No. 08-15640-FF

In The
United States Court of Appeals
for the Eleventh Circuit

WILLIAM AKINS,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

On Appeal from the United States District Court
for the Middle District of Florida

BRIEF *AMICUS CURIAE* OF GUN OWNERS FOUNDATION AND GUN OWNERS OF AMERICA, INC. IN SUPPORT OF APPELLANT

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November 26, 2008
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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The undersigned counsel for the *amici curiae*, Gun Owners Foundation, *et al.*, certifies pursuant to Rules 26.1-1 and 28-1(b), Rules of the United States Court of Appeals for the Eleventh Circuit, that the following listed persons and entities, in addition to those listed in the Brief of Appellant previously filed herein, have an interest in the outcome of this case.

Bagley, Nicholas, counsel for Appellee

Gun Owners Foundation, Amicus Curiae in support of Appellant

Gun Owners of America, Inc., Amicus Curiae in support of Appellant.

Miles, John S., counsel for Amici Curiae

Morgan, Jeremiah L., counsel for *Amici Curiae*

Olson, William J., counsel for *Amici Curiae*

Titus, Herbert W., counsel for *Amici Curiae*

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(c), and Eleventh Circuit Rule 28-1(b), it is hereby certified that the *amici curiae*, Gun Owners Foundation and Gun Owners of America, Inc., are non-stock, nonprofit corporations, neither of which has any parent company, and no person or entity owns them or any part of them.

_____
William J. Olson
Attorney of Record for *Amici Curiae*

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INTEREST OF THE AMICI CURIAE

Gun Owners Foundation ("GOF") and Gun Owners of America, Inc. ("GOA") are nonprofit educational organizations, exempt from federal taxation under sections 501(c)(3) and 501(c)(4) of the Internal Revenue Code, respectively, and each is dedicated, *inter alia*, to the correct construction, interpretation and application of the law, with particular emphasis on federal firearms statutes and constitutional guarantees related to firearm ownership and use.

GOF is a public charity which primarily engages in nonpartisan research and public education and assistance concerning the construction of constitutions and statutes related to the right of citizens to bear arms, and engages in public interest litigation in defense of human and civil rights secured by law, including the defense of the rights of crime victims, the rights to own and use firearms, and related issues. GOA is a social welfare organization which also engages in nonpartisan research and education, as well as assistance, regarding victims' rights and certain public policy issues and public interest litigation, particularly that related to the correct construction of the Constitution and federal and state statutes. In the past, each of the *amici* has conducted research on other issues

involving the interpretation of federal law and has filed *amicus curiae* briefs in other federal litigation involving such issues.[1]

STATEMENT OF ISSUE

Whether the district court erred, in violation of 5 U.S.C. section 706(2)(A), by its failure to hold unlawful and to set aside the Bureau of Alcohol, Tobacco and Firearms' Ruling that the Akins Accelerator is a machinegun, on the ground that such ruling was arbitrary, capricious, or not in accordance with 26 U.S.C. section 5845(b)'s definition of a machinegun?

SUMMARY OF ARGUMENT

At the heart of this appeal is the question whether the Bureau of Alcohol, Tobacco and Firearms ("ATF") acted arbitrarily, capriciously, or not in accord with the law when it ruled that the Akins Accelerator was a machinegun, as defined in 26 U.S.C. section 5845(b). It is submitted that the ATF ruling was wrong as a matter of law, and that the court below erred in upholding that ATF ruling.

In pertinent part, 26 U.S.C. section 5845(b) defines a machinegun as "any part designed and intended solely and exclusively ... for use in converting a

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[1] *Amici* requested and received the consents of the parties to the filing of this brief *amicus curiae*, pursuant to Rule 29(a), Federal Rules of Appellate Procedure.

weapon [so that it] 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." (Emphasis added.)

Initially, ATF concluded correctly that the Akins Accelerator was **not** a machinegun, having found that the accelerator enabled a semiautomatic weapon to increase its rate of fire by **multiple functions** of the trigger, including an initial pull of the trigger followed by a series of trigger movements interrupted by the placement of the trigger finger, each interruption of which caused the firearm to be discharged again. Out of an alleged concern for "public safety" threatened by a "dangerous weapon," ATF changed its ruling, concluding that the Akins Accelerator was a machinegun because "a **single pull** of the trigger initiates an automatic firing cycle," without the shooter having to repeatedly pull the trigger. (Emphasis added.)

ATF acknowledged that it was overruling its prior decisions (based on the statutory definition) that a machinegun was characterized as a weapon that fires "automatically" by a "**single function** of the trigger" and substituting a **new definition** of a machinegun (based on a new policy) as a weapon that fires automatically solely by a "**single pull** of the trigger" even if multiple trigger functions are required.

This decision exceeded ATF's rulemaking authority under 18 U.S.C. section 926, having been made: (a) without proper notice and hearing; (b) in direct conflict with the statutory definition of a machinegun; and (c) without any support in either the legislative history or judicial precedent. To the contrary, the statutory language, legislative history, and judicial precedent conclusively demonstrate that "function" and "pull" are not equivalent. The Akins Accelerator did not cause a semiautomatic weapon to fire faster by "a single function" of the trigger; rather it enabled a semiautomatic weapon to increase its rate of fire only by faster multiple functions of the trigger.

In short, the ATF decision with respect to the Akins Accelerator was not in accordance with the statutory definition of a machinegun. ATF's asserted concern for "public safety" does not permit it to disregard the federal firearms laws as they are written, particularly in view of the constitutional guarantee of the individual right to keep and bear arms and related protections.

ARGUMENT

I. The District Court's Decision, Upholding the ATF Ruling that the Akins Accelerator Is a Machinegun, Was Arbitrary, Capricious, and Contrary to 26 U.S.C. Section 5845(b).

A "machinegun" is "any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual

reloading, by a **single function** of the trigger." 26 U.S.C. § 5845(b) (emphasis added). The statute further provides that "any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun" is, itself, a "machinegun."

According to both the district court and the changed position of ATF, the Akins Accelerator qualifies as a machinegun because it converts a semiautomatic weapon so as to enable one to shoot that weapon "automatically" by a single "**pull of the trigger**." *See* Order dated Sept. 23, 2008, pp. 10-12 (U.S. District Court, Middle District of Florida, Tampa Division, Case No. 8:08-cv-988-T-26TGW) (hereinafter "Dist. Ct. Order"); R. 29. *See also* ATF Rul. 2006-2 (Dec. 13, 2006).[2] The district court reached this result on the erroneous assumption that, **as a matter of law**, the "'single **function** of the trigger' is **synonymous** with 'single **pull** of the trigger.'" *See* Dist. Ct. Order, p. 11 (emphasis added). Similarly, ATF assumed that, **as a matter of law**, "the National Firearms Act ... **equated** 'single **function** of the trigger' with 'single **pull** of the trigger.'" *See* ATF Rul. 2006-2, p. 2 (emphasis added).

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[2] ATF Ruling 2006-2 appears on pages A-1 through A-5 of the Appendix to this brief.

By substituting "**single pull**" for "**single function**" in the legal definition of a machinegun, both the district court and ATF concluded that, as a matter of law, it was irrelevant that the Akins Accelerator could not fire rapidly without **multiple functions** of the trigger. However, ATF admitted that "the trigger mechanically resets" between shots, as with all semi-automatic firearms. As ATF Ruling 2006-2 indicates, rapid fire could not be achieved by a "**single pull**" of the trigger **unless** the shooter continues to employ his finger to affect trigger function in discharging each round by maintaining "finger pressure against the stock" so that when "the trigger [again comes back into] contact [with] the shooter's trigger finger" it continues to shoot "repeatedly until the ammunition is exhausted or the finger is removed." *See* ATF Rul. 2006-2, p. 2; *accord*, Dist. Ct. Order, p. 10.

Thus, according to ATF and the district court, because the Akins Accelerator, "when installed in a semiautomatic rifle, results in a weapon that shoots more than one shot, without manual reloading, by a single **pull** of the trigger, [it is] a machinegun as defined in the National Firearms Act and the Gun Control Act." ATF Rul. 2006-2, p. 2.

The ATF's ruling that the Akins Accelerator is a machinegun was contrary to 5 U.S.C. section 706(2), in that it was arbitrary, capricious and not in accordance with the law defining a machinegun, as set forth in 26 U.S.C. section

5845(b), and the district court's decision upholding that ruling was wrong as a matter of law.

A. The Akins Accelerator Enables a Weapon to Shoot Multiple Shots Only by Multiple "Functions" of the Trigger.

Although 26 U.S.C. section 5845(b) defines a machinegun in relation to a "**function**" of the trigger of a firearm, neither it nor any other statute defines "function." "When a word is not defined by statute," the "normal[] [rule is to] construe it in accord with its ordinary or natural meaning." Smith v. United States, 508 U.S. 223, 228 (1993). Contrary to the assumption of both the district court and ATF, the meanings of "function" and "pull" are not the same. Webster's Third New International Dictionary defines **"function"** as "one of a group of related actions contributing to a larger action" or "operation." *Id.,* p. 921. By contrast, Webster's defines "**pull**" to mean "to exert force upon so as to cause or tend to cause motion toward the force" or "tug at" in contrast to "push." *Id.*, p. 1839. This distinction is clarified by firearms law expert Stephen Halbrook, who writes: "[w]hile pulling is the most prominent method of functioning a trigger, the term 'function' is not so limited." S. Halbrook, Firearms Law Deskbook, Section 6:6, p. 446 (2008 Ed.) (hereinafter "Halbrook's Deskbook). Thus, Halbrook has observed that "a 'single function of the trigger' is broader than

a 'single pull of the trigger,' for a pull is only one type of function, which also includes, e.g., to push." *Id.*

Indeed, in a letter dated February 22, 2008, addressed to a Mr. Michael Derdziak of Greenville, South Carolina, John R. Spencer, Chief, ATF Firearms Technology Branch ("FTB"), followed the normal use of these words when he wrote that, in its evaluation of "two stage trigger devices," FTB has "interpreted the phrase 'single function of the trigger' to mean a single movement of the trigger, regardless of **whether** that movement is the manual (conscious) **pull** of the trigger **or** the manual (conscious) **release** of the trigger." (Underline original; bold added.) Letter of John R. Spencer, Chief, Firearms Technology Branch, to Michael Derdziak, Feb. 22, 2008, 903050:MSK, 3111/2008-243.[3] Applying that same interpretation of the meaning of "function" to the Akins Accelerator, which is at issue in this case, Halbrook writes:

> The Akins Accelerator is a shoulder stock mechanism into which a particular semiautomatic firearm is installed, thereby facilitating rapid firing. **When the trigger is pulled**, this single function of the trigger causes the firearm to discharge. The resulting recoil pushes the entire firearm rearward within the stock. This movement of the entire firearm moves the trigger rearward away from the trigger finger (which is held in place against an integral stop built into the stock), allowing the trigger to reset. A compressed spring then pushes the

[3] This letter appears on pages A-6 through A-7 of the Appendix to this brief.

> entire firearm including the trigger forward, depressing the moving trigger against the stationary trigger finger. This results in **another separate single function of the trigger**, causing the firearm to discharge again. The cycle is then repeated. While the trigger finger remains stationary, the trigger itself moves back and forth for each shot fired. In short, only one shot is fired for each single function of the trigger. [Halbrook's Deskbook, Section 6:10, p. 479 (emphasis added).]

Not surprisingly, ATF, when in its initial determination it applied the same meaning of "function" to the Akins Accelerator, came to the same conclusion as Halbrook: the Akins Accelerator was not a machinegun:

> The proposed theory of operation of this stock involves the application of the movement of the counter recoiling rifle to initiate a rapid succession of semiautomatic fire. The shooter places his trigger finger behind the adjustable screws and forward of the weapon's trigger after **the weapon is initially fired** and the action is moved to the rear (by the recoiling mechanism), the subsequent forward movement of the action is halted by the shooter's trigger finger being held against the adjustable screws. The **trigger is then depressed and a second firing of the weapon commences**. The **movements** of the action within the stock assembly are used to **consecutively fire the weapon in lieu of the traditional method of manually pulling the trigger.** [Letter of Sterling Nixon, Chief, ATF Firearms Technology Branch, to Thomas Bowers, Nov. 17, 2003, 903050:RDC, 3311/2004-096; *see also* R. Vasquez, Assistant Chief, ATF Firearms Technology Branch, to Thomas Bowers, Nov. 22, 2004, 903050:MRC, 3311/2006-1060 cited in Halbrook's Deskbook, Section 6:10, pp. 479-80 (emphasis added).]

Yet, two years later, ATF changed its position, handing down ATF Ruling 2006-2, based not on any new discovery concerning the operation of the Akins

Accelerator, but, as found by the district court, based solely upon a policy change regarding its interpretation of the law:

> In Ruling 2006-2, ATF explains that the motivation for its reconsideration of the earlier letters to Plaintiff came from requests by "several members of the firearms industry to classify devices that are exclusively designed to increase the rate of fire of a semiautomatic firearm."... The Ruling then sets forth a mechanical description of how such a device works (using the Akins Accelerator as an example) and reaches the important conclusion: "a single pull of the trigger initiates an automatic firing cycle."... Next it outlines the **new policy**, **equating a "single function of the trigger" with a "single pull of the trigger,"** and connecting the **new interpretation** to the legislative history of the NFA.... Finally, Ruling 2006-2 recognizes that this interpretation represents a **policy change** and states "to the extent that previous ATF rulings are inconsistent with this determination, they are hereby overruled." [Dist. Ct. Order, pp. 12-13 (emphasis added).]

Because the two terms — "pull" and "function" — "are not synonymous," the interpretive "gloss" placed on 26 U.S.C. section 5845(b) "is not supported by the statute's plain language" and, thereby, "impermissibly expands on the requirements of the statute." *See* National Rifle Association v. Brady, 914 F.2d 475, 484 (4th Cir. 1990).

B. The ATF's "New" Rule Defining "Single Function of the Trigger" to Mean "Single Pull of the Trigger" Is Not Entitled to Deference.

In justification of this change of legal policy — equating "single function of the trigger" to "single pull of the trigger" — **neither** ATF nor the district court

made any effort to examine whether ATF's interpretation of the statutory text was consistent with the **intent of Congress**. Instead, the district court employed a "highly deferential" standard of review, concluding that ATF had provided sufficient "reasoned analysis," thereby "demonstrating that its new interpretation of the phrase 'single function of the trigger' is necessary to protect the public from dangerous firearms." Dist. Ct. Order, pp. 8-9, 12. The ATF ruling is not entitled to such deference.

1. ATF Has Limited Rule-Making Authority.

Currently, 18 U.S.C. section 926 authorizes ATF to "prescribe **only** such rules and regulations **as are necessary to carry out the provisions of this chapter**...." (Emphasis added.) Prior to the enactment of the Firearms Owners' Protection Act ("FOPA") in 1986, this provision read more broadly: "The Secretary **may prescribe** such rules and regulations **as he deems reasonably necessary** to carry out the provisions of this chapter...." *See* Pub. L. 90-618 (Gun Control Act of 1968), 82 Stat. 1213, 1226 (Oct. 22, 1968) (emphasis added). However, FOPA narrowed this grant of authority by adding the word, "**only,**" after "prescribe," and substituting the phrase, "as are necessary" for "as he deems reasonably necessary." *See* Pub. L. 99-308, 110 Stat. 449, 459 (May 19, 1986). This change of language, alone, confirms the district court's error in ignoring the

statutory language in favor of ATF's policy change based upon its assessment that "its new interpretation of the phrase 'single function of the trigger' is necessary to protect the public from dangerous firearms." *See* Dist. Ct. Order, p. 12. As the court of appeals warned in NRA v. Brady, "[t]he change in language in Sec. 926 surely counsels BATF not to stray from the directives of the statute...." *Id.*, 914 F.2d at 479.

There is no catch-all "provision" in Chapter 44 of Title 18 of the United States Code that prohibits "dangerous firearms." Rather, the statutory provisions describe with great specificity all firearms subject to regulation. *See generally* 18 U.S.C. § 921(a). "Machinegun" is expressly stated to have "the meaning given such term in [26 U.S.C. section 5845(b)]." 18 U.S.C. § 921(a)(23). Thus, ATF is not authorized to substitute its "reasoned analysis" for the intent of Congress as specifically expressed by the statutory text defining a machinegun. Instead, it is "the existing statutory text" that is the "starting point in discerning congressional intent...." *See* Lamie v. United States Trustee, 540 U.S. 526, 534 (2004). ATF's task, as was the district court's, was "to construe what Congress has enacted[,] begin[ning], as always, with the language of the statute." Duncan v. Walker, 533 U.S. 167, 172 (2001).

This rule holds even in cases, such as this one, where "a court reviews an agency's construction of the statute which it administers...." Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842 (1984). In such cases:

> First, **always**, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, **must** give effect to the unambiguously expressed intent of Congress. If, however, ... the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a **permissible construction of the statute.** [Chevron, 467 U.S. at 842-43 (emphasis added). *See also* NRA v. Brady, 914 F.2d at 478.]

Instead of complying with this threshold rule of Chevron, the district court leap-frogged over the "statutory language" to ATF's alleged expert "experience and reasoned analysis,"[4] as if Congress had conferred "broad discretion" upon ATF, as it had upon the Environmental Protection Agency, as discussed in Chevron. *See* 467 U.S. at 845-62.[5] Instead, the district court should have examined ATF's new

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[4] *See* Dist. Ct. Order, p. 14.

[5] *Compare* 42 U.S.C. section 4331(a) (Congressional declaration of national environmental policy "to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans") *with* FOPA (Pub. L. 99-308, section 1) (Congressional findings affirming "the rights of citizens ... to keep and bear arms under the second amendment to the United States Constitution [and] to reaffirm

policy to ascertain whether it conformed with the "plain language of the statute." *See* NRA v. Brady, 914 F.2d at 484.

2. ATF's Reliance on Legislative History Is Misplaced.

ATF has claimed — and the district court agreed — that the "legislative history" of the National Firearms Act supports the view that "single function of the trigger" means the same thing as "single pull of the trigger." *See* ATF Rul. 2006-2, p. 2; Dist. Ct. Order, pp. 11-22. As Appellant points out in his brief, however, it is astonishing that the district court accepted "without question" ATF's belated reliance upon "a [72-year old] snippet of testimony buried in the congressional record by a non-member of Congress." Brief of Appellant ("Appl. Br."), pp. 22-23.

Not only is the district court's acceptance of such reliance surprisingly facile, it is directly contrary to a long-standing rule of the Supreme Court not to "accord any significance to ... statements" made by persons other than members of Congress or statements not included in "official Senate and House Reports." *See* Kelly v. Robinson, 479 U.S. 36, 51, n.13 (1986). Indeed, in 2001, the Supreme Court applied this rule, dismissing an appeal to a 78-year old statement made by a

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the intent of Congress ... that 'it is not the purpose of this title to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms ... for lawful purposes.'").

witness before a congressional subcommittee as the source of language that appeared in a statute:

> Legislative history is problematic even when the attempt is to draw inferences from the intent of duly appointed committees of the Congress. It becomes far more so when we consult sources still more steps removed from the full Congress and **speculate** upon the significance of the fact that a certain interest group sponsored or opposed particular legislation. [Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 120 (2001) (emphasis added).]

Yet ATF and the district court have done just the opposite, speculating that a portion of the testimony of the National Rifle Association ("NRA") president, opposing the bill, taken out of context, transformed the meaning of the statutory "single function of the trigger" to be the "single pull of the trigger,"[6] notwithstanding the fact that the NRA president testified that the single function of the trigger was the very "essence" of a machinegun, not the single pull of the trigger. *See* National Firearms Act: Hearings Before the Committee on Ways and Means, H.R. Rep. No. 9066, 73rd Cong., 2d Sess., at 41 (1934).

In any event, speculation based on dusty congressional hearing transcripts is not helpful. The language of 26 U.S.C. section 5845(b) is "unambiguous," so that there is no need to "resort to legislative history to determine what Congress

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[6] *See* ATF Rul. 2006-2; Dist. Ct. Order, pp. 11-12.

intended" the word "function" to mean. *See* Blaustein & Reich, Inc. v. Buckles, 365 F.3d 281, 288, n.15 (4th Cir. 2004).

3. ATF Failed to Comply with 18 U.S.C. Section 926(b).

Not only did the district court erroneously defer to ATF's substantive decision changing its rules by equating "single function of the trigger" to "single pull of the trigger," but it mistakenly deferred to the process by which ATF effectuated its change of policy. As Appellant has pointed out in his brief, ATF Ruling 2006-2 was not just an application of a preexisting rule, but the issuance of a new rule, subject to the notice and comment provisions of 5 U.S.C. section 553. *See* Applt. Br., p. 10. In its Case Background statement, the district court acknowledged that the ATF had, by Ruling 2006-2 , "issued a new policy statement" without having afforded any prior hearing. Dist. Ct. Order, pp. 6-7. The district court also acknowledged that this "new policy" is based upon a new rule that equates a "single function of the trigger" with a "single pull of the trigger." Dist. Ct. Order, p. 13. Yet, the district court concluded that "the [Administrative Procedure Act's] notice and comment requirements do not apply" because the ATF change of policy concerns only "interpretive rules," not substantive ones. Dist. Ct. Order, p. 17.

Overlooked by the district court, however, is the requirement in 18 U.S.C. section 926(b) that — "before prescribing ... rules and regulations [as are necessary] to carry out the provisions of this chapter" — ATF "**shall** give not less than ninety days public notice, and shall afford interested parties opportunity for hearing...." (Emphasis added.) According to Gun South, Inc. v. Brady, 877 F.2d 858 (11th Cir. 1989), section 926(b) applies when ATF "engages in rulemaking." *Id.*, 877 F.2d at 865. If ATF's Ruling 2006-2 was no more than an ATF decision "applying the law to the facts of an individual case," then it would not "approach the function of rulemaking." *See id.* But Ruling 2006-2 was more than that. It rested upon an entirely new policy that altered Akins' "substantive rights" and, therefore, was rulemaking subject to the notice and hearing opportunity afforded by section 926(b). *See* RSM, Inc. v. Buckles, 254 F.3d 61, 69 (4th Cir. 2001).

C. ATF Ruling 2006-2 Is Not Supported by Judicial Precedent.

Citing Staples v. United States, 511 U.S. 600 (1994) and United States v. Camp, 343 F.3d 743 (5th Cir. 2003), the district court affirmed ATF's claim that "common-sense determination" that equated "single pull of the trigger" with "single function of the trigger" was reasonable. Dist. Ct. Order, p. 11. As pointed out in Appellant's Brief, neither case supports ATF's view.

Without the slightest hesitation, the district court boldly, but erroneously, proclaimed that, in Staples, "[t]he Supreme Court has **adopted the view** that 'single function of the trigger' is **synonymous** with 'single pull of the trigger.'" Dist. Ct. Order, p. 11 (emphasis added). As Appellant points out in his brief, the question of whether "function" means "pull" was not before the Staples Court. Applt. Br., p. 22. Indeed, as the paragraph in Staples upon which the district court relied stated, the issue addressed by the Staples Court was the meaning of the word "automatic[ally]," not of the word "function." *See* Staples, 511 U.S. at 602, n.1. Since the weapon at issue in Staples fired only by a "pull" of the trigger, the Court simply "used" pull, rather than function, because pull was a convenient shorthand way to describe how the weapon operated, wholly unrelated to the issue that was before the Court.

As for Camp, the district court simply ignored the court of appeals' discussion of its prior decision in United States v. Jokel, 969 F.2d 132 (5th Cir. 1992), wherein the court had concluded that just because a firearm did not shoot, "as is traditional, [by] pulling a small lever," it would be error "'to impute to Congress the intent to restrict the term to apply to only one kind of trigger, albeit a very common kind. *The language implies no intent to restrict the meaning ....*'" Camp, 343 F.3d 743, 745 (5th Cir.2003) (italics original). Yet, as pointed out in

Appellant's Brief, that is exactly what ATF Ruling 2006-2 would do if applied consistently to firearms that shoot automatically by some operation other than a "pull" of the trigger. *See* Applt. Br., p. 22.

Moreover, prior to the issuance of ATF Ruling 2006-2, courts of appeals in both the Seventh and Ninth federal circuits had decided cases demonstrating that the trigger function element of a machinegun included more than a "pull" of the trigger; to construe it otherwise "would lead to the absurd result of enabling persons to avoid the National Firearms Act simply by using weapons that employ a button or switch mechanism for firing." United States v. Evans, 978 F.2d 1112, 1113, n.2 (9th Cir. 1992). *Accord* United States v. Fleischli, 305 F.3d 643, 655 (7th Cir. 2002). Surely, it would be equally absurd for ATF to rule in the future that such weapons that employ a "button or switch mechanism for firing" would not be machineguns because they do not shoot automatically by a single "pull" of the trigger.

D. ATF's Ruling 2006-2 Cannot Be Justified by the Need "to Protect the Public from Dangerous Firearms."

The district court found support for ATF Ruling 2006-2 in ATF's assessment that the Akins Accelerator threatened the "public safety," by enabling a semiautomatic weapon to shoot at an increased rate of fire. *See* Dist. Ct. Order,

p. 12. After all, a machinegun is not defined by statute as a weapon which can be operated so that it fires real fast. *See* Dist. Ct. Order, p. 17 (at "a high rate of fire...."). Moreover, it is not within ATF's authority to balance the interests of societal safety and firearms use and ownership. Rather, it is ATF's duty to enforce the federal firearms laws as they are written and as they are constitutionally permitted by the Second, Fourth, Fifth, Ninth, and Tenth Amendments. *See* Pub. L. 99-308, section 1, 100 Stat. 449 (May 19, 1986).

In Staples, the Supreme Court construed 26 U.S.C. section 5861(d)'s prohibition against the possession of an unregistered machinegun to require the government to prove beyond a reasonable doubt that the possessor "know[s] of the particular characteristics that make his weapon" a machinegun. Staples, 511 U.S. at 609. In so ruling, the Court rejected the government's plea that it would be enough that the prosecution show that the person possessing a firearm knew that it was a "dangerous" instrumentality. *Id.*, 511 U.S. at 611. It did so because firearms laws should be interpreted and applied with respect for the "long tradition of widespread lawful gun ownership by private individuals in this country." *Id.*, 511 U.S. at 610.

Since Staples, the Supreme Court has decided that the Second Amendment protects an **individual** right to keep and bear arms. District of Columbia v. Heller,

554 U.S. ___, 171 L. Ed.2d 637 (2008). In so ruling, the Court likened the right to keep and bear arms to the First Amendment freedoms of religion, speech, press, assembly, and petition, deserving the same high protection as those rights. *Id.*, 171 L.Ed. 2d at 683. More specifically, the Court rejected the notion that Second Amendment rights could be subject to "gun control" laws measured by an "interest-balancing" formula that would justify restrictions on gun ownership in light of an overriding governmental interest in public safety. *Id.*, 171 L.Ed.2d at 682-83. To subject the Second Amendment constitutional guarantee to such judicial "assessments," the Court concluded, would make it "no constitutional guarantee at all." *Id.*, 171 L.Ed.2d at 683. To allow ATF to stretch the reach of Congressionally-crafted firearms laws in the name of "public safety" — as the district court did here — would be to allow ATF to do what the Heller Court, itself, refused to do, because "the enshrinement of [the] constitutional right[] [to keep and bear arms] necessarily takes certain policy choices off the table." *Id.*, 171 L.Ed.2d at 684.

CONCLUSION

For the reasons stated, the ATF ruling that the Akins Accelerator is a machinegun was arbitrary, capricious, and not in accordance with the statutory

definition of a machinegun as set forth in 26 U.S.C. section 5845(b). The district court's decision and judgment upholding that ruling should be reversed.

Respectfully submitted,

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November 26, 2008
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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

IT IS HEREBY CERTIFIED:

1. That the foregoing Brief *Amicus Curiae* of Gun Owners Foundation and Gun Owners of America, Inc. in Support of Appellant complies with the type-volume limitation of Rule 32(a)(7)(B), Federal Rules of Appellate Procedure, because this brief contains 4,963 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

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) because this brief has been prepared in a proportionally spaced typeface using WordPerfect version 13.0.0.568 in 14-point Time New Roman.

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William J. Olson
Attorney for *Amici Curiae*

Dated: November 26, 2008

APPENDIX

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BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES
RULING 2006-2

18 U.S.C. 922(o): Transfer or possession of machinegun

26 U.S.C. 5845(b): Definition of machinegun

18 U.S.C. 921(a)(23): Definition of machinegun

The definition of machinegun in the National Firearms Act and the Gun Control Act includes a part or parts that are designed and intended for use in converting a weapon into a machinegun. This language includes a device that, when activated by a single pull of the trigger, initiates an automatic firing cycle that continues until the finger is released or the ammunition supply is exhausted.

ATF Rul. 2006-2

The Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) has been asked by several members of the firearms industry to classify devices that are exclusively designed to increase the rate of fire of a semiautomatic firearm. These devices, when attached to a firearm, result in the firearm discharging more than one shot with a single function of the trigger. ATF has been asked whether these devices fall within the definition of machinegun under the National Firearms Act (NFA) and Gun Control Act of 1968 (GCA). As explained herein, these devices, once activated by a single pull of the trigger, initiate an automatic firing cycle which continues until either the finger is released or the ammunition supply is exhausted.

Accordingly, these devices are properly classified as a part "*designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun"* and therefore machineguns under the NFA and GCA.

The National Firearms Act (NFA), 26 U.S.C. Chapter 53, defines the term "firearm" to include a machinegun. Section 5845(b) of the NFA defines "machinegun" as *"any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also include the frame or receiver of any such weapon, any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun, and any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person."* The Gun Control Act of 1968 (GCA), 18 U.S.C. Chapter 44, defines machinegun identically to the NFA. 18 U.S.C. 921(a)(23). Pursuant to 18 U.S.C. 922(o), machineguns manufactured on or after May 19, 1986, may only be transferred to or possessed by Federal, State, and local government agencies for official use.

ATF has examined several firearms accessory devices that are designed and intended to accelerate the rate of fire for semiautomatic firearms. One such device

consists of the following components: two metal blocks; the first block replaces the original manufacturer's V-Block of a Ruger 10/22 rifle and has attached two rods approximately ¼ inch in diameter and approximately 6 inches in length; the second block, approximately 3 inches long, 1 ⅜ inches wide, and ¾ inch high, has been machined to allow the two guide rods of the first block to pass through. The second block supports the guide rods and attaches to the stock. Using ¼ inch rods, metal washers, rubber and metal bushings, two collars with set screws, one coiled spring, C-clamps, and a split ring, the two blocks are assembled together with the composite stock. As attached to the firearm, the device permits the entire firearm (receiver and all its firing components) to recoil a short distance within the stock when fired. A shooter pulls the trigger which causes the firearm to discharge. As the firearm moves rearward in the composite stock, the shooter's trigger finger contacts the stock. The trigger mechanically resets, and the device, which has a coiled spring located forward of the firearm receiver, is compressed. Energy from this spring subsequently drives the firearm forward into its normal firing position and, in turn, causes the trigger to contact the shooter's trigger finger. Provided the shooter maintains finger pressure against the stock, the weapon will fire repeatedly until the ammunition is exhausted or the finger is removed. The assembled device is advertised to fire approximately 650 rounds per minute. Live-fire testing of this device demonstrated that a single pull of the trigger initiates an automatic firing

cycle which continues until the finger is released or the ammunition supply is exhausted.

As noted above, a part or parts designed and intended to convert a weapon into a machinegun, *i.e.*, a weapon that will shoot automatically more than one shot, without manual reloading, by a single function of the trigger, is a machinegun under the NFA and GCA. ATF has determined that the device constitutes a machinegun under the NFA and GCA. This determination is consistent with the legislative history of the National Firearms Act in which the drafters equated "single function of the trigger" with "single pull of the trigger." *See, e.g., National Firearms Act: Hearings Before the Comm. on Ways and Means, House of Representatives, Second Session on H.R. 9066*, 73rd Cong., at 40 (1934). Accordingly, conversion parts that, when installed in a semiautomatic rifle, result in a weapon that shoots more than one shot, without manual reloading, by a single pull of the trigger, are a machinegun as defined in the National Firearms Act and the Gun Control Act.

Held, a device (consisting of a block replacing the original manufacturer's V-Block of a Ruger 10/22 rifle with two attached rods approximately ¼ inch in diameter and approximately 6 inches in length; a second block, approximately 3 inches long, 1 ⅜ inches wide, and ¾ inch high, machined to allow the two guide rods of the first block to pass through; the second block supporting the guide rods

and attached to the stock; using ¼ inch rods; metal washers; rubber and metal bushings; two collars with set screws; one coiled spring; C-clamps; a split ring; the two blocks assembled together with the composite stock) that is designed to attach to a firearm and, when activated by a single pull of the trigger, initiates an automatic firing cycle that continues until either the finger is released or the ammunition supply is exhausted, is a machinegun under the National Firearms Act, 26 U.S.C. 5845(b), and the Gun Control Act, 18 U.S.C. 921(a)(23).

Held further, manufacture and distribution of any device described in this ruling must comply with all provisions of the NFA and the GCA, including 18 U.S.C. 922(o).

To the extent that previous ATF rulings are inconsistent with this determination, they are hereby overruled.

Date approved: December 13, 2006

Michael J. Sullivan

Director

U.S. Department of Justice

Bureau of Alcohol, Tobacco,
Firearms and Explosives

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903050:MSK
3111/2008-243

FEB 22 2008

Mr. Michael Derdziak
108 Creekwood Ct
Greenville, South Carolina 29607

Dear Mr. Derdziak:

This refers to your faxed correspondence dated January 23, 2008, to the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), Firearms Technology Branch (FTB), in which you ask whether a semiautomatic rifle equipped with a manually operated device which allows its "host rifle" to fire a single round when the trigger is pulled and a single round when the trigger is released would be classified as a "machinegun" as defined in the National Firearms Act (NFA). This device is generally referred to as a "two-stage trigger device."

For your information, the NFA, 26 U.S.C. § 5845(b), defines a "machinegun" as follows:

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

In the past, FTB has evaluated these types of devices and has interpreted the phrase "single function of the trigger" to mean a single movement of the trigger, regardless of whether that movement is the manual (conscious) pull of the trigger or the manual (conscious) release of the trigger.

Thus, fitting a two-stage trigger device to a semiautomatic firearm which enables the weapon to fire **a single shot** when the trigger is manually (consciously) pulled by the user's finger and another **single shot** when the trigger is manually (consciously) released by the user's finger **would not** create a **weapon** classified as a machinegun under the NFA (§ 5845(b)). In addition, such a trigger device, by itself, would not be regulated under NFA provisions.

Please note that this determination is dependent on two important points.

1. **That the operator/user of the device is consciously manipulating the trigger for each pull and release.** Any device (whether commercially manufactured or homemade) which accelerated the movement of the trigger or forced the trigger into the trigger finger of the operator at such a speed that the operator would be unaware of the finger movement (i.e., would not be voluntarily/consciously pulling the trigger himself) would result in the creation of a weapon that would be classified as a "machinegun" as defined above.

2. **That only a single shot is fired for each pull and release of the trigger.** If each pull and release of the trigger resulted in **more then one shot being fired,** the weapon fitted with such a device would be classified as a "machinegun" as defined in the NFA.

We thank you for your inquiry and trust the foregoing has been responsive to your request for information.

Sincerely yours,

John R. Spencer
Chief, Firearms Technology Branch

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing Brief *Amicus Curiae* of Gun Owners Foundation and Gun Owners of America, Inc. in Support of Appellant was made, this 26th day of November, 2008, by depositing sufficient hard copies of the brief in the United States Mail, First-Class, postage prepaid, addressed to the attorneys of record for the parties, as follows:

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