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; UNITED STATES DEPARTMENT OF JUSTICE; STEVEN DETTELBACH, in his official capacity as Director of the 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 SUPPLEMENTAL BRIEF

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July 25, 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.

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INTRODUCTION

"Bump stocks" are devices that can be affixed to semi-automatic rifles to assist with more rapid firing, particularly among users with limited hand mobility. Between 2008 and 2017, the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) repeatedly issued classification decisions indicating that non-mechanical bump stocks are not "machinegun[s]" as defined by federal law and thus are not subject to the federal ban on sale and possession of machineguns. *See* ATF, *Bump-Stock-Type Devices*, 83 Fed. Reg. 66,514, 66,514 (Dec. 26, 2018) ("Bump Stock Rule" or "Final Rule"). The devices purchased by Appellant Michael Cargill, known as "Slide Fires," were among several varieties of non-mechanical bump stocks commercially marketed throughout that period.

A 2017 mass shooting in Las Vegas (involving a shooter using semi-automatic rifles equipped with bump stocks) led senior Executive Branch officials to order ATF to reverse those classification decisions. ATF complied on December 26, 2018 by issuing the Bump Stock Rule, which declared that non-mechanical bump stocks are, in fact, "machinegun[s]" within the meaning of 26 U.S.C. § 5845(b)[1] and ordered Americans possessing those devices to destroy them or abandon them at an ATF office by March 26, 2019. *Ibid.*

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[1] ATF re-classified all varieties of non-mechanical bump stocks then available for sale as machineguns, reasoning that they all "utilize essentially the same functional design." *Id.* at 66,516.

A federal agency is, of course, entitled (as here) to change its position regarding the meaning of a federal statute and declare that previous Administrations had construed the statute erroneously. But it is ultimately the duty of federal courts "to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1804). And the best reading of § 5845(b) is the one espoused by ATF before December 2018: a non-mechanical bump stock is *not* a "machinegun."

This case is not about gun control. It is instead about who has the constitutional prerogative to change the criminal law if changes are warranted. The current statute, adopted in 1986, defines "machinegun" in a manner that does not encompass non-mechanical bump stocks. It is unlawful for a prosecutorial entity like ATF to rewrite existing law without authorization from Congress. Any change in gun-control laws must emanate from Congress. Indeed, Congress adopted and President Biden signed major new gun-control legislation last month,[2] but the new statute makes no changes in the definition of "machinegun" and does not ban bump stocks. The Court should enjoin ATF's efforts to enact new legislation on its own.

Nor is this a case in which ATF's statutory construction is entitled to deference from the courts. ATF has expressly waived any deference claim for the Bump Stock Rule under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837

[2] Bipartisan Safer Communities Act, Pub. L. 117-159 (enacted June 25, 2022).

(1984). Indeed, Appellant *and* Appellees both agree that ATF's construction is not entitled to *Chevron* deference. Almost all of § 5845(b)'s applications are criminal in nature, and the Supreme Court has held repeatedly that courts should not defer to the Executive Branch's reading of a criminal statute. On the contrary, to the extent that this Court determines that the statutory language is ambiguous regarding whether § 5845(b) applies to non-mechanical bump stocks, the rule of lenity requires that the statute be construed *against* the Government.

STATEMENT OF THE CASE

In an effort to prevent criminal use of machineguns and other high-powered firearms, Congress passed the National Firearms Act of 1934 (NFA), Pub. L. No. 73-474, 48 Stat. 1236 (June 26, 1934). The NFA imposed a very steep tax on the purchase of a machinegun. That tax provision was effectively a criminal statute; Congress concluded that many gangsters would obtain machineguns without paying the tax and then could be prosecuted for tax evasion. *Gun Owners of America, Inc. v. Garland*, 992 F.3d 442, 450 (6th Cir. 2021)("*Gun Owners I*"), *vacated*, 4 F.4th 576 (6th Cir. 2021).

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

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

> term shall also include the frame or receiver of any such weapon, any combination of parts designed and intended for use in converting a weapon into a machinegun, and any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person.

26 U.S.C. § 5845(b). That definition is incorporated into the criminal code by 18 U.S.C. § 921(a)(23).

"Bump" Firing and Semi-Automatic Weapons. A gun qualifies as a "semi-automatic" weapon if it will fire only once when the shooter pulls and holds down the trigger; a semi-automatic will fire more than once only if the shooter releases and reengages the trigger between shots. Final Rule, 83 Fed. Reg. at 66,516. 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.[3]

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[3] Bump firing has been explained as follows:

> A shooter who bump fires relies on the recoil energy from the rifle's discharge to push the gun slightly backward from the trigger finger, which remains stationary. The rifle's trigger resets as it separates from the trigger finger. The shooter then uses the non-trigger hand placed on the rifle's fore-end to push the gun (and thus the trigger) slightly forward. The trigger "bumps" into the still-stationary trigger finger, discharging a second shot. The recoil energy from each additional shot combined with the shooter's forward pressure with the non-trigger hand allows the rifle's backward-forward cycle to repeat itself rapidly. A shooter may also use a belt loop to bump fire by sticking the trigger finger inside the loop and shooting from the waist level to keep the rifle more stable.

Attaching a bump stock to a semi-automatic rifle facilitates the bump firing of the rifle and is particularly useful for individuals who, for whatever reason, have not mastered bump firing without a bump stock. A bump stock replaces a semi-automatic rifle's standard stock with a plastic casing that allows the rifle's receiver to slide back and forth within the casing. *Id.* at 66,516, 66,518. A bump stock also includes an extension ledge on which the shooter places his or her trigger finger to keep it stationary while shooting. *Id.* at 66,516. Recoil energy from the rifle's discharge separates the stationary trigger finger from the trigger, allowing the trigger to reset. By applying "forward pressure with the non-trigger hand" on the fore-end of the rifle while "maintaining the trigger finger on the device's ledge *with constant rearward pressure*" (emphasis added), the shooter forces the rifle (and trigger) forward following recoil, thereby "bumping" the trigger into the trigger finger and initiating a second discharge. *Id.* at 66,518. The key to successful bump firing is applying forward pressure with the non-trigger hand while keeping the trigger finger stationary despite the rifle's recoil. A shooter can master that ability through practice or can use a bump stock to assist in the effort.

ATF Regulation of Bump Stocks. William Akins obtained a patent in 2000 for the first bump stock, which he named the "Akins Accelerator." In response to a letter

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

from Akins, ATF issued a classification letter in 2002, determining that the Accelerator was not a "machinegun" because an Accelerator-equipped semi-automatic rifle "did not fire more than one shot by a single function of the trigger." *Akins v. United States*, 312 Fed. Appx. 197, 198 (11th Cir. 2009). After conducting further testing, ATF in 2006 overruled its prior determination and concluded that the Accelerator was, indeed, a "machinegun." Both ATF and the Eleventh Circuit noted that the device contains a mechanical part—an internal spring—that thrusts the rifle forward following recoil, thereby causing the weapon "to fire continuously ... until the gunman releases the trigger or the ammunition is exhausted." *Id.* at 200. Based on that analysis, the Eleventh Circuit in 2009 affirmed ATF's determination that the Accelerator met the statutory definition of a "machinegun" because a single act of the shooter—pulling the trigger—causes the weapon to fire "automatically" more than one shot. *Ibid.*

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

Following the 2017 Las Vegas mass shooting, a number of government officials appealed to ATF to reconsider those letter rulings. *Id.* at 66,516. In particular, President Trump issued a memorandum concerning bump stocks that directed the Department of Justice "to dedicate all available resources ... to propose ... a rule banning all devices that turn legal weapons into machineguns." ROA.526, 83 Fed. Reg. 7,949 (Feb. 20, 2018).

The next month, ATF formally proposed issuing a regulation to "clarify" that non-mechanical bump stocks are machineguns within the meaning of 26 U.S.C. § 5845(b). 83 Fed. Reg. 13,442 (March 29, 2018). The Final Rule, issued on December 26, 2018, amended regulations at 27 C.F.R. §§ 447.11, 478.11, and 479.11 to change ATF's interpretation of the statutory definition of a machinegun, which states that a weapon is a "machinegun" if it "automatically" fires more than one shot "by a single function of the trigger." 26 U.S.C. § 5845(b). 83 Fed. Reg. at 66,553-54. The Final Rule amended the pertinent regulations to construe "single function of the trigger" as meaning "a single pull of the trigger and analogous motions" and to construe "automatically" (as it modifies "shoots, is designed to shoot, or can be readily restored to shoot") as meaning "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." *See* 27 C.F.R. § 447.11. Reversing ATF's 2008-2017 letter rulings, the new regulations explicitly state that § 5845(b)'s definition of "machinegun" includes non-mechanical bump stocks of the sort that ATF previously declared were not machineguns.

Ibid. They assert that such devices "allow[] semi-automatic firearms to shoot more than one shot with a single pull of the trigger," *ibid.*, notwithstanding that the trigger resets for each shot and that no second shot will fire unless the shooter takes steps beyond the initial pull of the trigger.

The Final Rule required those possessing bump stocks "to destroy them or abandon them at an ATF office" by March 26, 2019. 83 Fed. Reg. at 66,514. When the Final Rule was adopted, Appellant Cargill lawfully owned two Slide Fire bump stocks. ROA.529. He is a law-abiding ex-Army soldier and has no disqualifications that would prevent him from lawfully owning or operating a firearm and related accessories. ROA.501. In response to the Final Rule, Cargill surrendered both of his Slide Fire devices to ATF, but ATF has agreed to preserve them pending the outcome of this lawsuit. ROA.529.

Proceedings Below. After surrendering his devices, Cargill sued ATF, seeking invalidation of the Final Rule. He alleged, among other things, that: (1) the best reading of 26 U.S.C. § 5845(b) is the one espoused by ATF before December 2018, not the one adopted by ATF in the Final Rule; (2) the Final Rule conflicts with the statutory definition of a machinegun and thus exceeds ATF's authority; (3) ATF lacks authority to issue a legislative rule that may lead to criminal consequences; (4) because the Final Rule is not a valid legislative rule, ATF may not seek judicial deference to its statutory interpretation; (5) to the extent that the courts determine that the definition of

machinegun is ambiguous with respect to bump stocks, they should apply the rule of lenity to determine that non-mechanical bump stocks are not machineguns; and (6) if 26 U.S.C. § 5845(b) were interpreted as authorizing ATF's declaration that non-mechanical bump stocks are prohibited machineguns, then the statute would be an unconstitutional delegation of Congress's legislative powers to draft criminal laws.

In response, ATF conceded that it lacks authority to issue any legislative rule concerning the definition of a machinegun. ROA.405. Instead, ATF argued that the Final Rule is an interpretive rule that constitutes the best reading of the statute, that non-mechanical bump stocks have always been included within the statutory definition of machineguns, and that ATF's prior, contrary interpretation was mistaken. ROA.392-93.

The district court conducted a one-day bench trial on September 9, 2020. Both sides introduced extensive documentary evidence. The sole live witness was David Smith, a firearms examiner for ATF, who testified as an expert witness regarding the operation of bump-fire systems. ROA.510.

On November 23, 2020, the district court issued its findings of fact and conclusions of law and entered judgment for ATF on all claims. ROA.498-572.

The court held that the Final Rule is a legislative rule, notwithstanding ATF's assertions that it lacked authority to issue a legislative rule and that it intended the Final Rule to be an interpretive rule. ROA.534-38. In reaching that conclusion, the court relied in part on the D.C. Circuit's holding that the Final Rule is a legislative rule. *See*

Guedes v. Bureau of Alcohol, Tobacco, Firearms and Explosives, 920 F.3d 1, 18-19 (D.C. Cir. 2019) ("*Guedes I*"). The district court stated that the Final Rule will have a "significant effect[] on private interests," and asserted that such effects are "characteristic of legislative rules." ROA.538.

The court also held that ATF was authorized to issue legislative rules interpreting 26 U.S.C. § 5845(b) by virtue of the rulemaking authority delegated by 18 U.S.C. § 926(a) and 26 U.S.C. § 7805(a). ROA.539-43. It so held despite its acknowledgment that "Defendants agree with Plaintiff that 'the narrow statutory delegation on which the [Final Rule] relies does not provide the Attorney General the authority' to issue legislative rules with criminal consequences. (Dkt. #59 at 16.)" ROA.540. The court cited the D.C. Circuit's *Guedes I* ruling and the Tenth Circuit's ruling in *Aposhian v. Barr*, 958 F.3d 969 (10th Cir. 2020) (*Aposhian I*), both of which held that ATF possessed statutory authority to issue the Final Rule as a legislative rule.

The court parted company with *Guedes I* and *Aposhian I*, however, with respect to whether ATF's interpretation of 26 U.S.C. § 5845(b) is entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Both the D.C. and Tenth Circuits held that ATF's interpretation is entitled to *Chevron* deference, and they upheld the Final Rule on that basis after concluding that 26 U.S.C. § 5845(b) is ambiguous with respect to whether non-mechanical bump stocks fall within the statutory definition of machineguns. The district court held that ATF's interpretation

was not entitled to *Chevron* deference because 26 U.S.C. § 5845(b) has significant criminal-law applications and "criminal laws are for courts, not for the Government, to construe." ROA.549 (quoting *Abramski v. United States*, 573 U.S. 169, 191 (2014)). The court stated that it would rely "solely on 'the traditional tools of statutory construction' to determine whether the Final Rule adopts the correct interpretation of the definition of 'machinegun' as applied to bump-stock type devices." ROA.550 (quoting *Texas v. United States*, 497 F.3d 491, 503 (5th Cir. 2007)).[4]

The court ultimately concluded that the "best reading" of the statutory definition of "machinegun" encompasses non-mechanical bump stocks of the sort owned by Cargill. ROA.551-62. The court accepted the Final Rule's construction of § 5845(b)—that a weapon shoots more than one shot "automatically" if multiple shots fire "as a result of a self-acting or self-regulating mechanism that allows the firing of multiple rounds through a single pull of the trigger." ROA.556-560. It then held that a single pull of the trigger initiates the requisite "self-acting or self-regulating mechanism," ROA.556-62, notwithstanding ATF's explicit acknowledgment that multiple shots will fire only if the shooter *also*: (1) applies forward pressure with the non-trigger hand on the fore-end of the rifle; and (2) maintains constant rearward pressure

[4] In light of that ruling, the court declined to address an additional argument raised by Cargill in opposition to *Chevron* deference: that deference is inappropriate when, as here, the Government has expressly waived any claim to *Chevron* deference. ROA.546-49.

on the extension ledge. 83 Fed. Reg. at 66, 518. The court rejected Cargill's contention that ATF failed to adequately distinguish non-mechanical bump stocks (which the Final Rule classifies as machineguns) from semi-automatic rifles (which ATF does not classify as machineguns despite the fact that semi-automatic rifles can be bump fired by experienced shooters with or without the assistance of bump stocks). ROA.563-64.

Finally, the district court rejected Cargill's arguments under the non-delegation doctrine. ROA.543-46. It held that § 5845(b) provides ATF with an "intelligible principle" constitutionally adequate to guide ATF in determining what weapons to classify as "machineguns." ROA.546.

A three-judge panel of this Court affirmed the district court's judgment on December 14, 2021. On June 23, 2022, the Court granted Cargill's petition for rehearing *en banc* and vacated the panel opinion.

SUMMARY OF ARGUMENT

The evidence at trial demonstrated conclusively that 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." 26 U.S.C. § 5845(b). 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's fore-end. And if the initiation of a "single function of the trigger" does not suffice *by itself* to cause repeat firing, then that single function cannot plausibly be described as causing the weapon to fire "automatically." Because a single function of the trigger does not suffice to initiate automatic firing of semi-automatic rifles equipped with non-mechanical bump stocks, they do not meet the statutory definition of a machinegun.

The result is unchanged if one views the "trigger[ing]" mechanism for such weapons to be application of forward pressure on the rifle's fore-end rather than the pull of the rifle's actual trigger. Under that latter scenario, a single application of the triggering mechanism (*i.e.*, the application of forward pressure on the rifle's fore-end) is similarly insufficient to initiate an automatic firing sequence. A second shot will not fire unless the shooter continues to apply forward pressure on the fore-end while *also* applying rearward pressure on the bump stock's extension ledge.

The need to apply that rearward pressure (while simultaneously applying forward pressure with the non-trigger hand) explains why it is impossible to bump fire a semi-automatic rifle equipped with a non-mechanical bump stock using only one hand. *See* ROA.656 (acknowledgment by ATF's expert witness that bump firing requires use of both hands). That feature distinguishes bump-stock-equipped semi-automatic rifles from fully automatic weapons (*i.e.*, machineguns), which require nothing more than a finger pulling and holding the trigger to fire continuously.

Moreover, it is impossible to square the Final Rule's conclusion that non-mechanical bump stocks are machineguns with the uncontested evidence that every shot fired by a bump-stock-equipped semi-automatic rifle requires a separate "function" of the trigger. Such weapons are incapable of firing a second time unless the trigger finger separates from the trigger and allows the trigger to reset by moving forward. There is nothing "automatic" about that separation; it occurs only because the bump shooter holds his finger in place (whether on his own or with the assistance of a belt loop or an extension ledge) while the trigger (in conjunction with the rifle's frame) recoils.

The district court's construction of 26 U.S.C. § 5845(b) has been rejected by a significant majority of federal appellate judges outside the Fifth Circuit who have considered it. Two appeals courts (the D.C. and Tenth Circuits) have upheld the Final Rule, *Guedes I*, 920 F.3d at 31-32; *Aposhian I*, 958 F.3d at 984-85, while a third appeals court (the U.S. Navy-Marine Corps Court of Criminal Appeals) rejected the rule, concluding that bump stocks are not "machineguns" within the meaning of § 5845(b). *United States v. Alkazahg*, 81 M.J. 764, 779-84 (U.S. Navy-Marine Corps Ct. Crim App. 2021). But both the D.C. and Tenth Circuits *rejected* ATF's contention that the Final Rule represents the "best reading" of the statute. On the contrary, they both held that § 5845(b) is ambiguous with respect to whether non-mechanical bump stocks are "machineguns," and they upheld the Final Rule only after applying *Chevron* deference and

determining that the Final Rule is a "reasonable" interpretation of an ambiguous statute. *Guedes I*, 920 F.3d at 28-32; *Aposhian I*, 958 F.3d at 984-89.

ATF's construction of the statutory definition of "machinegun" is not entitled to *Chevron* deference, for at least three independent reasons. First, while ATF may be entitled to offer its views regarding the proper interpretation of the statute defining machineguns, the Final Rule is not a valid *legislative* rule because Congress has not authorized ATF to engage in such rulemaking. Indeed, ATF repeatedly conceded in the district court that it lacks such authority. *See, e.g.*, Dkt. #59 at 14. If the Final Rule is a mere *interpretive* rule, it has no possible claim to deference.

Second, ATF expressly waived any claim to *Chevron* deference. When the Government disclaims reliance on *Chevron*, courts have no plausible justification for substituting a federal agency's construction of a federal statute in place of their own best reading of the statute. *Guedes v. Bureau of Alcohol, Tobacco, Firearms and Explosives*, 140 S. Ct. 789, 790 (2020) ("*Guedes II*") (statement of Gorsuch, J., respecting denial of certiorari).

Third, *Chevron* deference has no role to play in the construction of federal statutes that, like 26 U.S.C. § 5845(b), are applied in a criminal-law context in the overwhelming majority of cases. As the district court correctly held, "criminal laws are for courts, not for the Government, to construe." ROA.549 (quoting *Abramski v. United States*, 573 U.S. 169, 191 (2014)). Applying the *Chevron* framework to statutes with criminal applications

is fundamentally unfair to criminal defendants. The executive branch is, by definition, a party to every criminal case. Thus, when courts defer to executive-branch constructions of ambiguous criminal statutes, they are improperly employing a bias that systematically favors prosecutors and denies due process of law to defendants. *See* Philip Hamburger, Chevron *Bias*, 84 Geo. Wash. L. Rev. 1187 (2016).

Moreover, deferring to the Government's interpretation of 26 U.S.C. § 5845(b) is inconsistent with the rule of lenity. The rule of lenity is a centuries-old canon of statutory construction holding that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Skilling v. United States*, 561 U.S. 358, 410 (2010). To the extent that the Court finds any ambiguity regarding whether non-mechanical bump stocks are included within the definition of machineguns, that ambiguity should be resolved by applying the rule of lenity and ruling that they fall outside the definition.

The nondelegation doctrine counsels a similarly narrowed definition of machineguns. ATF's decision to classify non-mechanical bump stocks as machineguns can only be justified by interpreting 26 U.S.C. § 5845(b) as authorizing the agency to so classify any weapon that ATF determines to be too dangerous. But if so broadly construed, the statute would constitute an unconstitutional delegation of legislative power; it would not provide ATF with an "intelligible principle" to guide ATF in executing the statute. *See Jarkesy v. SEC*, 34 F.4th 446, 459-63 (5th Cir. 2022). To avoid that constitutional problem, the Court should interpret the words of § 5845(b) in accord

with their ordinary meaning—an approach that plainly prevents non-mechanical bump stocks from being classified as machineguns.

ARGUMENT

I. A NON-MECHANICAL BUMP STOCK IS NOT PROPERLY CLASSIFIED AS A "MACHINEGUN" UNDER 29 U.S.C. § 5845(b)

For many years before 2018, ATF held that non-mechanical bump stocks were not "machineguns" within the meaning of 29 U.S.C. § 5845(b). After carefully examining how such devices worked, ATF issued a series of ten separate letter rulings from 2008 to 2017, each concluding that non-mechanical bump stocks (*i.e.*, bump stocks with no mechanical parts) should not be classified as "machineguns" because a semi-automatic weapon equipped with a non-mechanical bump-stock cannot "automatically" shoot more than one shot "by a single function of the trigger." Final Rule, 83 Fed. Reg. at 66,514.

ATF reversed that position in December 2018 after being ordered to do so by senior Executive Branch officials and without undertaking any new field examination of how bump-stock-equipped semi-automatic weapons operate. The result of that reversal was to brand Cargill a criminal. The Final Rule 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. ATF announced that Cargill and others would not be prosecuted if they destroyed or

surrendered their bump stocks by March 26, 2019. *Ibid.* But by deeming its new interpretation simply a belated recognition of the proper scope of the machinegun statute, ATF effectively ruled that the nonprosecution of Cargill (and the hundreds of thousands of others who purchased bump stocks during the years when ATF said they were legal) is solely a matter of prosecutorial discretion.

ATF's 2008-17 explanation regarding why bump stocks are not machineguns is far more persuasive than the contrived explanation it now provides for its sudden reversal of course. A brief discussion of the history of ATF's classification of bump stocks is helpful in understanding ATF's pre-2018 interpretation.

A. Unlike the "Akins Accelerator," Non-Mechanical Bump Stocks Contain No Mechanical Parts

As noted *supra* at 6, the Eleventh Circuit agreed with ATF that the Akins Accelerator met the statutory definition of a "machinegun." *Akins*, 312 Fed. Appx. at 200. Both ATF and the Eleventh Circuit determined that the Accelerator's internal spring automatically thrusts the rifle forward following recoil and thus can "automatically" produce multiple shots by a single function of the trigger. *Ibid.*

ATF's later determination that non-mechanical bump stocks were *not* machineguns followed logically from its analysis of the Akins Accelerator. The presence of a spring in the Akins Accelerator meant that all the shooter had to do was pull the trigger to produce continuous firing. There was no need for the shooter to take the

additional step of pushing the rifle's fore-end forward with his non-shooting hand following recoil because the spring performed that task for him. While it was true that the rifle's trigger continued to reset after each shot, the continued firing could legitimately be deemed the "automatic" result of one pull of the trigger because it required no additional effort by the shooter.

ATF's 2008-17 letter rulings recognized that the firing sequence is considerably different when a shooter uses a non-mechanical bump stock. A bump stock lacking a spring or other mechanical parts cannot replicate the Akins Accelerator's automatic-firing sequence. A non-mechanical bump stock is nothing more than "several pieces of plastic and rubber." ROA.648. ATF's expert witness acknowledged that if one pulls the trigger of a bump-stock-equipped semi-automatic rifle and does nothing more, the weapon will fire only once. ROA.644. He further acknowledged that while a shooter needs only one hand to fire an Akins Accelerator-equipped weapon continuously, ROA.641, it requires two hands to bump fire a semi-automatic rifle equipped with a non-mechanical bump stock. ROA.656. And that is because bump firing such a weapon requires the shooter to do more than simply pull the trigger once; he must also apply forward pressure with the non-trigger hand on the fore-end while simultaneously applying constant rearward pressure on the bump stock's extension ledge. Final Rule, 83 Fed. Reg. at 66,518.

B. The Final Rule Misconstrues the Requirements of Section 5845(b) by Overlooking the Considerable Human Input Required to Fire More than One Shot from a Bump-Stock-Equipped Semi-Automatic Rifle

The Final Rule reversed ATF's longstanding position and held that non-mechanical bump stocks are, in fact, "machineguns" as defined by federal law. ATF's reversal was not based on any new insight regarding the manner in which bump stocks operate. Rather, the agency simply adopted a new reading of 26 U.S.C. § 5845(b) and declared that its old reading was "erroneous."

The Final Rule is the subject of at least four on-going federal-court challenges. ATF's defense of the Final Rule has been largely an exercise in misdirection. ATF has repeatedly asserted that it has adopted the "best reading" of § 5845(b) because it has interpreted two of the statute's key terms—"automatically" and "single function of the trigger"[5]—in a manner that is consistent with their ordinary meaning. *See, e.g.*, Dkt. #46 at 10 (stating that "[t]he [Final] Rule represents the best interpretation of the statutory text because it correctly interprets and applies the text in accordance with ordinary, accepted meaning.").

[5] *See* 27 C.F.R. § 447.11 ("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.").

But the fatal flaw in the Final Rule is not the words it uses to paraphrase "automatically" and "single function of the trigger." Rather, ATF went astray by applying its new verbal formulation (particularly the phrase "self-acting or self-regulating mechanism") in a manner wholly inconsistent with the common understanding of those words. ATF's new regulations state explicitly that non-mechanical bump stocks are machineguns, but they do so by employing a rationale wholly divorced from the statutory definition of a machinegun:

> The term "machinegun" includes a bump-stock-type device, *i.e.*, a device that allows 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.

27 C.F.R. §§ 447.11, 478.11 & 479.11.

The final clause of the regulations is a complete *non sequitur*. The definition of "machinegun" says nothing about whether a weapon continues firing "without additional physical manipulation of the trigger by the shooter." Rather, a weapon is defined as a "machinegun" if but only if "a single function of the trigger" can cause the weapon to shoot "automatically." 26 U.S.C. § 5845(b). The plain meaning of that sentence is that a weapon is not a "machinegun" if something more is required of the shooter than a single function/pull of the trigger to produce more than one shot. That "something more" is the forward pressure the shooter must maintain on the fore-end with his non-

trigger hand *and* the rearward pressure he must maintain on the extension ledge. Whether a weapon can continue to fire "without additional physical manipulation of the trigger by the shooter"—the Final Rule's justification for declaring that a non-mechanical bump stock is a machinegun—is simply irrelevant to the statutory analysis.[6]

Judge Karen Lecraft Henderson of the D.C. Circuit has cogently explained why the Final Rule is a misinterpretation of § 5845(b):

> "Automatically" cannot be read in isolation. On the contrary, it is modified—that is, limited—by the clause "by a single function of the trigger." ... "Automatically ... by a single function of the trigger" is the sum total of the *action necessary* to constitute a firearm a "machinegun." 26 U.S.C. § 5845(b). A "machinegun," then, is a firearm that shoots more than one round by a single trigger pull without manual reloading. 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"). [Final Rule], 83 Fed. Reg. at 66,532. By including more action than a single trigger pull, the Rule invalidly expands section 5845(b).

Guedes I, 920 F.3d at 43-44 (Henderson, J., concurring in part and dissenting in part) (emphasis in original).[7]

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[6] Besides which, ATF's factual premise is incorrect: there *is* "additional physical manipulation of the trigger." Each additional shot requires that the trigger move backward as a result of its contact with the trigger finger, and the distance it moves must precisely equal the distance it moved on the first shot.

[7] Judge Henderson was right, although she could have added that rearward pressure on the extension ledge is an additional "AND THEN SOME" input.

The district court disagreed with Judge Henderson's analysis, asserting, "the movement of the weapon back and forth between shots while the trigger finger remains stationary on the trigger ledge *is* the result of an automatic, 'self-acting or self-regulating mechanism.'" ROA.558. That response misses Judge Henderson's point. The back-and-forth movement of the weapon cannot be said to have been caused "automatically ... by a single function of the trigger" unless there are no additional forces, extraneous to the "single function of the trigger," that are necessary to create that movement. And it is not disputed that the weapon's frame will not move forward following recoil unless the shooter applies forward pressure on the fore-end *and* rearward pressure on the extension ledge.

As Judge Henderson stated, her reading of the statute "comports with the common sense meaning of the language used." *Id.* at 44. She explained:

> Suppose an advertisement declares that a device performs a task "automatically by a push of a button." I would understand the phrase to mean pushing the button activates whatever function the device performs. It should come as a surprise, I submit, if the device does not operate until the button is pushed *and* some other action is taken—a pedal pressed, a dial turned, and so on.

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

The district court's conclusion that the Final Rule constitutes the "best reading" of § 5845(b) has been rejected by a significant majority of federal appellate judges outside the Fifth Circuit who have addressed the issue. Only six judges have agreed with ATF's construction. *See Gun Owners of America, Inc. v. Garland*, 19 F.4th 890, 908-09 (6th Cir. 2021) (*en banc*) ["*Gun Owners II*"] (White, J., opinion in support of affirmance).[8] Seventeen appellate judges have endorsed ATF's pre-2018 construction of § 5845(b) and have concluded that ATF's current construction is wrong. *See Gun Owners II*, 19 F.4th 912-15 (Murphy, J., joined by seven other judges, dissenting); *Guedes I*, 920 F.3d at 35-48 (Henderson, J., dissenting); *Alkazahg*, 81 M.J. at 779-84 (three-judge panel of Navy-Marine Corps Court of Criminal Appeals finds unanimously that the statutory definition of "machinegun" does not include non-mechanical bump stocks); *Aposhian v. Wilkinson*, 989 F.3d 890, 891-903 (10th Cir. 2021) ("*Aposhian II*") (Tymkovich, J., joined by four other judges, dissenting from decision to vacate the grant of rehearing *en banc* as

[8] 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*, 992 F.3d 446, 469 (6th Cir. 2021) ["*Gun Owners I*"]. 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. Judge White's concurring opinion endorsing ATF's reading of the statute was joined by five other judges.

improvidently granted).[9] Four other appellate judges disagreed that the Final Rule constitutes the "best reading" of § 5845(b); they concluded that the statute is ambiguous with respect to non-mechanical bump stocks and, applying *Chevron* deference, upheld the Final Rule as a "reasonable" interpretation of the statute. *Guedes I*, 920 F.3d at 169 (*per curiam* D.C. Circuit decision joined by Judges Srinivasan and Millett); *Aposhian I*, 958 F.3d at 984-88 (Tenth Circuit decision by Judge Briscoe, joined by Judge Moritz).

C. The Result Is Unchanged Regardless of How One Defines the Triggering Mechanism of a Bump-Stock-Equipped Weapon

Cargill encourages the Court to view Plaintiff's Exhibit 2, ROA.672 (AR3318), a video that depicts firing a bump-stock-equipped semi-automatic rifle.[10] The video illustrates that: (1) the rifle will fire only one shot if the shooter pulls the trigger once and does nothing more; and (2) the rifle can be made to fire more than one shot if the shooter pulls the trigger and also applies forward pressure on the rifle's fore-end with his non-trigger hand while simultaneously applying rearward pressure on the extension ledge with his trigger hand. The video demonstrates that a bump stock does not meet

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[9] The Tenth Circuit granted a petition to rehear its *Aposhian I* decision but later, by a 6-5 vote in *Aposhian II*, vacated the grant of rehearing *en banc* as improvidently granted. The five dissenters would have held that "the best reading" of § 5845(b) is that bump stocks are not machineguns. *Aposhian II*, 989 F.3d at 891.

[10] The video can be viewed on Youtube at Patton Media & Consulting, *Exhibit 28 Bump Stock Analytical Video FPCGICG*, YOUTUBE (June 27, 2018), https://www.youtube.com/watch?v=EGMuTPmOG7g.

the statutory definition of a machinegun: a single pull of the trigger does not "automatically" (*i.e.*, without further human intervention) cause the rifle to fire more than one shot.

The district court approached the statutory analysis somewhat differently. It noted that the shooter need not affirmatively move his trigger finger to pull the trigger backward to initiate firing. Firing can be initiated if the shooter holds his trigger finger steady on the extension ledge and "pushes forward [on the fore-end] to engage the trigger finger with the trigger." ROA.512. The court thereby suggested that the actual triggering mechanism is not the "function" of the lever commonly thought of as the "trigger" but the placement of forward pressure on the fore-end.

The district court's apparent identification of forward pressure as the triggering mechanism is unusual, given that a bump-stock-equipped semi-automatic weapon has a traditional trigger lever that, when moved backward, will initiate firing. But the court's analytic approach makes no difference to the weapon's proper classification. Pushing forward on the rifle's fore-end will still produce only one shot (even if the shooter maintains that forward pressure) unless the shooter then holds his trigger finger against the extension ledge and *also* applies rearward pressure with his shooting hand on the extension ledge. Final Rule, 83 Fed. Reg. at 66,518. Hence, initiating firing in the manner identified by the court cannot be said to "automatically" cause the weapon to fire more than one shot.

ATF's expert witness testified that placement of the trigger finger on the extension ledge was unnecessary: the finger serves only as an object for the re-set trigger to strike as the shooter pushes the trigger forward; replacing the finger with a "post" would accomplish the same purpose. ROA.512. But the witness conceded that firing will cease if the shooter ceases to apply rearward pressure. ROA.622, 656. Moreover, he testified on cross-examination that bump firing a semi-automatic rifle requires use of two hands, ROA.656; and the reason that two hands are required is that (as conceded by ATF, 83 Fed. Reg. at 66,518, and illustrated by Exhibit 2) the shooter must push forward on the fore-end and simultaneously apply rearward pressure on the extension ledge with his shooting hand.

Counsel for ATF repeatedly cites case law indicating that the word "trigger" should be broadly construed to include any process or device that triggers a weapon's firing sequence. But counsel has failed to explain how that case law advances ATF's argument that a "single function of the trigger" of a bump-stock-equipped semi-automatic weapon can "automatically" produce multiple shots. The panel cited one of ATF's cases, *United States v. Camp*, 343 F.3d 743 (5th Cir. 2003), for the proposition that courts should avoid "mechanistic reading[s]" of § 5845(b). Panel Op. 10. *Camp* is irrelevant. That case involved a criminal defendant who added an electric switch to his rifle; flipping the switch activated a motor that in turn caused the traditional lever trigger on his weapon to move forward and backward repeatedly—thereby causing the weapon

to fire repeatedly. The Court had no difficulty rejecting the defendant's argument that his weapon was not a machinegun simply because multiple shots were accompanied by multiple movements of the traditional lever trigger. 343 F.3d at 745. The Court broadly construed § 5845(b)'s use of the word "trigger";[11] it held that the weapon's actual trigger was the defendant's switch and that his weapon was a "machinegun" because flipping the switch initiated an automatic firing sequence. *Ibid.* *Camp* does not suggest that a weapon "automatically" fires more than one shot "by a single function of the trigger" when (as here) firing a second shot requires additional human intervention.

In connection with its 2006 Akins Accelerator ruling, ATF interpreted the statutory phrase "single function of the trigger" to mean "single pull of the trigger." As the district court recognized, that interpretation arguably narrowed the scope of the statute, because the word "function" could be interpreted more broadly than the word "pull." ROA.561. In the Final Rule, ATF changed its interpretation of the phrase; it now interprets "single function of the trigger" to mean "single pull of the trigger and analogous motions." 27 C.F.R. §§ 447.11, 478.11, & 479.11. ATF adopted the change

[11] To support its broad reading of "trigger," *Camp* cited *United States v. Jokel*, 969 F.2d 132, 135 (5th Cir. 1992); *United States v. Evans*, 978 F.2d 1112, 1113 (9th Cir. 1992); and *United States v. Fleischli*, 305 F.3d 643, 655 (7th Cir. 2002). Counsel for ATF has relied on those decisions as well, but each is similarly inapposite here. Each simply stands for the unremarkable propositions that the word "trigger" can apply to other types of triggering mechanisms besides a traditional lever trigger and that it makes no difference whether a lever trigger must be pulled or pushed.

to emphasize its view that the words "function" and "trigger" should be interpreted broadly enough to encompass unorthodox firing mechanisms. ATF acknowledged that the former interpretation might "lead to confusion" by suggesting that "*only* a single *pull* of the trigger will qualify as a single function." Final Rule, 83 Fed. Reg. at 66,534. ATF adopted new language to clarify that "a push or other method of initiating the firing cycle must also be considered a 'single function of the trigger.' ... The term 'single function' is reasonably interpreted to also include other analogous methods of trigger activation." *Id.* at 66,534-35.

The quoted language makes clear that the phrase "analogous motions" refers solely to motions designed to initiate the firing sequence. It does not refer to other actions of the shooter that are unrelated to the weapon's triggering mechanism. In other words, if the triggering mechanism is the pull of a lever trigger, applying forward pressure with the non-trigger hand is not an "analogous motion."

The district court attached significance to the fact that some automatic weapons long classified as "machineguns" will not continue firing unless the shooter not only pulls the trigger but continues to hold it down. It reasoned that if an automatic weapon is a machinegun even though the shooter must take an action following pulling the trigger (that is, he must also hold it down), then a bump-stock-equipped semi-automatic weapon can also be classified as a machinegun even though the shooter seeking to fire a second shot must continue to push forward with his non-trigger hand (and pull

rearward with his trigger hand) after pulling the trigger. ROA.558-560. That argument-by-analogy is unpersuasive. The Supreme Court has on several occasions equated "single pull of the trigger" with both pulling the trigger *and* holding it down. For example, in *Staples v. United States*, 511 U.S. 600, 602 n.1 (1994), the Court said:

> As used here, the term "automatic" and "fully automatic" refer to a weapon that fires repeatedly with a single pull of the trigger. That is, once its trigger is depressed, the weapon will automatically continue to fire until its trigger is released or the ammunition is exhausted.

The district court pointed to no instances in which courts have interpreted the phrase "single pull of the trigger" (or "single function of the trigger") as including other actions (such as application of forward pressure by the non-trigger hand) not directly related to the trigger pull.

The Navy-Marine Corps appeals court, in its opinion holding the Final Rule invalid, explicitly rejected the district court's analogy, explaining:

> 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.

Alkazahg, 81 M.J. at 782-83.

Finally, the Final Rule's conclusion that non-mechanical bump stocks are machineguns is inconsistent with the uncontested evidence that every shot fired by a bump-stock-equipped semi-automatic rifle requires a separate "function" of the trigger.

Such weapons are incapable of firing a second time unless the trigger finger separates from the trigger, allows the trigger to reset by moving forward, and then contacts the trigger again. There is nothing "automatic" about that separation; it occurs only because the bump shooter holds his finger in place (whether on his own or with the assistance of a belt loop or an extension ledge) while the trigger (in conjunction with the rifle's frame) recoils. And re-contact with the trigger to bump fire a second shot only occurs because the bump shooter exerts forward pressure on the fore-end *and* rearward pressure on the extension ledge.

D. ATF Cannot Explain Why Bump Firing with the Assistance of a Bump Stock Should Be Treated Differently from Bump Firing Without Such Assistance

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 re-engages the trigger between shots. Final Rule, 83 Fed. Reg. at 66,516. But as explained in more detail above (at 4) 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. The key to bump firing is holding one's trigger finger in place rather than allowing the finger to recoil along with the trigger. If one holds the finger in place (thereby creating separation between the finger and the trigger),

the trigger resets and can initiate another shot if the shooter thrusts the rifle forward following recoil, thereby "bumping" the trigger into the stationary finger.

Some shooters employ a belt loop to assist with keeping their trigger finger stationary. Others use a non-mechanical bump stock; the bump stock's plastic casing and extension ledge are designed to remain stationary while the weapon's main frame recoils, thereby assisting in keeping the trigger finger stationary. But all bump firing of semi-automatic weapons occurs in precisely the same manner, regardless what accessories the shooter may employ.

ATF concedes that one who bump fires a semi-automatic weapon without a bump stock, even if using a belt loop, is not using a "machinegun." ATF cannot adequately explain why bump firing with bump-stock assistance should be treated differently. The absence of such an explanation is fatal to ATF's interpretation of § 5845(b).

ATF seeks to distinguish bump firing using a belt loop by asserting that it is "more difficult than using a bump-stock style device." *Id.* at 66,533. That may be true (one using a belt loop faces greater difficulty controlling recoil), but it does not serve to distinguish the manner in which a semi-automatic weapon operates in those two scenarios. ATF also asserts that a non-mechanical bump stock is a "self-acting or self-regulating mechanism," while a belt loop is not—because "no device is present to capture and direct the recoil energy; rather, the shooter must do so." *Ibid.* That conclusory statement provides no explanation of what constitutes a "self-acting or self-

regulating mechanism" or why a bump-stock-equipped semi-automatic rifle should be deemed to meet that description. In fact, a non-mechanical bump stock does *not* meet that description because (unlike in an Akins Accelerator) no mechanical device is present to capture and direct the recoil energy. The non-trigger hand is what thrusts the rifle frame forward so that the trigger bumps into the trigger finger.

The district court sought to distinguish belt loops by asserting, "unlike a bump stock, a belt loop is 'not designed and intended ... for use in converting a weapon into a machinegun." ROA.563. But that assertion simply assumes the answer to the issue before the Court; Cargill obviously does not *intend* to use his bump stocks to "convert[] a weapon into a machinegun."

In sum, ATF's inability to draw a plausible rationale for the distinction it draws between bump stocks (prohibited as machineguns) and belt loops and semi-automatic weapons capable of being bump fired (not prohibited) indicates that the Final Rule is not the "best reading" of 26 U.S.C. § 5845(b).

II. ATF'S CONSTRUCTION OF THE STATUTE DEFINING "MACHINEGUN[S]" AS IT APPLIES TO BUMP STOCKS IS NOT ENTITLED TO *CHEVRON* DEFERENCE

The Court need go no further in its analysis. The best reading of § 5845(b) is the one ATF espoused before December 2018, not the one it adopted in the Final Rule. The Court should reverse the judgment below and direct the district court to enter judgment for Cargill.

Even if the Court determines that § 5845(b) is ambiguous regarding whether bump stocks should be classified as machineguns, it should still direct entry of judgment for Cargill. That result is required because ATF's construction of the statute is not entitled to deference from the courts. On the contrary, any ambiguity should be resolved in Cargill's favor under the rule of lenity.

There are at least three separate reasons why courts should not afford *Chevron* deference to ATF's statutory construction.

A. Only Legislative Rules Are Entitled to *Chevron* Deference, and the Final Rule Is Not a Valid Legislative Rule

The Government's authority to seek *Chevron* deference for the Final Rule is dependent on a finding that the Final Rule is a valid legislative rule (*i.e.*, a rule that has the force and effect of law) rather than a mere interpretive rule. Mere interpretive rules that do not carry the force of law are not entitled to *Chevron* deference. *See, e.g., Exelon Wind I, L.L.C. v. Nelson*, 766 F.3d 380, 392 (5th Cir. 2014).

The district court held that the Final Rule is a legislative rule, ROA.534-38, and ATF had authority to issue such legislative rules. ROA.539-43. The court concluded that Congress delegated that authority under 18 U.S.C. § 926(a), which authorizes the Attorney General to "prescribe only such rules and regulations as are necessary to carry out the provisions of [the Gun Control Act]," as well as under 26 U.S.C. § 7805(a), which

entitles the Government to "prescribe all needful rules and regulations for the enforcement of [the NFA]."

That ruling is erroneous; it fails to account for the criminal-law aspects of the Final Rule. As a general matter, "criminal laws are for the courts, not for the Government, to construe." *Abramski*, 573 U.S. at 191. The narrow statutory delegations on which the Final Rule relies include no hint that Congress intended to convey authority to engage in legislative rulemaking with criminal consequences. Certainly, the text of neither 18 U.S.C. § 922(o) (which makes it a criminal offense to transfer or possess a machinegun manufactured after 1986) nor 26 U.S.C. § 5845(b) (which defines "machinegun") contains language suggesting that the Executive Branch has been granted authority to issue legislative rules having criminal consequences. The text of those statutes stands in sharp contrast to other provisions of federal firearms law where Congress has expressly attached criminal consequences to violations of the Attorney General's regulations. *See, e.g.*, 18 U.S.C. § 922(m) (criminalizing the failure to maintain firearms records required by DOJ regulations); 18 U.S.C. § 923 (firearms licensing requirements).

Indeed, in the district court ATF expressly conceded that neither 18 U.S.C. § 926(a) nor 26 U.S.C. § 7805(a) authorized it to issue legislative rules that could lead to criminal consequences with respect to the transfer or possession of machineguns. *See* Dkt #46 at 22; Dkt #59 at 14. For that reason, ATF insisted that the Final Rule be

treated as an interpretive rule. *Ibid.* Cargill agrees with the district court that several aspects of the Final Rule suggest that at the time it was issued, ATF intended the Final Rule to be a legislative rule. ROA.534-538. But for the reasons explained above, ATF lacked authority to issue a valid legislative rule, and thus the Final Rule should be deemed at most an interpretive rule. As such, the Final Rule is not entitled to *Chevron* deference.

B. Courts Should Not Grant *Chevron* Deference to an Agency's Construction of a Statute When the Agency Has Expressly Waived *Chevron*

In the district court, ATF expressly waived reliance on *Chevron* deference. Dkt. #46 at 24; Dkt. #59 at 17. It stated initially that it had no need to rely on *Chevron* because the Final Rule "sets forth the best interpretation of the statutory text." *Ibid.* It then explicitly stated that application of *Chevron* deference by the district court was "unwarranted":

> [D]eference is unwarranted because neither party contends that it should apply. As the Supreme Court recently reaffirmed, courts should reach only those arguments that the parties present to the court. *See United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1578-79 (2020) (concluding it was "abuse of discretion" for the Ninth Circuit to fail to follow the principle of party presentation).

Dkt. #46 at 24-25.

The district court recognized that ATF had expressly declined to assert *Chevron* deference. ROA.546. It ultimately declined to decide whether it was bound by ATF's

waiver because it invoked other grounds for determining that *Chevron* deference was inapplicable. ROA.549.

This Court should abide by ATF's concession that *Chevron* deference is unwarranted. When the Government disclaims reliance on *Chevron*, courts have no plausible justification for substituting a federal agency's construction of a federal statute in place of their own best reading of the statute. *Guedes II*, 140 S. Ct. at 790 (statement of Gorsuch, J., respecting denial of certiorari). As Justice Gorsuch explained:

> If the justification for *Chevron* is that "'policy choices' should be left to executive branch officials 'directly accountable to the people'" *Epic Systems* [*Corp. v. Lewis*], 138 S. Ct. [1612], 1630 [(2018)] (quoting *Chevron*, 467 U.S. at 865), then courts must equally respect the Executive's decision *not* to make policy choices in the interpretation of Congress's handiwork.

Ibid.

Both the D.C. Circuit (in *Guedes I*) and the Tenth Circuit (in *Aposhian I*) refused to be bound by ATF's express waiver of *Chevron* deference.[12] Both courts ultimately determined that ATF's construction of § 5845(b) was entitled to *Chevron* deference, and (by identical 2-1 votes) they declined to preliminarily enjoin enforcement of the Final Rule, concluding that it was a reasonable construction of that statute. *Guedes I*, 920 F.3d

[12] The Government's waiver of *Chevron* deference was particularly vociferous in *Guedes*. The Government told the D.C. Circuit that "if the validity of its rule (re)interpreting the machinegun statute 'turns on the applicability of *Chevron*, it would prefer that the [r]ule be set aside rather than upheld." *Guedes II*, 140 S. Ct. at 789 (Gorsuch, J., statement regarding denial of certiorari).

at 23 (ATF not permitted to waive *Chevron* under the circumstances of the case); *id.* at 32 (Final Rule "sets forth a permissible interpretation of the statute's ambiguous definition of 'machinegun.'"); *Aposhian I*, 958 F.3d at 981-82 (declining to enforce *Chevron* waiver); *id.* at 989 (stating that because the Final Rule "sets forth a reasonable interpretation of the statute's ambiguous definition of 'machinegun,' it merits our deference.").

The D.C. and Tenth Circuits erred in granting *Chevron* deference to ATF's statutory interpretation despite ATF's express waiver of deference. As Judge Carson stated in dissent, the Tenth Circuit, rather than providing equal justice to all parties before the court, "place[d] an uninvited thumb on the scale in favor of the government." *Aposhian I* at 998 (Carson, J., dissenting) (quoting *Guedes II* at 790).

The no-acceptance-of-waiver decisions from the D.C. and Tenth Circuits directly conflict with *Alkazahg*. *See* 81 M.J. at 778 (stating that even if the Final Rule were ambiguous, no deference to ATF's interpretation of § 5845(b) would be warranted in light of the federal government's "disclaimer of *Chevron* deference"). They are also in tension with numerous Supreme Court decisions. *HollyFrontier Cheyenne Refining LLP v. Renewable Fuels Ass'n*, 141 S. Ct. 2172 (2021), explicitly recognized that a court appropriately declines to apply the *Chevron* framework to an agency's statutory construction when the agency does not request deference, stating that because EPA in the Supreme Court did not seek *Chevron* deference for its interpretation of a disputed statute (as it had done in the appeals court), the Court "therefore decline[s] to consider

whether any deference might be due." 141 S. Ct. at 2180. *See also County of Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1474 (2020) (declining to apply *Chevron* deference after noting that "[n]either the Solicitor General nor any party has asked us to give ... *Chevron* deference to EPA's interpretation of the statute"); *Estate of Coward v. Nicklos Drilling Co.*, 505 U.S. 469, 477 (1992) (stating that the Court "need not resolve the difficult issues regarding deference" because the agency requested no deference). *See also State of New York v. Dep't of Justice*, 951 F.3d 84, 101 n.17 (2d Cir. 2020) (applying de novo review and explaining that defendants did not claim "*Chevron* deference ... and, thus, we do not consider whether any such deference might be warranted."); *CFTC v. Erskine*, 512 F.3d 309, 314 (6th Cir. 2008) ("[T]he CFTC waived any reliance on *Chevron* deference by failing to raise it to the district court."). If, as courts have repeatedly held, an administering agency can *forfeit* its claim to *Chevron* deference by declining to assert it, then surely the agency can *waive Chevron* by affirmatively disavowing it.

C. *Chevron* Deference Has No Role to Play in the Construction of Statutes with Significant Criminal Applications

The district court declined to apply *Chevron* deference because it determined deference is inappropriate in cases involving agency interpretations of criminal statutes. ROA.549-551. That ruling is a proper statement of the law and should be affirmed.

Although § 5845(b)'s definition of "machinegun" can apply in several contexts, the statutory scheme is overwhelmingly criminal in nature. As Tenth Circuit Judge Allison Eid has explained:

> [T]he definition of "machinegun" ... has an enormous criminal impact. By contrast, the civil scope of the statutory regime is quite limited. ... Only "machineguns" that fall within [two] narrow exceptions are subject to civil consequences, and even then, the civil consequences are limited—the chief consequence is a registration requirement. 26 U.S.C. §§ 5841, 5845(a), (b).

Aposhian II, 989 F.3d at 905 (10th Cir. 2021) (Eid, J., dissenting from decision to vacate *en banc* order). For example, *Alkazahg* was an appeal by a defendant convicted of possessing a bump stock; had the appeals court not overturned his criminal conviction on the ground that a non-mechanical bump stock is not a "machinegun," he faced a potential ten-year sentence. *See* 18 U.S.C. § 924(a)(2).

Several older Supreme Court decisions have suggested that *Chevron* deference may sometimes be appropriate for agency interpretations of a statute that has some criminal applications, at least where the statute applies primarily in non-criminal proceedings. *See, e.g., Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 703-04 (1995) (applying the *Chevron* framework to (and ultimately upholding as "reasonable") a regulation interpreting the Endangered Species Act, even though the statute has some criminal applications). But more recently, the Court has held categorically that "criminal laws are for the courts, not the Government, to construe." *Abramski*, 573 U.S. at 191. *See United States v. Apel*, 571 U.S. 359, 369 (2014) (stating that courts should not defer to

"the Government's reading of a criminal statute"). And where, as here, a statute is overwhelmingly criminal in nature, there is no justification for courts' abdicating their responsibility to say what the law is by deferring to the views of administrative officials.

Although the D.C. and Tenth Circuits applied *Chevron* and deferred to ATF's construction of § 5845(b), both recognized that the Supreme Court's *Abramski* and *Apel* decisions "signaled some wariness about deferring to the government's interpretations of criminal statutes." *Guedes I*, 920 F.3d at 25; *Aposhian I*, 958 F.3d at 984. Other appeals courts, including this Court in an unpublished opinion, have assigned greater weight to *Abramski* and *Apel* and have categorically declined to defer to government interpretations of criminal statutes. *United States v. Garcia*, 707 Fed. App'x 231, 234 (5th Cir. 2017); *see also United States v. Kuzma*, 967 F.3d 959, 971 (9th Cir. 2020); *United States v. Balde*, 943 F.3d 73, 83 (2d Cir. 2019); *Gun Owners I*, 992 F.3d at 455, vacated and rehearing *en banc* granted, 2 F.4th 576 (6th Cir. 2021). The Sixth Circuit panel quoted *Apel*'s statement that "we have never held that the Government's reading of a criminal statute is entitled to any deference," 571 U.S. at 369, and observed, "'never' and 'any' are absolutes, and the Court did not draw any distinctions, add any qualifiers, or identify any exceptions." *Ibid.* These recent decisions have taken to heart Justice Scalia's observation that *Babbitt*'s "drive-by ruling" on deference to agency interpretation of statutes with both civil and criminal applications "deserves little weight." *Whitman v. United States*, 574 U.S. 1003 (2014) (Scalia, J., statement regarding the denial of certiorari).

The decisions of the D.C. and Tenth Circuits are inconsistent with rights traditionally afforded criminal defendants. Under the Constitution, "[o]nly the people's elected representatives in the legislature are authorized to 'make an act a crime.'" *United States v. Davis*, 139 S. Ct. 2319, 2325 (2019) (quoting *United States v. Hudson*, 7 Cranch (11 U.S.) 32, 34 (1812)). The D.C. and Tenth Circuit decisions disregard that rule; they permit executive branch officials to prosecute individuals for conduct that the reviewing judge concludes is not proscribed by any statute. As Justice Gorsuch recently counseled, "Before courts may send people to prison, we owe them an *independent* determination that the law actually forbids their conduct. A 'reasonable' prosecutor's say-so is cold comfort in comparison." *Guedes II*, 140 S. Ct. at 790 (statement of Gorsuch, J., respecting denial of certiorari) (emphasis added). Whatever one's views of *Chevron* deference in the civil context, it has no proper place in the criminal law. *Apel*, 571 U.S. at 369.

True, a statute may have both civil and criminal applications. But even if, in the civil context, Congress can sometimes be presumed to have authorized a federal agency "to make rules carrying the force of law[,]" *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001), any such presumption is antithetical to criminal law, where personal liberty is at stake. And because courts assign a single meaning to a single law, regardless of whether a reviewing court is addressing it in a civil or criminal law context, *Clark v. Martinez*, 543 U.S. 371, 380 (2005), no presumption of delegated law-making power can be read into hybrid civil-criminal statutes.

Chief Justice John Marshall famously stated that it "emphatically" is the constitutional "duty" of federal judges "to say what the law is." *Marbury v. Madison*, 5 U.S. at 177. Judges who apply *Chevron* deference are abandoning that duty by issuing judgments that assign controlling weight to a non-judicial entity's interpretation of a statute. And the consequences of that abandonment are particularly pernicious in the context of criminal law. As Sixth Circuit Judge Alice Batchelder has explained, "giving one branch the power to both draft and enforce criminal statutes jeopardizes the people's right to liberty." *Gun Owners I*, 992 F.3d at 465. For a court to abandon its independent judgment in a manner that favors an actual *litigant* before the court—as is true when prosecutors are pursuing a criminal conviction—violates the due process rights of criminal defendants who are denied an independent appraisal of their claims. *See* Philip Hamburger, Chevron *Bias*, 84 Geo. Wash. L. Rev. 1187 (2016).

III. THE RULE OF LENITY REQUIRES THAT ANY AMBIGUITY IN 29 U.S.C. § 5845(b) BE CONSTRUED AGAINST THE GOVERNMENT

The district court did not apply the rule of lenity in this case because it determined that "traditional tools of statutory construction yield unambiguous meanings" for the language contained in 29 U.S.C. § 5845(b). ROA.553-554. Cargill agrees with the district court that § 5845(b) is unambiguous regarding the proper classification of non-mechanical bump stocks (albeit Cargill disagrees with the district court's conclusion

regarding the statute's unambiguous meaning) and thus that the rule of lenity need not be applied here.

If the Court nonetheless ends up agreeing with the D.C. and Tenth Circuits that the statute is ambiguous and that this dispute cannot be resolved through application of other traditional rules of statutory interpretation, then the Court should apply the rule of lenity to resolve the dispute in Cargill's favor. The rule of lenity is a centuries-old canon of statutory construction holding that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Skilling*, 561 U.S. at 410.

The D.C. and Tenth Circuits assigned no weight to the rule of lenity when reviewing the Final Rule. Citing *Babbitt*, the Tenth Circuit held that where an agency's construction of a disputed statute is set out in a formal regulation, "*Chevron*, not the rule of lenity, should apply." *Aposhian I*, 958 F.3d at 983. The D.C. Circuit held that "in circumstances in which *both Chevron* and the rule of lenity apply," *Chevron* should take precedence. *Guedes I*, 920 F.3d at 27.

But as explained above, *Chevron* does *not* apply here. Accordingly, the Court should apply the rule of lenity to resolve any otherwise-unresolvable ambiguities it detects in § 5845(b). And even if *Chevron* also applies, the Court should look first to the rule of lenity—a far more established canon of statutory construction—when resolving

ambiguities.[13] The "rule of lenity" is a new name for an old idea—the notion that "penal laws should be construed strictly." *The Adventure*, 1 F.Cas. 202, 204 (No. 93) (CC Va. 1812) (Marshall, C. J.). The rule first appeared in English courts, justified in part on the assumption that when Parliament intended to inflict severe punishments it would do so clearly. 1 W. Blackstone, *Commentaries on the Laws of England* 88 (1765) (Blackstone); 2 M. Hale, *The History of the Pleas of the Crown* 335 (1736); *see also* L. Hall, *Strict or Liberal Construction of Penal Statutes*, 48 Harv. L. Rev. 748, 749–751 (1935). As Justice Gorsuch has explained, the rule of lenity as adopted by American courts "came to serve distinctively American functions—a means for upholding the Constitution's commitments to due process and the separation of powers" and "became a widely recognized rule of statutory construction in the Republic's early years." *Wooden v. United States*, 142 S. Ct. 1063, 1082 (2022) (Gorsuch, J., concurring in the judgment).

The Supreme Court has stated that the rule of lenity is "premised on two ideas":

> First, a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed; second, legislatures and not courts should define criminal activity.

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[13] Giving precedence to the rule of lenity over *Chevron* deference is consistent with the *Chevron* decision. That decision stated, "If a court, employing *traditional tools of statutory construction*, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Chevron*, 467 U.S. at 843 n.9 (emphasis added). Given its historical pedigree, the rule of lenity undoubtedly qualifies as a "traditional tool of statutory construction."

Babbitt, 515 U.S. at 704 n.18 (citations omitted). Both of those concerns are implicated here. If § 5845(b) is ambiguous, then permitting ATF to determine that the statute criminalizes possession of bump stocks risks permitting the executive branch to usurp Congress's role. And in every case in which *Chevron* matters (*i.e.*, cases in which a reviewing court concludes that Congress did *not* intend the construction adopted by a federal agency), that is exactly what is happening.

More importantly, contrary to ATF's claim, the Final Rule does *not* provide "fair warning" of the line that may not be crossed. As Chief Judge Timothy Tymkovich explained in his Tenth Circuit dissent, "The government expects an uncommon level of acuity from average citizens to know that they must conform their conduct not to the statutory language, but to the interpretive gap-filling of an agency which may or may not be upheld by a court." *Aposhian II*, 989 F.3d at 899-900 (Tymkovich, C.J., dissenting). And Justice Gorsuch has concluded that citizens should not be "forced to guess whether the statute will be declared ambiguous; to guess again whether the agency's initial interpretation of the law will be declared 'reasonable'; and to guess again whether a later and opposing agency interpretation will also be held 'reasonable.'" *Guedes* II, 140 S. Ct. at 790 (statement of Gorsuch, J., respecting denial of certiorari).

In sum, to the extent that the Court finds any ambiguity regarding whether non-mechanical bump stocks are "machinegun[s]," that ambiguity should be resolved by applying the rule of lenity and ruling that they fall outside the definition.

IV. SECTION 5845(b) SHOULD BE CONSTRUED AGAINST THE GOVERNMENT TO AVOID RAISING CONSTITUTIONAL PROBLEMS UNDER THE NONDELEGATION DOCTRINE

The nondelegation doctrine "is rooted in the principle of separation of powers that underlies our tripartite system of Government." *Mistretta v. United States*, 488 U.S. 361, 371 (1989). The Constitution mandates that only the people's elected representatives may adopt new federal laws restricting individual liberty. U.S. Const., Art. I, § 1 ("*All* legislative Powers herein granted shall be vested in a Congress of the United States[.]") (emphasis added). The grant of "[a]ll legislative Powers" to Congress means that Congress may not transfer to others "powers which are strictly and exclusively legislative." *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42-43 (1825). Interpreting 26 U.S.C. § 5845(b) to permit ATF to classify non-mechanical bump stocks as machineguns would constitute divestment of Congress's exclusive legislative power to create crimes. At a minimum, it would raise serious questions regarding whether the statute violates Art. I, § 1's Vesting Clause.

Some have questioned whether the Vesting Clause imposes any limits on Congress's authority to divest itself of legislative powers by assigning them to an administrative agency. But the Constitution does not say simply that legislative powers are "vested" in Congress; it states that they "shall be vested" in Congress, thereby indicating that legislative powers are Congress's alone to exercise. Whatever the word "vested" might mean when considered in isolation, the Constitution's use of the phrase

"shall be vested" in conjunction with its strict separation of powers among three distinct branches of government can only be construed as expressing an intent that vested powers must continue to be vested where the Constitution has placed them. *See* Philip Hamburger, *Nondelegation Blues*, Geo. Wash. L. Rev., Vol. 91 (forthcoming 2023); available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3990247. Importantly, the Supreme Court has never wavered from its understanding that the Vesting Clause's "assignment of power to Congress is a bar on its further delegation." *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (plurality opinion).

As explained at length in Section I above, if the words of 29 U.S.C. § 5845(b) are interpreted in a manner consistent with their ordinary meaning, non-mechanical bump stocks are not encompassed within the statute's definition of "machinegun[s]." That was ATF's position until December 2018. Indeed, even in the face of public outcry that arose in the aftermath of the October 1, 2017 Las Vegas shooting, ATF's Chief Counsel sent a proposed memorandum to the Attorney General that defended ATF's longstanding position. ROA.522.

ATF has stated publicly that its sudden reversal was based on a newly acquired understanding of § 5845(b)'s true meaning. But a logical inference from the available evidence is that political pressure from senior Executive Branch officials and Members of Congress caused the reversal—pressure from individuals who likely had no knowledge of § 5845(b)'s language but harbored public safety concerns over use of

bump stocks by criminals. *See, e.g.*, ROA.521-27. Such individuals undoubtedly viewed their policy goal (immediate elimination of bump stocks) as far more important than the underlying legal issue (whether ATF possessed statutory authority to prohibit possession or transportation of bump stocks).

Those who support banning non-mechanical bump stocks would likely be happy with a court decision upholding the Final Rule based on the following line of reasoning: "Congress adopted the NFA and the Gun Control Act for the purpose of granting the Attorney General and ATF broad authority to regulate dangerous weapons. That authority includes the power to ban any weapon that ATF determines to be unreasonably dangerous. The Final Rule, which prohibits possession of non-mechanical bump stocks, is a valid exercise of that authority." That reasoning—whether or not openly acknowledged in a court opinion—is the only coherent basis for a decision upholding the Final Rule, given that § 5845(b)'s statutory language cuts so strongly against ATF.

But any decision upholding the Final Rule based on a general sense of legislative purpose rather than the statutory language actually adopted by Congress would raise serious constitutional concerns. A congressional delegation of power to an executive agency can pass constitutional muster under the Vesting Clause only if Congress "lays down by legislative act an intelligible principle to which the person or body authorized to exercise the delegated authority is directed to conform." *Gundy*, 139 S. Ct. at 2123

(plurality) (quoting *Mistretta*, 488 U.S. at 372). A statute that does no more than instruct ATF to eliminate any weapon it deems too dangerous would likely flunk that test because it fails to provide any "intelligible principle" to guide ATF in determining which weapons to ban. The NFA and the Gun Control Act contain no language even suggesting that Congress was delegating to ATF authority to criminalize possession of bump stocks; it is therefore impossible to discern from those statutes an "intelligible principle" to guide ATF in determining whether to criminalize possession.

Rather than face that constitutional dilemma, the Court should strive to issue a decision based solely on the plain meaning of § 5845(b)'s statutory language. Adopting that approach will lead the Court to conclude that a non-mechanical bump stock is not properly classified as a "machinegun." And if public safety concerns dictate that bump stocks should be banned, Congress is the appropriate body to make that determination—a determination of the sort its recently adopted gun-control legislation demonstrates it is quite capable of making.

CONCLUSION

The Court should reverse the decision of the district court and direct entry of judgment for Cargill.

Respectfully submitted,

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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 Appellant's Supplemental Brief 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 12,905, 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
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July 25, 2022

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of July, 2022, I electronically filed Appellant's Supplemental Brief 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.

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