No. 20-51016

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MICHAEL CARGILL,

Plaintiff-Appellant,

v.

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

Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of Texas
District Court Case No. 1:19-cv-349 (Hon. David Alan Ezra)

RESPONSE TO PETITION FOR REHEARING EN BANC

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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 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.

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Michael Cargill

Defendants-appellees:

All defendants are governmental

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INTRODUCTION AND SUMMARY

Defendants-appellees respectfully urge that plaintiff-appellant's petition for rehearing should be denied. The panel in this case upheld the conclusion of the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) 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 2018 rule at issue, ATF concluded that bump stocks fall within the statute's definition of a machinegun by converting 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). After conducting an evidentiary hearing, the district court concluded that ATF's understanding was the best interpretation of the statute, and a panel of this Court agreed.

Plaintiff identifies no error in the panel's decision, much less an error that would merit en banc review. He does not take issue with the conclusion that bump stock firing is initiated by a single function of the trigger. He urges, however, that the firing is not automatic because (as explained below) a shooter maintains forward pressure on the front part of the gun while his trigger finger remains stationary. As

the panel explained, however, even "a prototypical machine gun requires the shooter to 'keep constant pressure on the trigger with his shooting hand's trigger finger,'" and plaintiff "offers no reason why firearms that require the shooter to maintain pressure on the trigger function 'automatically' but firearms that require the shooter to maintain pressure on the barrel of the gun do not." Op. 14.

Plaintiff mistakenly urges that review is appropriate because the panel's decision conflicts with the decisions of other circuits. He recognizes that no circuit has sustained a challenge to the rule, but he emphasizes that other circuits have done so while according the rule *Chevron* deference. That the panel concluded that ATF's interpretation was not only a reasonable interpretation, but also the best interpretation, is not the type of conflict that warrants en banc review. On the contrary, plaintiff does not ask this Court to eliminate a conflict but to create one.

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); 18 U.S.C. § 922(o). 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 the agency's view of their classification under the National Firearms Act. *See* 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, making the weapon capable of firing "approximately 650 rounds per minute." *Id.* In reviewing that device, 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.* (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 (Dec. 13, 2006).[1] The Eleventh Circuit sustained ATF's determination, explaining that interpreting "single function of the trigger" as "'single pull of the trigger' is consonant with the statute and its legislative history." *Akins v. United States*, 312 F. App'x 197, 200 (11th Cir. 2009). It also rejected a vagueness challenge to the statute because "[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." *Id.* at 201.

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 such as that used in the Akins Accelerator. In the final 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 the trigger of a weapon equipped with a spring-less 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 backwards-and-forwards cycle without "the need for the shooter to manually capture,

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

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. Plaintiff is an individual who surrendered two bump stocks to ATF following issuance of the rule. ROA.529. His complaint raises claims under the Administrative Procedure Act and various constitutional provisions, and seeks a declaratory judgment and a permanent injunction barring enforcement of the rule, as well as the return of his bump stocks. ROA.45-46; ROA.529-30.

The district court rejected plaintiff's claims after a bench trial at which the parties submitted exhibits and defendants offered the testimony of an ATF firearms expert. ROA.498-500.

4. Plaintiff appealed, and a unanimous panel of this Court affirmed, holding that "bump stocks qualify as machine guns under the best interpretation of the statute." Op. 2.

a. The panel first concluded that ATF had properly interpreted the statutory term "single function of the trigger" to mean "a single pull of the trigger and analogous motions." *See* Op. 7-12. The panel explained that "[b]oth the Supreme Court and this court have replaced the word 'function' with 'pull' when paraphrasing the NFA's definition of 'machinegun,'" that "the two terms were used almost

interchangeably in the context of firearms" at the time the statute was enacted, and that the Eleventh Circuit in *Akins* had held over a decade ago that interpreting "single function of the trigger" as "single pull of the trigger" is "consonant with the statute." Op. 8-9. The panel reasoned that "[t]his caselaw and contemporary usage reflect a simple fact undergirding the Rule's interpretation of the statute—in ordinary English, firearm triggers typically 'function' by means of a shooter's 'pull.'" Op. 9.

The panel explained that a "single function of the trigger" initiates a bump stock's automatic firing sequence. As the district court found, "when a bump stock is used as intended, the shooter pushes forward to engage the trigger finger with the trigger, which causes a single trigger pull that initiates a firing sequence that continues to fire as long as the shooter continues to push forward" on the front of the weapon with his non-shooting hand. Op. 11-12 (quoting ROA.512).

The panel rejected plaintiff's argument that a bump stock does not fire multiple rounds by a "single function of the trigger" because the trigger must mechanically reset each time the weapon fires. It noted (Op. 10) that this Court had rejected "a similarly mechanistic interpretation" of the statute in *United States v. Camp*, 343 F.3d 743 (5th Cir. 2003), in which the Court considered a rifle that had been modified with a switch-activated, motorized fishing reel placed within the trigger guard. When the shooter pulled the switch, the reel would rotate and "that rotation caused the original trigger to function in rapid succession." *Id.* at 744. Because the shooter needed to perform only "one action—pulling the switch he installed—to fire multiple shots,"

this Court held that the rifle was a "machinegun" that fired more than one shot "by a *single* function of the trigger," even though the original trigger reset repeatedly during the firing sequence. *Id.* at 745.

The panel further explained that plaintiff's interpretation "effectively rewrit[es] the statute" so that it defines a machinegun as "a weapon which shoots more than one shot 'every time the trigger functions' rather than 'by a single function of the trigger.'" Op. 10. Moreover, plaintiff's interpretation "defies common sense" because "there is no reason why 'Congress would have zeroed in on the mechanistic movement of the trigger in seeking to regulate automatic weapons,' given that the 'ill sought to be captured by this definition was the ability to drastically increase a weapon's rate of fire, not the precise mechanism by which that capability is achieved.'" Op. 11.

b. The panel next concluded that ATF had properly interpreted the term "automatically" in the statute 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." Op. 12 (quoting 83 Fed. Reg. at 66,553). The panel explained that ATF's interpretation is based on "a nearly word-for-word copy of the dictionary definition," and that the interpretation accords with the Seventh Circuit's conclusion that "automatically" in the statute "delineates how the discharge of multiple rounds from a weapon occurs: as the result of a self-acting mechanism" that

"is set in motion by a single function of the trigger." Op. 13 (quoting *United States v. Olofson*, 563 F.3d 652, 658 (7th Cir. 2009)).

The panel concluded that bump stock-equipped weapons shoot as the result of such a self-regulating mechanism because, as the district court found, after the shooter applies the initial forward pressure on the firearm that causes the trigger pull, the weapon "continue[s] firing until the shooter stops pushing forward with his non-shooting hand or the weapon runs out of ammunition or malfunctions." Op. 14-15.

The panel rejected plaintiff's argument that a weapon does not fire automatically if it requires any manual input after the single function of the trigger that initiates the firing sequence. That claim "ultimately proves too much," because even "a prototypical machine gun requires the shooter to 'keep constant pressure on the trigger with his shooting hand's trigger finger,'" and plaintiff "offers no reason why firearms that require the shooter to maintain pressure on the trigger function 'automatically' but firearms that require the shooter to maintain pressure on the barrel of the gun do not." Op. 14.

c. Having concluded that bump stocks are machineguns under the best interpretation of the statute, the panel found it unnecessary to consider plaintiff's argument that the rule is not entitled to *Chevron* deference. Op. 7 n.4. The panel also rejected plaintiff's reliance on the rule of lenity, explaining that because "the traditional tools of statutory interpretation make it clear" that ATF's interpretation "is

the best interpretation of the statute," "no 'grievous ambiguity or uncertainty' remains" to resolve and so "the rule of lenity does not apply to this case." Op. 15-16.

d. Finally, the panel concluded that plaintiff "has no standing" to pursue his remaining claims that ATF exceeded its statutory authority by issuing the rule and that the rule violates separation-of-powers principles. Op. 17. The panel explained that because bump stocks are machineguns and thus illegal to possess under federal law, plaintiff's "ability to own a bump stock would not change" even if he could prevail on those claims. *Id.*

REASONS WHY THE PETITION SHOULD BE DENIED

As plaintiff does not dispute, the panel decision does not conflict with any decision of this Court. Furthermore, the panel's decision is correct, does not present a question of exceptional importance, and does not conflict with any circuit court decision. The Court should thus deny the petition.

1. Plaintiff repeatedly and mistakenly urges that the panel's decision conflicts with the decisions of other courts of appeals. *See* Pet. 6-10. But as the panel decision notes (Op. 2 n.2), the Sixth Circuit, Tenth Circuit, and D.C. Circuit have all rejected challenges to ATF's bump stock classification. *See Gun Owners of Am., Inc. v. Garland*, 19 F.4th 890 (6th Cir. 2021) (en banc); *Aposhian v. Barr*, 958 F.3d 969, 982 (10th Cir. 2020), *reinstated on reh'g*, 989 F.3d 890 (10th Cir. 2021), *petition for cert. pending*, No. 21-159 (U.S. Aug. 2, 2021); *Guedes v. ATF*, 920 F.3d 1, 35 (D.C. Cir. 2019), *cert. denied*, 140 S. Ct. 789, 789 (2020). The D.C. Circuit and the Tenth Circuit both 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. Had the panel invalidated the rule, it would have gone into conflict with the rulings of those circuits. Instead, it reached the same result as every other court of appeals to rule on the question.

Plaintiff emphasizes that the D.C. Circuit's and Tenth Circuit's decisions accorded *Chevron* deference to the agency's analysis as a basis for upholding the agency's interpretation while the panel reached that conclusion based on a de novo review of the statute. That is not the type of "conflict" that warrants 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. In doing so, it affirmed the same conclusion reached by the district court after an evidentiary hearing that closely considered the workings of bump stocks. That the D.C. and Tenth Circuits 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; 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 amendment. Here, the law in every

circuit to consider the issue is the same. The point of plaintiff's petition is therefore not to eliminate a circuit conflict but to create one.

Plaintiff is equally wide of the mark in asserting (Pet. 8) that the panel decision is "in tension with the Sixth Circuit's ruling." 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. The relevant point is that the en banc Sixth Circuit, like the panel here, declined to enjoin the rule. 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.).

Plaintiff is correct (Pet. 7) 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), that court 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. Plaintiff identifies no error in the panel's decision, much less an error that would warrant correction by the en banc Court. Notably, plaintiff's petition does not take issue with the panel's interpretation of "single function of the trigger." *See* Pet. 11-13. Plaintiff does not question the panel's conclusion that "single function of the trigger" means a "single pull of the trigger and analogous motions," nor does he challenge the panel's rejection, based in part on this Court's decision in *Camp*, of a mechanistic interpretation of that phrase under which a bump stock could not qualify as a machinegun because its trigger resets repeatedly during the firing sequence.

Instead, plaintiff contends (Pet. 11-12) that the best reading of the statute is "the one that ATF provided between 2006 and 2018," when ATF recognized that a spring-less bump stock's firing sequence is initiated by a "single function of the trigger" but erroneously believed that such bump stocks do not fire "automatically." He reasons (Pet. 12) that a weapon does not fire automatically if "something more" than "a 'single function of the trigger' is … required to effectuate repeat firing." Because a shooter using a bump stock must "us[e] his non-trigger hand to apply

constant forward pressure on the rifle," he asserts that bump stocks do not permit a weapon to fire "automatically." *Id.*

The panel properly rejected that argument as "prov[ing] too much": even "a prototypical machine gun requires the shooter to 'keep constant pressure on the trigger with his shooting hand's trigger finger,'" and "Cargill offers no reason why firearms that require the shooter to maintain pressure on the trigger function 'automatically' but firearms that require the shooter to maintain pressure on the barrel of the gun do not." Op. 14.

Plaintiff responds by pointing to a passage in *Alkazahg* in which the court reasoned that "[i]t 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," 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." Pet. 13 (quoting *Alkazahg*, 81 M.J. at 782-83).

That reasoning is flawed on several levels. First, its account of how a bump stock operates is simply incorrect. As the district court here found after a bench trial that included testimony from an ATF firearms expert, there is no "holding of the trigger" when a shooter fires a bump stock-equipped weapon. Rather "the shooter pushes forward to engage the trigger finger with the trigger, which causes a single trigger pull that initiates a firing sequence that continues to fire as long as the shooter

continues to push forward." Op. 12 (quoting ROA.512). "Importantly," the panel noted, "after initiating the firing sequence in this manner, the 'shooter does not have to pull rearward to continue firing as long as he keeps his finger on the trigger ledge.'" Op. 12 n.8 (quoting ROA.512). The *Alkazahg* court was thus mistaken in suggesting that a bump stock requires a shooter to apply pressure at two points of the weapon while a prototypical machinegun requires only one pressure point. And that court made no effort to explain why forward pressure on a weapon is less of a "mechanical self-acting and impersonal … function" than backward pressure on the trigger. Second, the *Alkazahg* court was wrong to think that addition of a second point of pressure would be dispositive under the statute; a weapon that required a shooter to hold down a button with one hand and a trigger with the other to fire automatically would be no less a machinegun.

The *Alkazahg* court's interpretation is thus at odds with the terms of the statute and would undermine its purpose by allowing manufacturers to circumvent the statutory restriction by a shift in the locus of a shooter's pressure on the weapon. That a bump stock-equipped rifle and a prototypical machinegun both fire multiple shots "by just maintaining pressure on the weapon" "more accurately reflects the line Congress drew with the term 'automatically' than would a distinction based on the strict mechanical workings within the weapon." ROA.559.

Plaintiff also errs (Pet. 12) in believing it significant that a shooter can "bump fire[]" weapons by other means, such as through the use of a rubber band or belt

loop. As the rule explains, such items do not operate "automatically" because they are "not a 'self-acting or self-regulating mechanism'": "[w]hen such items are used for bump firing, no device is present to capture and direct the recoil energy; rather, the shooter must do so." 83 Fed. Reg. at 66,533.

3. Plaintiff argues (Pet. 9-10) that the Court should grant en banc rehearing to address a series of questions about *Chevron* deference that "the Court will likely have to address" if it concludes that the panel's de novo statutory interpretation was incorrect, including whether *Chevron* deference applies to statutes with criminal applications. Those questions could arise only if the panel decision otherwise warranted en banc review—which it does not—and the en banc Court then concluded that the panel and district court were mistaken in concluding that ATF's understanding was the best interpretation of the statute. The panel did not pass on those *Chevron* questions, and the government has not sought *Chevron* deference in defending the bump stock classification. Plaintiff thus asks the Court to grant en banc review to consider these significant questions in a case where the panel did not consider the application of *Chevron* deference and no party urges its application.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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FEBRUARY 2022

CERTIFICATE OF SERVICE

I hereby certify that on February 28, 2022, I electronically filed the foregoing response with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. Service will be accomplished by the appellate CM/ECF system.

s/ Kyle T. Edwards
Kyle T. Edwards

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 35(b)(2) 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 Garamond 14-point font, a proportionally spaced typeface.

s/ Kyle T. Edwards
Kyle T. Edwards