No. 22-1222

In the Supreme Court of the United States

DAMIEN GUEDES, ET AL.,

Petitioners,

v.

BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, ET AL.,

Respondents.

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

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

The courts of appeals have divided over the validity of Respondents' Rule sweeping non-mechanical bump stocks within 26 U.S.C. § 5845(b)'s definition of "machinegun." Respondents cannot dispute that "this case presents an important question of statutory interpretation that has divided the courts of appeals and that warrants further review by this Court." BIO.13. Instead, Respondents spend the bulk of their brief in opposition urging the Court to choose their favored vehicle for resolving that split—*Garland v. Cargill*, No. 22-976—based on two supposed "significant vehicle issues" with this case. BIO.17. But far from "significant," one of the Government's supposed "vehicle issues" is entirely illusory—and the other *favors granting this Petition*.

Respondents first argue that the Court's review in this case could be "complicate[d]" because Petitioners purportedly "did not properly dispute" the district court's "factual conclusions about how bump stocks function." *Id.* at 16. The point is entirely irrelevant, since the factual conclusions at issue—a completely vanilla description of the functioning of bump stocks, *see* App.19—are entirely consistent with every argument against Respondents' Rule that Petitioners intend to present or that the Court is likely to consider. The question presented in this case is not a factual dispute about how bump stocks work; the parties are in agreement on that score. The question presented here is the purely legal one of whether Respondents properly stretched Section 5845(b) to encompass them.

Respondents also point out that Petitioners devoted some portion of the Petition to the issues surrounding *Chevron USA, Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), that have occupied much of the lower courts' analysis of the challenged Rule. That is true, but it is a powerful reason for granting review *in this case*—either instead of *Cargill*, or at least alongside it. There can be no doubt that this Court will need to address the applicability and validity of *Chevron* in deciding the questions presented: most of the federal appellate judges who have voted to uphold the rule have done so based on *Chevron*, and every court to have struck it down has done so only after *rejecting Chevron*. Yet the certiorari-stage briefs in *Cargill* scarcely mention *Chevron*. This Court should grant the Petition here to ensure that it will be adequately presented with the full panoply of arguments it must consider as it assesses the "important question of statutory interpretation" before it. BIO.13.

ARGUMENT

I. Respondents' brief in opposition makes clear that this case is worthy of the Court's review. As Respondents themselves explain, the case "presents an important question of statutory interpretation that has divided the courts of appeals." *Id.* And the answer to that divisive question will determine whether law-abiding citizens are threatened with draconian criminal penalties for merely possessing an item that executive functionaries—based on nothing but interpretive fiat—have declared to be unlawful. The stakes could scarcely be higher.

II. After *conceding* that the question presented in this case "warrants further review by this Court," *id*,

Respondents argue that the Court *should decline to grant certiorari anyway*, because Respondents have hand-picked a different vehicle: "the Government's earlier-filed petition in *Cargill*." *Id.* at 15. But neither of the supposed "vehicle problems" with this case that Respondents purport to identify is remotely persuasive.

A. Respondents' first "significant vehicle issue[ ]" is that "case-specific questions" about whether Petitioners have forfeited any objection to certain of the "district court's factual conclusions about how bump stocks function" could purportedly "complicate this Court's consideration of the question presented." *Id.* at 16–17. It is hard to see how, given that none of the factual findings at issue has any relevance to the questions of statutory interpretation presented here.

The sum total of the "factual findings" that Petitioners purportedly did not dispute are the district court's entirely uncontroversial description of how a bump stock operates: "To use a bump stock, the shooter must maintain forward pressure on the barrel and, at the same time, pull the trigger and maintain rearward pressure on the trigger. . . In this way, the shooter is able to reengage the trigger without additional pulls of the trigger." App.19. None of these propositions has any bearing on the questions presented by the Petition. The validity of Respondents' interpretation of Section 4845(b) does not turn on whether a non-mechanical bump stock allows a user to fire more than one shot "without additional pulls of the trigger," *id.*; it turns on whether the statute's reference to firing more than one round "*automatically* . . . by a single *function* of the trigger," 26 U.S.C. § 5845(b) (emphases added), can properly be interpreted as encompassing

the firing of more than one round *semi*automatically, by a single *pull* of the trigger.[1]

B. The second "vehicle issue[ ]" Respondents put forward is that "petitioners devote a substantial portion of their petition to *Chevron*-related issues." BIO.17. This does at least identify a difference between the Petition here and in *Cargill*, but it is one that counsels *in favor* of granting review in this case.

Of the fifteen Court of Appeals Judges who have voted to uphold Respondents' Rule, nine of them have done so based on *Chevron* deference. *See Gun Owners of Am., Inc. v. Garland*, 19 F.4th 890, 898–907 (6th Cir. 2021) (en banc) (Opinion of White, J., joined by Moore, Cole, Clay, and Stranch, J.J.); *Aposhian v. Barr*, 958 F.3d 969, 979–984 (10th Cir. 2020) (Opinion of Briscoe, J., joined by Moritz, J.); App.121–55 (Per Curiam opinion of Srinivasan and Millett, J.J.). Indeed, the preliminary-injunction-stage panel below invoked *Chevron* to uphold the Rule *even though Respondents disclaimed any reliance on the doctrine*. And the appellate decisions *striking down* the Rule have all likewise grappled with *Chevron* at length. *See Cargill v. Garland*, 57 F.4th 447, 464–69 (5th Cir.

[1] Judge Walker's dissent from the denial of rehearing argued that even if " 'function' means 'pull,' it is *still* not clear that the statute covers bump stocks." App.84. That argument, however, is based on Respondents' own determination "that a 'pull' of the trigger can include other 'analogous' ways of 'activating a trigger,' " *id.* (cleaned up)—and it thus does not rely on any assertion that the user of a bump stock literally "pulls" the trigger (i.e., engages the trigger by rearward movement of the trigger finger) more than once. Even this alternative argument, then, is entirely consistent with the "district court's factual conclusions about how bump stocks function." BIO.16.

2023); *Gun Owners of Am., Inc. v. Garland*, 992 F.3d 446, 454–68 (6th Cir.), *on reh'g en banc,* 19 F.4th 890 (6th Cir. 2021); *Hardin v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 65 F.4th 895, 899–901 (6th Cir. 2023). Justice Gorsuch's statement respecting the earlier denial of certiorari in this case also extensively treats with the applicability, and validity, of *Chevron* deference. *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 140 S. Ct. 789, 789–91 (2020) (Statement of Gorsuch, J.).

Accordingly, whether the Government likes it or not, the specter of *Chevron* unavoidably haunts this case, and the Court will almost certainly find it necessary to address it in determining the correct interpretation of 26 U.S.C. § 5845(b). Yet none of the principal certiorari-stage briefs in *Cargill* discusses *Chevron* in any meaningful way. Petitioners' presentation of the *Chevron* issue—and the intertwined question whether the rule of lenity applies—is thus a powerful reason to prefer this case as a vehicle for resolving the questions presented. Yes, the Government's Petition in *Cargill* "has been fully briefed since June 21, 2023," BIO.15, but this Petition *is fully briefed now*, and the Court's procedures do not contain a "first-to-file" rule.

At the very least, this consideration counsels in favor of granting review both in *Cargill* and in this case, to ensure that the Court has before it the entire suite of arguments that have surfaced in the lower courts concerning the validity of Respondents' Rule. Respondents claim that "the Court does not typically grant duplicative petitions merely to allow additional litigants to participate as parties," *Id.* at 17, but as the *Chevron* issue they identify demonstrates, the petitions here are not duplicative. And the Court routinely

grants, and consolidates for argument, multiple petitions raising the same or similar questions, where doing so ensures the Court will be presented with the full panoply of arguments bearing on those questions. *See, e.g.*, *Campos-Chaves v. Garland*, No. 22-674; *Brown v. United States*, No. 22-6389; *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, No. 20-1199.

Respondents also claim that "because the D.C. Circuit declined to rely on *Chevron*, this case does not properly present any question about the *Chevron* doctrine." BIO.17. That is not so; the preliminary-injunction-stage decision below extensively discussed and expressly relied upon *Chevron*, so the issue is squarely presented. *See* App.121–55. Moreover, given the Government's contention below that *"Chevron*'s applicability is . . . not . . . susceptible to 'waiver' (or forfeiture) in the ordinary sense" because it is an inherent part of a court's "interpretative authority," Br. for Appellees, D.C. Cir. Doc. 1920528 at 53 (Nov. 1, 2021), it can hardly be heard now to claim that the question of *Chevron* deference is somehow not properly before this Court.

III. The Petition explains why Respondents' Rule is unlawful, and Judge Walker and Judge Henderson's dissents below detail the particulars at greater length. *See* App.80–88; App.178–90. The Government's principal response to all of this is a reference to "its filings in *Cargill*," and a halfhearted handful of sentences that try to wedge its rule within Section 5845(b)'s definition. Nothing Respondents say here or in *Cargill* adequately justifies the Rule.

A. Respondents first attempt to explain how a firearm equipped with a non-mechanical bump stock fires multiple rounds with "a single function of the trigger," 26 U.S.C. § 5845(b), even though the trigger still functions only once for each shot that is fired, BIO.18–19. This is so, they say, because the "firing sequence enabled by a bump stock is *initiated* by a 'single function of the trigger.' " Cargill.Pet.17 (emphasis added). But the same thing could be said about the operation of a semi-automatic firearm *without* a bump stock: the first pull of the trigger "initiates" a "firing sequence" of multiple rounds if the user continues to repeatedly pull the trigger. That does not render an ordinary semi-automatic arm a "machinegun," of course, because each successive shot in the "firing sequence" requires a new "function of the trigger"—and Section 5845(b) only applies where multiple shots *are fired* "by a single function of the trigger," not where the firing of multiple rounds *is initiated* "by a single function of the trigger." So too here. Just as with an unequipped semi-automatic firearm, "[e]very shot requires a new movement of the trigger. If a gun fitted with a bump stock fires *more* than one round with a single movement of the trigger, it has malfunctioned." App.81.

To be sure, a bump stock facilitates a "back-and forth cycle that causes the trigger to bump repeatedly against the shooter's stationary finger." BIO.19. (That is, so long as the user maintains the forward pressure necessary to keep the trigger snug against her finger.) But while that certainly *decreases the time that lapses* between each "function of the trigger," it does not cause the firearm to discharge "more than one shot . . . by a single function of the trigger," 26 U.S.C.

§ 5845(b), so it is entirely irrelevant to the determination whether the arm constitutes a machinegun as Congress chose to define it in Section 5845(b).

Congress may define "machinegun" in terms of a firearm's rate of fire rather than how many rounds are fired by each function of its trigger. Such a definition might even better capture some people's perception of the risks posed by fully automatic firearms. But that is not the definition Congress adopted in Section 5845(b), and it is up to the elected lawmakers in that body to amend that statute—not the bureaucrats at ATF, and not even the judges who authored the decisions below.

B. Even if non-mechanical bump stocks enabled a semi-automatic firearm to fire multiple rounds with a "single function of the trigger," that firing would still not take place "automatically," and so Respondents' Rule would still be contrary to 26 U.S.C. § 5854(b). For a firearm equipped with such a device does not continue to fire in a "self-acting" way—"going of itself." App.85. Rather, it continues to fire *only* if the user undertakes the separate, continuous action of maintaining forward pressure on the front part of the firearm. It is only that distinct action that causes the successive rounds to fire—*not* the firearm or bump stock "going of itself." And "[a] mechanism cannot be self-acting or self-regulating if it requires user input to keep working." *Id.*

Respondents resist that conclusion, asserting that "[t]he pressure that the shooter must maintain on the front of a weapon modified with such a bump stock is no different than the pressure a shooter must maintain on the trigger of a conventional machinegun to

engage in continuous fire." *Cargill*.Pet.21. But maintaining pressure on the trigger of a fully automatic machinegun *is* very different in the following respect: that user input is a "function *of the trigger*." 26 U.S.C. § 5845(b) (emphasis added). And under the statutory definition, that difference is dispositive. Section 5845 does not define "machinegun" as a firearm that fires multiple shots automatically, full stop—that is, without *any input from the user whatsoever*. Rather, it defines "machinegun" as a firearm that fires more than one round automatically "by a single function of the trigger." A conventional machinegun is automatic in just this sense: it "go[es] of itself" *so long as* the user directs it to do so by the "function of the trigger." A semi-automatic firearm equipped with a non-mechanical bump stock does not, because the user can fire more than one round only if she undertakes a continuous action that *has nothing to do* with the function of the trigger: maintaining forward pressure on the firearm with her other hand.

The Government attempts to undermine this distinction through the construction of a hypothetical firearm that fires continuously with a single function of the trigger, in the manner of a conventional machinegun, but only if the user "also press[es] and hold[s] a button with his non-trigger hand." *Cargill*.Pet.24. Respondents' imaginary device also appears to be distinct from a non-mechanical bump stock—and again, in just the way that the statutory text singles out. For if pressing the non-trigger-hand button merely serves to *keep the trigger engaged*, as Respondents' hypothetical suggests, then this action is best understood as simply *a part of* the "function of the trigger" itself—in the same manner as if the

manufacturer dispensed with a conventional trigger altogether and *replaced* it with a button that functioned to cause the firearm to discharge multiple rounds so long as it was depressed. Since either type of hypothetical firearm would still fire multiple rounds "automatically" with each "function of the trigger," both would qualify as machineguns under Section 5845(b)'s definition. Non-mechanical bump stocks do not, so they remain outside the scope of that definition.

C. Section 5845(b)'s plain language thus unambiguously forecloses Respondents' Rule interpreting the statute as sweeping non-mechanical bump stocks within the definition of machinegun. But even if there could be any doubt about that, the statutory text at the very least does not *unambiguously support* Respondents' interpretation. And because the rule of lenity, and the constitutional principles that undergird it, require Congress to establish any criminal restrictions in unambiguous language, that alone is enough to doom Respondent's Rule. The administration is free to urge Congress to update Section 5845(b) in a way that would encompass non-mechanical bump stocks. But the statutory text as it stands does not do so, and the Constitution does not allow the Executive Branch—dissatisfied by the congressional response to its overtures—to "use creative interpretations to grab for itself even more power." App.94. This Court should grant review, reverse the decision below, and set aside Respondents' unlawful Rule.

CONCLUSION

The Court should grant the writ.

September 15, 2023

Respectfully submitted,

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