No. 22-976

In the Supreme Court of the United States

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

v.

MICHAEL CARGILL, RESPONDENT

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

BRIEF IN SUPPORT OF CERTIORARI

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QUESTIONS 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). "Bump stocks" are devices that attach to semi-automatic rifles to assist with more rapid firing and are useful for individuals with limited finger dexterity. Between 2008 and 2017, the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) repeatedly issued classification decisions stating that non-mechanical bump stocks are not "machinegun[s]" under section 5845(b). But in 2018, ATF reversed its longstanding interpretation and issued a rule declaring bump stocks machineguns and ordering Americans possessing those devices to destroy them or abandon them at an ATF office by March 26, 2019. The question presented is as follows:

> 1. Whether a bump stock–equipped semiautomatic weapon fires "automatically more than one shot … by a single function of the trigger" and thus falls within the definition of a "machinegun" in section 5845(b).

The Court should also address the following question, which was addressed by the court of appeals and is encompassed within the government's question presented:

> 2. If the definition of "machinegun" in section 5845(b) is ambiguous, whether the Fifth Circuit correctly held that the rule of lenity requires courts to construe that statutory ambiguity against the government.

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ATF enforces federal statutes regulating the sale and possession of firearms, including 26 U.S.C. § 5845(b)'s prohibition on "machinegun[s]." *See* 18 U.S.C. § 922(o). Between 2008 and 2017, ATF repeatedly issued classification decisions stating that non-mechanical bump stocks—devices that can be attached to semi-automatic weapons—are not "machinegun[s]" under section 5845(b). In 2018, ATF reversed its longstanding interpretation and issued a rule declaring that bump stocks are machineguns under section 5845(b). It also ordered Americans possessing those devices to destroy them or abandon them at an ATF office.

Respondent Michael Cargill sued ATF over its new rule and sought declaratory and injunctive relief, as well

as vacatur of ATF's rule under section 706 of the APA. *See* 5 U.S.C. § 706(2)(A) (authorizing reviewing courts to "hold unlawful and set aside" unlawful agency action). The district court dismissed Cargill's claims,[1] and a three-judge panel of the Fifth Circuit affirmed. Pet. App. 72a–91a. Then the en banc Fifth Circuit reversed and directed entry of judgment for Cargill. Pet. App. 49a. The Solicitor General now seeks review of the Fifth Circuit's decision.

Cargill agrees with the Solicitor General that the Court should grant the petition. The question presented has sharply divided the federal courts of appeals. Three appeals courts, including the court below, agree with ATF's pre-2018 position that non-mechanical bump stocks are not "machinegun[s]." Two other appeals courts agree with ATF's present-day interpretation.

The Court should also grant certiorari because the definition of "machinegun" in section 5845(b) is an issue of statutory construction that affects many Americans. ATF estimates that Americans purchased 520,000 bump stocks during the nine-year period when ATF excluded them from the statutory definition of "machinegun." The 2018 rule now requires those owners to either surrender or destroy devices that they had lawfully obtained. Those (like Cargill) who have already surrendered their bump stocks will never recover them if the rule stands. ATF admits that the expected loss of property will exceed $100 million. Finally, the meaning of "machinegun" in section 5845(b) is an issue on which national uniformity is needed; it is not tenable to have a regime in which the sale and possession

1. Pet. App. 92a–153a.

of bump stocks are outlawed in some circuits while permitted in others.

Cargill also urges the Court to expand the question presented to better address the holding of the court below. A plurality of the en banc Fifth Circuit (eight out of 16 judges) endorsed ATF's pre-2018 interpretation of 26 U.S.C. § 5845(b)—that a non-mechanical bump stock is *not* a machinegun—as the "best" interpretation of the statute. The five concurring judges thought that section 5845(b) is ambiguous as applied to bump stocks and that the rule of lenity requires construing that ambiguity against the government. Of those 13 judges in the majority, 12 of them agreed that, at the very least, section 5845(b) was "egregiously ambiguous" and that the rule of lenity therefore required reversal.

Because the rule-of-lenity issue featured so prominently in the decision below, it is fairly encompassed within the Petitioners' question presented. If the Court determines that either the 2018 rule or ATF's prior interpretation unambiguously is the "best" interpretation of section 5845(b), then it will, of course, be unnecessary for the Court to address the rule of lenity. But, if the Court decides that section 5845(b)'s meaning cannot be definitively determined even after applying standard canons of construction, then the Court will need to decide whether to apply the rule of lenity to this criminal statute. As the competing opinions below well illustrate, there is considerable disagreement among the courts over the amount of ambiguity needed to trigger the rule of lenity. Construing the question presented to encompass the actual basis for

the decision below will enable the Court to provide much-needed guidance on this frequently recurring issue.

Cargill encourages the Court to grant the petition and direct the parties also to address the following question, which is fairly encompassed within the question presented by the Solicitor General: If the definition of "machinegun" in section 5845(b) is ambiguous, whether the Fifth Circuit correctly held that the rule of lenity requires courts to construe that statutory ambiguity against the government.

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 opinion of the three-judge panel of the court of appeals 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. At issue is the validity of a December 2018 Final Rule issued by the Bureau of Alcohol, Tobacco, Firearms and Explosives. The Final Rule appears in the Federal Register at 83 Fed. Reg. 66,514 (Dec. 26, 2018) and is included in the Administrative Record at AR5764–AR5804.

JURISDICTION

The en banc court of appeals issued its judgment on January 6, 2023. The Solicitor General timely filed a petition for certiorari on April 6, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT

"Bump stocks" are devices that attach to semi-automatic rifles to assist with more rapid firing, particularly by users with limited finger dexterity. Respondent Michael Cargill was among the many Americans who purchased bump stocks during the lengthy period when ATF permitted the marketing and possession of non-mechanical bump stocks.

A federal criminal statute adopted in 1986 bans civilian ownership of any "machinegun" manufactured after 1986. 18 U.S.C. § 922(o)(1). The statutory definition of a "machinegun," which has remained constant since 1986, states:

> 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 the control of a person.

26 U.S.C. § 5845(b). That definition is incorporated into the criminal code by 18 U.S.C. § 921(a)(24).

A. "Bump" Firing and Semi-Automatic Weapons. A gun qualifies as a "semi-automatic" weapon if it will fire

only once when the shooter pulls and holds down the trigger; a semi-automatic will fire more than once only if the shooter releases and reengages the trigger between shots. *See* Final Rule, 83 Fed. Reg. at 66,516; 18 U.S.C. § 921(a)(29). But experts can "bump fire" semiautomatic rifles at rates approaching those of automatic weapons. Bump firing is a "technique that any shooter can perform with training or with everyday items such as a rubber band or belt loop." *Id.* at 66,532.[2]

Attaching a bump stock to a semi-automatic rifle facilitates the bump firing of the rifle and is particularly useful for individuals who, for whatever reason, have not mastered bump firing without a bump stock. A bump stock replaces a semi-automatic rifle's standard stock with a

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2. Bump firing has been explained as follows:

> 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 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) ["*Gun Owners II*"] (Murphy, J., dissenting from affirmance of judgment by equally divided vote) (citing *id.* at 66,533).

plastic casing that allows the rifle's receiver to slide back and forth within the casing. *Id.* at 66,516, 66,518. A bump stock also includes an extension ledge on which the shooter places his or her trigger finger to keep it stationary while shooting. *Id.* at 66,516. Recoil energy from the rifle's discharge separates the stationary trigger finger from the trigger, allowing the trigger to reset. By applying "forward pressure with the non-trigger hand" on the fore-end of the rifle while "maintaining the trigger finger on the device's ledge *with constant rearward pressure*" (emphasis added), the shooter forces the rifle (and trigger) forward following recoil, thereby "bumping" the trigger into the trigger finger and initiating a second discharge. *Id.* at 66,518. The key to successful bump firing is applying forward pressure 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.

B. ATF Regulation of Bump Stocks. William Akins obtained a patent in 2000 for the first bump stock, which he named the "Akins Accelerator." In response to a letter from Akins, ATF issued a classification letter in 2002, determining that the Accelerator was not a "machinegun" because an Accelerator-equipped semi-automatic 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). After conducting further testing, ATF in 2006 overruled its prior determination and concluded that the Accelerator was, indeed, a "machinegun." Both ATF and the Eleventh Circuit noted that the device contains a

mechanical part—an internal spring—that thrusts the rifle forward following recoil, thereby causing the weapon "to fire continuously … until the gunman releases the trigger or the ammunition is exhausted." *Id.* at 200. Based on that analysis, the Eleventh Circuit in 2009 affirmed ATF's determination that the Accelerator met the statutory definition of a "machinegun" because a single act of the shooter—pulling the trigger—causes the weapon to fire "automatically" more than one shot. *Ibid.*

Upon its reclassification of the Akins Accelerator as a machinegun, ATF announced that "removal of the internal spring would render the device a nonmachinegun under the statutory definition" because without the spring the weapon would not "automatically" move forward following recoil. Final Rule, 83 Fed. Reg. at 66,517. In ten separate letter rulings issued between 2008 and 2017, ATF concluded that non-mechanical bump stocks (*i.e.*, bump stocks that lack mechanical parts, such as a spring) were not machineguns because "they did not 'automatically' shoot more than one shot with a single pull of the trigger." *Ibid.*

C. ATF Reverses Its Position. A 2017 mass shooting in Las Vegas (involving a shooter using semiautomatic rifles, apparently equipped with bump stocks) created public outcry to ban bump stocks. Congress introduced multiple bills to that effect. *See* H.R. 3947, 115th Cong. (2017); H.R. 3999, 115th Cong. (2017). While these bills were being debated, senior executive-branch officials ordered ATF to reverse its prior decisions that non-mechanical bump stocks are not "machinegun[s]" under section 5845(b). In particular, President Trump issued a

memorandum directing the Department of Justice "to dedicate all available resources … to propose … a rule banning all devices that turn legal weapons into machineguns." 83 Fed. Reg. 7,949 (Feb. 20, 2018).

The next month ATF proposed a rule to "clarify" that non-mechanical bump stocks are machineguns under 26 U.S.C. § 5845(b). 83 Fed. Reg. 13,442 (March 29, 2018). The Final Rule, issued in December 2018, amended previous regulations to state explicitly that section 5845(b)'s definition of "machinegun" includes non-mechanical bump stocks of the sort that ATF previously declared outside the scope of section 5845(b). *See* ATF, *Bump-Stock-Type Devices*, 83 Fed. Reg. 66,514 (Dec. 26, 2018) (amending 27 C.F.R. §§ 447.11, 478.11, and 479.11) ("Final Rule").[3] Senator Dianne Feinstein—who sponsored one of the bills mentioned above—warned that this attempt to preempt the legislative process "hinges on a dubious analysis claiming that bumping the trigger is not the same as pulling it" and affirmed that "legislation is the only way to ban bump stocks." Press Release, Sen. Dianne Feinstein, *Feinstein Statement on Regulation to Ban Bump Stocks* (Mar. 23, 2018).

The revised regulations now define a prohibited "machinegun" to include a bump-stock device that "allows a semi-automatic firearm to shoot more than one shot with a single pull of the trigger," 27 C.F.R. § 447.11, even

3. ATF re-classified as machineguns all varieties of non-mechanical bump stocks then available for sale, reasoning that they all "utilize essentially the same functional design." *Id.* at 66,516. The devices purchased by Cargill, known as Slide Fires, were among several varieties of non-mechanical bump stocks commercially marketed through 2018.

though the trigger resets for each shot and no second shot will fire unless the shooter takes additional steps beyond the initial pull of the trigger. The Final Rule ordered Americans possessing those devices to destroy them or abandon them at an ATF office by March 26, 2019. 83 Fed. Reg. at 66,514.

D. Proceedings Below. Cargill surrendered his bump stocks to ATF and then filed this suit challenging the Final Rule. The complaint alleged, among other things, that: (1) the best reading of 26 U.S.C. § 5845(b) is the one espoused by ATF before December 2018; (2) the Final Rule conflicts with the statutory definition of a machinegun and thus exceeds ATF's authority; (3) ATF lacks authority to issue a legislative rule that may lead to criminal consequences; (4) because the Final Rule is not a valid legislative rule, ATF's interpretation is not entitled to judicial deference; (5) if the courts determine that the definition of machinegun is ambiguous as applied to bump stocks, then they should apply the rule of lenity and hold that non-mechanical bump stocks are not machineguns; and (6) if 26 U.S.C. § 5845(b) indeed authorizes ATF to declare that non-mechanical bump stocks are prohibited machineguns, then the statute would violate the Constitution by divesting Congress's legislative powers to draft criminal laws.

In response, ATF conceded that it lacks authority to issue any legislative rule concerning the definition of a machinegun. Instead, ATF argued that the Final Rule is an interpretive rule that constitutes the best reading of the statute, that non-mechanical bump stocks have always been included within the statutory definition of machine-

guns, and that ATF's prior, contrary interpretation was mistaken.

The case was submitted for decision based on the Administrative Record compiled by ATF. The district court conducted a half-day bench trial on September 9, 2020, to hear the testimony of an ATF official—called to assist the trial judge in understanding how bump stocks work.

On November 23, 2020, the district court entered judgment for ATF on all claims. Pet. App. 92a–153a. The court held that the Final Rule is a legislative rule, despite ATF's assertions that it lacked authority to issue a legislative rule and that it intended the Final Rule to be an interpretive rule. *Id.* at 121a–125a. In reaching that conclusion, the court relied in part on the D.C. Circuit's holding that the Final Rule is a legislative rule. *See Guedes v. Bureau of Alcohol, Tobacco, Firearms and Explosives*, 920 F.3d 1, 18–19 (D.C. Cir. 2019) ["*Guedes I*"]. The district court stated that the Final Rule will have a "significant effect[] on private interests," and asserted that such effects are "characteristic of legislative rules." Pet. App. 124a.

The court also held that ATF was authorized to issue legislative rules interpreting 26 U.S.C. § 5845(b) by the rulemaking authority delegated in 18 U.S.C. § 926(a) and 26 U.S.C. § 7805(a). Pet. App. 125a–128a. It so held despite acknowledging that "Defendants agree with Plaintiff that 'the narrow statutory delegation on which the [Final Rule] relies does not provide the Attorney General the authority' to issue legislative rules with criminal consequences." *Id.* at 126a. To support its holding, the court cited the D.C. Circuit's *Guedes I* ruling and the Tenth Circuit's ruling in *Aposhian v. Barr*, 958 F.3d 969 (10th Cir.

2020) ["*Aposhian I*"], both of which held that ATF possesses statutory authority to issue the Final Rule as a legislative rule.

The court parted company with *Guedes I* and *Aposhian I*, however, on whether ATF's interpretation of 26 U.S.C. § 5845(b) is entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Both the D.C. and Tenth Circuits held that ATF's interpretation is entitled to *Chevron* deference, and they upheld the Final Rule on that basis after concluding that 26 U.S.C. § 5845(b) is ambiguous as applied to non-mechanical bump stocks. The district court, by contrast, held that ATF's interpretation was not entitled to *Chevron* deference because 26 U.S.C. § 5845(b) has significant criminal-law applications and "criminal laws are for courts, not for the Government, to construe." Pet. App. 134a (quoting *Abramski v. United States*, 573 U.S. 169, 191 (2014)). The court stated that it would rely "solely on 'the traditional tools of statutory construction' to determine whether the Final Rule adopts the correct interpretation of the definition of 'machinegun' as applied to bump-stock type devices." *Ibid.* (quoting *Texas v. United States*, 497 F.3d 491, 503 (5th Cir. 2007)).[4]

The district court ultimately concluded that the "best reading" of the statutory definition of "machinegun" encompasses non-mechanical bump stocks of the sort owned

4. In light of that ruling, the court declined to address an additional argument raised by Cargill in opposition to *Chevron* deference: that deference is inappropriate when, as here, the Government has expressly waived any claim to *Chevron* deference. *Id.* at 131a–133a.

by Cargill. Pet. App. 135a–145a. The court accepted the Final Rule's construction of section 5845(b)—that a weapon shoots more than one shot "automatically" if multiple shots fire "as a result of a self-acting or self-regulating mechanism that allows the firing of multiple rounds through a single pull of the trigger." *Id.* at 138a–143a. It then held that a single pull of the trigger initiates the requisite "self-acting or self-regulating mechanism," *id.* at 143a–145a, notwithstanding ATF's explicit acknowledgment that multiple shots will fire only if the shooter *also*: (1) applies forward pressure with the non-trigger hand on the fore-end of the rifle; and (2) maintains constant rearward pressure on the extension ledge. 83 Fed. Reg. at 66,518. The court rejected Cargill's contention that ATF failed to adequately distinguish non-mechanical bump stocks (which the Final Rule classifies as machineguns) from semi-automatic rifles (which ATF does not classify as machineguns despite the fact that semi-automatic rifles can be bump fired by experienced shooters with or without the assistance of bump stocks). Pet. App. 145a–146a.

Finally, the district court rejected Cargill's non-delegation arguments, holding that section 5845(b) provides ATF with an "intelligible principle" to guide ATF in determining what weapons to classify as "machineguns." *Id.* at 131a.

A three-judge panel of the Fifth Circuit affirmed, holding that "bump stocks qualify as machine guns under the best interpretation of the statute." Pet. App. at 73a. In June 2022, however, the Fifth Circuit granted Cargill's petition for rehearing en banc, which automatically vacated the panel opinion.

By a 13-3 vote, the en banc Fifth Circuit reversed the district-court judgment and remanded with instructions to enter judgment for Cargill. Pet. App. 1a–71.

Writing for a plurality of eight of the 16 judges, Judge Elrod stated that a "plain reading" of section 5485(b) "reveals that a bump stock is excluded from the technical definition of 'machinegun.'" *Id.* at 3a. She explained:

> The definition of machinegun … establishes two conditions that must obtain in order for a weapon to qualify. The weapon must operate "automatically" and "by a single function of the trigger." According to the statute's unambiguous language, neither condition obtains as applied to a semi-automatic rifle equipped with a non-mechanical bump stock. The failure of either condition is sufficient to entitle Cargill to judgment.

Id. at 32a.

Writing on behalf of an 11-judge majority, Judge Elrod held alternatively that "assuming *arguendo*" that section 5845(b) is ambiguous as applied to bump stocks, the rule of lenity requires that the statute be construed against the government. Pet. App. 41a–45a.[5] The court "recognized that courts have considered two standards for whether a

5. Part V of Judge Elrod's opinion addressed the rule of lenity. Chief Judge Richman and Judges Stewart, Southwick, and Ho concurred in the judgment and joined in Part V. Judge Oldham, who joined Parts I–IV.A of the opinion, did not join Part V and expressed no views regarding applicability of the rule of lenity. *See id.* at 2a n*.

statute is sufficiently ambiguous to trigger the rule of lenity":

> One standard asks whether there is a "reasonable doubt" as to the statute's meaning. … The other inquires whether there is a "grievous ambiguity" in the statute. The Supreme Court does not appear to have decided which of these standards governs the rule of lenity.

Id. at 41a (citations omitted). The court concluded that "it does not matter which standard applies because the rule of lenity applies even under the more stringent 'grievously ambiguous' condition." *Id.* at 42a. It explained, "Assuming that the statute at issue here is ambiguous, we can only 'guess' at its definitive meaning. We have availed ourselves of all traditional tools of statutory construction, and in this circumstance, they fail to provide meaningful guidance." *Ibid.* (quoting *United States v. Suchowolski*, 838 F.3d 530, 534 (5th Cir. 2016)).[6]

Finally, Judge Elrod's plurality opinion said the court need not address Cargill's challenge to Congress's divesting of power "because multiple independent reasons compel us to hold the Final Rule to be unlawful." Pet. App. 46a. She added, "But if more were needed, this issue may well implicate the canon of constitutional avoidance." *Ibid.*

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6. Judge Elrod also stated that ATF's interpretation of section 5845(b) is not entitled to *Chevron* deference, because: (1) the Government did not ask for such deference; (2) the *Chevron* framework does not govern interpretation of statutes that apply criminal penalties; and (3) the Final Rule is inconsistent with prior ATF interpretations of section 5845(b). Pet. App. 32a–41a. ATF does not seek review of that portion of Judge Elrod's opinion.

Judge Haynes concurred in the judgment only, concluding that section 5485(b) "is ambiguous such that the rule of lenity favors the citizen in this case." Pet. App. 49a.

Judge Ho, joined by Chief Judge Richman and Judge Southwick, concurred in part and wrote separately to explain why he believed that the rule of lenity requires section 5845(b) to be construed against the Government. Pet. App. 49a–62a. He concluded that "the grammar and syntax" of the phrase "single function of the trigger" and the word "automatically" "are at best inconclusive, and that lenity therefore requires us to side with the citizen over the government." *Id.* at 54a.

Judge Higginson, who authored the panel decision. dissented, joined by Judges Dennis and Graves. Pet. App. 63a–71a. He disagreed with the majority's construction of section 5485(b) "[f]or the reasons stated in the panel opinion." *Id.* at 63a.

The bulk of his dissent focused on what he deemed a misapplication of the rule of lenity. He asserted that the "majority and lead concurrence" ignored Supreme Court precedent by "apply[ing] the rule of lenity to garden-variety ambiguity." *Id.* at 64a–65a. He stated:

> [T]he majority does not explain how the tools upon which it relied to interpret the statute—dictionaries, grammar, and corpus linguistics—would be useless to resolve an interpretive debate if the statute were ambiguous. So the majority rests on an unstated and unsupported leap: ambiguous statutes are always grievously ambiguous. In effect, this means the rule of lenity would apply to decide any ambiguity in

> Cargill's favor. … The lead concurrence adopts an equally low threshold for lenity.

Id. at 65a–66a.

ARGUMENT

I. THE COURT SHOULD GRANT THE PETITION

The Court should grant the petition. The question presented is one that has sharply divided the federal appeals courts. As a result, ATF's Final Rule banning non-mechanical bump stocks is effectively unenforceable in a large number of States while fully enforceable in others.

Moreover, the definition of "machinegun" is an important issue of statutory construction that affects many Americans. The circuit split leaves citizens throughout the country in a quandary over whether their possession of a bump stock is illegal and might subject them to 10 years' imprisonment. The potential financial loss faced by those who purchased 520,000 bump stocks during the years ATF said they were legal is large; ATF estimates that if its ban is upheld and ATF does not return bump stocks to their original owners, their losses will exceed $100 million.

A. The Appeals Courts Are Sharply Divided Regarding Whether Bump Stocks Are Properly Classified as Machineguns

As the court below acknowledged, federal-court challenges to the Final Rule have "engendered great disagreement" among the federal appeals courts. Pet. App. 16a. While a significant majority of federal judges to address the issue have agreed with the Fifth Circuit's decision to reject ATF's interpretation of section 5845(b), at

least one circuit—the D.C. Circuit—has held unequivocally that the Final Rule constitutes the "best" interpretation of section 5845(b). Review is warranted to resolve this recent, acknowledged, and irreconcilable circuit conflict.

After giving a series of inconclusive signals over the past two years, the Sixth Circuit recently agreed with the Fifth Circuit and construed section 5845(b) as excluding bump stocks from the definition of "machinegun[s]." *Hardin v. Bureau of Alcohol, Tobacco, Firearms and Explosives*, 65 F.4th 895 (6th Cir. 2023).[7] The Sixth Circuit held:

> The viability of competing interpretations is exemplified not only by the myriad and conflicting judicial opinions on this issue, but also by the ATF's own flip-flop in its position. And because the statute is subject to more than one reasonable interpretation, it is ambiguous.

Id. at 898. Applying the rule of lenity, the court stated, "Because the relevant statutory scheme does not clearly and unambiguously prohibit bump stocks, we are bound to construe the statute in Hardin's favor." *Id.* at 902. Judge Bush concurred in the judgment; he would have held that "the best reading of the statute is that Congress

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7. In 2021, a Sixth Circuit panel held that non-mechanical bump stocks are not properly classified as machineguns under the best reading of the statute. *Gun Owners of America, Inc. v. Garland* ["*Gun Owners I*"], 992 F.3d 446, 469 (6th Cir. 2021). The Sixth Circuit later granted rehearing en banc. The en banc court split 8-8 and could not render a majority opinion; the result was affirmance of the district court's judgment rejecting a challenge to the Final Rule. *Gun Owners II*, 19 F.4th at 896.

never gave the ATF 'the power to expand the law banning machine guns through [the] legislative shortcut' of the ATF's rule." *Id.* at 902 (quoting *Gun Owners II*, 19 F.4th at 910 (Murphy, J., dissenting)).

A military appeals court also agreed with the Fifth Circuit's holding. *United States v. Alkazahg*, 81 M.J. 764 (U.S. Navy-Marine Corps Ct. Crim. App. 2021). That court overturned a criminal conviction of a Marine who possessed a bump stock after determining that the best reading of 26 U.S.C. § 5845(b) excludes bump stocks from the definition of machineguns. 81 M.J. at 784.[8]

On the other side of the ledger, the D.C. and Tenth Circuits have held, over dissents, that 26 U.S.C. § 5845(b)'s applicability to bump stocks is ambiguous and denied preliminary injunctions on the ground that ATF's Final Rule is entitled to *Chevron* deference. *Guedes I*, 920 F.3d at 32; *Aposhian I*, 958 F.3d at 985.[9] The dissenting opinions argued that the best reading of 26 U.S.C. § 5845(b) excludes bump stocks from the definition of machineguns. *Guedes I*, 920 F.3d at 43–44 (Henderson, J., dissenting); *Aposhian I*, 958 F.3d at 991–1001 (Carson, J., dissenting).[10]

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8. The federal government did not appeal *Alkazahg*, and that decision is now final within the military justice system.

9. This Court denied a petition to review *Guedes I*. 140 S. Ct. 789 (2019) ["*Guedes II*"]. In connection with the order denying review, Justice Gorsuch opined that the D.C. Circuit erred in affording *Chevron* deference to the Final Rule. *Id.* at 790 (statement of Gorsuch, J., respecting denial of certiorari).

10. The Tenth Circuit granted rehearing en banc but voted 6-5 after oral argument to vacate the order as improvidently granted. *Aposhian v. Wilkinson*, 989 F.3d 890 (10th Cir. 2021) ["*Aposhian II*"]. The five dissenting judges issued opinions stating that the

(continued…)

When *Guedes* returned to the D.C. Circuit following entry of final judgment for ATF, the appeals court again upheld the Final Rule—this time on the ground that the Final Rule adopted the best interpretation of 26 U.S.C. § 5845(b). *Guedes v. Bureau of Alcohol, Tobacco, Firearms and Explosives*, 45 F.4th 306 (D.C. Cir. 2022) ["*Guedes III*"].

The conflict among the appeals courts is not inadvertent, as each of the later-issued decisions construing section 5845(b) acknowledged the previous conflicting decisions from other courts. There is no reason to suppose that the conflict will disappear without this Court's intervention. Review is warranted to resolve the conflict.

B. The Question Presented Is Exceptionally Important

Review is also warranted because the question presented is exceptionally important. The Final Rule is negatively affecting hundreds of thousands of law-abiding citizens.

Despite ATF's previous assurances that federal law permitted possession of a bump stock, the Final Rule now brands as criminals all those who *ever* possessed a bump stock. According to ATF, federal law has unambiguously prohibited possession of bump stocks since 1986. ATF announced that owners would not be prosecuted if they destroyed or surrendered their bump stocks by March 26, 2019. Final Rule, 83 Fed. Reg. at 66,546. But by decreeing that its Final Rule was simply a belated recognition of the proper scope of the machinegun statute, ATF purports to

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best reading of 26 U.S.C. § 5845(b) is that bump stocks are not machineguns. *Id.* at 891–908.

make nonprosecution of pre-2019 bump stock owners a matter of prosecutorial discretion. As the D.C. Circuit recognized, "the government's understanding that bump-stock devices have always been machine guns under the statute … mean[s] that bump-stock owners have been committing a felony for the entire time they have possessed the devices." *Guedes I*, 920 F.3d at 19–20. Before hundreds of thousands of otherwise law-abiding citizens living outside the Fifth and Sixth Circuits are permanently branded as criminals, review is warranted to determine which of ATF's conflicting interpretations of section 5845(b) is correct.

In addition, bump-stock purchasers are facing substantial economic loss as a result of ATF's about-face. ATF estimates that Americans purchased 520,000 bump stocks during the decade when ATF said they were legal. The Final Rule requires owners to surrender or destroy their devices; they will recover nothing if the Final Rule stands. ATF admits that the loss of property will exceed $100 million. Final Rule, 83 Fed. Reg. at 66,515. The federal government is refusing to provide compensation for those losses, and the federal courts have uniformly rejected demands for just compensation under the Fifth Amendment's Takings Clause. *See*, *e.g.*, *McCutchen v. United States*, 14 F.4th 1355 (Fed. Cir. 2021), cert. denied, 143 S. Ct. 422 (2022).

C. The Fifth Circuit's Holding that Bump Stocks Are Not "Machinegun[s]" Under Section 5845(b) Is Correct

Although Cargill agrees with ATF that the Court should grant the petition, ATF's argument that bump stocks are "machinegun[s]" is without merit. The Final

Rule misconstrues the requirements of section 5845(b) by overlooking the considerable human input required to fire more than one shot from a bump-stock-equipped semi-automatic rifle.

A weapon is defined as a "machinegun" if but only if "a single function of the trigger" can cause the weapon to shoot "automatically." 26 U.S.C. § 5845(b). The plain meaning of that sentence is that a weapon is not a "machinegun" if something more is required of the shooter than a single function of the trigger to produce more than one shot. And, as the Final Rule concedes, the shooter must do considerably more than pull the trigger once if he wishes the weapon to fire multiple shots. *See* Final Rule, 83 Fed. Reg. at 66,518 (stating that producing a second shot requires the shooter to place "forward pressure on the barrel-shroud or fore-grip of the rifle" while simultaneously "maintaining the trigger finger on the device's ledge with constant rearward pressure.").

ATF argues that a process can be deemed "automatic" even when the process requires some additional human input to continue to operate. Pet. at 21. But it cites no dictionary definitions to support that reading.[11] And as D.C. Circuit Judge Karen LeCraft Henderson concluded,

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11. Moreover, when the petition describes what additional human input is necessary, it mentions that the shooter must push forward on the fore-end of the rifle with his non-trigger hand but repeatedly fails to mention that he must also apply rearward pressure with his shooting finger/hand. *See*, *e.g.*, *id.* at 6, 8, 11, 21. Judicial review of the Final Rule is undertaken based on the Administrative Record, which expressly determined that application of "constant rearward pressure" with the shooting hand is a necessary component. Final Rule, 83 Fed. Reg. at 66,516.

ATF's definition of "automatically" is inconsistent "with the common sense meaning of the language used." *Guedes I*, 920 F.3d at 44 (Henderson, J., concurring in part and dissenting in part). She explained:

> Suppose an advertisement declares that a device performs a task "automatically by a push of a button." I would understand the phrase to mean pushing the button activates whatever function the device performs. It should come as a surprise, I submit, 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.

Ibid. So too, when section 5845(b) states that a weapon is a machinegun if it fires multiple rounds "automatically" based on "a single function of the trigger," that provision is properly read as excluding weapons that will fire multiple rounds only if the shooter undertakes a task *in addition to* effecting a single function of the trigger.

ATF argues that a bump-stock-equipped semiautomatic rifle should be deemed to shoot multiple rounds "automatically" with only "a single function of the trigger" because a bump stock "harnesses the firearm's recoil energy in a continuous back-and-forth cycle initiated by a single pull of the trigger." Pet. at 20. That assertion lacks any evidentiary support. A weapon's "recoil energy" causes the rifle to move in one direction only: backward. The rifle moves forward following recoil only if the shooter manually pushes it forward with his non-shooting hand.

It is the absence of a mechanism to move the rifle forward "automatically" following recoil that distinguishes non-mechanical bump stocks from the Akins Accelerator. The latter contains a mechanical device—a spring—that thrusts the rifle forward following recoil, thereby causing the weapon to fire a second time "automatically" (*i.e.*, without additional human intervention). *See Akins*, 312 Fed. Appx. at 200. Non-mechanical bump stocks do not contain that spring, and thus a bump-stock-equipped semi-automatic weapon will not fire a second time unless the shooter pushes the rifle forward while applying rearward pressure with the shooting hand (thereby pushing the trigger forward and into contact with the stationary trigger finger). In light of that distinction between the two devices, there is no merit to ATF's assertion that the rationale adopted by the Fifth Circuit plurality would require legalization of the Akins Accelerator. Pet. at 23.

II. The Court Should also Address Whether Section 5845(b) Is Ambiguous as Applied to Bump Stocks and, If so, Whether the Fifth Circuit Properly Applied the Rule of Lenity When Construing the Statute

ATF contends that section 5845(b) unambiguously supports its position, set out in the Final Rule, that the definition of "machinegun[s]" includes non-mechanical bump stocks. Cargill contends, on the contrary, that section 5845(b) unambiguously supports his position that non-mechanical bump stocks are *not* machineguns. Neither position garnered the support of a majority of the Fifth Circuit: eight of 16 judges supported Cargill's position, while three supported ATF. Rather, the court

majority ruled for Cargill only after concluding that: (1) section 5845(b) is "grievously ambiguous" regarding its application to non-mechanical bump stocks; and (2) the rule of lenity requires courts to construe that ambiguity against the government. *Id.* at 41a–45a (majority opinion); *id.* at 49a (Haynes, J., concurring in the judgment).

Given that basis for the decision below, the rule-of-lenity issue is fairly encompassed within the question presented and should be addressed by the Court if necessary to resolve this dispute. While each side believes that the statute unambiguously supports its position, the rule of lenity's applicability will be squarely presented if the Court agrees with the Fifth Circuit that the statute is ambiguous as applied to non-mechanical bump stocks.

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). The rule is more easily stated than applied, and there is considerable confusion among the lower federal courts regarding just how ambiguous a criminal statute must be before the canon applies and the statute must be construed against the government.

That confusion was evident in the Fifth Circuit's decision. The majority expressed uncertainty regarding which of two standards should be applied in determining whether a statute is ambiguous: (1) a standard that asks whether there is a "reasonable doubt" as to the statute's meaning, Pet. App. 41a (citing *Moskal v. United States*, 498 U.S. 103, 108 (1990)); or (2) a standard that asks whether there is a "grievous ambiguity" in the statute.

Ibid. (quoting *Chapman v. United States*, 500 U.S. 453, 463 (1991)). The majority concluded that it did not matter which standard it applied "because the rule of lenity applies even under the more stringent 'grievously ambiguous' standard." *Id.* at 42a. The court stated that it was unable to resolve ambiguities in the phrases "single function of the trigger" and "automatically," even after employing "all available tools of statutory construction." *Id.* at 43a. That inability led the court to conclude that section 5845(b) is "grievously ambiguous," although it conceded that "the precise meaning of 'grievously ambiguous' is not entirely clear." *Ibid.*

The dissent strongly disagreed with the majority's standard for judging ambiguity. It argued that this Court has "repeatedly instructed" that the rule of lenity should be construed extremely stringently. *Id.* at 63a. The dissent asserted, "[T]he Supreme Court lets us deploy lenity to narrow laws only as a last resort when, having tried to make sense of a statute using every other tool, we face an unbreakable tie between different interpretations." *Id.* at 64.

While conceding that the majority gave lip service to the "grievously ambiguous" standard, the dissent charged that the majority actually interpreted the rule of lenity far more broadly:

> [T]he majority does not explain how the tools upon which it relied to interpret the statute—dictionaries, grammar, and corpus linguistics—would be useless to resolve an interpretive debate if the statute were ambiguous. So the majority rests on an unstated and unsupported

> leap: ambiguous statutes are always grievously ambiguous. In effect, this means the rule of lenity would apply to decide any ambiguity in Cargill's favor.

Pet. App. 66a.

Disagreement within the Fifth Circuit over how to apply the rule of lenity mirrors similar disagreements among members of this Court. *Compare Wooden v. United States*, 142 S. Ct. 1063, 1075 (2022) (Kavanaugh, J., concurring) ("Properly applied, the rule of lenity … rarely if ever plays a role because, as in other contexts, hard interpretive conundrums, even related to complex rules, can often be solved."); *with id.* at 1085–86 (Gorsuch, J., concurring in the judgment) ("Where the traditional tools of statutory interpretation yield no clear answer, the judge's next step isn't to legislative history or the law's unexpressed purposes. The next step is to lenity. … Or as Chief Justice Marshall put it, '[t]o determine that a case is within the intention of a statute, its language must authorise us to say so.'") (quoting *United States v. Wiltberger*, 5 Wheat. 76, 96 (1820)).

In light of these conflicting views among the justices, it is little wonder that the appeals courts disagree on how the rule of lenity should be applied to resolve conflicting statutory interpretations. The Court's articulation of a "grievously ambiguous" test has done little to eliminate the confusion. The Fifth Circuit majority and dissenting opinions agreed that the rule of lenity should be invoked to resolve conflicting interpretations of section 5845(b) only if, after applying ordinary rules of statutory interpretation, they determined that section 5845(b) is

"grievously ambiguous." But they disagreed over how the "grievously ambiguous" standard applies to this case. The dissent accused the majority of applying a watered-down standard under which "ambiguous statutes are always grievously ambiguous." Pet. App. 66a. And the majority candidly admitted that "the precise meaning of 'grievously ambiguous' is not entirely clear." *Id.* at 43a. The Court can clear up that confusion by including within its review the Fifth Circuit's decision to invoke the rule of lenity.

Whatever rule-of-lenity standard the Court adopts, Cargill urges the Court to incorporate within that standard the policy considerations that have led courts to recognize the rule throughout our nation's history. First, the rule of lenity "exists in part to protect the Due Process Clause's promise that a 'fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed.'" *Bittner v. United States*, 143 S. Ct. 713, 725 (2023) (opinion of Gorsuch, J., joined by Jackson, J.) (quoting *McBoyle v. United States*, 283 U.S. 25, 27 (1931)). There is serious reason to question that section 5845(b)'s wording provides fair warning that a bump stock is a "machinegun" whose possession can result in a 10-year prison sentence. As Justice Gorsuch opined in connection with a previous bump-stock certiorari petition, ATF "used to tell everyone that bump stocks don't qualify as 'machineguns.' Now it says the opposite. … How, in all this, can ordinary citizens be expected to keep up?" *Guedes II*, 140 S. Ct. at 790 (statement of Gorsuch, J.). To provide "fair warning," a criminal statute "must be *reasonably* clear; and a person

of ordinary intelligence must be able to *reasonably understand* what conduct is proscribed by law and what penalty is attached." David S. Romantz, *Reconstructing the Rule of Lenity*, 40 Cardozo L. Rev. 523, 571 (2018) (emphasis in original).

Second, the rule of lenity plays a role in vindicating the separation of powers. It is the role of Congress, not the courts or an agency, to write the laws and prescribe the circumstances under which the government may impose criminal penalties. The rule of lenity "helps safeguard this design by preventing judges from intentionally or inadvertently exploiting doubtful statutory expressions to enforce their own sensibilities." *Wooden*, 142 S. Ct. at 1083 (Gorsuch, J., concurring in the judgment).

Cargill agrees with the views of the 25 federal appellate judges who have written or joined opinions stating that section 5845(b) is best read as excluding non-mechanical bump stocks from the definition of machineguns. But as the Sixth Circuit recently opined, "the viability of competing interpretations [of section 5845(b)] is exemplified not only by the myriad and conflicting judicial opinions on this issue, but also by the ATF's own flip-flop in its position." *Hardin*, 65 F.4th at 898. Cargill does not agree with the conclusion that the Sixth Circuit draws from "the myriad and conflicting judicial opinions on this issue": that the statute is "ambiguous" simply because "it is subject to more than one reasonable interpretation." *Ibid.* But the conflicting judicial opinions on the bump-stock issue provide substantial support for Cargill's alternative argument that, at the very least, section 5845(b) is irremediably ambiguous as applied to bump stocks and thus that the

rule of lenity requires that the statute be construed against the government.

The Court should address the rule-of-lenity issue decided by the Fifth Circuit, if necessary to fully resolve the case.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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