No. 20-51016

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MICHAEL CARGILL,
Plaintiff-Appellant,

v.

MERRICK GARLAND, U.S. Attorney General; UNITED STATES DEPARTMENT OF JUSTICE; 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 REPLY BRIEF

Richard A. Samp
(Counsel of Record)
Harriet M. Hageman
Mark S. Chenoweth
NEW CIVIL LIBERTIES ALLIANCE
1225 19th Street NW, Suite 450
Washington, DC 20036
202-869-5210
rich.samp@ncla.legal

September 1, 2022

Counsel for Plaintiff-Appellant

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
Richard A. Samp
Attorney of Record for Appellant

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Page(s)

Statutes, Regulations, and Constitutional Provisions:

Miscellaneous:

INTRODUCTION

The Government's brief employs a gambit that it has used throughout both this and related bump-stock proceedings. It begins by construing the meaning of terms that appear in the statutory definition of "machinegun" ("single function of the trigger," "automatically"), and then argues that since its construction of those terms is accurate, the Court should uphold its decision that non-mechanical bump stocks are "machineguns" under 26 U.S.C. § 5845(b).

But that focus on the meaning of individual words and phrases is misguided; there is no serious dispute between the parties about the meaning of statutory terms "single function of the trigger" (construed by the Bureau of Alcohol, Tobacco, Firearms and Explosives to mean "single pull of the trigger and analogous motions") and "automatically" (construed by ATF to mean "functioning as the result of a self-acting or self-regulating mechanism"). Regardless of how those terms are construed, a semi-automatic weapon equipped with a non-mechanical bump stock does not meet the statutory definition of "machinegun" because a single function/pull of the trigger cannot "automatically" (or in a "self-acting" or "self-regulating" manner) cause the weapon to fire more than one shot.

As ATF concedes, the weapon will not fire a second shot unless the shooter, *in addition* to pulling the trigger, also applies "forward pressure with the non-trigger hand on" the fore-end of the rifle while simultaneously "maintaining the trigger finger on the

device's ledge *with constant rearward pressure*," ATF, *Bump-Stock Type Devices*, 83 Fed. Reg. 66,514, 66,518 (Dec. 26, 2018) ("Final Rule") (emphasis added), thereby pushing the trigger forward so that it bumps into the trigger finger. In light of this admitted need for additional shooter actions, pulling the trigger once will not produce a second shot "automatically"—or, expressing the same thought using different words, will not do so as a result of a "self-acting or self-regulating mechanism."

ATF has properly disavowed a right to *Chevron* deference for its construction of 26 U.S.C. § 5845(b). ATF has thereby implicitly rejected the holdings of the D.C. and Tenth Circuits, which declined to preliminarily enjoin the Final Rule after determining that the statutory definition of "machinegun" is ambiguous with respect to bump stocks and then applying the *Chevron* framework to resolve the ambiguity in ATF's favor. *See Guedes v. Bureau of Alcohol, Tobacco, Firearms and Explosives* ["*Guedes I*"], 920 F.3d 1 (D.C. Cir. 2019); *Aposhian v. Barr* ["*Aposhian I*"], 958 F.3d 969 (10th Cir. 2020). Accepting ATF's concession, the rule of lenity is the only remaining canon of statutory construction that can be applied here to resolve any genuine ambiguity that the Court is otherwise unable to resolve.

I. ATF'S FOCUS ON THE "ORDINARY" MEANING OF "SINGLE FUNCTION OF THE TRIGGER" AND "AUTOMATICALLY" IGNORES THE MEANING OF SECTION 5845(b) WHEN READ AS A WHOLE

Federal law defines a "machinegun" as "any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without

manual reloading, by a single function of the trigger." 26 U.S.C. § 5845(b). The definition also encompasses parts that can be used to convert a weapon into a machinegun.

Cargill's Supplemental Brief explains at length why bump-stock equipped semi-automatic weapons are not included within that definition. *See, e.g.,* Cargill Br. 20-25. As we explain, "The plain meaning of [§ 5845(b)] 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." *Id.* at 21. That "something more" is the forward pressure the shooter must repeatedly apply to the fore-end of the weapon with his non-trigger hand while simultaneously maintaining rearward pressure with his trigger finger/hand. *Id.* at 21-22.

ATF seeks to overcome the plain import of the statutory language when read as a whole, by focusing instead on ATF's constructions of the individual terms "automatically" and "single function of the trigger." ATF has construed the term "'automatically' as it modifies 'shoots, is designed to shoot, or can be readily restored to shoot,'" to mean "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." 27 C.F.R. §§ 447.11, 478.11, & 479.11. In support of that definition, it quotes the now-vacated panel opinion and argues:

> [T]his definition of "automatically" precisely mirrored the definition of "one leading dictionary from 1934, the year the NFA [National Firearms Act] was enacted," which stated that "'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.'"

ATF Br. at 27 (quoting *Cargill v. Garland*, 20 F.4th 1004 (5th Cir. 2021), *vacated*, 37 F.4th 1091 (5th Cir. 2022) (quoting *Webster's New International Dictionary* 187 (2d ed. 1934))). ATF cites a second dictionary from the same time period to the same effect. *Ibid.* (citing the definition of "automatic" in *Oxford English Dictionary* 574 (1933): "[s]elf-acting under conditions fixed for it, going of itself"). It adds, "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." *Ibid.* (quoting *Cargill*, 20 F.4th at 1012).

ATF's fixation on its construction of "automatically" might be meaningful if that construction cast some new light on § 5845(b)'s use of the word. But it does not. "Self-acting" and "self-regulating" are roughly synonymous with "automatic." *See, e.g.*, *Webster's New World College Dictionary* 1300, 1302 (2007) (defining "self-acting" as "acting without outside influence or stimulus; working by itself; automatic," and defining "self-regulating" as "regulating oneself or itself, so as to function automatically or without outside control"). After setting out its undisputed construction of "automatically," ATF asserts without meaningful explanation that a bump stock permits a semi-automatic

weapon to fire "automatically" because pulling the trigger a single time initiates a process that is somehow "[s]elf-acting under conditions fixed for it." ATF Br. 28 (quoting Final Rule, 83 Fed. Reg. at 66,519). But for the same reasons (explained above) that a single function/pull of the trigger does cause the weapon to fire more than one shot "automatically," it also does not activate some "self-acting" or "self-regulating" mechanism that can cause the weapon to fire more than once. A non-mechanical bump stock may assist a shooter in managing the weapon's recoil, but it is not "a mechanism that performs a required act" (*i.e.*, the firing of a second shot). *Webster's New International Dictionary* 187 (2d ed. 1934). Under either verbal formulation, the weapon cannot fire more than once unless the shooter does "something more" after pulling the trigger—and the provision of that additional human input is what prevents the firing from being labeled either "automatic" or the result of some "self-acting" or "self-regulating" mechanism.

Although ATF argues that a process can be deemed "automatic" even when the process requires some "additional human input" to continue to operate, ATF Br. 30, it cites no dictionary definitions to support that reading. The sole real-life example it cites, an "automatic" sewing machine, cuts against its argument. ATF claims that a sewing machine "may fairly be described as operating 'automatically' even though the user must both press down the pedal and push the fabric through." *Ibid.* But electric sewing machines began being advertised as "automatic" because a single, initiating human input

(pressing the pedal that activates the electric current) suffices to cause the needle to continue moving up and down "automatically" until the operator deactivates the pedal; *no other human input is required*.[1] In sharp contrast, a bump-stock equipped semi-automatic weapon fires only once after the shooter pulls and holds the trigger, unless substantial additional human input is provided—and thus cannot be deemed to shoot "automatically" more than one shot by a single pull of the trigger.

As Judge Henderson of the D.C. Circuit has explained, "By including more action than a single trigger pull, the [Final] Rule invalidly expands section 5845(b)." *Guedes I*, 920 F.3d at 44 (Henderson, J., concurring in part and dissenting in part). She also noted that, from 1934 until 1968, the NFA defined "machinegun" as including "a firearm that shoots more than one round 'automatically or semiautomatically.'" *Id.* at 45 (quoting 26 U.S.C. § 2733(b) (1940)). She concluded that because Congress deleted "semiautomatically" in 1968, "ATF is without authority to resurrect it by regulation." *Ibid.*

Similarly misguided is ATF's focus on its construction of the phrase "single function of the trigger." ATF notes that from 2006 to 2018 it construed that phrase to mean "single pull of the trigger." ATF Br. 24. ATF's brief argues at length that that

[1] Before the advent of "automatic" sewing machines, moving the machine's needle up and down necessitated continuous human input: the operator provided manual power to the machine by using his/her foot to push a treadle back and forth.

construction is consistent with the 1934 legislative history of the NFA. *Id.* at 23-24. Yet ATF (in connection with its 2018 Final Rule) abandoned its position that "single function" is synonymous with "single pull." Expanding its interpretation of "single function of the trigger," ATF now construes the phrase to mean "single pull of the trigger and analogous motions." 27 C.F.R. §§ 447.11, 478.11, & 479.11.[2]

But Cargill does not take issue with ATF's evolving definitions of what constitutes a "function" of the trigger. Under any of those definitions, the central issue remains: what happens "automatically" when there is a *single* "function" of the triggering mechanism. And the uncontested evidence is that a bump-stock equipped semi-automatic weapon will fire only once when the shooter limits his actions to a single function/pull of the trigger.

II. ATF MISCHARACTERIZES PLAINTIFF'S ARGUMENT WITH RESPECT TO THE FUNCTIONING OF THE TRIGGER

ATF asserts that "Cargill does not challenge the understanding of 'single function of the trigger' comprehensively analyzed by the panel, the district court, and ATF," ATF

[2] ATF adopted the 2018 change 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.

Br. 29, and that "Plaintiff does not take issue with the determination that a shooter initiates a bump stock's firing sequence with a 'single function of the trigger.'" *Id.* at 1. Those statements are inaccurate; as Cargill's opening brief makes clear, he strongly disagrees with the manner in which the panel and district court "analyzed" the application of that statutory term and with ATF's assertion that a "single function of the trigger" can initiate a "firing sequence" that exceeds a single shot.

More importantly, ATF's assertion is emblematic of its misguided approach to statutory interpretation. ATF myopically focuses seriatim on individual terms within the statutory definition of "machinegun" rather than attempting to construe the statute as a whole. The unambiguous phrase "single function of the trigger" becomes significant only when read in conjunction with the remainder of § 5845(b): does a "single function" cause the weapon to "automatically" fire more than one shot? If not, the weapon is not a machinegun. The statute simply does not concern itself with what happens when the trigger has multiple functions/pulls.

In any event, the evidence indicates that multiple "functions" occur during a bump-firing sequence of a semi-automatic weapon, whether or not a non-mechanical bump stock is attached to the weapon. The triggering mechanism of virtually all semi-automatic weapons is a lever trigger; they are designed to fire only a single shot each time the lever is pulled (or, in some weapons, pushed). If the second movement of the lever occurs "automatically"—as with the Akins Accelerator, which uses a spring to thrust the

trigger into contact with the stationary trigger finger; or with the motorized device at issue in *United States v. Camp*, 343 U.S. 743 (5th Cir. 2003), which caused the lever trigger to move automatically without human intervention following an initial push of a switch—then the weapon qualifies as a "machinegun." It does not matter how often the trigger has moved because the first trigger activation suffices by itself to "automatically" produce multiple shots. But a bump-stock equipped semi-automatic weapon will fire a second shot only if the trigger is activated a second time, and that second activation will not occur unless the shooter thrusts the trigger forward (and into the trigger finger) by repeatedly applying forward pressure on the rifle's fore-end with his non-trigger hand while simultaneously applying rearward pressure with his trigger finger/hand.[3]

ATF asserts, "Cargill's acknowledgment that the Akins Accelerator is a machinegun forecloses any challenge to the Rule's understanding of the term 'single function of the trigger.'" ATF Br. 29. ATF is correct that Cargill does not take issue with ATF's ever-changing constructions of that term. But ATF errs in asserting that Cargill's agreement about classification of the Akins Accelerator amounts to a concession that the

[3] As Sixth Circuit Judge Murphy has explained, ATF's decision to include "analogous motions" within its definition of "function of the trigger" makes clear that the trigger of a bump-stock equipped semi-automatic weapon functions repeatedly when being bump fired. *Gun Owners of America, Inc. v. Garland*, 19 F.4th 890, 914 (6th Cir. 2021) (*en banc*) ["*Gun Owners II*"] (Murphy, J., dissenting from affirmance of judgment by equally-divided vote) (stating that "[t]he shooter's act of pushing the trigger into the trigger finger is an 'analogous motion' for each shot of such a rifle").

trigger of a bump-stock equipped semi-automatic rifle functions only once during a bump-firing sequence. As explained above, the Akins Accelerator and a non-mechanical bump stock differ in a crucial respect: with the former, second and subsequent functions of the trigger occur without any human intervention, while with the latter, the trigger will not function a second time unless the shooter manually moves the trigger forward until it bumps up against the trigger finger.

The panel (quoting the district court) suggested otherwise; it concluded that the firing mechanism is activated a second time when the weapon's "recoil energy bumps the trigger finger into the trigger." *Cargill*, 20 F.4th at 1013 (cited at ATF Br. 26). That conclusion is clearly erroneous. A weapon's "recoil energy" does not cause the trigger to come into contact with the trigger finger; on the contrary, it causes the rifle frame (including the trigger) to move backward, *away* from the trigger finger. The trigger comes back into contact with the trigger finger *only* if the shooter thrusts the trigger forward by applying forward pressure on the fore-end of the weapon to overcome the recoil energy. *Gun Owners II*, 19 F.4th at 911 (Murphy, J., dissenting) (citing Final Rule, 83 Fed. Reg. at 66,553). The Final Rule demonstrates that ATF itself disagrees with the district court's and panel's findings regarding the manner in which a semi-automatic weapon operates. *See* 83 Fed. Reg. at 66,518, 66,532.

III. ATF HAS FAILED TO ARTICULATE A MEANINGFUL DISTINCTION BETWEEN BUMP FIRING WITH AND WITHOUT A BUMP STOCK

ATF concedes that experts can "bump fire" any semi-automatic weapon at rates approaching those of automatic weapons. Although ATF now asserts that it is "exponentially more difficult" to bump fire a semi-automatic weapon without the aid of a bump stock, ATF Br. 35, that assertion is belied by the record: the Final Rule concedes that bump firing is a "technique that *any shooter* can perform with training or with everyday items such as a rubber band or belt loop." 83 Fed. Reg. at 66,532 (emphasis added).[4] Given that use of a bump stock does not change the manner in which a semi-automatic weapon operates, ATF has failed to provide any plausible explanation for why it classifies non-mechanical bump stocks as "machinegun[s]" while semi-automatic weapons not equipped with bump stocks are not so classified.

ATF asserts that a bump stock assists a shooter in managing the recoil of a semi-automatic weapon, thus "serving as 'a self-acting or self-regulating mechanism that performs a required act at a predetermined point in an operation.'" ATF Br. 35 (quoting

---

[4] Moreover, use of a bump stock does not eliminate the need for training. As recounted by the trial court, ATF's expert witness "testified that, even with his extensive experience, firing a weapon equipped with a bump stock did not come all that naturally, and required practice." ROA.513. As one *amicus curiae* has explained, "[E]ven with a bump stock, a shooter must put forth a near exact amount of pressure on the body of the firearm to cause the trigger to re-engage with the trigger finger after each reset. ... Thus, unlike operating a machinegun, bump firing takes a significant amount of ongoing manual interaction, skill, and very intentional movements to effectuate." Brief of *Amici* Firearms Policy Coalition, *et al.*, at 13.

83 Fed. Reg. at 66,533). But for purposes of satisfying the statutory definition of "machinegun," the "required act" that a device must perform is causing a weapon to fire more than one shot "automatically" following a single function/pull of the trigger. ATF has not explained how a plastic bump stock that assists with managing a weapon's recoil—as all stocks do—can be said to perform "the required act" when semi-automatic weapons used in conjunction with belt loops or rubber bands are deemed not to do so.

As Judge Murphy explained in rejecting ATF's capture-the-recoil-energy argument:

> [ATF's] view reads the word "automatically" in isolation, not in context. ... "Automatically" does not modify the phrase "capture the recoil energy"; it modifies the phrase "shoots" "by a single function of the trigger." Just because one part of a rifle's operation is "automatic" does not mean that it automatically shoots by a single function of its trigger. Even semiautomatic rifles have some "automatic" features (hence their name). They use the "force of recoil and mechanical spring action to eject the empty cartridge case after the first shot and load the next cartridge" without human action. *Webster's Ninth* [*New Collegiate Dictionary*] 1069 (1984). But they do not shoot multiple shots "automatically" "by a single function of the trigger" because a shooter must use manual force to reengage the trigger for each shot. The same is true of bump stock rifles.

Gun Owners II, 19 F.4th at 914-15 (Murphy, J., dissenting).

IV. BUMP-STOCK EQUIPPED WEAPONS ARE DISTINGUISHABLE FROM AUTOMATIC WEAPONS THAT CONTINUE TO FIRE ONLY IF THE SHOOTER PULLS AND HOLDS THE TRIGGER

ATF attempts to attach significance to the fact that some automatic weapons long classified as "machinegun[s]" will not continue firing unless the shooter not only pulls

the trigger but continues to hold it down. It asserts that bump-stock equipped semi-automatic weapons are indistinguishable from such automatic weapons because in both instances the weapons will continue firing only if the shooter "maintain[s] pressure on the weapon while firing." ATF Br. 26.

Yet ATF fails to respond to Cargill's arguments, set out in his opening brief, that rebut ATF's indistinguishable-from-automatic-weapons argument. In particular, Cargill pointed out the significant differences between the pull-and-hold of a trigger and the human intervention required to bump fire a weapon after the initial pull of the trigger. Cargill Br. 30. Perhaps most importantly, movement of the trigger is the one human interaction explicitly contemplated by § 5845(b), a strong textual clue that a weapon should not be determined to fire more than one shot "automatically" if it will not do so in the absence of human intervention not directly connected to the trigger. It was on that basis that one federal appeals court—the Navy-Marine Corps Court of Criminal Appeals—explicitly rejected the federal government's indistinguishable-from-automatic-weapons argument. *United States v. Alkazahg*, 81 M.J. 764, 782-83 (U.S. Navy-Marine Corps Ct. Crim. App. 2021).

Cargill also pointed out that the Supreme Court in *Staples v. United States*, 511 U.S. 600, 602 n.1 (1994), equated "single pull of the trigger" with both pulling the trigger *and* holding it down. Indeed, that is the most natural way to read the quoted phrase; it is the pulling of the trigger with one's finger followed by *retraction* of the finger that is more

naturally thought of as constituting two separate actions. ATF has no response to Cargill's reading of *Staples*. Moreover, as Judge Murphy concluded, "a typical machine gun qualifies [under § 5845(b)] even though the shooter pulls the trigger *and* keeps it pressed down because that combined external influence still does no more than result in one action of the trigger." *Gun Owners II*, 19 F.4th at 915 (Murphy, J., dissenting).

ATF also contends that Cargill's interpretation of § 5845(b) would create an "enormous loophole" in the statute:

> Congress did not ban machineguns only to have that ban circumvented by a shift in the locus of a shooter's pressure on the weapon. ... [O]n Cargill's view, the result would be the same if the shooter simply pressed and held down a button with the non-trigger hand to enable automatic fire while pulling the trigger with the other hand. After all, that would require the shooter to "undertake[] a task *in addition to* effecting a single function of the trigger" to produce more than one shot, and Cargill believes the statute "is properly read as excluding" such weapons.

ATF Br. 33 (quoting Cargill Br. 23).

ATF's scenario is as far-fetched as it is unconvincing. Cargill hesitates to categorize ATF's hypothetical weapon too definitively without knowing precisely how it operates, but the weapon sounds very much like a "machinegun." If pushing down a button with one's non-trigger hand is what initiates automatic fire, then under this Court's *Camp* decision, the button is part of the weapon's trigger mechanism, and "a single function" of that trigger mechanism causes the weapon "automatically" to fire multiple shots. *Camp* held that a switch used to initiate an automatic "firing sequence"

on a weapon should be deemed a part of the weapon's trigger mechanism, and thus the weapon met § 5845(b)'s definition of a "machinegun." 343 F.3d at 745.

In the Final Rule, ATF made clear that it deems the "trigger" of a standard semi-automatic weapon equipped with a bump stock to be the traditional lever trigger. *See, e.g.*, 83 Fed. Reg. at 66,518, 66,519, 66,527, 66,532. In its brief, ATF does not disavow that position, but it leaves open the possibility of recognizing a second triggering mechanism. ATF states that a shooter can initiate firing in one of two slightly different ways: either (1) pulling the trigger backward with his trigger finger (the method described in the Final Rule); or (2) placing the trigger finger firmly on the bump stock's extension ledge while pushing forward on the fore-end of the rifle—thereby bumping the trigger into the trigger finger (the method described by the district court, ROA.511-512). ATF Br. 13-14. ATF suggests, without saying so explicitly, that a shooter pushing forward on the rifle's fore-end could be deemed the triggering mechanism on a bump-stock equipped semi-automatic weapon. ATF Br. 34. ATF then seeks to analogize a shooter pushing forward on the fore-end *and* maintaining that forward pressure, to the shooter of an automatic weapon who pulls the trigger and holds it down. *Ibid.*

But as Cargill explained in his opening brief (at 26), that line of argument is unavailing. Even accepting the possibility that forward pressure on the rifle's fore-end could be deemed the triggering mechanism (a highly questionable notion, given ATF's longstanding contrary position), it still 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 pressure by pushing forward again after recoil) unless the shooter also applies "constant rearward pressure" with his trigger finger/hand. Final Rule, 83 Fed. Reg. at 66,158. That rearward pressure is yet another human intervention—thereby demonstrating that the weapon is not "automatically" firing more than one shot based on a single function of the trigger.

Despite the Final Rule's repeated acknowledgments that bump firing requires the shooter to maintain "constant rearward pressure" with the trigger finger/hand, 83 Fed. Reg. at 66,518, ATF's brief fails to discuss that issue or to challenge Cargill's assertion that such rearward pressure is a necessary component of bump firing. Accordingly, ATF should be deemed to have waived any challenge.

More fundamentally, a bump-stock equipped semi-automatic weapon bears virtually no resemblance to a fully automatic weapon. A mounted automatic weapon will shoot continuously even though the shooter does nothing more than apply a finger to the trigger and pull; he need not handle the weapon in any manner. In contrast, bump firing a semi-automatic weapon requires a shooter not only to pull the trigger but also to engage in constant manipulation of the weapon *with both hands*. ROA.656; Final Rule, 83 Fed. Reg. at 66,518.

Indeed, the considerable human exertion required to bump fire a semi-automatic weapon is *literally* "manual" force—the word manual derives from the Latin word *manus*,

meaning hand. Reliance on manual force of this nature—an exertion that takes a fair amount of strength—is the exact opposite of an "automatic," "self-acting," or "self-regulating" mechanism.

V. ANY GENUINE AMBIGUITY IN THE APPLICATION OF SECTION 5845(b) SHOULD BE RESOLVED IN CARGILL'S FAVOR UNDER THE RULE OF LENITY

ATF has correctly conceded that its interpretation of § 5845(b) is not entitled to deference from this Court under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). ATF Br. 39-42. The Court should honor that concession. As Justice Neil Gorsuch has explained, "If the justification for *Chevron* is that policy choices should be left to executive branch officials directly accountable to the people, ... then courts must equally respect the Executive's decision *not* to make policy choices in the interpretation of Congress's handiwork." *Guedes v. Bureau of Alcohol, Tobacco, Firearms and Explosives* ["*Guedes II*"], 140 S. Ct. 789 790 (2020) (statement of Gorsuch, J., respecting denial of certiorari).

Two federal appeals courts (the D.C. Circuit in *Guedes I* and the Tenth Circuit in *Aposhian I*) ignored ATF's disavowal of *Chevron* and applied deference to resolve perceived ambiguities in § 5845(b) in ATF's favor. But as is fully explained in Cargill's opening brief, the *Chevron* doctrine is inapplicable here for at least three separate reasons: (1) the Final Rule cannot be upheld as a legislative rule (the only type of rule to which *Chevron* deference can apply) because Congress has not authorized ATF to engage in

such rulemaking; (2) ATF expressly waived any claim to *Chevron* deference; and (3) *Chevron* deference has no role to play in construction of federal statutes that (as here) apply primarily in a criminal-law context. Cargill Br. 33-43.[5]

Cargill contends that federal law *unambiguously* supports his view (also the view espoused by ATF between 2006 and 2018) that a non-mechanical bump stock is not a "machinegun" under § 5845(b). In the absence of a statutory ambiguity, there is no call for the Court to apply any sort of deference doctrine in resolving this matter.

But if, after applying other canons of statutory construction, the Court concludes that § 5845(b) is genuinely ambiguous with respect to whether the statute applies to non-mechanical bump stocks, it should apply the rule of lenity to resolve the ambiguity in Cargill's favor. *United States v. Orellana*, 405 F.3d 360, 371 (5th Cir. 2005) (stating that fundamental fairness requires that unclear criminal statutes be construed against the drafter). Moreover, the court should apply the rule of lenity even if it determines that *Chevron* deference is otherwise applicable. As *amicus curiae* Pacific Legal Foundation explains, the rule of lenity takes precedence over *Chevron*. Brief of *Amicus* PLF at 6-13.

---

[5] Although ATF agrees that the Court should not apply *Chevron* deference in this case, it expressly disagrees with Cargill's contention that the *Chevron* doctrine is inapplicable to statutes with criminal applications. ATF Br. 43-44. But ATF's brief failed to address *United States v. Garcia*, 707 Fed. Appx. 231 (5th Cir. 2017), an unpublished Fifth Circuit decision which held, in reliance on *Abramski v. United States*, 573 U.S. 169, 191 (2014), that "no deference is owed to agency interpretations of criminal statutes." 707 Fed. Appx. at 234.

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"—and thus must take precedence over *Chevron*.

VI. HOW RAPIDLY A WEAPON CAN FIRE IS NOT RELEVANT TO WHETHER IT QUALIFIES AS A "MACHINEGUN"

The panel upheld the Final Rule based in part on what it perceived as Congress's purpose in adopting the National Firearms Act: to restrict possession of firearms that pose a danger to public safety because they shoot too rapidly. *Cargill*, 20 F.4th at 1011. The panel stated:

> We ... decline to adopt a mechanistic reading of [§ 5845(b)]. ... [I]nterpreting 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 it is achieved."

Ibid. (quoting *Aposhian v. Barr*, 374 F. Supp. 3d 1145, 1152 (D. Utah 2019), *aff'd*, 958 F.3d 969 (10th Cir. 2020)).

Cargill urges the Court to reject that non-textualist mode of statutory interpretation.[6] The Supreme Court has repeatedly instructed that any analysis of a statute's meaning must "begin with the text." *Facebook, Inc. v. Duiguid*, 141 S. Ct. 1163, 1169 (2021). In construing a statute, courts "must presume that Congress 'says in a statute what it means and means in a statute what it says there.'" *Rotkiske v. Klemm*, 140 S. Ct. 355, 360 (2019) (quoting *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 254 (1992)). Section 5845(b) includes no language suggesting that weapons should be classified as machineguns based on the rapidity with which they are capable of firing.[7] Rather, the statutory definition of machinegun focuses exclusively on the weapon's mechanism. A weapon capable of firing more than one shot "automatically" based on a "single function of the trigger" is a "machinegun"; a weapon that lacks such capability is not.

---

[6] The D.C. Circuit's recent decision upholding the Final Rule adopts a similar non-textualist approach. The D.C. Circuit stated: "Congress's concern for the danger posed by machine guns centered on their destructive potential and exacerbation of serious crime. Bump stocks present a heightened capacity for lethality as well. ... It is therefore consistent with congressional purpose to define 'single function' with a focus on the weapon's ease of use." *Guedes v. Bureau of Alcohol, Tobacco, Firearms and Explosives* ["*Guedes III*"], __ F.4th __, 2022 WL 3205889 at *6 (D.C. Cir., Aug. 9, 2022). Cargill notes that the panel's and the D.C. Circuit's conclusion is based on a factually inaccurate premise: that bump stocks increase the rapidity with which a semi-automatic weapon can be fired. In fact, any semi-automatic weapon can be bump fired with or without a bump stock; the presence of a bump stock makes bump firing somewhat easier for less-skilled shooters, but it does not increase the rate of fire versus bump firing without a bump stock.

[7] Indeed, ATF concedes that the machinegun ban is inapplicable to Gatling guns, despite the rapid-fire capability of those weapons. *See* ATF Rul. 2004-5 (Aug. 18, 2004).

Federal appellate judges have repeatedly recognized that the statutory definition of machinegun is unrelated to how rapidly a weapon can fire. *See, e.g., Aposhian v. Wilkinson* ["*Aposhian II*"], 989 F.3d 890, 903 (10th Cir. 2021) (Tymkovich, J., joined by four other judges, dissenting from decision to vacate the grant of rehearing *en banc* as improvidently granted) ("Congress did not define 'machinegun' based upon the speed at which a firearm shoots or the firearm's potential for mass carnage. Section § 5845(b) defined 'machinegun' based on its mechanical operation. The language of that statute and that statute alone is what we must apply."); *id.* at 906 (Carson, J., dissenting) ("The NFA speaks in terms of how a firearm functions, not its capability of firing rapidly or causing harm.").

It is the job of legislatures, not courts, to decide what gun control measures are necessary for public safety purposes. Indeed, at least 12 state legislatures have banned possession of bump stocks, *Gun Owners of America, Inc. v. Garland* ["*Gun Owners I*"], 992 F.3d 446, 472 (6th Cir.), *vacated*, 4 F.4th 576 (6th Cir. 2021), but Congress has not chosen to adopt a nationwide ban. As Judge Murphy explained:

> [N]o doubt many people believe that rifles equipped with bump stocks share the same dangerous traits that led Congress to ban machine guns. Bump Stock Rule, 83 Fed. Reg. at 66,520. So even though these newer devices might not fall "within the letter" of the statutory "machinegun" ban, courts may be tempted to treat them as covered anyway because they fall within its underlying "spirit." ... In our country, however, the judiciary has long had a narrower duty: "to apply, not amend, the work of the People's representatives."

Gun Owners II, 19 F.4th at 928 (Murphy, J., dissenting) (quoting *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1726 (2017)).

Cargill explained in his opening brief why ignoring the text of § 5845(b) and instead interpreting it based on its underlying "spirit" would raise serious constitutional concerns under the nondelegation doctrine. Cargill Br. 47-50. The actual text of § 5845(b) sets out an "intelligible principle" to guide ATF in determining which weapons should be classified as "machineguns." But if § 5845(b) were interpreted as specifying nothing more than that ATF should use its best judgment in determining what weapons should be banned as a means of ensuring public safety, the statute would run afoul of Article I, Section 1 of the Constitution, which prohibits Congress from divesting itself of its legislative powers. *See Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019). As so interpreted, the statute would supply no intelligible principle to guide ATF and would simply empower ATF to enact its own legislation. Rather than foment that constitutional dilemma, the Court should issue a decision based on the plain meaning of § 5845(b)'s statutory language.

CONCLUSION

The Court should reverse the decision of the district court, direct entry of judgment for Appellant Michael Cargill, and order immediate return of his two bump stocks.

Respectfully submitted,

/s/ Richard A. Samp
Richard A. Samp
(Counsel of Record)
Harriet M. Hageman
Mark S. Chenoweth
NEW CIVIL LIBERTIES ALLIANCE
1225 19th Street NW, Suite 450
Washington, DC 20036
202-869-5210
rich.samp@ncla.legal

September 1, 2022

Counsel for Plaintiff-Appellant

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 Reply 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 5,846, 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

September 1, 2022

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of September, 2022, I electronically filed Appellant's Supplemental Reply 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.

/s/ Richard A. Samp
Richard A. Samp