No. 20-51016

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MICHAEL CARGILL,

Plaintiff – Appellant,

v.

MERRICK GARLAND, U.S. Attorney General; UNITED STATES DEPARTMENT OF JUSTICE; REGINA LOMBARDO, in her official capacity as Acting Director of the Bureau of Alcohol, Tobacco, Firearms and Explosives; BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES,

Defendants – Appellees.

On Appeal from the United States District Court, Western District of Texas, No. 1:19-cv-349, Honorable David A. Ezra

REPLY BRIEF FOR APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for Appellant Michael Cargill certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Appellant

Michael Cargill

Appellees

MERRICK GARLAND, U.S. Attorney General, in his official capacity;
UNITED STATES DEPARTMENT OF JUSTICE;
REGINA LOMBARDO, in her official capacity as Acting Director of the Bureau of Alcohol, Tobacco, Firearms and Explosives; and
BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES

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INTRODUCTION

ATF's defense of its final rule, *Bump-Stock Type Devices*, 83 Fed. Reg. 66514 (Dec. 26, 2018), reads like a discussion of an entirely different regulation and a completely different case than the one presented here. ATF blinks reality and insists that its rule doesn't really do anything—it just repeats what has always been true—never mind the text of the rule saying otherwise. And from this flawed foundation, it proceeds to dismiss the Final Rule's fundamental defects because, again, if the rule doesn't do anything, then those defects hardly matter.

ATF cannot avoid reality so easily; the Final Rule was an agency effort to rewrite the substantive criminal law. As ATF has acknowledged, though, the agency lacks the authority to overrule Congress and change the settled meaning of what constitutes a machinegun. Not only does it lack any regulatory power to issue binding regulations, even if the agency had such power, there is no statutory ambiguity that it could attempt to resolve through a regulation. Moreover, rather than supplementing the statute, the Final Rule rewrites it and improperly seeks to alter what constitutes a machinegun, which is something that no agency can accomplish by regulation. Indeed, if Congress attempted to give ATF the

power it has sought to exercise here, that would violate constitutional limits on the divestment of legislative authority.

ARGUMENT

I. ATF HAD NO AUTHORITY TO ISSUE THE FINAL RULE

A. The Final Rule Is Legislative

ATF remains committed to a narrative that has been rejected by every court to consider the Final Rule, and one that denies reality. ATF insists that, despite all evidence to the contrary in the rule itself, the Bump Stock Final Rule "is an interpretive rule that informs the public of the agency's understanding of the law; it does not purport to exercise authority to make law." ATF Br. at 36. And, despite the Rule's future effective date, statement of future effect, and creation of new criminal liability, ATF steadfastly maintains that it merely restates the status quo—"the Rule adopts the correct understanding of the statutory terms and correctly determines that bump stocks qualify as machineguns," which, ATF says, was *always* the case. ATF Br. at 37, 39.

ATF claims that the Rule is interpretive only, but hardly bothers to formulate an argument on that score. *See* ATF Br. at 36. This silence is not surprising, as the courts have not reached differing conclusions about

this threshold inquiry. *See Aposhian v. Barr*, 958 F.3d 969, 980 (10th Cir. 2020) ("All pertinent indicia of agency intent confirm that the [Final] Rule is a legislative rule.") *vacated by* 973 F.3d 1151 (10th Cir. 2020) (*en banc*), *and reinstated by* 989 F.3d 890, 891 (10th Cir. 2021) (*en banc*); *Guedes v. ATF*, 920 F.3d 1, 17-20 (D.C. Cir. 2019) (same).[1] As discussed in Mr. Cargill's opening brief, appeals courts—in multiple cases and across majority opinions and dissents—have universally agreed that the Rule is legislative because (i) it speaks unequivocally of the intent to alter the rights of bump stock owners; (ii) it was published in the Code of Federal Regulations; (iii) it imposes obligations and produces significant effects on private interests; (iv) the agency invoked purported legislative rulemaking authority in the rule; and, (v) it includes a future effective date. *See* Aplt. Br. 23-26.

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[1] ATF suggests that the Sixth Circuit held that the Final Rule is interpretive when invalidating it, but it plainly did no such thing. *See* ATF Br. at 36. While not explicit, the majority assumed the legislative nature of the rule, as it applied the framework of *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), which only applies to legislative rules and only when "the statutory provision is ambiguous" and the agency attempts to fill the gap with a legislative rule. *See Gun Owners of America v. Garland*, 992 F.3d 446, 455 (6th Cir. 2021). The dissent *was* explicit. *See id.* at 476 (White, J., dissenting) ("The ATF's rule is 'legislative.'") ATF offers no reason to reject prior courts' decisions on this issue, so its incorrect reading of *GOA* matters little.

ATF weakly responds, in a footnote, that its inclusion of a future effective date does not mean the Rule has any actual effect, because "[t]hose statements reflected the government's decisions (1) not to prosecute individuals who possessed bump stocks during the period in which the Department had erroneously classified them, and (2) to provide a reasonable grace period for individuals who already possessed bump stocks to come into compliance with the law." ATF Br. at 39 n. 6. But that is not what the Rule said at all. As the district court correctly recognized, "The Rule informs bump-stock owners that their devices '*will be prohibited when* this rule becomes effective.'" ROA.535 (quoting *Guedes*, 920 F.3d at 19). ATF "went out of [its] way to clarify that—before the Final Rule's effective date—any person 'currently in possession of a bumpstock-type device *is not acting unlawfully*.'" ROA.535 (quoting *Final Rule*, 83 Fed. Reg. at 66523). "The Final Rule also provides guidance for how individuals can comply '*to avoid violating* 18 U.S.C. § 922(o)' and emphasizes that it will 'criminalize *only future conduct, not past possession*' of bump-stock-type devices." ROA.535 (quoting *Final Rule*, 83 Fed. Reg. at 66525, 66530.) These are not statements of prosecutorial

grace—they are unequivocal assertions that the Rule is *changing* the future scope of criminal liability.

Regardless, ATF ignores the other factors demonstrating the legislative character of the Rule. For instance, the district court correctly noted that by ATF's own estimation, the Final Rule voids the lawful sale of as many as 520,000 bump-stock devices, with an economic impact of approximately $102.5 million. ROA.538 (citing *Final Rule*, 83 Fed. Reg. at 66547). Such a massive financial impact is quintessentially the type of "significant effect[] on private interests" that only a legislative rule may produce. *See Gulf Restoration Network v. McCarthy*, 783 F.3d 227, 236 (5th Cir. 2015). In the end, ATF simply has no answer to the reality that the Rule is what it says it is—a legislative rule.

B. ATF Had No Authority to Issue Any Legislative Rule, Including the Final Rule

The rule's legislative nature is ultimately determinative here. If the rule is legislative, then it is void because ATF has no power to issue legislative rules. ATF tries to deflect this inquiry as being unimportant, saying that "whether the Rule is legislative or interpretive does not affect the outcome here because the Rule adopts the correct understanding of the statutory terms and correctly determines that bump stocks qualify as

machineguns." ATF Br. at 37. But this skips past more fundamental questions that doom the Rule. If Congress did not give ATF the power to write legislative rules—and it did not—then a court need not even consider the substantive content of the rule to deem it unlawful and set is aside. Separately, because there is no statutory ambiguity for the rule to resolve, under the *Chevron* framework, the rule is invalid at step one.

As Mr. Cargill argued, and ATF agreed, ATF had *no* authority to issue a legislative rule. *See* Aplt. Br. 27-29. ATF explained to the district court that it acknowledged it lacked such authority, which is *why* ATF has been so insistent that its rule was merely interpretive. *See* ROA.539-40. ATF understands, at least tacitly, that its lack of substantive authority dooms the Rule. It argues that the agency's "authority to issue regulations" "does not turn on the existence of an ambiguity," because the rule is merely "interpretive." ATF Br. at 36, 40-41. ATF understands that it lacks the power to alter the definition of a machinegun; but because it has done so anyway, this Court should respect ATF's construction of its own (lack of) authority and invalidate the Rule. *See Texas v. United States*, 497 F.3d 491, 502 (5th Cir. 2007) ("Agency authority may not be lightly presumed.").

C. ATF Had No Authority to Issue the Final Rule Because There Is No Statutory Gap to Fill

Even if ATF had the authority to issue a legislative rule, the statutory text is unambiguous, and thus "there is no gap for the agency to fill and thus no room for agency discretion." *United States v. Home Concrete & Supply, LLC*, 566 U.S. 478, 487 (2012) (citation omitted). This lack of a gap to fill renders the Rule "invalid and unenforceable." *New Mexico v. Dep't of Interior*, 854 F.3d 1207, 1224, 1231 (10th Cir. 2017).

ATF again does not challenge this conclusion, even though it means that the Rule is invalid. ATF simply asserts that "the Rule's application of the terms used to define 'machinegun' in the National Firearms Act is correct, and there exists no ambiguity, let alone grievous ambiguity, in the statute." ATF Br. at 40. The district court, moreover, gave mixed signals about this question, noting in passing that it believed ATF had a sufficient regulatory basis to issue a "legislative rule that fills gaps in the definition of 'machinegun'" under the statutes, but also concluding, irreconcilably, that "uncertainty does not exist" in the statutory terms. ROA.541, 551 (quoting *Kisor v. Wilkie*, 139 S.Ct. 2400, 2415 (2019)).

As discussed in Mr. Cargill's opening brief though, there is no ambiguity in the statute, as courts have routinely held that the precise

terms at issue in this statute are unambiguous. *See United States v. Olofson*, 563 F.3d 652, 660 (7th Cir. 2009) (the "common meaning of 'automatically' is readily known by laypersons" and "a person of ordinary intelligence would have understood the common meaning of the term—'as the result of a self-acting mechanism'"); *United States v. Fleischli*, 305 F.3d 643, 655 (7th Cir. 2002) (the phrase "a single function of the trigger" is "plain enough" that efforts to parse it further become "brazen" and "puerile"). Ultimately, as five members of the Tenth Circuit wrote, "the statute is unambiguous," and courts have simply found "ambiguity where there is none." *Aposhian*, 989 F.3d at 892, 894 (Tymkovich, C.J., dissenting, joined by Hartz, Holmes, Eid, Carson, JJ.). The Rule has no gap to fill, and it is invalid and unenforceable as a result. *See id.*

II. ATF HAD NO AUTHORITY TO ISSUE A FINAL RULE THAT CONTRADICTS THE STATUTORY DEFINITION OF A MACHINEGUN

This Court can, and perhaps should, resolve this case on the threshold issues presented above. But if it proceeds to the question of whether the Final Rule conflicts with the statutory definition of a machinegun, the record demonstrates that the Final Rule is irreconcilable with the traditional limits placed in the statutory text. Having backed itself into a corner concerning its authority to issue

legislative rules, ATF steadfastly maintains that none of this really matters because the Final Rule does nothing more than restate what was always true—"adopt[ing] the correct understanding of the statutory terms and correctly determin[ing] that bump stocks qualify as machineguns." ATF Br. at 37. But to maintain this fiction ATF curiously abandons the trial evidence, particularly that presented by *its own expert witness*, proving that a bump stock alters nothing about the operation of a semiautomatic firearm.

The Final Rule contradicts the statutory text in two distinct ways. First, the Final Rule treats the word "automatically" to encompass continuous physical input between shots, again collapsing the traditional line separating machineguns from semiautomatic weapons. Second, the Final Rule redefines a "single function of the trigger" to mean only the deliberate pull of a trigger lever, thereby disregarding the mechanical action of semiautomatic firearms.

A. The Final Rule Improperly Defines "Automatically" to Include Continuous Manual Input from a Shooter

The Final Rule first conflicts with the statute because it reads the word "automatically" to include fire that is caused by deliberate, consistent input by the shooter between rounds. "[A]utomatically" in

§ 5845(b) means "as the result of a self-acting mechanism." *Olofson*, 563 F.3d at 658. But ATF's own trial evidence is clear—a semiautomatic rifle equipped with a bump stock requires a shooter to use deliberate force with *both* arms to fire additional rounds—he must "overcome th[e] recoil impulse" created by firing an initial shot by "pressing [the firearm] back forward," and yet again pushing the "trigger back in contact with the trigger finger" to fire the next round all while holding the rifle to his shoulder, and "press[ing] the firearm all the way back" "securely against [his] shoulder." ROA.631, 633, 655. "If a single function of the trigger *and then some other input* is required to make the firearm shoot automatically, we are not talking about a 'machinegun' as defined in § 5845(b)." *Aposhian*, 989 F.3d at 896 (Tymkovich, C.J., dissenting, joined by Hartz, Holmes, Eid, Carson, JJ.); *see also Guedes*, 920 F.3d at 44 (Henderson, J., dissenting) ("The statutory definition of "machinegun" does not include a firearm that shoots more than one round "automatically" by a single pull of the trigger **AND THEN SOME** (that is, by "constant forward pressure with the non-trigger hand")."

ATF tries for an expansive view of the word automatically, and one that includes any action that is "[s]elf-acting under conditions fixed for

it," which it thinks must also include taking discrete physical actions between firing rounds. ATF Br. at 29 (quoting *Final Rule*, 83 Fed. Reg. at 66519). In support, ATF also notes that a "prototypical machinegun likewise requires a shooter to maintain pressure on the firearm"—its trigger lever—to fire multiple rounds. ATF Br. at 31.

ATF's argument shows how ATF's view of the word "automatically" is totally unmoored from the statutory text. "Automatic" fire means *something*. Reading the term to encompass two-handed operation improperly disregards "the longstanding distinction between 'automatic' and 'semiautomatic'" firearms, which, at the time of enactment, "depended on whether the shooter played a manual role in the loading and *firing* process." *Guedes*, 920 F.3d at 45 (Henderson, J., dissenting) (emphasis added).

Finally, confronted with the undisputed evidence that it introduced, as well as the district court's findings of fact, both of which make it clear that a semiautomatic equipped with a bump stock requires significant manual input from the user between shots, ATF encourages this Court to jettison the trial evidence entirely in favor of "the agency's understanding of how a firearm operates[.]" ATF Br. at 32. Relying

instead on the *Rule's* text, for instance, ATF claims that a shooter cannot really "'bump fire' weapons by other means, such as through the use of a rubber band or belt loop." ATF Br. at 31. But the district court found otherwise—with practice, "bump firing" "can be achieved with other devices (like a belt loop) or with no device at all." ROA.513. This comes from ATF's own expert testimony that a Slide Fire bump stock has the same mechanical operation as a belt loop—it acts as a "post" for the trigger finger while the shooter allows the weapon to slide back and forth in his hands. ROA.632, 662. There is no basis, in law or in good sense, to disregard the trial record and the district court's corresponding factual determinations just because ATF does not *like* them or because they demonstrate the absurdity of ATF's interpretation.

Similarly, ATF asserts that firing a semiautomatic rifle equipped with a bump stock should be viewed more like "just maintaining pressure on the weapon," again in defiance of the trial evidence. *See* ATF Br. at 31. ATF's trial expert explained the multi-step process for firing a weapon equipped with a bump stock and testified that "even with his extensive experience, firing a weapon equipped with a bump stock did not come all that naturally, and required practice 'as you would learn [how to use] any

mechanical device.'" ROA.513 (quoting David Smith, Trial Tr. at 85:11–85:24 (Sept. 9, 2020)). But a Slide Fire has no springs, adds no mechanical parts, and can only be operated with *both* hands simultaneously performing separate tasks between shots. ROA.641, 642, 648. If a shooter fails to push forward on the weapon in a particular fashion, using both of his/her hands, the weapon will not fire more than one round. ROA.656, 657. The version of facts put forward in ATF's appellate brief cannot dislodge or carry the day against the facts adduced via trial testimony from ATF's expert witness.

B. The Final Rule Improperly Defines the Single Function of a Trigger to Exclude Mechanical Trigger Resets Between the Firing of Rounds

Separately, the Final Rule improperly attempts to redefine the traditional (and statutorily recognized) mechanical distinction between semiautomatic and automatic firearms. As ATF's own expert witness explained at trial, bump stocks do nothing to change the firing mechanism of a semiautomatic firearm. The trigger of a semiautomatic rifle equipped with a bump stock functions normally, that is, precisely the same way as the trigger on one not equipped with a bump stock. For every new shot fired, the shooter's finger must be released from the

trigger lever, and the trigger must lock back into place between each shot. ROA.651, 652, 654, 656, 659. The shooter's finger must "lose[] contact with the trigger lever" so that the "trigger mechanism [can] reset" for every round fired. ROA.652, 654. The only thing different is how a shooter engages the trigger—bumping the firearm *into* his stationary finger rather than pulling *back* on the trigger lever. *See* ROA.633, 655.

But ATF's Rule insists that this separation is irrelevant, and ATF claims that a trigger "functions" when a shooter engages in a course of actions that "initiate[a] firing sequence." ATF Br. at 26. ATF believes there is some difference between "activat[ing] the trigger" the first time and re-engaging the trigger between successive shots. ATF Br. at 25-26. It just seems not to count unless a shooter deliberately pulls on a trigger lever. *See id.*

ATF's view cannot be reconciled with the statutes. Under both the Gun Control Act and National Firearms Act, the term "machinegun" means "any weapon which shoots … automatically more than one shot, without manual reloading, by a single function of the trigger." 26 U.S.C. § 5845(b); *see also* 18 U.S.C. § 921(23). The statute focuses on the mechanical operation of a trigger, *not* the use of the shooter's trigger

finger. *GOA*, 992 F.3d at 471-72. "First, the phrase plainly refers only to the 'single function *of the trigger*,' … not 'the trigger finger[.]'" *Id.* at 471. It does not matter, therefore, if a shooter *pulls* a trigger lever or engages the mechanism by pushing the gun *into* his finger. *See id.* "Second, this interpretation is further supported by the fact that the rest of § 5845(b)'s statutory definition of a machine gun describes the firearm, not the shooter, the shooter's body parts, or the shooter's actions." *Id.*

But because "'function' refers to the mechanical process[,]" "a bump stock cannot be classified as a machine gun under § 5845(b)." *Id.* "With a bump stock attached to a semiautomatic firearm … the trigger still must be released, reset, and pulled again before another shot may be fired. A bump stock may change *how* the pull of the trigger is accomplished, but it does not change the fact that the semiautomatic firearm shoots only one shot for each pull of the trigger." *Id.* "With or without a bump stock, a semiautomatic firearm is capable of firing only a single shot for each pull of the trigger and is unable to fire again until the trigger is released and the hammer of the firearm is reset." *Id.* at 471-72.

ATF's answer to this argument involves reliance on decisions that only strengthen Mr. Cargill's case. Citing this Court's decisions in *Camp*

v. United States, 343 F.3d 743 (5th Cir. 2003), and *United States v. Jokel*, 969 F.2d 132, 135 (5th Cir. 1992), ATF asserts that this Court has held that a semiautomatic rifle is still a machinegun "if the trigger mechanism on the weapon mechanically operates each time a bullet is discharged." ATF Br. at 17, 23-24. But ATF focuses on the wrong "trigger."

The *Camp* decision simply reaffirms why the Final Rule is invalid. Camp had created his own conversion kit from a fishing reel, which he placed on a standard semiautomatic rifle. 343 F.3d at 745. "When an added switch behind the original trigger was pulled, it supplied electrical power to a motor connected to the bottom of a fishing reel that had been placed inside the weapon's trigger guard; the motor caused the reel to rotate; and that rotation caused the original trigger to function in rapid succession. The weapon would fire until either the shooter released the switch or the loaded ammunition was expended." *Id*. This Court rejected Camp's argument that his device was not a machinegun because the trigger lever still had to be engaged between shots, because Camp focused on the wrong trigger. *Id*. at 745. The "trigger" wasn't "the rifle's original metal lever/trigger" it was the electric switch that automatically engaged the device. *Id*. In fact, this Court specifically distinguished Camp's device

from a "legal 'trigger activator'" because the *legal* device required a shooter "*to separately pull the trigger each time you want to fire the gun*," using spring-assistance. *Id*. (emphasis in original). Here, of course, there is no other trigger, much less an electric on/off switch. The only way to make a bump stock fire is for the shooter to engage the trigger lever. *See* ROA.633, 655. It is thus just like the *legal* trigger activator that this Court distinguished from Camp's device. *See* 343 F.3d at 745.

The *Jokel* decision applied the same reasoning and recognized merely that a "trigger" is any mechanism that causes a weapon to fire—whether it is a trigger lever or something else. Jokel possessed a homemade shotgun, which he fired "by inserting a nail near the hammer in such a way that, when the hammer was released, it would fall forward and hit the nail." 969 F.2d at 133. This Court held that the "ordinary meaning" of a "trigger" included any "*mechanism* that is used to initiate the firing sequence." *Id*. at 135 (emphasis added). The *mechanism* for firing a semiautomatic rifle that is equipped with a bump stock is the trigger lever. *See* ROA.633, 655.

ATF also insists that unless this Court adopts the Final Rule's definition of a trigger's function then "a variety of other weapons would

no longer be deemed machineguns even though they operate, from the shooter's perspective, identically to a machinegun and produce the same results." ATF Br. at 28. But to make this misleading argument, ATF slyly asserts that, factually, a semiautomatic equipped with a bump stock automatically engages in a "firing sequence" that begins with a single trigger pull. ATF Br. at 25-26. Indeed, each example ATF lists relies on mechanical assistance between firing, such as a "battery-operated" device that operates with a push-button, or another "battery-operated piston attached to the index finger that pulled and released the trigger" on a weapon. ATF Br. at 28. Bump stocks have no such automatic assistance though and will only fire as long as the shooter continues to "overcome th[e] recoil impulse" by "pressing [the firearm] back forward," and yet again pushing the "trigger back in contact with the trigger finger" to fire the next round. ROA.633, 655. ATF's examples are simply inapposite.

III. EVEN IF THE STATUTE WERE AMBIGUOUS, ATF'S INTERPRETATION WOULD STILL BE INVALID BECAUSE THE RULE OF LENITY COMPELS ADOPTION OF MR. CARGILL'S READING OF THE STATUTORY TEXT

Even if this Court were to identify some gap in the statutory text and allow ATF, over its own objection, to promulgate a legislative rule filling that gap, ATF's Final Rule would *still* be invalid because the rule

of lenity requires the statutory ambiguity to be resolved in favor of Mr. Cargill's reasonable reading that precludes criminal liability. *See GOA*, 992 F.3d at 466-67 (holding that *Chevron* deference does not apply to the Final Rule, "to the contrary, ambiguities in criminal statutes have always been interpreted against the government, not in favor of it").

As the Sixth Circuit put it, "deference to the administering agency's interpretation of a criminal statute directly conflicts with the rule of lenity and raises serious constitutional concerns. Consequently, we must hold that no deference is owed to an agency's interpretation of a criminal statute." *Id.* at 460. Instead, doubts must be construed in Mr. Cargill's favor. *See id.* at 467. This is because "a court's deferring to an executive-branch agency's interpretation of a congressional statute naturally raises separation-of-powers concerns." *Id.* at 464. "Specifically, deferring to the executive branch's interpretation of a criminal statute presents at least three serious separation-of-powers concerns: (1) it puts individual liberty at risk by giving one branch the power to both write the criminal law and enforce the criminal law; (2) it eliminates the judiciary's core responsibility of determining a criminal statute's meaning; and (3) it reduces, if not eliminates, the public's ability to voice its moral judgments

because it transfers the decision-making from elected representatives in the legislature to unaccountable bureaucrats in the executive's administrative agencies." *Id.* at 464-65. Hence, "*Chevron* deference categorically does not apply to the judicial interpretation of statutes that criminalize conduct" and "[b]ecause the definition of machine gun in § 5845(b) applies to a machine-gun ban carrying criminal culpability and penalties[,]" this Court cannot grant *Chevron* deference to the ATF's interpretation and must instead apply the rule of lenity. *See id.* at 454, 466-67.

ATF seems to recognize the problem with jettisoning the rule of lenity in favor of *Chevron* deference, so it yet again does not ask for deference to its view of the statute. *See* ATF Br. at 18 ("Plaintiff's arguments about *Chevron* deference are irrelevant to resolving this case."). Yet it defends the district court's decision not to apply the rule of lenity because it insists that there is no "ambiguity, let alone grievous ambiguity, in the statute." ATF Br. at 40.[2] But if Mr. Cargill and ATF are

[2] ATF also points out that the district court refused to apply the rule of lenity after it said that there was no ambiguity in the statutory text. ATF Br. at 40. ATF fails to appreciate, however, that the district court also concluded that the statute was ambiguous enough to allow ATF to fill a purported gap with a legislative rule yet refused to apply the rule of lenity

both mistaken in their view of the statute's plainness, then lenity must apply—not *Chevron*.[3]

IV. If ATF Is Permitted to Rewrite the Federal Criminal Law, Then the Final Rule Is an Unconstitutional Divestment of Legislative Power

Finally, ATF ignores a critical constitutional point that invalidates the Final Rule. As Mr. Cargill argued before the district court and in his opening brief, if the Final Rule *was* authorized by 18 U.S.C. § 926(a), then it would represent an unlawful exercise of legislative power by the Executive Branch. *See* Aplt. Br. 58-64. This is not just another argument that the Rule conflicts with the statute—it is an argument about what it means if the rule and the statute *can* be reconciled. If Congress genuinely meant for ATF to be able to revise the statutory definition of a machinegun, it would constitute an unconstitutional divestment of legislative power to the agency. *See* Aplt. Br. 58-64. In other words,

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for that same ambiguity. *See* ROA.541, 551. There is no basis to distinguish degrees of ambiguity. If ambiguity exists, then this Court must adopt a reading of the statute that maximizes liberty, thereby rejecting ATF's effort to expand criminal liability. *See Yates v. United States*, 574 U.S. 528, 547-48 (2015).

[3] As argued in Mr. Cargill's opening brief, there are other reasons to refuse to apply *Chevron* deference beyond the rule of lenity. *See* Aplt. Br. 51-57. ATF disputes none of these reasons.

Congress *cannot* give ATF the power it has tried to exercise. To this concern, ATF says nothing.

This Court must not be so glib—the Sixth Circuit and five judges on the Tenth Circuit have accurately explained the stakes. If allowed to create new criminal liability here, "the Final Rule violates the separation of powers" and the "delegation [of Congressional power] raises serious constitutional concerns by making ATF the expositor, executor, and interpreter of criminal laws." *Aposhian*, 898 F.3d at 900 (Tymkovich, C.J., dissenting, joined by Hartz, Holmes, Eid, Carson, JJ.). Congress cannot "blithely delegate[] away" the "responsibility to determine what conduct should be condemned[.]" *GOA*, 992 F.3d at 466. If Congress meant for ATF to take over that function, it would impermissibly "transfer to [the agency] the essential legislative functions with which it is thus vested." *Id.* at 464 (quoting *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529-30 (1935)).

CONCLUSION

For the foregoing reasons, Mr. Cargill respectfully requests that this Court reverse the district court, direct entry of judgment for Mr. Cargill and permanently set aside the Final Rule.

May 27, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 27, 2021, an electronic copy of the foregoing brief was filed with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF filing system and that service will be accomplished using the appellate CM/ECF system.

/s/ Caleb Kruckenberg

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I hereby certify that this document complies with Federal Rule of Appellate Procedure 32(a)(7)(B)(ii). It is printed in Century Schoolbook, a proportionately spaced font, and includes 4821 words, excluding items enumerated in Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and Fifth Circuit Rule 32.2. I relied on my word processor, Microsoft Word, to obtain the count.

/s/ Caleb Kruckenberg

CERTIFICATE OF ELECTRONIC COMPLIANCE

I hereby certify that in the foregoing brief, filed using the Fifth Circuit CM/ECF filing system, all required privacy redactions have been made pursuant to Fifth Circuit Rule 25.2.13, any required paper copies to be submitted to the Court are exact copies of the version submitted electronically, and the electronic submission was scanned for viruses with the most recent version of a commercial virus scanning program, and is free of viruses.

/s/ Caleb Kruckenberg