No. 20-51016

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MICHAEL CARGILL,

Plaintiff – Appellant,

v.

ROBERT M. WILKINSON, Acting U.S. Attorney General; UNITED STATES DEPARTMENT OF JUSTICE; REGINA LOMBARDO, in her official capacity as Acting Director of the Bureau of Alcohol, Tobacco, Firearms and Explosives; BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES,

Defendants – Appellees.

On Appeal from the United States District Court, Western District of Texas, No. 1:19-cv-349, Honorable David A. Ezra

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for Appellant Michael Cargill certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Appellant

Michael Cargill

Appellees

ROBERT M. WILKINSON, Acting U.S. Attorney General, in his official capacity;
UNITED STATES DEPARTMENT OF JUSTICE;
REGINA LOMBARDO, in her official capacity as Acting Director of the Bureau of Alcohol, Tobacco, Firearms and Explosives; and
BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES

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STATEMENT REGARDING ORAL ARGUMENT

Appellant, Michael Cargill, respectfully requests oral argument. This case involves a challenge to a regulation that has nationwide consequences for hundreds of thousands of Americans. A related challenge in the Tenth Circuit Court of Appeals prompted *en banc* consideration. *See Aposhian v. Whitaker*, No. 19-4036 (10th Cir.) (*en banc* oral argument held Jan. 27, 2021; rehearing *en banc* dismissed over five dissents March 5, 2021). Oral argument will help the Court more fully develop and clarify the issues and facts.

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JURISDICTIONAL STATEMENT

Mr. Cargill challenged the Final Rule as being unconstitutional and unlawful under Article I, § 1, Article I, § 7 and Article II, § 3 of the U.S. Constitution, and 5 U.S.C. § 706(2)(A), (B), and (C). ROA.9-38. The district court had federal question jurisdiction in this case pursuant to 5 U.S.C. § 702 and 28 U.S.C. § 1331. This Court has jurisdiction to review the district court's final order directing judgment for ATF. 28 U.S.C. § 1291.

INTRODUCTION

This case is not about gun control. When a deranged gunman opened fire on a crowd in Las Vegas, Nevada on October 1, 2017, the nation suffered a horrible tragedy. Using a large cache of weapons, many of which were equipped with scopes, 100-round magazines and bump stocks, that gunman murdered 58 innocent people and injured hundreds of others. Many lawmakers believed that tragedy cried out for a *legislative* response to the misuse of dangerous weaponry. Many of them sought to *prospectively* ban ownership of bump stocks after careful consideration of their capacity to inflict harm. Such policies are entirely appropriate for our *elected* representatives to consider.

This case is instead about who has the constitutional prerogative to change the criminal law when changes are warranted. Rightly or wrongly, Congress has not prohibited bump stocks, and it is unlawful for a prosecutorial entity, like the Bureau of Alcohol, Tobacco, Firearms and Explosives, to rewrite existing law when Congress has not acted. That is the situation presented here, with ATF choosing to assume the mantle of Congress and adopt the Bump Stock Final Rule. Even if ATF's goal is laudable, this Court has a constitutional obligation of its own to strike

down ATF's attempted arrogation of legislative power. Otherwise, if a national tragedy permits an administrative agency to bypass the Constitution's prescribed path for lawmaking, then the Executive Branch will be able to usurp Congress' legislative function and substitute the agency's will for that of the people's elected representatives.

Significantly, ATF's administrative fix has undermined Congress' efforts to enact a lawful legislative response. After the tragedy in Las Vegas, Congress considered a variety of bi-partisan legislative efforts to prohibit the sale of new bump stocks, over the protest of many gun-rights advocates. But when ATF's regulation preempted any decision from Congress, those legislative efforts all stalled. As Senator Dianne Feinstein put it, "ATF has consistently stated that bump stocks could not be banned through regulation because they do not fall under the legal definition of a machine gun. … Both Justice Department and ATF lawyers know that legislation is the only way to ban bump stocks. The law has not changed since 1986, and it must be amended to cover bump stocks[.]" Press Release, Sen. Dianne Feinstein, *Feinstein Statement on Regulation to Ban Bump Stocks* (Mar. 23, 2018). Executive interference

with legislative prerogatives comes at a steep cost. And only this Court can restore the appropriate constitutional balance.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Whether the Final Rule was legislative (or interpretive), and whether the Court erred in rejecting ATF's own insistence that it lacks statutory authority to issue any legislative rules.

II. Whether the statutory definition of a machinegun was unambiguous, and thus whether ATF's attempted gap-filling rule was invalid.

III. Whether the Final Rule contradicts the plain statutory definition of a machinegun, when a bump stock neither functions automatically (because it requires continuous manual input) nor changes the function of a semiautomatic firearm's trigger mechanism.

IV. Whether ATF has the constitutional authority to rewrite a criminal law to expand the scope of criminal liability created by Congress.

STATEMENT OF THE CASE AND FACTS

A. The Relevant Statutes

Under the National Firearms Act (NFA), 26 U.S.C. §§ 5812(a), 5861, Congress criminalized the possession or transfer of an unregistered firearm, while also prohibiting the registration of firearms otherwise banned by law. In 1968, Congress passed the Gun Control Act (GCA), criminalizing possession of firearms for certain classes of people. *See* 18 U.S.C. § 921 *et seq*. In 1986 Congress amended the GCA, codified at 18 U.S.C. § 922(o), to outlaw most machineguns and simultaneously make

it unlawful for any person to register those weapons. Today it is a federal felony, punishable by up to 10 years in prison for first-time offenders, for any person to "transfer or possess a machinegun." 18 U.S.C. §§ 922(o), 924(a)(2).

Under both the GCA and NFA, the term "machinegun" means "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); *see also* 18 U.S.C. § 921(23).

B. ATF Classifications of Bump Stocks

"Bump fire" is a shooting technique where a user of a firearm quickly engages the trigger of a semiautomatic weapon multiple times, resulting in rapid fire. ROA.513.[1] "[B]ump-stock-type devices" allow the firearm to slide back-and-forth freely in the shooter's hands. ROA.1572 (*Bump-Stock-Type Devices*, 83 Fed. Reg. 66514, 66516 (Dec. 26, 2018)). According to ATF, when using a bump stock, a shooter places his trigger finger on a plastic ledge that is part of the bump stock (and not on the trigger itself), with that dominant hand holding the stock firmly against

[1] Citations to the district court's findings of fact and conclusions of law omit internal citations to the record, except where otherwise noted.

his shoulder. ROA.1572. Then, while "maintaining constant forward pressure with the non-trigger hand on the barrel-shroud or fore-grip of the rifle, and maintaining the trigger finger on the device's ledge with constant rearward pressure[,]" the shooter engages the trigger. ROA.1574. The recoil from the initial shot pushes the firearm rearward and causes the trigger to lose contact with the finger and *manually* reset. ROA.1572-73. By applying continuous forward pressure with the non-trigger hand, the shooter is able to force the trigger back into his trigger finger, and thus "re-engages by 'bumping' the shooter's stationary finger" into the trigger. ROA.1572.

ATF, through its Firearms Technology Branch (FTB), has issued dozens of classification letters evaluating whether certain bump stocks fall under the definition of a machinegun set out in 26 U.S.C. § 5845(b). ROA.518. In order to issue classification letters, FTB must physically examine a particular device; FTB insists that it "cannot make a classification on pictures, diagrams, or theory." ROA.684. In every classification of bump stocks since 2006, ATF has concluded these devices were not machineguns so long as they lacked an internal mechanism, such as a spring. *See* Administrative Record (AR), 106, 111, 116, 126, 134,

138, 157, 160, 167, 171, 179, 191, 201, 206, 218, 235, 238, 242, 250, 258, 263, 268, 272, 275; ROA.1611-25 (certified index of administrative record).

These classification letters included specific approval of the Slide Fire. ROA.519. The "Slide Fire" is a type of bump stock that was commercially available in the United States starting in 2010. ROA.520. On June 7, 2010, ATF concluded that the Slide Fire "has no automatically functioning mechanical parts or springs and performs no automatic mechanical function when installed," and thus "is a *firearm part* and is not regulated as a firearm under [the] Gun Control Act or the National Firearms Act." ROA.519, 677.

C. ATF Maintains Its Prior Interpretations in the Face of Intense Political Pressure.

On October 1, 2017, a shooter opened fire on a large crowd in Las Vegas, Nevada, killing 58 people and injuring hundreds of others. ROA.520. Some of the firearms used by the shooter were equipped with bump stocks. ROA.520.

Even in the wake of this tragedy, however, ATF reaffirmed its understanding that bump stocks were "'ATF approved' as advertised." ROA.521. According to the agency, "unless there is some self-acting

mechanism that allows a weapon to shoot more than one round, you cannot have a machinegun." AR, 361.

On October 4, 2017, Representative David Cicilline proposed H.R. 3947, "The Automatic Gunfire Prevention Act," which would have amended the GCA to prohibit any "bump-fire device … that is designed or functions to accelerate the rate of fire of a semiautomatic rifle but not convert the semiautomatic rifle into a machinegun." ROA.521. H.R. 3947 was never advanced in the House and lapsed with the conclusion of the 115th Congress. ROA.521.

Also on October 4, 2017, Senator Dianne Feinstein proposed S. 1916, which was identical to H.R. 3947. ROA.522. That bill also lapsed. ROA.522.

On October 5, 2017, the Chief Counsel for ATF sent a proposed memorandum entitled, "Legality of 'Bump-Fire' Rifle Stocks" to the Office of the Attorney General of the United States. ROA.522. ATF had determined that bump-stock devices were not machineguns because they lacked "automatically functioning mechanical parts or springs" and "the shooter must apply constant forward pressure with the non-shooting hand and constant rearward pressure with the shooting hand." ROA.522.

On October 6, 2017, Jim Cavanaugh, a "Law Enforcement Analyst" for NBC and MSNBC, sent Acting Director Brandon an email outlining his "outside view" "on Bump Stocks." ROA.523. Cavanaugh "recommend[ed] an overruling of the prior decision[s] and putting it under the NFA." ROA.698. Cavanaugh continued, "Regardless of what Congress does or does not do ... You can do it fast and it is the right thing to do, don't let the technical experts take you down the rabbit hole[.]" ROA.698. Acting Director Brandon replied, "Thanks, Jim. At FTB now. Came to shoot it myself. I'm very concerned about public safety and share your view. Have a nice day, Tom." ROA.523, 698.

Acting Director's Brandon's calendar for that day indicates his presence at ATF's National Training Center in Martinsburg, WV. ROA.523. There is no other indication in the record that any officer or employee of ATF test-fired, or physically re-evaluated any bump-stock device following the October 1, 2017 shooting in Las Vegas. ROA.523.

On October 10, 2017, Representative Carlos Curbelo proposed H.R. 3999, which would have amended the GCA to prohibit bump-stock devices. ROA.523. H.R. 3999 was never advanced in the House and lapsed with the conclusion of the 115th Congress. ROA.524.

On October 11, 2017, Rick Vasquez, Former Assistant Chief and Acting Chief of the FTB, submitted a letter to ATF defending the Slide Fire classification. ROA.700. Vasquez explained the prior classification was based on the testing officer's determination that the Slide Fire could not fire multiple rounds without also manually resetting the trigger mechanism. ROA.701.

On October 12, 2017, Earl Griffith, Chief of ATF's Firearms and Ammunition Technology Division (FATD), reported in internal emails that ATF had "been asked by DOJ to look at our legal analysis on bump stocks." ROA.703. Shortly thereafter on November 9, 2017, Acting Director Brandon sent an email to senior staff saying that "the Department has reached a decision that ATF is to move forward with the issuance of a regulation on bump-stocks." ROA.704. On February 20, 2018, President Trump issued a memorandum, "directing the Department of Justice to dedicate all available resources" "to propose … a rule banning all devices that turn legal weapons into machineguns[.]" *See* ROA.526.

On March 16, 2018, ATF Acting Director Thomas E. Brandon[2] testified before the Senate Judiciary Committee that he had consulted with "technical experts," "firearms experts" and "lawyers" within ATF in October 2017 and that the consensus was that "bump stocks" "didn't fall within the Gun Control Act and the National Firearms Act." ROA.526-27. However, after Director Brandon "went outside and over to DOJ" and, based on different directions from the "Attorney General" and "DOJ" had issued advance notice of proposed rulemaking for a rule banning bump stocks. ROA.526-27.

D. The Final Rule

On December 26, 2018, the Attorney General and ATF issued the Final Rule. ROA.1570. The Final Rule alters the statutory definition of a "machinegun" by amending three regulations: 27 C.F.R. §§ 447.11, 478.11 and 479.11. ROA.1609-10. As relevant here, the amendment to Section 478.11 modifies the definition of machinegun under the GCA, purportedly under the AG's authority set out in 18 U.S.C. § 926(a). ROA.1610. The amendment to Section 479.11 modifies the definition of

[2] Current ATF Acting Director Regina Lombardo has been substituted as a defendant-appellee.

machinegun under the NFA, purportedly under the authorization of 26 U.S.C. § 7805. ROA.1610. For all provisions, a "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. … 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*.

ROA.1609-10. (emphasis added).

Because these devices had been previously approved by ATF for sale, "current possessors of these devices w[ere] required to destroy the devices or abandon them at an ATF office prior to the effective date of the rule," which was March 26, 2019. ROA.1570.

ATF estimated that as many as 520,000 bump-stocks were sold legally between 2010 and 2018. ROA.1603. Americans spent approximately $102.5 million on the purchase of these devices, all of

which have now been ordered to be destroyed or surrendered to ATF. ROA.1603.

E. The Final Rule's Impact on Mr. Cargill

In April 2018, Plaintiff Michael Cargill lawfully acquired two Slide Fire devices in reliance on ATF's explicit approval. ROA.529. Mr. Cargill is a law-abiding person and has no disqualification that would prevent him from lawfully owning or operating a firearm and related accessories. ROA.501. In response to the Final Rule, on March 25, 2019, Mr. Cargill surrendered both of his Slide Fire devices to ATF, but ATF has agreed to preserve his devices pending the outcome of this lawsuit. ROA.529.

F. Procedural History

Mr. Cargill sued ATF, arguing, as relevant here, that the Final Rule is invalid because: (1) the Final Rule is ultra vires because ATF lacks authority to issue any legislative rules; (2) there is no statutory ambiguity in the term "machinegun," and thus ATF has no authority to issue a legislative rule "filling a gap" left in that term; (3) the Final Rule conflicts with the statutory definition of a machinegun and thus exceeds ATF's authority; (4) the Final Rule constitutes an invalid and unreasonable interpretation of the statutory definition of a machinegun;

and (5) the Final Rule is an unconstitutional exercise of legislative power that has been improperly divested by Congress. ROA.358-359.

In response ATF conceded that it lacks authority to issue any legislative rule concerning the definition of a machinegun. ROA.405. Instead, ATF argued that the Final Rule was an interpretive rule that merely restated the best reading of the existing statutory definition of a "machinegun." ROA.392-93.

On September 9, 2020, the matter proceeded to a bench trial.

G. Expert Testimony at Trial

David Smith is a firearms examiner for ATF and expert "in the field of firearm mechanics and operations." ROA.615 (David Smith, Trial Tr. (Sept. 9, 2020)). The district court accepted Mr. Smith as an expert qualified "to give a technical explanation of how bump fire systems work," and "how semi-automatic firearms and automatic firearms work." ROA.510.

Mr. Smith testified that a machinegun is mechanically able to fire continuously once "the shooter pulls back on the trigger mechanism" "without further input from the shooter." ROA.647. Or, as the district court found, a machinegun will "continue to fire if 'you continue to keep

your finger down on the trigger.'" ROA.512 (quoting at Smith Tr. at 81:22–82:5). It typically relies on a mechanism called an "auto sear," which allows the firing pin to strike additional rounds without further input from the trigger mechanism. ROA.647.

A semiautomatic firearm "needs additional input" between firing rounds. ROA.643. A semiautomatic will not fire multiple rounds if the shooter holds the trigger, "because the hammer will catch" on a part called "the disconnector." ROA.644, 647. The disconnector stops the firing pin from striking a new round unless the shooter releases the trigger lever and resets it by pulling the lever again. ROA.643, 644, 647, 651.

A bump stock, like the Slide Fire, does not change the internal mechanics of a semiautomatic firearm at all. For each new shot, the shooter must hold the rifle to his shoulder, and "press the firearm all the way back" "securely against [his] shoulder." ROA.631. The shooter must then hold his "finger on th[e] trigger rest" continuously. ROA.631. With his other hand, the shooter must "press the firearm forward," *into* his trigger finger, and the recoil forces the firearm back toward the shooter's shoulder. ROA.631, 632. This motion creates separation of the trigger finger from the trigger, so the "trigger mechanism [can] reset." ROA.652,

654. The shooter must then "overcome that recoil impulse" by "pressing [the firearm] back forward," and yet again pushing the "trigger back in contact with the trigger finger" to fire the next round. ROA.633, 655. If a shooter fails to push forward in this fashion, using both of his/her hands, the weapon will not fire more than one round. ROA.656, 657.

A bump stock does not replace any mechanical part, such as a disconnector, nor does it add any mechanism such as an auto sear, that would allow a semiautomatic to function as a machinegun. ROA.648-49. Bump stocks do not change the distance the trigger lever must travel between shots in order to reset. ROA.660.

When operating a semiautomatic with a bump stock, the firearm's trigger functions normally for every new shot fired—the shooter's finger must be released from the trigger lever, and the trigger must lock back into place between each shot. ROA.651, 652, 654, 656, 659. Every round fired with a bump stock follows the normal operation of a semiautomatic—the "hammer catches on the disconnector" after the first round is fired, and when the trigger is released, as "the trigger … moves forward, that moves the disconnector out of contact with the hammer and the hammer resets on that front sear surface of the trigger" to allow a

new round to be fired following a new action on the trigger lever. ROA.656.

A bump stock simply facilitates the "bump fire" shooting technique, allowing the firearm to slide back and forth to create space for the shooter's finger to lose contact with the trigger lever. ROA.650-51, 654. "Smith testified that, even with his extensive experience, firing a weapon equipped with a bump stock did not come all that naturally, and required practice 'as you would learn [how to use] any mechanical device.'" ROA.513 (quoting Smith Tr. at 85:11–85:24). Further, as the district court found, with practice, "bump firing" "can be achieved with other devices (like a belt loop) or with no device at all." ROA.513. Nevertheless, ATF now considers a bump stock an illegal machinegun, while at the same time considering bump fire to be lawful. ROA.663.

As the district court found, "it is not the rate of fire that separates semi-automatic firearms from automatic ones." ROA.515. A "semi-automatic rifle can typically fire as fast as the shooter can pull with their trigger finger." ROA.514-15. This can be "quite fast" for a skilled shooter—appearing as fast as a machinegun's rate of fire. ROA.624.

Unlike other bump stocks, the Slide Fire "did not have internal springs or similar mechanical parts to channel recoil energy." ROA.518-19. Another device, an Akins Accelerator, had two springs that "drive the trigger mechanism and receiver back [and] forward into the shooter's trigger finger." ROA.641. A shooter could fire an Akins Accelerator with one hand, because the springs mechanically assisted bump firing and would "continue to fire until [the shooter] remove[d] the trigger finger from the trigger guard or it r[an] out of ammunition." ROA.641. But a Slide Fire has no springs, adds no mechanical parts, and can only be operated with *both* hands simultaneously performing separate tasks between shots. ROA.641, 642, 648.

On November 23, 2020, the district court issued a verdict for ATF in a written decision and order. ROA.575. Mr. Cargill timely appealed on December 14, 2020. ROA.573.

SUMMARY OF THE ARGUMENT

The district court committed four separate legal errors, each of which independently warrants reversal of the judgment below.

First, the Final Rule was invalid because the agency lacked any authority to issue a legislative rule. The Final Rule was an undeniable

effort by ATF to revise the statutory definition of a machinegun and bring bump stocks within the law's prohibition. But as ATF conceded, "the narrow statutory delegation on which the Rule relied does not provide the Attorney General the authority to" "engage in rulemaking that may lead to criminal consequences[.]" ROA.405. The district court should have accepted ATF's position concerning its *own power* and struck down the rule on this basis.

Second, even if ATF had the authority to issue the rule, the statutory definition is unambiguous and leaves no room for the agency to issue "gap-filling" regulations. An agency may only fill in gaps to clarify ambiguities in statutory law; it cannot circumvent or replace the plain statutory text. The Final Rule, however, does just that and is invalid for this reason as well.

Third, the other errors aside, ATF's new definition of a machinegun contradicts the limits set out by Congress. Unlike an automatic weapon, a bump stock requires a shooter to apply continuous physical input to a semiautomatic weapon for each round fired. Separately, a bump stock changes nothing about a semiautomatic firearm's trigger mechanism. For each round fired with a bump stock the shooter must re-engage and

mechanically re-set the trigger, and thus each shot is *the result of a single function of the trigger*. A bump stock is not a machinegun.

Fourth, if ATF is permitted to rewrite the federal criminal law, then the Final Rule is the product of an unconstitutional divestment of legislative authority. While ATF certainly does not believe it has the authority to line-edit the criminal code, see ROA.405, the Final Rule does exactly that. It thus exceeds the outer reaches of legislative authority bestowed on an agency.

STANDARD OF REVIEW

"When reviewing a bench trial judgment, [this Court] inspect[s] findings of fact for clear error and review[s] legal conclusion de novo." Am. *Guarantee & Liab. Ins. Co. v. ACE Am. Ins. Co.*, 983 F.3d 203, 208 (5th Cir. 2020).

ARGUMENT

Article I, § 1 of the U.S. Constitution vests "[a]ll legislative powers" in the Congress. Article I, § 7, Clauses 2 and 3 require that "Every Bill" shall be passed by both the House and the Senate and signed by the President "before it [may] become a Law." Article II, § 3 of the Constitution directs that the President "shall take Care that the Laws be

faithfully executed … .” Under this structure “it remains a basic principle of our constitutional scheme that one branch of the Government may not intrude upon the central prerogatives of another.” *Loving v. United States*, 517 U.S. 748, 756-57 (1996).

Thus, “an agency literally has no power to act … unless and until Congress confers power upon it.” *La. Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374 (1986). And an agency may only “fill [] statutory gap[s]” left by “ambiguities in statutes within an agency’s jurisdiction to administer” to the extent Congress “delegated” such responsibility to the agency. *Nat’l Cable & Telecommunications Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005).

“Agency authority may not be lightly presumed.” *Texas v. United States*, 497 F.3d 491, 502 (5th Cir. 2007) (citation omitted). “[M]ere ambiguity in a statute is not evidence of congressional delegation of authority.” *Id.* (citation omitted). A court does “not merely presume that a power is delegated if Congress does not expressly withhold it, as then agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well.” *Contender Farms, L.L.P. v. U.S. Dep’t of Agric.*, 779 F.3d 258, 269 (5th

Cir. 2015) (citation omitted). "It stands to reason that when Congress has made an explicit delegation of authority to an agency, Congress did not intend to delegate additional authority *sub silentio*." *Texas*, 497 F.3d at 501.

Further, an agency can only fill in any "gaps" in a statute. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984). "If uncertainty does not exist … [t]he regulation then just means what it means—and the court must give it effect, as the court would any law." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019).

In "review[ing] an agency's construction of [a] statute," the first question then is "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. "If the intent of Congress is clear, that is the end of the matter, for the court as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.*

Even when agency action is otherwise permitted, it can still constitute an invalid exercise of legislative power. "[T]he integrity and maintenance of the system of government ordained by the Constitution mandate that Congress generally cannot delegate its legislative power to another Branch." *Mistretta v. United States*, 488 U.S. 361, 371-72 (1989)

(citation omitted). Furthermore, "the lawmaking function belongs to Congress … and may not be conveyed to another branch or entity." *Loving*, 517 U.S. at 758. Congress may not "abdicate or [] transfer to others the essential legislative functions with which it is thus vested." *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529 (1935). The President, acting through his agencies, therefore, may not exercise Congress's legislative power to declare entirely "what circumstances … should be forbidden" by law. *Panama Refining Co. v. Ryan*, 293 U.S. 388, 418-19 (1935).

I. ATF Had No Authority to Issue the Final Rule Because It Is a Legislative Rule

ATF has correctly acknowledged that it lacks authority to issue any legislative rules concerning the definition of a machinegun. *See* ROA.405, 539-40. Hence, if the Final Rule is legislative—which it is, in part because it purports to impose new legal obligations—then it exceeds ATF's authority. The district court should have vacated the rule on this threshold basis alone.

As the district court correctly found, the Final Rule is legislative. *See* ROA.535-36. Agency statements usually take one of two forms: "interpretive rules" or "legislative rules." *Perez v. Mortg. Bankers Ass'n*,

135 S. Ct. 1199, 1204, 1206 (2015). A "legislative rule" is "issued by an agency pursuant to statutory authority and has the force and effect of law." *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 139 S. Ct. 2051, 2055 (2019) (citation omitted). A legislative rule "affect[s] individual rights" and "create[es] new law." *Davidson v. Glickman*, 169 F.3d 996, 999 (5th Cir. 1999). "[N]onlegislative rules do not have the force of law[.]" *U.S. Dep't of Labor v. Kast Metals Corp.*, 744 F.2d 1145, 1152 (5th Cir. 1984). "[T]his Court is not bound by an administrative agency's classification of its own action"—"A paisley ribbon will not make up for damaged goods; the substance, not the label, is determinative." *Id.* at 1149.

Likewise, both the Court of Appeals for the District of Columbia Circuit and the now-reinstated panel opinion for the Court of Appeals for the Tenth Circuit unanimously rejected ATF's argument that the rule was a mere interpretation. As the D.C. Circuit said, "All pertinent indicia of agency intent confirm that the Bump-Stock Rule is a legislative rule." *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 920 F.3d 1, 18 (D.C. Cir. 2019). The panel decision by the Tenth Circuit agreed, saying that "it is evident that the Final Rule intends to speak with the

force of law." *Aposhian v. Barr*, 958 F.3d 969, 980 (10th Cir. 2020), *vacated by* 973 F.3d 1151 (10th Cir. 2020) (*en banc*), *and reinstated by* No. 19-4036, Slip Op. at *1, --- F.3d ---- (10th Cir. Mar. 5, 2021) (*en banc*). The district court correctly followed that analysis and determined that several factors conclusively established that the Final Rule is a legislative rule. ROA.535-538.

First, the Final 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." ROA.535 (quoting *Guedes*, 920 F.3d at 19). "The Rule informs bump-stock owners that their devices '*will be prohibited when* this rule becomes effective.'" ROA.535 (quoting *Guedes*, 920 F.3d at 19). That language also specifies future effect. ATF "went out of [its] way to clarify that—before the Final Rule's effective date—any person 'currently in possession of a bumpstock-type device *is not acting unlawfully*.'" ROA.535 (quoting 83 Fed. Reg. at 66523). "The Final Rule also provides guidance for how individuals can comply '*to avoid violating* 18 U.S.C. § 922(o)' and emphasizes that it will 'criminalize *only future conduct, not past possession*' of bump-stock-type devices." ROA.535 (quoting 83 Fed. Reg. at 66525, 66530.)

"Second, the Final Rule's 'publication in the Code of Federal Regulations also indicates that it is a legislative rule.'" ROA.536 (quoting *Guedes*, 920 F.3d at 19). 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). "Because the Final Rule purports to amend three definitional sections of the CFR (27 C.F.R. §§ 447.11, 478.11 and 479.11), this factor also suggests the Final Rule is legislative." ROA.536-37.

Third, the Final Rule "impose[s] obligations [and] produce[s] … significant effects on private interests." ROA.537-38 (quoting *Gulf Restoration Network v. McCarthy*, 783 F.3d 227, 236 (5th Cir. 2015)). By ATF's own estimation, the Final Rule voids the lawful sale of as many as 520,000 bump-stock devices, with an economic impact of approximately $102.5 million. ROA.538 (citing *Final Rule*, 83 Fed. Reg. at 66547). Such a massive financial impact is quintessentially the type of "significant effect[] on private interests" that only a legislative rule could produce. *See Gulf Restoration Network*, 783 F.3d at 236.

Finally, "'the agency has explicitly invoked its general legislative authority' by invoking two separate delegations of legislative authority."

ROA.537 (quoting *Guedes*, 920 F.3d at 19.) The Final Rule cites to 18 U.S.C. § 926(a) and 26 U.S.C. § 7805(a) and claims that these provisions vest "the responsibility for administering and enforcing the NFA and GCA" in the Attorney General. ROA.537.

While the district court reached the correct threshold determination, it incorrectly rejected ATF's own concession that it lacked authority to issue a legislative rule. *See* ROA.539-40. But because the rule was legislative, it was invalid under ATF's own understanding of its delegated authority.

The Final Rule purported to amend the statutory definition of machinegun found in the NFA under the authorization of 26 U.S.C. § 7805 and the same statutory definition as it applies to the GCA under the Attorney General's authority set out in 18 U.S.C. § 926(a). But ATF contended "in this litigation and in related cases on appeal" that the "delegations cited in the Final Rule" do "'not provide the Attorney General the authority' to issue legislative rules with criminal consequences." ROA.539-40. Still, the court "conclude[d] that section 926(a) is a broad enough delegation for ATF to issue a legislative rule[,]"

and, contrary to ATF, "26 U.S.C. § 7805 provides [ATF] the authority to issue a legislative rule like the Final Rule." ROA.541-42.

The district court's conclusion was wrong. First, the Attorney General has *no* legislative rulemaking authority under Section 7805(a). 26 U.S.C. § 7805(a) generally references the *Treasury's* authority, not ATF or the AG, except authority "expressly given" to those agencies under Title 26. The only power expressly given to the Attorney General or ATF under the NFA was that of "administration and enforcement" of the statute and "interpretation[]" of its terms. 26 U.S.C. §§ 7801(a)(2)(A), (a)(2)(B). Issuing a legislative rule that rewrites a statutory definition and creates half a million new felons is not an act of "administration and enforcement" that the Attorney General is empowered to undertake, nor is it an act of "interpretation[]" authorized to ATF. The Attorney General and ATF therefore had no power to issue the Final Rule as it relates to the NFA.

The Attorney General's authority under the GCA also cannot support the Final Rule. The GCA allows the Attorney General to "prescribe only such rules and regulations as are necessary to carry out the provisions of" the GCA. 18 U.S.C. § 926(a). The Final Rule goes far

beyond a housekeeping regulation designed to implement the GCA. The Attorney General and ATF therefore had no power to issue the Final Rule as it relates to the GCA.

Furthermore, the presence of the delegations of interpretive authority under 26 U.S.C. § 7805(a) and implementing authority under 18 U.S.C. § 926(a) confirms that Congress withheld a different type of legislative rulemaking authority. Mindful that "[a]gency authority may not be lightly presumed," Congress' "explicit delegation" of such limited authority is proof that it "did not intend to delegate additional authority *sub silentio*." *See Texas*, 497 F.3d at 501-02.

ATF had no power to issue a binding, legislative rule. Yet the Final Rule is in fact a binding, legislative rule. It is therefore void.

II. ATF Had No Authority to Issue the Final Rule Because There Is No "Statutory Gap" to Fill

While the initial error provides sufficient reason to reverse the district court decision, the Final Rule is also invalid because it does not resolve any legislative ambiguity. Indeed, as *five* circuit court judges have now concluded, "the statute is unambiguous," and courts have simply found "ambiguity where there is none." *Aposhian*, No. 19-4036, Slip Op. at 12 (Tymkovich, C.J., dissenting, joined by Hartz, Holmes, Eid, Carson,

JJ.). The district court failed to conduct the required exhaustive analysis concerning any purported ambiguity in the statutory definition of a machinegun. Instead, it noted in passing that it believed ATF had a sufficient regulatory basis to issue a "legislative rule that fills gaps in the definition of 'machinegun'" under the statutes. ROA.541. But it also concluded, irreconcilably, that "uncertainty does not exist" in the statutory terms. ROA.551 (quoting *Kisor*, 139 S.Ct. at 2415). From this erroneous foundation, the district court concluded, without analysis, that where the statutory definition included the phrases "single function of the trigger" and "automatically," "[b]y not defining those terms explicitly in the statute, Congress implicitly delegated the authority to clarify those terms." ROA.545.

Contrary to the district court's conclusion, and because ATF conceded that "there is no ambiguity" in the statutory term "machinegun," ROA.408, ATF simply had no authority to issue a legislative rule filling any alleged "gap" in that term. Agency rulemaking authority "comes into play, of course, only as a consequence of statutory ambiguity[.]" *Texas*, 497 F.3d at 501. In other words, there must first be "gap[s]" for an agency to fill. *Chevron*, 467 U.S. at 843 (citation omitted).

A statute that is unambiguous "means that there is no gap for the agency to fill and thus no room for agency discretion." *United States v. Home Concrete & Supply, LLC*, 566 U.S. 478, 487 (2012) (citation omitted). Without a gap from statutory ambiguity, an agency has no power to act, and any further attempt to define the terms in a statute is "invalid and unenforceable." *New Mexico v. Dep't of Interior*, 854 F.3d 1207, 1224, 1231 (10th Cir. 2017). In other words—"If the statute is not ambiguous, [the] inquiry ends there." *Keller Tank Servs. II, Inc. v. Comm'r of Internal Revenue*, 854 F.3d 1178, 1196 (10th Cir. 2017).

Furthermore, and contrary to the district court's analysis, in construing statutes, courts must "give undefined terms their ordinary meanings," and the lack of a statutory definition does not render a statute ambiguous. *In re Taylor*, 899 F.3d 1126, 1129 (10th Cir. 2018); *see also United States v. Theis*, 853 F.3d 1178, 1181 (10th Cir. 2017) (undefined term was not ambiguous after determining term's "plain meaning"); *United States v. Day*, 700 F.3d 713, 725 (4th Cir. 2012) ("It is beyond cavil that a criminal statute need not define explicitly every last term within its text[.]"). If agencies can rewrite statutes by defining every undefined term, Congress cannot control the law. No matter how clear the statute,

some term will always be left undefined—or else the definitions themselves will have undefined terms in them. But "silence does not always constitute a gap an agency may fill"; often it "simply marks the point where Congress decided to stop authorization to regulate." *Oregon Rest. & Lodging Ass'n v. Perez*, 843 F.3d 355, 360, 362 (9th Cir. 2016) (O'Scannlain, J., dissenting from the denial of rehearing *en banc* on behalf of 10 judges). Reading Congress' silence as an implicit grant of authority is both "a caricature of *Chevron*" and a "notion [] entirely alien to our system of laws." *Id.* at 359-60.

Additionally, and as the district court acknowledged (but did not apply), a court has a duty to "exhaust all the traditional tools of construction" before "wav[ing] the ambiguity flag." *Kisor*, 139 S.Ct. at 2415 (citations omitted). "[O]nly when that legal toolkit is empty and the interpretive question still has no single right answer can a judge conclude that it is more one of policy than of law." *Id.* (citation omitted). Yet while partly recognizing these principles, and even declaring that "uncertainty does not exist" in the statute, the district court still allowed ATF to "fill in" its own self-defined ambiguity. *See* ROA.551 (quoting *Kisor*, 139 S.Ct. at 2415).

Ultimately, the district court "wave[d] the ambiguity flag" too quickly. *See Kisor*, 139 S.Ct. at 2415. As discussed, the statute defines a "machinegun" as "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). (Emphasis added). And in the course of criminally prosecuting people for violating this statute, DOJ *successfully argued for decades* that the precise terms it now seeks to redefine were not ambiguous. *See, e.g.*, *United States v. Williams*, 364 F.3d 556, 558 (4th Cir. 2004) (finding the definition of "machinegun" to be unambiguous). Courts have likewise consistently ruled that the statutory definition of "machinegun" "is unambiguous." *United States v. TRW Rifle 7.62X51mm Caliber, One Model 14 Serial 593006*, 447 F.3d 686, 689 n. 4 (9th Cir. 2006). Indeed, even in this litigation, ATF has insisted that "there is no ambiguity" in the statutory definition of a machinegun. ROA.408.

Courts also have ruled specifically that the "common meaning of 'automatically' is readily known by laypersons" and "a person of ordinary intelligence would have understood the common meaning of the term—'as the result of a self-acting mechanism.'" *United States v. Olofson*, 563 F.3d 652, 660 (7th Cir. 2009). Furthermore, the phrase "a single function

of the trigger" is "plain enough" that efforts to parse it further become "brazen" and "puerile." *United States v. Fleischli*, 305 F.3d 643, 655 (7th Cir. 2002).

While Congress did not necessarily anticipate the development of bump stocks, it did clearly choose to use unambiguous statutory terms to draw a line between weapons that fire one bullet with a single function of the trigger and machineguns, which fire multiple rounds continuously with one function of the trigger. Thus, "the statute is unambiguous." *Aposhian*, No. 19-4036, Slip Op. at 12 (Tymkovich, C.J., dissenting, joined by Hartz, Holmes, Eid, Carson, JJ.). This means that ATF lacks any gap to fill through the Final Rule and the Final Rule is "invalid and unenforceable." *See New Mexico*, 854 F.3d at 1224, 1231.

III. ATF Had No Authority to Issue a Final Rule That Contradicts the Statutory Definition of a Machinegun

Even ignoring the other fundamental defects in ATF's position and its conceded inability to issue any legislative rules, the Final Rule is still invalid because it fundamentally changes the settled statutory meaning of a machinegun. Under the Final Rule's analysis, a weapon becomes a machinegun *even if the shooter must re-engage the trigger mechanism for each round fired*. That construction conflicts with the clear text of the

statute. It also creates a muddle with no clear limits. Never mind that bump firing with a beltloop is not a crime. ATF's single-minded effort to outlaw bump stocks simply doesn't work within the framework established by Congress. Only Congress could tinker with the definition of a machinegun, and ATF's attempt to get to its preferred outcome through confounding and inconsistent interpretations does not pass muster.

Thus, the district court also erred when it reached the curious conclusion, that, even though the Final Rule was legislative and had substantively amended the federal criminal law, "the Final Rule adopts the proper interpretation of 'machinegun' by including bump stock devices[.]" ROA.550. In other words, the district court determined that bump stocks were always machineguns under the statutory definition, which "unambiguously" included bump stocks. ROA.553-54. That position is indefensible.

A. Congress Has Directly Spoken to the Issue—Bump Stocks Are Not Machineguns

1. For More Than a Decade ATF Correctly Determined That Bump Stocks Are Not Machineguns

Under both the GCA and NFA, the term "machinegun" means "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); *see also* 18 U.S.C. § 921(23).

The Supreme Court has explained that the current definition of a machinegun

> refer[s] to a weapon that fires repeatedly with a single pull of the trigger. *That is, once its trigger is depressed, the weapon will automatically continue to fire until its trigger is released or the ammunition is exhausted*. Such weapons are 'machineguns' within the meaning of the Act. We use the term *'semiautomatic' to designate a weapon that fires only one shot with each pull of the trigger*, and which requires no manual manipulation by the operator to place another round in the chamber after each round is fired.

Staples v. United States, 511 U.S. 600, 602 n. 1 (1994) (emphasis added).

A weapon functions "automatically" when it "discharge[s] multiple rounds" "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." *Olofson*, 563 F.3d at 658.

ATF experts have long recognized that bump-stock devices are not machineguns because they require manual manipulation of the firearm between firing of rounds in order to reset and re-engage the trigger mechanism between shots. ATF has publicly stated at least 27 times, either in classification rulings or formal letters defending those

classifications, that bump-stock devices are not machineguns. *See* AR, 106, 111, 116, 126, 134, 138, 145, 157, 160, 167, 170, 175, 179, 191, 198, 201, 206, 218, 235, 238, 242, 250, 258, 263, 268, 272, 275. The reasoning of these classification rulings is consistent—in each case ATF determined that the shooter must apply constant forward pressure with the non-shooting hand and constant rearward pressure with the shooting hand to manually re-engage the trigger mechanism between the firing of rounds. *See* ROA.518-19. "Each shot" is therefore "*fired by a single function of the trigger*." AR, 106. (Emphasis added).

ATF's prior classifications were premised on intensive fact-finding and test-firing of the devices. Classifications are based on FTB/FATD's manual inspection of the firearms. ROA.515-16. Indeed, the Administrative Record is filled with examples of circumstances where FTB has declined to classify devices because the requesting party had failed to furnish a sample, and FTB could only make classifications after test-firing a device. ROA.516. As FTB wrote in one such letter, "FTB cannot make a classification on pictures, diagrams, or theory." ROA.516. And based on this manual review, ATF approved dozens of bump stocks. ROA.518-19.

2. Neither the Law nor Bump Stocks Have Changed, Only ATF's Political Position Has

Even now, ATF adheres to its *technical* understanding of how a bump stock operates, and reaffirms the analysis done by FTB in the prior classifications. As said in the Final Rule, "bump firing" is a technique where a shooter fires a semiautomatic weapon by allowing the weapon to slide against his trigger finger such that he "re-engages" the trigger "by 'bumping' [his] stationary finger." ROA.1588-89. Bump firing may be accomplished "without a bump-stock device" and could be achieved with "items such as belt loops that are designed for a different primary purpose but can serve an incidental function of assisting with bump firing." ROA.1588-89. Bump stocks merely facilitate bump firing and require the shooter to "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[.]" ROA.1574, 1589.

The trial expert elaborated on this operation, testifying that for each shot fired from a weapon equipped with a Slide Fire, the shooter must hold the rifle to his shoulder, and with his other hand, must "press the firearm forward," *into* his trigger finger. ROA.631, 632. This creates

separation of the trigger finger from the trigger, so the "trigger mechanism [can] reset." ROA.652, 654. By "pressing [the firearm] back forward," the shooter then puts the "trigger back in contact with the trigger finger" to fire the next round. ROA.633, 655. In other words, the shooter engages the trigger anew for each round, by pushing the gun forward with his other, non-trigger hand. If a shooter fails to push forward into the trigger, using two hands, the weapon will not fire more than once. ROA.656, 657.

The Slide Fire also does nothing to change the firing mechanism of a semiautomatic firearm. The shooter's finger must still "lose[] contact with the trigger lever" so that the "trigger mechanism [can] reset" for every round fired. ROA.652, 654. A bump stock does not replace any mechanical part, such as a disconnector, nor does it add any mechanism such as an auto sear, that would allow a semiautomatic to function as a machinegun. ROA.648-49. Bump stocks do not change the distance the trigger lever must travel between shots, nor do they alter any mechanical part of the trigger mechanism. ROA.648-49, 660. The trigger of a semiautomatic equipped with a bump stock functions normally for every new shot fired—the shooter's finger must be released from the trigger

lever, and the trigger must lock back into place between each shot. ROA.651, 652, 654, 656, 659.

3. The Final Rule Alters the Statutory Definition of Machinegun

Despite this settled meaning and technical understanding, ATF has now discarded its prior understanding of the statute. As six circuit court judges have now recognized, "[t]he statute's plain meaning unambiguously excludes bump stocks." *See Aposhian*, No. 19-4036, Slip Op. at 11 (Tymkovich, C.J., dissenting, joined by Hartz, Holmes, Eid, Carson, JJ.); *Guedes*, 920 F.3d at 43 (Henderson, J., dissenting). The Final Rule changes the statutory terms and defines certain devices as machineguns even when they do not initiate an automatic firing cycle from a single function of a trigger. Indeed, the "clear language" of the statute "leaves little wiggle room" in this regard. *Aposhian*, 958 F.3d at 992 (Carson, J., dissenting). ATF's new rule therefore attempts to do what no agency may do; it "amend[s] legislation outside the single, finely wrought and exhaustively considered, procedure the Constitution commands" and "upset[s] reliance interests in the settled meaning of [the] statute." *See New Prime, Inc. v. Oliveira*, 139 S.Ct. 532, 539 (2019).

a. The Final Rule Improperly Defines "Automatically" to Include Continuous Manual Input from a Shooter

ATF's new definition contradicts the statute, first because it improperly defines the term "automatically" to disregard a shooter's additional manual manipulation of the firearm between shots. There is nothing "self-acting" about the "cycle of operations" it takes to fire using a bump stock. *See Olofson*, 563 F.3d at 658. To the contrary, the shooter must act both deliberately and continuously to overcome recoil using both hands in the process. If he fails to push the barrel shroud forward with the non-trigger hand *into* the trigger against the gun's recoil after every shot, the gun will not fire again. ROA.655, 656, 657, 660. But for some inexplicable reason, ATF thinks those extra manual actions don't count anymore. *See* ROA.633, 655. "If a single function of the trigger *and then some other input* is required to make the firearm shoot automatically, we are not talking about a 'machinegun' as defined in § 5845(b)." *Aposhian*, No. 19-4036, Slip Op. at 11 (Tymkovich, C.J., dissenting, joined by Hartz, Holmes, Eid, Carson, JJ.).

Thus, the rule disregards the other physical manipulation bump firing requires. As Judge Henderson put it, "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')." *Guedes*, 920 F.3d at 44. ATF now ignores the shooter's act of "pressing [the firearm] back forward," and pushing the "trigger back in contact with the trigger finger" using the non-trigger hand between each round, even though that additional manual manipulation is precisely what resets the trigger before each shot can be fired. ROA.633, 655, 656, Thus a "nonmechanical" "bump stock" "is not 'self-acting or self-regulating' on the trigger" "[b]ecause the user of the firearm *must also* apply constant forward pressure with his or her nontrigger hand for the bump stock to work." *Aposhian*, 958 F.3d at 992 (Carson, J., dissenting). "Because a bump stock requires this extra physical input, it does not fall within the statutory requirement that the weapon shoot 'automatically … by a single function of the trigger.'" *Aposhian*, No. 19-4036, Slip Op. at 12 (Tymkovich, C.J., dissenting, joined by Hartz, Holmes, Eid, Carson, JJ.).

The Final Rule therefore improperly disregards "the longstanding distinction between 'automatic' and 'semiautomatic'" firearms, which, at the time of enactment, "depended on whether the shooter played a

manual role in the loading and firing process." *Guedes*, 920 F.3d at 45 (Henderson, J., dissenting) (emphasis added). Congress deliberately chose to include semiautomatic weapons in the 1934 definition of a machinegun, even though this would encompass "the ordinary repeating rifle" and other weapons that would shoot "only one shot" from each trigger function. *See Hearing on H.R. 9066, House Ways and Means Comm.*, 73rd Cong., 40, 41 (1934) (Testimony of Karl T. Frederick, President National Rifle Association of America). Congress changed the law in 1968, however, and ever since that time, semiautomatic weapons have not come under the statute's prohibition. *See Staples*, 511 U.S. at 602 n. 1. But "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." *Guedes*, 920 F.3d at 45 (Henderson, J., dissenting).

b. The Final Rule Improperly Defines the Single Function of a Trigger to Exclude Mechanical Trigger Resets Between the Firing of Rounds

The Final Rule separately fails because it redefines a trigger's "function" in such a way as to rob the statute of any meaning. The statute

speaks of automatic fire "that is set in motion by a single function of the trigger," *Olofson*, 563 F.3d at 658, but the Final Rule pretends that a shooter initiates automatic fire with a bump stock by only "'pull[ing]' the trigger once," even though he must continue "bumping" the trigger between each shot. ROA.1589. ATF insists that the only way to initiate a trigger function is the "deliberate and volitional act of the user pulling the trigger" or taking some analogous motion. ROA.1590.

But "bumping" a trigger is functionally the same as "pulling" it; one cannot engage the firing mechanism any other way—either the trigger is operated with the finger or the gun cannot shoot. "Every shot requires the trigger to go through this full process again." *Aposhian*, No. 19-4036, Slip Op. at 10 (Tymkovich, C.J., dissenting, joined by Hartz, Holmes, Eid, Carson, JJ.). Even now ATF concedes that "bumping" the trigger "re-engage[s]" it between shots. ROA.1572. ATF's expert was even more detailed, noting that the trigger of a firearm functions the same whether or not a bump stock is attached. ROA.648-49. Whether a trigger is pushed or bumped, it must move backwards to precisely the same point in order to reset the trigger and fire the next shot. ROA.651, 652, 654, 656, 659, 660. On the other hand, in a real machinegun, the trigger remains

depressed, and the trigger never has to move forward and then backwards again in order to reset and fire. ROA.647. ATF has discarded this normal distinction for a totally unworkable and illogical one not found in any statute.

Moreover, ATF's insistence that a bump stock is a machinegun, but bump firing is permissible, is nonsensical. *See* ROA.643. If ATF is correct, and the bump fire "cycle of operations" is the same as firing a machinegun, then bump fire must also be prohibited. A Slide Fire has the same mechanical operation as a belt loop—it acts as a "post" for the trigger finger while the shooter allows the weapon to slide back and forth in his hands. ROA.632, 662. What this really shows is that ATF's definition is not a deliberate or careful reading of the statutory text; it is an attempt to achieve a pre-determined policy goal *despite* the legal definition of a machinegun.

These points have not been lost on other judges. Judge Henderson noted that "a semiautomatic rifle equipped with a bump stock *cannot* fire more than one round with a *single* function of the trigger" because "the trigger of a semiautomatic rifle must release the hammer for each individual discharge." *Guedes*, 920 F.3d at 47. Five members of the Tenth

Circuit agreed—"A semiautomatic rifle, equipped with a bump stock, does not fire multiple shots by a single function of the trigger." *Aposhian*, No. 19-4036, Slip Op. at 10 (Tymkovich, C.J., dissenting, joined by Hartz, Holmes, Eid, Carson, JJ.).

c. The District Court's Analysis Does Not Withstand Scrutiny

The district court responded to these arguments by adopting a "shooter-focused interpretation" that places a bump stock inside the definition of a machinegun. ROA.554, 556, 562. According to the court, while firing with a bump stock "mentally, you're doing nothing but pressing forward" and the trigger action becomes "unconscious[]," and thus there was "no meaningful difference" between truly automatic fire and the "cycle of operations" that occur while firing a weapon equipped with a bump stock. ROA.514, 559, 561. The court reached this conclusion even though the "strict mechanical working within the weapon" was not "automatic." ROA.559.

The district court's approach erred because it constitutes an express refutation of Congress' statutory approach. "The statute speaks only to how the trigger acts, making no mention of the shooter." *Aposhian*, No. 19-4036, Slip Op. at 10 (Tymkovich, C.J., dissenting, joined by Hartz,

Holmes, Eid, Carson, JJ.). Congress looked at a trigger's "function" in a mechanistic way and asked whether the trigger mechanism operated "automatic[ally]." *See* 26 U.S.C. § 5845(b). Congress did not include any requirement that engaging the "function" of a trigger be deliberate or conscious between rounds on the part of the shooter lest it become automatic fire. *See id*. The district court simply added these requirements to the statutory text.

The district court's reasoning also runs into trouble because it conflicts with the court's own recognition that "it is *not* the rate of fire that separates semi-automatic firearms from automatic ones." ROA.515. (emphasis added). Indeed, a "semi-automatic rifle can typically fire as fast as the shooter can pull with their trigger finger," which in some cases appears as fast as a machinegun's rate of fire. ROA.623-24. But if one ignores the "strict mechanical working within the weapon" in favor of a test that measures outcomes, surely rate of fire would be a key determinant. *See* ROA.559.

Of course, it takes little imagination to see the problems that arise from the district court's interpretation. As the district court recognized, not only can skilled shooters fire a semiautomatic as fast as a traditional

machinegun, they can "bump-fir[e]" firearms without a bump stock. ROA.513. Under the district court's analysis, both acts would presumably convert a semiautomatic weapon into a machinegun simply by how a marksman used the weapon. That approach turns a skilled shooter into a "machine gun;" an absurd result that simply cannot stand. It was thus error for the court to reject that definition in favor of a more generalized "shooter-focused" test.

B. Even If the Statutory Text Were Ambiguous, ATF's Interpretation Would Still Be Invalid

Even if there were some room in the statutory text for ATF to attempt to alter the meaning of a "machinegun," *and* the rule did not directly conflict with the statute, ATF's new definition would still be invalid because this Court must resolve any ambiguity in Mr. Cargill's favor. Further, the best reading of the statute runs counter to the new rule.

1. The Rule of Lenity Compels Adoption of Mr. Cargill's Reading of the Statute

The district court correctly determined that, ambiguity or no, ATF is not entitled to any deference for its interpretation of the statute. ROA. 549. As the court recognized, "*Chevron* does not apply to criminal statutes." ROA.549. This is because a court owes no deference to a

prosecutor's interpretation of a criminal law. *Abramski v. United States*, 573 U.S. 169, 191 (2014). Even ATF agrees with this point. *See* ROA.405 ("As a general matter, 'criminal laws are for courts, not for the Government, to construe.'") (ATF brief quoting *Abramski*, 573 at 191).

Instead, "any ambiguity concerning the ambit of criminal statutes" is resolved "in favor of lenity." *Yates v. United States*, 135 S.Ct. 1074, 1088 (2015) (citation omitted). "Application of the rule of lenity ensures that criminal statutes will provide fair warning concerning conduct rendered illegal and strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability." *Liparota v. United States*, 471 U.S. 419, 427 (1985).

Thus, "whatever else one thinks about *Chevron*, it has no role to play when liberty is at stake." *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 140 S. Ct. 789, 790 (2020) (Gorsuch, J., statement regarding denial of certiorari). As this Court has recognized, when a statute is ambiguous and an agency purports to interpret it, the rule of lenity "cuts the opposite way" from deference "for the purpose of imposing *criminal liability*[.]" *United States v. Orellana*, 405 F.3d 360, 369 (5th Cir. 2005). This Court has also accepted the government's "reservations

as to whether [a criminal] ATF regulation as a whole is entitled to any level of deference whatsoever" because of the rule of lenity. *Id*. To defer to ATF's interpretation would "upend ordinary principles of interpretation" and allow "federal administrators [to] in effect create (and uncreate) new crimes at will, so long as they do not roam beyond ambiguities that the laws contain." *Whitman v. United States*, 135 S. Ct. 352, 353 (2014) (Scalia, J., statement regarding denial of certiorari, joined by Thomas, J.).

As the district court concluded, the rule of lenity, and not deference to ATF, should apply here because the Final Rule "carries the possibility of criminal sanctions." ROA.549 (quoting *Guedes*, 140 S.Ct. at 790 (Gorsuch, J.)). The Final Rule purports to make the estimated 520,000 people who purchased bump stocks in reliance on ATF approval into federal felons under 18 U.S.C. § 922(o). *Final Rule*, 83 Fed. Reg. at 66547. And ATF now insists that anyone who has ever possessed a bump stock, including Mr. Cargill, has violated the criminal prohibition on machineguns and faces up to 10 years in federal prison. *See* ROA.407 (arguing Final rule merely meant to "raise awareness" of existing criminal prohibition). Because of these consequences, the rule of lenity

compels this Court to resolve any ambiguity in Mr. Cargill's favor. Thus, even if the definition of machinegun were ambiguous, this Court would have to reject ATF's interpretation.

The district court erred, however, in failing to *apply* the rule of lenity. Even though it concluded that the statute was ambiguous enough to allow ATF to fill a purported gap with a legislative rule, and recognized the need for lenity, the district court nevertheless ruled in favor of ATF's interpretation. *See* ROA.541, 551. That conclusion is internally irreconcilable and must be reversed. If ambiguity exists, then this Court must adopt a reading of the statute that maximizes liberty, thereby rejecting ATF's effort to expand criminal liability. *See Yates*, 135 S.Ct. at 1088. "With the rule [of lenity] aiding our interpretation, § 5845(b) clearly answers the issue at hand: bump stocks do not fall within the definition of machine gun." *Aposhian*, No. 19-4036, Slip Op. at 22 (Tymkovich, C.J., dissenting, joined by Hartz, Holmes, Eid, Carson, JJ.).

2. ATF Is Not Owed *Chevron* Deference, and Mr. Cargill Presents the Best Reading of the Statute

Even if this Court does not apply lenity *instead* of *Chevron* deference, there are other reasons that it must follow the district court's

lead and "place no 'thumb on the scale in favor of the government'." ROA.550 (quoting *Guedes*, 140 S.Ct. at 790 (Gorsuch, J.)).

First, as ATF argued below, "[D]eference is unwarranted because neither party contends that it should apply." ROA.407. This Court should accept that position, because even when otherwise applicable, an agency may always decline to exercise its delegated authority. *Chevron* deference applies, if at all, because Congress has delegated "authority to the agency to elucidate a specific provision of the statute by regulation." *Chevron*, 467 U.S. at 843. And when an agency declines to exercise that authority and "doesn't ask for deference to its statutory interpretation, '[the Court] need not resolve the … issues regarding deference which would be lurking in other circumstances.'" *Hydro Res., Inc. v. E.P.A.*, 608 F.3d 1131, 1146 (10th Cir. 2010) (*en banc*) (quoting *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 477 (1992)).[3] This Court has recognized this

[3] The Tenth Circuit, *en banc*, requested additional briefing and argument concerning whether ATF could properly waive reliance on *Chevron* deference. *See Aposhian*, 973 F.3d at 1151. The court subsequently reinstated the panel opinion, over the dissent of five judges, without determining the permissibility of *Chevron* waiver. *See Aposhian*, No. 19-4036, Slip Op. at 17 (Tymkovich, C.J., dissenting, joined by Hartz, Holmes, Eid, Carson, JJ.). Regardless, ATF's waiver is sufficient to reject *Chevron*, but for all the other reasons discussed in this section, the waiver

principle in an unpublished decision. *See Albanil v. Coast 2 Coast, Inc.*, 444 F. App'x 788, 796 (5th Cir. 2011) (unpublished) ("Plaintiffs did not raise their *Chevron* argument in the district court … . Thus, they have waived this argument."). Other courts have routinely recognized that reliance on *Chevron* deference is a waivable, non-jurisdictional argument. *See, e.g., Glob. Tel*Link v. F.C.C.*, 866 F.3d 397, 408 (D.C. Cir. 2017); *C.F.T.C. v. Erskine*, 512 F.3d 309, 314 (6th Cir. 2008). ATF has affirmatively waived reliance on deference both at the district court and in companion litigation, and thus, not only is it unnecessary for this Court to "resolve the … issues regarding deference which would be lurking in other circumstances" *Estate of Cowart*, 505 U.S. at 477, but this Court may not now review that issue. *See Simon v. United States*, 891 F.2d 1154, 1159 (5th Cir. 1990) (government's waiver of non-jurisdictional argument precluded appellate review of the subject of waiver).

Waiver aside, ATF's *inconsistent* interpretation is not owed deference. Deference is premised on the assumption that an agency "with

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is by no means necessary for this Court to read the statute without deference to ATF.

great expertise and charged with responsibility for administering the provision would be in a better position to do so" than courts. *See Chevron*, 467 U.S. at 865. An interpretive pedigree carries significance, so courts do not defer to interpretation that has "not been uniform." *Baldwin v. United States*, 589 U.S. ---, ---, 140 S. Ct. 690, 693 (2020) (Thomas, J., dissenting from denial of certiorari) (quoting *Merritt v. Cameron*, 137 U.S. 542, 552 (1890)).

But ATF's position has been anything but consistent. ATF interpreted the statutory language to *exclude* bump stocks. *See* ROA.518. It even followed this understanding *after* the tragedy in Las Vegas in October 2017. *See* ROA.521. This interpretation across administrations of both political parties was based on the agency's *physical examination* of these devices and its expertise in the area. Then ATF changed course suddenly, without conducting additional physical examinations. ATF's new interpretation is not entitled to any deference.

Next, ATF disregarded its own technical expertise in writing the rule, and thus no deference is warranted for this reason as well. A Court does not owe an agency deference "when the promulgating agency lacks expertise in the subject matter being interpreted." *Orellana*, 405 F.3d at

369; *see also Kisor*, 139 S.Ct. at 2413 (deference presumes that "[a]gencies (unlike courts) have unique expertise, often of a scientific or technical nature, relevant to applying a regulation to complex or changing circumstances") (citation omitted).

Even after the tragedy, the consensus within the agency was that "bump stocks" "didn't fall within the Gun Control Act and the National Firearms Act." ROA.521. Nevertheless, the agency issued the Final Rule at the insistence of the President, overruling *the experts* within the agency. *See* ROA.525-27. As the district court found, there is "no evidence in the Administrative Record regarding whether Acting Director Brandon, or anyone affiliated with ATF, actually test-fired or physically examined a bump stock device … since" October 2017 and before ATF's change in position. ROA.523. Instead, according to the district court, "Defendants transparently considered political input when changing their interpretations of terms within the statutory definition of 'machinegun' in section 5845(b)." ROA.567. But ATF's expertise, for purposes of deference, is in firearms analysis, not *political* considerations. Thus, deference to the legal interpretation in ATF's Final Rule would be improper. *See Orellana*, 405 F.3d at 369.

Next, this Court should not grant ATF any deference because doing so is inconsistent with this Court's duty of independent judgment. Judicial independence has been a touchstone of legitimate governance at least since English judges resisted King James I's insistence that "[t]he King being the author of the Lawe is the interpreter of the Lawe." *See* Philip Hamburger, *Law and Judicial Duty* 149-50, 223 (2008). Through the independent judicial office, the Founders ensured that judges would not administer justice based on someone else's interpretation of the law. *See* THE FEDERALIST No. 78 (Alexander Hamilton) ("The interpretation of laws is the proper and peculiar province of the courts."). Thus, whatever ATF's beliefs about the best interpretation of the statutory definition of a machinegun, it remains the judiciary's role to "say what the law is." *See Marbury v. Madison*, 5 U.S. 137, 177 (1803).

Relatedly, deference to ATF here would deprive Mr. Cargill of the judicial impartiality that due process requires. *See Com. Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 149 (1968) (judicial bodies "not only must be unbiased but also must avoid even the appearance of bias."). Judicial bias need not be personal bias to violate due process—it can also be institutional. In fact, institutionalized judicial bias is more pervasive, as

it systematically subjects parties across the entire judiciary to bias rather than only a party before a particular judge. Deferring to ATF here would impose systematic bias in favor of the government litigant in this case. *See* Philip Hamburger, *Chevron Bias*, 84 GEO. WASH. L. REV. 1187 (2016). Such bias would deny Mr. Cargill due process by favoring the government's litigating position. *See Tumey v. Ohio*, 273 U.S. 510, 532 (1927) ("Every procedure" that might lead a judge "not to hold the balance nice, clear, and true between the state and the accused denies the latter due process of law.").

When deference is not applicable, the statute "means what it means—and the court must give it effect, as the court would any law." *Kisor*, 139 S. Ct. at 2415. As discussed, under its natural reading, ATF was correct in its original understanding that bump-stock devices are not machineguns.[4]

[4] Even if this court were to consider deferring to ATF's interpretation under *Chevron*, that interpretation goes so far beyond any rational understanding of the statutory text that it is unreasonable and must be rejected. The Final Rule, which conflicts with court interpretations and more than a decade of consistent ATF interpretation, is not reasonable.

IV. If ATF Is Permitted to Rewrite the Federal Criminal Law, Then the Final Rule Is an Unconstitutional Divestment of Legislative Power

Even if this Court could otherwise conclude that the Final Rule was valid, it would represent an unlawful exercise of legislative power. As five circuit court judges have recognized, if allowed to create new criminal liability here, "the Final Rule violates the separation of powers" and the "delegation [of Congressional power] raises serious constitutional concerns by making ATF the expositor, executor, *and* interpreter of criminal laws." *Aposhian*, No. 19-4036, Slip Op. at 21-22 (Tymkovich, C.J., dissenting, joined by Hartz, Holmes, Eid, Carson, JJ.). Because it would involve a purely political determination of the scope of criminal liability, only Congress could pass a legislative rule that criminalized the possession of bump-stock devices. ATF's purported exercise of that authority is therefore unconstitutional.

Article I of the Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." U.S. Const. art. I, § 1. Article II agencies, under this Vesting Clause, may not exercise Congress's legislative power to declare entirely "what

circumstances … should be forbidden" by law. *Panama Refining Co.*, 293 U.S. at 418-19.

The Supreme Court has struggled with defining the limits on the legislature's divestment of its authority. Traditionally the Court has allowed agencies to exercise authority so long as Congress set out an "intelligible principle to which the person or body authorized to [exercise the authority] is directed to conform." *Mistretta*, 488 U.S. at 372. But that test lacks clear contours. Furthermore, five members of the Court have recently expressed interest in at least exploring a reconsideration of that standard. *See Gundy v. United States*, 139 S. Ct. 2116, 2131-42 (2019) (Gorsuch, J., dissenting, joined by Roberts, C.J., and Thomas, J.); *id*. at 2130-31 (Alito, J., concurring in the judgment); *Paul v. United States*, 140 S. Ct. 342 (2019) (mem.) (Kavanaugh, J., statement respecting the denial of certiorari).

As Justice Gorsuch recently highlighted in his dissenting opinion in *Gundy v. United States*, though, the Court's precedents offer at least three limiting principles to consider in order "to decide whether Congress has unconstitutionally divested itself of its legislative responsibilities."139 S. Ct. at 2135 (Gorsuch, J., dissenting).

"First, we know that as long as Congress makes the policy decisions when regulating private conduct, it may authorize another branch to fill up the details." *Id.* at 2136. The opposite is true as well—when Congress leaves policy decisions up to another branch, it unlawfully divests itself of power. *See A.L.A. Schechter Poultry Corp.*, 295 U.S. at 529.

The Court provided a concrete example of this distinction in *United States v. Eaton*, 144 U.S. 677 (1892). There, the Court struck down a series of federal tax regulations that purported to impose criminal liability even though Congress had not set out a penalty provision. *Id.* at 688. As there were "no common-law offenses against the United States," it was up to Congress to provide criminal punishment for violation of a regulation. *Id.* at 687. This decision could not be delegated to an agency, because "[i]t would be a very dangerous principle" to allow an agency to issue regulations that, themselves, carried criminal penalties under the general rubric of being "a needful regulation" to enforce a statute. *Id.* at 688. Thus, the Court held that "[i]t is necessary that a sufficient statutory authority should exist for declaring any act or omission a criminal offense," even if the agency could otherwise issue regulations that had, "in a proper sense, the force of law[.]" *Id.*

"Second, once Congress prescribes the rule governing private conduct, it may make the application of that rule depend on executive fact-finding." *Gundy*, 139 S.Ct. at 2136 (Gorsuch, J., dissenting). This distinction weighed heavily in the Court's analysis in *Touby v. United States*, where the Court allowed the Attorney General to add a substance to a list of prohibited drugs temporarily if he determined that doing so was "necessary to avoid an imminent hazard to the public safety." 500 U.S. 160, 166 (1991). As described by Justice Gorsuch, "In approving the statute, the Court stressed all the[] constraints on the Attorney General's discretion and, in doing so, seemed to indicate that the statute supplied an 'intelligible principle' because it assigned an essentially fact-finding responsibility to the executive." *Gundy*, 139 S.Ct. at 2141. Exercise of authority that lacks any such fact-intensive inquiry likely also lacks an essential limit. *See id.*

"Third, Congress may assign the executive and judicial branches certain non-legislative responsibilities." *Id.* at 2137. For instance, the Executive Branch possesses certain unique and historical constitutional authorities, such as those related to foreign affairs, and the Court may view such exercises of delegated authority more favorably. *Id.* This is a

point that has been emphasized by lower courts following *Gundy*. *See United States v. Bruce*, 950 F.3d 173, 175 (3d Cir. 2020) ("Importantly, the non-delegation doctrine applies only to delegations by Congress of legislative power; it has no application to exercises of executive power.").

The Final Rule runs afoul of all three of the limiting principles set out by the Court in this area. First, the Final Rule was an overtly political decision by the agency. As the district court said, ATF "transparently considered political input" when issuing the rule. ROA.567. Acting Director Brandon essentially admitted as much, testifying that on October 1, 2017, he had consulted with "technical experts," "firearms experts" and "lawyers" within ATF, and the consensus within the agency was that "bump stocks" "didn't fall within the Gun Control Act and the National Firearms Act," but acknowledging that ATF's change in position had occurred after he had gone "outside and over to DOJ." ROA.526-27. The decision as to what conduct is or is not *criminal*, however, is precisely the kind of decision reserved for Congress, and not an agency like ATF. *See Eaton*, 144 U.S. at 687-88.

Next, the exercise of authority cannot be justified as being dependent on the agency's fact-finding powers. As discussed, the Final

Rule was plainly not spurred by any new factual analysis. All of its past technical examinations resulted in determinations that bump stocks were not machineguns. *See* ROA.518-19. Indeed, Acting Director Brandon appeared to agree with an outside party that the agency should not "let the technical experts" decide the issue. *See* ROA.523 And the district court found "no evidence in the Administrative Record regarding whether Acting Director Brandon, or anyone affiliated with ATF, actually test-fired or physically examined a bump stock device … since" October 2017. ROA.523. Agency fact-finding certainly did not supply an intelligible limiting principle here.

Finally, the Final Rule cannot be justified based on any unique exercise of presidential powers. This is a straightforward statutory question, but it implicates criminal punishment, which is a uniquely *legislative* interest. *See Eaton*, 144 U.S. at 687-88. If anything, the Executive Branch's power here should be at its weakest.

The district court's rejection of this argument turned simply on its view that "the standards for compliance with non-delegation principles 'are not demanding,'" such that essentially any regulatory action by ATF is justified. ROA.544 (quoting *Gundy*, 139 S.Ct. at 2129). To be sure, the

court was correct that "the Supreme Court has 'over and over upheld very broad delegations,'" but that is not an excuse to give ATF a free pass here. *See* ROA.545 (quoting *Gundy*, 139 S.Ct. at 2129). As discussed, at least five members of the Court have expressed interest in reconsidering the intelligible-principle standard, and, as Justice Gorsuch has argued, the existing standard cannot be read in such a way as to render it meaningless. *See Gundy*, 139 S.Ct. at 2131-42 (Gorsuch, J., dissenting, joined by Roberts, C.J., and Thomas, J.); *id.* at 2130-31 (Alito, J., concurring in the judgment); *Paul*, 140 S. Ct. at 342 (Kavanaugh, J., statement respecting the denial of certiorari). If ATF can permissibly rewrite the substantive criminal law, when it lacks any delegation of lawmaking power, then the non-divestment principle would become a true nullity.

CONCLUSION

For the foregoing reasons, Mr. Cargill respectfully requests that this Court reverse the district court and direct entry of judgment for Mr. Cargill.

March 8, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on March 8, 2021, an electronic copy of the foregoing brief was filed with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/EFC filing system and that service will be accomplished using the appellate CM/ECF system.

/s/ Caleb Kruckenberg

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I hereby certify that this document complies with Federal Rule of Appellate Procedure 32(a)(7)(B)(ii). It is printed in Century Schoolbook, a proportionately spaced font, and includes 12,986 words, excluding items enumerated in Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and Fifth Circuit Rule 32.2. I relied on my word processor, Microsoft Word, to obtain the count.

/s/ Caleb Kruckenberg

CERTIFICATE OF ELECTRONIC COMPLIANCE

I hereby certify that in the foregoing brief, filed using the Fifth Circuit CM/EFC filing system, all required privacy redactions have been made pursuant to Fifth Circuit Rule 25.2.13, any required paper copies to be submitted to the Court are exact copies of the version submitted electronically, and the electronic submission was scanned for viruses with the most recent version of a commercial virus scanning program, and is free of viruses.

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