

No. 08-15640

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

WILLIAM AKINS,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

BRIEF FOR THE UNITED STATES AS APPELLEE

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STATEMENT REGARDING ORAL ARGUMENT

The government does not request oral argument because this case involves the application of settled law to undisputed facts. We of course stand ready to present argument if the Court believes it would be useful.

TABLE OF CONTENTS

Page

CERTIFICATE OF INTERESTED PERSONS

STATEMENT REGARDING ORAL ARGUMENT

STATEMENT OF JURISDICTION.. 1

STATEMENT OF THE ISSUES.. 1

STATEMENT OF THE CASE.. 2

STATEMENT OF FACTS. 2

 I. STATUTORY BACKGROUND. 2

 II. FACTUAL BACKGROUND. 3

 A. The Device.. 3

 B. The Initial Classification.. 4

 C. ATF’s Reclassification of the Device.. 5

 III. PROCEDURAL HISTORY. 7

SUMMARY OF ARGUMENT.. 10

STANDARD OF REVIEW. 11

ARGUMENT. 12

 I. THE AGENCY ACTED REASONABLY IN CLASSIFYING
 PLAINTIFF’S DEVICE AS A MACHINEGUN. 12

 A. The Agency’s Interpretation of the
 Definition of “Machinegun” Is Reasonable
 and Entitled to Deference. 12

 B. Plaintiff Fails to Demonstrate Any
 Infirmities in the Agency’s Classification
 Decision.. 15

 C. Plaintiff’s Criticism of the District
 Court’s Opinion Is Misplaced And, in Any
 Event, Mistaken. 19

II.	THE CLASSIFICATION DETERMINATION DID NOT VIOLATE PLAINTIFF'S DUE PROCESS RIGHTS.	21
A.	The Due Process Clause Imposes No Requirement to Provide Plaintiff with an Oral Hearing.	21
B.	The Statutory Definition of Machinegun Is Not Unconstitutionally Vague.	25
	CONCLUSION.	28
	CERTIFICATE OF SERVICE	
	CERTIFICATE OF COMPLIANCE	

TABLE OF AUTHORITIES

Cases:	<u>Page</u>
<u>Akins v. United States</u> , 82 Fed. Cl. 619 (Ct. Fed. Cl. 2008)	7
<u>In re Bleaumontaine, Inc.</u> , 634 F.2d 1383 (5th Cir. 1981)	25
<u>Chevron USA, Inc. v. Natural Resources Defense Council, Inc.</u> , 467 U.S. 837 (1984)	12, 15
<u>Coates v. Cincinnati</u> , 402 U.S. 611 (1971)	25, 26
<u>Coleman v. CIR</u> , 791 F.2d 68 (7th Cir. 1986)	26
* <u>Darrell Andrews Trucking, Inc. v. FMCSA</u> , 296 F.3d 1120 (D.C. Cir. 2002)	22, 23
<u>Dredge Corp. v. Penny</u> , 338 F.2d 456 (9th Cir. 1964)	24
<u>Farmer v. Higgins</u> , 907 F.2d 1041 (11th Cir. 1990)	12
<u>Florida Fruit & Vegetable Growers Ass'n v. Brock</u> , 771 F.2d 1455 (11th Cir. 1985)	19
<u>Florida Power & Light Co. v. Lorion</u> , 470 U.S. 729 (1985)	19
<u>Ford Motor Co. v. Texas Dep't of Transp.</u> , 264 F.3d 493 (5th Cir. 2001)	10
<u>Go Leasing, Inc. v. NTSB</u> , 800 F.2d 1514 (9th Cir. 1986)	27
<u>Grayned v. City of Rockford</u> , 408 U.S. 104 (1972)	11, 12, 25
<u>Great Lakes Dredge & Dock Co. v. Tanker</u> , 957 F.2d 1575 (11th Cir. 1992)	11
* <u>Gun South, Inc. v. Brady</u> , 877 F.2d 858 (11th Cir. 1989)	3, 9, 12, 18, 23, 24

<u>United States v. Kelly</u> , 276 Fed. Appx. 261 (4th Cir. 2007)	26
<u>United States v. Nieves-Castano</u> , 480 F.3d 597 (1st Cir. 2007)	26, 27
<u>United States v. Williams</u> , 364 F.3d 556 (4th Cir. 2004)	26
<u>Vineland Fireworks Co., Inc. v. ATF</u> , 544 F.3d 509 (3d Cir. 2008)	12
<u>York v. Secretary of Treasury</u> , 774 F.2d 417 (10th Cir. 1985)	3, 23

Statutes:

5 U.S.C. § 553	18
5 U.S.C. § 554	22
18 U.S.C. § 922	2
18 U.S.C. § 926	3, 18
26 U.S.C. § 5845	3, 6, 10, 13, 25
26 U.S.C. § 6103	20
28 U.S.C. § 1291	1
28 U.S.C. § 1331	1
28 U.S.C. § 1346	1
Pub. L. No. 73-474, 48 Stat. 1236 (1934)	2, 26
Pub. L. No. 90-618, 82 Stat. 1213 (1986)	2
Pub. L. No. 99-308, 100 Stat. 449 (1986)	2

Regulations:

27 C.F.R. Part 479	3
------------------------------	---

Rules:

Fed. R. App. P. 4	1
-----------------------------	---

Legislative Materials:

H.R. Rep. No. 9066, 73rd Cong., 2nd Sess.(1934)	6, 14
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Other Authorities:

George C. Nonte, Jr., *Firearms Encyclopedia* 13 (1973). . . . 13, 14
Webster's Ninth New Collegiate Dictionary 498 (1986). 16

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STATEMENT OF JURISDICTION

Plaintiff invoked the jurisdiction of the district court under 28 U.S.C. §§ 1331 & 1346(a)(2). D1, at 2. Final judgment was entered on September 23, 2008, and defendants filed a timely notice of appeal on September 30, see Fed. R. App. P. 4(a). This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the Bureau of Alcohol, Tobacco, Firearms and Explosives acted arbitrarily, capriciously, or contrary to law in classifying plaintiff's device as a machinegun.

2. Whether the agency's classification decision violated plaintiff's rights under the Due Process Clause.

STATEMENT OF THE CASE

The Akins Accelerator is a device that, when mounted on a semi-automatic rifle, allows a shooter to pull the trigger a single time and fire at a rate of roughly 650 rounds a minute. The Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) determined in November 2006 that the device qualified as a "machinegun" and that its possession was therefore prohibited under the Gun Control Act. In May 2008, William Akins, the inventor and manufacturer of the Akins Accelerator, filed suit to challenge ATF's classification of his device. Four months later, the district court granted the government's motion for summary judgment. Plaintiff appealed.

STATEMENT OF FACTS

I. STATUTORY BACKGROUND.

The Firearm Owners' Protection Act, Pub. L. No. 99-308, 100 Stat. 449 (1986), amended the Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213, to prohibit any person from possessing a "machinegun" manufactured after May 19, 1986. 18 U.S.C. § 922(o). "Machinegun" is in turn defined in the National Firearms Act, Pub. L. No. 73-474, 48 Stat. 1236 (1934), as amended, to mean

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.

26 U.S.C. § 5845(b). The Bureau of Alcohol, Tobacco, Firearms and Explosives is charged with administering the Gun Control Act and the National Firearms Act. See 18 U.S.C. § 926; 27 C.F.R. Part 479; Gun South, Inc. v. Brady, 877 F.2d 858, 864 (11th Cir. 1989) (recognizing delegation); York v. Secretary of Treasury, 774 F.2d 417, 419 (10th Cir. 1985) (same).

II. FACTUAL BACKGROUND.

A. The Device.

In 1998, plaintiff William Akins invented the Akins Accelerator. The device is an assembly for the stock of a semi-automatic rifle. Without the device, a semi-automatic rifle will shoot a single bullet with a single pull of the trigger. With the device, however, a shooter can pull a rifle's trigger a single time and fire a continuous stream of bullets. D12, at 3 (stating in his patent application that the device would "increase the cyclic rate at which the trigger of a semi-automatic firearm can be actuated to discharge the weapon").¹ The device works by using a spring to reverse the recoil of the semi-automatic weapon. Whereas the recoil of a rifle normally causes the rifle to fall back after firing, the spring inside the device allows the rifle to leap back into place automatically. See Appellant's Br. 4-5.

The effect is that the rifle rocks at a rate of hundreds of

¹ "D" provides a reference to the district court docket entry. "AR" refers to the administrative record filed with the district court.

times a minute against a stationary trigger finger that is, in turn, held in place by stop screws. Each time the gun rocks forward, the trigger is actuated and a new bullet is fired. See Appellant's Br. 5; see also D12, at 3 (plaintiff's patent describing device); D19-3, at 5 (AR 3) (plaintiff's lawyer's description of the device); D19-4, at 9 (AR 94) (ATF's description of device). As a result, the Akins Accelerator allows for the continuous firing of approximately 650 rounds per minute--more than ten bullets per second. D19-4, at 9 (AR 94); see also D19-5, at 10 (AR 232) (advertising that the device "fires at 800 rounds per minute, accurately and controllably"). The district court record includes a video from plaintiff's website offering a vivid demonstration of the device in action. See D21 (government's motion "to file evidence in its original form") (also available at www.youtube.com/watch?v=9P8AbTKvykE).

B. The Initial Classification.

Plaintiff contacted the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) in March 2002 to ask whether his device would be classified as a machinegun. D19-3, at 3 (AR 1). An attached letter from his attorney explained that plaintiff had "devised a simple and inexpensive, but ingenious, method of altering the stock on some semiautomatic rifles in a manner which allows them to be fired so rapidly that the practical effect is equivalent to a fully-automatic machinegun." D19-3, at 5 (AR 3). Plaintiff sent a second request for a classification decision in June 2003. D19-3, at 7 (AR 5).

In July 2003, ATF asked plaintiff to provide a sample of the device for testing, D19-3, at 9 (AR 7), which he did, D19-3, at 10 (AR 8). In November 2003, the Firearms Technology Branch (FTB) of ATF sent a letter to plaintiff stating without elaboration that “[t]he weapon did not fire more than one shot by a single function of the trigger” and concluding that “the submitted stock assembly does not constitute a machinegun * * * .” D19-3, at 15 (AR 13). The letter noted, however, that the device had broken during testing. Uncertain whether the classification related only to the defective device or whether it covered a properly functioning Akins Accelerator, plaintiff asked for clarification in January 2004. D19-3, at 21 (AR 19). FTB explained in response that its classification determination was based on the stock assembly’s “theory of operation,” which “was clear even though the rifle/stock assembly did not perform as intended.” D19-3, at 22 (AR 20).

C. ATF’s Reclassification of the Device.

In August 2006, ATF grew concerned that it had approved a device that was, as a functional matter, indistinguishable from a machinegun. D19-3, at 24 (AR 22). For that reason, the agency opened an investigation into the device. D19-3, at 34 (AR 32).

After completing its investigation, ATF informed plaintiff in November 2006 that it had revisited its classification determination and concluded that the Akins Accelerator was a machinegun because it “shoot[s] automatically more than one shot, without manual reloading, by a single function of the trigger.”

D19-4, at 9 (AR 94) (emphasis in original) (quoting 26 U.S.C. § 5845(b)). The agency explained that the legislative history of the National Firearms Act "indicates that the drafters equated 'single function of the trigger' with 'single pull of the trigger.'" D19-4, at 9 (citing National Firearms Act: Hearings Before the Committee on Ways and Means, House of Representatives, Second Session on H.R. 9066, 73d Cong., at 40 (1934)). For that reason, "it is the position of this agency that conversion parts that are designed and intended to convert a weapon into a machinegun, that is, one that will shoot more than one shot, without manual reloading, by a single pull of the trigger, are regulated as machineguns under the National Firearms Act and the Gun Control Act." D19-4, at 9-10 (AR 94-95). ATF further noted that, "[t]o the extent the determination in this letter is inconsistent with" its earlier classification decisions, "they are hereby overruled." D19-4, at 10 (AR 95).

In January 2007, ATF issued Ruling 2006-2, which formally adopted the position that the definition of "machinegun" includes devices that, "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." D19-4, at 17 (AR 114). As in its letter to plaintiff, ATF explained that this position accorded both with the statutory language defining "machinegun" and its legislative history. D19-4, at 18 (AR 115). The interpretive ruling emphasized that "[t]o

the extent that previous ATF rulings are inconsistent with this determination, they are hereby overruled." D19-4, 19 (AR 116).

In February 2007, plaintiff asked ATF to reconsider its position and requested an oral hearing. D19-4, at 26 (AR 123). ATF "considered [plaintiff's] arguments for reconsideration" but nevertheless "determined that the device should remain classified as a machinegun for the reasons stated in the ruling." D19-5, at 31 (AR 190).

III. PROCEDURAL HISTORY.

In March 2007, plaintiff filed suit against the United States in the Court of Federal Claims seeking, among other things, compensation under the Takings Clause for damages arising out of ATF's reclassification of his device. The court dismissed plaintiff's suit in July 2008, Akins v. United States, 82 Fed. Cl. 619, 622-23 (Ct. Fed. Cl. 2008), holding that he "fail[ed] to state a compensable takings claim under the Fifth Amendment" because ATF had been acting pursuant to its police powers. In addition, the district court observed that plaintiff had "voluntarily entered an area subject to pervasive federal regulation--the manufacture and sale of firearms," which undercut any "expectation interest in manufacturing and distributing Akins Accelerators to the public free from Federal regulation." Id. at 624. Plaintiff did not appeal.

On May 19, 2008, plaintiff filed a complaint against the United States in the District Court for the Middle District of Florida. In this new complaint, plaintiff (1) challenged the

classification of his device as a machinegun; (2) argued that his right to due process was violated when ATF declined to provide him with an oral hearing on the classification of his device; and (3) maintained that the statutory definition of "machinegun" was unconstitutionally vague. D1.

The district court granted the government's motion for summary judgment in September 2008. D29. The court began by carefully describing the history of the classification determination and noting that "[p]laintiff does not dispute that the purpose of the Akins Accelerator is to make it possible for the shooter to act once and cause the rifle to fire repeatedly until its ammunition is exhausted or until the shooter takes an action to remove hi[s] finger from the device." D29, at 10. The court then held that ATF's determination that this sort of device operated through a "single function of the trigger," and was hence a machinegun, was consistent with law and neither arbitrary nor capricious. The court noted that the legislative history confirmed the agency's view that a "single function of the trigger" encompassed a single pull of the trigger. D29, at 11. And the court observed that, in Staples v. United States, 511 U.S. 600 (1994), the Supreme Court "adopted the view that 'single function of the trigger' is synonymous with 'single pull of the trigger.'" D29, at 11.

The court rejected plaintiff's contention that ATF's reconsideration of its original classification determination rendered its later designation arbitrary and capricious: "In this

case," the court explained, "ATF presents * * * a 'reasoned analysis,' demonstrating that its new interpretation of the phrase 'single function of the trigger' is necessary to protect the public from dangerous firearms." D29, at 12 (quoting Gun South Inc. v. Brady, 877 F.2d 858, 862 (11th Cir. 1989)).

The court also rejected plaintiff's argument that due process required ATF to offer an oral hearing on its classification determination. The court first noted that plaintiff had made an "actual presentation of his arguments in written form to the agency," and that "the APA does not require that ATF provide him with a formal hearing." D29, at 14-15. Applying the three-factor balancing test from Mathews v. Eldridge, 424 U.S. 319, 335 (1976), the court then found that the Due Process Clause likewise imposed no oral hearing requirement. The court reasoned (1) that "the pervasive federal regulation of the manufacture and sale of firearms" seriously qualified plaintiff's interest in selling guns free from federal regulation, D29, at 15; (2) that the risk of erroneous deprivation of that interest was small given that plaintiff had been allowed to submit voluminous arguments to ATF, D29, at 15-16; and (3) that ATF had a profound public interest in moving quickly to prohibit the unhindered sale of a weapon that was, in practical effect, indistinguishable from a conventional machinegun, D29, at 18. The court further noted that "Plaintiff fails to even argue how an oral hearing would have made a difference in the outcome" given that he "presented only

questions of law and statutory interpretation, not factual disputes of the sort that require an oral hearing.” D29, at 16.

Finally, the district court rejected plaintiff’s argument that the statutory definition of machinegun was unconstitutionally vague. Recognizing that a statute is void for vagueness “only where no standard of conduct is outlined at all; when no core of prohibited activity is defined,” D29, at 19 (quoting Ford Motor Co. v. Texas Dep’t of Transp., 264 F.3d 493, 509 (5th Cir. 2001)), the court found that “Plaintiff’s own actions in communicating repeatedly with ATF suggest that the statute gave him fair notice that Akins Accelerators might well fall within the prohibited standard of conduct.” D29, at 19.

One week later, plaintiff filed a notice of appeal. D31.

SUMMARY OF ARGUMENT

Federal law bans the possession of post-1986 machineguns, which are defined to include “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).

The Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) reasonably determined that this definition covers the Akins Accelerator, which augments the firing rate of a standard-issue rifle to allow a shooter to fire approximately 650 rounds per minute with a single pull of the trigger. Plaintiff offers no basis for setting aside the agency’s determination. ATF acted consistently with the language, legislative history, and purpose

of the statute in determining that a weapon that fires automatically upon a single pull of the trigger is a weapon designed to shoot more than one shot by a single function of the trigger.

Plaintiff's constitutional arguments are insubstantial. Plaintiff was provided with notice of ATF's classification decision and given an opportunity to raise written objections. Due process did not require the agency to also provide an oral hearing. Nor does plaintiff offer any explanation of how such a hearing might have altered the agency's decision.

Plaintiff's contention that the definition of "machinegun" is unconstitutionally vague is likewise without merit. The statutory language put plaintiff on notice that a device that increased the firing rate of a semi-automatic rifle to roughly 650 rounds a minute might constitute a machinegun. For that reason, plaintiff repeatedly sought out ATF's views as to the proper classification of his device. As the two circuit courts to have considered vagueness challenges to the definition of "machinegun" have held, it cannot plausibly be maintained that "the person of ordinary intelligence" would lack "a reasonable opportunity to know what is prohibited." Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).

STANDARD OF REVIEW

The district court's entry of summary judgment is reviewed de novo. See Great Lakes Dredge & Dock Co. v. Tanker, 957 F.2d 1575, 1578 (11th Cir. 1992). "[E]ven in the context of summary

judgment," however, "an agency action is entitled to great deference. Under the Administrative Procedure Act, a court shall set aside an action of an administrative agency where it is arbitrary, capricious, or an abuse of discretion. 5 U.S.C. § 706(2) (A)." Preserve Endangered Areas of Cobb's History, Inc. v. U.S. Army Corps of Engineers, 87 F.3d 1242, 1246 (11th Cir. 1996).

ARGUMENT

I. THE AGENCY ACTED REASONABLY IN CLASSIFYING PLAINTIFF'S DEVICE AS A MACHINEGUN.

A. The Agency's Interpretation of the Definition of "Machinegun" Is Reasonable and Entitled to Deference.

"We must defer to the [ATF's] interpretation of the Gun Control Act and its regulations absent plain error in the Bureau's interpretation.'" Farmer v. Higgins, 907 F.2d 1041, 1045 (11th Cir. 1990) (quoting Gun South, Inc. v. Brady, 877 F.2d 858, 864 (11th Cir.1989)). See also Vineland Fireworks Co., Inc. v. ATF, 544 F.3d 509, 514 (3d Cir. 2008) (holding that, in reviewing challenges to the "interpretation of the statutory provisions ATF administers, we utilize principles of Chevron deference").

Under these principles, this Court "defer[s] to the agency's interpretation if it 'is based on a permissible construction of the statute.'" Miami-Dade County v. EPA, 529 F.3d 1049, 1062 (11th Cir. 2008) (quoting Chevron USA, Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984)). As the Supreme Court has explained, "when an agency is charged with

administering a statute, part of the authority it receives is the power to give reasonable content to the statute's textual ambiguities." IRS v. FLRA, 494 U.S. 922, 933 (1990).

ATF acted well within the scope of its discretion in concluding that the Akins Accelerator falls within the statutory definition of machinegun. As defined in 26 U.S.C. § 5845(b), the term "machinegun" means "any weapon which shoots * * * automatically more than one shot, without manual reloading, by a single function of the trigger." ATF reasonably concluded that the device, which is designed to permit a shooter to pull the trigger of a semi-automatic rifle a single time and expel a continuous stream of bullets at a rate of approximately 650 rounds per minute, comes within the compass of this provision.

In reaching this conclusion, ATF interpreted the phrase "single function of the trigger" to include devices that, "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." D19-4, at 17 (AR 114). This definition is fully consonant with the statute. As the Supreme Court explained in Staples v. United States, 511 U.S. 600, 602 n.1 (1994) (internal quote omitted), a weapon is a "machinegun[] within the meaning of the [National Firearms] Act" if it "fires repeatedly with a single pull of the trigger. That is, once its trigger is depressed, the weapon will automatically continue to fire until its trigger is released or the ammunition is exhausted." See also George C. Nonte, Jr., Firearms

Encyclopedia 13 (1973) (defining the term "automatic" to include "any firearm in which a single pull and continuous pressure upon the trigger (or other firing device) will produce rapid discharge of successive shots so long as ammunition remains in the magazine or feed device--in other words, a machinegun").

In addition, as ATF explained, its interpretation of "single function of the trigger" comports with a definition offered in a congressional hearing leading up to the enactment of the National Firearms Act, which first enacted the phrase into law. As the then-president of the National Rifle Association explained to Congress, a gun "which is capable of firing more than one shot by a single pull of the trigger, a single function of the trigger, is properly regarded, in my opinion, as a machine gun." National Firearms Act: Hearings Before the Committee on Ways and Means, H.R. Rep. No. 9066, 73rd Cong., 2nd Sess., at 40 (1934).

Although both plaintiff and amici criticize ATF's reliance on a statement from a congressional hearing, Appellant's Br. 23, Amicus Br. 14-16, ATF invoked it not as a definitive indication of congressional intent. The testimony instead bolsters the agency's unremarkable point that interpreting "a single function of the trigger" to include "a single pull of the trigger" is a reasonable gloss on the statutory term.

Furthermore, ATF's interpretation of "single function of the trigger" accords with Congress's manifest intent to get automatic weapons off the market and keep them out of the hands of dangerous criminals. See United States v. Haney, 264 F.3d 1161,

1168 (10th Cir. 2001) (observing that “banning possession of post 1986 machine guns is an essential part of the federal scheme to regulate interstate commerce in dangerous weapons”). Plaintiff acknowledges that he has “devised a simple and inexpensive, but ingenious, method of altering the stock on some semiautomatic rifles in a manner which allows them to be fired so rapidly that the practical effect is equivalent to a fully automatic machinegun.” D19-3, at 5 (AR 3). It would be anomalous to suggest that Congress disabled ATF from moving to prevent the distribution in interstate commerce of a weapon that is in every respect the practical equivalent to a machinegun.

In short, ATF’s interpretation of the statutory definition of “machinegun” is eminently reasonable, and is therefore entitled to deference under Chevron.

B. Plaintiff Fails to Demonstrate Any Infirmities in the Agency’s Classification Decision.

Plaintiff objects to ATF’s interpretation on several grounds. First, plaintiff maintains that ATF improperly took into account policy considerations and disregarded the statutory text in interpreting the phrase “single function of the trigger.” Appellant’s Br. 16-17 (criticizing agency’s reliance on “policy” and “views”); Appellant’s Br. 19-21 (criticizing agency’s concern with public safety). Because ATF must interpret the phrase “single function of the trigger” in order to carry out its delegated responsibilities, however, it was incumbent upon the agency to “consider varying interpretations and the wisdom of its policy on a continuing basis.” Chevron, 467 U.S. at 863-64.

That the agency's considered policy judgment clashes with plaintiff's does not render its interpretation unreasonable.

Plaintiff offers no support for the counter-intuitive position that the statutory phrase "single function of the trigger" necessarily excludes devices that operate by a "single pull of the trigger." "[F]unction" is a word of broad scope that, on one definition, means "any of a group of related actions contributing to a larger action." Webster's Ninth New Collegiate Dictionary 498 (1986). ATF reasonably concluded that a single pull of the trigger on a semi-automatic firearm equipped with the Akins Accelerator is an "action" that "contribut[es] to a larger action," which is to say, the continuous firing of a weapon at a rate of roughly 650 rounds per minute.

Plaintiff nevertheless asserts that ATF's interpretation is "absurd" because defining "single function of the trigger" to mean "single pull of the trigger" would exclude from the definition of machinegun devices that operate by pressing a switch to activate an automatic firing cycle on a semi-automatic weapon. Appellant's Br. 22; see also Amicus Br. 17-19 (making similar argument). Plaintiff misunderstands the agency's interpretation. ATF has never suggested that devices that operate by means other than pulling are excluded from the definition of machinegun. To the contrary, the agency has explicitly noted that "'function' * * * does not limit ATF to a narrow definition such as 'pull only.'" D19-4, at 61 (AR 159); see also United States v. Camp, 343 F.3d 743, 745 (5th Cir. 2003)

(declining to read § 5845(b) in a manner that would artificially restrict its meaning).

Second, plaintiff impugns the good faith of ATF personnel and maintains that they exhibited bias in classifying the device as a machinegun. Appellant's Br. 26-28. This complaint is difficult to fathom. By August 2006, ATF had recognized that the Akins Accelerator was a highly dangerous device that transforms a rifle into the practical equivalent of a machinegun. D19-3, at 24 (AR 22). Concerned, ATF consulted with its attorneys to determine if it had legal authority to classify the device as a machinegun. D19-3, at 58 (AR 58) (noting that agency counsel "have just finished up legal research on the Akins Accelerator"). After confirming that it did, ATF moved promptly to adopt an interpretation that would best protect the public safety.² D19-4, at 17 (AR 114). There is not a shred of evidence to suggest that agency personnel were motivated by anything but a bona fide desire to better effectuate the congressional prohibition on machineguns.

Third, plaintiff appears to argue that ATF acted arbitrarily in changing its position on the proper classification of plaintiff's device. Appellant's Br. 14 ("This discrepancy begs the question: Was [ATF] wrong about the facts in 2003 or was it

² Plaintiff finds it suspicious that ATF did not re-test his device until after it opened its investigation. Appellant's Br. 27-28. Plaintiff nowhere explains how earlier testing would have affected ATF's decision given that the agency in fact completed testing before it issued its decision. D19-4, at 8 (AR 93).

wrong about the facts in 2006?"). As this Court explained in Gun South Inc., 877 F.2d at 862, however, ATF has the authority "to reconsider and rectify errors even though the applicable statute and regulations do not expressly provide for such reconsideration." As described above, ATF has offered a cogent explanation for its 2006 adoption of an interpretation of the phrase "single function of the trigger." D19-4, at 18-19 (AR 115-16). At the same time, ATF expressly "overruled" any "previous ATF rulings that are inconsistent with this determination." D19-4, at 19 (AR 116). ATF has thus satisfied its obligation to provide a "reasoned analysis for the change" in its position. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42 (1983).³

³ Amici argue that ATF was required to provide notice and solicit comments before issuing its interpretation of the definition of "machinegun." Amicus Br. 16-17. Plaintiff has not raised this argument, and "arguments raised only by amici may not be considered." Richardson v. Alabama State Board of Education, 935 F.2d 1240, 1247 (11th Cir. 1991). Amici are in any event mistaken. ATF's decision was in the nature of an informal adjudication, not a rulemaking. See Gun South, Inc., 877 F.2d at 865 ("These activities which involve applying the law to the facts of an individual case, do not approach the function of rulemaking."). Even if the classification determination were a rulemaking, the APA specifically exempts "interpretative rule[s]" from notice and comment requirements. See 5 U.S.C. § 553(b) (A). The provision of 18 U.S.C. § 926 requiring notice and comment for substantive rulemakings in no way alters this analysis. As the Fourth Circuit has explained in considering § 926, "[a]bsent a clearer message from Congress * * * , we are hesitant to work a fundamental alteration in the relationship between the agency and the courts." National Rifle Association v. Brady, 914 F.2d 475, 479 (4th Cir. 1990).

C. Plaintiff's Criticism of the District Court's Opinion Is Misplaced And, in Any Event, Mistaken.

Plaintiff nonetheless urges that the district court's entry of summary judgment was inappropriate because, in his view, a genuine dispute of material fact remains. This misperceives the nature of an APA claim, however. As this Court has explained, "[t]he focal point for judicial review of an administrative agency's action should be the administrative record," and "a court conducting a judicial review is not generally empowered" to go beyond that record in reaching judgment. Preserve Endangered Areas of Cobb's History, Inc. v. U.S. Army Corps of Engineers, 87 F.3d 1242, 1246 (11th Cir. 1996) (internal quote omitted). Because "[t]he factfinding capacity of the district court is thus typically unnecessary," Florida Power & Light Co. v. Lorion, 470 U.S. 729, 744 (1985), summary judgment "is particularly appropriate in cases in which the court is asked to review * * * the decision of a federal administrative agency," Florida Fruit & Vegetable Growers Ass'n v. Brock, 771 F.2d 1455, 1459 (11th Cir. 1985) (internal citations omitted). Plaintiff's effort to manufacture a fact question is thus beside the point.

In any event, what plaintiff characterizes as a factual dispute reflects, instead, his disagreement with the legal conclusion that ATF reached. Plaintiff argues that the government is factually mistaken in stating that "the rifle fires automatically with a single function [of] the trigger." Appellant's Br. 13. There is no disagreement, however, about the manner in which the device operates: it harnesses the recoil of a

semi-automatic weapon to allow it to rock hundreds of times per minute against a stationary trigger finger. Each time the trigger presses against the shooter's finger, another bullet is fired. See Appellant's Br. 3-5 (providing same explanation). ATF has taken the position that the single conscious act of pulling the trigger finger and instigating this automatic firing cycle constitutes "a single function of the trigger." Plaintiff's disagreement with that legal conclusion does not a factual dispute make.

Plaintiff also urges that summary judgment was inappropriate because the agency record was inadequate to allow for meaningful judicial review. Appellant's Br. 23-25. Specifically, plaintiff observes that portions of the record were withheld because they were privileged, and then reiterates his claim that the agency has failed adequately to explain its position that his device is a machinegun. The administrative record, however, provides a more-than-adequate basis for reviewing ATF's classification decision, see, e.g., D19-4, at 18-19 (AR 115-16), and the agency withheld only those documents subject to valid privileges (including the attorney-client privilege) and statutory confidentiality protections, see 26 U.S.C. § 6103.⁴ Plaintiff's

⁴ Plaintiff states that "[t]he government first asserted the existence and service of a privilege log * * * in its Reply Brief" in the district court. Appellant's Br. 23. This is incorrect. The table of contents for the administrative record that the government filed with the court clearly notes that "[a] copy of the privilege log will be supplied to plaintiff," D19-3, at 2, and the government did, in fact, provide plaintiff with a copy. In his brief to this Court, plaintiff "certifies * * *

unsupported allegations about the state of the record provide no basis for questioning the district court judgment.

II. THE CLASSIFICATION DETERMINATION DID NOT VIOLATE PLAINTIFF'S DUE PROCESS RIGHTS.

Plaintiff alleges that ATF's classification of his device as a "machinegun" violated his right to due process of law, both because ATF denied him an oral hearing and because the underlying statute is unconstitutionally vague. Neither claim has merit.

A. The Due Process Clause Imposes No Requirement to Provide Plaintiff with an Oral Hearing.

When ATF moved to classify plaintiff's device as a machinegun in November 2006, it carefully explained the basis for its decision. D19-4, at 8 (AR 93). One month later, ATF issued a ruling in which it concluded that "a single function of the trigger" encompassed "a single pull of the trigger." D19-4, at 17 (AR 114). Shortly thereafter, plaintiff took advantage of the opportunity to file objections and submitted a thirteen-page legal memo challenging the classification determination. D19-4, at 27 (AR 124). ATF carefully considered plaintiff's arguments, D19-4, at 57-62; D19-5, at 1-7 (AR 155-67), and ultimately "determined that the device should remain classified as a

that he has received no such privilege log." Appellant's Br. 24. Plaintiff has never raised this objection either formally (through a Rule 59(e) motion to amend or alter the judgment of the district court) or informally (in a request to government counsel for a copy of the privilege log). Because "[a]rguments not raised in the district court are waived," Johnson v. United States, 340 F.3d 1219, 1227 n.8 (11th Cir. 2003), this belated complaint does not warrant reversal.

machinegun for the reasons stated in the ruling,” D19-5, at 31 (AR 190).

At no point in this agency process did the APA or any other provision of law require ATF to provide plaintiff with an oral hearing. See 5 U.S.C. § 554 (imposing a host of procedural strictures “in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing,” but declining to impose similar strictures on informal adjudications). Plaintiff does not argue otherwise.

Instead, plaintiff maintains that the Due Process Clause independently necessitates an oral hearing when ATF moves to classify a device as a machinegun. As the Supreme Court explained in Mathews v. Eldridge, 424 U.S. 319 (1976), however, “[t]he essence of due process is the requirement that a person in jeopardy of serious loss be given notice of the case against him and opportunity to meet it.” 424 U.S. at 348 (internal quote and correction omitted). Plaintiff has been provided with notice of the classification decision and an opportunity to challenge that decision. The Due Process Clause requires nothing more. See also National Rifle Association v. Brady, 914 F.2d 475, 485 (4th Cir. 1990) (“It is well-settled that the requirement of a hearing does not necessitate that the hearing be oral.”).

The D.C. Circuit has rejected as “groundless” precisely this sort of due process claim. In Darrell Andrews Trucking, Inc. v. FMCSA, 296 F.3d 1120, 1134 (D.C. Cir. 2002), the issue was whether, in an informal agency adjudication downgrading a motor

carrier's safety rating, "not providing an oral hearing and discovery * * * violates the Due Process Clause of the Constitution." The court explained that

[i]t is clear that [the carrier] did receive due process here. The [agency] citation put [the carrier] on notice of the charges, [the carrier] had an opportunity to present its arguments through written briefs, and the carrier similarly had an opportunity to present evidence of the unreliability of toll receipts by affidavit. Procedural due process requires no more in this kind of administrative setting.

Id. at 1134. Plaintiff was likewise "on notice" of the classification and "had an opportunity" to challenge it. Id. His due process claim is thus similarly groundless.

Reference to the balancing test from Mathews only reinforces the conclusion that the Constitution does not independently require an oral hearing. As this Court has explained, the "Supreme Court's balancing test essentially requires [the Court] to weigh three factors: (1) the nature of the private interest; (2) the risk of an erroneous deprivation of such interest; and (3) the government's interest in taking its action." Gun South, 877 F.2d at 867 (citing Mathews, 424 U.S. at 335). However substantial the plaintiff's pecuniary interest in selling his device, ATF's careful consideration of his written objections diminishes substantially "the risk of an erroneous deprivation" of that interest. Indeed, plaintiff cannot identify any factual error on the part of the agency that would have been amenable to correction in an oral hearing. Compare York v. Secretary of Treasury, 774 F.2d 417, 421 (10th Cir. 1985) (holding that the risk of error was low because the agency's determination is

"easily documented and not based to a significant extent upon witness credibility or other subjective determinations"). And there is no authority for the proposition that plaintiff was entitled to an oral hearing to challenge the legal basis for ATF's interpretation of the phrase "single function of the trigger." See Dredge Corp. v. Penny, 338 F.2d 456, 464 (9th Cir. 1964) (holding that "[t]he opportunity to be heard orally on questions of law is not an inherent element of procedural due process, even where substantial questions of law are involved").

Furthermore, the government has a strong interest in moving expeditiously to pull machineguns off the market. As this Court explained in Gun South, 877 F.2d at 867, "[t]he protection of the public's health and safety is a paramount government interest which justifies summary administrative action." The government's interest is all the more profound in this case given that plaintiff's device, if not classified as a machinegun, would be subject to no federal restrictions on its distribution or sale. Because the device permits a semi-automatic rifle to fire at a rate of 650 rounds per minute, the danger of permitting it to remain on the market is manifest. See United States v. Golding, 332 F.3d 838, 840 (5th Cir. 2003) (discussing the "risk * * * presented by the inherently dangerous nature of machineguns").⁵

⁵ Plaintiff speculates that ATF could have provided him with a pre-deprivation hearing without burdening the agency or delaying its decision. Appellant's Br. 33-34. Plaintiff is doubly mistaken: oral hearings divert agency resources away from other important tasks and, as a general rule, introduce delay into administrative proceedings. More importantly, however, his

B. The Statutory Definition of Machinegun Is Not Unconstitutionally Vague.

The definition of "machinegun" includes any device "designed and intended solely and exclusively" to permit a weapon "to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger." 26 U.S.C. § 5845(b). This statutory text put plaintiff on notice that his device, which (in his words) "increase[s] the cyclic rate at which the trigger of a semi-automatic firearm can be actuated to discharge the weapon," D12, at 3, could well be a "machinegun." That is why plaintiff repeatedly contacted ATF to determine whether his device would be classified as a machinegun. D19-3, at 3 (AR 1); D19-3, at 7 (AR 5); D19-3, at 21 (AR 19).

Plaintiff nonetheless asserts that the statutory phrase "by a single function of the trigger" is so vague that its application to his device violates his constitutional right to due process of law. As the Supreme Court has explained, however, a statute is void for vagueness only where it fails to give "the person of ordinary intelligence a reasonable opportunity to know what is prohibited," Grayned v. City of Rockford, 408 U.S. 104, 108 (1972), "not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative

unsupported conjecture ignores that, "in assessing what process is due, substantial weight must be given to the good-faith judgments of the individuals charged by Congress with the administration of programs that the procedures they have provided assure fair consideration of the claims of individuals." In re Bleaufontaine, Inc., 634 F.2d 1383, 1387-88 (5th Cir. 1981) (internal quote, correction, and ellipses omitted).

standard, but rather in the sense that no standard of conduct is specified at all," Coates v. Cincinnati, 402 U.S. 611, 614 (1971). Because "[u]ncertainty is a fact of legal life," Coleman v. CIR, 791 F.2d 68, 71 (7th Cir. 1986), the Constitution's "prohibition against excessive vagueness does not invalidate every statute which a reviewing court believes could have been drafted with greater precision," Rose v. Locke, 423 U.S. 48, 49 (1975) (per curiam).

Judged under these standards, § 5845(b) is unquestionably constitutional. Whatever ambiguities inhere in the phrase "single function of the trigger," it is undoubtedly a "comprehensible normative standard," Coates, 402 U.S. at 614, and gives "people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits," Hill v. Colorado, 530 U.S. 703, 732 (2000). Indeed, although the relevant language has been on the books for more than 70 years, see National Firearms Act, Pub. L. No. 73-474, 48 Stat. 1236 (1934), no court has ever held it unconstitutional. To the contrary, both the Fourth and Sixth Circuits have recently given short shrift to the argument that § 5845(b) is unconstitutionally vague. See United States v. Kelly, 276 Fed. Appx. 261, 267 (4th Cir. 2007); United States v. Carter, 465 F.3d 658, 664 (6th Cir. 2006); United States v. Williams, 364 F.3d 556, 560 (4th Cir. 2004).

Moreover, the Supreme Court held in Staples that an individual can be prosecuted for the unlawful possession of a machinegun only if he knew that the weapon in question was, in

fact, a machinegun. 511 U.S. 600; see also United States v. Nieves-Castano, 480 F.3d 597, 600 (1st Cir. 2007) (“The government correctly accepts that Staples’s scienter requirement also applies to prosecutions under 18 U.S.C. § 922(o).”). As the Court has explained elsewhere, “a scienter requirement may mitigate a law’s vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed.” Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499 & n.14 (1982). In the same vein, ATF’s interpretation of the phrase “single function of the trigger” to encompass devices that, “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,” D19-4, at 17 (AR 114), ameliorates any possible vagueness by providing plaintiff with clarity as to the proper interpretation of the phrase. See Go Leasing, Inc. v. NTSB, 800 F.2d 1514, 1525 (9th Cir. 1986) (holding that “potential vagueness may be mitigated by * * * executive interpretation of the challenged provision”).

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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