No. 21-1215

IN THE
Supreme Court of the United States

GUN OWNERS OF AMERICA, INC.; GUN OWNERS FOUNDATION; VIRGINIA CITIZENS DEFENSE LEAGUE; MATT WATKINS; TIM HARMSEN; AND RACHEL MALONE,
Petitioners,

v.

MERRICK B. GARLAND, in his official capacity as Attorney General of the United States; UNITED STATES DEPARTMENT OF JUSTICE; BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES; AND MARVIN G. RICHARDSON, in his official capacity as Acting Director, Bureau of Alcohol, Tobacco, Firearms and Explosives,
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

REPLY BRIEF FOR PETITIONERS

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I. THE GOVERNMENT URGES THE DISTRICT COURT'S JUDGMENT BE UPHELD WHILE VIEWING ITS ANALYSIS AS DEEPLY FLAWED.

The government asserts that "[t]he court of appeals correctly affirmed the district court's denial of a preliminary injunction," omitting that the Sixth Circuit's affirmance occurred by default through rule of court — without any majority opinion. Brief for the Respondents in Opposition ("Opp.") 15. Indeed, the only majority decision reached by the Sixth Circuit occurred when Petitioners prevailed before the panel (vacated by grant of *en banc* review).

The government thus is left in the curious (and contradictory) position of nominally defending the district court's decision to avoid this Court's review, yet believing the district court's opinion to be wrong in every respect — except the ultimate result reached. Indeed, the government entirely rejects the district court's application of *Chevron* deference to sanction ATF's newest "interpretation" of a decades-old statute.[1]

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[1] The district court believed the statutory definition was ambiguous (Opp. 9-10), while ATF argued it was unambiguous and that its interpretation was the "best" (Opp. 14); the district court applied *Chevron v. NRDC*, 467 U.S. 837 (1984) (Opp. 9) which ATF opposed (Opp. 14, 23); the district court viewed ATF's interpretations as merely "permissible" (Opp. 10), while ATF argued it had the "best interpretation" (Opp. 14); the district court even believed Petitioners' interpretation of both parts of the statute were "reasonable" (Pet. App. 188a), while ATF believed Petitioners' view not just wrong, but dangerous, allowing all manner of mischief (Opp. 20). The district court's rejection of the government's reasoning explains why the government expended

Additionally, the government largely ignores the Sixth Circuit panel opinion which struck the Final Rule, mentioning it only in passing. *See* Opp. 11-12. Meanwhile, the panel adopted the analytical approach the government sought, rejecting application of deference and seeking to find the "best" meaning of the statute.[2] The panel did not reach the ultimate result preferred by the government, instead adopting Petitioners' view of the statute, which makes the government's efforts to sweep it under the rug hardly surprising.

Meanwhile, the government focuses heavily on the various opinions of two five-judge minorities (six judges in total) of the *en banc* Sixth Circuit who concluded that "ATF's interpretation of the statute is the best one." Opp. 12-13, 19. Finally, the government fails to wrestle with the *en banc* dissenting opinion by eight judges who, like the panel, took the analytical approach favored by the government, but reach a result the government did not like. *See* Opp. 13-14.

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little effort defending the district court's analysis.

[2] In fact, the panel agreed with the government that *Chevron* did not apply (Opp. 11), and proceeded to analyze the statute "without deference to the agency's interpretation" (Opp. 12), and determined the "best" meaning of the statute using the approach urged by the government. Moreover, the panel relied on this Court's decision in *United States v. Apel*, 571 U.S. 359 (2014), as argued by the government to the district court. *See* ECF #38 2; Pet. App. 91a-92a. Primarily, the government criticizes the panel's decision only because it reached an ultimate result "inconsistent with decisions of the Tenth and D.C. Circuits rejecting similar challenges to the same final rule." Opp. 12.

Finally, although the government's opposition is designed to give the impression that there is unanimity among the courts which have considered challenges to the Bump Stock Rule, the truth is far more complicated.[3] Indeed, the government's position — that ATF's interpretation of the statute is the "best one" — was rejected not only by the district court, whose decision the government now seeks to preserve, but also by 10 of the 16 judges on the *en banc* court.

II. THIS COURT SHOULD REJECT ATF'S NEWEST CONTRIVED STATUTORY "INTERPRETATION."

The government acknowledges that Petitioners "assert ... that the statute unambiguously excludes bump stock devices," but accuses Petitioners' analysis of being "brief[]" and "fail[ing] to develop that argument in any meaningful way." Opp. 14, 19. The short reply to this accusation of brevity is that Petitioners filed a petition, not a merits brief, and the statute is simple and clear. Indeed, until directed by

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[3] Whereas the Tenth and D.C. Circuits upheld the Final Rule through *Chevron* deference, the Fifth Circuit conducted its own statutory analysis. Thus, the government carefully asserts that "[t]he judgment below [a default affirmance without written opinion] is consistent with the result reached [but not necessarily the analytical approach taken] by three other courts of appeals...." Opp. 21. To be sure, the government claims "the validity of the rule does not turn on the application of *Chevron*." Opp. 22. But that is a *non sequitur*, as there is no guarantee that the courts which have upheld the final rule as a "permissible" interpretation under *Chevron* would conclude (absent *Chevron*) that ATF has the "best" interpretation of the statute.

President Trump's politically driven mandate to reverse its position, ATF always believed the statute to be clear and *not* to include bumpstocks.

Thus, any purported statutory ambiguity is of recent vintage, interjected by ATF's new and contorted manipulation of the English language to *make* a type of rifle stock — a "bump stock" — fit into the statutory definition of a "machinegun." As the Petition explains, Congress carefully crafted an unambiguous definition of "machinegun" with two linked requirements: it must operate "'[i] automatically ... [ii] by a single function of the trigger.'" Petition for Certiorari ("Pet.") 14. The Petition explained how ATF and some circuit court judges have "muddied the waters" by finding ambiguity where there is none. *Id.* 15.

First, the Petition discussed ATF's need to rewrite the statutory language of the statute, replacing "single function of the trigger" with "single pull of the trigger," changing the statute's focus from the mechanical act of the trigger to the volition of the shooter, and asserting that the verb chosen by ATF improved the statute that Congress wrote. *Id*. 15. The government disputes Petitioners' characterization, claiming that its statutory rewrite is "consistent with both ordinary language and common-sense...." Opp. 20. The government relies on this Court's decision in *Staples v. United States*, 511 U.S. 600, 602 n.1 (1994), which described "a single pull of the trigger" when discussing a machinegun. Opp. 17. *Staples* never purported to offer a conclusive "machinegun definition. Pet. App. 43a. Even so, the Court went on to explain precisely what it meant by pulling the trigger: "[t]hat is, <u>*once its*</u>

trigger is depressed, the weapon will automatically continue to fire...." Pet. App. 127a. In other words, the Court, like the statute, focused on "whether the trigger moves," not "whether the shooter initiates the automatic firing," as advanced by the government.[4] Opp. 18.

Inadvertently, the government opposition actually admits that a rifle equipped with a bump stock operates *neither* by a "single function of the trigger" as the statute requires, *nor* by a "single pull of the trigger" as ATF prefers. The government explains that, between shots, recoil "shift[s] the trigger away from the shooter's trigger finger … [t]his separation allows the firing mechanism to reset." Opp. 6; *see also* 16 ("'permitting the trigger to lose contact with the finger' and reset itself."). The fact that the trigger "reset[s]" means that a separate mechanical trigger "function" is necessary for another shot. The fact that the trigger and the trigger finger physically "separate" between shots means that a separate trigger "pull" is necessary for another shot, because it is evident that one cannot continue to "pull" a trigger without touching it.

The government's explanation of how bump stocks operate "automatically" fares no better. The

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[4] The government also relies on an informal statement by a congressional committee witness. Opp. 17. But that is not how this Court interprets the meaning of an unambiguous statute. *See Dep't of Hous. v. Rucker*, 535 U.S. 125, 132 (2002) (reference to legislative history is inappropriate when the text of the statute is unambiguous).

government claims that a rifle equipped with a bump stock "fires 'as the result of a self-acting or self-regulating mechanism'" (Opp. 19), while the statute requires it to fire "automatically ... by [*i.e.,* as the result of] a single function of the trigger." Indeed, the government concedes that a bump stock *requires more* than a "single function of the trigger," noting that "the *only additional* human input a bump stock requires after the initial trigger pull is forward pressure by the shooter on the front of the weapon with the non-trigger hand." Opp. 20 (emphasis added). Of course, *any* "additional human input" more than "a single function of the trigger" to reset the trigger and fire again is more than the statute allows.[5] *See Guedes v. BATFE*, 920 F.3d 1, 35 (D.C. Cir. 2019) (Henderson, J., dissenting) (calling the government's interpretation a "single function plus").

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[5] The government notes that "prototypical machineguns" require the shooter "maintain pressure ... on the trigger." Opp. 21. But that is not "*additional* human input," rather only what is required to maintain "a single function of the trigger." Finally, the government claims "[a] firearm operates 'automatically' whether it requires constant backward pressure on the trigger or constant forward pressure on the front of the weapon." Opp. 21. But again, this ignores the statutory text, which focuses on the "function of the trigger," not some *other* "human input" on some *other* part of a firearm. Indeed, at *en banc* oral argument below, government counsel rejected the notion that, on a rifle equipped with a bump stock, the trigger had somehow been replaced by the rest of the firearm. Oral Argument 35:40 (conceding that "the trigger ... is still the trigger on the AR-15" when equipped with a bump stock).

III. THE GOVERNMENT IS UNCONCERNED ABOUT LEAVING THE LOWER COURTS ADRIFT ON CRITICAL QUESTIONS.

The government admits that at least one of the *Chevron* issues raised by the Petition is "potentially significant." Opp. 29. Nevertheless, the government asks the Court not to clarify the muddle in the lower courts, claiming Petitioners' issues presented to be "abstract questions" in relation to this case. Opp. 14. On the contrary, the lower courts' misapplication of *Chevron* is real, and not made "abstract" simply because "the government has consistently maintained that *Chevron* is not applicable." *Id.*

The government argues that consideration of Petitioners' second and third questions presented is "unnecessary" because the government has properly interpreted the statute. Opp. 22-23. But to determine whether the government wins on the statutory interpretation question necessarily requires consideration of Petitioners' first question presented, which raises serious questions as to the agency's manipulation of the statutory text. In other words, while seeking to avoid the Court's review of questions two and three, the government makes an excellent case for the Court's review of question one.

A. The Court Should State Definitively whether *Chevron* Applies to Criminal Statutes.

The government claims this Court should decline review because "petitioners do not address the

distinction between legislative and interpretive rules," and "[p]etitioners' *Chevron* questions would arise only if the rule was legislative and therefore eligible for deference." Opp. 25. On the contrary, whether the final rule is legislative or interpretive is a distinction without a difference relevant here, and indeed, courts have come to both conclusions.

If the final rule is merely "interpretive," as the government claims (Opp. 23), then it is plain the government has misinterpreted the statute, as explained in Section I of the Petition. On the other hand, if the final rule is "legislative," then it is ineligible for *Chevron* for the reasons stated in Sections II and III of the Petition. Either way, the district court erred by failing to "say what the law is." In other words, regardless of whether the final rule is legislative or interpretive, it must be struck down, because the statute does not mean what ATF says it means.

Second, the government fails to minimize the extent of the very real circuit split identified in the Petition as to whether *Chevron* applies to the criminal law, dismissing various statements in the lower courts as being made "without ... briefing" and "dicta." Opp. 27-28. The government also seeks to minimize this Court's decisions in *Apel* and *Abramski v. United States*, 573 U.S. 169 (2014), even though it was the government that argued those cases' relevance to the district court. Opp. 25-27.

Third, the government characterizes as "unfounded" Petitioners' claim that the Sixth Circuit is

"hopelessly conflicted" on application of *Chevron* deference to criminal statutes. Opp. 28. But the government's own telling undermines that notion. As the government explains, the Sixth Circuit's history on this issue has involved the "proceedings in this case [which] did not produce a precedential opinion" despite nearly two years of litigation and consideration by the full court, a "vacated … prior panel decision," and various "dissenting and concurring opinions by individual judges." Opp. 29. In other words, despite repeated consideration of the issue by numerous panels (and even the full court) over many years, the Sixth Circuit is adrift (and indeed is evenly split) as to whether *Chevron* deference applies to the government's interpretation of criminal statutes. If that does not represent a "hopelessly conflicted" situation, it is hard to imagine what would.

Fourth, the government submits that this Court need not resolve the conflict between *Chevron* and the rule of lenity, on the theory that "both parties" agree the statute is unambiguous. Opp. 29. But Petitioners have not asked for this Court's review of the parties' legal positions, but rather the judgment of the Sixth Circuit, which affirmed the district court's decision by default after deadlocking. And, *despite* the parties' agreement that the statute *is not* ambiguous and that *Chevron does not* apply, the district court concluded that the statute *is* ambiguous and that *Chevron must be* applied. *See* Pet. 5-6. Because of that finding of ambiguity, this Court's review is necessary to decide whether *Chevron* or the rule of lenity takes precedence to resolve ambiguities in criminal statutes. Indeed, if

the rule of lenity applies, the decision below must be vacated. *See* Pet. 27.[6]

B. The Court Should Decide whether *Chevron* Can Be Waived.

The government devotes little time to addressing the issue whether *Chevron* deference can be waived by the government. Opp. 30-31. Generally, the government criticizes Petitioners' "attempts ... to identify a division of authority on that question," on the theory that the results across the circuits are all over the map. Opp. 30. Of course, that was Petitioners' entire point as to why this Court's review is necessary, since "there are nearly as many different answers as there are circuit courts" about whether *Chevron* must apply, may apply, or must not apply based on whether the government invokes its protections. Pet. 32.

Interestingly, the government's opposition argues that a court should be free to "mak[e] its own independent judgment about how best to apply" *Chevron* in spite of "the government's litigation choices...." Opp. 31. That claim stands in stark contrast to the government's criticism of the district

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[6] The government also argues that lenity "does not apply here" because "[n]o court has found Section 5845(b) to be grievously ambiguous…." Opp. 29-30. Of course, the district court's decision did not even consider whether lenity might apply, so there was no reason for the court to consider the precise degree of the statutory ambiguity. *See also* App. 23a (finding that both parties' "readings are plausible.").

court's "unsound ... conclusion" that the final rule was legislative and thus that *Chevron* applied. Opp. 23. It also begs the question why the government has felt it necessary or appropriate to make repeated "litigation choices" to disclaim application of *Chevron* at every stage of this litigation if, at the end of the day, its waiver is merely academic, and uninformative to a court that must decide the *Chevron* issue for itself.

IV. THE COURT SHOULD NO LONGER DEFER CONSIDERATION OF THE ISSUES RAISED HERE.

The government makes one last plea for this Court to deny the Petition, because the matter comes up on the denial of injunctive relief. Opp. 32. According to the government, this Court should not now decide whether these muddled areas of the law need clarification — at least not until some later date, after the lower courts issue a "final judgment." *Id.* Such an argument might apply if this were the first circuit to consider the matter, but it is not.

For example, when this Court denied review of the D.C. Circuit's opinion in *Guedes v. ATF*, 140 S.Ct. 789 (2020) in March 2020, no other court of appeals had issued an opinion (not even from a panel) on the final rule. Since then, there have been numerous decisions, including from the Tenth Circuit in *Aposhian v. Wilkinson,* 989 F.3d 890 (10th Cir. 2021) (panel and *en banc*), the Fifth Circuit in *Cargill v. Garland,* 20 F.4th 1004 (5th Cir. 2021) (panel) (*en banc* petition pending), the Sixth Circuit below (panel and *en banc*), and the

NMCCA in *United States v. Alkazahg*, 81 M.J. 764 (N-M Ct. Crim. App. 2021).

There is no reason to further delay review. There has been considerable airing of the legal issues involved in this case across four circuits, as well as a military court of appeals.[7] Relief already has been delayed since the final rule was announced on December 26, 2018. There is no reason to deny certiorari on this basis.

CONCLUSION

For the reasons stated above and previously, the petition should be granted.

Respectfully submitted,

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[7] The government dismisses the ruling of the Navy-Marine Corps Court of Criminal Appeals ("NMCCA") that a bumpstock most certainly is not a machine gun, on the theory that it is not the ruling of the highest military court. Opp. 22. However, the NMCCA is the highest military court to consider the issue because the government made the tactical decision not to risk an appeal. Moreover, it is interesting, if not instructive, that the one court to have addressed the issue whose judges have the most experience with firearms, ruled definitively that a bumpstock is not a machinegun.

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