[ORAL ARGUMENT HELD MARCH 8, 2022]

No. 21-5045

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DAMIEN GUEDES, et al.,

Plaintiffs-Appellants,

v.

BUREAU OF ALCOHOL, TOBACCO,
FIREARMS AND EXPLOSIVES, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Columbia

RESPONSE TO PETITION FOR REHEARING EN BANC

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

MARK B. STERN
MICHAEL S. RAAB
ABBY C. WRIGHT
BRAD HINSHELWOOD
Attorneys, Appellate Staff
Civil Division, Room 7256
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 514-7823

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases: **Page(s)**

Statutes:

Rules:

Other Authorities:

INTRODUCTION AND SUMMARY

The panel here held that "bump stocks" are "machineguns" within the meaning of the governing statute that bars their possession. That decision accords with the rulings of the other courts of appeals to consider similar challenges, and it presents no legal issue of exceptional importance that would warrant review by the full Court.

Bump stocks are devices that replace a rifle's standard stationary stock and enable a shooter to fire hundreds of rounds per minute with a single pull of the trigger. In the rule at issue, the Bureau of Alcohol, Tobacco, Firearms and Explosives concluded that bump stocks fall within the statute's definition of a machinegun because they convert a rifle to fire "automatically more than one shot, without manual reloading, by a single function of the trigger." 26 U.S.C. § 5845(b).

The panel concluded that ATF's understanding is the best interpretation of the statute. Plaintiffs identify no error in the panel's analysis, much less an error that would merit en banc review. The panel explained that understanding the phrase "single function of the trigger" to encompass "a shooter's volitional action that initiates an automatic firing sequence" comports with judicial interpretations of

that term and is "consonant with the ordinary meaning of 'function' at the time of the statute's enactment," Op. 11-12, as well as with Congress's purpose in restricting machineguns because of their "heightened capacity for lethality," Op. 14. Similarly, the Rule's definition of the term "automatically" "pulls directly from dictionaries of the 1930s" and "has found approval in past judicial interpretations." Op. 14-15.

Plaintiffs chiefly contend that a weapon is not a machinegun if a shooter must do anything other than simply pull the trigger to produce automatic fire. Any further human input, they contend, renders the process no longer "automatic." As the panel explained, plaintiffs' reading would render the statutory prohibition on machineguns largely meaningless. To maintain automatic firing of a traditional machinegun, the shooter must apply continuous pressure on the trigger (as, in the case of bump stocks, the shooter must maintain forward pressure on the barrel). Indeed, on plaintiffs' view, a manufacturer could take a machinegun outside the scope of the statutory prohibition simply by adding a button for the shooter to press down with one hand in order maintain automatic fire.

Plaintiffs identify no issue warranting en banc review, and the petition should be denied.

BACKGROUND

1. Congress has generally banned the possession of a machinegun, which it has defined as a weapon that can shoot "automatically more than one shot, without manual reloading, by a single function of the trigger." 26 U.S.C. § 5845(b) (definition); 18 U.S.C. § 922(o) (criminal prohibition). The definition also encompasses parts that can be used to "convert[] a weapon into a machinegun." 26 U.S.C. § 5845(b).

"Bump stocks" are devices that permit a shooter to fire hundreds of rounds per minute with a single pull of the trigger. 83 Fed. Reg. 66,514, 66,515-16 (Dec. 26, 2018). A bump stock replaces the standard stationary stock on an ordinary semiautomatic rifle—the part of the weapon that typically rests against the shooter's shoulder. It is composed of a sliding stock attached to a grip fitted with an "extension ledge" where the shooter rests his trigger finger while shooting the firearm. *Id.* at 66,516. After a single pull of the trigger, the bump stock "harnesses and directs the firearm's recoil energy to slide the firearm

back and forth so that the trigger automatically re-engages by 'bumping' the shooter's stationary finger without additional physical manipulation of the trigger by the shooter." *Id.*

ATF first addressed bump stock devices in 2002, when it was asked to review the "Akins Accelerator" through its procedure for allowing manufacturers to submit novel weapons or devices for a classification under the National Firearms Act. 83 Fed. Reg. at 66,517. The Akins Accelerator used a spring to harness the recoil energy of each shot, causing "the firearm to cycle back and forth, impacting the trigger finger" repeatedly after the first pull of the trigger, and making the weapon capable of firing "approximately 650 rounds per minute." *Id.* ATF initially concluded that the Akins Accelerator did not qualify, but in reviewing that device again, ATF concluded that "the phrase 'single function of the trigger'" should be understood to include "a 'single pull of the trigger,'" explaining that the Akins Accelerator created "a weapon that '[with] a single pull of the trigger initiates an automatic firing cycle that continues until the [shooter's] finger is released, the weapon malfunctions, or the ammunition supply is exhausted.'" *Id.* (first alteration in original) (quoting *Akins v. United States*, No. 8:08-cv-988,

slip op. at 5 (M.D. Fla. Sept. 23, 2008)). ATF also published a public ruling announcing its interpretation of "single function of the trigger," in which it reviewed the National Firearms Act and its legislative history and explained that the phrase denoted a "single pull of the trigger." ATF, ATF Ruling 2006-2, *Classification of Devices Exclusively Designed to Increase the Rate of Fire of a Semiautomatic Firearm* (Dec. 13, 2006).[1] The Eleventh Circuit sustained ATF's determination, explaining that ATF's interpretation was "consonant with the statute and its legislative history" and that "[t]he plain language of the statute defines a machinegun as any part or device that allows a gunman to pull the trigger once and thereby discharge the firearm repeatedly." *Akins v. United States*, 312 F. App'x 197, 200, 201 (11th Cir. 2009) (per curiam).

2. The 2018 rulemaking addressed the question whether a bump stock is properly classified as a machinegun when its operating mechanism does not include an internal spring. In the Rule, ATF concluded that inclusion of an internal spring is not determinative of a bump stock's status. The agency explained that after a single pull of

[1] Available at https://go.usa.gov/xHd89.

the trigger of a weapon equipped with a bump stock, the shooter's trigger finger remains stationary on the extension ledge as the shooter applies constant forward pressure with the non-trigger hand on the barrel-shroud or the fore-grip of the rifle (parts at the front of the firearm). The bump stock then directs the firearm's recoil energy into a continuous firing cycle without "the need for the shooter to manually capture, harness, or otherwise utilize this energy to fire additional rounds." 83 Fed. Reg. at 66,532. A bump stock thus constitutes a "self-regulating" or "self-acting" mechanism that allows the shooter to attain continuous firing after a single pull of the trigger and, consequently, converts a semiautomatic rifle into a machinegun. *Id.*; *see also id.* at 66,514, 66,518.

3. Plaintiffs challenged the Rule on various statutory and constitutional grounds. The district court denied a preliminary injunction, this Court affirmed that denial, and the Supreme Court denied certiorari. *Guedes v. ATF*, 920 F.3d 1 (D.C. Cir. 2019), *cert. denied*, 140 S. Ct. 789 (2020). The district court subsequently entered summary judgment in the government's favor, and plaintiffs appealed.

A unanimous panel of this Court affirmed, holding that bump stocks qualify as machineguns under "the best interpretation of the statute." Op. 21. The panel observed that the Rule's interpretation of the phrase "single function of the trigger" as encompassing "a shooter's volitional action that initiates an automatic firing sequence" comported with judicial interpretations of that term and is "consonant with the ordinary meaning of 'function' at the time of the statute's enactment," Op. 11-12, while also "align[ing] with Congress's purpose" in restricting machineguns because of their "heightened capacity for lethality," Op. 14. The panel likewise noted that the Rule's definition of the term "automatically" "pulls directly from dictionaries of the 1930s" and "has found approval in past judicial interpretations." Op. 14-15. The panel then addressed the relationship between these two statutory terms in context: the "single function" is "the initiating human action that sets off a self-regulating sequence of events," as illustrated by the statute's description of automatic firing occurring "*by* a single function of the trigger." Op. 16. This definition covers bump stocks, the panel held, because "a single 'function' or 'pull' of the trigger by the shooter activates the multiple-shot sequence," and the process of firing multiple

shots is "self-regulating" because the bump stock "regulates the weapon's back-and-forth movement after a predetermined point in an operation—the shooter's pull of the trigger—and remains self-regulating as long as the shooter maintains pressure on the barrel." Op. 18-19.

The panel rejected plaintiffs' contention that the term "single function of the trigger" means only "the mechanistic movement of the trigger itself," observing that this reading was "unworkable, internally inconsistent, and counterintuitive." Op. 22, 23. That reading would exclude from the definition of "machinegun" weapons in which the repeated actuation of the weapon's trigger was fully automated after an initial shot, such as the Akins Accelerator. Op. 23-24. The panel observed that plaintiffs' argument that "bump stocks do not operate automatically because the shooter must maintain constant forward pressure on the bump stock with his non-trigger hand" was "no less problematic," explaining that "[t]his definition would remove what Plaintiffs would describe as a prototypical machine gun from the realm of 'automatic,' as the shooter must both pull the trigger and keep his finger depressed on the trigger to continue firing." Op. 24.

Finally, the panel noted that the rule of lenity did not apply. That rule "only applies if, after considering text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the statute [such] that the Court must simply guess at what Congress intended." Op. 26 (quoting *Maracich v. Spears*, 570 U.S. 48, 76 (2013)). No such ambiguity is present here after application of "the array of tools" employed in statutory interpretation, "including the statute's plain language, prior case law, contemporaneous understandings, and congressional purpose." *Id.*

REASONS WHY THE PETITION SHOULD BE DENIED

The panel's decision is correct, does not present a question of exceptional importance, and does not conflict with any circuit court decision. Nor does it conflict with any decision of this Court; after all, this Court previously affirmed the denial of a preliminary injunction in this very case. *Guedes v. ATF*, 920 F.3d 1, 35 (D.C. Cir. 2019). The Court should thus deny the petition.

1. Plaintiffs identify no conflict between the panel opinion and the decisions of other courts of appeals. Every other circuit to consider the question has upheld ATF's interpretation of the statute. *See Gun*

Owners of Am., Inc. v. Garland, 19 F.4th 890 (6th Cir. 2021) (en banc), *cert. denied*, No. 21-1215, 2022 WL 4651301 (U.S. Oct. 3, 2022); *Aposhian v. Barr*, 958 F.3d 969, 982 (10th Cir. 2020), *reinstated on reh'g*, 989 F.3d 890 (10th Cir. 2021), *cert. denied*, No. 21-159, 2022 WL 4651284 (U.S. Oct. 3, 2022); *Cargill v. Garland*, 20 F.4th 1004 (5th Cir. 2021), *op. vacated, reh'g en banc granted*, 37 F.4th 1091 (5th Cir. 2022) (per curiam). The Tenth Circuit upheld the classification at the preliminary-injunction stage after affording *Chevron* deference to the Rule's interpretation of the machinegun statute, while the en banc Sixth Circuit affirmed by an equally divided vote a district court decision declining to enter a preliminary injunction against the Rule. A panel of the Fifth Circuit affirmed a final judgment in the government's favor, holding that "the 'Rule adopts the proper interpretation of "machinegun" by including bump stock devices.'" *Cargill*, 20 F.4th at 1009.[2]

Plaintiffs state that the panel's decision "conflicts with the views of numerous circuit judges," Pet. 7, noting that some judges have

[2] As noted, the Fifth Circuit granted rehearing en banc in *Cargill*. 37 F.4th 1091 (5th Cir. 2022) (per curiam). Oral argument was held on September 13, 2022.

disagreed with ATF's interpretation. Such disagreements are not a basis for rehearing en banc, which can be justified by conflicts with the "authoritative decisions of other United States Courts of Appeals." Fed. R. App. P. 35(b)(1)(B).

Plaintiffs are likewise mistaken in urging that the panel's decision is "inconsistent with" interlocutory decisions—including a prior decision of this Court—that upheld the Rule after affording *Chevron* deference to the Rule's interpretation of the statute. Pet. 7-8 (citing *Guedes*, 920 F.3d at 32, and *Aposhian*, 958 F.3d at 985-87). In concluding that ATF's interpretation was reasonable, those decisions expressly left open the question of whether ATF's reading of the statute was the correct one. *Guedes*, 920 F.3d at 28; *Aposhian*, 958 F.3d at 984-85. That is the question the panel answered here, reaching the same result without application of *Chevron* deference.

In any event, differences in reasoning do not warrant en banc review. The panel concluded that ATF's classification of bump stocks was not only a reasonable application of the statute but also the best interpretation of the statute. That the Tenth Circuit upheld the classification after concluding that it was reasonable presents no

question of law for the full Court to review. The decision likewise does not implicate the rationale of Rule 35; as the advisory committee notes to Rule 35 explain, inter-circuit conflict is a ground for seeking en banc rehearing because "[w]hen the circuits construe the same federal law differently, parties' rights and duties depend upon where a case is litigated." Fed. R. App. P. 35 advisory committee's note to 1998 amendments. Here, the law in every circuit to consider the issue is the same. The point of plaintiffs' petition is therefore not to eliminate a circuit conflict but to create one.

Plaintiffs garner no support from relying on the Sixth Circuit's ruling in *Gun Owners*. Pet. 8. The en banc Sixth Circuit affirmed, by an equally divided vote, a district court decision denying a preliminary injunction against the Rule. There is thus no opinion of the court with which the panel decision could be in tension, and the outcome, as in this case, is that the plaintiff's request to enjoin the Rule was rejected. Moreover, the opinions in support of affirmance in *Gun Owners* accord with the panel's view that ATF offered the best understanding of the statute. Judge White's opinion concluded that the Rule "is entitled to *Chevron* deference," but also that "even without applying deference, the

Final Rule provides the best interpretation" of the statute. *Gun Owners*, 19 F.4th at 898 (White, J.). And Judge Gibbons' opinion concluded that "*Chevron* application is unnecessary here" because the Rule's interpretation "is unambiguously the best interpretation" of the statute. *Id.* at 909 (Gibbons, J.).

Plaintiffs are correct (Pet. 8-9) that the panel decision conflicts with a decision of the Navy-Marine Corps Court of Criminal Appeals, but that conflict does not warrant en banc review. In *United States v. Alkazahg*, 81 M.J. 764 (N-M. Ct. Crim. App. 2021), the U.S. Navy-Marine Corps Court of Criminal Appeals concluded that bump stocks do not satisfy the definition of "machinegun" and therefore that a servicemember's possession of such a device did not violate the Uniform Code of Military Justice. *See id.* at 784. Although the court found the statutory definition of "machinegun" ambiguous, *see id.* at 779, it stated that the relevant terms are "best read" not to encompass bump stocks, *id.* at 780. The decision does not create an inter-circuit conflict. Indeed, that court is not the highest court in the military justice system; its decisions are subject to review by the U.S. Court of Appeals for the

Armed Forces. *See* 10 U.S.C. § 867. (The Judge Advocate General declined to seek further review of the *Alkazahg* decision.)

2. Plaintiffs identify no error in the panel's decision, much less an error that would warrant correction by the en banc Court. Plaintiffs' discussion of the panel's analysis with respect to "single function of the trigger" is difficult to parse. It begins by asserting that the panel failed to "meaningfully engag[e] with the differences between sprung active automating devices and the un-sprung passive bump stocks at issue here." Pet. 9. By "sprung active" devices, plaintiffs presumably mean the Akins Accelerator, which, as discussed, used an internal spring to redirect the recoil energy of each shot and force the trigger repeatedly into the shooter's stationary finger. *See* 83 Fed. Reg. at 66,517. The Rule's definition of "single function of the trigger" is the same definition that ATF applied in determining that the Akins Accelerator was a machine gun, and plaintiffs do not contend otherwise. *See id.* at 66,518; Op. 12. Before the panel, plaintiffs urged that the Akins Accelerator did not operate by a single function of the trigger, and that bump stocks likewise did not operate in this manner. The panel examined the errors underlying that argument in detail. Op. 12-14. Although plaintiffs'

petition does not acknowledge that the Eleventh Circuit correctly sustained ATF's definition in *Akins*, they do not challenge that conclusion and also make no attempt to identify any basis for distinguishing bumps stocks from the Akins Accelerator in this regard.

Plaintiffs focus instead on the contention that weapons equipped with bump stocks do not fire "automatically," but they fail to grapple with the panel's detailed analysis. The panel explained that the Rule's definition of "automatically" "pulls directly from dictionaries of the 1930s, which defined 'automatic' as 'having a self-acting or self-regulating mechanism that performs a required act at a predetermined point in an operation;—said esp. of machinery or devices which perform work formerly or usually done by hand.'" Op. 14-15 (quoting 83 Fed. Reg. at 66,519; *Automatic*, Webster's New International Dictionary (2d ed. 1934)). That understanding has also been adopted by other courts interpreting the National Firearms Act, quoting the same dictionary definitions relied on by the Rule. *United States v. Olofson*, 563 F.3d 652, 658 (7th Cir. 2009).[3]

[3] Plaintiffs' assertion that *Olofson* "neglected to mention the word 'self-regulating' as even a permissible interpretation of 'automatically,'"

Continued on next page.

Plaintiffs' primary objection to this definition appears to be that it allows a weapon to require "additional manual input" while operating "automatically." Pet. 12. That argument rests on the assertion that the term "automatically" is constrained by the statutory phrase "by a single function of the trigger" to forbid any "additional manual input beyond the statutorily defined 'single function of the trigger.'" *Id.*

The panel correctly rejected that reading, which would enable shooters to remove an M16 or similar weapon from the scope of the prohibition on machineguns merely by adding a button that must be held down with the shooter's other hand to enable automatic fire. *See Gun Owners*, 19 F.4th at 910 (Gibbons, J.) (noting that this reading would allow "parts specifically intended to achieve machinegun functionality with a single pull of the trigger so long as the part also

---

Pet. 10, is puzzling. *See Olofson*, 563 F.3d at 658 (observing that "[a] leading dictionary" defined the term "as '[h]aving a self-acting or self-regulating mechanism that performs a required act at a predetermined point in an operation'"). Plaintiffs' assertion that the panel here "ignored" definitions "that define automatic as 'self-acting,' not merely self-regulating," Pet. 12, is equally puzzling, as the panel repeatedly addressed that language, Op. 14, 15, 16, 24. The panel explained that the quoted definition is disjunctive—something operates automatically if it has "a self-acting *or* self-regulating mechanism." *See* Op. 15 (emphasis added).

requires some minutia of human involvement"). As the panel explained, "by a single function of the trigger" "clarifies" the term automatically rather than "limiting" it. Op. 16. Citing a dictionary definition demonstrating that the word "by" is used to indicate that something occurs "through the means of" or "in consequence of" something else, the panel observed that the phrase "by a single function of the trigger" is properly understood "to establish only the preconditions for setting off the 'automatic' mechanism, without foreclosing some further degree of manual input." Op. 16 (first quoting *By*, Webster's New International Dictionary (2d ed. 1934); and then quoting *Guedes*, 920 F.3d at 31). Plaintiffs' response is the unexplained assertion that "the statute simply cannot bear" that reading. Pet. 11.

More generally, as the panel explained, nothing about the term "automatically" precludes some measure of human input. Plaintiffs articulate no reason why the dictionary definitions require the exclusion of all such input. And many weapons that indisputably qualify as machineguns require the shooter to "both pull the trigger and keep his finger depressed on the trigger to continue firing," Op. 24. Plaintiffs

rightly do not suggest that the required continued pressure takes the prototypical machinegun outside the scope of the statute.[4]

3. Plaintiffs' remaining arguments likewise provide no basis for en banc review. Although plaintiffs discuss the rule of lenity at length (Pet. 13-16), the panel simply looked to Supreme Court precedent dictating that the rule of lenity "only applies if, after considering text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the statute [such] that the Court must simply guess at what Congress intended." Op. 26 (quoting *Maracich v. Spears*, 570 U.S. 48, 76 (2013)); *see Muscarello v. United States*, 524 U.S. 125, 138 (1998) ("The simple existence of some statutory ambiguity, however, is not sufficient to warrant application of that rule, for most statutes are ambiguous to some degree."). No such ambiguity remains here after

[4] Plaintiffs assert that the panel erred in "saying . . . that a bump-stock harnesses recoil to drive the body [of the weapon] 'back and forth'" because recoil energy does not "drive the trigger forward again" to bump the stationary finger. Pet. 11 n.3 (quoting Op. 17). The panel opinion was quoting the factual conclusions of the district court—conclusions plaintiffs did not contest. Op. 17. In any event, context makes clear that both the district court and the panel well understood that forward pressure on the weapon is required for the back-and-forth cycle to occur; as the preceding sentence specifies, "the shooter must maintain forward pressure on the barrel" for the bump stock to perform its intended purpose. *Id.*; *accord* Op. 19.

application of the ordinary tools of statutory construction. Similarly, the central point of cases on which plaintiffs seek to rely, Pet. 13-14, is that the rule of lenity does not apply where looking to "the particular statutory language, . . . the design of the statute as a whole and to its object and policy" produces an answer to the statutory question. *Maracich*, 570 U.S. at 76 (quoting *Crandon v. United States*, 494 U.S. 152, 158 (1990)). Plaintiffs' suggestion that lenity applies simply because "sophisticated jurists have vigorously disagreed about what the statute forbids," Pet. 15, fundamentally misconceives the canon. Sophisticated jurists frequently differ in interpreting statutes; the statutory terms do not, for that reason, pose "grievous ambiguity." And a sharp division among the sophisticated jurists of the Supreme Court as to the meaning of a criminal statute has never been thought to trigger the rule of lenity. *See, e.g.*, *Maracich*, 570 U.S. at 76, 80; *Muscarello*, 524 U.S. at 138-39.

Finally, plaintiffs urge (Pet. iii, 16) that the decision warrants rehearing because it places individuals who previously possessed bump stocks at risk of prosecution. The government has made clear, however, that individuals who previously possessed these devices will not be

prosecuted for conduct occurring before the deadline provided in the Rule for relinquishing or destroying them. *See, e.g.*, 83 Fed. Reg. at 66,539 (explaining that the Rule "allows ample time for current owners to destroy or abandon such devices. To the extent that owners timely destroy or abandon these bump-stock-type devices, they will not be in violation of the law or incarcerated as a result").

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

MARK B. STERN
MICHAEL S. RAAB
ABBY C. WRIGHT

s/ Brad Hinshelwood
BRAD HINSHELWOOD
Attorneys, Appellate Staff
Civil Division, Room 7256
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 514-7823
bradley.a.hinshelwood@usdoj.gov

November 2022

CERTIFICATE OF COMPLIANCE

This brief complies with the Court's October 4, 2022 order limiting a response to 3,900 words because it contains 3,898 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Century Schoolbook 14-point font, a proportionally spaced typeface.

s/ Brad Hinshelwood
Brad Hinshelwood

CERTIFICATE OF SERVICE

I hereby certify that on November 2, 2022, I electronically filed the foregoing response with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Service will be accomplished by the appellate CM/ECF system.

s/ Brad Hinshelwood
Brad Hinshelwood