No. _____

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The question of statutory construction at the heart of this case concerns the meaning of the term "machinegun," as defined by Congress in 26 U.S.C. § 5845(b). In 2018, the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") issued a set of regulations (collectively, "the Rule"), that reinterpreted "machinegun" more expansively than ever before to prohibit, for the first time, accessories known as non-mechanical bump stocks. Nevertheless, the D.C. Circuit upheld the Rule on summary judgment, finding that ATF's novel interpretation of "machinegun" was, in fact, "the best interpretation." In doing so, the court of appeals eschewed the district court's earlier reliance on *Chevron* to uphold the rule.

The questions presented are:

(1) Whether the definition of "machinegun" in 26 U.S.C. § 5845(b) includes non-mechanical bump stocks.

(2) If the definition of "machinegun" in 26 U.S.C. § 5845(b) is ambiguous, whether that ambiguity should be construed against the Government.

PARTIES TO THE PROCEEDING

Petitioners are Damien Guedes, Shane Roden, FPC Action Foundation, Florida Carry, Inc., and Madison Society Foundation, Inc. Petitioners were the plaintiffs in the United States District Court for the District of Columbia and the plaintiffs-appellants in the United States Court of Appeals for the District of Columbia Circuit.

Respondents the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF"), Merrick Garland, in his official capacity as Attorney General of the United States, and Steven Dettelbach, in his official capacity as Director of ATF, were defendants-appellees in the United States Court of Appeals for the District of Columbia Circuit. Respondents Garland and Dettelbach were substituted for their predecessors in office.

RULE 29.6 DISCLOSURE STATEMENT

No Petitioner has a parent corporation, and no publicly held corporation owns 10% or more of any of Petitioners' stock.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

- *Damien Guedes, et al., v. Bureau of Alcohol, Tobacco, Firearms and Explosives, et al.*, No. 21-5045 (D.C. Cir.) (opinion issued and judgment entered August 9, 2022; rehearing en banc denied May 2, 2023).

- *Damien Guedes, et al., v. Bureau of Alcohol, Tobacco, Firearms and Explosives, et al*, No. 1:18-cv-03086 (D.D.C.) (opinion issued and judgment entered February 19, 2021).

The issue of the proper interpretation of 26 U.S.C. § 5845(b) is also the subject of the Government's pending petition in *Garland v. Cargill*, No. 22-976 (U.S. Apr. 6, 2023).

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Petitioners respectfully seek a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 45 F.4th 306 and is reproduced at Pet.App.1. The order of the Court of Appeals denying rehearing en banc is reported at 66 F.4th 1018 and is reproduced at Pet.App.67. The opinion of the United States District Court for the District of Columbia is reported at 520 F.Supp.3d 51 and is reproduced at Pet.App.33.

JURISDICTION

The Court of Appeals issued its judgment on August 9, 2022, and issued its order denying rehearing en banc on May 2, 2023. Pet.App.67. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

26 U.S.C. § 5845(b) provides:

> 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. 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 control of a person.

18 U.S.C. § 922(o)(1) provides:

> Except as provided in paragraph (2), it shall be unlawful for any person to transfer or possess a machinegun.

18 U.S.C. § 924(a)(2) states in relevant part:

> Whoever knowingly violates subsection. . . (o) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

The relevant regulations are set out in the Appendix.

INTRODUCTION

This Petition presents legal issues of exceptional importance. These issues have sharply divided the courts of appeals across the Nation, and the Government has already sought this Court's review to resolve them. *See generally* Pet., *Garland v. Cargill*, No. 22-976 (U.S. Apr. 6, 2023).[1] At the center of this case is whether the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") properly interpreted the term "machinegun," as defined in 26 U.S.C. § 5845(b), to include items known as non-mechanical bump stocks. Following Congressional inaction to amend § 5845(b) in 2018 to explicitly prohibit non-mechanical bump stocks in the statute, ATF took matters into its own hands and issued a regulation "interpreting" the existing statute to reach bump stocks. Before ATF's Rule, non-mechanical bump stocks were understood to be lawful—after ATF's Rule, possession purportedly is a federal crime.

Below, the D.C. Circuit upheld ATF's Rule and its criminalization of non-mechanical bump stocks. Pet.App.3. In doing so, the D.C. Circuit joined the

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[1] And the Government appears ready to seek certiorari again. *See* Government's Notice, *Gun Owners of America, et al., v. Garland, et al.*, No. 1:18-cv-1429, Doc. 85 (W.D. Mich. June 12, 2023) (noting that the "Solicitor General has authorized the government to petition the Supreme Court for a writ of certiorari" in *Hardin v. ATF*, No. 20-6380 (6th Cir.)).

If the Court is inclined to grant review of § 5845(b) and ATF's Rule, then it would benefit from hearing from Petitioners in this case as well as the parties in *Cargill*. At a minimum, this Court should hold this Petition pending disposition of *Cargill*.

Tenth Circuit in finding the Rule lawful. But, while these courts reached the same destination, they took different paths. The D.C. Circuit became the first circuit to conclusively hold that "a bump stock is a machine gun under the best interpretation of the statute." Pet.App.19. A deeply fragmented Tenth Circuit held that the Rule could only be upheld under the deference it believed was required by *Chevron*. *See Aposhian v. Barr*, 958 F.3d 969 (10th Cir. 2020), *aff'g* 374 F. Supp. 3d 1145 (D. Utah 2019), *en banc reh'g order vacated as improvidently granted*, 989 F.3d 890 (10th Cir. 2021) (en banc).

Earlier this year, the en banc Fifth Circuit held ATF's Rule to be unlawful, splitting with the D.C. Circuit and Tenth Circuit. *Cargill v. Garland*, 57 F.4th 447 (5th Cir. 2023) (en banc), *rev'g* 20 F.4th 1004 (5th Cir. 2021), and *Cargill v. Barr*, 502 F. Supp. 3d 1163 (W.D. Tex. 2020). Eight judges concluded that the statutory definition of "machinegun" unambiguously *does not* encompass non-mechanical bump stocks. In an alternative holding, and in separate concurrences, twelve Fifth Circuit judges held that, *if* the definition of "machinegun" was ambiguous, then *Chevron* deference did not apply and, instead the rule of lenity required construing § 5845(b) *not* to include non-mechanical bump stocks.

The Sixth Circuit has also joined the fray regarding bump stocks. Initially, the en banc court split evenly, with eight judges finding the Rule unlawful and eight finding it valid. *See Gun Owners of Am., Inc. v. Garland*, 19 F.4th 890 (6th Cir. 2021) (en banc), *vacating by an equally divided court* 992 F.3d 446 (6th Cir. 2021), *and aff'g by an equally*

divided court Gun Owners of Am., Inc. v. Barr, 363 F. Supp. 3d 823 (W.D. Mich. 2019). Recently, a panel of the Sixth Circuit reviewed the issued yet again and held the rule invalid, with two judges invalidating ATF's Rule under the rule of lenity and one concluding that "machinegun" simply and unambiguously does not include non-mechanical bump stocks. *Hardin v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 65 F.4th 895 (6th Cir. 2023).

As of now, at least 30 opinions authored or joined by 57 different federal judges, totaling over 400 reported pages, have addressed whether non-mechanical bump stocks are properly understood as "machineguns" defined in § 5845(b). These opinions are divided both on the ultimate merits and on the appropriate interpretative method to decide them.

That the courts of appeals are so divided on an issue of federal law is itself sufficient for this Court's review. *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 140 S. Ct. 789, 791 (2020) (statement of Gorsuch, J.) (highlighting importance of the courts of appeals "considered judgments"). That the issue involves criminal consequences for otherwise ordinary, law-abiding citizens makes the need for review particularly compelling. That the issue goes to the heart of federal agency power, touching both *what* is a crime and *who* can deem it so, makes this Court's review absolutely essential.

As Judge Walker wrote in his dissent from the denial of rehearing en banc below, ATF's rule is a variation on an increasingly recurring theme: "(1) Congress considers a highly controversial solution

to a modern problem that attracts great public attention[;] (2) Despite that attention, Congress does not pass legislation addressing it[;] (3) The executive then finds within an old statute the power to address the problem that Congress did not." Pet.App.89. But in this case that sort of regulatory response to Congressional inaction flies in the face of the "the Anglo-American legal system['s]" long history of "restrict[ing] the executive branch's power to create new crimes." Pet.App.91. Regardless of whether an agency may "use creative interpretations to grab for itself even more power" in any other context, ATF may not "stretch[] the text of the National Firearms Act to criminalize conduct that Congress has not." Pet.App.94.

Petitioners respectfully submit that now is the time for this Court to address the long-percolating issues raised by this case and, accordingly, this Court should grant the Petition.

STATEMENT

Petitioners are challenging a 2018 ATF regulation that construes the meaning of "machinegun," as defined by 26 U.S.C. § 5845(b) and used in federal criminal statutes. In an effort to prevent criminal use of machineguns and other specified firearms, Congress passed the National Firearms Act of 1934 (NFA), Pub. L. No. 73-474, 48 Stat. 1236 (June 26, 1934). The NFA imposed what was then a very steep tax on the purchase of a machinegun. That tax provision was effectively a criminal statute; Congress concluded that many gangsters would obtain machineguns without paying the tax and then could

be prosecuted for tax evasion. *Gun Owners of Am.*, 992 F.3d at 450.

In 1986, Congress passed the Firearm Owners' Protection Act, Pub. L. No. 99-308, 100 Stat. 449 (May 19, 1986), which banned civilian ownership of "machineguns" manufactured after May 1986, as well as any parts used to convert an otherwise legal semiautomatic firearm into an illegal machinegun. This ban is codified at 18 U.S.C. § 922(o). Whoever knowingly violates the ban faces fines and up to 10 years in prison. *Id.* § 924(a)(2).

The definition reads, in pertinent part, "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." 26 U.S.C. § 5845(b).

"For decades, the government interpreted that definition to exclude guns that fire only a single bullet each time the trigger moves." Pet.App.78 (Walker, J., dissenting). In a 1955 determination, the government considered whether a "crank-operated gatling gun" was a "machinegun." *Id.* The Government said no "because it was 'not designed to shoot automatically . . . more than one shot with a single function of the trigger.' The crank just let the user fire the gun more quickly." *Id.* (quoting Rev. Rul. 55-528, 1955 WL 9410).

Bump Stocks. Designed for people with limited hand mobility (e.g., due to arthritis), a non-mechanical bump stock replaces the standard stock of a semiautomatic rifle. To initiate bump firing, the

shooter "maintain[s] constant forward pressure with the non-trigger hand on the barrel-shroud or fore-grip of the rifle, and maintain[s] the trigger finger on the device's ledge with constant rearward pressure." Final Rule, *Bump-Stock-Type Devices*, 83 Fed. Reg. 66,518 (Dec. 26, 2018). While keeping his trigger finger stationary in front of the trigger on the bump stock's extension ledge, the shooter also maintains constant rearward pressure with his trigger hand. The recoil energy from the fired shot causes the firearm to slide backward; the manual forward pressure applied by the shooter's non-trigger hand must then resist the recoil to initiate the next shot. As the non-trigger hand pushes the firearm forward, the trigger "bumps" against the shooter's stationary trigger finger, causing the trigger to depress and the firearm to shoot again.

As with any semiautomatic weapon, the trigger must be completely depressed, released, and then reset between each shot. A shooter can neither "bump" fire with one hand, nor hold down the trigger to fire multiple shots. A bump stock's extension ledge just helps keep a shooter's finger stationary in order to complete the trigger's depress-release-reset cycle. In addition, "a bump stock needs constant input from the shooter if a gun is to keep firing. He must keep forward pressure on the bump stock for it to work. If he does not, the weapon will fire only one shot." Pet.App.85 (Walker, J., dissenting). The distinction is straightforward—a semiautomatic rifle, whether fired with or without a bump stock, can only fire one round per function of the trigger while a machinegun can fire multiple rounds per function of the trigger.

The first-patented bump stocks operated differently. These used internal springs to create the "bump"-firing sequence after the shooter pulled the trigger once. In 2002, ATF determined that the device fell outside the statutory definition of a machinegun because it "did not modify how a semiautomatic rifle's trigger 'moves' with each shot." Pet.App.165 (Henderson, J., dissenting). In 2006, ATF overruled its prior decision, determining that the internal spring mechanism in such stocks made semiautomatic firearms a machinegun as an individual "need only pull the trigger once to activate the firing sequence." *Cargill*, 57 F.4th at 462 n.8. But ATF stated that if the internal spring was removed from the device, then it "'would render the device a non-machinegun under the statutory definition.' " *Bump-Stock-Type Devices*, 83 Fed. Reg. 66,517.

"Between 2008 and 2017, . . . ATF . . . issued classification decisions concluding that other bump-stock-type devices were not machineguns, primarily because the devices did not rely on internal springs or similar mechanical parts to channel recoil energy." *Id.* at 66,514 (emphasis added). Instead, these non-mechanical devices "require 'the maintenance of pressure by the shooter' to work." Pet.App.79 (Walker, J., dissenting) (quoting 83 Fed. Reg. at 66,518).

The Final Rule. ATF reversed course in 2018, concluding (via formal regulation) that non-mechanical bump stocks should be reclassified as machineguns. *See Bump-Stock-Type Devices*, 83 Fed. Reg. 66,514. That reversal followed a horrific tragedy in October 2017, in which a highly skilled, lone gunman fired semiautomatic rifles equipped with

bump stocks from a Las Vegas hotel room, killing 58 people and wounding more than 500. In response, then-President Trump "direct[ed] the Department of Justice to dedicate all available resources … as expeditiously as possible, to propose for notice and comment a rule banning all devices that turn legal weapons into machineguns." Presidential Documents, *Application of the Definition of Machinegun to "Bump Fire" Stocks and Other Similar Devices*, 83 Fed. Reg. 7,949 (Feb. 20, 2018).

The Final Rule amended regulations at 27 C.F.R. §§ 447.11, 478.11, and 479.11 to change ATF's interpretation of the statutory definition of a machinegun. Federal law states that a weapon is a "machinegun" if it "automatically" fires more than one shot "by a single function of the trigger." 26 U.S.C. § 5845(b); *see* 18 U.S.C. § 921(23) (incorporating § 5845(b)'s definition into the criminal code). The Final Rule amended the pertinent regulations to construe "single function of the trigger" as meaning "a single pull of the trigger and analogous motions" and to construe "automatically" (as it modifies "shoots, is designed to shoot, or can be readily restored to shoot") as meaning "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." *See* 27 C.F.R. § 447.11. ATF concluded that § 5845(b)'s definition of "machinegun" includes non-mechanical bump stocks. *Bump-Stock Type Devices*, 83 Fed. Reg. at 66,515. It asserted that such devices permit users to initiate an automatic firing sequence with a single "pull" of the trigger and "analogous

motions"—notwithstanding that the trigger resets for each shot. *Id*.

ATF's Final Rule took effect on March 26, 2019. ATF estimated that Americans possessed up to 520,000 previously legal non-mechanical bump stocks. Notice of Proposed Rulemaking, *Bump-Stock-Type Devices*, 83 Fed. Reg. 13,442, 13,451 (Mar. 29, 2018). The Final Rule required those devices to be destroyed or abandoned by March 26, 2019. 83 Fed. Reg. at 66,546.

Proceedings Below. Petitioners Damien Guedes and Shane Roden purchased non-mechanical bump stocks at a time when ATF publicly confirmed that possession of such devices was entirely legal. Petitioners FPC Action Foundation, Florida Carry, Inc., and Madison Society Foundation, Inc., have members who did the same.

In December 2018, Petitioners challenged the Final Rule by filing suit in federal district court in the District of Columbia against ATF, the Attorney General, and ATF's Director. Petitioners argued, among other things, that ATF lacked statutory authority to issue regulations with the force of law expanding the scope of the machinegun ban; that ATF violated the Constitution's separation-of-powers mandate by attempting to usurp legislative power; and that ATF's construction of 26 U.S.C. § 5845(b) is contrary to the statute's mandate. The district court had jurisdiction under 28 U.S.C. § 1331. On the same day, Petitioners filed a motion for a preliminary injunction against enforcement of the Rule.

Relying on this Court's *Chevron* framework, the district court and the court of appeals denied Petitioners' motion for a preliminary injunction on the grounds that the "statutory definition of 'machinegun' is ambiguous and [ATF's] interpretation" to include non-mechanical bump stocks "is reasonable." Pet.App.146 (D.C. Cir.). The courts applied *Chevron* notwithstanding the fact that § 5845(b) is a criminal statute.

This Court denied certiorari on interlocutory appeal. In a separate statement, Justice Gorsuch wrote that "the interlocutory petition" did "not merit review" because "[t]he errors apparent in this preliminary ruling might yet be corrected before final judgment" and this Court would benefit from "hearing the[] considered judgments" of "other courts of appeals . . . actively considering challenges to the same regulation." *Guedes*, 140 S. Ct. at 791 (Statement of Gorsuch, J.). "But waiting should not be mistaken for lack of concern." *Id.*

The case returned to the district court, which entered summary judgment for ATF for the same reasons it had denied a preliminary injunction. On appeal, the D.C. Circuit changed course. Instead of finding (again) that § 5845(b) was ambiguous, it now held that "the best interpretation" of the statute was the one ATF had offered. Consequently, it sidestepped the *Chevron* questions that had occupied the panel in the preliminary injunction proceedings. And absent a finding of ambiguity, the court declined to apply the rule of lenity.

The D.C. Circuit upheld the Rule by interpreting two operative parts of § 5845(b)'s definition of a "machinegun." The statute defines a "machinegun" as a weapon that shoots "automatically more than one shot, without manual reloading, by a single function of the trigger." The first key phrase is "single function of a trigger." The court of appeals held that ATF correctly defined this phrase to mean a "single *pull* of the trigger." The second key is the word "automatically," which the court of appeals defined as "a self-acting or self-regulating mechanism." Pet.App.18.

Putting these two interpretations together, the court of appeals found that a bump stock allowed automatic firing of "more than one shot" by a "single pull" of the trigger. Pet.App.23. A bump stock allows an individual to fire "without additional pulls" because it is additional bumps against a "stationary trigger finger" that cause firing to repeat. Pet.App.20–21. And the first pull sets in motion a "self-regulating process." "The bump stock harnesses and directs the firearm's recoil energy along a linear path, thereby forcing the firearm to shift back and forth. That process will not conclude until the shooter releases forward pressure on the barrel, the weapon runs out of ammunition, or it malfunctions." Pet.App.21. This was "automatic."

The en banc court denied Petitioners' timely petition for rehearing en banc. Judges Henderson and Walker dissented.

As Judge Walker explained, ATF (and the panel) erred in both interpretative moves. To begin with,

§ 5845(b)'s reference to a "single function of the trigger" was not interchangeable with "single *pull* of the trigger." "Function" means "natural and proper action," *Webster's New International Dictionary* 876 (2d ed. 1933), with the "function" of an object meaning "[t]he special kind of activity proper to [it]; the mode of action by which it fulfills its purpose." Pet.App.81 (Walker, J., dissenting) (quoting 4 *Oxford English Dictionary* 602 (1933)). The key difference between an automatic and semiautomatic firearm is the "mode of action" by which additional shots are fired. In a semiautomatic firearm, the "natural and proper action" of its trigger releases one, and only one, bullet with every trigger function. By contrast, an automatic firearm only requires the trigger to function once to fire more than one shot.

Unlike "function," the word "pull" "focuses on the reason why the trigger moves, not, as the statute requires, on how often the trigger itself moves. That gets it backwards. The statute is indifferent about why the trigger moves—pull, bump, or otherwise—it looks only to how many shots are fired each time the trigger moves," which is to say each time it "functions." Pet.App.83–84. And even when bump stocks are used with a rifle, "[e]ach bump, like each pull, fires one bullet. A single action never causes the rifle to fire more than one shot." Pet.App.85.

Redefining "function" as "pull" is also improper, Judge Walker explained, because it "ignores the fact that Congress knows how to write 'single pull of the trigger' when it wants to." Pet.App.84. In fact, Congress did just that in defining "rifle" and "shotgun." *See* 26 U.S.C. § 5845(c), (d) (a rifle "fire[s]

only a single projectile through a rifled bore for each single pull of the trigger"); 18 U.S.C. § 921(a)(5) (a shotgun "fire[s] through a smooth bore either a number of ball shot or a single projectile for each single pull of the trigger").

ATF's second misinterpretation concerned the ability of a firearm to "shoot[] automatically." Consulting dictionaries contemporaneous with the enactment of § 5845(b) indicates that "automatically" means "having a self-acting or self-regulating mechanism," Pet.App.85 (Walker, J., dissenting) (quoting *Webster's New International Dictionary* 187 (2d ed. 1934)), or "[s]elf-acting under the conditions fixed for it, going of itself." *Id.* (quoting 1 *Oxford English Dictionary* 574 (1933)). But a semiautomatic firearm affixed with a bump stock is plainly not "self-acting" or "going of itself." A self-acting mechanism does not "require[] user input to keep working." Pet.App.85. But a semiautomatic firearm with a "bump stock needs constant input from the shooter if [the] gun is to keep firing." *Id.* After all, an individual "must keep forward pressure on the bump stock for it to work. If he does not, the weapon will fire only one shot." *Id.*

As with "function," ATF had rewritten the statute Congress passed in its interpretation of "automatically." When the National Firearms Act was initially enacted in 1934, Congress "defined machinegun to cover both guns that fire more than one shot 'semiautomatically' and those that do so "automatically." Pet.App.86 (quoting Pub. L. No. 73-474, 48 Stat. 1236). However, "Congress deleted the word 'semiautomatically' from the statutory

definition" in 1968 and did not add it back in when the ban on civilian ownership of "machineguns" was enacted in 1986. *Id.* (citing Pub. L. No. 90-618, 82 Stat. 1213). Pet.App.86–87 Nevertheless, ATF's Rule "writes it back in." Pet.App.87.

Even putting aside the merits and the ways in which ATF's (re)interpretation of "machinegun" is unlawful, both Judge Henderson and Judge Walker recognized that this case is one of "exceptional importance" not only to the parties but to the Nation at large. Pet.App.76 (Henderson, J., dissenting); Pet.App.88 (Walker, J., dissenting). "The day before the Bureau's rule, owning a bump stock was legal. The day after, it carries a ten-year prison sentence— all without Congress lifting a finger." Pet.App.94 (Walker, J., dissenting). Whether that is lawful plainly called for additional review.

REASONS FOR GRANTING THE PETITION

I. The Lower Courts Are Fragmented and Divided on ATF's Rule Prohibiting Non-Mechanical Bump Stocks.

The topline split is as follows: the D.C. Circuit and Tenth Circuit have upheld the Rule prohibiting bump stocks, while the Fifth Circuit and the Sixth Circuit have found it unlawful. But to merely state the divide in circuits is to understate how fragmented these decisions are. The courts below are divided not only on whether the Rule prohibiting non-mechanical bump stocks is lawful but also on whether § 5845(b) is ambiguous. And even those courts that agree that provision is ambiguous are split on what to do about the ambiguity they find.

A. The lower courts are divided on whether the term "machinegun" is ambiguous.

The D.C. Circuit's decision below held that the "best interpretation" of "machinegun" includes non-mechanical bump stocks. The panel of the D.C. Circuit is not alone in finding § 5845(b) to be unambiguous, but it does stand alone in finding bump stocks to fall within § 5845(b)'s unambiguous terms.

An eight-judge plurality of the en banc Fifth Circuit found that the plain meaning of "machinegun" *does not* include bump stocks.[2] Among other reasons, the plurality determined that "[t]he problem" with interpreting "function" to mean "pull" "is that it is based on words that do not exist in the statute." *Cargill*, 57 F.4th at 459–60. "Congress chose to define a "machinegun" by reference "to the mechanics of the firearm," and not from the perspective of what an individual does to fire it. *Id* at 460. And the mechanics of a semiautomatic firearm's trigger do not change with or without a bump stock. An individual still must "pull[]" or "bump" "the trigger of a semi-automatic weapon equipped with a non-mechanical bump stock each time he or she fires a bullet" and each time only a single bullet is fired. *Id.* at 459. Thus, "more than one" bullet is *not* fired by a "single function of the

[2] In the lead Fifth Circuit en banc opinion, eight judges found the Rule unlawful because § 5845 unambiguously does not include bump stocks. Of that plurality, seven, "assuming arguendo" that § 5845 is "ambiguous" would, in an alternative holding, also invalidate the Rule because of the rule of lenity. Five members of the Fifth Circuit would only invalidate the Rule on rule-of-lenity grounds.

trigger." While it is true that bump stocks allow the "single function of a trigger" to repeat at a higher rate, Congress chose not to define "machineguns" by "how quickly they fire." *Id*. at 459, 464.

The eight judges of the Fifth Circuit likewise rejected ATF's interpretation of "automatically." *Id*. at 462–63. In the statute, "the phrase 'by a single function of the trigger' modifies the adverb 'automatically.' Thus, the condition is satisfied only if it is the trigger that causes the firearm to shoot automatically." *Id*. at 463. Yet with a bump stock, the initial pull of a trigger does not permit a semiautomatic firearm to keep firing. "Rather, to continue the firing after the shooter pulls the trigger, he or she must maintain manual, forward pressure on the barrel and manual, backward pressure on the trigger ledge." *Id*. The additional manual input means the firing is not automatic.

In its initial foray into the merits of the Rule, the en banc Sixth Circuit equally divided on whether the Rule was lawful. *Gun Owners of Am., Inc.*, *v. Garland*, 19 F.4th 890 (6th Cir. 2021) (en banc). In doing so, eight judges found ATF's interpretation to be unambiguously wrong. In explaining why "a 'bump-stock rifle' does not qualify'" as a machinegun, the eight judges concluded that § 5845(b)'s use of the word "function" as "pull" was an untenable "rewrite" of the statute. *Id.* at 910, 912, 914 (Murphy, J., dissenting). "ATF's use of the word 'pull' wrongly changes the focus from the firearm's mechanical perspective (how does the firearm work?) to the shooter's operational perspective (how does a shooter shoot the gun?)." *Id.* at 913–14. And, as for "automatically," non-

mechanical bump stocks still require that an individual "use manual force to reengage the trigger for each shot." *Id.* at 915. After all, "[e]ven semiautomatic rifles have *some* 'automatic' features (hence their name)." *Id.* at 914–15. But it is the additional manual input to reengage the trigger that distinguishes them.

Most recently, however, a panel of the Sixth Circuit returned to consider the Rule again, and this panel (lacking binding en banc precedent) held § 5845 to be ambiguous. *Hardin v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 65 F.4th 895 (6th Cir. 2023). That panel joined the ranks of twelve judges of the Fifth Circuit that either primarily or as an alternative holding considered § 5845(b) ambiguous. *Cargill*, 57 F.4th at 469 (alternative holding); *id.* at 473 (Haynes, J., concurring in the judgment); *id.* (Ho, J., concurring in part and concurring in the judgment).

A sharply divided Tenth Circuit likewise concluded that § 5845(b) was ambiguous. A divided panel did not address whether the Rule "reflect[s] the best interpretation" of Section 5845(b). *Aposhian v. Barr*, 958 F.3d 969, 977 (10th Cir. 2020). Instead, it held that Congress had authorized ATF to issue binding regulations and that Section 5845(b) was "ambiguous." *Id.* at 985. The decision was initially vacated when the Tenth Circuit granted rehearing en banc. But the en banc court later reinstated the panel decision by a vote of 6 to 5, having determined that the petition for rehearing was improvidently granted. The five judges that would have vacated the panel's decision found that § 5845(b) was *not* ambiguous.

B. Even the courts that agree § 5845(b) is ambiguous disagree as to whether the rule of lenity or *Chevron* guides the interpretation.

Divided panels of the Sixth Circuit and the Tenth Circuit, together with twelve judges of the Fifth Circuit (in separate opinions) concluded that § 5845(b) is ambiguous. While agreeing on this premise, the courts divided on the proper approach to take, given two competing frameworks that apply to ambiguous statutes: *Chevron* and the rule of lenity. This is a question this Court previously found cert-worthy but declined to resolve. *See Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1572 (2017) (finding "no need to resolve whether the rule of lenity or *Chevron* receive[d] priority" because the statute at issue was unambiguous).

The Tenth Circuit applied *Chevron*. *Aposhian*, 958 F.3d at 984. In fact, it held that the rule of lenity can never trump application of *Chevron* deference. Relying on this Court's decision in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995), the panel majority stated that where an agency has issued a formal regulation interpreting a statute over which it "has both civil and criminal enforcement authority, *Babbitt* suggests that *Chevron*, not the rule of lenity, should apply." *Aposhian*, 958 F.3d at 983. The panel majority acknowledged that some of this Court's more recent decisions "signaled some wariness about deferring to the government's interpretations of criminal statutes." *Id*. at 984 (internal quotation marks omitted). But the majority, relying on the decision

reached by the D.C. Circuit during the preliminary injunction proceedings of this case, held that *Babbitt* still controls when an agency "has promulgated a regulation through formal notice-and-comment proceedings." *Id.*

Both the recent Sixth Circuit panel and the twelve judges of the Fifth Circuit rejected the Tenth Circuit's decision in *Aposhian*. Instead, they applied the rule of lenity to § 5845(b). Both relied on this Court's decisions in *United States v. Apel*, 571 U.S. 359 (2014) and *Abramski v. United States*, 573 U.S. 169, 191 (2014), to conclude *Chevron* has no application here. As this Court has explained, it has "never held that the Government's reading of a criminal statute is entitled to any deference." *Apel*, 571 U.S. at 369. "That is so because 'criminal laws are for the courts, not for the Government, to construe.'" *Cargill*, 57 F.4th at 467 (quoting *Abramski*, 573 U.S. at 191). Contrary to the Tenth Circuit, the Fifth Circuit held that *Babbitt* "did not purport to set forth a general rule respecting the interpretation of criminal regulations," so *Babbitt* did not control. *Id.* The Sixth Circuit declined to adopt a "bright-line rule that *Chevron* deference cannot be applied to agency constructions of statutes with criminal consequences," but nevertheless, because of § 5845(b)'s "predominantly criminal . . . scope and . . . the nature of the actions that it criminalizes," it found *Chevron* inappropriate. *Hardin*, 65 F.4th at 900.

With *Chevron* put to one side, the rule of lenity stepped to the fore. According to members of the Fifth Circuit, "[a]ssuming the definition of machinegun is ambiguous, we are bound to apply the rule of lenity. That is, we are bound to construe the definition of

machinegun to exclude a semi-automatic weapon equipped with a non-mechanical bump stock." *Cargill*, 57 F.4th at 471.

As the Sixth Circuit explained, "when *Chevron* deference is not warranted and standard principles of statutory interpretation 'fail to establish that the Government's position is unambiguously correct[,] we apply the rule of lenity and resolve the ambiguity in [the criminal defendant's] favor.'" *Hardin*, 65 F.4th at 901 (quoting *United States v. Granderson,* 511 U.S. 39, 54 (1994)). The Government may have policy reasons that it would want to make bump stocks illegal, but "[i]t would be dangerous . . . to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated.'" *Id.* at 902 (quoting *Cargill*, 57 F.4th at 478 (Ho, J., concurring)); *see also United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 96 (1820). As § 5845(b) "does not clearly and unambiguously prohibit bump stocks," the court was "bound to construe the statute" not to prohibit them. *Hardin*, 65 F.4th at 902.

The divide in the circuits on whether *Chevron* applies to statutes with criminal applications goes beyond the bump-stock context. Other courts reject the position of the Tenth Circuit (and of the D.C. Circuit in the preliminary injunction proceedings). In *United States v. Balde*, 943 F.3d 73 (2d Cir. 2019), the Second Circuit rejected a claim that it should defer to an ATF regulation that sought to clarify when an alien should be deemed "in the United States" for purposes of a criminal immigration statute. The court explained that deference was unwarranted because

"the Supreme Court has clarified that law enforcement agency interpretations of criminal statutes are not entitled to deference." *Id*. at 83. The appeals court expressed its no-deference holding in unequivocal terms: "Whether the Government interprets a criminal statute too broadly (as it sometimes does) or too narrowly . . . , a court has an obligation to correct its error." *Id.* (quoting *Abramski*, 573 U.S. at 191).

Likewise, a panel of the Ninth Circuit categorically rejected claims that the courts should defer to an agency's construction of criminal statutes—and it did so in connection with its consideration of the meaning of 26 U.S.C. § 5845(b), the very statute at issue here. *See United States v. Kuzma*, 967 F.3d 959 (9th Cir. 2020). Although the ATF interpretation at issue was expressed in informal guidance, the Ninth Circuit's unequivocal language indicates that the panel's ruling would have been the same even if ATF had construed the statute through a formal regulation. *Id.* Indeed, the court stated that ATF lacked authority to issue formal regulations interpreting Section 5845(b).

* * *

Are non-mechanical bump stocks "machineguns"? The lower courts are divided. If so, is it because of the § 5845(b)'s unambiguous text? Or, rather, does the text foreclose the applicability of § 5845(b) to non-mechanical bump stocks? The lower courts are divided. Or, do other interpretative frameworks beyond the plain text control because of ambiguity? If so, does *Chevron* compel courts to accept an agency's

determination of what is criminal? Does the rule of lenity apply instead? Again, the lower courts are divided.

That these remain open questions over which at least 57 judges in 30 opinions covering over 400 reported pages have fragmented makes plain that only this Court can resolve them.

II. ATF's Rule Is Unlawful.

By granting this Petition, the Court will resolve several important questions, applicable beyond the narrow confines of the Rule. Yet, it will also be able to correct ATF's unlawful overreach, which made the possession of non-mechanical bump stocks by ordinary, law-abiding citizens a criminal offense, all "without Congress lifting a finger." Pet.App.94 (Walker, J., dissenting).

A. Congress's definition of "machinegun" unambiguously does not include non-mechanical bump stocks.

A "machinegun" is a term of art, and Congress used particular words to define it. Specifically, a "machinegun" is "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). At the time of this definition's original enactment, the evidence suggests that the phrase "function of the trigger" had never before been used in the English language. *Cargill*, 57 F.4th at 461 n.7.

But by "interpret[ing] the words consistent with their ordinary meaning at the time Congress enacted the statute," *Wisc. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2070 (2018), it is apparent that Congress's idiosyncratic definition of "machinegun" is singularly focused on "the mechanics of a firearm," *Cargill*, 57 F.4th at 461. The two operative phrases with respect to firearm mechanics are "single function of a trigger" and "automatically." The question is whether a non-mechanical bump stock allows a semiautomatic firearm to fire more than one shot automatically by a single function of a trigger. The answer is no.

At the time of enactment, "function" "meant the 'natural and proper action' of a thing." Pet.App.81 (Walker, J., dissenting) (quoting *Webster's New International Dictionary* 876 (2d ed. 1933)). To put it another way, "[s]omething's 'function' was '[t]he special kind of activity proper to [it]; the mode of action by which it fulfills its purpose.'" *Id.* (quoting 4 *Oxford English Dictionary* 602 (1933)); *Cargill*, 57 F.4th at 459; *Aposhian*, 989 F.3d at 895 (Tymkovich, C.J., dissenting); *Gun Owners of Am.*, 19 F.4th at 912 (Murphy, J., dissenting).

"[H]ere, we must ask whether the 'natural and proper action' of the trigger lets a rifle modified by a bump stock fire 'more than one shot.' It does not." Pet.App.81 (Walker, J., dissenting). A non-mechanical bump stock does not change how a trigger functions. In a semiautomatic firearm without a bump stock, "[t]he trigger . . . must necessarily 'pull' backwards and release the rifle's hammer—the part of a rifle that sets in motion how the bullet leaves the barrel—every time that the rifle discharges. The rifle cannot fire a

second round until both the trigger and hammer reset." *Aposhian*, 958 F.3d at 995 (Carson, J., dissenting) (internal citation omitted). When a semiautomatic firearm has a bump stock, the firearm still fires only one shot until the trigger resets and is engaged again. What changes is how the individual engages the trigger (with subsequent bumps, rather than pulls), but the operation of the trigger is unaltered. "To be sure, a non-mechanical bump stock increases the rate at which the process occurs. But the fact remains that only one bullet is fired each time" that the trigger is engaged. *Cargill*, 57 F.4th at 459. In fact, "[i]f a gun fitted with a bump stock fires *more than one round* with a single movement of the trigger, it has malfunctioned." Pet.App.81 (Walker, J., dissenting) (emphasis added); *see also Gun Owners of Am.*, 19 F.4th at 912 (Murphy, J., dissenting).

The Rule attempts to avoid the fact that a bump stock does not alter the "function" of a firearm by redefining "function" to mean "pull or analogous motions." In ATF's view, an individual with a firearm equipped with a bump stock only pulls the trigger a single time with subsequent firing enabled by "bumps" rather than "pulls." Thus, more than one shot is enabled by a "single pull of the trigger." But § 5845(b) is "indifferent about why the trigger moves—pull, bump, or otherwise—it looks only to how many shots are fired each time the trigger moves." Pet.App.83–84. (Walker, J., dissenting). And whether made to move by a pull or a bump, a semiautomatic firearm with a bump stock still fires only one bullet every time the trigger is engaged. *Id.*; *Cargill*, 57 F.4th at 459; *Hardin*, 65 F.4th at 903–04 (Bush, J.,

concurring in the judgment); *Gun Owners of Am.*, 19 F.4th at 913 (Murphy, J., dissenting); *Aposhian*, 989 F.3d at 896 (Tymkovich, C.J., dissenting); *Aposhian*, 958 F.3d at 995 (Carson, J., dissenting).

The second operative part of the definition of "machinegun" is the requirement that more than one bullet fire "automatically." Again, looking to the definition at the time of enactment, "automatically" means "self-acting." *Cargill*, 57 F.4th at 463 (citing *Oxford English Dictionary* at 574 (1933)). And a bump stock does not permit a semiautomatic firearm to fire more than one bullet in a "self-acting" manner. "[A]utomatically" means an individual need do no more once a trigger is engaged to keep a firearm firing. Consider an "advertisement," which "declares that a device performs a task 'automatically by a push of a button.'" Pet.App.180 (Henderson, J., concurring in part and dissenting in part). Most "would understand the phrase to mean pushing the button activates whatever function the device performs. It would come as a surprise . . . if the device does not operate until the button is pushed and *some other action is taken*—a pedal pressed, a dial turned and so on." *Id.* at 181.

An automatic firearm really is automatic because once a trigger is pulled, no more manual input is necessary to keep the firearm firing. But "a firearm that shoots more than one round . . . by a single pull of the trigger AND THEN SOME (that is, by 'constant forward pressure with the non-trigger hand')" is not automatic. *Id.* at 180 (emphasis in original). It is akin to pressing a button and then taking some other action. "Bump firing does not maintain if all a shooter does is initially pull the trigger." *Cargill*, 57 F.4th at

463. If all an individual does is pull the trigger, a semiautomatic rifle with a bump stock will only fire a single round.

To read "automatically" to encompass even those mechanisms that require additional manual input from the individual shooter would elide the distinction between "automatic" and "semiautomatic." "[A]n automatic gun reloads and fires automatically, so long as the shooter keeps his finger on the trigger." Pet.App.86 (Walker, J., dissenting). By contrast, "[a] semiautomatic gun is one 'in which part, *but not all*, of the operations involved in loading and firing are performed automatically.'" Pet.App.86 (Walker, J., dissenting) (emphasis added). "A gun modified by a bump stock works semi automatically: the shooter plays a manual role in the firing process because he must keep constant pressure on the bump stock." *Id.*; *see also* Pet.App.181–82 (Henderson, J., concurring in part and dissenting in part); *Cargill*, 57 F.4th at 463; *Hardin*, 65 F.4th at 903 (Bush, J., concurring in the judgment); *Gun Owners of Am.*, 19 F.4th at 911–12 (Murphy, J., dissenting); *Aposhian*, 989 F.3d at 896 (Tymkovich, C.J., dissenting); *Aposhian*, 958 F.3d at 992 (Carson, J., dissenting).[3]

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[3] In fact, as the Fifth Circuit recognized, to accept ATF's definition would mean that nearly *all* semiautomatic rifles are automatic because these firearms can be bump fired without a non-mechanical bump stock. "[I]f ordinary bump firing constituted automatic fire, the Final Rule would convert a semiautomatic weapon into a machinegun simply by how a marksman used the weapon. That absurd result reveals the flaw in the Government's line of reasoning." *Cargill*, 57 F.4th at 464 (internal quotation marks omitted).

When originally enacted, § 5845(b) included "semiautomatic" firearms in the definition of "machinegun." Congress removed it in 1968. Pet.App.86 (Walker, J., dissenting). "ATF is without authority to resurrect it by regulation." Pet.App.182 (Henderson, J., concurring in part and dissenting in part).

B. If § 5845(b) is ambiguous, the rule of lenity, rather than *Chevron*, applies.

Even if the statutory language were ambiguous, the rule of lenity would require the Court to rule against the Government. The only possible argument to the contrary is that *Chevron* deference trumps the rule of lenity. And the Court has granted certiorari on whether to overrule *Chevron*. *See Loper Bright Enter. v. Raimondo*, No. 22-451 (U.S. May 1, 2023). The Court should do so, and it should do so in this case if the issue is not decided by *Loper Bright Enterprises*. But even if *Chevron* persists as an interpretative framework, then the rule of lenity should apply before a court can invoke *Chevron* in interpreting statutes, like § 5845(b), with criminal implications. That is for at least three independent reasons.

First, under the Constitution, "[o]nly the people's elected representatives in the legislature are authorized to 'make an act a crime.'" *United States v. Davis*, 139 S. Ct. 2319, 2325 (2019) (quoting *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812)). The application of *Chevron* to statutes with criminal implications disregards that rule; "[s]uch a scheme 'raises serious constitutional concerns by making [the] ATF the expositor, executor, and interpreter of

criminal laws.'" *Hardin*, 65 F.4th at 900 (quoting *Aposhian*, 989 F.3d at 900 (Tymkovich, J., dissenting from the denial of rehearing en banc)). "Before courts may send people to prison, we owe them an independent determination that the law actually forbids their conduct. A 'reasonable' prosecutor's say-so is cold comfort in comparison." *Guedes*, 140 S. Ct. at 790 (statement of Gorsuch, J.). Whatever one's views of *Chevron* deference in the civil context, it has no proper place in the criminal law. *Apel*, 571 U.S. at 369.

Chevron deference is often justified based on agency expertise. An administering agency is thought better equipped than a generalist court to determine the best interpretation of a statute because of its specialized expertise in the statute's subject matter. *See, e.g., Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 651–52 (1990). Whatever the merits of that rationale in the civil context, it is unpersuasive in the criminal-law realm. "Criminal statutes reflect the value-laden, moral judgments of the community as evidenced by their elected representatives' policy decisions," *Gun Owners of America*, 992 F.3d at 461 (citing *Gregg v. Georgia*, 428 U.S. 153, 175 (1976)), not technical knowledge. In fact, "there is nothing highly technical or complex about condemning, for example, the distribution of dangerous drugs, the commission of violent acts, or, as relevant here, the possession of deadly weapons." *Hardin*, 65 F.4th at 901.

Second, applying the *Chevron* framework to statutes with criminal applications is also fundamentally unfair to criminal defendants. The Executive Branch is, by definition, a party in every

criminal case. Thus, when courts defer to Executive Branch constructions of ambiguous criminal statutes, they are displaying a bias that systematically favors prosecutors and harms defendants. Even the *appearance* of potential bias toward a litigant violates the Due Process Clause. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 886–87 (2009). Individuals should not be subjected to criminal trials, with their liberty at stake, where the judge puts a thumb on the scale in favor of the prosecutor. Given the fundamental unfairness of such procedures, it is no wonder that the Court has held categorically that "criminal laws are for courts, not for the Government, to construe." *Abramski*, 573 U.S. at 191.

Third, *Chevron* itself counsels that before any deference should be given to the Government's interpretation, a reviewing court must "apply[] the ordinary tools of statutory construction." *City of Arlington v. Fed. Commc'ns Comm'n*, 569 U.S. 290, 296 (2013) (quoting *Chevron*, *USA, Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–843 (1984)) (emphasis added). The rule of lenity is a centuries-old canon of statutory construction holding that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Skilling v. United States*, 561 U.S. 358, 410 (2010). "This is a rule of construction . . . as old and well established as law itself." *Cargill*, 57 F.4th at 473 (Ho, concurring in part and concurring in the judgment) (quoting *United States v. Wilson*, 28 F. Cas. 699, 709 (C.C.E.D. Pa. 1830)).

Given its lengthy pedigree, the rule of lenity fits comfortably within *Chevron*'s definition of an ordinary

tool of statutory construction. Thus, *City of Arlington* dictates that the rule of lenity should be considered *before* application of *Chevron* deference.

As the courts that have applied the rule of lenity to § 5845(b) and the Rule have all concluded, lenity commands that § 5845(b) be interpreted to *not* include bump stocks. *Hardin*, 65 F.4th at 902; *Cargill*, 57 F.4th at 469; *id.* at 473 (Haynes, J., concurring in the judgment); *id.* (Ho, J., concurring in part and concurring in the judgment); *Gun Owners of Am.*, 19 F.4th at 927 (Murphy, J., dissenting); *Aposhian*, 989 F.3d at 899–900 (Tymkovich, C.J., dissenting from the denial of rehearing en banc).

The case of bump stocks is perhaps Exhibit A of why the rule of lenity exists. For more than a decade, ATF told "the public that bump stocks were legal. After the rule, bump-stock owners who relied on that advice are felons if they do not discard their devices." Pet.App.77 (Walker, J., dissenting). Yet the rule of lenity forbids playing "pinball" with interpretations of criminal law based on public pressure or altered policy positions. *Aposhian*, 989 F.3d at 900 (Tymkovich, C.J., dissenting from the denial of rehearing en banc). Instead, lenity protects "core constitutional concerns: fair notice and the separation of powers," *id.* at 899, ensuring "[i]t is the legislature . . . which is to define a crime, and ordain its punishment," *Wiltberger*, 18 U.S. at 95, and that individual citizens have "fair warning . . . of what the law intends to do if a certain line is passed," *Cargill*, 57 F.4th at 473 (quoting *McBoyle v. United States*, 283 U.S. 25, 27 (1931) (Holmes, J.)).

"The ATF's interpretation of 'machinegun' gives anything but fair warning—instead, it does a *volte-face* of [the agency's] almost eleven years' treatment of a non-mechanical bump stock as not constituting a 'machinegun.'" Pet.App.174 (Henderson, J., concurring in part and dissenting in part). Only Congress can bring about such turnabouts in what is and what is not a crime.

III. This Petition Presents a Good Vehicle to Finally Resolve These Important and Recurring Issues.

The Government is authoring an "increasingly common story:" (1) a great controversy and public outcry attends a modern problem, and a proposed legislative solution is considered by Congress; (2) but Congress ultimately does not enact that proposed solution into federal statute; (3) an executive branch agency steps into the breach and "finds within an old statute the power to address the problem that Congress did not." Pet.App.89–90 (Walker, J., dissenting) (collecting examples).

That is, of course, what happened with bump stocks. *Id.* ("Congress recently considered at least five bills restricting or banning bump stocks."); *Cargill*, 57 F.4th at 451 ("Multiple bills . . . were introduced in both houses of Congress."); *see, e.g.,* Automatic Gunfire Prevention Act, S. 1916, 115th Cong. § 2 (2017) (proposing to ban "bump-fire device[s]").

This "common story" is particularly problematic here because the issues presented by this Petition and the Rule involve criminal consequences for otherwise

law-abiding citizens. Even in the ordinary case, governance by executive shortcut is an affront to our Republic's separation of powers. But the Rule presents a rather extraordinary case because it involves the very principle the separation of powers is designed to protect: individual liberty. *Bond v. United States*, 564 U.S. 211, 222, (2011). Few federal agency actions could have graver implications than the criminalization of previously lawful conduct. But that is exactly what the Rule accomplishes.

From the beginning, the Constitution has assigned the responsibility to determine what is a federal crime to Congress. As this Court stated in 1812, "[t]he legislative authority of the Union must . . . make an act a crime [and] affix a punishment to it." *Hudson*, 11 U.S. (7 Cranch) at 34; *see also Wiltberger*, 18 U.S. (5 Wheat.) at 95 (Marshall, C.J.) ("[T]he power of punishment is vested in the legislative . . . department. It is the legislature . . . which is to define a crime, and ordain its punishment."). This makes sense, as the determination that something ought to be criminal "represents the moral condemnation of the community" accompanied by the "seriousness of criminal penalties." *United States v. Bass*, 404 U.S. 336, 348 (1971). If such a determination is to be made, it should be made by the Congress "through the assent of the people's representatives and thus [with] input from the country's many parts, interests[,] and classes." *Wooden v. United States*, 142 S. Ct. 1063, 1083 (2022) (Gorsuch, J., concurring).

Of course, the Constitution's assignment to the legislature of the power to determine what is or is not

criminal by means of written law is nothing new. Since the Magna Carta, "the Anglo-American legal system has . . . restricted the executive branch's power to create new crimes. Crimes are made by legislation, not executive fiat." Pet.App.91 (Walker, J., dissenting).

More recently, however, the Executive has encroached on Congress's sole power to determine what is and is not criminal—and the Judiciary (at least in some courts) has abdicated its obligation to independently assess the Executive's interpretation of what has been made criminal. In this, the Rule poses a double threat to the liberty secured by the Constitution's separation of powers. Instead of Congress deciding that possession of non-mechanical bump stocks should be criminal, the Executive did. And, in some courts, instead of an independent judicial assessment that Congress intended to criminalize certain conduct, the judiciary defers to the Executive.

* * *

"[T]he bump stock ban is not ordinary. It's the source of a circuit split. It's the product of an agency's impatience with Congress. And it's an affront to 800 years of Anglo-American legal history restricting the executive's power to create new crimes." Pet.App.88. It is an issue that requires this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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