No. 20-51016

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MICHAEL CARGILL,
Plaintiff-Appellant,

v.

MERRICK B. GARLAND, U.S. Attorney General; U.S. DEPARTMENT OF JUSTICE; MARVIN RICHARDSON, Acting Director, Bureau of Alcohol, Tobacco, Firearms and Explosives; BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES,
Defendants-Appellees.

On Appeal from the U.S. District Court
for the Western District of Texas,
No. 1-19-cv-349, Honorable David A. Ezra

APPELLANT'S PETITION FOR REHEARING *EN BANC*

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January 28, 2022

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CERTIFICATE OF INTERESTED PERSONS

Cargill v. Garland, No. 20-51016

The undersigned counsel of record 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.

Plaintiff-Appellant: Michael Cargill

Defendants-Appellees: All defendants are governmental.

Counsel for Plaintiff-Appellant: Richard Samp, Mark Chenoweth, Harriet Hageman, the New Civil Liberties Alliance (a nonprofit corporation that issues no common stock)

Counsel for Defendants-Appellees: Brian T. Boynton, Ashley C. Hoff, Mark B. Stern, Michael S. Raab, Abby C. Wright, Brad Hinshelwood, Kyle T. Edwards, U.S. Dept. of Justice.

/s/ Richard A. Samp
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RULE 35 STATEMENT

This petition raises questions of exceptional importance. Federal law makes it a felony to possess a "machinegun." This case marks the fifth occasion in the past two years on which a federal appeals court has addressed the meaning of 26 U.S.C. § 5845(b), which defines "machinegun"; and two circuits (the Sixth and Tenth) voted to address it *en banc*. The panel's decision conflicts with the decision of *every one* of the appeals courts that has ruled on the issue, thereby exacerbating an existing conflict considerably.

For many years, the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) determined that non-mechanical "bump stocks" were not "machineguns," and hence their possession was not prohibited. In 2018, ATF reinterpreted § 5845(b) and reversed course, holding that bump stocks are, indeed, "machineguns." The two questions raised by the Petition are: (1) do bump stocks meet the statutory definition of "machineguns"; and (2) if § 5845(b) is ambiguous on initial reading (as two circuits have held), do either the rule of lenity or *Chevron* deference have a role to play in construing the statute?

Those two issues "present[ ] question[s] of exceptional importance" because the panel decision is not only wrong, but conflicts with authoritative decisions from other federal appeals courts. Rule 35(b)(1)(B). On the first question, the panel held that ATF's 2018 rule constitutes the best reading of § 5845(b); the U.S. Navy-Marine Corps Court of Criminal Appeals holds that bump stocks are not "machineguns" within the meaning § 5845(b); and the D.C. and Tenth Circuits hold that the statute is ambiguous with

respect to whether it covers bump stocks. The Sixth Circuit was equally divided and thus could not render a majority opinion. Eight judges on the Sixth Circuit opined that bump stocks are not "machineguns," six judges opined that they are, and two judges sided with ATF without disclosing their rationale.

On the second question, divided panels of the D.C. and Tenth Circuits held that ATF's interpretation was entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), and upheld it on that basis. The Navy-Marine Corps court disagreed, holding that even if the statute were ambiguous, no deference is warranted because the federal government has consistently and affirmatively waived any right to deference. The Sixth Circuit issued no ruling on the deference issue, but the split among individual judges mirrored their split on the statutory-interpretation issue. The panel in this case, having concluded that ATF's rule is the best reading of the statute, deemed it unnecessary to address deference.

The questions presented are of exceptional importance for a second reason: ATF's rule has a significant negative impact on hundreds of thousands of law-abiding citizens. Americans purchased 520,00 bump stocks at a time when ATF said that it was legal to do so. According to the panel, ATF was right to reverse course because its prior position was erroneous—federal law has unambiguously prohibited possession of bump stocks since the 1980s. In other words, the panel has branded Petitioner Michael Cargill, and all others who purchased bump stocks before 2019, as felons subject to ten years'

imprisonment, who have avoided criminal liability due solely to prosecutorial discretion. Rehearing en banc is warranted to prevent ATF's harsh rewriting of the statutory text.

If the Court rules against ATF on the first question presented, but does not accept Cargill's position that non-mechanical bump stocks are unambiguously not "machineguns" under § 5845(b), then it will need to address the deference question to resolve this case. Although the D.C. and Tenth Circuits held that ATF's rule is entitled to *Chevron* deference, those holdings conflict with controlling authority from the Supreme Court, which has repeatedly held that deference is unwarranted when the federal government affirmatively disavows it and that the government's reading of a criminal statute is *not* entitled to deference.

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STATEMENT OF ISSUES MERITING *EN BANC* CONSIDERATION

(1) Does ATF's 2018 determination that bump stocks meet the statutory definition of "machineguns" constitute the best reading of 26 U.S.C. § 5845(b); or is the best reading ATF's pre-2018 determination that bump stocks are not "machineguns"; or is § 5845(b) ambiguous on this issue?

(2) If § 5845(b) is ambiguous on initial reading (as both the D.C. Circuit and the Tenth Circuit hold), do either the rule of lenity or *Chevron* deference have a role to play in construing the statute?

STATEMENT OF THE CASE

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. Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), *Bump-Stock-Type Devices*, 83 Fed. Reg. 66,514, 66,516 (Dec. 26, 2018) ("Bump Stock Rule"). But experts can "bump fire" semi-automatic 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.[1]

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[1] 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

Long before 2018, manufacturers began selling "bump stocks," devices that can be attached to a semi-automatic rifle to assist with bump firing. A bump stock replaces a semi-automatic rifle's standard stock with one that allows the rifle to slide back and forth within the stock. *Id.* at 66,516, 66,518. The bump stock channels the recoil energy from the rifle's discharge in "constrained linear rearward and forward paths." *Id.* at 66,532. "Yet a shooter still must use the non-trigger hand to put forward pressure on the fore-end so that the rifle and trigger move forward after the recoil." *Gun Owners II*, 19 F.4th at 912 (Murphy, J., dissenting).

Since 1986, it has been a federal crime to possess a "machinegun." 18 U.S.C. § 922(o)(1). The statutory definition of "machinegun" has remained constant since that date:

> The term "machinegun" means any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger.

26 U.S.C. § 5845(b). Also included are parts intended solely "for use in converting a weapon into a machinegun." *Ibid.*

> 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 ["*Gun Owners II*"], 19 F.4th 890, 911 (6th Cir. 2021) (*en banc*) (Murphy, J., dissenting from affirmance of judgment by equally-divided vote) (citing *id.* at 66,533).

ATF has consistently advised that semi-automatic weapons are not "machineguns." The inventor of the first patented bump stock approached ATF two decades ago for ATF's opinion regarding whether the device ran afoul of the machinegun prohibition. Although the device used internal springs to create a bump-firing sequence after the shooter pulled the trigger once, ATF in 2002 determined that the device fell outside the statutory definition of "machinegun" because it "did not modify how a semiautomatic rifle's trigger 'moves' with each shot." *Guedes v. ATF*, 920 F.3d 1, 37 (D.C. Cir. 2019) (Henderson, J., dissenting). In 2006, ATF overruled its prior decision, determining that the internal spring mechanism made the device a machinegun. ATF also stated, however, that removing the internal spring "would render the device a non-machinegun under the statutory definition." Bump Stock Rule, 83 Fed. Reg. at 66,517.

The bump stocks at issue here are non-mechanical, *i.e.*, they contain no springs or other mechanical devices designed to facilitate repeat firing. Between 2008 and 2017, ATF "issued classification decisions concluding that other bump-stock-type devices were not machineguns, primarily because the devices did not rely on internal springs or similar mechanical parts to channel recoil energy." *Id.* at 66,514. Instead, these devices rely entirely on the shooter's non-trigger hand to overcome recoil energy.

ATF reversed course in 2018, concluding (via the Bump Stock Rule) that non-mechanical bump stocks should be reclassified as machineguns. The Rule amended

pertinent regulations to change ATF's understanding of 26 U.S.C. § 5845(b). Noting that § 5845(b) defines "machineguns" as including weapons that shoot multiple shots "automatically" with a "single function of the trigger," ATF asserted non-mechanical bump stocks are "machineguns" because they ostensibly permit users to initiate an automatic firing sequence with a single "pull" of the trigger and "analogous motions," 83 Fed. Reg. at 66,515—notwithstanding that the trigger resets for each shot and the non-trigger hand's forward pressure on the fore-stock is not an analogous motion.

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

Appellant Michael Cargill purchased two non-mechanical bump stocks at a time when ATF publicly confirmed that possession was entirely legal. Following adoption of the Bump Stock Rule, Cargill surrendered the devices to ATF and filed this lawsuit. He asserted, among other things, that the Rule conflicts with the unambiguous statutory definition of machinegun.

Following a bench trial, the district court denied relief. The district court held that the Rule adopted the "correct" interpretation of § 5845(b)—that bump stocks are "machineguns" within the clear meaning of the statute. ROA.556.

Cargill appealed, arguing that the Rule contradicts § 5845(b)'s unambiguous terms. He further argued that even if the statute is ambiguous, the rule of lenity requires that any ambiguity be resolved in his favor—and that *Chevron* deference should play no role in the case because ATF affirmatively asserted that its Rule was "interpretive" and thus not entitled to *Chevron* deference.

A panel of this Court affirmed. It separately considered the meanings of "single function of the trigger" (Slip Op. 7-12) and "automatically." Slip Op. 12-15.

The panel held that § 5845(b)'s reference to "single *function*" of the trigger is synonymous with "single *pull*" of the trigger. *Id.* at 9. It held that a bump stock-equipped rifle satisfies the statute's single-pull-leads-to-multiple-shots requirement because a "single pull" of the trigger "initiates a firing sequence that continues to fire *as long as the shooter continues to push forward*." *Id.* at 12 (emphasis added).

The panel also held that such a rifle satisfies the "automatically" requirement. *Id.* at 12-15. While conceding that the weapon does not fire more than one shot unless the shooter maintains constant forward pressure on the fore-end of the rifle so as to permit the trigger to reengage after each shot, the panel held that that requirement does not make the firing sequence anything other than "automatic[ ]." *Id.* at 14.

The panel said that, in light of its finding that § 5845(b) unambiguously defines "machineguns" as including bump stocks, it need not consider doctrines designed to

address statutory ambiguity—including *Chevron* deference and the rule of lenity. *Id.* at 7 n.4, 16.

ARGUMENT

I. REHEARING *EN BANC* IS WARRANTED BECAUSE THE PANEL'S CONSTRUCTION OF THE MACHINEGUN STATUTE CONFLICTS WITH THAT OF EVERY OTHER APPEALS COURT THAT HAS RULED ON THE ISSUE

The panel held that the Bump Stock Rule's interpretation of the statutory definition of "machineguns"—which ATF used to determine that bump stocks are machineguns—"is the best interpretation of the statute." Slip Op. 17. That holding conflicts with holdings of three other federal appeals courts—the D.C. and Tenth Circuits and the U.S. Navy-Marine Corps Court of Criminal Appeals—and is in tension with the Sixth Circuit's ruling. In light of those conflicts, this proceeding "presents a question of exceptional importance" under Fed.R.App.P. 35(b)(1)(B).

The D.C. Circuit in *Guedes* addressed whether the Rule was consistent with the statutory definition of "machinegun." In conflict with the panel's holding, the D.C. Circuit held that "single function of the trigger" and "automatically" are both ambiguous. 920 F.3d at 29. It explained, "[T]he statutory phrase 'single function of the trigger' admits of more than one interpretation. It could mean 'a mechanical act of the trigger.' Or it could mean 'a single pull of the trigger from the perspective of the shooter.'" *Ibid.* (citation omitted). It added:

> [T]he statutory term "automatically" admits of multiple interpretations. … The term "automatically" does not require that there be no human involvement to give rise to more than one shot. *See, e.g.*, Webster's New International Dictionary … 156 (defining "automatic" as "self-acting or self-regulating …"). But how much human input in the "self-acting" or "self-regulating" mechanism is too much?

Id. at 30. The D.C. Circuit upheld the Bump Stock Rule under *Chevron* as "a permissible interpretation of the statute's ambiguous definition of 'machinegun.'" *Id.* at 32.

The panel decision also conflicts with a decision of the Tenth Circuit. *Aposhian v. Barr*, 958 F.3d 969 (10th Cir. 2020). *Aposhian* held that "the statutory definition of 'machinegun' is ambiguous" and ultimately upheld the Bump Stock Rule not (as did the panel) as "the best reading" of the statute, but on the ground that "ATF's interpretation is reasonable." *Id.* at 985. The Tenth Circuit determined that "single function of the trigger" and "automatically" were both ambiguous. *Id.* at 985-87.

The panel decision also conflicts with a decision of a military appeals court. *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) for unlawful possession of a machinegun, after determining that the best reading of 26 U.S.C. § 5845(b) is that bump stocks are not "machineguns." 81 M.J. at 784.[2]

[2] The federal government chose not to appeal from *Alkazahg*. That appellate decision is now final within the military justice system.

Finally, the panel decision is in tension with the Sixth Circuit's ruling. A Sixth Circuit panel enjoined enforcement of the Bump Stock Rule, holding that "a bump stock does not fall within the statutory definition of a machine gun." *Gun Owners of America, Inc. v. Garland* ["*Gun Owners I*"], 992 F.3d 446, 469 (6th Cir. 2021). The court later vacated the panel decision and granted rehearing *en banc*. The *en banc* court split 8-8 and thus could not render a majority opinion; the result was affirmance of the district court's judgment rejecting a challenge to the Rule. *Gun Owners II*, 19 F.4th at 896. Eight judges joined an opinion by Judge Murphy, which would have held that the "best reading" of 26 U.S.C. § 5845(b) is that non-mechanical bump stocks are not "machineguns." *Id.* at 912-15 (Murphy, J., dissenting). Only six judges affirmatively endorsed ATF's interpretation. *Id.* at 908-09 (White, J., opinion in support of affirmance).

The panel here did not reach the *Chevron* and rule-of-lenity issues raised by Cargill, ruling that it need not do so given its holding that the statute unambiguously favors ATF's interpretation. Slip Op. 7 n.4, 16. But if this Court concludes that the D.C. and Tenth Circuits correctly determined that § 5845(b) is ambiguous, it will need to address whether ATF is entitled to deference—or whether the rule of lenity entitles Cargill to prevail. There is a sharp split of appellate authority on that issue as well. The D.C. and Tenth Circuits both held that the Bump Stock Rule should be upheld at *Chevron* Step Two as a "permissible" interpretation of the statute, while the Navy-Marine Corps appeals court held that, even if the statute were ambiguous, no deference to ATF's

interpretation was warranted in light of the federal government's "disclaimer of *Chevron* deference." *Alkazahg*, 81 M.J. at 778.

The D.C. and Tenth Circuit decisions sharply conflict with Supreme Court case law. *See HollyFrontier Cheyenne Refining, LLC v. Renewable Fuels Ass'n*, 141 S. Ct. 2172, 2018 (2021) (declining to consider *Chevron* deference when waived by the federal government); *United States v. Apel*, 571 U.S. 359, 369 (2014) (courts should not defer to "the Government's reading of a criminal statute"). This Court has likewise declined to defer to federal-government constructions of criminal statutes. *United States v. Garcia*, 707 F.App'x 231, 234 (5th Cir. 2017).

In sum, *en banc* review is warranted because the petition raises two issues of exceptional importance. The first issue—does § 5845(b)'s definition of "machineguns" unambiguously include bump stocks?—warrants review because the panel's affirmative answer to that question conflicts with the answer provided by every other appeals court that has ruled on the issue. The second issue—if § 5845(b) is ambiguous, does either the rule of lenity or *Chevron* deference apply?—warrants review because the Court will likely have to address that question if it rules in Cargill's favor on the first issue, and because other appellate courts' answers to that question sharply conflict with one another.

Before granting *Chevron* deference to ATF's interpretation of the allegedly ambiguous statute, this Court would first need to determine that: (1) Congress authorized ATF to issue *legislative* rules construing the statute; (2) the rule of lenity does *not* apply at

Chevron Step One to resolve ambiguities in a criminal statute against the government; (3) the government's express disavowal of *Chevron* deference does *not* preclude its application; and (4) ATF's interpretation of the ambiguous statute is reasonable. If any one of those points is incorrect—and all of them are—*Chevron* deference cannot save the rule.

II. THE BUMP STOCK RULE HAS A SIGNIFICANT NEGATIVE IMPACT ON HUNDREDS OF THOUSANDS OF LAW-ABIDING CITIZENS

The questions presented are of exceptional importance—and thus warrant *en banc* review—for a second reason: ATF's Rule has a significant negative impact on hundreds of thousands of law-abiding citizens.

ATF estimates that Americans purchased 520,000 bump stocks during the decades when ATF said they were legal. The Rule required owners to either surrender or destroy their devices; those (like Cargill) who surrendered bump stocks will never recover them if the panel decision stands. ATF admits that the loss of property will exceed $100 million. 83 Fed. Reg. at 66,515.

Moreover, the panel decision has branded Cargill a criminal. It held that federal law has unambiguously prohibited possession of bump stocks since 1986—notwithstanding that until December 2018, ATF was telling Americans that possession of bump stocks was perfectly legal. Slip Op. at 15-16. ATF announced that Cargill and others would not be prosecuted if they destroyed or surrendered their bump

stocks by March 26, 2019. 83 Fed. Reg. at 66,546. But the panel, by holding that ATF's Rule was simply a belated recognition of the proper scope of the machinegun statute, effectively ruled that Cargill's nonprosecution is solely a matter of prosecutorial discretion.

Indeed, the D.C. Circuit's conclusion that § 5845(b) is ambiguous—and that the Bump Stock Rule is a legislative rule designed to fill a pre-existing statutory void—was largely driven by its unwillingness to criminalize conduct previously condoned by ATF. In rejecting ATF's claim that its Rule was interpretive, the court stated:

> [I]f the Bump-Stock Rule is merely interpretive, it conveys the government's understanding that bump-stock devices have always been machine guns under the statute. ... That in turn would mean that bump-stock owners have been committing a felony for the entire time they have possessed the devices. ... And that would be notwithstanding a number of prior contrary interpretations by the agency.

Guedes, 920 F.3d at 19-20.

The panel failed to address that drastic implication of its ruling. Rehearing *en banc* is warranted given the ruling's significant negative impact on Cargill and thousands of others.

III. THE PANEL MISCONSTRUED THE MACHINEGUN STATUTE

Rehearing *en banc* is also warranted because the panel's construction of 26 U.S.C. § 5845(b) is implausible. The "best reading" of the statute is the one that ATF provided between 2006 and 2018: a non-mechanical bump stock is *not* a "machinegun" because

a semi-automatic rifle equipped with a non-mechanical bump stock is not a weapon that "shoots, is designed to shoot, or can readily be restored to shoot, automatically more than one shot ... by a single function of the trigger."

It is uncontested that if the shooter of a bump stock-equipped weapon pulls the trigger once and does nothing more, it will fire only one bullet. Something more than a "single function of the trigger" is thus required to effectuate repeat firing—and that "something more" is a shooter using his non-trigger hand to apply constant forward pressure on the rifle. And if the initiation of a "single function of the trigger" is insufficient *by itself* to cause repeat firing, then that single function cannot plausibly be described as causing the weapon to fire "automatically."

A semi-automatic rifle operates in precisely the same manner when a bump stock is attached as it does without a bump stock. ATF concedes that one who "bump fires" a semi-automatic rifle not equipped with a bump stock, even if using a belt loop, is not using a "machinegun." ATF cannot explain why "bump firing" with bump-stock assistance should be treated differently.

The panel noted that "a prototypical machine gun requires the shooter to maintain constant pressure on the trigger with his shooting hand's trigger finger." Slip Op. at 14. The panel argued that there is "no reason why firearms that require the shooter to maintain pressure on the trigger function 'automatically' but firearms that require the

shooter to maintain pressure on the barrel of the gun do not." *Ibid.* *Alkazahg* convincingly rebutted that argument:

> It is incorrect to equate the holding of the trigger in an automatic weapon with the holding of the trigger and the forward motion in a semi-automatic weapon equipped with a bump stock. That is because the former is shooting automatically *by a single function of the trigger*, while the latter is relying on an additional human action beyond the mechanical self-acting and impersonal trigger function.

81 M.J. at 782-83.

One strong indication that the panel's construction is incorrect is its rejection by the vast majority of federal appellate judges outside the Fifth Circuit to consider it. Six judges have agreed with that construction. *See Gun Owners II*, 19 F.4th at 896 (White, J., opinion in support of concurrence). Twenty-one judges have rejected it: three from the D.C. Circuit, three from the Navy-Marine Corps court, eight from the Sixth Circuit, and seven from the Tenth Circuit.[3]

[3] The Tenth Circuit granted a petition to rehear its *Aposhian* decision but later, by a 6-5 vote, vacated the grant of rehearing en banc as improvidently granted. *Aposhian v. Wilkinson*, 989 F.3d 890 (10th Cir. 2021). The five dissenters would have held that "the best reading" of the statute is that bump stocks are not "machineguns." *Id.* at 891 (Tymkovich, C.J., dissenting). The two judges who constituted the panel majority concluded that the statute is ambiguous on the issue, *Aposhian v. Barr*, 958 F.3d at 985, bringing the total to seven who reject the *Cargill* panel's construction.

CONCLUSION

The Court should grant the petition for rehearing *en banc*.

Respectfully submitted,

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January 28, 2022

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CERTIFICATE OF COMPLIANCE

I am counsel of record for Plaintiff-Appellant Michael Cargill. Pursuant to Fed.R.App.P. 32(a)(7)(C), I hereby certify that the foregoing Petition for Rehearing *En Banc* is in 14-point, proportionately spaced Garamond type. According to the word processing system used to prepare this brief (WordPerfect X8), the word count of the brief is 3,900, not including the certificate of interested persons, table of contents, table of authorities, signature block, certificate of service, and this certificate of compliance.

/s/ Richard A. Samp
Richard A. Samp

January 28, 2022

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of January, 2022, I electronically filed the Petition for Rehearing *en banc* with the Clerk of the Court for the U.S. Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Richard A. Samp
Richard A. Samp

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
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No. 20-51016

MICHAEL CARGILL,

Plaintiff—Appellant,

versus

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.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:19-CV-349

Before DENNIS, HIGGINSON, and COSTA, *Circuit Judges*.

STEPHEN A. HIGGINSON, *Circuit Judge*:

On October 1, 2017, a gunman firing several semiautomatic rifles equipped with bump stocks killed 58 people and wounded 500 more in Las Vegas. In the aftermath of this tragedy, the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") promulgated a rule (the "Bump Stock Rule" or "Rule") stating that bump stocks are "machinegun[s]" for purposes of the National Firearms Act ("NFA") and the federal statutory

bar on the possession or sale of new machine guns.[1] *Bump-Stock-Type Devices*, 83 Fed. Reg. 66,514 (Dec. 26, 2018); *see also* 18 U.S.C. §§ 922(o)(1), 921(a)(23); 26 U.S.C. § 5845(b). Plaintiff-Appellant Michael Cargill has challenged the Rule, arguing that it contradicts the plain language of the statute, that it exceeds ATF's statutory authority, and that it violates the separation of powers. After a trial, the district court rejected Cargill's claims, concluding in a 75-page order that the Rule "properly classifies a bump stock as a 'machinegun' within the statutory definition." Because we agree with the district court that bump stocks qualify as machine guns under the best interpretation of the statute, we AFFIRM.[2]

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[1] Except when quoting sources, we use the two-word spelling of "machine gun."

[2] Three other circuits have also rejected challenges to the Bump Stock Rule. In April 2019, the D.C. Circuit denied a motion for a preliminary injunction against the Rule, concluding that the statutory definition of "machinegun" is ambiguous and that the Rule is entitled to *Chevron* deference. *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 920 F.3d 1 (D.C. Cir. 2019) (per curiam). One judge dissented, arguing that the Rule contradicts the statute's plain language. *Id.* at 35 (Henderson, J., dissenting). The Supreme Court denied certiorari, 140 S. Ct. 789 (2020), though Justice Gorsuch issued a statement arguing that the Rule is not entitled to *Chevron* deference. *Id.* at 789-91 (Gorsuch, J., statement regarding denial of certiorari). In May 2020, the Tenth Circuit denied another motion to preliminarily enjoin the Rule, for similar reasons as the D.C. Circuit. *Aposhian v. Barr*, 958 F.3d 969 (10th Cir. 2020). Four months later, the Tenth Circuit vacated that opinion and granted a rehearing en banc, 973 F.3d 1151 (10th Cir. 2020) (en banc), but it subsequently reversed course, vacating the order granting rehearing en banc and reinstating the original panel opinion. *Aposhian v. Wilkinson*, 989 F.3d 890 (10th Cir. 2021) (en banc). Five judges dissented from the decision to vacate the en banc order. *Id.* at 891 (Tymkovich, C.J. dissenting, joined by Hartz, Holmes, Eid, and Carson, JJ.). The plaintiff in that case has filed a petition for certiorari in the Supreme Court. Petition for Writ of Certiorari, *Aposhian v. Garland*, No. 21-159 (U.S. Aug. 4, 2021). Finally, in March 2021, a Sixth Circuit panel granted a preliminary injunction against the Rule, holding that the Rule is not entitled to *Chevron* deference and is not the best interpretation of the NFA. *Gun Owners of Am., Inc. v. Garland*, 992 F.3d 446, 450 (6th Cir. 2021). However, the Sixth Circuit vacated that decision, 2 F.4th 576 (6th Cir. 2021) (en banc), and an evenly divided en banc court affirmed the district court's judgment upholding the Rule. No. 19-1298, --- F.4th ----, 2021

I.

A.

Federal law generally makes it "unlawful for any person to transfer or possess a machinegun." 18 U.S.C. § 922(o)(1). The federal machine gun ban incorporates the NFA's definition of "machinegun," 18 U.S.C. § 921(a)(23), which reads as follows:

> 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).

Congress has vested in the Attorney General authority to prescribe rules and regulations necessary to enforce the NFA and the federal machine gun ban. *See* 18 U.S.C. § 926(a); 26 U.S.C. §§ 7801(a)(2)(A), 7805(a). The Attorney General has delegated this responsibility to ATF. *See* 28 C.F.R. § 0.130(a)(1)-(2).

B.

As the district court found, a "bump stock" is "an accessory attached to a firearm to increase its rate of fire, to make it easier for somebody to fire a weapon faster." More specifically, bump stocks are devices that "harness the

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WL 5755300 (6th Cir. Dec. 3, 2021) (en banc); *see Gun Owners of Am. v. Barr*, 363 F. Supp. 3d 823, 826 (W.D. Mich. 2019).

force of recoil to enable a weapon to fire multiple rounds when, while keeping the trigger finger stationary, the shooter pushes forward with the non-shooting hand." These devices generally consist of "a sliding shoulder stock molded or otherwise attached to a grip," "a 'trigger ledge,' on which the shooter places his finger," and "a detachable rectangular receiver module that goes in the receiver well of the bump stock's handle to guide the recoil of the weapon when fired." The "firing sequence" of a semiautomatic rifle equipped with a bump stock "begins when the shooter presses forward on the firearm to initially engage the trigger finger." The gun then "slides back and forth[,] and its recoil energy *bumps* the trigger finger into the trigger to continue firing until the shooter stops pushing forward with his non-shooting hand or the weapon runs out of ammunition or malfunctions." (emphasis added). Thus, "when a bump stock is used as intended, the shooter pushes forward to engage the trigger finger with the trigger, which causes a single trigger pull that initiates a firing sequence that continues to fire as long as the shooter continues to push forward." *See also* 83 Fed. Reg. at 66,516 ("Shooters use bump-stock-type devices with semiautomatic firearms to accelerate the firearms' cyclic firing rate to mimic automatic fire.").

Prior to the 2017 mass shooting in Las Vegas, ATF had maintained that bump stocks that did not use internal springs, such as the device used in the Las Vegas shooting, were not machine guns for purposes of federal law. 83 Fed. Reg. at 66,516. However, after the Las Vegas shooting, ATF decided to reconsider that position, and it issued an advance notice of proposed rulemaking in December 2017. *Application of the Definition of Machinegun to "Bump Fire" Stocks and Other Similar Devices*, 82 Fed. Reg. 60,929 (Dec. 26, 2017). Shortly thereafter, then-President Donald Trump issued a memorandum instructing the Department of Justice "to propose for notice and comment a rule banning all devices that turn legal weapons into machineguns." *Application of the Definition of Machinegun to "Bump Fire"*

Stocks and Other Similar Devices, 83 Fed. Reg. 7,949, 7,949 (Feb. 20, 2018). ATF issued a notice of proposed rulemaking in March 2018, *Bump-Stock Devices*, 83 Fed. Reg. 13,442 (Mar. 29, 2018), and, after receiving more than 186,000 comments, promulgated a final rule in December 2018. 83 Fed. Reg. at 66,514, 66,519.[3]

The Bump Stock Rule interprets the NFA's above-quoted definition of "machinegun." *See* 26 U.S.C. § 5845(b). The Rule states:

> For purposes of this definition, the term "automatically" as it modifies "shoots, is designed to shoot, or can be readily restored to shoot," means functioning as the result of a self-acting or self-regulating mechanism that allows the firing of multiple rounds through a single function of the trigger; and "single function of the trigger" means a single pull of the trigger and analogous motions.

83 Fed. Reg. at 66,553 (codified at 27 C.F.R. §§ 447.11, 478.11, 479.11). Based on this interpretation of the terms "automatically" and "single function of the trigger," the Rule concludes that the "term 'machinegun' includes a bump-stock-type device," since bump stocks enable "a semi-automatic firearm to shoot more than one shot with a single pull of the trigger by harnessing the recoil energy of the semi-automatic firearm to which it is affixed so that the trigger resets and continues firing without additional physical manipulation of the trigger by the shooter." *Id.* at 66,553-54.

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[3] The Bump Stock Rule was signed by Acting Attorney General Matthew G. Whitaker. *Id.* at 66,554. Subsequently, parties challenging the rule argued that Whitaker had not been validly serving as Acting Attorney General. *Bump-Stock-Type Devices*, 84 Fed. Reg. 9,239, 9,240 (March 14, 2019). To resolve any uncertainty about the Rule's legitimacy, newly-sworn-in Attorney General William Barr issued a statement in March 2019 saying that he had evaluated "the rulemaking record" and "personally come to the conclusion that it is appropriate to ratify and affirm the [Rule]." *Id.*

By its own terms, the Rule became "effective" on March 26, 2019, ninety days after its promulgation. *Id.* at 66,514. The Rule explains that "individuals are subject to criminal liability only for possessing bump-stock-type devices *after* the effective date of regulation," and it instructs bump stock owners to either "undertake destruction of the devices" or "abandon [them] at the nearest ATF office." *Id.* at 66,525, 66,530.

C.

Following the issuance of the Bump Stock Rule, Michael Cargill surrendered two bump stocks to ATF. He then sued ATF under the Administrative Procedure Act and various constitutional provisions, seeking a declaratory judgment and permanent injunction preventing the enforcement of the Bump Stock Rule against him and others similarly situated, along with the return of his bump stocks.

After holding a bench trial, the district court denied Cargill's requested relief on all counts. The court first determined that ATF had statutory authority to issue the Bump Stock Rule and that the Rule did not violate the constitutional principles of non-delegation and separation of powers. The court then concluded that the Bump Stock Rule adopts the "correct" interpretation of the terms "automatically" and "single function of the trigger." Accordingly, the court held that the Rule "properly classifies a bump stock as a 'machinegun' within the statutory definition." Cargill timely filed this appeal.

II.

We first consider the statutory interpretation issue. Recall that, for purposes of federal law, "[t]he term 'machinegun' means any weapon which shoots . . . automatically more than one shot, without manual reloading, by a single function of the trigger," including "any part designed and intended solely and exclusively, or combination of parts designed and intended, for use

in converting a weapon into a machinegun." 26 U.S.C. § 5845(b). Cargill argues that the Bump Stock Rule's conclusion that bump stocks qualify as "machinegun[s]" under this definition contradicts the statute's unambiguous terms. Cargill further argues that even if the statute is ambiguous, the rule of lenity requires the court to resolve any ambiguity in his favor. The district court rejected these arguments, concluding that the "Rule adopts the proper interpretation of 'machinegun' by including bump stock devices" and that "the rule of lenity does not apply." We agree with the district court's conclusions.[4]

A.

Cargill argues that bump stocks unambiguously are not "machinegun[s]" under the above statutory definition because semiautomatic firearms equipped with bump stocks (1) do not shoot "more than one shot . . . by a single function of the trigger" and (2) do not shoot "automatically." We consider each of these points in turn.

1.

Cargill argues that bump stock-equipped semiautomatic rifles do not shoot "more than one shot . . . by a single function of the trigger" because the trigger of such weapons must mechanically "reset" before the gun can

[4] Cargill also argues that if the statute is ambiguous, the Bump Stock Rule is not entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), reasoning primarily that *Chevron* does not apply to cases involving criminal statutes and that ATF explicitly waived *Chevron* in the district court. Because we conclude that bump stocks are "machinegun[s]" under the best interpretation of the statute, we do not address whether the Rule is entitled to deference. *See Edelman v. Lynchburg Coll.*, 535 U.S. 106, 114 (2002) (explaining that "there is no occasion to defer and no point in asking what kind of deference, or how much" would apply in cases where an agency has adopted "the position we would adopt even if there were no formal rule and we were interpreting the statute from scratch").

"fire the next shot." Cargill thus appears to interpret the phrase "single function of the trigger" to mean "a single mechanical act of the trigger" or perhaps "a single movement of the trigger." On the other hand, the Bump Stock Rule provides that "'single function of the trigger' means a single pull of the trigger and analogous motions." 83 Fed. Reg. at 66,553.

The Rule's interpretation of the statutory phrase proves compelling. Both the Supreme Court and this court have replaced the word "function" with "pull" when paraphrasing the NFA's definition of "machinegun." S*ee Staples v. United States*, 511 U.S. 600, 602 n.1 (1994) (observing that the NFA treats a weapon that "fires repeatedly with a single pull of the trigger" as a machinegun, in contrast to a "weapon that fires only one shot with each pull of the trigger"); *United States v. Anderson*, 885 F.2d 1248, 1250 (5th Cir. 1989) (en banc) (explaining that "fully automatic pistols . . . qualify as 'machine guns'" under the NFA because "they will fire more than one round of ammunition in response to a single pull of the trigger").[5] Indeed, at the time the statute was enacted, the two terms were used almost interchangeably in the context of firearms. *See* H.R. Rep. No. 73-1780, at 2 (1934) (explaining that the NFA "contains the usual definition of machine gun as a weapon designed to shoot more than one shot without reloading and by a single pull of the trigger"); *National Firearms Act: Hearings on H.R. 9066 Before the H. Comm. On Ways & Means*, 73d Cong. 40 (1934) [hereinafter *NFA Hearings*] (statement of Karl T. Frederick, President, National Rifle Association of America) ("A gun . . . which is capable of firing more than one shot by a single pull of the trigger, a single function of the trigger, is properly

[5] *See also Guedes v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 356 F. Supp. 3d 109, 130 (D.D.C.), *aff'd*, 920 F.3d 1 (D.C. Cir. 2019), *cert. denied*, 140 S. Ct. 789 (2020) ("Tellingly, courts have instinctively reached for the word 'pull' when discussing the statutory definition of 'machinegun.'" (citing *Staples*, 511 U.S. at 602 n.1; *United States v. Oakes*, 564 F.2d 384, 388 (10th Cir. 1977)).

regarded, in my opinion, as a machine gun."). Accordingly, in a case involving a predecessor rule to the Bump Stock Rule, the Eleventh Circuit expressly held that ATF's "interpretation . . . that the phrase 'single function of the trigger' means a 'single pull of the trigger' is consonant with the statute." *Akins v. United States*, 312 F. App'x 197, 200 (11th Cir. 2009) (unpublished) (citing *Staples*, 511 U.S. at 602 n.1; *NFA Hearings* at 40). This caselaw and contemporary usage reflect a simple fact undergirding the Rule's interpretation of the statute—in ordinary English, firearm triggers typically "function" by means of a shooter's "pull."[6]

The Chief Judge of the Tenth Circuit makes perhaps the strongest case that the NFA defines "machinegun" in terms of a trigger's mechanical acts. Writing in dissent, he argues that the "statute's plain language makes clear the 'function' must be '*of the trigger*.' The statute speaks only to how the trigger acts, making no mention of the shooter." *Aposhian v. Wilkinson*, 989 F.3d 890, 895 (10th Cir. 2021) (Tymkovich, C.J., dissenting from vacation of order granting rehearing en banc) (citation omitted). He continues:

> The trigger on [a semiautomatic rifle equipped with a bump stock] must necessarily "pull" backwards and release the rifle's hammer every time that the rifle discharges. The rifle cannot fire a second round until both the trigger and hammer reset. Every shot requires the trigger to go through this full process again. The fact that a bump stock accelerates this

[6] *See, e.g.*, OLIVER WENDELL HOLMES, JR., THE COMMON LAW: LECTURE IV 149-50 (1881) (explaining that "[t]he ordinarily intelligent and prudent member of the community would foresee the possibility of danger from pointing a gun which he had not inspected into a crowd, and pulling the trigger, although it was said to be unloaded").

> process does not change the underlying fact that it requires multiple functions of the trigger to mimic a machine gun.

Id. (cleaned up).

We considered a similarly mechanistic interpretation of § 5854(b) in *United States v. Camp*. That case involved a firearm that operated as follows:

> 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.

343 F.3d 743, 744 (5th Cir. 2003). The gunowner argued that because the "original trigger . . . functioned each time the rifle was fired, the rifle, as modified, did not become a machine gun." *Id.* at 745. "The switch," he averred, "is merely a legal 'trigger activator.'" *Id.* However, we held that because the modified weapon "required only one action—pulling the switch [the gunowner] installed—to fire multiple shots," the weapon "shoot[s] automatically more than one shot . . . by a *single* function of the trigger." *Id.* (third alteration in original) (quoting 26 U.S.C. § 5845(b)). To hold otherwise, we explained, "would allow transforming firearms into machine guns, so long as the original trigger was not destroyed." *Id.*

Our court thus rejected a mechanistic interpretation of § 5845(b) in *Camp*. We likewise decline to adopt a mechanistic reading of the statute, for several reasons in addition to the precedent set by *Camp*. As an initial matter, the mechanistic interpretation of the NFA twists the statutory text, effectively rewriting the statute to make "function" a verb that has "trigger" as its subject—that is, rewriting the statute so that it defines a "machinegun" as a weapon which shoots more than one shot "every time the trigger functions" rather than "by a single function of the trigger." Moreover,

interpreting the NFA mechanistically defies common sense. As one district court has observed, there is no reason why "Congress would have zeroed in on the mechanistic movement of the trigger in seeking to regulate automatic weapons," given that the "ill sought to be captured by this definition was the ability to drastically increase a weapon's rate of fire, not the precise mechanism by which that capability is achieved." *Aposhian v. Barr*, 374 F. Supp. 3d 1145, 1152 (D. Utah 2019), *aff'd*, 958 F.3d 969 (10th Cir. 2020), *petition for cert. filed sub nom. Aposhian v. Garland*, No. 21-159 (U.S. Aug. 4, 2021). Congress likely chose the term "function" not to emphasize the mechanical working of the trigger but rather because it has a broader meaning than "pull," in order "to forestall attempts by weapon manufacturers or others to implement triggers that need not be pulled, thereby evading the statute's reach." *Id.*[7] Finally, the mechanistic interpretation of the statute does not account for the above-discussed arguments relating to prior judicial interpretations and ordinary usage. For these reasons, ATF's interpretation of the statute is the best interpretation. The phrase "single function of the trigger," as used in the NFA, means "a single pull of the trigger and analogous motions."

Accordingly, Cargill's argument that semiautomatic firearms equipped with bump stocks do not shoot "more than one shot . . . by a single function of the trigger" fails. As explained above, the district court found that "when a bump stock is used as intended, the shooter pushes forward to

[7] To that end, ATF defined "single function of the trigger" as "a single pull of the trigger *and analogous motions*," 83 Fed. Reg. at 66,553 (emphasis added), recognizing "that there are other methods of initiating an automatic firing sequence that do not require a pull." *Id.* at 66,515. ATF encourages gun manufacturers to submit novel weapons and devices to the agency so that the agency can inform manufacturers in advance of production whether it considers the weapon or device to be a machine gun. *See* ATF, U.S. Dep't of Justice, *National Firearms Act Handbook* 41 (Apr. 2009).

engage the trigger finger with the trigger, which causes a single trigger pull that initiates a firing sequence that continues to fire as long as the shooter continues to push forward."[8] Or in the words of the Rule, "when a shooter who has affixed a bump-stock-type device to a semiautomatic firearm pulls the trigger, that movement initiates a firing sequence that produces more than one shot." 83 Fed. Reg. at 66,519. Because bump stocks thus allow a shooter to shoot more than one shot by a single pull of the trigger, they allow a shooter to shoot "more than one shot . . . by a single function of the trigger." 26 U.S.C. § 5845(b).

2.

Cargill further argues that because the shooter must "push the barrel shroud forward with the non-trigger hand into the trigger against the gun's recoil after every shot," semiautomatic weapons equipped with bump stocks do not fire "automatically." Cargill thus appears to interpret the term "automatically" to mean "completely without manual input." On the other hand, the Bump Stock Rule provides that the term "automatically," as used in the statutory definition of "machinegun," "means functioning as the result of a self-acting or self-regulating mechanism that allows the firing of multiple rounds through a single function of the trigger." 83 Fed. Reg. at 66,553.

Once again, the Rule offers a compelling interpretation of the statute. "We often look to dictionary definitions for help in discerning a word's ordinary meaning." *Cascabel Cattle Co., L.L.C. v. United States*, 955 F.3d 445, 451 (5th Cir. 2020). According to one leading dictionary from 1934, the year

[8] Importantly, after initiating the firing sequence in this manner, the "shooter does not have to pull rearward to continue firing as long as he keeps his finger on the trigger ledge." Indeed, the district court quoted an expert as testifying that "the trigger finger 'could be replaced by a post and would function the same way.'"

the NFA was enacted, "automatically" is the adverbial form of "automatic," which in turn means "[h]aving a self-acting or self-regulating mechanism that performs a required act at a predetermined point in an operation." WEBSTER'S NEW INTERNATIONAL DICTIONARY 187 (2d ed. 1934). Another dictionary from the time defines "automatic" as "[s]elf-acting under conditions fixed for it, going of itself." OXFORD ENGLISH DICTIONARY 574 (1933). Relying on these definitions, the Seventh Circuit has explained that for purposes of the NFA, "the adverb 'automatically' . . . delineates how the discharge of multiple rounds from a weapon occurs: as the result of a self-acting mechanism" which "is set in motion by a single function of the trigger and is accomplished without manual reloading." *United States v. Olofson*, 563 F.3d 652, 658 (7th Cir. 2009). As a nearly word-for-word copy of the dictionary definition that accords with past judicial interpretation, the Rule's interpretation of "automatically" is the best interpretation of that term.[9]

The Chief Judge of the Tenth Circuit again makes the strongest case against the Rule's interpretation of the statute. He argues that it is a mistake to "abstract[] 'automatically' from the rest of the statutory language." *Aposhian*, 989 F.3d at 896 (Tymkovich, C.J., dissenting). After all, "[t]he statute is unambiguous about what makes the firearm shoot automatically: the function of the trigger." *Id.* Accordingly, "[i]f 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)." *Id.* And, he explains, bump stocks require this extra input:

> [I]f a shooter pulls the trigger of a semiautomatic rifle equipped with a non-mechanical bump stock without doing anything

[9] Indeed, the Rule explicitly relied on these dictionary definitions and the Seventh Circuit's *Olofson* opinion when interpreting "automatically." *See* 83 Fed. Reg. at 66,519.

> else, the rifle will fire just one shot. . . . To make the firearm "shoot automatically more than one shot", the shooter must also be pulling forward on the barrel of the gun. Because a bump stock requires this extra physical input, it does not fall within the statutory requirement that the weapon shoot "automatically . . . by a single function of the trigger."

Id. (citations omitted).

Though not unreasonable on its face, the claim that a weapon does not fire "automatically" if it requires any manual input from the shooter beyond a single pull of the trigger in order to fire more than one shot ultimately proves too much. True, a shooter firing a semiautomatic firearm equipped with a bump stock generally must maintain "constant forward pressure with the non-trigger hand on the barrel-shroud or fore-grip of the rifle." 83 Fed. Reg. at 66,516. However, as the district court explained, a prototypical machine gun requires the shooter to "keep constant pressure on the trigger with his shooting hand's trigger finger." Cargill offers no reason why firearms that require the shooter to maintain pressure on the trigger function "automatically" but firearms that require the shooter to maintain pressure on the barrel of the gun do not. Accordingly, we reject this interpretation of the statute. A firearm functions "automatically" as long as it "function[s] as the result of a self-acting or self-regulating mechanism that allows the firing of multiple rounds through a single function of the trigger," 83 Fed. Reg. at 66,553, regardless of whether a shooter must maintain pressure on the weapon while firing.

Recall that the district court found that after a shooter pulls the trigger of a bump stock-equipped semiautomatic rifle to initiate the weapon's firing sequence, the gun "slides back and forth[,] and its recoil energy bumps the trigger finger into the trigger to continue firing until the shooter stops pushing forward with his non-shooting hand or the weapon runs out of

ammunition or malfunctions." The district court further found, based on expert testimony, that "even though the shooter's finger disengages and re-engages with the trigger during the bump firing process, the sequence set in motion by the initial forward pressure causing a trigger pull continues. Multiple rounds fire because '[t]he weapon recoils faster than you can react.'" Or as the Rule itself explains, a bump stock "harness[es] the recoil energy of the semi-automatic firearm to which it is affixed so that the trigger resets and continues firing without additional physical manipulation of the trigger by the shooter." 83 Fed. Reg. at 66,553-54. For these reasons, semiautomatic firearms equipped with bump stocks shoot "as the result of a self-acting or self-regulating mechanism that allows the firing of multiple rounds through a single function of the trigger"—in other words, they shoot "automatically" for purposes of the statute. 26 U.S.C. § 5845(b).

B.

Cargill argues that even if the statutory text is ambiguous, ATF's interpretation of the NFA is invalid because the court must resolve any ambiguity in this criminal statute in his favor under the rule of lenity. *See Yates v. United States*, 574 U.S. 528, 547-48 (2015) ("[A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity."). However, "the rule of lenity only applies if, after considering text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the statute such that the [c]ourt must simply guess as to what Congress intended." *Maracich v. Spears*, 570 U.S. 48, 76 (2013) (quoting *Barber v. Thomas*, 560 U.S. 474, 488 (2010)). Here, for the reasons explained above, the traditional tools of statutory interpretation make it clear that the Bump Stock Rule's interpretation of the NFA's definition of "machinegun" is the

best interpretation of the statute. Because no "grievous ambiguity or uncertainty" remains, *id.*, the rule of lenity does not apply to this case.[10]

* * *

A bump stock is "a part designed and intended" to enable a person armed with a semiautomatic rifle to "shoot[] . . . automatically more than one shot, without manual reloading, by a single function of the trigger." 26 U.S.C. § 5845(b). Accordingly, we agree with the district court that the Bump Stock Rule properly classifies bump stocks as "machinegun[s]" for purposes of federal law. *Id.*; *see also* 18 U.S.C. § 921(a)(23).[11]

III.

Cargill argues that ATF exceeded its statutory authority by issuing the Bump Stock Rule. Cargill further argues that even if the agency had statutory authority to issue the Rule, the Rule violates the constitutional principle of separation of powers. The district court concluded that Congress had

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[10] Though the district court concluded that "the traditional tools of statutory interpretation yield unambiguous meanings" for the disputed terms, we hold only that the statute does not contain the kind of grievous ambiguity that causes the rule of lenity to apply.

[11] Though we conclude that the Bump Stock Rule offers the best interpretation of the NFA's definition of "machinegun," Congress may wish to further clarify whether various novel devices qualify as machine guns for purposes of federal law. In accordance with the statutory opinion transmission project, our Opinion Clerk will notify Congress that this opinion "bears on technical matters of statutory construction." *See* Robert A. Katzmann & Russell R. Wheeler, *A Mechanism for "Statutory Housekeeping": Appellate Courts Working with Congress*, 9 J. APP. PRAC. & PROCESS 131 (2007) (describing the history and purpose of the statutory opinion transmission project); Marin K. Levy & Tejas N. Narechania, *Interbranch Information Sharing: Examining the Statutory Opinion Transmission Project*, 108 CAL. L. REV. 917, 921 (2020) (encouraging "federal appellate judges to send more opinions to Congress").

delegated authority to ATF to issue a rule like the Bump Stock Rule and that this Congressional delegation does not violate the separation of powers.

We do not address these issues. As explained above, the Bump Stock Rule's interpretation of the NFA's definition of "machinegun" is the best interpretation of the statute. Accordingly, resolution of these issues will not affect the outcome of the case—either way, bump stocks are "machinegun[s]" and thus illegal under federal law. 18 U.S.C. § 922(o)(1). And because Cargill's ability to own a bump stock would not change even if his claims that ATF exceeded its statutory authority and that the Rule violates the separation of powers were vindicated, Cargill has no standing to pursue these claims in federal court.[12] *See Fed. Election Comm'n v. Akins*, 524 U.S. 11, 24 (1998) (explaining that, in order to have standing, plaintiffs must "show injury to 'a particular right of their own, as distinguished from the public's interest in the administration of the law'" (quoting *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 125 (1940))); *California v. Texas*, 141 S. Ct. 2104, 2112 (2021) ("We do not reach these questions of the Act's validity, however, for Texas and the other plaintiffs in this suit lack the standing necessary to raise them.").

IV.

For the foregoing reasons, we AFFIRM the judgment of the district court.

[12] Cargill does not argue that Congress cannot outlaw bump stocks.