No. 22-1222

IN THE

Supreme Court of the United States

DAMIEN GUEDES, *ET AL.*,
Petitioners,
v.
BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, *ET AL.*, *Respondents*.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the D.C. Circuit

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

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INTEREST OF THE *AMICI CURIAE*[1]

Gun Owners of America, Inc., Gun Owners Foundation, Gun Owners of California, Virginia Citizens Defense League, Tennessee Firearms Association, Grass Roots North Carolina, Rights Watch International, Heller Foundation, America's Future, and Conservative Legal Defense and Education Fund are nonprofit organizations, exempt from federal income tax under either section 501(c)(3) or section 501(c)(4) of the Internal Revenue Code. These entities, *inter alia*, participate in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law.

STATEMENT OF THE CASE

On October 1, 2017, the most deadly mass shooting in the history of the country occurred in Las Vegas, Nevada, targeting attendees at a music festival adjacent to the Mandalay Bay Resort and Casino, resulting in the death of at least 58 persons. Bumpstocks were found attached to certain of the

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[1] It is hereby certified that counsel of record for all parties received notice of the intention to file this brief at least 10 days prior to the filing of it; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

semi-automatic rifles found in the room of Stephen Paddock.

In response, President Donald Trump directed the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") to take action against bumpstocks. Prior to that, ATF had maintained the longstanding position that non-mechanical bumpstocks were not machine guns and did not convert a semi-automatic firearm into a machinegun. However, after the President's directive, ATF began the process to reverse that position. On December 26, 2017, ATF published an Advance Notice of Proposed Rulemaking ("ANPRM") entitled "Application of the Definition of Machinegun to 'Bump Fire' Stocks and Other Similar Devices," 82 *Fed. Reg.* 60,929 (Dec. 26, 2017). On March 29, 2018, ATF published a Notice of Proposed Rulemaking entitled "Bump-Stock-Type Devices," 83 *Fed. Reg.* 13,442 (Mar. 29, 2018). Exactly one year after its ANPRM, on December 26, 2018, ATF published its final rule, effective on March 26, 2019. "Bump-Stock-Type Devices," 83 *Fed. Reg.* 66,514 (Dec. 26, 2018). The ATF rule criminalized possession of 519,927 bumpstocks, ordering those who had lawfully acquired them in accordance with prior ATF ruling letters to either destroy them or surrender them to law enforcement.

Plaintiff Damien Guedes, joined by another individual and three organizational plaintiffs, challenged the Rule in the U.S. District Court for the District of Columbia. On February 25, 2019, the district court denied Plaintiffs' request for a temporary injunction. *Guedes v. BATFE*, 356 F. Supp. 3d 109

(D.D.C. 2019) ("*Guedes I*"). Relying on *Chevron v. Nat. Res. Def. Council*, 467 U.S. 837 (1984), despite the fact that no party had argued it applied, the district deferred to the ATF's revised interpretation: "Congress defined 'machinegun' in the NFA to include devices that permit a firearm to shoot 'automatically more than one shot, without manual reloading, by a single function of the trigger' ... but it did not further define the terms 'single function of the trigger' or 'automatically.' According to the district court, because both terms were ambiguous, ATF was permitted to reasonably interpret them." *Guedes I* at 120.

In April 2019, the D.C. Circuit affirmed the district court's denial of injunctive relief. *Guedes v. BATFE*, 920 F.3d 1 (D.C. Cir. 2019) ("*Guedes II*"), and this Court declined to stay the Final Rule. *Guedes v. BATFE*, 2019 U.S. LEXIS 2483 (2019). This Court then denied Plaintiffs' petition for certiorari. *Guedes v. BATFE*, 140 S. Ct. 789 (2020).

In 2021, the district court granted summary judgment to ATF. *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 520 F. Supp. 3d 51 (D.D.C. 2021) ("*Guedes III*"). The D.C. Circuit affirmed, but on different grounds. Although the district court had found the disputed statutory terms ambiguous and gave *Chevron* deference to ATF's interpretation, the Court of Appeals ruled that the ATF's reinterpretation was actually *the "best"* interpretation of the statutory language. *Guedes v. BATFE*, 45 F.4th 306, 313 (D.C. Cir. 2022) ("*Guedes IV*"). In May 2023, the D.C. Circuit denied Plaintiffs'

petition for rehearing *en banc*. *Guedes v. Bureau of Alcohol*, 66 F.4th 1019 (D.C. Cir. 2023).

SUMMARY OF ARGUMENT

The D.C. Circuit Court treated the challenged ATF Rule, which reversed more than a decade of ATF letter rulings that bumpstocks were not machineguns, as if it was the product of a thoughtful reexamination of the statutory text. It was not. The Rule implemented a political, not legal, Presidential decision to ban bumpstocks after the most deadly mass shooting in the history of the country near the Mandalay Bay Resort and Casino in Las Vegas. Making the decision to ban bumpstocks even more curious, the court simply assumed that bumpstocks had been used in Las Vegas, despite the absence of any law enforcement source for that assertion. ATF later admitted it has no records showing that bumpstocks had ever been used in crimes. Nevertheless, as the ATF Rule explained, all 519,927 privately owned bumpstocks that had been purchased lawfully were required either to be turned into law enforcement or destroyed, or their law-abiding owners would be charged with felonies.

Despite the fact that the ATF Rule was directed by President Trump, the court believed it to provide the "best" possible interpretation of the statute. The only reason the court offered for why the statute had been viewed differently in the past was that the agency had not "engaged" with the statute. To achieve President Trump's directive, ATF was required to make substantial changes to the regulatory definition of machine gun that are at odds with the statutory

definition. Even with those changes, ATF found it necessary to add a sentence expressly decreeing that bumpstocks are now machineguns.

The statute requires that a "machinegun" operate "by a single **function** of the trigger," but the Rule rewrites that phrase as "by a single **pull** of the trigger." "Single function of the trigger" clearly and unambiguously refers to the **mechanical process** through which the trigger goes (what the firearm is doing). The phrase clearly does not refer to the **biological process** (what the shooter is doing) which sets this mechanical process into motion. The statute requires that a machinegun fire "**automatically** ... by a single function of the trigger." But bumpstocks require coordinated human inputs not involving the trigger — applying forward pressure to the rifle and rearward pressure on the bumpstock (which the court disregarded as incidental "analogous motions").

While the court below believed ATF had achieved the "best" interpretation of the statute, in other challenges the Rule was considered to be inconsistent with the statute. In one of these cases, where eight circuit court judges took this position, a Petition for Certiorari is before the Court in *Garland v. Cargill*, No. 22-976. These *amici* urge that the *Guedes* petition be held, the *Cargill* petition be granted, and the Rule be overturned.

ARGUMENT

The Petition for Certiorari ("Pet. Cert.") summarizes the multitude of challenges that have

been brought against the ATF Bumpstock Rule across the country, and recounts the conflicting decisions reached in those challenges. Noting the split among the circuits on the issue, the Petition notes that "at least 30 opinions authored or joined by 57 different federal judges, totaling over 400 reported pages, have addressed" the Rule. Pet. Cert. at 5, 16-24.

These *amici* agree that this Court's review is required to resolve a circuit split, and resolve an important but undecided matter of federal law. In fact, some of these *amici* (Gun Owners of America, Gun Owners Foundation, and Virginia Citizens Defense League) brought a challenge against the Rule in the Western District of Michigan which, on appeal to the Sixth Circuit, achieved the first decision overturning the Rule, but which was later vacated when the Sixth Circuit split evenly (8-8) after argument on rehearing *en banc*. This Court chose not to grant review in that case. *See* Section IV, *infra*.

This *amicus* brief primarily seeks to supplement Petitioners' treatment of the opinion of the D.C. Circuit below, and set out additional facts about the origin and approach of the ATF in devising its new Rule banning bumpstocks.

Amici urge that the petition should be held pending resolution of the petition for writ of certiorari in *Garland v. Cargill*, No. 22-976, which should be granted, and the bumpstock rule overturned.

I. ATF'S REVERSAL OF ITS LONGSTANDING POSITION THAT BUMPSTOCKS ARE NOT MACHINE GUNS WAS DIRECTED BY PRESIDENT TRUMP, NOT BASED ON A NEW AGENCY ANALYSIS.

Repeatedly, the D.C. Circuit asserted that the ATF Rule refining the statutory meaning of "machinegun" (26 U.S.C. § 5845(b))[2] provides not just a "reasonable" interpretation, but rather "the best interpretation of 'machine gun' under the governing statutes." *Guedes IV* at 310; *see also id.* at 313, 314, 317, 319, 322. By sidestepping the district court's finding of statutory ambiguity, the D.C. Circuit avoided the need to address the thorny issue of *Chevron* deference.

The circuit court summarized the ATF's longstanding position as follows:

> Between 2008 and 2017 ... the Bureau issued **ten letter rulings** in which it concluded that devices relying on both the recoil energy and the shooter's constant forward pressure were **not machine guns**. These weapons fired multiple shots with a "single pull of the trigger," but in the Bureau's view did not operate "automatically," though **the Bureau**

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[2] The ATF reinterpretation focused primarily on two elements of the definition found in 26 U.S.C. § 5845, which are bolded here: "Machinegun. The term 'machinegun' means 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**." (Emphasis added.)

> **did not engage with the meaning of the term**. [*Id.* at 311 (emphasis added) (citing ATF's Bump Stock Rule at 66,518).]

Apparently, the circuit court did not find it the least bit surprising that, for many years, ATF had repeatedly and consistently interpreted and applied a Congressional statute without — as the circuit court put it — ever having **"engage[d]"** with the meaning of the statutory text. Rather, the circuit court impliedly concluded that, only when ATF was under political pressure did it finally bother to examine the statute it was charged with enforcing, and only then did it arrive at not just a "reasonable" or "permissible" interpretation — but the very "best" one. On the contrary, "when the government … speaks out of both sides of its mouth, no one should be surprised if its latest utterance isn't the most convincing." *Bittner v. United States*, 143 S. Ct. 713, 722 n.5 (2023).

The circuit court provided a one-sentence explanation of what motivated ATF to change its longstanding position:

> In the aftermath of the Las Vegas shooting, then-President Trump and Congress **urged** the Bureau to **revisit** its position on bump stocks. Department of Justice Announces Bump-Stock-Type Devices Final Rule, Dep't of Just. (Dec. 18, 2018), https://www.justice.gov/opa/pr/department-justice-announces-bump-stock-type-devices-final-rule. [*Guedes IV* at 311 (emphasis added).]

This abbreviated version of events not only fails to provide relevant information, but also is profoundly misleading. President Trump did not "urge" the Bureau to "revisit" its position, but rather explicitly "direct[ed]" the agency to "propose" a rulemaking to reverse its position.

On October 5, 2017, the Trump White House initially signaled its willingness to support legislation to ban bumpstocks.[3] But the administration quickly shifted from supporting legislation to demanding administrative action — without Congress. Shortly thereafter, ATF published its **Advance Notice of Proposed Rulemaking** entitled "Application of the Definition of Machinegun to 'Bump Fire' Stocks and Other Similar Devices" on December 26, 2017.[4] The deadline for comments was January 25, 2018.[5]

On February 20, 2018, President Trump then issued an order to the U.S. Department of Justice in the form of a "Memorandum for the Attorney General" that was published in the *Federal Register* on February 23, 2018:

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[3] "President Trump 'open' to discussion of 'bump stocks' ban," *CNN Wire* (Oct. 5, 2017).

[4] Gun Owners of America's Comments in response to the ANPRM were submitted on January 9, 2018. Gun Owners Foundation's Comments were filed on January 18, 2018.

[5] In response, over 115,000 comments were received, and over 35,000 comments were posted on regulations.gov, with 85 percent of commenters opposing the ban.

> Today, I am **directing** the Department of Justice to dedicate all available resources to complete the **review of the comments** received, and, as **expeditiously** as possible, **to propose** for notice and comment **a rule banning** all devices that turn legal weapons into machineguns. [Application of the Definition of Machinegun to "Bump Fire" Stocks and Other Similar Devices, Memorandum for the Attorney General (Feb. 20, 2018), 83 *Fed. Reg.* 7,949 (Feb. 23, 2018).]

That February 23, 2018 Memorandum (i) confirmed the Presidential directive was motivated by the Las Vegas Shooting, and (ii) blamed the Obama-era ATF for having "repeatedly conclud[ing] that particular bump stock type devices were lawful." *Id.* And, after noting that the Department of Justice had received "100,000 comments" on its Advance Notice of Proposed Rulemaking, where comments concluded January 25, 2018, the President essentially directed that the comments from the public be scanned through, and regardless of what problems they revealed, ATF simply should issue a rule "banning" bump stocks through "swift and decisive action." *Id.*

Three days later, on February 26, 2018, President Trump made his direction to ATF even more clear: "Bump stocks, we are writing that out. I am writing that out." "I don't care if Congress does it or not, I'm writing it out myself."[6]

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[6] A. Alexander, "Trump says he is 'writing out' bump stocks," *Politico* (Feb. 26, 2018).

This series of statements provides no indication that President Trump ordered that ATF ban bump stocks based on any thoughtful re-examination of the statutory text, 26 U.S.C. § 5845(b). Nevertheless, on March 29, 2018, ATF followed the President's directive, issuing its **Notice of Proposed Rulemaking** entitled "Bump-Stock-Type Devices," with comments due by June 27, 2018.[7] The Comments filed by *amicus* Gun Owners Foundation[8] asserted:

> ATF has only the authority delegated to it by Congress through statute. **President Trump's ordering ATF to ban bump stocks by administrative fiat** may place the agency in an uncomfortable position, but it does [not] grant ATF the authority to regulate bump stocks. **The NPRM reflects a political decision, not a legal one**, which is in clear conflict with both the law and with all prior ATF rulings on the subject, and therefore should be withdrawn. [Emphasis added.]

On December 26, 2018, ATF published its final rule, effective on March 26, 2019. "Bump-Stock-Type Devices," 83 *Fed. Reg.* 66514 (Dec. 26, 2018).

To be sure, when an agency is ordered to reverse its position, and basically to disregard the comments

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[7] The ATF received 193,297 comments.

[8] Gun Owners Foundation's Comments in response to the NPRM were submitted on May 9, 2018. Gun Owners of America's Comments were filed on May 15, 2018.

submitted in response to a proposed rulemaking, the Administrative Procedure Act is flouted, not followed. Even more significantly, when the agency reverses its position on a dime based on orders from elected officials rather than reasoned analysis, this is not the rule of law, but rather "'the King ... creat[ing] an[] offence by ... proclamation, which was not an offence before.'" *Whitman v. United States*, 574 U.S. 1003, 1004 (2014) (Scalia, J., dissenting from denial of certiorari).

Indeed, an agency cannot "reverse its current view 180 degrees anytime based merely on the shift of political winds and *still* prevail." *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring). Nor may an agency "rewrit[e] ... unambiguous statutory terms" to suit "bureaucratic policy goals." *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 325 (2014). These principles have particular application when the sanctions that the agency seeks to impose on Americans are criminal, as they are here. Rather, "[o]nly the people's elected representatives in Congress have the power to write new federal criminal laws." *United States v. Davis*, 139 S. Ct. 2319, 2323 (2019).

II. THE D.C. CIRCUIT ASSUMED THAT BUMPSTOCKS WERE USED IN THE LAS VEGAS SHOOTING.

The D.C. Circuit decision repeatedly asserted, without citation, that bumpstocks were "used" in the Las Vegas shooting. *Guedes IV* at 310, 311 n.2, 318. Insofar as that shooting provided the political impetus

for President Trump to direct the Department of Justice to reverse its position that bumpstocks were not machineguns, it is important to locate a source for the Court's factual representation.[9] Based on reports on the shooting from the Las Vegas Metropolitan Police Department[10] and the FBI,[11] the more correct statement would be that rifles **equipped with** bumpstocks were found in the hotel room of Stephen Paddock.

Three other facts also make it even more uncertain as to whether there was any "use" of bumpstocks in Las Vegas. First, there was no ATF report on the Las Vegas shooting to that effect. In fact, the FBI actually

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[9] Numerous court opinions have stated as fact that bumpstocks were used without citation to any authority. *See, e.g.*, *Aposhian v. Barr*, 374 F. Supp. 3d 1145, 1148 (D. Ut. 2019) ("a lone shooter employing multiple semi-automatic rifles with attached bump-stock-type devices fired several hundred rounds of ammunition into a crowd"); *Gun Owners of Am., Inc. v. Garland*, 992 F.3d 446, 452-453 (6th Cir. 2021) ("The gunman used bump-stock devices attached to his semiautomatic rifles to increase his rate of firing").

[10] The Las Vegas Police report on the shooting showed pictures of approximately 13 rifles in Paddock's room, to which were affixed bumpstocks, but did not state they were used. *See* LVMPD Preliminary Investigative Report, 1 October / Mass Casualty Shooting (Jan. 18, 2018).

[11] The FBI's report on the shooting shocked many, in that it consisted only of a three-page behavioral analysis, which did not assert that bumpstocks were used. *See* FBI, Key Findings of the Behavioral Analysis Unit's Las Vegas Review Panel (LVRP) (undated). Lastly, the FBI released in its "The Vault" website two groups of heavily-redacted documents involving Paddock which do not appear to establish **use** of bumpstocks.

refused to allow the ATF personnel to inspect the rifles found in Paddock's room.[12] Second, when a FOIA request was made to ATF about the use of bumpstocks in a crime, ATF provided the following response: "We have conducted a search for 'any records documenting the **use** of a bump fire-type stock used during the commission of any crime to date,' and found no responsive records."[13] This ATF response, made on May 1, 2019, was long after the October 1, 2017 Las Vegas shooting. While it is possible, one would assume that if bumpstocks had been known to have been "used" in the Las Vegas shooting, ATF would have had records of such a report, and would have produced them. Lastly, it appears that no further examination of many of Paddock's weapons will be possible, as it has been reported that "[o]f the 49 guns Paddock owned, 13 have been retained by the FBI and the rest were destroyed...."[14]

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[12] *See* ATF briefing slide on "Las Vegas Recovered Weapons and Ammunition" ("ATF personnel were **not** allowed to physically examine the interior of the weapons for machinegun fire-control components...."). *See* D. Codrea, "Las Vegas Bump Stock FOIA Claims ATF Not Allowed to Examine Weapons," *Ammoland* (Aug. 15, 2018).

[13] *See* ATF Deputy Chief, Disclosure Division Peter J. Chisholm May 1, 2019 letter to attorney Stephen Stamboulieh (emphasis added).

[14] C. Mossburg, "Guns belonging to Las Vegas massacre shooter destroyed, property sold with proceeds to be divided among victims' families," *CNN* (Apr. 21, 2023).

III. THE D.C. CIRCUIT ADJUDGED ATF'S POLITICALLY DIRECTED REINTERPRETATION OF "MACHINEGUN" TO BE THE "BEST" POSSIBLE INTERPRETATION.

As discussed *supra*, the D.C. Circuit had no problem with ATF being directed to issue a revised regulation to achieve a politically desired result, despite its variance from the statutory text and despite its reversing more than a decade of ATF's own contrary rulings. *See Guedes IV* at 311. Rather, the court went further to conclude that this politically directed rewrite somehow achieved the "best" possible interpretation of the statute. *See id.* at 310. To the contrary, the Rule presents neither the "best," nor even a "reasonable" interpretation.

A. The Regulation Amended the Statute.

According to Congress, a machinegun is "any weapon which shoots ... **automatically** more than one shot, without manual reloading, **by a single function of the trigger**." 26 U.S.C. § 5845(b) (emphasis added). When this definition, which was repeated in the ATF regulation, is applied to a bumpstock, ATF's longstanding position that a bumpstock is not a machinegun is clearly correct. Thus, to implement the directive it received, it was necessary for ATF to issue the following regulation that both substantially varied from, and supplemented, the statute, for the sole purpose of covering bumpstocks:

> For purposes of this definition, the term "**automatically**" as it modifies "shoots, is designed to shoot, or can be readily restored to shoot," **means** functioning as the result of a **self-acting or self-regulating mechanism** that allows the firing of multiple rounds through a single function of the trigger; and "**single function** of the trigger" **means** a **single pull** of the trigger **and analogous motions**. [27 C.F.R. § 478.11 (emphasis added).]

Yet even after literally replacing a key word ("pull") in the statute, ATF still found it necessary to add another sentence to the end of its revised definition:

> The term "machine gun" **includes a bump-stock-type device**.... [*Id.* (emphasis added)]

Were there any remaining doubt, this last provision in the new regulation confirms that ATF was seeking not to achieve the "best" interpretation of the statute, but rather to achieve the particular result that President Trump directed.

B. The Statutory Term "Automatically" Is Clear and Unambiguous, and Does Not Require Supplementation.

A shooter using a bumpstock must apply both forward pressure to the rifle, and rearward pressure on the bumpstock, in order both to begin and to maintain a sequence of bump fire. This necessary application of

simultaneous and opposing pressures by the shooter means that a bumpstock does not in any sense operate "automatically."

Nor could the required human inputs, made on parts of the firearm that are *not the trigger*, mean that the weapon fires "automatically ... by a single function *of the trigger*." The statute must be read as a whole. A machinegun is one that "shoots ... **automatically** more than one shot, without manual reloading, **by a single function of the trigger**." 26 U.S.C. § 5845(b) (emphasis added). A "single function of the trigger" is critical limiting language for "automatically," representing the starting and the ending point of just how much input is allowable.

Paradoxically, the D.C. Circuit previously asserted that "by a single function of the trigger" does not necessarily mean "by *only* a single function of the trigger," but instead could mean "by a single function of the trigger" plus "some further degree of manual input." *Guedes II* at 31. This explanation blatantly violates the rule that "[n]othing is to be added to what the text states or reasonably implies ... a matter not covered is to be treated as not covered." A. Scalia and B. Garner, Reading Law at 93 (West Publishing: 2012). As Judge Henderson explained in her dissent to the D.C. Circuit's denial of a preliminary injunction, "[t]he statute specifies a single function; the Rule specifies a single function *plus*." *Guedes II* at 35 (Henderson, J., dissenting). To stop reading after "automatically" would be to miss the meaning of the statute; the definition of machinegun is not limited simply to automatic shooting, but to automatic

shooting that occurs **without** manual reloading and **by** a single function of the trigger. *See id.* at 43 (Henderson, J., dissenting).

"In sum," the D.C. Circuit eventually held in the case below, "automatically is best understood to mean a 'result of a self-acting or self-regulating mechanism.'" *Guedes IV* at 317. But a bumpstock-equipped rifle is not "self-acting" or "self-regulating." Rather, it is human-acted and human-regulated. Without continuous forward pressure to the rifle and continuous rearward pressure to the bumpstock by the operator, there would be no counteracting of the firearm's recoil, no additional forward pressure, and thus no additional "functions of the trigger" and no additional shots fired.

In criticizing Plaintiffs' approval of ATF's historic interpretation of "automatically," the court asserts that even a conventional machine gun requires more than a "single function of the trigger," because "the shooter must both **pull the trigger** and **keep his finger depressed on the trigger** to continue firing." *Guedes IV* at 321 (emphasis added). This is equivalent to arguing that putting your foot down involves multiple "functions of the foot," since after putting your foot down, it remains on the ground.

C. The Statutory Phrase "Single Function of the Trigger" Is Clear and Does Not Mean "Single Pull of the Trigger."

The statute defines a "machinegun" as one that operates "by a single **function** of the trigger," but the

Rule rewrites that phrase as "by a single **pull** of the trigger." The words "function" and "pull" are not synonyms, nor are they even related concepts. "Single function of the trigger" clearly and unambiguously refers to the **mechanical process** through which the trigger goes (*i.e.*, what the firearm is doing). The phrase clearly does not refer to the **biological process** (*i.e.*, what the shooter is doing) which sets this mechanical process into motion.

According to the D.C. Circuit, the ATF rewrite of the statute relied on part of a footnote from this Court which states: "a weapon that fires repeatedly with a single pull of the trigger." *Staples v. United States*, 511 U.S. 600, 602 n.1 (1994); *see Guedes IV* at 314. But this excerpt from *Staples* distorts this Court's actual meaning. The cited note in *Staples* continues: "**once its trigger is depressed,** the weapon will automatically continue to fire **until its trigger is released.**" *Id.* (emphasis added). It is clear that this Court was describing an actual machine gun — not a bumpstock-equipped semiautomatic rifle where which the trigger is "released" and reset with every shot.

In further blue penciling the statutes, the court below ruled that, "under the National Firearms Act and Gun Control Act, a 'single function' of the trigger is best understood as a 'single pull of the trigger' **and 'analogous motions**....'" *Guedes IV* at 317 (emphasis added). Apparently substituting "pull" for "function" was not enough, so ATF gratuitously added "and analogous motions" — not to achieve the "best" interpretation of the statute, but to ban bumpstocks.

If the statutory text were applied, it is clear a bumpstock-equipped rifle fires only a single round "by a single function of the trigger." Each time the trigger of a semiautomatic firearm is depressed and reset (one complete function of the trigger), one round is fired. Click, bang, click. A bumpstock does not change this mechanical operation, but only facilitates the shooter making the process occur more rapidly. On the other hand, an actual machinegun fires a series of shots for each "function" of the trigger. Click, bang, bang, bang, click.

Indeed, the D.C. Circuit has previously acknowledged as much, noting that the statute as written "would tend to exclude bump-stock devices: ... a semiautomatic rifle outfitted with a bump stock ... engender[s] a rapid bumping of the trigger against the shooter's stationary finger, such that **each bullet is fired because of a distinct mechanical act of the trigger**." *Guedes II* at 29 (emphasis added). Judge Henderson's dissent to that decision was even more clear — "a bump stock *cannot* fire more than one round with a *single* function of the trigger.... If the focus is — as it must be — on the trigger, a bump stock does not qualify as a 'machinegun.'" *Id.* at 47-48 (Henderson, J., dissenting).

IV. TWO SIXTH CIRCUIT PANELS HAVE INVALIDATED THE ATF BUMPSTOCK RULE.

In its August 9, 2022 opinion, the D.C. Circuit reported that "every circuit to have considered this question has so far upheld the Bump Stock Rule."

Guedes IV at 322. That review of the circuits counted the Sixth Circuit as having upheld the rule, but there is more to that story.

Since the court below ruled, on April 25, 2023, as pointed out by Petitioners, a Sixth Circuit panel invalidated ATF's Rule, concluding that the statutory term "machinegun" does not include non-mechanical bumpstocks. *See Hardin v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 65 F.4th 895 (6th Cir. 2023); *see also* Pet. Cert. at 5. In fact, this was actually the second time a Sixth Circuit panel reversed the ATF. An earlier Sixth Circuit panel had also rejected the Rule in a case brought by three of these *amici* — Gun Owners of America, Gun Owners Foundation, and Virginia Citizens Defense League.

The earlier challenge was brought to the Rule in the Western District of Michigan. The district court concluded that, although Congress had not explicitly declared whether bump stock-equipped weapons were machineguns, applying *Chevron* deference, ATF's definition was permissible. *Gun Owners of Am. v. Barr*, 363 F. Supp. 3d 823, 831-832 (W.D. Mich. 2019).

On appeal, however, a divided Sixth Circuit panel reversed in an opinion written by Judge Batchelder. Citing this Court's decision in *United States v. Apel*, 571 U.S. 359, 369 (2014), the panel observed that "we have *never* held that the Government's reading of a *criminal* statute is entitled to *any* deference," and *"Chevron* deference categorically does not apply to the judicial interpretation of statutes that criminalize conduct, *i.e.*, that impose criminal penalties." *Chevron*

deference should not apply in the criminal context because criminal laws are not based so much in "agency expertise" as in "the moral condemnation of the community." *Gun Owners of Am., Inc. v. Garland*, 992 F.3d 446, 454-55, 462 (6th Cir. 2021) (vacated *en banc* in *Gun Owners of Am., Inc. v. Garland,* 19 F.4th 890 (6th Cir. 2021). Thus, the panel concluded:

> for criminal statutes, where the primary question is what conduct should be condemned and punished, the first rationale of *Chevron* deference — deferring to an agency's expertise — is unconvincing because the agency's technical specialized knowledge does not assist in making the value-laden judgment underlying our criminal laws. That judgment is reserved to the people through their duly elected representatives in Congress. [*Id.* at 463.]

The panel further explained that *Chevron* deference in the criminal context would violate the Constitution's separation of powers. "[G]iving one branch the power to both draft and enforce criminal statutes jeopardizes the people's right to liberty," the court noted. *Id.* at 465.

On June 25, 2021, the Sixth Circuit granted *en banc* review and heard oral argument on October 20, 2021, after which the court split evenly 8 to 8, thereby affirming the district court opinion by default. *See*

Gun Owners of Am., Inc. v. Garland, 19 F.4th 890 (6th Cir. 2021).[15]

V. COURTS MAY NOT INTERPRET STATUTES BASED ON MARKETING MATERIALS OR REWRITE STATUTES TO BETTER IMPLEMENT PERCEIVED CONGRESSIONAL CONCERNS.

A. Marketing Materials.

To bolster ATF's regulatory revisions to the statutory text, the D.C. Circuit quoted from bumpstock sales brochures, including one manufacturer that referred to a bumpstock-equipped rifle as "a legal method of 'full-auto firing,'" and a device which allows the shooter "'to recreate the feeling of automatic firing.'" *Guedes IV* at 306, 318. Another stated that its device would allow for "'[s]praying 900 rounds in 60 seconds.'" *Id.* at 322. None of these statements establish whether a bumpstock is a machinegun under the statute. This is not a consumer fraud case where the courts attempt to divine whether a product meets the self-serving promotional claims of its manufacturer. Rather, it is purely a question of statutory interpretation, and marketing materials are neither an accepted nor permissible way to interpret statutory text.

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[15] Concurring opinions were filed by Judges White (joined by Judges Moore, Cole, Clay, and Stranch) and Gibbons (joined by Moore, Cole, White, and Stranch), while a dissenting opinion was filed by Judge Murphy (joined by Chief Judge Sutton and Judges Batchelder, Kethledge, Thapar, Bush, Larsen, and Nalbandian.)

B. Perceived Congressional Concern.

In finding ATF's new interpretation of "machinegun" to be the "best" possible interpretation, the D.C. Circuit interpreted "machinegun" as viewed through the lens of congressional concern about lethality and rate of fire:

> Congress's **concern** for the danger posed by machine guns centered on their **destructive** potential and exacerbation of serious crime. Bump stocks present a heightened capacity for **lethality** as well; they are estimated to **fire between 400 and 800 bullets** per minute, as compared to a semiautomatic weapon's **180 bullets** per minute. [*Guedes IV* at 316 (emphasis added).]

From this, the court concluded: "It is therefore consistent with congressional purpose to define 'single function' [of the trigger] with a focus on the weapon's ease of use." *Guedes IV* at 316. The court seemed to believe that ATF's substitution of "single pull" for Congress' test "single function," better served congressional "concerns" than the term that Congress had chosen.

Yet all firearms are potentially destructive and lethal. If Congress had wanted to make rate of fire the test for what qualifies as a machine gun, it certainly could have done so. Having not done so, what rate of fire is to be permitted? Although today 180 bullets per minute might seem fine, why could a future court not conclude that this allows too much "destructive

potential," "exacerbation of serious crime," or "heightened capacity for lethality"? How many rounds per minute is too many? When the statutory definition is abandoned in favor of a perceived "congressional concern" test, there is no certainty to be had.

Agencies are neither free to edit statutes to fit their own policy agendas, nor to implement some alleged "concern" that bureaucrats divine from a congressional enactment. Rather, "Congress alone has the institutional competence, democratic legitimacy, and (most importantly) constitutional authority to revise statutes in light of new social problems and preferences. Until it exercises that power, the people may rely on the original meaning of the written law." *Wisconsin Central Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018). *See also Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 325-28 (2014) ("[a]n agency has no power to 'tailor' legislation to bureaucratic policy goals by rewriting unambiguous statutory terms ... to suit its own sense of how the statute should operate ... [the agency's] need to rewrite [the statute] should have alerted [it] that it had taken a wrong interpretive turn."); *Christensen v. Harris County*, 529 U.S. 576, 588 (2000) (an agency may not, "under the guise of interpreting a regulation ... create *de facto* a new regulation."); *Dig. Realty Trust, Inc. v. Somers*, 138 S. Ct. 767, 782 (2018) ("[t]he statute's unambiguous ... definition ... precludes the [agency] from more expansively interpreting that term.").

CONCLUSION

For the foregoing reasons, the petition should be held pending resolution of the petition for writ of certiorari in *Garland v. Cargill*, No. 22-976, which should be granted, and the Rule vacated.

Respectfully submitted,

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