

No. 22-976

In the Supreme Court of the United States

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

v.

MICHAEL CARGILL

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

REPLY BRIEF FOR THE PETITIONERS

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A bump stock transforms a semiautomatic rifle into a weapon that shoots hundreds of bullets per minute with a single pull of the trigger. The Fifth Circuit nonetheless held that a bump stock is not a “machinegun” under the National Firearms Act (NFA), 26 U.S.C. 5801 *et seq.* That decision defies the ordinary meaning of the statutory language, conflicts with the decisions of other courts of appeals, and threatens to create a dangerous loophole in the criminal prohibition on possessing new machineguns, 18 U.S.C. 922(o)(1).

Although respondent defends the judgment below on the merits, he “agree[s] with the Solicitor General that the Court should grant the petition” for a writ of certiorari because this case presents “an important question of statutory construction” on which the courts of appeals are “sharply divided.” Br. in Support of Cert. 2, 17. Respondent proposes that the Court add a second

question addressing the rule of lenity, but that question is already fairly included within the question presented in the government's petition—as respondent himself concedes. See *id.* at 24-30. The Court should grant the petition, decline respondent's invitation to add a redundant question, and reverse the judgment below.

A. Respondent Agrees That The Fifth Circuit's Decision Warrants This Court's Review

The petition demonstrates (at 26-28) that the Fifth Circuit's decision is inconsistent with the decisions of several other circuits, which have rejected challenges to the same interpretive rule at issue here. Since the petition was filed, that conflict has only become more entrenched. Respondent's brief supporting certiorari thus correctly recognizes (at 17-24) that this Court should grant certiorari because this case implicates a square division of authority on an issue where national uniformity is essential.

After the petition was filed, a divided panel of the Sixth Circuit deepened the existing conflict by holding that bump stocks are not machineguns as defined in 26 U.S.C. 5845(b). See *Hardin v. ATF*, 65 F.4th 895, 897 (2023). The panel majority observed that the question “[w]hether a bump stock is a machinegun” has divided the courts of appeals, *id.* at 898 (collecting cases)—including the Sixth Circuit itself, which had previously granted rehearing en banc to consider the issue only to divide evenly. See *Gun Owners of Am., Inc. v. Garland*, 19 F.4th 890, 896 (2021), cert. denied, 143 S. Ct. 83 (2022) (cited at Pet. 26). By the *Hardin* panel majority's count, the question has occasioned a “total of 22 opinions * * * which fully explore all aspects of the issue in nearly 350 pages of text.” 65 F.4th at 898. The *Hardin* majority adopted the position of the en banc Fifth Cir-

cuit and held that principles of lenity require reading the statutory definition not to encompass bump stocks. See *id.* at 901-902. Judge Bush concurred in the judgment and would have held that the statutory definition “clearly” excludes bump stocks. *Id.* at 903; see *id.* at 902-904.*

The Sixth Circuit’s decision in *Hardin* underscores the need for this Court’s review. As respondent recognizes, “it is not tenable to have a regime in which the sale and possession of bump stocks are outlawed in some circuits while permitted in others.” Br. in Support of Cert. 2-3. Not only do the Fifth and Sixth Circuits’ decisions undermine the uniformity of federal law, they also undercut the practical effect of decisions by other courts rejecting analogous challenges. Bump stocks manufactured and sold in the Fifth and Sixth Circuits will predictably find their way to other parts of the country. Pet. 29. The question presented is also exceptionally important because bump stocks, like other machineguns, pose an acute danger to the public and to law enforcement. *Ibid.*; see Pet. App. 71a (Higginson, J., dissenting) (describing bump stocks as “instrument[s] of mass murder”).

B. Respondent’s Additional Question Is Redundant

The petition for a writ of certiorari asks this Court to decide the important question of statutory interpretation that has divided the courts of appeals: “Whether a bump stock device is a ‘machinegun’ as defined in 26 U.S.C. 5845(b) because it is designed and intended for

* The Solicitor General has authorized the filing of a petition for a writ of certiorari in *Hardin*. The government plans to request that its forthcoming petition in that case be held pending the Court’s disposition of this case and then disposed of as appropriate.

use in converting a rifle into a machinegun, *i.e.*, into a weapon that fires ‘automatically more than one shot * * * by a single function of the trigger.’” Pet. I. Respondent agrees that the Court should grant review of that question. Br. in Support of Cert. 2, 17, 20-21. Respondent proposes, however, that the Court add a second question: “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 the statutory ambiguity against the government.” *Id.* at 4; see *id.* at 24-30. That additional question is redundant and unnecessary.

Under Rule 14.1(a) of the Rules of this Court, a petition for a writ of certiorari must contain the questions presented for the Court’s review, “expressed concisely.” Sup. Ct. R. 14.1(a). The rule adds that the questions presented “should be short and should not be * * * repetitive.” *Ibid.* That admonition to be concise works in conjunction with the Court’s traditional principle, confirmed in Rule 14.1(a), that “[t]he statement of any question presented is deemed to comprise every subsidiary question fairly included therein.” *Ibid.*; see, *e.g.*, *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992).

The rule of lenity is a principle of statutory interpretation. Accordingly, as even respondent acknowledges, the question whether that principle has any role to play in the interpretation of Section 5845(b) is a subsidiary question that is “fairly encompassed within the question presented” in the petition. Br. in Support of Cert. 25. Indeed, this Court routinely considers the application of the rule of lenity in the absence of a separate question specifically raising it. See, *e.g.*, *Shular v. United States*, 140 S. Ct. 779, 787 (2020); *Shaw v. United States*, 580 U.S. 63, 71-72 (2016). Here, the government addressed

the rule of lenity in the petition (at 25-26), and respondent will be free to rely on it if the Court grants certiorari. Adding a second question presented would neither alter the issues before the Court nor otherwise aid the Court's consideration of the case.

C. The Fifth Circuit's Decision Is Wrong

Respondent briefly contends that the Fifth Circuit correctly held that bump stocks do not qualify as machineguns. See Br. in Support of Cert. 21-24. A complete discussion of that question can await the full briefing and argument that both parties agree is warranted. But respondent's discussion of the merits offers no persuasive defense of the Fifth Circuit's decision.

The NFA defines a "machinegun" as a weapon (or parts designed and intended to create a weapon) that "fires automatically more than one shot * * * by a single function of the trigger." 26 U.S.C. 5845(b). As the petition explains (at 15-26), a rifle modified with a bump stock satisfies both elements of that definition. First, such a weapon is capable of firing more than one shot by "a single function of the trigger," 26 U.S.C. 5845(b), because the bump stock allows the shooter to initiate a continuous firing cycle by a single pull of the trigger. After the shooter has pulled the trigger a single time, the bump stock itself functions to channel the recoil energy from each shot into a continuous back-and-forth cycle in which the trigger repeatedly bumps the shooter's stationary finger and the weapon continues to fire until all the ammunition is exhausted. Second, a rifle modified with a bump stock fires more than one shot "automatically," *ibid.*, because the bump stock is a "self-acting or self-regulating mechanism," Pet. 20 (citation omitted).

Respondent resists both conclusions, principally on the theory that a device cannot be a machinegun if it “requires some additional human input to continue” the automatic firing sequence. Br. in Support of Cert. 22; see *id.* at 21-24. But a prototypical machinegun also requires some additional human input, insofar as the shooter must hold down the gun’s trigger to continue firing—not to mention the human input required to control the recoil energy generated by each shot. The statutory definition thus does not turn on whether some minimal human input is required to maintain the continuous firing cycle. See Pet. 24-25. Instead, the question is whether the continuous firing sequence occurs through a self-acting or self-regulating mechanism. A bump stock meets that test: It is self-acting under the conditions set for it by the shooter, even in designs that require the shooter to maintain forward pressure on the barrel or foregrip of the weapon with the shooter’s non-trigger hand. See 83 Fed. Reg. 66,514, 66,532-66,533 (Dec. 26, 2018).

A contrary reading of the statute would create a dangerous loophole inviting easy circumvention of Congress’s considered decision to prohibit an exceptionally lethal class of weapons. As the government explained, excluding any weapon that requires some minimal continuing human input from the statutory definition of “machinegun” would mean that a prototypical machinegun could be excluded merely by modifying it to require some “minutia of human involvement,” such as holding down a button with the non-trigger hand. Pet. 25 (citation omitted). Respondent nowhere disputes that his construction of the statute would dictate that implausible result, rendering the prohibition on machineguns nugatory—a trifle to be easily evaded. And

that only further confirms what the natural reading of the statutory text instructs: A bump stock device is a machinegun covered by the NFA.

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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Solicitor General

JUNE 2023