No. 19-_____

In the United States Court of Appeals
for the Sixth Circuit

IN RE
GUN OWNERS OF AMERICA, INC., *ET AL.*,

EMERGENCY PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN AND MOTION FOR A STAY OF AGENCY ACTION

KERRY L. MORGAN
PENTIUK, COUVREUR & KOBILJAK, P.C.
2915 Biddle Avenue, Suite 200
Wyandotte, Michigan 48192
(734) 281-7100

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

March 19, 2019

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: _____ Case Name: In re Gun Owners of America, Inc., et al

Name of counsel: Robert J. Olson

Pursuant to 6th Cir. R. 26.1, Gun Owners of America, Inc., et al.
Name of Party

makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on _____ the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/_____
_____
_____

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTRODUCTION

Pursuant to Rule 21 of the Federal Rules of Appellate Procedure, Petitioners respectfully request that this Court issue a writ of mandamus to the district court below, directing the court to enjoin implementation of Defendants' Final Rule until such time as the district court issues its opinion on Petitioners' motion for preliminary injunction in the case before it, which has now been pending nearly three months.

Additionally, Pursuant to Rule 8 of the Federal Rules of Appellate Procedure, Petitioners also seek from this Court a stay of implementation of the Final Rule, pending any appeal and the issuance of a final unappealable decision on Petitioners' complaint. Pursuant to FRAP 8(a)(2)(A)(ii), Petitioners assert that they have requested this relief from the district court, which has not timely ruled on their motion.

This case involves a challenge by Gun Owners of America, *et al.* ("Petitioners") to the Bureau of Alcohol, Tobacco, Firearms, and Explosives' ("ATF") *et al.* ("Defendants") Final Rule classifying so-called "bump fire stocks" as machineguns, banning their private possession, and ordering their destruction. 83 Fed. Reg. 66514. Petitioners have pursued this case with all diligence, and have taken every step possible in the district court to obtain a timely ruling on their Motion for Preliminary Injunction (ECF # 9, 10), filed December 26, 2018.

The district court, however, has failed to issue a ruling on Petitioners' motion. There now remain only seven days (including today) until ATF's Final Rule becomes effective next Tuesday, March 26, 2019. Prior to that date, hundreds of thousands of law-abiding gun owners have been ordered to destroy over $100 million of lawfully owned property, or risk felony prosecution. That simply cannot be allowed to happen, especially while Petitioners' claims have yet to be adjudicated.

JURISDICTIONAL STATEMENT

This Petition arises from Gun Owners of America, *et al.* v. William P. Barr *et al.*, Docket No. 18-1429, pending in the U.S. District Court for the Western District of Michigan. This Court has jurisdiction over this Petition, and the authority to issue writs of mandamus, pursuant to the All Writs Act, 28 U.S.C. Section 1651(a), as laid out in Rules 8 and 21 of the Federal Rules of Appellate Procedure. The Court has authority to enjoin federal agencies pursuant to the Administrative Procedures Act, 5 U.S.C. Section 706.

ISSUES PRESENTED FOR REVIEW

Whether the Court should issue a writ of mandamus to the district court, ordering that court to enjoin the implementation date of a final agency rule, given

that the district court has failed to rule on Plaintiff's motion for preliminary injunction of the final rule, which has now been pending nearly three months?

Whether the Court should stay implementation of that final agency rule, pending resolution of Petitioners' claims, where the agency has arbitrarily ordered the wholesale destruction of over $100 million of property, owned by hundreds of thousands of law-abiding Americans, by March 26, 2019?

BACKGROUND & SUMMARY OF ARGUMENT

On December 26, 2018, Defendants published in the Federal Register a Final Rule purporting to further define the statutory definition as to what constitutes a machinegun. 83 Fed. Reg. 66514. The Final Rule also states specifically that popular firearm accessories known as "bump fire stocks" are now considered machineguns and thus banned for sale and possession under federal law. In reclassifying bump stocks as machineguns, the Final Rule reverses over a decade of prior and repeated ATF classifications of bump stocks as mere firearm accessories (entirely unregulated by federal law). Under the Final Rule, the owners of what Defendants estimate to be 520,000 bump stocks (Petitioners estimate the actual number to be far higher) are required to destroy or surrender their lawfully owned property (valued at over $100 million) before March 26,

2019, or else face criminal penalties of up to 10 years' imprisonment and a $250,000 fine.

On December 26, 2018 (the day after Christmas, and during the government shutdown), the Final Rule was officially published in the Federal Register. Petitioners filed their complaint and motion for preliminary injunction on the very same day. *See* ECF # 1, 9, 10. Petitioners' complaint challenged the Final Rule as being contrary to a clear and unambiguous statute, and thus outside ATF's authority to promulgate under the Administrative Procedures Act ("APA").[1]

After the district court denied without prejudice Defendants' motion for stay during the government shutdown (ECF # 20), the parties filed a "Joint Stipulation to Expedited Briefing Schedule" on January 8, 2019. ECF # 22. The parties jointly asked the court for an expedited briefing schedule, culminating with oral argument in early February 2019.

The district court rejected this joint request for expedited briefing and oral argument by the parties. Rather, the court established its own briefing schedule — greatly extending the dates requested by the parties by nearly a month. *See* ECF # 22, 23. By its order, the court extended the dates for briefing even beyond the

[1] Petitioners also brought a due process claim and a takings claim, but did not brief those claims at the preliminary injunction stage.

standard deadlines required by the court's local rules.[2] Initially, the court set oral argument for March 11, 2019. However, in response to a letter by Petitioners (ECF #31) stating their need for a prompt hearing and an opinion (leaving sufficient time to challenge an adverse decision, should one issue), the district court moved the hearing date to five days earlier, on March 6, 2019 (ECF #33).

Oral argument was heard by the district court on March 6, 2019 in Kalamazoo, Michigan. At the culmination of oral argument, the district court noted the time-sensitive nature of the case, and promised to endeavor to issue a ruling soon. The same day, the court issued a minute entry on the docket noting that "motion taken under advisement, opinion and order to issue." ECF #43. However, no decision has been forthcoming. On Monday morning, March 18, 2019, Counsel for Plaintiffs contacted the district court's case manager, inquiring as to issuance of an opinion, in light of the Final Rule's effective date, but to no avail. Bump stock owners are now left with only seven days (including today) before the Final Rule becomes effective.

---

[2] LCivR 7.2(c) of the Western District of Michigan requires that "[u]nless otherwise ordered, any party opposing a dispositive motion shall, within twenty-eight (28) days after service of the motion, file a responsive brief," and "[t]he moving party may, within fourteen (14) days after service of the response, file a reply brief." Adherence to that local rule would have required a response brief by late January and a reply by mid-February.

Petitioners, their members and supporters, and American gun owners in general both need and deserve an answer on this issue. Petitioner Gun Owners of America has received numerous phone calls and emails from its law-abiding members and supporters, frantically asking for advice on their continued possession of bump stocks at this late date. At least some of these individuals plan to surrender their property to ATF no later than Monday, March 25 (the day before implementation of the Final Rule), or otherwise destroy their property so as not to risk felony prosecution at the hands of the government. This cannot be permitted to occur until Petitioners' claims have been adjudicated. In order to preserve the status quo, this Court should issue a writ of mandamus to the district court ordering the district to enjoin implementation of the Final Rule pending issuance of its decision, as well as stay implementation of the Final Rule while Petitioners' claims are adjudicated in the courts.

ARGUMENT

1. A Writ of Mandamus Should Issue Here.

This court has jurisdiction to issue a writ of mandamus pursuant to 28 U.S.C. Section 1651(a). A party seeking mandamus must demonstrate that it has a "clear and indisputable" right, there are "no other adequate means" of relief, and the writ is otherwise "appropriate under the circumstances." Cheney v. United

States Dist. Court for D.C., 542 U.S. 367, 380-81 (2004). This Court looks to several specific factors in considering petitions for a writ of mandamus, including whether: "(1) The party seeking the writ has no other adequate means, such as direct appeal, to attain the relief desired ... or (2) The petitioner will be damaged or prejudiced in a way not correctable on appeal. (This guideline is closely related to the first.)." In re Perrigo Co., 128 F.3d 430, 435 (6th Cir. 1997) (factors 3-5 omitted because they deal with "orders" by a district court, and thus do not apply here). Petitioners clearly meet both of these relevant tests.

Certainly, a district court has broad discretion to set its own schedule for briefing and the issuance of its opinions. But that discretion cannot extend to denying a Plaintiff a decision in a case with a government-imposed schedule where a 90-day window has nearly run out and the deadline is now upon us. As this Circuit has noted, "[t]he Supreme Court likewise has stated that a writ of mandamus is available to a court of appeals 'where a district court persistently and without reason refuses to adjudicate a case properly before it.' Will v. Calvert Fire Ins. Co., 437 U.S. 655, 661-62, 57 L. Ed. 2d 504, 98 S. Ct. 2552 (1978)." In re Dutton, 1993 U.S. App. LEXIS 29300, *8 (6th Cir. 1993). *See also* United States ex rel. Drummond, 886 F.3d 448, 450 (5th Cir. 2018).

Aside from the requested relief, there simply is no other adequate means for Petitioners to obtain a decision on their claims before they suffer irreparable harm on March 26. Petitioners are not seeking an order forcing the district court to rule, or rule by a certain date, but simply an order to preserve the status quo and enjoin the Final Rule from going into effect while Petitioners' claims proceed through the normal judicial process. This will permit the district court the time it needs to consider Petitioners' motion.

Petitioners have diligently pursued their case in the district court, attempting to obtain a prompt resolution of their claims. However, the district court has not ruled on Plaintiffs' motion, which has been pending nearly three months, and Plaintiffs cannot afford to wait any longer. As noted above, the challenged regulation becomes effective next Tuesday, March 26, 2019.

Thus, in order to avoid the significant and irreparable harm that the government agrees will follow (ECF #34, p. 27 n. 16), it is necessary for this Court to issue a writ of mandamus instructing the lower court to place implementation of the Final Rule on hold pending its resolution of Petitioners' claims. This will serve the interests of justice, as it will maintain the status quo pending the district court's and this Court's consideration of this case.

2. A Stay of ATF's Regulation Pending Appeal Is the Appropriate Remedy Here.

In other bump stock challenges pending in the U.S. Court of Appeals for the District of Columbia, the government challenged the Appellants' request for expedited briefing, arguing that "the proper procedural mechanism ... is to file an emergency motion for injunctive relief pending appeal." Guedes v. ATF, USCA D.C. Cir. Case #19-5042, Document #1775047, pp. 1, 4. In those cases, the government had objected to an expedited appellate briefing schedule, noting that the "extremely compressed timeline" requested by the Petitioners would require briefing, argument, and decision by the court to occur within a period of 27 days. *Id.* at 1-2. Thus, Petitioners seek the relief in this case the government believed appropriate in the D.C. bump stock cases. Ordinarily, Petitioners would ask for this relief after issuance of the district court's opinion. However, in this case there simply is insufficient time to wait any longer.

3. Appellants Meet the Criteria for a Stay Pending Appeal.

This Court has noted that it "examines four factors when considering a stay pending appeal under Federal Rule of Appellate Procedure 8(a): (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the

prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay." Northeast Ohio Coalition for the Homeless v. Husted, 2012 U.S. App. LEXIS 26926, *2 (6th Cir. 2012). These are "'not prerequisites that must be met, but are interrelated considerations that must be balanced together.'" *Id.* at *6.

The inquiry on a motion for stay pending appeal is similar to the inquiry on a motion for preliminary injunction (which is what Appellants are seeking in the district court). For example, "[t]o justify the granting of a stay ... a movant need not always establish a high probability of success on the merits. ... The probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury Petitioners will suffer absent the stay. *Id.* Simply stated, more of one excuses less of the other." Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog, 945 F.2d 150, 153 (6th Cir. 1991). Additionally, in focusing on the likelihood of success, courts look not at whether the Appellants will actually prevail, but whether they "have strong arguments" and whether their "argument ... has merit." Husted at *6, 11.

a. Appellants have presented a strong likelihood of success on the merits to the district court. *See* ECF # 10, 37. Federal law, in pertinent part, defines a machinegun as "any weapon which shoots, is designed to shoot, or can

be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger." 26 U.S.C. Section 5845(b).

Here, Defendants have admitted that definition is clear and unambiguous. 83 Fed. Reg. 66527; Brief for Appellees in Guedes v. ATF, 19-5042 Doc # 1777426 (D.D.C), p. 37. However, rather than simply "applying the definition to [bump stocks]," (U.S. v. TRW Rifle, 447 F.3d 686, 689 n.4 (9th Cir. 2006), Defendants seek to further "interpret" that unambiguous statute, and thereby 'define the definition' of a machinegun. Admitting that a bump stock does not fire more than one round by "a single function of the trigger," Defendants concede they have rewritten the statute to be "single pull of the trigger," an "expanded" standard they then argue (incorrectly) covers bump stocks. ECF #37, pp. 1-2. As Petitioners point out, however, bump stocks do not even fire more than a single round by a "single pull of the trigger." ECF # 10, p. 7.

Next, Defendants then create a definition of "automatically" that also does not encompass bump stocks. The Final Rule alleges a bump stock is a machinegun because it "harness[es] ... recoil energy...." 83 Fed. Reg. 66554. But, unable to counter Petitioners claims that bump stocks are incapable of harnessing energy, Defendants then argued only that a bump stock "helps a shooter channel recoil energy" — less than the Final Rule requires. ECF #34, p. 23. Later still,

Defendants sought only to demonstrate that bump stocks "channel recoil energy" — something entirely different than "harness," as Petitioners pointed out. ECF #37, p. 8.

Defendants also argue that "automatically" means "functioning as the result of a self-acting or self-regulating mechanism." 83 Fed. Reg. 66553. But they admit that a bump stock doesn't act by itself, but rather because of the shooter: "in conjunction with the shooter's maintenance of pressure...." *Id.* at 66516. And Defendants do not claim that a bump stock is the actual "mechanism" which channels energy, but rather incomprehensibly that the "empty space" behind the bump stock is the "mechanism." ECF #37 p. 8.

Next, Defendants claim additional human input, such as the forward pressure necessary to operate a bump stock, is permissible while still rendering a firearm "automatic." Yet as Petitioners pointed out, the statute provides the precise boundaries of automatic — "by a single function of the trigger." ECF # 37, p. 10. Since bump stocks require more input than "a single function of the trigger," they are not automatic under the definition.

Finally, Petitioners have explained the numerous and repeated factual errors in Defendants' Final Rule and in their briefing, wherein Defendants now suddenly claim bump stocks in 2019 somehow function precisely the opposite than they did

a decade before. ECF #37, p. 6, *et seq.* ATF has changed not only its interpretation of the law, but its fundamental recitation of the facts — all designed to reach the result it wishes. Countering Defendants' unsupported and contrived description, Petitioners filed factual declarations in support of their Motion, which were not rebutted by the Defendants. These declarations describe the actual functioning of a bump stock and why it cannot be a machine gun as a matter of law.

Defendants in this case have expressly disclaimed that they are entitled to any deference under Chevron v. Nat. Res. Def. Council, 467 U.S. 837 (1984), in interpreting this criminal statute, pursuant to United States v. Apel, 571 U.S. 359 (2014). ECF # 38. As Petitioners explained at oral argument, Apel applies not only to Chevron deference, but to the same "arbitrary and capricious" deference accorded under the APA, 5 U.S.C. Section 706. In other words, it is up to the courts to determine what the statute means. And the government has conceded that the statute as written is unambiguous and does not apply to bump stocks. Petitioners should prevail on that basis alone.

b. As noted above, Defendants has conceded that irreparable harm will result in this case. ECF #34, p. 27 n. 16.

c. Finally, as Petitioners explained in their briefing and at oral argument, there is no public safety concern here. First, Defendants have offered no concrete evidence that bump stocks have ever been used in any crime, including the Las Vegas shooting. Second, Defendants offer no conceivable explanation how banning bump stocks would prevent crime, when all sorts of other devices, techniques, and firearms remain on the market, offering identical (if not more effective) results. Rather, as Petitioners explained, "[i]t is in the public interest for ... an agency to implement properly the statute it administers." Mylan Pharms., Inc. v. Shalala, 81 F. Supp. 2d 30, 45 (D.D.C. 2000).

CONCLUSION

For the foregoing reasons, Plaintiff-Appellants respectfully request that their emergency petition and motion be granted and that this Court (i) issue a writ of mandamus ordering the district to enjoin implementation of the Final Rule pending issuance of its decision, and (ii) order the Final Rule stayed and Appellees enjoined from enforcing that rule, pending a final unappealable decision on Petitioners' complaint. Petitioners respectfully request the Court require Defendants to file any response[3] by Wednesday, March 20 (pursuant to FRAP

[3] If Defendants need more time to respond, they are, of course, have the power to extend the implementation of the Final Rule.

21(b)(1)) and, if at all possible, to rule on Petitioners' petition and motion no later than Friday, March 21, 2019, in order to avoid the otherwise irreparable and nationwide destruction of property that no doubt will occur in the last few days before the Final Rule becomes effective.

Respectfully submitted,

/s/ Robert J. Olson

KERRY L. MORGAN
PENTIUK, COUVREUR & KOBILJAK, P.C.
2915 Biddle Avenue, Suite 200
Wyandotte, Michigan 48192
(734) 281-7100

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

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

IT IS HEREBY CERTIFIED:

1. That the foregoing Emergency Petition for a Writ of Mandamus to the United States District Court for the Western District of Michigan and Motion for a Stay of Agency Action, complies with the type-volume limitation of Rule 21(d)(1), Federal Rules of Appellate Procedure, because this petition contains 3,169 words, excluding the parts of the petition exempted by Rule 32(f).

2. This petition 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 18.0.0.200 in 14-point Times New Roman.

/s/ Robert J. Olson
Robert J. Olson
Counsel for Appellants

Dated: March 19, 2019

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing Emergency Petition for a Writ of Mandamus to the United States District Court for the Western District of Michigan and Motion for a Stay of Agency Action, was made, this 19th day of March 2019, by email, upon all parties or their counsel of record.

/s/ Robert J. Olson
Robert J. Olson
Counsel for Appellants