certainly is not the best, or even a plain, reading of the statute and thus cannot be sustained absent *Chevron* deference, which all parties, ATF included, agree should not apply. While ATF seeks affirmance on the alternative ground that it believes its interpretation is what the statute requires, no appellate judge in the country has agreed with ATF on that point, and the court below found the statute ambiguous.

While this Court should not be bound by its hasty and preliminary prior decision in this case, if it does feel so bound, it should refer the case for *en banc* review to allow Appellants to present briefing on their *Chevron* and lenity arguments for the first time to a decisionmaker free to rule upon them *de novo*.

As for the interpretive questions, ATF offers little new by way of defense of its redefinition of what constitutes automatically firing more than one shot by a single function of the trigger. As Judge Henderson observed in dissent and as two appellate panels (one later vacated) subsequently agreed, bump stocks require multiple functions of the trigger to fire multiple shots, operate only by virtue of continued manual input in "bumping" the trigger mechanism against a stationary trigger finger, and hence do not convert an ordinary semi-automatic rifle into a machinegun. *Guedes v. ATF*, 920 F.3d 1, 39-48 (D.C. Cir. 2019) ("Guedes II") (Henderson, J., dissenting); *Gun Owners of America, Inc. v. Garland*, 992 F.3d 446 (6th Cir. 2021), *reh'g en banc granted*, 2 F.4th 576 (6th Cir. 2021); *United States v. Alkazahg*, 2021 WL 4058360 (N-M. Ct. Crim. App. 2021). ATF's theories and definitions, if accepted, would convert all semiautomatic weapons into machineguns, would make common household items like tennis balls, padded jackets, rubber bands, and belt loops into components that could be combined with semiautomatic weapons to make them into machineguns, and would lead to absurd distinctions and contradictions. Indeed, the only way ATF avoids such contradictions is by selectively and inconsistently invoking their

definitions to reach a predetermined result, as in the case of binary triggers. Those problems all demonstrate that ATF's Final Rule is arbitrary, capricious, and contrary to the law.

If this Court nonetheless continues to think that ATF's interpretation is a plausible reading of an ambiguous statute, then Appellants reiterate and preserve their broader arguments regarding waiver, *Chevron*, lenity, and the separation of powers. Those arguments are amply set forth in Appellant's opening brief.

ARGUMENT

I. THE LAW OF THE CASE DOES NOT APPLY HERE.

Despite the lack of full briefing on the *Chevron* issues at the preliminary injunction phase of this case, this Court's *sua sponte* decision to raise and decide *Chevron* issues not subject to dispute by the parties, and ATF's own repeated claims that this Court was wrong in the overwhelming majority of its prior reasoning, ATF now claims that the law of the case controls because "this Court's prior decision, which issued after full briefing and oral argument, comprehensively addressed the arguments [Appellants] present on this appeal." ATF Br. 18 (citing *Guedes II*); *see also id.* at 20-28. That assertion is meritless and

inconsistent with ATF's substantive arguments. Indeed, ATF seeks affirmance not on the grounds set forth below or in the prior appeal, but for the rejected reason that its reading is correct rather than merely a supposedly permissible legislative construction of an ambiguous statute. *See also* Resp'ts' Opp'n Br. 14, *Guedes v. ATF* (No. 19-296) (U.S.), 2019 WL 6650579, at *14 (arguing *Guedes II* "erred" when it applied *Chevron* because "ATF has never proceeded by legislative rule in determining whether particular devices are machine guns, it has not asserted the statutory authority to do so, and it did not do so here"). That it has occasionally shifted its stance from a claim regarding the "plain meaning" of the statute to a claim that it proffers the "best reading" of the statute does not save it here. If ATF had legislative discretion over an ambiguous statute, it need not have selected the "best" reading and failed to recognize, much less exercise, its supposed discretion. Its current argument only succeeds if this Court rejects the application of *Chevron* entirely, rejects the application of the rule of lenity even during *de novo* court interpretation, and then contrary to nearly eight decades of ATF's own reading of the law, concludes that ATF's hasty reversal under political pressure somehow suddenly discovered the "best" reading of the

actual language of the statute. That ATF leads with a reliance on the law of the case that it largely rejects is thus surprising.

In any event, the law of the case does not apply to this Court's earlier conclusions regarding the likelihood of success on the merits. As even ATF's primary case, *Sherley v. Sebelius*, recognizes, application of the doctrine to a preliminary-injunction decision requires a "definitive, fully considered legal decision based on a fully developed factual record and a decision making process that included full briefing and argument without unusual time constraints." *Sherley v. Sebelius*, 689 F.3d 776, 782 (D.C. Cir. 2012); ATF Br. at 21.

The hasty briefing and decision required by ATF's short fuse for implementing, and refusal to stay, the Final Rule, combined with this Court's adoption of an unbriefed and affirmatively eschewed rationale, militates against ATF's current claim that *Guedes II* is dispositive. *See Sherley*, 689 F.3d at 782 ("An appellate court in a later phase of the litigation with a fully developed record, full briefing and argument, and fully developed consideration of the issue need not bind itself to the time-pressured decision it earlier made on a less adequate record."). The

existence of intervening authority only furthers that conclusion. *See* Guedes Br. 23-24.

If the Court nonetheless disagrees and views *Guedes II* as binding, then it should take the case *en banc*, as suggested in Appellants' opening brief, at 39, and in their previous petition to that effect. *Clarke v. United States*, 915 F.2d 699, 707 (D.C. Cir. 1990) ("As the court can dis-*en banc* a case that it has ordered heard *en banc,* … it presumably retains the power to reverse a denial of *en banc* review until the issuance of the mandate.") (citation omitted). Subsequent decisions by the Sixth Circuit and the Navy-Marines Corps Court of Criminal Appeals provide ample cause to go *en banc* to reconsider the erroneous reasoning and result of *Guedes II*. *See Gun Owners of America, Inc. v. Garland*, 992 F.3d 446, 474-75 (6th Cir. 2021) (panel decision; vacated and taken *en banc*) (concluding that *Chevron* did not apply to the Final Rule and that "a bump stock cannot be classified as a machine gun"); *United States v. Alkazahg*, 2021 WL 4058360, at *10-13 (N-M. Ct. Crim. App. 2021) (concluding that *Chevron* can be waived, deciding the statute was ambiguous, interpreting the statute to mean that bump stocks are not machineguns, and deciding that, even if those first points were wrong,

the rule of lenity applied). Indeed, as the Petitioner in *Aposhian v. Garland* notes, there are acknowledged circuit splits on whether *Chevron* can be waived and on whether *Chevron* rather than lenity can be applied to criminal or mixed-use statutes. *See* Reply in Supp. of Cert. at 6-9, *Aposhian v. Garland* (No. 21-159) (U.S.). Such existing circuit splits are ample grounds for considering this case *en banc* if *Guedes II* is deemed controlling.

II. THE FINAL RULE IS INCONSISTENT WITH THE STATUTORY DEFINITION OF A MACHINEGUN.

As set forth in Appellants' opening brief, at 22-37, the Final Rule ignores the language, grammar, and history of the definition of machinegun to adopt a rule that is overbroad and unrelated to the actual criteria set forth in the statute. At every step, ATF alters the statutory language, shifting the criteria away from a focus on the firearm itself and toward an unenacted shooter-focused rule. Instead of requiring multiple shots from the object-focused single "function of the trigger," ATF substitutes a conduct-focused requirement of a single "pull" of the trigger. And instead of requiring that the multiple shots occur "by" a single function (or even "pull") of the trigger, ending when the trigger is released, ATF now only requires that the single "pull" merely initiate a

sequence of events leading to further shots, even though the trigger is released and reengaged for every subsequent shot. And even then, ATF no longer requires that such shots occur automatically—*i.e.*, by a self-acting mechanism—but instead includes all self-regulating mechanisms that make it easier (against an undefined baseline) to fire additional shots, regardless of the amount of manual human intervention required to cause the trigger to function. At every step, therefore, ATF has abandoned the actual language of a criminal statute and expanded the definition of machinegun in an arbitrary and capricious manner not in accord with the law.

A. "Single function of the trigger" refers to the mechanical action of the trigger.

ATF's continued claim, at 29-31, that the phrase "function of the trigger" means "pull" of the trigger continues to be wrong for the reasons given in Appellants' opening brief, at 22-26. It distorts the form of speech in the sentence, alters the focus to the volitional action of the operator rather than the physical action of the trigger itself, and cannot even be applied consistently, as even ATF must add other "analogous motions" to its redefinition to accommodate its change in focus from trigger to shooter. ATF Br. 10 (citing Final Rule, *Bump-Stock-Type Devices*, 83 FED.

REG. 66,514, 66,515 (Dec. 26, 2018)). While "pulling" a trigger is certainly a *means* of *making* the trigger function, it is not the function of the trigger itself, and there are many other means of causing a trigger to function. Bumping the trigger, for example, or releasing it, makes a trigger function, but the statute does not distinguish between how a trigger is *caused* to function, only whether the trigger itself engages in one or more functions.

By focusing on the action and intent of the operator, rather than the trigger, ATF then sets the stage for it to ignore second or subsequent functions of the trigger by claiming those functions are not volitional and do not constitute a "pull" of the trigger, even if they involve the trigger engaging in multiple functions—*i.e.*, transits across its range of motion to either free the hammer and cause a bullet to be fire, or to reset the hammer once the trigger is released.[1] *See* JA70–73; Guedes Br. 24 (citing Appellants' Br. 5-7 & Images 1-7, *Guedes v. ATF* (No. 19-5042) (D.C. Cir.)). Even ATF's own regulations recognize that the trigger must be "re-

[1] ATF reviewed, but rejected, a comment suggesting it add a volitional element to its definition. Having failed to adopt that view as part of the rulemaking, it cannot save its decision by importing a volitional test now. *See* Cutonilli Amicus Br. 6 (citing Final Rule, 83 FED. REG. at 66,534).

engage[d]" with every bump of the shooter's finger. Final Rule, 83 FED. REG. at 66,516. Yet ATF would obfuscate that fact by denying that each such re-engagement of the trigger causes a separate function of the trigger.

ATF also distorts what it is that a single function of the trigger must do: shoot more than one shot. Instead of multiple shots being fired "by" a single function of the trigger, ATF substitutes the convoluted notion that a single "pull" of the trigger need only "initiate[]" a firing sequence for subsequent shots, regardless how many further pulls, pushes, releases, or "functions" of the trigger are involved in those subsequent shots. But in using the phrase "by a single function of the trigger," 26 U.S.C. § 5845(b) necessarily reads as requiring the action to occur by one *and only one* function of the trigger, not merely be initiated by one function and then followed by as many others as needed, whether automatically or not. Had that been the intended original meaning (much less the original public understanding), the statute would have read quite differently. *Alkazahg*, 2021 WL 4058360, at *13 (ATF's approach would "judicially transform" the statutory definition beyond recognition;

Congress could have adopted the "shooter-focused approach" or even the "rate-of-fire approach" if it wanted to "by enacting those words").

By altering the statutory language to use vaguer and broader concepts, ATF distorts the textual object of the word "automatically" by suggesting that it need only be the trigger that moves (functions) automatically after the first pull initiates the sequence. ATF incorrectly suggests, at 39, that it does not matter that "bump stocks automate the back-and-forth movement of the trigger"—which they do not—"rather than the internal movement of the hammer." But the statutory text makes that distinction relevant by defining the complete condition—one and only one function of the trigger—that must cause automatic "fire" of more than one shot, which is ultimately the function of the hammer repeatedly striking the cartridges in a typical firearm. A machine gun is not defined by whether the *trigger* is caused to function automatically, but instead by whether the weapon "fires" more than one shot automatically by a *single* function of the trigger. And even with a bump stock, a weapon fires only one shot with each function of the trigger. *See Gun Owners of Am., Inc.*, 992 F.3d at 472 (panel decision; vacated and taken en banc) ("[B]ump-stock devices do not fundamentally change the

line Congress drew to distinguish automatic firearms from semiautomatic ones."). Multiple functions of the trigger, even if automatic, cannot be squared with the actual language of the statute. Such a reading would eliminate the need for the entire phrase "by a single function of the trigger," given that the word automatically would then do all of the work, even where multiple operations of the trigger are involved so long as there is supposedly only a single volitional initiating event—a "pull."

ATF's renewed reliance, at 31-32, on *Akins v. United States*, 312 F. App'x 197, 200 (11th Cir. 2009) for its substitution of the word "pull" is no use to it absent *Chevron* deference, as the Eleventh Circuit deferred to ATF's view rather than reached it as an original matter. And to the extent the Eleventh Circuit endorsed the underlying *Akins* ruling, it presumably also endorsed the remainder of ATF's interpretation of what constituted automatic versus manual bump stocks. Its passing reference to the plain language of the statute involved a different aspect of the definition not relevant here.

Finally, ATF's reliance, at 33, on the use of the word "pull" in *Staples v. United States*, 511 U.S. 600, 602 n.1 (1994), is misplaced. That

case did not address the meaning of the word "function" in the definition of a machinegun, but rather talked about the difference between automatic and semi-automatic weapons in a manner that makes clear bump stocks do not involve automatic fire given the repeated release of the trigger. *See Alkazahg*, 2021 WL 4058360, at *12 (quoting *United States v. Olofson*, 563 F.3d 652, 658 (7th Cir. 2009)) (explaining that *Staples* merely gave "commonsense explanations of the words *automatic* and *semiautomatic*" that were not "precedentially binding"). That the *Staples* opinion casually used the common example of "pulling" the trigger (which is a typical means of *causing* a trigger to function, but not *a* function of the trigger), is hardly surprising or relevant to the discussion here.

B. "Automatically" refers to a self-acting mechanism.

Appellants' opening brief, at 27-30, explained in detail why the phrase "shoots … automatically" necessarily requires multiple shots by a self-acting mechanism, not merely a self-regulating one, why ATF's alternative definition contradicts its own examples and past rulings that were extant at the time Congress passed the Gun Control Act, renders

the notion of semi-automatic operation meaningless, and would be grossly overbroad.[2]

ATF nonetheless continues to obfuscate, claiming, at 33-36, that there is no material difference between a sprung and unsprung bump stock. Of course, the spring in an Akins Accelerator provides the motive force for the body of the firearm to move forward and reengage the trigger with the finger, whereas with an unsprung bump stock it is the shooter who must manually push the trigger mechanism into his or her finger to cause a subsequent function of the trigger and a subsequent shot.[3] That would seem to be the very definitional difference between a self-acting device and a device requiring external input. *See, e.g.*, *Alkazahg*, 2021 WL 4058360, at *14 (concluding that bump stocks do not lead to automatic firing because "'automatic' suggests by its ordinary meaning *de minimus* human interaction and only just enough to merely initiate

[2] ATF, at 45 n.6, discounts definitions contemporaneous with the 1968 GCA, claiming that the word "automatically" was unchanged from its original use in 1934. That, of course, is false given the 1934 statute used the word "semiautomatically," which was narrowed to "automatically" in 1968. *See* Guedes Br. 30.

[3] As noted in the opening brief, at 8 n.2, even a sprung bump stock operates by more than one function of the trigger, regardless whether the subsequent functions of the trigger might be deemed automatic.

the 'automatic' process"). ATF's reliance on generic definitions of automatic to include self-regulating mechanisms ignores more specific contemporary definitions of automatic weapons, the specific object of *what* must occur automatically, and is overbroad. Guedes Br. 27-28.

The notion that anything that "constrain[s]" the movement of the rifle causes it to "shoot" automatically, ATF Br. 35-36, once again engages in more linguistic deception. As explained in Appellants' opening brief, at 33-34, 36, dozens of features of semi-automatic firearms constrain the operation or behavior of weapons and make them easier to shoot. Even if such built-in features could be said to operate automatically in some sense—they are an intrinsic part of the design, for example—at best they cause the firearm to stabilize automatically, perhaps to reload automatically, or even, in the case of a muzzle brake, to prevent muzzle lift automatically. But neither bump stocks nor any of the physical features discussed in the opening brief cause a firearm to "shoot automatically" more than one shot. And even if one could argue that an unsprung bump-stock "automatically" causes an ordinary trigger to be

released and reset, it does not cause the subsequent reengagement of the trigger absent further manual input from the shooter.[4]

ATF next argues, at 40-43, that, if Appellants' reading is correct, it would "call into question the status of a number" of other weapons, including the Akins Accelerator and weapons addressed in the 2018 rule, as well as other decisions by the courts of appeals. Regarding the Akins Accelerator, that is likely true regarding the proper reading of "a single function of the trigger," as ATF itself initially concluded. As for other devices that mechanically assist with multiple functions of a standard trigger, ATF Br. 42, some such devices might not be covered, though there may be different questions about what constitutes the true "trigger" on firearms with a motor and an on/off button. For non-motorized firearms, however, there is no debate regarding what constitutes the trigger or how it operates.

What ATF neglects to mention, however, is that even its new definition would not cover Gatling guns operated by a manual crank, or

[4] Indeed, in that regard, a binary trigger automatically resets the trigger mechanism even before the trigger is released, and if a fixed-stock firearm with such a trigger is held with a gentle grip, recoil alone would cause *both* a release of the trigger and a second shot to be fired. Once again, the line ATF seeks to draw is incoherent.

even their modern equivalents, trigger cranks, which can depress and release a trigger rapidly by the continuous manual cranking of a ratchet or cam. The larger point is that such statutory limitations do not matter here and are instead a question for Congress.

That a statute written to address machineguns does not cover other firearms or devices that might be of concern hardly warrants a disingenuously expanded reading of that statute. The definition of a machinegun also does not cover semi-automatic rifles, which many seem to dislike these days, or explosive devices, or trigger cranks for that matter. If ATF is dissatisfied with the long-established limits on the definition of machineguns, it can raise that with Congress rather than take legislating new crimes into its own hands. Congress could have defined machineguns based on the functional rate and quantity of fire, but it did not do so. A firearm that slowly yet automatically fires 2 shots in a row by a single function of the trigger (think a select-fire rifle with a low rate of fire) is a machinegun under that statute. A manual Gatling gun firing dozens of shots rapidly is not. That is the choice Congress made and it matters not one bit whether ATF or this Court thinks it should have regulated more expansively or based on different criteria.

ATF is also wrong to argue, at 43-44, that guns with binary-triggers are meaningfully different from guns with bump stocks. Appellants already explained, at 37, that bump stocks result in the same "release" of the trigger that ATF now suggests is actually a separate discrete function with a binary trigger (*i.e.*, the release of the trigger that results in a subsequent shot being fired). And to the extent ATF is returning to its shooter-focused "volitional motion" concept of what constitutes a second function of the trigger, that still does not distinguish binary triggers. Bump firing two rounds in a row with a binary trigger is far more "automatic" than with an unsprung bump stock and requires less volition to merely allow the recoil to cause the release and second shot than does the affirmative forward motion required with bump stocks to reengage the trigger to fire a second shot. ATF's distinction is entirely empty when applied to bump firing a fixed-stock weapon with a binary trigger.

ATF also argues, at 44, that the forward pressure that spring-less bump stocks require is no different than the pressure used to keep the trigger depressed in "prototypical machineguns." But the forward pressure applied when bump firing with or without a bump stock is not on the trigger, but on the body of the rifle. Pressure on the *trigger* itself

is applied and released and then applied again for each subsequent shot. If the test is constant pressure on *any* part of the firearm, then the mere act of maintaining a grip on any semiautomatic rifle, or pressing its stock firmly into one's shoulder, throughout multiple independent functions of the trigger also involves constant pressure on something other than the trigger and is certainly necessary to allow multiple shots to be fired (else the firearm fall to the ground when pressure on the gun is released). While that example may seem foolish or absurd, it illustrates those exact qualities in attempting to equate continued pressure on the foregrip of a rifle with continued pressure on a trigger in order to prevent it from releasing. Bump firing a weapon, even without a bump stock, necessarily requires removing pressure from the trigger, allowing it to reset, and then reapplying pressure to the trigger to fire the next shot.

ATF then argues, at 46-48, that the Final Rule was not concerned with bump stocks just because it made guns easier to fire, but rather because the "bump stock automates the bump firing process" that can otherwise be accomplished with or without common household objects. Aside from falsely implying that a bump stock harnesses "recoil energy" to drive the body of a firearm *forward* rather than merely rearward to

cause a release of the trigger, ATF simply ignores that virtually all of the examples given in Appellants' opening brief, at 33-34, 36, also constrain the path of the firearm, direct the linear recoil energy, and in some ways even assist in the subsequent forward motion, unlike bump stocks themselves. Thus, a fixed stock directs and controls recoil energy to maintain linearity when bump firing far more than with a firearm (handgun) without a fixed shoulder stock. Rubber bands, belt loops, padded jackets, tennis balls, or even broomsticks, when combined with a semi-automatic rifle, all constrain the linear motion of the rifle or otherwise help a shooter regulate the bump-firing process and thus even the potential combination would satisfy ATF's definition of a machinegun. That is an absurd result, as ATF implicitly admits, though it struggles hopelessly to deny that such is the inevitable result of its redefinition.

Finally, ATF argues, at 48-49, that the understanding of how a bump stock operates is "entitled to deference." But there is no confusion or dispute whatsoever regarding *how* a bump stock physically works. The dispute instead turns on how that process should be characterized relative to the statutory words used to define a machinegun. ATF should

receive no deference at all for that, claims no deference for its legal interpretations, and should not be allowed to conflate facts and law now.

C. Congress in 1968 ratified a narrow reading of the definition of machinegun.

ATF suggests, at 50-51, that the Gun Control Act of 1968 did nothing to narrow the defined scope of a machinegun. In support, however, ATF looks not to the text of the 1968 amendments, but rather to the "legislative history." But ATF's reliance on floor debates to suggest that the removal of the phrase "or semiautomatically" magically *broadened* the scope of the definition of machinegun asks this Court to ignore the plain meaning of the statutory text. That Congress expanded the definition in other ways—by adding parts intended to or merely capable of turning a firearm into a machine gun—does not change the narrowing of the underlying definition of what it takes to be a machinegun. In fact, it shows that Congress was already attuned to any perceived limitations in its definition and fixed those limitations where it thought appropriate. That the substitution of the word automatically for semiautomatically was deemed a reflection of existing law, ATF Br. 50-51, further confirms Congress' awareness of the more limited interpretations of what constituted a machinegun even prior to the

narrowing change in language to comport with such interpretations. That the district court imagines ATF's narrow rulings in this area, and its 1955 ruling on Gatling guns in particular, were insufficiently settled by 1968 is utter speculation. ATF Br. 51. Congress undertook to overhaul that very section of the statute, narrowing it in some respects and broadening it to include uncovered weapons in other respects. The notion that it overlooked an unchallenged 13-year-old decision on Gatling guns of all things is absurd.

D. The Final Rule's definitions are unreasonable as applied to bump stocks and are overbroad.

ATF concedes, at 59-60, that it did not engage in any legislative determinations when adopting the Final Rule, but only applied its understanding of the statutory terms which it viewed as unambiguous. That this Court nonetheless viewed the rule as legislative because of its effective date does not preclude the ordinary APA argument that ATF failed to recognize and exercise its discretion regarding the definitional questions. Such refusal to recognize discretion is definitionally arbitrary and capricious. *See* Guedes Br. 59-61.

As for the arbitrary scope and application of ATF's definitions, those issue are largely discussed in the earlier sections. While ATF at

various points disputes that its definition would reach all semiautomatic firearms or other miscellaneous aids to bump firing, its distinctions routinely ignore its own definitions. Indeed, bump firing, with or without a bump stock or other aid, satisfies ATF's broader definition of automatic fire *initiated* by an initial pull of the trigger and operating in a *self-regulating* manner so long as the surrounding conditions are met. Thus, bump firing in every instance is *initiated* by the first "pull" of the trigger, the recoil energy from the shot is used to cause the trigger to release and reset, and then a subsequent shot is caused by forward pressure on the body of the firearm. Whether there is some additional part or component that makes that easier has no bearing at all on any part of ATF's *definition* of a machine gun. The cycle of fire-recoil-push forward-fire repeats itself even without a bump stock so long as the shooter maintains the "conditions" of medium forward pressure on the body of the firearm. That a bump stock channels the recoil and may make it *easier* to bump fire a weapon, such ease has no bearing on whether the cycle is automatic under ATF's expansive notion of that concept. All of the examples of overbreadth reflect ATF's reliance on irrelevant distinctions that have nothing to do with the definitions it offers. And its distinctions certainly

have nothing to do with the myriad parts and common items that also would help channel recoil, aid in the rebound of a firearm, or otherwise make bump firing easier to "regulate." If the ongoing manual intervention of pushing forward on the body of a firearm to reengage a trigger after recoil is nonetheless an "automatic" cycle initiated by the first pull of the trigger, then it is automatic with or without a bump stock.

III. IF THE STATUTE IS AMBIGUOUS, THE FINAL RULE IS INVALID.

A. *Chevron* deference was waived.

ATF concedes, at 52, that it has "not invoked *Chevron*" in defending the Final Rule. It nevertheless rejects Appellants' suggestion, at 40-44, that its failure to invoke *Chevron* constitutes waiver that this Court was required to accept. But *Chevron* merely infers a delegation of legislative discretion, it does not force an agency to exercise that discretion. Such delegated choice includes the choice to rise or fall with the statutory text, which is what ATF in fact chose repeatedly, explicitly, and even under the acknowledged risk of losing the case if it misread the statute. It is hard to imagine any rationale justifying this Court contradicting that choice that would not stand as an indictment of *Chevron* deference in its entirety. In addition to *United States v. Sineneng-Smith*, 140 S. Ct. 1575

(2020), which rejected a similarly interventionist disregard of the party-presentation principle, the Supreme Court has expressly accepted the government's waiver of *Chevron* deference in the recent *HollyFrontier Cheyenne Refining, LLC v. Renewable Fuels Ass'n*, 141 S. Ct. 2172, 2180 (2021). And the Navy-Marines Corps Court of Criminal Appeals in *Alkazahg* correctly recognized that such precedent applied to the Final Rule here, holding that *Chevron* could be—and was—waived by the government and thereafter rejecting the Final Rule. 2021 WL 4058360, at *10 (citing *HollyFrontier*, 141 S. Ct. at 2180).

B. *Chevron* deference is inappropriate for statutes with criminal applications, and the rule of lenity requires ambiguities to be read narrowly.

Despite having conceded throughout this case that *Chevron* does not apply to the criminal/civil statute in this case, ATF now argues, at 54-56, that *Chevron* actually does apply to statutes with criminal applications. But as Judge Batchelder explained earlier this year, in a case where ATF made this same argument, neither of the two cases on which ATF now relies—*Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995); *United States v. O'Hagan*, 521 U.S. 642 (1997)—actually applied *Chevron*. *Gun Owners of Am., Inc. v.*

Garland, 992 F.3d at 456-58 (panel decision; vacated and taken en banc). The many cases cited in Appellants' opening brief, at 49-51, contradict any general application of deference to laws defining crimes.

ATF also argues, at 56-57, that *United States v. Apel*, 571 U.S. 359 (2014), and *Abramski v. United States*, 573 U.S. 169 (2014), are inapposite because they "did not involve regulations." But the express rejection of agency discretion to interpret criminal statutes in those cases did not depend on the lack of regulations, and there is nothing to suggest the rule was meant to be so limited. *See also* Reply in Supp. of Cert. at 9-10, *Aposhian v. Garland* (No. 21-159) (U.S.) (explaining that those cases use "sweeping language" that did not turn on the existence of "formal regulations").

Finally, ATF's claim, at 57-58, that the rule of lenity should only apply after *Chevron* because of the inference that Congress *intended* the agency to decide any ambiguity highlights the absurdity in this case. To start, the false inference of delegation through ambiguity is especially suspect in the criminal context, as literally every case on the rule of lenity demonstrates. Lenity is expressly designed as a check on such implied delegation to the Executive, not an afterthought. Guedes Br. 54.

Furthermore, ATF itself has repeatedly denied that it has delegated authority to legislatively construe the statutory definition of machinegun, so one marvels at its sudden reliance on non-existent implied delegation. If ambiguity is delegation to which deference is owed, this Court should defer to ATF's views on its limited legislative authority long before rejecting those views to force upon it supposed discretion it has neither claimed nor exercised.

C. If *Chevron* deference governs despite the criminal applications of the statute and the government's affirmative rejection of any legislative authority, then it is unconstitutional as applied.

While ATF cites, at 58, *Guedes II*, 920 F.3d at 28, to argue *Chevron* is entirely consistent with the separation of powers because "delegations of legislative authority in the criminal sphere are constitutional," that decision is mistaken and should be revisited. If the panel feels bound by it despite arguments to the contrary, Guedes Br. 44-56, then the full Court should reconsider that holding *en banc*.

ATF's dismissal, at 58 n.8, of the delegation concerns raised by various Justices in *Gundy v. United States*, 139 S. Ct. 2116 (2019), misses the point. Though not directly dealing with lenity or *Chevron*, both those doctrines turn on the proper scope of delegation and how to construe

statutes purporting to delegate legislative authority to the Executive Branch. Guedes Br. 51-52, 57-58. An ambiguous statute that courts refuse to interpret for themselves does not provide intelligible principles to constrain supposedly delegated authority. Rather, application of *Chevron* would pile delegation upon delegation until an agency is left with little more than implied instructions to "do whatever you like," which would violate the separation of powers in all instances, but most especially in connection with criminal laws.

D. The Final Rule is unreasonable, arbitrary, and capricious.

ATF suggests, at 59-60, that the Final Rule was not arbitrary because it viewed its interpretation as being compelled by the statutory text. But that simply concedes the error should this Court once again find that the statute was ambiguous. If ATF failed to *recognize* its supposed legislative discretion, it cannot possibly have *exercised* such discretion in a manner that was not arbitrary and capricious. Even under the most simplistic conception of the APA, the Final Rule cannot stand unless ATF was correct that the rule was not merely allowed, but *compelled*, by the statutory definition of a machinegun.

CONCLUSION

This Court's earlier decision in *Guedes II* was wrong, was rushed, and lacked the benefit of adversarial briefing on the issues the Court ultimate relied upon. Indeed, all parties disagreed with the central bases for this Court's decision affirming the denial of a preliminary injunction. Although it would be best to reconsider the reasoning of that decision, either at the panel level or *en banc*, even if the Court does not do so the Final Rule is still arbitrary and capricious given that ATF did not recognize or exercise its supposed discretion and its redefinition is woefully overbroad and inconsistent in its application. Even deference cannot cure such inconsistencies. This Court should reverse the decision below and remand with instructions to enter summary judgment for the Guedes plaintiffs.

Respectfully Submitted,

s/ Erik S. Jaffe

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CERTIFICATE OF COMPLIANCE

I certify, on this 9th day of December, 2021, that the foregoing Final Reply Brief of Appellants complies with the word limit under Fed. R. App. P. 32(a)(7) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 6,033 words. The number of words was determined through the word-count function of Microsoft Word for Mac (version 16.55). This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font.

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ANTI-VIRUS CERTIFICATION

I certify that the foregoing Reply Brief submitted in PDF format via the ECF system was scanned using the current version of Norton Internet Security and no viruses or other security risks were found.

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CERTIFICATE OF SERVICE

I certify that, on this 9th day of December, 2021, I caused the foregoing Final Reply Brief of Appellants to be served via the ECF system, and by overnight delivery by a third-party commercial printer, on all counsel therein, namely:

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