No. 22-976

In the Supreme Court of the United States

MERRICK B. GARLAND, ATTORNEY GENERAL, ET AL.,
PETITIONERS

v.

MICHAEL CARGILL, RESPONDENT

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

The National Firearms Act defines a "machinegun" as "any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger." 26 U.S.C. § 5845(b). This definition also includes any "part designed and intended solely and exclusively . . . for use in converting a weapon into a machinegun." *Id.* A "bump stock" is a device attached to a rifle that allows the trigger to bump repeatedly into the shooter's finger after firing. This can produce rapid fire through repeated manual activations of the trigger, but only if the shooter applies continual forward pressure on the barrel or front grip of the rifle with his non-trigger hand. The shooter must also keep his finger near the trigger and use that same hand to apply simultaneous rearward pressure on the weapon, which prevents the forward thrusts of the non-trigger hand from moving the entire weapon forward.

Between 2008 and 2017, the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) issued numerous classification decisions under three different presidential administrations holding that non-mechanical bump stocks do not qualify as "machineguns" under 26 U.S.C. § 5845(b). But in 2018, ATF reversed its position and issued a final rule declaring bump stocks machineguns. The question presented is:

> Does a bump stock–equipped rifle fire more than one shot "automatically . . . by a single function of the trigger"?

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OPINIONS BELOW

The opinion of the en banc court of appeals is reported at 57 F.4th 447 and reproduced at Pet. App. 1a–71a. The vacated opinion of the three-judge panel is reported at 20 F.4th 1004 and reproduced at Pet. App. 72a–91a. The district court's opinion is reported at 502 F. Supp. 3d 1163 and reproduced at Pet. App. 92a–153a. The final rule issued by ATF appears in the Federal Register at 83 Fed. Reg. 66,514 (Dec. 26, 2018) and is included in the Administrative Record at AR5764–AR5804.

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions and agency rules are reproduced in the appendix to the petitioner's brief.

STATEMENT

Federal law bans civilians from transferring or possessing machineguns. *See* 18 U.S.C. § 922(o)(1).[1] A "machinegun" is defined as:

> [A]ny 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).[2] Machineguns differ from "semi-automatic" weapons (also called "self-loading" or "auto-

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1. The statute exempts machineguns that were "lawfully possessed" before 1986. *See* 18 U.S.C. § 922(o)(2)(B).

2. The Solicitor General's statement gets off to a bad start by quoting not from the statutory definition of "machinegun," but from a paraphrase in *Staples v. United States*, 511 U.S. 600 (1994). *See* Pet. Br. at 2 ("Under federal law, a 'machinegun' is a firearm that 'fires *repeatedly* with a single *pull* of the trigger.'" (quoting *Staples*, 511 U.S. 600, 602 n.1 (1994) (emphasis added)). The statutory definition of machinegun does not turn on whether a weapon fires "*repeatedly*" with a "single *pull*" of the trigger; it asks whether a firearm shoots more than one shot "*automatically*" by a "single *function*" of the trigger. This is the

(continued…)

loading" firearms), which automatically load a new cartridge into the chamber after firing, yet still require the shooter to re-activate the trigger before a subsequent shot is fired. *See* 18 U.S.C. § 921(a)(29) (defining "semi-automatic rifle"). A machinegun, by contrast, will fire more than one shot if the shooter holds down the trigger; a semi-automatic weapon will fire only once unless the shooter releases and reengages the trigger between shots.

I. BUMP FIRING AND BUMP STOCKS

Experts have devised ways for semi-automatic rifles to fire at rates approaching those of machineguns. One of these techniques is called "bump firing," which causes the trigger to bump repeatedly and rapidly into the shooter's finger. The technique is summarized aptly by Judge Murphy:

> A shooter who bump fires relies on the recoil energy from the rifle's discharge to push the gun slightly backward from the trigger finger, which remains stationary. The rifle's trigger resets as it separates from the trigger finger. The shooter then uses the non-trigger hand placed on the rifle's fore-end to push the gun (and thus the trigger) slightly forward. The trigger "bumps" into the still-stationary trigger finger, discharging a second shot. The recoil energy from each additional shot combined

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first of the many efforts to disguise the text of 26 U.S.C. § 5845(b) that appear throughout the Solicitor General's brief.

> with the shooter's forward pressure with the non-trigger hand allows the rifle's backward-forward cycle to repeat itself rapidly. A shooter may also use a belt loop to bump fire by sticking the trigger finger inside the loop and shooting from the waist level to keep the rifle more stable.

Gun Owners of America, Inc. v. Garland, 19 F.4th 890, 911 (6th Cir. 2021) (en banc) (Murphy, J., dissenting from affirmance of judgment by equally divided vote) (citing Final Rule, 83 Fed. Reg. 66,514, 66,533 (Dec. 26, 2018)). Bump firing is a "technique that any shooter can perform with training or with everyday items such as a rubber band or belt loop." Final Rule, 83 Fed. Reg. at 66,532.

A "bump stock" is a device that attaches to a semi-automatic rifle that allows "bump firing" to occur. A bump stock replaces a semi-automatic rifle's standard stock[3] with a plastic casing that allows the rifle's receiver to slide back and forth within the casing. *See* Final Rule, 83 Fed. Reg. at 66,518.[4] A bump stock also includes an extension ledge for the shooter's trigger finger, which helps keep the finger stationary. *See id.* at 66,516. When the rifle fires, the recoil energy from its discharge separates the stationary trigger finger from the trigger, al-

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3. The "stock" is the part of a rifle that rests against the shooter's shoulder. *See* Final Rule, 83 Fed. Reg. at 66,516.

4. An animated .gif of this sliding process was cited in the Fifth Circuit plurality opinion, Pet. App. 10a n.3, and can be viewed at https://www.ca5.uscourts.gov/opinions/pub/20/20-51016_bump_fire_animation.gif

lowing the trigger to reset. The shooter must keep his finger stationary in front of the trigger and use his trigger hand to apply constant rearward pressure on the weapon, while simultaneously using his non-trigger hand to continually thrust the barrel or front grip of the rifle forward to counteract kickback. *See id.* at 66,518. This technique forces the rifle's receiver (and trigger) forward immediately following recoil, which "bumps" the trigger into the shooter's finger and activates another discharge. *See id.*[5]

The key to successful bump firing is administering continual and rapid forward thrusts on the barrel or front grip of the rifle with the non-trigger hand while keeping the trigger finger stationary despite the rifle's recoil. A shooter can master that ability with or without a bump stock, but it takes considerable practice either way.

II. ATF'S REGULATION OF BUMP STOCKS

The first bump stock was patented in 2000 by William Akins and called the "Akins Accelerator." This device used an internal spring, rather than forward pressure from the shooter's non-trigger hand, to force the rifle and trigger forward after recoil. *See* Final Rule, 83 Fed. Reg. at 66,517 (describing the Akins Accelerator). In 2003, ATF issued a classification letter declaring that the

5. Videos demonstrating the use of bump stocks by experts are in the trial-court record at docket entry 59-1, *see Cargill v. Garland*, No. 1:19-cv-00349-DAE (W.D. Tex.); *see also* Legally Armed America, *What is a bump fire stock?*, YouTube (Oct. 3, 2017), https://www.youtube.com/watch?v=D6oaRAgdslE.

Akins Accelerator was not a "machinegun" because an Akins-equipped rifle "did not fire more than one shot by a single function of the trigger." *Akins v. United States*, 312 Fed. Appx. 197, 198 (11th Cir. 2009).

In 2006, however, ATF changed its position and classified the Akins Accelerator as a machinegun. J.A. 7–11 (ATF's classification letter). In its classification letter, ATF asserted that the "legislative history" of the National Firearms Act of 1934 indicates that the "drafters" intended to equate a "single function of the trigger" with a "single pull of the trigger," although it did not quote or provide any analysis of this supposedly dispositive legislative history:

> Legislative history for the National Firearms Act indicates the drafters equated single function of the trigger" with "single pull of the trigger." National Firearms Act: Hearings Before the Comm. on Ways and Means, House of Representatives, Second Session on H.R. 9066. 73rd Cong., at 40 (1934). Accordingly, 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.

J.A. 10; *see also* Final Rule, 83 Fed. Reg. at 66,517 (acknowledging this "'single pull of the trigger' test marked a change from ATF's prior interpretations of 'single function of the trigger'"). ATF then declared the Akins

Accelerator a "machinegun" because "a single *pull* of the trigger initiates an automatic firing cycle that continues until the finger is released, the weapon malfunctions, or the ammunition supply is exhausted." J.A. 9–10 (emphasis added). On December 13, 2006, ATF issued Ruling 2006-2, which reiterates ATF's decision to equate "single function of the trigger" with "single pull of the trigger," based on "legislative history." J.A. 14 ("This determination is consistent with the legislative history of the National Firearms Act in which the drafters equated 'single function of the trigger' with 'single pull of the trigger.'").

After reclassifying the Akins Accelerator as a machinegun, ATF continued to issue letters approving the use of bump stocks that lack the internal spring of the Akins Accelerator, but instead require the shooter to apply constant forward pressure on the rifle that causes it to move forward and "bump" the trigger finger after recoiling. *See* Final Rule, 83 Fed. Reg. at 66,517 ("Following its reclassification of the Akins Accelerator as a machinegun, ATF determined and advised owners of Akins Accelerator devices that removal and disposal of the internal spring—the component that caused the rifle to slide forward in the stock—would render the device a non-machinegun under the statutory definition."). Between 2008 and 2017, ATF issued 15 separate letter rulings declaring that "non-mechanical" bump stocks fall outside the statutory definition of "machinegun" because they do not "automatically" shoot more than one shot

"with a single pull of the trigger."[6] ATF opined that the internal spring of the Akins accelerator is what caused multiple shots to fire "automatically" in response to a "single pull" of the trigger, and the need for a shooter to apply constant forward pressure on the rifle removes the "automatic" component provided by the spring.[7]

III. ATF Changes Its Interpretation Of "Machinegun" In Response To The 2017 Las Vegas Shooting

On October 1, 2017, a gunman armed in part with bump stock–equipped rifles opened fire on a crowd in Las Vegas, killing 58 and injuring hundreds more. This episode provoked efforts to outlaw bump stocks nationwide. Multiple bills were introduced in Congress to criminalize the manufacture, transfer, and possession of bump stocks,[8] but none were enacted. While these bills were pending, the Trump Administration sought to pro-

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6. J.A. 16–68; *see also* J.A. 22 ("The absence of an accelerator spring in the submitted device prevents the device from operating automatically as described in ATF Ruling 2006-2."). J.A. 25–26 ("The stock has no automatically functioning mechanical parts or springs and performs no automatic mechanical function when installed.").

7. *See* Final Rule, 83 Fed. Reg. at 66,517 ("ATF ultimately concluded that these devices did not qualify as machineguns because, in ATF's view, they did not 'automatically' shoot more than one shot with a single pull of the trigger.").

8. *See* H.R. 3947, 115th Cong. (2017), http://bit.ly/48Lr1hh; H.R. 3999, 115th Cong. (2017), http://bit.ly/3RQ3x3J; S. 1916, 115th Cong. (2017), http://bit.ly/3vj2Zfd; S. 2475, 115th Cong. (2018), http://bit.ly/3RNPWKo.

hibit bump stocks through executive decree. On December 26, 2017, ATF issued an advance notice of proposed rulemaking seeking comments on whether it should reinterpret the statutory definition of "machinegun" to include bump stocks. *See* ATF, *Application of the Definition of Machinegun to "Bump Fire" Stocks and Other Similar Device*s, 82 Fed. Reg. 60,929 (Dec. 26, 2017). And on February 20, 2018, President Trump issued a memorandum directing the Department of Justice to propose "as expeditiously as possible" a rule that would ban "all devices that turn legal weapons into machineguns."[9]

On March 29, 2018—37 days after President Trump's directive—ATF proposed a rule that would "clarify" the statutory definition of "machinegun" to include bump stocks. *See* ATF, *Bump-Stock-Type Devices*, 83 Fed. Reg. 13,442 (March 29, 2018). But Senator Dianne Feinstein—who sponsored S. 1916, one of the bills to outlaw bump stocks—warned that ATF lacked authority to ban bump stocks under 26 U.S.C. § 5845(b), and she urged Congress to enact legislation to ensure that any federal prohibition would rest on a sound legal footing:

> The ATF lacks authority under the law to ban bump-fire stocks. Period. . . .

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9. J.A. 91; *see also id.* ("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.").

> Legislation is the only answer and Congress should not attempt to pass the buck by waiting for the ATF.

Press Release, Sen. Dianne Feinstein, *Feinstein Statement on ATF Rulemaking on Bump Stocks* (Dec. 5, 2017), available at http://perma.cc/B5G5-QECJ. Senator Feinstein reiterated these concerns after ATF announced its proposed rule, declaring that the rule rests on a "dubious analysis" that would be vulnerable to court challenge. *See* Press Release, Sen. Dianne Feinstein, *Feinstein Statement on Regulation to Ban Bump Stocks* (Mar. 23, 2018), available at http://perma.cc/B4MF-WTSN ("Unbelievably, the regulation hinges on a dubious analysis claiming that bumping the trigger is not the same as pulling it. The gun lobby and manufacturers will have a field day with this reasoning.").

On December 26, 2018, ATF issued its final rule, which amends the definition of "machinegun" in 27 C.F.R. §§ 447.11, 478.11, and 479.11. *See* ATF, *Bump-Stock-Type Devices,* Final Rule, 83 Fed. Reg. 66,514 (Dec. 26, 2018) (Final Rule). Before the final rule, the definition of "machinegun" in these regulations tracked the statutory definition in 26 U.S.C. § 5845(b). *See id.* at 66,514. The final rule amends those regulations by tacking on the following language:

> 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 func-

> tion of the trigger; and "single function of the trigger" means a single pull of the trigger and analogous motions. The term "machine gun" includes a bump-stock-type device, *i.e.*, a device that allows a semi-automatic firearm to shoot more than one shot with a single pull of the trigger by harnessing the recoil energy of the semiautomatic firearm to which it is affixed so that the trigger resets and continues firing without additional physical manipulation of the trigger by the shooter.

Id. at 66,553–54. The final rule repudiated ATF's previous letter rulings that had excluded non-mechanical bump stocks from the statutory definition of "machinegun,"[10] and claimed that its new interpretation should receive deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).[11]

The final rule ordered Americans possessing bump stock to destroy them or abandon them at an ATF office by March 26, 2019. *See id.* at 66,514 ("[C]urrent possessors of these devices will be required to destroy the devices or abandon them at an ATF office prior to the effective date of the rule."). The rule estimates that as

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10. *See* Final Rule, 83 Fed. Reg. at 66,530–31.

11. *See* Final Rule, 83 Fed. Reg. at 66,527 ("Congress . . . implicitly left it to the Department to define "automatically" and "single function of the trigger" in the event those terms are ambiguous. . . . [T]he Department's construction of those terms is reasonable under *Chevron*.").

many as 520,000 bump-stock devices were sold between 2010 and 2018, each at a price ranging from $179.95 to $425.95, and that Americans spent approximately $102.5 million on these devices that now must be surrendered or destroyed. *See id.* at 66,547.

IV. Proceedings Below

Respondent Michael Cargill owned two Slide Fire bump-stock devices. After ATF issued its final rule, Cargill surrendered his bump stocks under protest and then sued to "set aside" the ATF rule. *See* 5 U.S.C. § 706(2)(A) (requiring courts to "hold unlawful and set aside" unlawful agency action). Cargill also sought declaratory and injunctive relief that would restrain ATF from enforcing the final rule against him and others. *See* Complaint, *Cargill v. Barr*, No. 1:19-cv-00349 (W.D. Tex. Mar. 25, 2019), Docket Entry No. 1, at 37–38.

Cargill attacked the final rule on numerous grounds. He argued that the rule is "not in accordance with law" because bump stocks fall outside the statutory definition of "machinegun." *See id.* ¶¶ 182–205. He argued that the rule is arbitrary and capricious because ATF "rejected the technical conclusions of its own experts at the insistence of the Department of Justice and the President." *See id.* ¶ 215. And he argued that ATF lacks substantive rulemaking authority over the statutory definition of "machinegun." *See id.* ¶¶ 220–240.

In response to Cargill's lawsuit, ATF characterized its final rule as an interpretive rule that merely describes the agency's views on the meaning of 26 U.S.C. § 5845(b), rather than a "substantive" or "legislative" rule that exercises gap-filling authority delegated by

Congress. *See* Defs.' Trial Br., *Cargill v. Barr*, No. 1:19-cv-00349 (W.D. Tex. Oct. 1, 2020), Docket Entry No. 59, at 13–16; *id.* at 13–14 ("A rule that announces an interpretation compelled by the statute is not legislative."). And ATF urged the Court to uphold the final rule by claiming that it evinces the "best interpretation" of 26 U.S.C. § 5845(b), disavowing any need for *Chevron* deference even though the rule went through notice-and-comment procedures. *See id.* at 17 ("[B]ecause the Rule sets forth the best interpretation of the statutory text, deference under *Chevron* . . . is not required to resolve this case.").

The district court entered judgment for ATF. Pet. App. 92a–153a. It held that the final rule was a substantive (or legislative) rule[12]—even though ATF's lawyers conceded that it wasn't—yet it declined to apply *Chevron* because the agency had abandoned its prior interpretation of the statute[13] and because *Chevron* is inapplicable to criminal statutes.[14] Then the district court held that the "traditional tools of statutory interpretation" provide "unambiguous" support for the final rule's inter-

12. Pet. App. 126a–127a ("[T]he Final Rule is a legislative rule for which Defendants invoked their authority under 18 U.S.C. § 926(a) and 26 U.S.C. § 7805").

13. Pet. App. 126a–127a; *see also id.* at 133a ("An interpretation that 'conflicts with the agency's earlier interpretation is entitled to considerably less deference than a consistently held agency view.'" (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987)).

14. Pet. App. 133a (citing *United States v. Apel*, 571 U.S. 359, 369 (2014)); *see also id.* at 133a–135a.

pretation of "machinegun,"[15] and it declined to apply the rule of lenity.

A three-judge panel of the Fifth Circuit affirmed,[16] but the Fifth Circuit granted rehearing en banc and reversed the district court by a 13-3 vote. Pet. App. 1a–71a. An eight-judge plurality,[17] in an opinion authored by Judge Elrod, argued that the statutory definition of "machinegun" unambiguously excludes non-mechanical bump stocks. Pet. App. 19a–32a. The plurality also argued that the *Chevron* framework would not apply even if the statute were ambiguous because: (1) ATF's lawyers waived reliance on *Chevron*;[18] (2) *Chevron* is inapplicable to statutes that impose criminal penalties;[19] and (3) ATF's present-day interpretation of "machinegun" contradicts its previous interpretations of the statute.[20]

Five other judges[21] thought the statutory definition of "machinegun" was sufficiently ambiguous to invoke

15. Pet. App. 137a–138a.

16. Pet. App. 72a–91a.

17. Judges Jones, Smith, Elrod, Willett, Duncan, Engelhardt, Oldham, and Wilson.

18. Pet. App. 32a–35a.

19. Pet. App. 36a–39a. Judge Oldham did not join this portion of the plurality opinion, leaving only seven of the Court's judges in support of this reason for refusing to apply *Chevron*. Pet. App. 2a n.*.

20. Pet. App. 39a–41a. Judge Oldham did not join this portion of the plurality opinion either. Pet. App. 2a n.*.

21. Chief Judge Richman, along with Judges Stewart, Haynes, Southwick, and Ho.

the rule of lenity.[22] Four of those judges, along with seven of the eight judges in the plurality, joined Part V of Judge Elrod's opinion, which assumed that the statute was ambiguous and held that the rule of lenity required ATF and the courts to resolve those ambiguities in Cargill's favor. Pet. App. 41a–45a. Three judges dissented.[23]

On remand, the district court entered judgment for Cargill but awarded him no relief—no declaratory judgment, no injunction, no return of his bump stocks, and no remedy that "holds unlawful" and "sets aside" the final rule under section 706 of the APA. *See* Judgment, *Cargill v. Garland*, No. 1:19-cv-00349 (W.D. Tex. Mar. 6, 2023), Docket Entry No. 65 ("Judgment is entered in favor of the Plaintiff, Michael Cargill."). Cargill protested that a court cannot enter judgment for a plaintiff that withholds all relief, but the district court denied Cargill's motion to amend the judgment after this Court granted certiorari. *See Cargill v. Garland*, No. 1:19-cv-00349 (W.D. Tex.), Docket Entries Nos. 68 (Mar. 28, 2023) and 78 (Nov 8, 2023). Cargill has appealed this "judgment" to the Fifth Circuit, where it remains pending.

SUMMARY OF ARGUMENT

Federal law defines a "machinegun" as "any weapon which shoots, is designed to shoot, or can be readily re-

22. Pet. App. 2a n.*; *id.* at 41a–45a; *id.* at 49a (Haynes, J., concurring in the judgment); *id.* at 49a–62a (Ho, J., concurring in part and concurring in the judgment).

23. Pet. App. 63a–71a (Higginson, J., dissenting, joined by Dennis and Graves, JJ.).

stored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger." 26 U.S.C. § 5845(b). A "machinegun" also includes any "part designed and intended solely and exclusively . . . for use in converting a weapon into a machinegun." *Id.* Cargill's bump stocks fall outside the definition of "machinegun" for two separate and independent reasons.

First, a bump stock does not cause a semi-automatic rifle to fire more than one shot "by a single function of the trigger." That is because the trigger of the gun resets—and must be reactivated by the shooter—between every single shot that is fired from a bump stock–equipped weapon. And that means there is only one shot per "function" of the trigger. A bump stock accelerates firing by causing repeated "functions" of the trigger to occur in rapid succession; it does not produce multiple shots in response to a "single function" of the trigger.

Second, even if one believes (or assumes for the sake of argument) that Cargill's non-mechanical bump stocks enable a semi-automatic rifle to fire more than one shot "by a single function of the trigger," they do not do so "automatically" because the shooter must continually thrust the barrel or front grip of the rifle forward with his non-trigger hand for each cartridge he wants to shoot, while simultaneously applying rearward pressure on the weapon with his trigger hand. These are *manual* functions, and there is no component in Cargill's bump stocks that "automates" the repeated firing of shots—such as the spring in the Akins Accelerator. And neither ATF nor the Solicitor General has identified *any* automating apparatus in Cargill's non-mechanical bump

stocks. There is no motor, no spring, no electrical device, or anything else that might automate a manual task.

Because Cargill's bump stocks are excluded from the statutory definition of "machinegun," there cannot be any implied delegation of gap-filling authority to ATF under the framework of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). But if this Court finds the statutory language capable of supporting either Cargill's or the Solicitor General's position, then it should interpret the statute for itself rather than presume a delegation to ATF, as the *Chevron* framework is inapplicable to statutes that define criminal offenses. *See Abramski v. United States*, 573 U.S. 169 (2014); *United States v. Apel*, 571 U.S. 359, 369 (2014). And if the Court finds the statute ambiguous, then it should construe ambiguities in favor of Cargill because the rule of lenity is implicated and a ruling that endorses ATF's interpretive rule will raise serious constitutional questions. By characterizing its final rule as an "interpretive" rule, ATF is purporting to declare what 26 U.S.C. § 5845(b) has *always* meant, and a ruling from this Court that adopts ATF's construction will retroactively make felons out of the hundreds of thousands of Americans who possessed or transferred bump stocks in reliance on ATF's representations of their legality.

Finally, if this Court rules for Cargill, it should instruct the district court to vacate ATF's final rule. *See* 5 U.S.C. § 706 ("The reviewing court *shall* . . . (2) hold unlawful and set aside agency action, findings, and conclusions found to be—(A) . . . not in accordance with law" (emphasis added)). The district court's entry of a "judg-

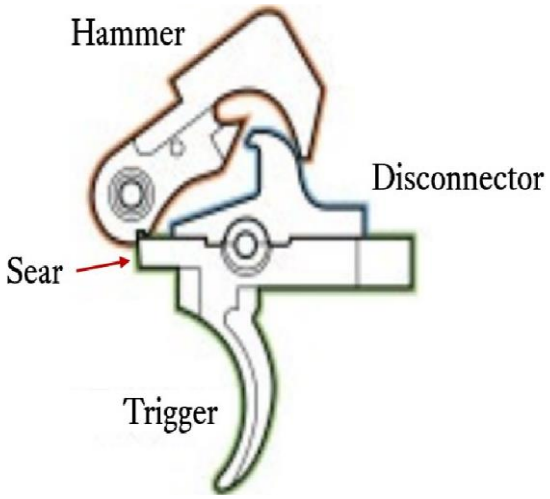
ment" for Cargill that withholds all relief is an oxymoron, and it defies the appellate court that had declared the final rule unlawful.

ARGUMENT

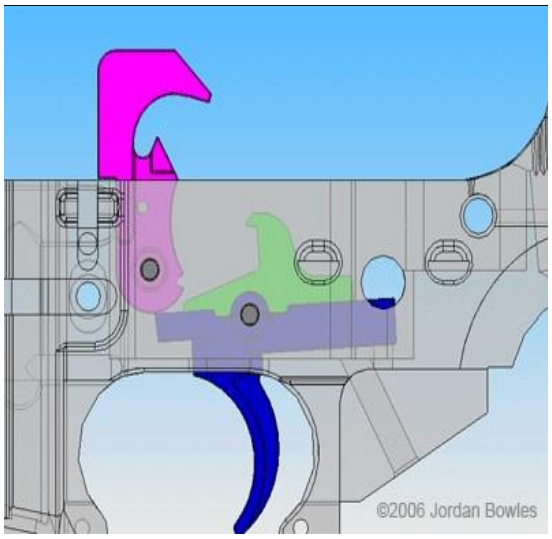
I. A Bump Stock Does Not Cause A Semi-Automatic Rifle To Discharge More Than One Shot "By A Single Function Of The Trigger"

A semi-automatic rifle differs from a "machinegun" because it requires the shooter to release and reengage the trigger between shots; this is what ensures that only one shot is fired for each "function" of the trigger. The Fifth Circuit plurality explained the mechanics of a semi-automatic weapon and provides illustrations showing how the trigger "functions" with each shot. Pet. App. 6a–8a.

The following illustration shows the relevant parts of a semi-automatic weapon in a cocked position:



The "trigger" is a lever (often curved) that allows the shooter to operate the internal mechanisms of a firearm. When the shooter pulls or presses or bumps the trigger, it causes a spring to swing the hammer forward into a firing pin, as displayed in the image below:



This action causes a single bullet to fire, which immediately propels the hammer back on to the disconnector while the trigger remains depressed. When the trigger is released, the hammer and trigger return to the cocked position shown on the previous page's illustration, allowing the shooter to fire again. An animated .gif showing the operation is cited in the Fifth Circuit plurality opinion, and can be viewed at http://perma.cc/73PR-AFCA. *See* Pet. App. 7a n.2.

All parties agree that a semi-automatic weapon of this sort fires only one shot per "function" of the "trigger." The shooting cycle proceeds as follows:

1. The shooter activates the trigger;
2. The trigger releases the hammer, which springs forward and causes a single bullet to be fired; and
3. The shooter releases or disengages the trigger, causing the trigger to reset and allowing the hammer and trigger to return to a cocked position.

All of this constitutes a "single function of the trigger," and any subsequent shot fired after the trigger has reset is the result of a separate "function of the trigger" rather than a continuation of the original function.[24]

A bump stock does not change any of this, and the shooting cycle of a bump stock–equipped semi-automatic rifle is exactly the same as a semi-automatic weapon without the bump stock: A shooter must activate the trigger, causing a single bullet to fire, and he must disengage the trigger and allow it to reset before reactivating the trigger for another shot. The only difference with a bump stock is that this shooting cycle repeats itself

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24. A machinegun, by contrast, uses a device called an "auto sear" that continuously re-cocks and re-releases the hammer for as long as the shooter holds down the trigger. Pet. App. 8a. In the words of the Fifth Circuit plurality, the auto sear "enables a pendulum swing of the hammer . . . without any further input from the user; with one pull of the trigger, an automatic weapon can shoot continuously until ammunition is depleted." *Id.* With these automatic weapons, a single activation of the trigger unleashes a repetitive cycle of firings before the trigger is released, reset, and reengaged.

more quickly, as the bump stock facilitates rapid firing through repeated "bumps" of the trigger into the shooter's finger. But that does not convert a semi-automatic rifle into a machinegun any more than a shooter with an extraordinarily quick trigger finger, and it does not change the fact that the trigger continues to reset and must be reactivated by the shooter after every shot. The "functions" of the trigger on a bump stock–equipped firearm do not merge into each other or become a single "function" merely because they occur in rapid succession, or because some device has helped the shooter to speed up his separate and distinct activations of the trigger. The "function" of the trigger remains exactly the same with or without the bump stock—and the use of a bump stock does not change the fact that only one bullet is fired for each activation of the trigger. A bump stock merely reduces the amount of time that elapses between the separate and distinct "functions" of the trigger; it does not cause more than one shot to fire in response to a "single function of the trigger."

A. The Court Should Reject ATF's Attempt to Equate a "Single Function of the Trigger" with a "Single Pull of the Trigger"

ATF understood all of this when it issued 15 classification letters between 2008 and 2017 declaring that "non-mechanical" bump stocks fall outside the statutory definition of "machinegun." J.A. 16–68. But in 2006, ATF announced that it would start interpreting a "single *function* of the trigger" to mean a "single *pull* of the trigger"—not because of anything that the statute says, but because ATF asserted that the "drafters" of the Na-

tional Firearms Act of 1934 intended to equate these phrases. J.A. 10 ("Legislative history for the National Firearms Act indicates the drafters equated 'single function of the trigger' with 'single pull of the trigger.'"); J.A. 14 (similar). But the "legislative history" that ATF cited consists of nothing more than a statement from Karl T. Frederick—who was not a member of Congress, but the then-President of the National Rifle Association—who said the following during a hearing before the House Ways and Means Committee:

> The definition which I suggest is this:
>
> A machine gun or submachine gun as used in this act means any firearm by whatever name known, loaded or unloaded, which shoots automatically more than one shot without manual reloading, *by a single function of the trigger*.
>
> The distinguishing feature of a machine gun is that *by a single pull of the trigger* the gun continues to fire as long as there is any ammunition in the belt or in the magazine. Other guns require a separate pull of the trigger for every shot fired, and such guns are not properly designated as machine guns. A gun however, 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 on H.R. 9066 Before the House Comm. on Ways and Means, 73d Cong., 2d Sess. 40 (1934) (emphasis added).[25] So ATF decided that it would no longer ask whether a weapon fires more than one shot by "a single *function* of trigger" (even though that is what the statute says), and instead ask whether a weapon fires more than one shot by "a single *pull* of trigger"—and that it would do so because an erstwhile NRA president appeared to regard those phrases as interchangeable when he testified before a congressional committee in 1934.

ATF's attempt to rewrite the statute in this manner is impermissible for many reasons. We can start with the most obvious problem: The enacted language of 26 U.S.C. § 5845(b) is what binds ATF, and an agency must follow the statutory text rather than embark on a quest to uncover the aspirations or intentions of those who lobbied for its enactment. *See Bostock v. Clayton County*, 140 S. Ct. 1731, 1738 (2020) ("[O]nly the words on the page constitute the law adopted by Congress and approved by the President."); *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 528 (2019) ("[W]e are not at liberty to rewrite the statute passed by Congress and signed by the President."). Under no circumstance may an agency (or a court) replace the words in a statute with language that reflects its belief about what the "drafters" thought or hoped to accomplish—even when those beliefs find support in legislative history. *See Epic*

25. The full transcript of this committee hearing can be viewed at https://perma.cc/MC6D-T3E3.

Systems Corp. v. Lewis, 138 S. Ct. 1612, 1631 (2018) ("[L]egislative history is not the law."). *Magwood v. Patterson*, 561 U.S. 320, 334 (2010) ("We cannot replace the actual text with speculation as to Congress' intent.").[26]

Yet there is an even more serious problem with ATF's attempt to rewrite 26 U.S.C. § 5845(b) by replacing the word "function" with the word "pull." As the Solicitor General points out, the phrase "single function of the trigger" *cannot* be equated with a "single pull of the trigger" because there are automatic firearms whose triggers are *pushed* rather than pulled—and the word "function" is needed to ensure that automatic weaponry of this sort falls within the statutory definition of "machinegun":

> [T]he term "single function of the trigger" is not limited to a single pull of the trigger. . . . Some automatic firearms that were well known in 1934 used triggers that had to be pushed with the thumb rather than pulled with the index finger. . . . Congress's use of the more general term "function" rather than "pull" ensured

26. *See also Lewis v. Chicago*, 560 U.S. 205, 215 (2010) ("It is not for us to rewrite the statute so that it covers only what we think is necessary to achieve what we think Congress really intended."); *Lamie v. U.S. Trustee*, 540 U.S. 526, 542 (2004) ("If Congress enacted into law something different from what it intended, then it should amend the statute to conform it to its intent."); *see also* Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 Harv. L. Rev. 417, 419 (1899) ("We do not inquire what the legislature meant; we ask only what the statute means.").

> that the statute would also cover those types of automatic firearms.

Pet. Br. at 21–22. So these phrases are *not* interchangeable and cannot be treated as interchangeable by ATF or by the courts—even though Karl T. Frederick may have regarded them as interchangeable when he spoke to the House Ways and Means Committee in 1934. *See United States v. Alkazahg*, 81 M.J. 764, 780 (N-M. Ct. Crim. App. 2021) (holding that the "structure and text" of 26 U.S.C. § 5845(b) "will not allow" a court "to judicially transform the phrase 'by a single *function* of the trigger' into 'by a single *pull* of the trigger.'").

Given that the Solicitor General acknowledges that a "single function of the trigger" has a different meaning from a "single pull of the trigger," and given the Solicitor General's recognition that the use of the word "function" in 26 U.S.C. § 5845(b) is essential to ensure that the definition of "machinegun" encompasses automatic weapons with triggers that are pushed rather than pulled, we are at a loss to understand how the Solicitor General can simultaneously *defend* ATF's reliance on Frederick's testimony—and attempt to buttress ATF's atextual construction of 26 U.S.C. § 5845(b) by pointing to additional evidence showing how government officials regarded a "single function of the trigger" as synonymous with a "single pull of the trigger." Pet. Br. at 18–21. The Solicitor General touts not only Frederick's testimony,[27] but

27. Pet. Br. at 18–19; *id.* at 19 ("Frederick repeatedly used 'function of the trigger' interchangeably with 'pull of the trigger.'").

also the House and Senate committee reports,[28] statements and actions of individual legislators,[29] a Department of Treasury opinion,[30] and this Court's opinion in *Staples*, 511 U.S. 600,[31] as evidence that "function of the trigger" and "pull of the trigger" are interchangeable. But then the Solicitor General goes on to insist that these phrases cannot be regarded as interchangeable because this would exclude automatic weapons with push triggers from the statutory definition of machinegun. Pet. Br. at 21–22. So which is it? Apparently the Solicitor General wants ATF (and the courts) to be able to equate a "single *function* of the trigger" with a "single *pull* of the trigger" when this would help them sweep disfavored weapons (such as Cargill's non-mechanical bump stocks) into the statutory definition of "machinegun," but not when it would cause automatic weapons with push triggers to fall outside the statutory definition. That approach is even more lawless than the construction of 26 U.S.C. § 5845(b) that appears in the ATF memoranda, as it not only disregards the enacted text but empowers

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28. *Id.* at 19.

29. *Id.* at 20 ("Members of Congress continued to use 'function of the trigger' and 'pull of the trigger' interchangeably in the years after the National Firearms Act was enacted.").

30. *Id.* at 21 (citing Rev. Rul. XII-38-7035, S.T. 772, 13-2 C.B. 434 (1934)).

31. *Id.* at 21 ("In *Staples v. United States*, 511 U.S. 600 (1994), this Court explained that 'a weapon that fires repeatedly with a single pull of the trigger' is a machinegun, while 'a weapon that fires only one shot with each pull of the trigger' is (at most) a semiautomatic firearm. *Id.* at 602 n.1.")

agencies and courts to replace the word "function" with the word "pull" on a selective and opportunistic basis.

B. The Court Should also Reject the Solicitor General's Attempt to Equate a "Single Function of the Trigger" with a "Single Motion of the Shooter" or a "Single Act of the Shooter"

The Solicitor General also proposes her own test for a "machinegun" that turns on whether a weapon fires more than shot by a single *motion* of the *shooter* or by a single *act* of the *shooter*. *See* Pet. Br. at 17 ("A firearm shoots more than one shot 'by a single function of the trigger,' if a single volitional motion, such as a push or a pull, initiates the firing of multiple shots." (citation omitted)); *id.* at 18 ("The term 'single function of the trigger' thus means a single initiation of the firing sequence by some act of the shooter.").[32] That construction is even further afield from the statutory text than the "single pull of the trigger" test. And it would not even reach Cargill's non-mechanical bump stocks, which require more than a "single motion" or a "single act" of the shooter to fire multiple shots.

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32. *See also* Pet. Br. at 18 ("[A] firearm shoots more than one shot 'by a single function of the trigger,' if it fires multiple rounds after the shooter pulls the trigger once." (citation omitted)); *id.* at 22 ("A semiautomatic rifle equipped with a bump stock fires multiple shots 'by a single function of the trigger' . . . [because] [i]t allows a shooter to initiate a bump-firing sequence with a single motion.").

1. The Solicitor General's Construction of 26 U.S.C. § 5845(b) Is Incompatible with the Statutory Language

The Solicitor General's argument rests on the following syllogism:

> Major Premise: The statutory definition of "machinegun" encompasses any device that causes more than one shot to fire in response to a "single motion of the shooter" or a "single act of the shooter."
>
> Minor Premise: Cargill's non-mechanical bump stocks cause more than one shot to fire in response to a "single motion of the shooter" or "single act of the shooter."
>
> Conclusion: Cargill's bump stocks qualify as "machineguns" under 26 U.S.C. § 5845(b).

Both the major premise and the minor premise of this argument are false. We will begin with the major premise.

A bump stock cannot qualify as a "machinegun" unless it causes a weapon to fire more than one shot "by a single function of the trigger." 26 U.S.C. § 5845(b). And the problem for the Solicitor General is that a bump stock does not alter the "function" of the "trigger" in any way. Regardless of whether a semi-automatic rifle is equipped with a bump stock, the weapon will fire only a single bullet in response to a single activation of the trigger—and the shooter must disengage the trigger, allow the trigger to reset, and activate the trigger again before a subsequent shot can be fired. The Solicitor General

does not deny any of this, and she admits that a bump stock–equipped weapon "fires only one shot each time the trigger bumps into the shooter's trigger finger." Pet. Br. at 23. This makes it impossible for the Solicitor General to deny that a separate and distinct "function of the trigger" is needed for each shot fired from a bump stock–equipped rifle, as she acknowledges that the trigger must be disengaged, reset, and activated again before another shot can occur.

The Solicitor General tries to avoid this by claiming that a "single *function* of the *trigger*" refers to a single *act* of the *shooter* or a single *motion* of the *shooter*, but this construction of the statute is textually indefensible. The shooter is not the trigger. *See* Pet. Br. at 23 (acknowledging that "trigger" refers to "a small, curved metal level pulled by the shooter."). The shooter is the person who *activates* and *interacts with* the trigger. A shooter is always distinct from the trigger, as the trigger has no volition, and is nothing more than a mechanical device that enables a shooter to operate the internal mechanisms of a firearm. *See id.* at 25 ("A 'trigger,' by definition, is a mechanism by which the shooter interacts with the firearm.").

So what matters is the behavior of the trigger—not the behavior of the shooter. And the statutory test for "machinegun" turns on whether the *trigger* is causing more than one shot to fire in response to each of its discrete "functions." It does not matter whether the *shooter* is undertaking a single motion or a single act. All that matters is whether the *trigger* is engaged in a single "function"—or in a sequence of distinct "functions"—

when it is activated repeatedly and in rapid succession by a shooter who uses a bump stock. And here the Solicitor General comes up empty, as the "function of the trigger" in a semi-automatic rifle remains exactly the same after a bump stock is attached. Each time the trigger is activated, it releases the hammer, causing a single bullet to be fired, and resets after the shooter disengages the trigger, allowing both the hammer and trigger to return to a cocked position. That completes the "function of the trigger," and when the trigger is reactivated, a separate "function of the trigger" begins anew. All the bump stock does is facilitate rapid activations of the trigger by allowing it to bump repeatedly into the shooter's finger; that does not change the fact that only one shot is fired each time the trigger is activated.

2. Cargill's Non-Mechanical Bump Stocks Require More Than a "Single Motion of the Shooter" or a "Single Act of the Shooter"

Even if this Court were to adopt the Solicitor General's atextual construction and equate a "single function of the trigger" with a single motion (or act) of the shooter, Cargill would still win because his non-mechanical bump stocks require the shooter to engage in at least *two* separate and distinct motions (or acts).

First, the shooter must activate or engage the trigger with the finger of his trigger hand, and he must keep that finger stationary and in front of the trigger to "bump" it when the shooter thrusts the rifle forward after recoiling. Second, the shooter must continually thrust the barrel or front grip of the rifle forward with his non-trigger hand, which causes the trigger to bump into the

shooter's finger after each shot. The shooter must also simultaneously apply ongoing rearward pressure on the weapon with his trigger hand. Each of these motions or acts is needed for successful bump firing; a single motion or act of the shooter will not initiate or maintain a bump-firing cycle. *See* Final Rule, 83 Fed. Reg. at 66,518.

The Solicitor General never acknowledges this problem, and she falsely suggests that a "single" motion of the shooter or a "single" interaction with the trigger can cause multiple shots to fire from a bump stock–equipped rifle. *See* Pet. Br. at 17 ("[A] single volitional motion . . . initiates the firing of multiple shots."); *id.* at 22 ("[A] bump stock . . . allows a shooter to initiate a bump-firing sequence with a single motion"); *id.* at 24 ("The shooter's initial manipulation of the trigger is the means of initiating a continuous cycle of firing multiple shots."). These statements ignore the fact that a "single" motion or interaction with the trigger is incapable of producing multiple shots. To bump fire, the shooter must *also*: (1) Continually thrust the barrel or front grip of the rifle forward with his non-trigger hand; (2) Simultaneously apply rearward pressure on the weapon with his trigger hand*; and* (3) Keep the finger of his trigger hand on the extension ledge to ensure continued "bumping" of the forward-moving trigger. It is simply false for the Solicitor General to say that "[a] shooter who is using a bump stock need *only* perform a single action on the trigger in order to set off a bump-firing cycle that discharges multiple shots." *Id.* at 25 (emphasis added).

The Solicitor General also argues that a "single function of the trigger" should refer to "the shooter's action

on the trigger." *See id.* at 25 ("It is . . . natural to read 'single function of the trigger' to refer to the shooter's action on the trigger.").[33] But we cannot comprehend why the Solicitor General would want to equate the "function of the trigger" with "the shooter's action on the trigger," given that bump stocks require the shooter to "bump" the trigger each time a shot is fired. Every single "bump" into the shooter's finger constitutes a separate and distinct "action on the trigger," and each of these of subsequent "actions on the trigger" is needed for every single shot that gets fired from a bump stock–equipped rifle. And every bump of the trigger moves the trigger the same amount and applies an equal amount of pressure to the trigger as the initial pull. The Solicitor General presents no argument for how each of these separate bumps can collectively be regarded as a "single action on the trigger"—let alone a "single function of the trigger," which is what the statutory text requires.

So the Solicitor General's argument fails even on its own terms, as a single motion or act of the shooter is incapable of causing multiple shots to fire from a bump stock–equipped rifle. And neither is a "single action on the trigger," a "single pull of the trigger," nor any of the other phrases that the Solicitor General proposes as substitutes for the "single function of the trigger" that appears in the statute. Any single "motion," "act," "action," or "pull" on the trigger must be supplemented with addi-

33. *See also* Pet. Br. at 26 ("[T]he definition refers to the shooter's interaction with the weapon").

tional and ongoing manipulation of the firearm and its trigger for more than one shot to be bump fired.

C. The Solicitor General's Remaining Arguments Are Meritless

The Solicitor General's remaining observations about bump stock–equipped rifles have no relevance to whether the *trigger* causes more than one shot to be fired in response to each of its discrete *functions*. The Solicitor General, for example, complains that bump stock–equipped rifles cause the trigger to participate in a single and ongoing "firing sequence."[34] But the statutory definition of "machinegun" is unconcerned with whether a weapon can fire multiple shots during a "firing sequence." The Solicitor General also notes that bump stocks enable a shooter to initiate "a continuous cycle of firing multiple shots,"[35] but the definition of "machinegun" does not turn on whether a weapon can fire multiple shots as part of a "continuous cycle." What matters under the statute is what the *trigger* does, and whether a "single function of the trigger" results in the firing of more than one shot.

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34. Pet. Br. at 24 ("The curved metal lever does not initiate a firing sequence — but rather continues a sequence that has already begun — when it repeatedly bumps into the shooter's finger during the bump-firing cycle. As a result, the curved metal lever's movements during the bump-firing cycle do not qualify as additional 'function[s] of the trigger' — *i.e.*, actions that translate volitional input to initiate a firing sequence."); *id.* at 23 ("'[A] single trigger pull . . . initiates a firing sequence.'" (quoting Pet. App. 104a)).

35. *Id.* at 24.

The Solicitor General is wrong to claim that "[i]t makes no statutory difference that, once the shooter has activated the device with a single pull or push, the device automates the movements of the trigger rather than the movement of the weapon's internal components." Pet. Br. at 24. The statutory definition of "machinegun" depends on what happens when the *trigger* is activated, and whether the weapon fires a single shot or multiple shots in response to each discrete "function" of that "trigger." It makes *all* the difference under the statute that a bump stock allows accelerated firing through repeated manual activations of the trigger, rather than by automating the internal machinery of the firearm in response to a single trigger activation. Only the latter converts a weapon into a "machinegun" as defined in 26 U.S.C. § 5845(b).[36] The Solicitor General is equally wrong to claim that bump stocks "automate" the external movements of the trigger. Bump stocks do not "automate" the external function of the trigger any more than they automate its internal functions, because a shooter must continually thrust forward on the barrel or front grip of the rifle with his non-trigger hand—and he must thrust forward

36. To be sure, an accessory *can* qualify as a "machinegun" if it contains a switch or button that causes the trigger on a firearm to activate repeatedly and automatically in response to a single flip of the switch or press of the button. *See infra* at 38–39; *United States v. Camp*, 343 F.3d 743, 744–45 (5th Cir. 2003). But in these situations the "trigger" becomes the switch or button on the accessory rather than the curved metal lever on the firearm. *See id.* Neither ATF nor the Solicitor General is arguing that a bump-stock device produces a new "trigger" that automates the movements of the curved metal lever on the gun.

to counteract kickback *each* time he wants to fire a shot or activate the trigger. *See infra* at 40–46.

The Solicitor General's appeal to what she describes as the statute's "evident purpose" or the "ill sought to be captured" by the statute also falls flat. *See* Pet. Br. at 24–25; *id.* at 35. According to the Solicitor General, 26 U.S.C. § 5845(b) was enacted to outlaw weapons that fire multiple shots with "ease," or that fire multiple shots in response to a "'single pull of the trigger.'" Pet. Br. at 25 (quoting *Staples*, 511 U.S. at 602 n.1). But none of these assertions about congressional goals can overcome the statutory language, which limits the definition of "machinegun" to weapons that fire more than one shot "by a single *function* of the *trigger*," and which is unconcerned with weapons (such as gatling guns or bump stock–equipped rifles) that fire single shots in response to repeated and manual activations of the trigger. Congress *could* have enacted a statute that makes the definition of "machinegun" turn on the weapon's rate of fire. Congress *could* have defined "machinegun" in a way that depends on the movements of the shooter rather than the "function" of the "trigger." And Congress *could* have outlawed firearms and devices that approach the "dangerousness"[37] of machineguns. *Cf. District of Columbia v. Heller*, 554 U.S. 570, 627 (2008) ("dangerous and unusual" weapons fall outside the Second Amendment). But Congress did none of these things, and neither a court nor an agency may subordinate the enacted statutory language to an actual or imagined congressional purpose.

37. Pet. Br. at 25.

See Henson v. Santander Consumer USA Inc., 582 U.S. 79, 89 (2017) ("[W]e will not presume with petitioners that any result consistent with their account of the statute's overarching goal must be the law but will presume more modestly instead 'that [the] legislature says . . . what it means and means . . . what it says.'" (quoting *Dodd v. United States*, 545 U.S. 353, 357 (2005)).[38]

Finally, the Solicitor General claims that the phrase "function of the trigger" is concerned with what the *shooter does to* the trigger, rather than the trigger's mechanical operation, and she analogizes this phrase to idioms such as "stroke of the key," "throw of the dice," and "swing of the bat"—all of which refer to actions taken by an unmentioned human actor rather than the object of

38. *See also Norfolk S. Ry. Co. v. Sorrell*, 549 U.S. 158, 171 (2007) ("It frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be law."); *Board of Governors v. Dimension Financial Corp.*, 474 U.S. 361, 374 (1986) ("Congress may be unanimous in its intent to stamp out some vague social or economic evil; however, because its Members may differ sharply on the means for effectuating that intent, the final language of the legislation may reflect hard-fought compromises. Invocation of the "plain purpose" of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise . . . ."); *Graham County Soil and Water Conservation Dist. v. U.S. ex rel. Wilson*, 559 U.S. 280, 302 (2010) (Scalia, J., concurring in part and concurring in the judgment) ("The Constitution gives legal effect to the 'Laws' Congress enacts, Art. VI, cl. 2, not the objectives its Members aimed to achieve in voting for them." (citing *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 79–80 (1998)).

the prepositional phrase. *See* Pet. Br. at 25–26. The problem with this analogy is that the "trigger" on a firearm *has* a "function," so the "function of the trigger" refers to the *trigger*'s function rather than the "function" of someone (or something) else. By contrast, it is nonsensical for a "key" to have a "stroke," for "dice" to have a "throw," or for a "bat" to have a "swing." So each of these expressions must be construed as referring to the act of the *person* who strikes the key, throws the dice, or swings the bat—even though the actor goes unmentioned in the phrase.

Yet even if this Court were to indulge the Solicitor General's request to focus on the act of the shooter (rather than the mechanical operation of the trigger), Cargill would *still* win because the shooter must continually and repeatedly "bump" the trigger to produce multiple shots—and each of these bumps constitutes a distinct "act of the shooter" (as well as a discrete "function of the trigger"). So no matter how the Solicitor General wants to construe the phrase "function of the trigger," she cannot escape the fact that only one shot will fire each time the shooter acts upon (or "interact[s] with")[39] the trigger. Even from "'the shooter's perspective'"[40] that the Solicitor General urges, it remains true that only one shot is fired in response to a "single function of the trigger."

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39. Pet. Br. at 26; *see also id.* ("The definition refers to the shooter's interaction with the weapon").

40. Pet. App. 25 (quoting Pet. App. 22a–23a).

D. 26 U.S.C. § 5845(b)'s Application to Other Firearm Accessories

The Solicitor General claims that Cargill's interpretation of "single function of the trigger" will exclude Akins Accelerators, forced-reset triggers, and motorized trigger devices from the statutory definition of "machinegun." Pet. Br. at 27–30. The Solicitor General's concerns are overstated.

A ruling that affirms the Fifth Circuit or vacates ATF's final rule need not (and should not) repudiate ATF's characterization of the Akins Accelerator. The Court could, for example, assume for the sake of argument that a "single function of the trigger" means a single motion (or act) of the shooter, yet hold that Cargill's non-mechanical bump stocks require *more* than a single motion (or act) to fire multiple shots because the shooter must continually thrust the barrel or front grip of the rifle forward with his non-trigger hand. *See supra* at 30–33. The Court could also assume for the sake of argument that bump stock–equipped rifles fire more than one shot "by a single function of the trigger," yet hold that Cargill's non-mechanical bump stocks do not fire these multiple shots "automatically" because the shooter must continually thrust the barrel or front grip of the rifle forward with his non-trigger hand, while simultaneously applying rearward pressure on the weapon with his trigger hand. *See infra* at 40–46; Pet. App. 28a–31a. The Akins Accelerator could then be distinguished because its internal spring provides an automating mechanism that is missing from Cargill's non-mechanical bump stocks. *See supra* at 7–8 & notes 6–7. It is also possible to

characterize other weapons as machineguns if the "trigger" can be defined as a switch or button on the accessory rather than the curved metal lever on the firearm that gets repeatedly "bumped" by the shooter. *See, e.g.*, *Camp*, 343 F.3d at 744–45. Because there is no evidence in the record showing the precise mechanics of these other weapons, it would be prudent for this Court not to address their legality, while nonetheless holding that a "single function of the trigger" occurs each time the relevant "trigger" on a firearm is activated and then resets.

The legality of a "forced-reset trigger" or a "motorized trigger device" will depend on whether and what extent these accessories alter the nature of the "trigger." There is no evidence in the record of how these contraptions operate, and the Court should not rule on the legality of these devices without a factual record—and without an adversarial presentation over their effects on the "trigger." It is enough to say that Cargill's argument does not compel an interpretation of 26 U.S.C. § 5845(b) that excludes motorized trigger devices from the definition of machinegun, because ATF (and the courts) can interpret the word "trigger" to refer to a switch on a motorized device that causes a weapon to automatically fire multiple shots in response to a single "function" of that switch. Pet. App. 27a ("[A] trigger is just the 'mechanism . . . used to initiate the firing sequence.'" (quoting *United States v. Jokel*, 969 F.2d 132, 135 (5th Cir. 1992)). Whether a "forced-reset trigger" qualifies as a "machinegun" will likewise depend on whether it has a mechanical apparatus that automatically causes more than one shot to

fire in response to a single and discrete "function" of that device.

Finally, the Solicitor General is wrong to claim that Cargill's definition of "machinegun" would exclude a device that automatically fires multiple bullets in response to the single press of a "button that oscillates up and down." Pet. Br. at 30. In this hypothetical apparatus, the "trigger" can refer to the mechanism that causes the button to oscillate automatically rather than the oscillating button itself—in the same way that the "trigger" on a fully automatic weapon refers to the mechanical part that causes the "auto sear" to swing the hammer back and forth automatically in response to a "triggering" function. Pet. App. 8a. In each of these situations, a single "function" of the relevant "trigger" starts an automatic process that leads to the firing of multiple bullets. But a bump stock does not change the nature of the "trigger" in any way; it merely facilitates rapid activations of the trigger by enabling it to bump repeatedly into the shooter's finger. That does not convert a semi-automatic weapon into a machinegun.

II. A Non-Mechanical Bump Stock Does Not Cause A Semi-Automatic Rifle To Discharge More Than One Shot "Automatically"

ATF's rule should be rejected for a separate and independent reason: Even if this Court decides (or assumes) that Cargill's non-mechanical bump stocks enable a rifle to fire more than one shot "by a single function of the trigger," they do not cause multiple shots to be fired *automatically* in response to that "single function of the trigger." To fire multiple shots, a non-mechanical bump

stock requires the shooter to engage in ongoing manual actions after he activates the trigger. The shooter must: (1) Continually thrust the barrel or front grip of the rifle forward with his non-trigger hand; (2) Apply continuous rearward pressure on the weapon with his trigger hand; and (3) Keep the finger of his trigger hand on the extension ledge to "bump" the trigger in response to each of the shooter's forward thrusts. And each time the shooter provides this ongoing forward and rearward pressure while maintaining the proper placement of his trigger finger, only one shot will fire in response to each "function" of the trigger. Nothing in Cargill's non-mechanical bump stocks "automates" the firing of even one shot after the trigger is activated, let alone multiple shots;[41] rather, the firing of multiple shots remains entirely dependent on the shooter's ongoing *manual* inputs and interactions with the weapon.

The Solicitor General acknowledges all of these mechanical realities. *See* Pet. Br. at 31 ("The shooter must . . . keep his trigger finger stationary on the bump stock's finger rest and maintain constant forward pressure on the barrel or front grip with his non-trigger hand."). Yet the Solicitor General insists that Cargill's bump stocks fire multiple shots "automatically" because the shooter "need not make any further pulling or pushing motions *on the trigger*" after its initial activation. Pet.

41. *See* Pet. Br. at 31 (defining "automatic" as "self-acting or self-regulating" (citing *Webster's Dictionary* 156; 1 *The Oxford English Dictionary* 574; *The American Heritage Dictionary of the English Language* 90)).

Br. at 31 (emphasis added). That is a non sequitur. A bump stock–equipped rifle cannot fire more than one shot "automatically . . . by a single function of the trigger" unless "a single function of the trigger"—by itself and without further assistance from the shooter—causes more than one shot to fire. If the rifle requires *any* extra help from the shooter apart from the initial activation of the trigger, then it is not firing more than shot "automatically . . . by a single function of the trigger," and it does not matter whether that extra help takes the form of a "pulling or pushing motion on the trigger"[42] or a pushing or pulling motion on some other part of the gun. *See Guedes v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 920 F.3d 1, 43–47 (D.C. Cir. 2019) (Henderson, J., concurring in part and dissenting in part); *see also id.* at 44 ("The statutory definition of 'machinegun' does not include a firearm that shoots more than one round 'automatically' by a single pull of the trigger **AND THEN SOME** (that is, by 'constant forward pressure with the non-trigger hand'" (emphasis in original)).

The Solicitor General tries to escape this by claiming that a device can be deemed "automatic" if it performs only "'*parts* of the work formerly or usually done by hand,'"[43] and she points to the "automatic teller machine," the "automatic car wash" and the "automatic sewing machine" as examples of contraptions that are called "automatic" even though they require sustained

42. Pet. Br. at 31.

43. Pet. Br. at 32 (quoting *Webster's Dictionary* 156).

and ongoing human inputs and interactions. Pet. Br. at 32–33. The problem with this analogy is that 26 U.S.C. § 5845(b) specifies the *precise task* that must be automated in a "machinegun"—the firing of "more than one shot"—and the statute specifies the *precise action* that must "automatically" cause the performance of that task: the "single function of the trigger." Merely placing the word "automatic" before the name of a device indicates that there is *something* about the device that is automated, but that does not purport to specify *which* particular tasks occur automatically or *what* actions are needed to trigger the automated process. The statutory definition of "machinegun," by contrast, tells the reader *exactly what* must happen "automatically" in response to a "single function of the trigger": the firing of multiple shots. If *any* additional help from the shooter is needed to effectuate that result, then the weapon is not a "machinegun" under 26 U.S.C. § 5845(b)—even if the weapon contains other "automatic" components or devices.[44]

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44. The Solicitor General invokes the phrase "automatic sewing machine" yet never mentions that the Federal Trade Commission outlawed this phrase as "deceptive" because a sewing machine requires continued and intervening "human effort"—just like a semi-automatic rifle equipped with a non-mechanical bump stock:

> "Automatic" means self-operating or self-regulating. Consumers therefore are led to believe that once activated, a sewing machine so described or depicted will operate mechanically without intervening human effort. However, no household electric sewing machine is automatic or self-operating in its entirety or as to its over-

(continued…)

The Solicitor General is also wrong to suggest that Cargill's argument (and the Fifth Circuit plurality opinion) excludes fully automatic weapons from the definition of "machinegun." Pet. Br. at 33–34. The Solicitor General correctly observes that the shooter of an automatic weapon must "keep the trigger pressed down,"[45] but the need for continuous holding of the *trigger* does not negate the existence of "automatic" firing under 26 U.S.C. § 5845(b). Recall that a "machinegun" has more than one shot fire "automatically . . . *by a single function of the trigger*." 26 U.S.C. § 5845(b) (emphasis added). Pressing and holding the trigger of a fully automatic rifle is what causes the trigger to "function"—and multiple shots fire "automatically" in response to that "single function of the trigger." Pushing forward on the barrel or front grip of the rifle is *not* part of the "function of the trigger"; it is a separate and distinct act from the trigger's function.

> all functions or operations, since all require considerable control, skill, knowledge, and personal intervention by the operator to achieve satisfactory results. Sewing machines. unlike "automatic" washing machines or dishwashers, cannot be turned on and left to operate by themselves.

16 C.F.R. § 401.1(b) (1965); *see also* 16 C.F.R. § 401.2 (1965) ("[C]onsumers . . . are led in many instances to believe that merely by the twist of a dial or the flick of a lever they will be able to easily perform complicated sewing operations."). The FTC repealed these regulations in 1990, but we have not uncovered any commercial use of the term "automatic sewing machine" since the FTC nixed it in 1965.

45. Pet. Br. at 33.

The need for these continual forward thrusts on the barrel or front grip makes it impossible for Cargill's bump stock–equipped rifles to fire more than one shot "automatically . . . by a single function of the trigger," because a mere "function of the trigger" is not enough to produce those multiple shots.

The Solicitor General fears that gun manufacturers might try to escape the statutory prohibitions on "machineguns" by designing a firearm that operates as a fully automatic weapon, while simultaneously requiring some "'minutia of human involvement' beyond holding the trigger" to activate its fully automatic functions (such as "pressing and holding down a selector button"). Pet. Br. at 36 (quoting *Gun Owners*, 19 F.4th at 910 (opinion of Gibbons, J.)). But a button that must be pushed and held before a firearm can function as a fully automatic weapon can plausibly be described as part of the "trigger," because its activation is necessary for the device to operate as a machinegun. It would be no different from a push-operated machinegun that requires the shooter to push and hold two buttons rather than just one, and the activation of those two buttons together would properly be regarded as a "single function of the trigger" from which multiple shots "automatically" fire. So the Solicitor General's imaginary weapon is no reason for this Court to disregard the current statutory definition of machinegun, which requires a "single function of the trigger" to "automatically" cause the firing of multiple shots. Until Congress amends 26 U.S.C. § 5845(b), a firearm that requires a "single function of the trigger"

plus some additional input or actions from the shooter to fire multiple shots is not a "machinegun."

III. The Solicitor General's Purposivist Arguments Should Be Rejected

Throughout her brief, the Solicitor General urges a construction of 26 U.S.C. § 5845(b) that accords with the statute's "evident purpose,"[46] and she claims that her purposivist interpretation of the statute finds support in *Abramski v. United States*, 573 U.S. 169 (2014), *American Broadcasting Cos. v. Aereo, Inc.*, 573 U.S. 431 (2014), and *County of Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462 (2020). Pet. Br. at 38–40. But the statutes in each of those three cases contained genuine textual ambiguities that opened the door to considerations of statutory purpose. *See id.* The Solicitor General and ATF, by contrast, have adopted an atextual construction of 26 U.S.C. § 5845(b), and nothing in *Abramski*, *Aereo*, or *County of Maui* holds or even suggests that a court can pursue a perceived statutory purpose by interpreting the word "trigger" to mean "shooter," by interpreting "function" to mean "pull," or by interpreting "automatically" to require additional and ongoing manual human input. And when a statutory text is at odds with a litigant's characterization of its purpose, courts (and agencies) must always follow the enacted language. *See MCI Telecommunications Corp. v. AT&T Co.*, 512 U.S. 218, 231 n.4 (1994) ("[W]e (and the FCC) are bound, not only by the ultimate purposes Congress has selected, but by the means

46. Pet. Br. at 24–25; *id.* at 35; *id.* at 38–42.

it has deemed appropriate, and prescribed, for the pursuit of those purposes"); *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83, 98 (1991) ("The best evidence of that purpose is the statutory text adopted by both Houses of Congress and submitted to the President."); *see also supra* note 38 and accompanying text.

Each of the "purposes" that the Solicitor General ascribes to 26 U.S.C. § 5845(b) creates a mismatch with the enacted text. Congress did not enact a statutory prohibition on weapons that "eliminate the manual movements that a shooter would otherwise need to make in order to fire continuously"[47]—even though Congress could have defined "machinegun" in this manner. Congress did not enact a prohibition on weapons that "can fire hundreds of rounds per minute,"[48] even though it could have linked the definition of "machinegun" to a weapon's rate of fire. Congress did not enact a prohibition on weapons that "'achieve the same lethality'"[49] as a conventional machinegun, even though it could have phrased the statutory prohibition this way. What Congress enacted was a statutory definition of "machinegun" that turns on whether a weapon can fire more than one shot "automatically . . . by a single function of the trigger." Whether that definition should be updated to encompass weapons that achieve the results of machineguns "through differ-

47. Pet. Br. at 40; *id.* at 40–41.

48. *Id.* at 40.

49. *Id.* at 41 (quoting Pet. App. 52a (opinion of Ho, J.)).

ent technological means"[50] is a decision for Congress to make, not agencies or courts.

IV. The Chevron Framework Is Inapplicable, And Any Ambiguities In The Statute Should Be Construed In Favor Of Cargill

The Solicitor General has not argued for *Chevron* deference, and for good reason: The *Chevron* framework is inapplicable to laws that define criminal offenses. *See Abramski v. United States*, 573 U.S. 169, 191 (2014) ("[C]riminal laws are for courts, not for the Government, to construe."); *United States v. Apel*, 571 U.S. 359, 369 (2014) ("[W]e have never held that the Government's reading of a criminal statute is entitled to any deference"). The Court should interpret 26 U.S.C. § 5845(b) for itself and without giving any weight to ATF's views under *Chevron*.[51]

Chevron deference is also inapplicable because the text of 26 U.S.C. § 5845(b) unambiguously excludes Cargill's non-mechanical bump stocks from the definition of "machinegun." *See supra* at 18–48. But if the Court finds any ambiguity in the statute (and it shouldn't), it should construe those ambiguities in favor of Cargill for at least two reasons. First, the rule of lenity would be implicated

50. *Id.* at 41.

51. The Fifth Circuit plurality opined that ATF's lawyers waived *Chevron* deference by failing to argue for it, Pet. App. 32a–35a, and that *Chevron* should not apply when an agency abandons its previous interpretation of a statute, Pet. App. 39a–41a. The Court need not resolve these issues because the criminal consequences that attach to 26 U.S.C. § 5845(b) suffice to render *Chevron* inapplicable.

because 26 U.S.C. § 5845(b) defines the scope of a federal criminal offense. *See* 18 U.S.C. § 922(o)(1) (criminalizing the transfer or possession of machineguns); *Abramski*, 573 U.S. at 188 n.10 (rule of lenity applies if, "after considering text, structure, history and purpose, there remains a grievous ambiguity or uncertainty in the statute"). ATF's interpretation of 26 U.S.C. § 5845(b) turns on legislative history rather than "text, structure, history and purpose,"[52] and the rule of lenity should trump consideration of legislative history whenever agencies or courts construe a statute with criminal consequences. Ordinary citizens do not have access to the 1934 testimony of a gun lobbyist, and if ATF can use legislative history of that sort to resolve the meaning of a criminal statute then the rule of lenity will no longer ensure that citizens receive fair notice before being subjected to criminal punishment.

The canon of constitutional avoidance should also lead this Court to reject ATF's interpretive rule because it purports to declare what 26 U.S.C. § 5845(b) has *always* meant. ATF's construction retroactively makes felons out of the hundreds of thousands of Americans who possessed or transferred bump stocks before the final rule had declared them "machineguns," even though ATF had repeatedly declared these devices lawful for more than a decade and issued at least 15 classification letters to that effect. *See supra* at 7–8 & note 6. Allowing an agency to retroactively expand the scope of a criminal statute in these circumstances would (at the very least)

52. *See supra* at 21–27.

present serious constitutional questions under the due process clause. *See Bouie v. City of Columbia*, 378 U.S. 347, 353 (1964). So ATF's construction of 26 U.S.C. § 5845(b) should be rejected even if the Court finds it textually permissible. *See Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (constitutional-avoidance canon prevails over agency-deference doctrines).

V. The Court Should Direct The District Court To "Hold Unlawful" And "Set Aside" ATF's Final Rule

The district court's decision to enter a "judgment" for Cargill that withholds all relief was inexcusable, as 5 U.S.C. § 706(2)(A) *requires* a court to "hold unlawful" and "set aside" agency action that an appellate court has found to be "not in accordance with law." *See* 5 U.S.C. § 706 ("The reviewing court *shall* . . . (2) hold unlawful and set aside agency action, findings, and conclusions found to be—(A) . . . not in accordance with law" (emphasis added)). The Court should direct the district court to award the relief described in 5 U.S.C. § 706(2)(A) on remand.

The Court should also direct the district court to formally vacate ATF's final rule, as a remedy to "set aside" unlawful agency action requires nullification of the agency's "action" rather than a plaintiff-specific remedy. *See Griffin v. HM Fla.-ORL, LLC*, 144 S. Ct. 1, 2 n.1 (2023) (statement of Kavanaugh, J.). Judicial review under the APA is unlike judicial review of statutes, in which courts are powerless to award relief directed at the challenged legislation. *See Whole Woman's Health v.*

Jackson, 141 S. Ct. 2494, 2495 (2021) ("[F]ederal courts enjoy the power to enjoin individuals tasked with enforcing laws, not the laws themselves."); *Seila Law LLC v. Consumer Financial Protection Bureau*, 140 S. Ct. 2183, 2220 (2020) (Thomas, J., concurring in part and dissenting in part) ("The Federal Judiciary does not have the power to excise, erase, alter, or otherwise strike down a statute."). Section 706 of the APA establishes a different regime that empowers the judiciary to act directly against the challenged agency action by "set[ting]" it "aside"—a prerogative that is "modeled on" an appellate court's review of trial-court judgments. Nicholas Bagley, *Remedial Restraint in Administrative Law*, 117 Colum. L. Rev. 253, 258 (2017); *see also* Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 Colum. L. Rev. 939, 940 (2011) (explaining how judicial review of agency action is "built on the appellate review model of the relationship between reviewing courts and agencies," which "was borrowed from the understandings that govern the relationship between appeals courts and trial courts in civil litigation"). The Court should direct entry of this remedy on remand and rebuke the district court for entering a putative "judgment" for Cargill that withholds all relief.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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