IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MICHAEL CARGILL,	)	
Plaintiff-Appellant,	)	**Docket No. 20-51016**
v.	)	
MERRICK GARLAND, *ET AL.*,	)	
Defendants-Appellees.	)	

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF *AMICUS CURIAE* OF GUN OWNERS OF AMERICA, INC., GUN OWNERS FOUNDATION, GUN OWNERS OF CALIFORNIA, INC, HELLER FOUNDATION, TENNESSEE FIREARMS ASSOCIATION, VIRGINIA CITIZENS DEFENSE LEAGUE, GRASS ROOTS NORTH CAROLINA, RIGHTS WATCH INTERNATIONAL, AMERICA'S FUTURE, AND CONSERVATIVE LEGAL DEFENSE AND EDUCATION FUND IN SUPPORT OF PLAINTIFF-APPELLANT ON REHEARING *EN BANC*

The movants, Gun Owners of America, Inc., Gun Owners Foundation, Gun Owners of California, Inc., Heller Foundation, Tennessee Firearms Association, Virginia Citizens Defense League, Grass Roots North Carolina, Rights Watch International, America's Future, and Conservative Legal Defense and Education Fund, through their undersigned counsel, hereby request leave of this Court to file their Supplemental Brief *Amicus Curiae* in Support of Plaintiff-Appellant on Rehearing *En Banc* in the above-captioned action.

The grounds in support of this motion are as follows:

1. Gun Owners of America, Inc. ("GOA") is a nonprofit social welfare organization, founded in 1976 and exempt from federal income tax under Internal Revenue Code ("IRC") section 501(c)(4). Gun Owners Foundation ("GOF") is a nonprofit educational and legal organization, exempt from federal income tax under IRC section 501(c)(3). GOA and GOF were established, *inter alia*, for the purpose of participating in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law. Together, GOA and GOF have more than 2 million members and supporters nationwide, and routinely litigate in support of the right to keep and bear arms in both state and federal

courts. GOA and GOF have numerous members and supporters who were affected by the ATF's reinterpretation of the definition of "machinegun" at issue in this case, and were deprived of their right to own bump stocks as a result.

2. Gun Owners of California, Inc., Heller Foundation, Tennessee Firearms Association, Virginia Citizens Defense League, Grass Roots North Carolina, Rights Watch International, America's Future, and Conservative Legal Defense and Education Fund, are nonprofit organizations, exempt from federal income tax under the IRC. They exist in order to promote and support the rights of Americans, including the right to keep and bear arms under federal and state constitutional provisions.

3. These *amici* filed a motion for leave to file an *amicus curiae* brief in support of the petition for rehearing *en banc* in this case on February 4, 2022, which motion was granted on February 8, 2022.

4. Gun Owners of America, Inc., *et al*.'s Supplemental Brief *Amicus Curiae* is timely. Although the Federal Rules of Appellate Procedure do not provide a deadline for the filing of an amicus brief at the supplemental briefing stage during rehearing *en banc*, both Rule 29(a)(6) specifies the filing of an *amicus curiae* brief during initial consideration on the merits 7 days after the filing of the principal brief of the party supported and Rule 29(b)(5) of the Federal Rules of

Appellate Procedure provides that an *amicus curiae* brief must be filed "no later than 7 days after the petition is filed." In all other respects, Gun Owners of America, Inc., *et al*.'s Supplemental Brief *Amicus Curiae* complies with the Federal Rules of Appellate Procedure, as well as the applicable Internal Operating Procedures of this Court, including with respect to content and form and with respect to length, as the brief is no more than 6,500 words.

5. Counsel for the movants have contacted counsel for both the Petitioner and Respondents, all of whom have consented to the filing of this Supplemental Brief *Amicus Curiae*.

6. This case raises broad and important issues, with implications far beyond bump stocks, for the millions of members and supporters of *amici* organizations. The ability of the ATF (or any executive branch agency) to reinterpret and effectively re-write statutory definitions of entire categories of firearms puts all members of these organizations – and all law-abiding firearm owners – in a state of continuous and ongoing confusion and peril. The ramifications of ATF's actions here already can be seen on the horizon, as ATF now moves toward reinterpreting definitions that apply to hundreds of millions of commonly owned firearms.[1] *Amici*'s members have a strong interest in the legal

1 *See*, *e.g.,* ATF's Final Rule, "Definition of 'Frame or Receiver' and Identification of Firearms," 87 *Fed. Reg.* 24652 (Apr. 26, 2022), reinterpreting

questions at issue in this case and their application to these broader issues, given the severe criminal penalties for violations of federal firearms laws, the arbitrary administrative reclassification of lawfully owned firearms and accessories as contraband, and the effects of the same on the enumerated constitutional right to keep and bear arms. The Supplemental Brief *Amicus Curiae* that movants seek leave to submit addresses several of the important aspects of this case, and identifies specific reasons why the district court's conclusions, affirmed by the panel of the Court, should be re-examined by this Court.

7. Some of these *amici* are plaintiffs-appellants in a case challenging the bump stocks regulation at issue in this case in a case recently decided by the Sixth Circuit *En Banc*, which is now pending on a Petition for Certiorari with the U.S. Supreme Court (Docket No. 21-1215).

WHEREFORE, the movants, *amici curiae* Gun Owners of America, Inc., *et al*., pray that their motion be granted and that they be given leave to file their Supplemental Brief *Amicus Curiae* in Support of Plaintiff-Appellant's Petition for Rehearing *En Banc* in this matter.

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numerous foundational definitions of the Gun Control Act as to what constitutes a "firearm" under federal law, including by drastically broadening the meaning of the terms "frame" and "receiver" that have existed unmolested for decades.

Respectfully submitted,

/s/ William J. Olson

William J. Olson*
Robert J. Olson
Jeremiah L. Morgan
WILLIAM J. OLSON, P.C.
370 Maple Avenue W, Suite 4
Vienna, VA 22180-5615
(703) 356-5070

DAVID BROWNE
SPIRO & BROWNE, PLC
2400 Old Brick Road
Glen Allen, VA 23060

JOHN I. HARRIS III
SCHULMAN, LEROY & BENNETT, PC
3310 West End Avenue, Suite 460
Nashville, TN 37203

*Attorney of Record

Attorneys for Movants, *Amici Curiae*
Gun Owners of America, Inc., *et al*.

CERTIFICATE OF COMPLIANCE WITH RULE 32(g)

IT IS HEREBY CERTIFIED:

1. That the foregoing Motion for Leave to File Supplemental Brief *Amici Curiae* of Gun Owners of America, Inc., *et al*., in Support of Plaintiff-Appellant and Reversal, complies with the type-volume limitation of Rule 27(d)(2)(A), Federal Rules of Appellate Procedure, because this motion contains 837 words, excluding the parts of the motion exempted by Rule 32(f).

2. This motion 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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

/s/ William J. Olson
William J. Olson
Counsel for Movants

Dated: August 1, 2022

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing Motion for Leave to File Brief *Amici Curiae* of Gun Owners of America, Inc., *et al.*, in Support of Plaintiff-Appellant and Reversal, was made, this 1st day of August, 2022, by the Court's Case Management/Electronic Case Files system upon the attorneys for the parties.

/s/ William J. Olson

_____

William J. Olson
Attorney for *Amici Curiae*

No. 20-51016

In the
United States Court of Appeals for the Fifth Circuit

MICHAEL CARGILL,

Plaintiff-Appellant,

v.

MERRICK B. GARLAND, U.S. Attorney General; U.S. DEPARTMENT OF JUSTICE; STEVEN DETTELBACH, in his official capacity as 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
for the Western District of Texas
No. 1-19-cv-349
Hon. David A. Ezra, Judge

Supplemental Brief *Amicus Curiae* of Gun Owners of America, Inc., Gun Owners Foundation, Gun Owners of California, Inc., Heller Foundation, Tennessee Firearms Association, Virginia Citizens Defense League, Grass Roots North Carolina, Rights Watch International, America's Future, and Conservative Legal Defense and Education Fund in Support of Plaintiff-Appellant on Rehearing *En Banc*

DAVID BROWNE
SPIRO & BROWNE, PLC
Glen Allen, VA 23060

JOHN I HARRIS III
SCHULMAN, LEROY & BENNETT PC
Nashville, TN 37203

August 1, 2022

WILLIAM J. OLSON*
JEREMIAH L. MORGAN
ROBERT J. OLSON
WILLIAM J. OLSON, P.C.
370 Maple Avenue W., Suite 4
Vienna, VA 22180-5615
(703) 356-5070
Counsel for Amici Curiae
*Attorney of Record

Case No. 20-51016

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MICHAEL CARGILL,

Plaintiff-Appellant,

v.

MERRICK B. GARLAND, *et al.*,

Defendants-Appellees,

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record 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.

Michael Cargill, Plaintiff-Appellant

Merrick B. Garland, *et al.*, Defendants-Appellees

Gun Owners of America, Inc., Gun Owners Foundation, Gun Owners of California, Inc., Heller Foundation, Tennessee Firearms Association, Virginia

Citizens Defense League, Grass Roots North Carolina, Rights Watch International, America's Future, and Conservative Legal Defense and Education Fund, *Amici Curiae*.

William J. Olson, Jeremiah L. Morgan, Robert J. Olson, David G. Browne, and John I. Harris III, counsel for *Amici Curiae*.

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(c), and 5th Circuit Rule 28.2.1, it is hereby certified that *amici curiae* Gun Owners of America, Inc., Gun Owners Foundation, Gun Owners of California, Inc., Heller Foundation, Tennessee Firearms Association, Virginia Citizens Defense League, Grass Roots North Carolina, Rights Watch International, America's Future, and Conservative Legal Defense and Education Fund are non-stock, nonprofit corporations, have no parent companies, and no person or entity owns them or any part of them.

/s/ William J. Olson
William J. Olson
Attorney of Record for *Amici Curiae*

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INTEREST OF *AMICI CURIAE*[1]

Gun Owners of America, Inc. ("GOA") is a nonprofit social welfare organization, exempt from federal income tax under Internal Revenue Code ("IRC") section 501(c)(4). It was founded in 1976 with the mission of protecting the Second Amendment rights of gun owners, and as part of that mission conducts research, participates in the public policy process, and is concerned with the construction of constitutional and statutory provisions which affect its members and supporters. Gun Owners Foundation ("GOF") is an educational and legal organization founded in 1983, exempt from federal income tax under IRC section 501(c)(3). GOF's mission is to defend the Second Amendment of the U.S. Constitution. Gun Owners of California, Inc. ("GOC") is a nonprofit membership organization, exempt from federal income tax under IRC section 501(c)(4). GOC was formed in 1975 to preserve and defend the Second Amendment rights of gun owners.

[1] All parties have consented to the filing of this brief. No party's counsel authored the brief in whole or in part. No party or party's counsel contributed money intended to fund preparing or submitting the brief. No person other than *amici*, their members or their counsel contributed money intended to fund preparing or submitting this brief.

Tennessee Firearms Association, Virginia Citizens Defense League ("VCDL"), Grass Roots North Carolina, Rights Watch International, and Heller Foundation are nonprofit organizations which work to promote and support the right to keep and bear arms under the Second Amendment and corresponding state constitutional provisions. America's Future and Conservative Legal Defense and Education Fund are nonprofit organizations which work to defend constitutional rights and protect liberties.

Most *amici* organizations have members and supporters who were affected by the ATF's Bump Stock Rule[2] reinterpreting the definition of "machinegun," and all are deeply concerned about ATF's usurpation of legislative power in changing the meaning of a federal statute, and related issues.

Most of these *amici* filed an *amicus* brief in this case in support of the petition for rehearing *en banc* on February 4, 2022, as well as *amicus* briefs in other challenges to the ATF Bump Stock Rule.

Additionally, GOA, GOF, and VCDL filed a challenge to the Bump Stock Rule in the U.S. District Court for the Western District of Michigan, which resulted

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[2] This *amicus* brief follows the convention adopted in the Panel Opinion and the briefing in this case, using the term "Bump Stock Rule" to refer to the regulation at issue — *Bump-Stock-Type Devices*, 83 *Fed. Reg*. 66,514 (Dec. 26, 2018).

in a decision by a Sixth Circuit panel enjoining the rule. That panel decision was vacated when *en banc* review was ordered — which review resulted in an evenly divided *en banc* court.[3] A petition for certiorari in that GOA litigation is now pending before the U.S. Supreme Court (*GOA v. Garland*, No. 21-1215).

STATEMENT OF THE CASE

On March 25, 2019, the Plaintiff-Appellant filed an action in the U.S. District Court for the Western District of Texas seeking to enjoin enforcement of the Bump Stock Rule which caused him to surrender to ATF the bump stocks that he had previously acquired and owned legally. Following a trial at which the only live witness was an ATF firearms expert, the district court denied injunctive relief and dismissed the case. The district court, in short, found that the Bump Stock Rule was consistent with the best reading of the relevant statutory language defining a machinegun, and was within the authority of the ATF to promulgate. *Cargill v. Barr*, 502 F. Supp. 3d 1163, 1198-99 (W.D. Tx. Nov. 23, 2020).

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[3] The vacated panel opinion below described the GOA litigation as follows: "[I]n March 2021, a Sixth Circuit panel granted a preliminary injunction against the Rule, holding that the Rule is not entitled to *Chevron* deference and is not the best interpretation of the NFA. *Gun Owners of Am., Inc. v. Garland,* 992 F.3d 446, 450 (6th Cir. 2021). However, the Sixth Circuit vacated that decision, 2 F.4th 576 (6th Cir. 2021) (en banc), and an evenly divided en banc court affirmed the district court's judgment upholding the Rule. No. 19-1298, --- F.4th ----, 2021 WL 5755300 (6th Cir. Dec. 3, 2021) (en banc)." *Cargill v. Garland*, 20 F.4th 1004, 1006 n.2 (2021).

On appeal, a panel of this Court unanimously affirmed the district court, essentially adopting the relevant findings of the district court's opinion and concluding that ATF's newest interpretation of the definition of "machine gun" was also its "best interpretation." *Cargill v. Garland*, 20 F.4th at 1006.

Plaintiff-Appellant sought review *en banc* by this Court to address the following questions: (1) do bump stocks meet the statutory definition of "machinegun"; and (2) if § 5845(b) is ambiguous on initial reading (as two other circuits have held), do either the rule of lenity or *Chevron* deference have a role to play in construing the statute? On June 23, 2022, this Court granted Plaintiff-Appellant's petition for rehearing *en banc*, vacating the panel opinion. *Cargill v. Garland*, 2022 U.S. App. LEXIS 17368 (5th Cir. June 23, 2022).

STATEMENT

This case raises an important question as to whether a type of rifle stock known as a bump stock falls within the statutory definition of a machinegun, but also raises an impressive number of issues, some of the most important involving the administrative state, including: separation of powers, the anti-delegation doctrine, the *Chevron* doctrine and its applicability in a criminal context and when waived by the government, and even the rule of lenity, all of which have been

briefed by the parties. However, this case has even further implications for administrative law and firearms law beyond those that have been briefed.

Here, all admit that, in response to a tragedy that occurred in Las Vegas, ATF flatly reversed its long-standing regulations and interpretations defining a machinegun. Thus, the Bump Stock Rule is an illustration of the principle utilized by advocates of state power — "never let a crisis go to waste." But while Congress may enact a law in response to a crisis, it is quite something else for the administrative state to use such a tragedy to usurp the legislative function to create a new crime — banning possession of hundreds of thousands of bump stocks — as has happened here. Congress was given multiple opportunities to enact legislation to ban bump stocks, but never did. Eschewing the legislative process, ATF stepped into the gap and usurped the power to change law.

Thus far, the federal courts have allowed the new Bump Stock Rule to stand. That inaction has encouraged ATF to advance other anti-gun agendas, putting all law-abiding firearm owners in a state of continuous and ongoing confusion and peril. ATF has been encouraged to reinterpret the decades-old statutory definition of "frame or receiver" — a rulemaking affecting millions of commonly owned

firearms, multiples of the number of bump stocks.[4] What might be next? If anti-gun forces are unsuccessful in Congress with respect to so-called "assault rifles," will judicial inaction encourage ATF to "reinterpret" the term "machinegun" to include all semi-automatic rifles?[5] These *amici* organizations urge this Court to enjoin ATF's complete reversal of position on bump stocks to reach a result not authorized by the statutory definition, before the ATF bureaucracy is encouraged to further usurp the legislative function.

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[4] *See, e.g.*, omnibus rulemaking issued by the Bureau of Alcohol, Tobacco, Firearms and Explosives of the U.S. Department of Justice on April 26, 2022, 2021R-05F, 87 *Fed. Reg*. 24652, and effective on August 24, 2022, entitled "Definition of 'Frame or Receiver' and Identification of Firearms," available at https://www.govinfo.gov/content/pkg/FR-2022-04-26/pdf/2022-08026.pdf. This rulemaking upends the very foundational definition of what is a "firearm" by drastically broadening the meaning of the terms "frame" and "receiver" that have existed for decades, including upending many years of the ATF's own interpretations. This sweeping reinterpretation of statutory language by ATF is already the subject of multiple lawsuits, including *Morehouse Enterprises, LLC et al. v. BATFE et al.* (Case No. 3:22-cv-116, D.N.D.), as well as a case pending in this Circuit, *Division 80 LLC v. Garland et al.* (Case No. 3:22-cv-148, S.D. Tex.).

[5] In 2013, nearly a decade ago, it was estimated that Americans owned between 262 million and 310 million firearms, of which 28 million were semi-automatic rifles. *See* E.W. Hill, *How Many Guns are in the United States: Americans Own between 262 Million and 310 Million Firearms*, Urban Publications (2013). These numbers have undoubtedly grown substantially since 2013.

ARGUMENT

I. THE CHALLENGED RULE WAS GROUNDED NEITHER IN TECHNICAL NOR LEGAL PRINCIPLES, BUT WAS PURELY POLITICAL.

Until ATF was ordered by a politically driven U.S. Department of Justice to reverse its long-standing classification of bump stocks, its firearms "experts" understood and ruled repeatedly that firearms equipped with bump stocks are not machineguns because they require "*continuous multiple inputs by the user* for each successive shot" in order to operate.[6] Then, in early 2018, under political pressure following the October 1, 2017 Las Vegas incident where bump stocks reportedly were found in the hotel room of the shooter, President Trump unilaterally declared that bump stocks *should be* machineguns, despite the fact that "[t]here is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes." *Clinton v. City of N.Y.*, 524 U.S. 417, 438 (1998). In response to such direction, turning on a dime, ATF immediately — with no change to the underlying statutory definition — claimed that bump stocks *are* machineguns, contradicting the agency's earlier factual statements by claiming that bump stocks

[6] *See GOA v. Garland*, Exhibit 20, http://lawandfreedom.com/wordpress/wp-content/uploads/2019/01/Plaintiffs-Complaint-Exhibits.pdf.

permit "continuous firing initiated by a *single action by the shooter*"[7] — a novel turn of phrase found nowhere in the applicable statutory language.

That is not the rule of law, but rather "'the King [] creat[ing] an[] offence by ... proclamation, which was not an offence before.'" *Whitman v. United States*, 574 U.S. 1003, 1004 (2014) (Scalia, J., dissenting from denial of certiorari). An agency cannot "reverse its current view 180 degrees anytime based merely on the shift of political winds and *still* prevail." *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring). Nor may an agency "rewrit[e] ...unambiguous statutory terms" to suit "bureaucratic policy goals." *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 325-26 (2014). Rather, "[o]nly the people's elected representatives in Congress have the power to write new federal criminal laws." *United States v. Davis*, 139 S. Ct. 2319, 2323 (2019).

Equally troubling is that both the panel and the district court engaged in a Herculean effort to rationalize the ATF's ability to suddenly reverse itself on bump stocks, despite the absence of intervening changes to the statutory language, discovery resulting from new testing, or of some peculiar change in the immutable laws of physics. Yet the agency's volte-face, and the justification for allowing it,

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[7] *See Gun Owners of America v. Garland*, Defendants-Appellees' Petition for Rehearing En Banc at 1-2 (6th Cir. No. 19-1298) (May 10, 2021) (emphasis added).

as enunciated by the district court and embraced by the panel, are belied at every turn by the very record created by the district court. The only live witness at the one-day trial — an ATF expert in firearms mechanics — gave testimony on numerous critical points which directly contradict the district court's own findings.

II. BUMP STOCKS ARE NOT MACHINEGUNS UNDER ANY READING OF 26 U.S.C. § 5845(B).

The district court correctly pointed out that Congress has revisited and revised the 1934 definition of a "machinegun" more than once — in 1968 and again in 1986. ROA 504-7. The now-vacated panel opinion — despite professing confidence in its "best" reading of the statutory language — acknowledged in footnote 11 that its opinion should be transmitted to Congress, as that is the proper forum and mechanism to address statutory language such as the definition of a "machinegun." *Cargill*, 20 F.4th at 1014 n.11. Having been examined and deliberated by Congress multiple times over the course of nearly a century, the definition of a machinegun is quite precise, its every word carefully considered many times, and cannot possibly be stretched to include bump stocks. "Our analysis begins with the language of the statute." *Leocal v. Ashcroft*, 543 U.S. 1, 8 (2004). A machinegun, as defined by 26 U.S.C. § 5845(b), must (1) fire more than one shot, and (2) it must do so (a) automatically, (b) without manual reloading, and

(c) by a single function of the trigger. The plain language of the statute requires that all of these elements exist in the same firearm (or collection of parts that may be readily assembled), at the same time, in order to be a machinegun.

As the Supreme Court recently explained in *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163 (2021), Congress generally defines devices for purposes of a statutory framework by setting forth (1) **what** the device must do and (2) **how** it must do it, in order to be that device. *Id*. at 1169 ("Congress defined an autodialer in terms of **what** it must do ('store or produce telephone numbers to be called') and **how** it must do it ('using a random or sequential number generator')." (Emphasis added.)

ATF, the district court, and the panel opinion each refer at times to a "pull" of the trigger despite the statute's use of the word "function," using the two distinct terms interchangeably. "Pull" implies the discrete action of a human, whereas "function" implies the movements of a device. The trigger, of course, is a self-contained mechanical system, which functions in a defined and repeatable manner.[8] Thus, its function is the same regardless of how many times, or how quickly, that function is initiated. Yet even with ATF's substitution of language,

[8] *See* "How an AR-15 Trigger Works," animated GIF *available at* https://imgur.com/WzRuu5t. When the trigger is fully depressed, it releases the hammer which in turn swings forward and fires a shot. The trigger then resets, and it must be moved forward — that is, "released" — before it can again be depressed/pulled to release the hammer and fire another round.

its rule fails the test. The trigger is "pulled" once for each shot on a semiautomatic firearm — even when a "bump stock" is utilized. This aspect of a bump stock's function when attached to a semiautomatic firearm is indisputable factually, and is wholly consistent with the definition of a "semiautomatic rifle" found in 18 U.S.C. § 921(a)(29) ("The term 'semiautomatic rifle' means any repeating rifle which utilizes a portion of the energy of a firing cartridge to extract the fired cartridge case and chamber the next round, and which requires a separate pull of the trigger to fire each cartridge.").

If the trigger must be pulled, released, and reset (completing one "function") for each and every shot, then the mere fact that a bump stock allows the user to perform this function more rapidly does not a machinegun make. Indeed, the ATF's own expert admitted at trial that the trigger on a semi-automatic rifle equipped with a bump stock mechanically resets with each shot (ROA 654-55), and that the rate of fire of a firearm does not determine whether it is a machinegun under the statutory definition (ROA 648).

Expanding the definition of "machinegun" to include any semiautomatic firearm configured to be rapidly fired semi-automatically via a bump stock is no different from "[e]xpanding the definition of an autodialer to encompass any equipment that merely stores and dials telephone numbers," and "would take a

chainsaw to these nuanced problems when Congress meant to use a scalpel." *Duguid* at 1171. Just as each individual number must be dialed, each individual shot from a firearm must occur via a separate "pull" (or "function") of the trigger.

If ATF's interpretation of § 5845(b) is allowed to stand, it potentially could redefine virtually any of the tens of millions of semiautomatic rifles in the nation as machineguns, just as "Duguid's interpretation of an autodialer would capture virtually all modern cell phones, which have the capacity to 'store ... telephone numbers to be called' and 'dial such numbers.'" *Id*. Such an interpretation would not merely miss the mark of being the "best" one — it would border on absurd and have far-reaching consequences.

The requirement "automatically" as used in § 5845(b) has generated comparatively little discussion, in this case and in others. The district court and panel focused on definitions employing the terms "self-acting or self-regulating mechanism." ROA 528-29; *Cargill*, 20 F.4th at 1012. However, even such definitions should rebut any notion that a bump stock could be a machinegun, given that its mode of action indisputably requires repeated release and re-activation of the trigger and, in any event, also requires continuous manipulation of the firearm and the trigger via deliberate human input. Indeed, the ATF's own expert testimony before the district court once again belies any notion that a bump

stock transforms a semiautomatic rifle into an "automatic" one, as deliberate and continuous input by the shooter is required in order for a rifle equipped with a bump stock to continue to fire. ROA 654-57.

III. THE DISTRICT COURT'S LEGAL CONCLUSIONS, AFFIRMED BY THE PANEL, ARE CONTRADICTED BY ITS FINDINGS OF FACT AND ARE CLEARLY ERRONEOUS.

A. Significance of Congressional Inaction.

A tragedy does not vest legislative power in an agency. The presence of bump stocks in a hotel room in Las Vegas does not empower ATF to modify a statutory definition that has been carefully crafted and then revised by Congress. Indeed, the district court correctly pointed out that in the immediate aftermath of the October 1, 2017 Las Vegas incident, the ATF immediately examined and reaffirmed its previous (and correct) interpretation that bump stocks are not machineguns. Then, legislation was offered in Congress — the only entity which constitutionally can change a statutory definition — to ban bump stocks, but Congress did not act on any of these bills. ROA 521-24.

The district court completely missed the significance of congressional inaction on introduced bills. The rule the court cites (ROA 553) — that unenacted legislation in one Congress can "provide no insight into the intentions of a previous Congress...." (*id.*) — does not fully respond to the significance of

congressional inaction. The district court missed the broader and simpler point. When Congress chose not to act on bills which would have changed the statutory definition, ATF had already reaffirmed its prior view that bump stocks were not machineguns. As the district court's own recitation of the timeline affirms, ATF issued the flawed Bump Stock Rule only *after* Congress considered and failed to enact legislation, solely based on political pressures brought to bear on the agency. ROA 521-527. It is the simple fact that Congress — the elected deliberative body constitutionally empowered to change statutes — considered changing the relevant definition and did not, followed by the purely political reversal of years of agency fact-finding, interpretation, and position. That is significant. The district court erroneously brushed aside the importance of this entire sequence of events as it pertains to the meaning of statutory language, swiftly charging past the obvious conclusion that an executive branch agency was driven by momentary and heated politics in purporting to change the very meaning of words that only the legislative branch may alter.[9]

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[9] Certainly there are times that, for political reasons, Members of Congress would prefer to have administrative agencies make controversial decisions that they would prefer not to go on record to make, even if those decisions are not authorized by statutes. If questioned by anti-gun constituents, the Member can claim credit, saying ATF fixed the problem. If questioned by pro-gun constituents, the Member can deflect criticism by disclaiming responsibility, saying ATF acted on its own. When the judiciary fails to hold the bureaucracy to the law, it only

B. Legal Conclusions at Variance with Findings.

The district court's opinion is rife with fatally flawed inconsistencies, and seeming internal disregard for its own factual findings and recitations of the relevant testimony of the only trial witness (the ATF firearms expert). The district court findings include the ATF expert's testimony that "'[a] bump stock is an accessory attached to a firearm to increase its rate of fire, to make it easier for somebody to fire a weapon faster [because it] moves the firearm back inside the stock and mentally you're doing nothing but pressing forward **so it brings it back in contact with your trigger finger and fires again**.'" ROA 510-11 (emphasis added). The district court found based on the expert's testimony that "the rifle slides back and forth and its recoil energy bumps the trigger finger into the trigger to continue firing…." ROA 511. ATF's own testimony and the district court's findings thus confirm that the trigger both "functions" and is "pulled," in any reasonable sense of the words, once for each shot when a bump stock is used.

The district court further found that "[b]y comparison, manufactured automatic firearms continue to fire if 'you continue to keep your finger down on the trigger.'" ROA 512. The district court adopted the expert's testimony that

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encourages Members of Congress to engage in this shameful behavior, which does damage to our system of representative government.

"'basically the pressing forward on the [bump stock-equipped semi-automatic weapon] is the equivalent of pulling the trigger on the [weapon] in full automatic.'... If the shooter stops pressing forward with a bump stock-equipped firearm or stops pulling the trigger with a fully automatic firearm, firing ceases." ROA 512. This testimony, and the district court's adoption of it as a finding of fact, are disturbingly misplaced. Neither the ATF nor any court can simply declare and criminalize — in defiance of the plain text, basic mechanics, and common sense — that *pushing forward on a gun* is the same as *pulling a trigger*. Words have no meaning if continuously pushing an entire gun forward with a hand that is nowhere near a trigger, is now linguistically and legally equivalent to a discrete "function" or "pull" of a trigger.

Indeed, the government has repeatedly disclaimed that position.[10] What's more, the district court goes on to rely upon the ATF expert's testimony that "bump firing" accomplished via other methods, like a belt loop, "is still 'not pulling the trigger between each shot' in these cases." ROA 513-14. If that is the

[10] At oral argument in the Sixth Circuit, the government counsel rejected the notion that, on a rifle equipped with a bump stock, the trigger had somehow been replaced by the rest of the firearm. *Gun Owners of America v. Garland*, en banc oral argument (Oct. 20, 2021) at 35:40 (conceding that "the trigger ... is still the trigger on the AR-15" when equipped with a bump stock).

case, then while every belt loop may not be a machinegun, every semiautomatic firearm becomes a machinegun — whenever a person is wearing trousers.

The district court also noted the ATF expert's testimony that, even with his extensive experience, firing a weapon equipped with a bump stock did not come naturally and required practice. ROA 512. Despite the district court's bare proclamation of consistency with the Bump Stock Rule's interpretation of the word "automatically," a device cannot be said to be "self-acting" and "self-regulating" if even an ATF firearms expert needs practice to make it work. A bump stock stands in stark contrast to a true machinegun, which employs a self-contained mechanism (such as an auto sear) within the trigger group to effortlessly create true automatic operation wherein the trigger is simply held down.

The district court also relies erroneously on a shooter's "mental" state when using a bump stock — a concept that simply cannot co-exist with the plain words of the Bump Stock Rule, let alone the underlying statutory definition. The district court relied upon the ATF expert's testimony about the shooter "mentally" pushing the firearm forward to conclude, in defiance of the plain text, that the shooter's mental state of pushing an entire gun forward was legally the same as a pull or function of the trigger. ROA 559. What is occurring with the shooter "mentally" is irrelevant — it is the function of the trigger that matters, because that is what the

statute provides. There is no *mens rea* or other mental element to be found or implied in the definition of a machinegun, whether one looks only to the text of § 5845(b) or to the broader re-writing as found in the Bump Stock Rule. It is, by necessity, a purely mechanical definition.

The district court repeats its fundamental error of examining the mental state of the shooter again in ¶ 164 of its opinion, when it refers to the shooter "unconsciously" disconnecting and reconnecting the finger with the trigger (and thus implicitly acknowledging again the repeated *function of the trigger*). ROA 561. The end result of the district court's error in this regard is summed up neatly in ¶ 165 of its opinion when it states that "[i]t does not matter that the trigger mechanically resets to 'function' again when the shooter only takes one 'function' to initiate the firing of multiple rounds." ROA 562. Of course, it matters how many times the trigger functions, because that is precisely what the inescapable text of the statute commands one to measure in answering the ultimate question of whether a firearm is a machinegun. Simply put, Congress did not define a machinegun by referring to functions or mental machinations "of the shooter," or to manipulations "of a whole firearm" as opposed to "of the trigger," and neither the ATF nor any court can simply rewrite such fundamental statutory terminology.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the Plaintiff-Appellant's briefs, the Court should reverse the decision of the district court and direct entry of judgment in favor of Plaintiff-Appellant Michael Cargill.

Respectfully submitted,

/s/ William J. Olson

WILLIAM J. OLSON*
JEREMIAH L. MORGAN
ROBERT J. OLSON
WILLIAM J. OLSON, P.C.
370 Maple Avenue W., Suite 4
Vienna, VA 22180-5615
(703) 356-5070
*Attorney of Record

Counsel for *Amici Curiae*

DAVID BROWNE
SPIRO & BROWNE, PLC
2400 Old Brick Road
Glen Allen, VA 23060

JOHN I. HARRIS III
SCHULMAN, LEROY & BENNETT, PC
3310 West End Avenue, Suite 460
Nashville, TN 37203

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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing Supplemental Brief *Amicus Curiae* of Gun Owners of America, Inc., *et al*. in Support of Plaintiff-Appellant on Rehearing *En Banc*, was made, this 1st day of August, 2022, by the Court's Case Management/Electronic Case Files system upon the attorneys for the parties.

/s/ William J. Olson
William J. Olson
Attorney for *Amici Curiae*

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

IT IS HEREBY CERTIFIED:

1. That the foregoing Supplemental Brief *Amicus Curiae* of Gun Owners of America, Inc., *et al*. in Support of Plaintiff-Appellant and Rehearing *En Banc* complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because this brief contains 4,317 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief 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), as well as Circuit Rule 32.1, because this brief has been prepared in a proportionally spaced typeface using WordPerfect version 18.0.0.200 in 14-point Times New Roman.

/s/ William J. Olson
William J. Olson
Attorney for *Amici Curiae*
Dated: August 1, 2022