No. 22-1222

# In the Supreme Court of the United States

DAMIEN GUEDES, ET AL., PETITIONERS

*v.*

BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

**BRIEF FOR THE RESPONDENTS**

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## QUESTION PRESENTED

Since 1986, Congress has prohibited the transfer or possession of any new "machinegun." 18 U.S.C. 922(*o*)(1). The National Firearms Act, 26 U.S.C. 5801 *et seq.*, 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 statutory definition also encompasses "any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun." *Ibid.*

A "bump stock" is a device designed and intended to permit users to convert a semiautomatic rifle so that the rifle can be fired continuously with a single pull of the trigger, discharging potentially hundreds of bullets per minute. In 2018, after a mass shooting in Las Vegas carried out using bump stocks, the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) published an interpretive rule concluding that bump stocks are machineguns as defined in Section 5845(b). The question presented is as follows:

Whether a bump stock device is a "machinegun" as defined in 26 U.S.C. 5845(b) because it is designed and intended for use in converting a rifle into a machinegun, *i.e.*, into a weapon that fires "automatically more than one shot * * * by a single function of the trigger."

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-32) is reported at 45 F.4th 306. The court of appeals' order denying rehearing and opinions respecting that order (Pet. App. 67-94) are reported at 66 F.4th 1018. An earlier opinion of the court of appeals (Pet. App. 95-191) is reported at 920 F.3d 1. The opinion of the district court (Pet. App. 33-64) is reported at 520 F. Supp. 3d 51. An earlier opinion of the district court (Pet. App. 192-271) is reported at 356 F. Supp. 3d 109.

### JURISDICTION

The judgment of the court of appeals was entered on August 9, 2022. A petition for rehearing was denied on May 2, 2023 (Pet. App. 67-68). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

### A. Legal Background

The National Firearms Act, 26 U.S.C. 5801 *et seq.*, 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). Since 1968, the definition has also encompassed parts that can be used to convert a weapon into a machinegun. See Gun Control Act of 1968, Pub. L. No. 90-618, Tit. II, sec. 201, § 5845(b), 82 Stat. 1231. A "machinegun" thus includes "the frame or receiver of any such weapon, any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun, and any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person." 26 U.S.C. 5845(b).

Congress first regulated the sale and possession of machineguns in the National Firearms Act of 1934, ch. 757, 48 Stat. 1236. In 1986, Congress amended Title 18 of the U.S. Code to prohibit the sale and possession of new machineguns, making it a crime "to transfer or possess a machinegun" unless a governmental entity is involved in the transfer or possession. Firearms Owners' Protection Act (FOPA), Pub. L. No. 99-308, § 102(9), 100 Stat. 452-453 (18 U.S.C. 922(*o*)). In enacting that criminal prohibition, Congress incorporated the definition of "machinegun" from the National Firearms Act. FOPA § 101(6), 100 Stat. 450 (18 U.S.C. 921(a)(23)). The 1986 amendments responded in part to evidence before Congress of "the need for more effective protection of law

enforcement officers from the proliferation of machine guns." H.R. Rep. No. 495, 99th Cong., 2d Sess. 7 (1986).

The Department of Justice regularly issues guidance concerning whether specific weapons or devices constitute machineguns. In particular, the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) encourages manufacturers to submit novel weapons or devices to the agency, on a voluntary basis, for ATF to assess whether the weapon or device should be classified as a machinegun or other registered firearm under the National Firearms Act. See ATF, U.S. Dep't of Justice, *National Firearms Act Handbook* 41 (rev. Apr. 2009) (*NFA Handbook*). The classification process enables ATF to provide manufacturers with "the agency's official position concerning the status of the firearms under Federal firearms laws" and thus to assist manufacturers in "avoid[ing] an unintended classification and violations of the law" before a manufacturer "go[es] to the trouble and expense of producing" the weapon or device. *Ibid.*; cf. 26 U.S.C. 5841(c) (requiring manufacturers to "obtain authorization" before making a covered firearm and to register "the manufacture of a firearm"). ATF has made clear, however, that "classifications are subject to change if later determined to be erroneous or impacted by subsequent changes in the law or regulations." *NFA Handbook* 41.

**B. Bump Stock Devices**

1. In 2004, a federal ban on certain semiautomatic "assault weapons" expired.[1] Since that time, ATF has

[1] 18 U.S.C. 921(a)(30), 922(v) (2000). Those provisions had been enacted in 1994 with a ten-year sunset provision. See Public Safety and Recreational Firearms Use Protection Act, Pub. L. No. 103-322, Tit. XI, Subtit. A, §§ 110102, 110105, 108 Stat. 1996-1998, 2000.

received a growing number of classification requests from inventors and manufacturers seeking to produce "devices that permit shooters to use semiautomatic rifles to replicate automatic fire," but "without converting these rifles into 'machineguns.'" 83 Fed. Reg. 66,514, 66,515-66,516 (Dec. 26, 2018). Whether such devices fall within the statutory definition of a "machinegun" turns on whether they allow a shooter to fire "automatically more than one shot * * * by a single function of the trigger." 26 U.S.C. 5845(b).

One such type of device is generally referred to as a "bump stock." ATF first encountered bump stocks in 2002, when it received a classification request for the "Akins Accelerator." 83 Fed. Reg. at 66,517. The Akins Accelerator, which attached to a standard semiautomatic rifle, 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. *Ibid.* Thus, by pulling the trigger once, the shooter "initiated an automatic firing sequence" that was advertised as firing "approximately 650 rounds per minute." *Ibid.*

ATF initially declined to classify the Akins Accelerator as a machinegun because the agency "interpreted the statutory term 'single function of the trigger' to refer to a single movement of the trigger." 83 Fed. Reg. at 66,517. In 2006, however, ATF revisited that determination and concluded that "the best interpretation of the phrase 'single function of the trigger' includes a 'single pull of the trigger.'" *Ibid.* The agency explained that the Akins Accelerator created "a weapon that 'with a single pull of the trigger initiates an automatic firing cycle that continues until the finger is released, the weapon malfunctions, or the ammunition supply is ex-

hausted.'" *Ibid.* (brackets and citation omitted). Accordingly, ATF reclassified the device as a machinegun under the statute. See *ibid.*

When the inventor of the Akins Accelerator challenged ATF's classification, the Eleventh Circuit upheld the determination. The court explained that interpreting the phrase "'single function of the trigger'" in Section 5845(b) to mean "'single pull of the trigger' is 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 Fed. Appx. 197, 200-201 (11th Cir.) (per curiam), cert. denied, 557 U.S. 942 (2009).

In 2006, in anticipation of similar future classification requests, ATF issued a public ruling announcing its interpretation of "single function of the trigger." ATF Ruling 2006-2, at 1 (Dec. 13, 2006). ATF explained that, after reviewing the text of the National Firearms Act and its legislative history, the agency had concluded that the phrase "single function of the trigger" includes a "single pull of the trigger." *Id.* at 2. When ATF reclassified the Akins Accelerator, however, it also advised owners of the device that "removal and disposal of the internal spring * * * would render the device a non-machinegun under the statutory definition," 83 Fed. Reg. at 66,517, on the theory that, without the spring, the device would no longer operate "automatically."

ATF soon received classification requests for bump stock devices that did not include internal springs. Those bump stocks replace the standard stock on an ordinary semiautomatic firearm. Unlike a regular stock, a bump stock channels the recoil from the first shot into

a defined path, allowing the weapon contained within the stock to slide back a short distance—approximately an inch and a half—and shifting the trigger away from the shooter's trigger finger. 83 Fed. Reg. at 66,532. This separation allows the firing mechanism to reset. *Ibid.* When the shooter maintains constant forward pressure on the weapon's barrel-shroud or fore-grip, the weapon slides back along the bump stock, causing the trigger to "bump" the shooter's stationary finger and fire another bullet. *Ibid.* In a series of classification letters between 2008 and 2017, ATF concluded that such devices did not enable a gun to fire "'automatically'" and were therefore not "machineguns." *Id.* at 66,517.

2. In 2017, a shooter used semiautomatic weapons equipped with bump stock devices to murder 58 people and wound 500 more in Las Vegas. 83 Fed. Reg. at 66,516. The bump stock devices allowed the shooter to rapidly fire "several hundred rounds of ammunition" into a large crowd attending an outdoor concert. *Ibid.* The Las Vegas mass shooting led ATF to review its prior classifications of bump stock devices. *Ibid.* In December 2017, ATF published an advance notice of proposed rulemaking, seeking public comment on "the scope and nature of the market for bump stock type devices." 82 Fed. Reg. 60,929, 60,930 (Dec. 26, 2017).

On March 29, 2018, ATF published a notice of proposed rulemaking regarding amendments to the definition of "machinegun" in three ATF regulations. See 83 Fed. Reg. 13,442, 13,457 (Mar. 29, 2018). The notice stated that ATF's post-2006 classification letters addressing bump stocks without internal springs did "not reflect the best interpretation of the term 'machinegun.'" *Id.* at 13,443. The notice further stated that ATF had "applied different understandings of the term

'automatically'" over time in reviewing bump stocks and that the agency had "authority to 'reconsider and rectify' potential classification errors." *Id.* at 13,445-13,446 (quoting *Akins*, 312 Fed. Appx. at 200). The notice proposed to "clarify that all bump-stock-type devices are 'machineguns'" under the statutory definition. *Id.* at 13,443. The notice elicited more than 186,000 comments. See 83 Fed. Reg. at 66,519.

ATF published a final rule on December 26, 2018. 83 Fed. Reg. at 66,514. The final rule amended ATF's regulations to address the terms "single function of the trigger" and "automatically" as used in the definition of "machinegun" in order to clarify that bump stock devices are machineguns under Section 5845(b). *Id.* at 66,553-66,554. In the preamble to the rule, the agency stated that it continued to adhere to its previous understanding that the phrase "'single function of the trigger'" includes a "'single pull of the trigger,'" while clarifying that the phrase also includes motions "analogous" to a single pull. *Id.* at 66,515. ATF also determined that, under the "best interpretation of the statute," *id.* at 65,521, the term "automatically" includes functioning "as the result of a self-acting or self-regulating mechanism that allows the firing of multiple rounds through a single pull of the trigger," *id.* at 66,519.

ATF further explained that, notwithstanding its prior classification letters, the agency had concluded that bump stocks "are machineguns" as defined by Congress in Section 5845(b). 83 Fed. Reg. at 66,515. Bump stocks enable a shooter to engage in a continuous firing sequence that occurs "automatically." *Id.* at 66,531. As the shooter's trigger finger remains stationary on the ledge provided by the design of the device and the shooter applies constant forward pressure with the non-

trigger hand on the barrel or fore-grip of the weapon, the firearm's recoil energy is directed into a continuous back-and-forth cycle without "the need for the shooter to manually capture, harness, or otherwise utilize this energy to fire additional rounds." *Id.* 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, accordingly, is a machinegun. *Ibid.*; see *id.* at 66,514, 66,518.

ATF rescinded its prior letters concluding that certain bump stocks were not machineguns. See 83 Fed. Reg. at 66,530-66,531. The agency also provided instructions for "[c]urrent possessors" of bump stocks "to undertake destruction of the devices" or to "abandon [them] at the nearest ATF office" to avoid liability under the statute. *Id.* at 66,530.

**C. The Present Controversy**

This suit is a challenge to ATF's final rule on bump stocks, brought by petitioners in the United States District Court for the District of Columbia. The gravamen of petitioners' challenge is that the statutory definition of "machinegun" does not encompass bump stocks and that ATF's rule is therefore unlawful. 26 U.S.C. 5845(b). The district court denied petitioners' motion for a preliminary injunction, Pet. App. 192-271; the court of appeals affirmed, *id.* at 95-191; and this Court denied an emergency application for a stay, 139 S. Ct. 1474 (No. 18A1019), and a petition for a writ of certiorari, 140 S. Ct. 789 (No. 19-296). The case then proceeded to final judgment. The district court rejected petitioners' challenge on the merits, Pet. App. 33-64, and the court of appeals again affirmed, *id.* at 1-32.

1. Petitioners are advocacy organizations and individuals who own bump stocks. Pet. 11. They filed this

suit in December 2018 to challenge ATF's final rule on various grounds. See Compl. ¶¶ 54-116. Petitioners also moved for a preliminary injunction. Pet. App. 37. In February 2019, the district court denied petitioners' motion in a consolidated opinion that also addressed (and denied) similar requests by other plaintiffs in parallel litigation. *Id.* at 192-271; see *id.* at 196-198. As relevant here, the court concluded that petitioners were not likely to succeed in showing that the rule is inconsistent with the statute. *Id.* at 211. Although the government had not contended that the agency's interpretation should be given deference, the court applied the *Chevron* framework, determined that the statute was ambiguous with respect to whether bump stocks are machineguns, and found ATF's interpretation to be reasonable. *Id.* at 208-209, 214-225; see *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837 (1984).

Petitioners filed an interlocutory appeal, and the court of appeals affirmed. Pet. App. 95-191. Like the district court, the court of appeals applied *Chevron* and concluded that ATF's interpretation of the disputed statutory language—*i.e.*, "automatically" and "by a single function of the trigger," 26 U.S.C. 5845(b)—is reasonable. Pet. App. 145-155. Judge Henderson concurred in part and dissented in part. *Id.* at 161-190. She could "think of little legitimate use for a bump stock," but she nonetheless would have held that petitioners were entitled to injunctive relief on the theory that the rule "expands the statutory definition of 'machinegun' and is therefore *ultra vires*." *Id.* at 189-190.

Although the court of appeals affirmed the denial of a preliminary injunction, it stayed the effective date of ATF's final rule for 48 hours to permit petitioners to seek relief from this Court. 19-5042 C.A. Judgment 2.

The Court denied petitioners' emergency stay application, with Justices Thomas and Gorsuch noting that they would have granted it. 139 S. Ct. 1474. Petitioners later filed a petition for writ of certiorari, which the Court denied. 140 S. Ct. 789. In a statement respecting the denial, Justice Gorsuch expressed the view that the lower courts had been "mistaken * * * to apply *Chevron*," while also noting that he "agree[d] with [his] colleagues that the interlocutory petition * * * does not merit review." *Id.* at 790-791.

2. The case then proceeded to final judgment in district court. In February 2021, the court granted summary judgment to the government on all of petitioners' claims "[f]or the same reasons articulated in [its] previous Memorandum Opinion and by the D.C. Circuit." Pet. App. 34-35; see *id.* at 33-64. In particular, the court again applied the *Chevron* framework and determined that ATF's final rule reflected at least a "reasonable" interpretation of the statutory language. *Id.* at 48-49.

The court of appeals unanimously affirmed. Pet. App. 1-32. Unlike the district court, however, the court of appeals did not rely on the *Chevron* framework. The court instead determined that the "rule is consistent with the best interpretation of 'machine gun' under the governing statutes." *Id.* at 3. The court explained that interpreting the phrase "by a single function of the trigger," 26 U.S.C. 5845(b), to encompass "a 'pull' of the trigger," *i.e.*, the "shooter's volitional action that initiates an automatic firing sequence," is "the best reading of the statutory phrase in light of the plain language and purpose of the statute." Pet. App. 13. The court further explained that "[s]uch an interpretation is * * * consonant with the ordinary meaning of 'function' at the time of the statute's enactment," *id.* at 13-14 (citing a 1934

dictionary), and with the legislative record, including congressional testimony by the then-President of the National Rifle Association, *id.* at 14-15. The court also observed that ATF was not interpreting the statute "on a blank slate," and that its interpretation is consistent with how this Court and others have referred to a single "function" of the trigger as a single "pull" of the trigger. *Id.* at 13 (citing *Staples* v. *United States*, 511 U.S. 600, 602 n.1 (1994)).

The court of appeals determined that the "statutory text similarly favors [ATF's] definition" of the term "'automatically,'" emphasizing that the agency's interpretation was drawn "directly from dictionaries of the 1930s." Pet. App. 16. The court also found that the agency's interpretation is bolstered by the "[s]tatutory context" in which the term "'automatically'" appears. *Id.* at 17 (citation omitted). In particular, the court explained that the phrase "'by a single function of the trigger'" is best understood "as the antecedent to 'automatically,'" in the sense that the single function of the trigger must be the "initiating human action that sets off a self-regulating sequence" of firing more than one bullet. *Id.* at 18 (citation omitted). The court further explained that, putting the two phrases together, the statutory definition is best read to encompass rifles equipped with bump stocks because, for such a weapon, "a single 'function' or 'pull' of the trigger by the shooter activates the multiple-shot sequence," which then continues through the "self-regulating" mechanism of the bump stock device itself. *Id.* at 21.

The court of appeals rejected petitioners' various contrary arguments. It emphasized that petitioners had "conceded that they were not challenging" any of the district court's factual conclusions about how bump

stocks operate. Pet. App. 19; see *id.* at 19-20 & n.5. And the court of appeals rejected petitioners' contention that the phrase "'single function of the trigger'" refers only to "the mechanistic movement of the trigger itself," *id.* at 26, calling that interpretation "unworkable, internally inconsistent, and counterintuitive," *id.* at 25. Among other problems, the court explained that petitioners' reading would exclude from the statutory definition weapons in which the repeated actuation of the weapon's trigger was fully automated after an initial shot, such as the Akins Accelerator. *Id.* at 26-27. The court also rejected petitioners' 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," noting that accepting such an interpretation "would remove what [petitioners] 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." *Id.* at 27-28.

Finally, the court of appeals rejected petitioners' invocation of the rule of lenity. Pet. App. 29-31. The court explained that lenity only comes into play "if, after considering text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the statute [such] that the [reviewing court] must simply guess at what Congress intended." *Id.* at 29 (quoting *Maracich* v. *Spears*, 570 U.S. 48, 76 (2013)). The court determined that 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.* at 30.

Petitioners sought rehearing en banc, which the court of appeals denied. Pet. App. 68. Judge Wilkins, joined by Judge Millett, concurred in the denial of rehearing en banc and explained that ATF's interpretation is consistent with a letter ruling issued by the Department of the Treasury in 1934. *Id.* at 69-76. Judge Henderson dissented from the denial of rehearing en banc for the reasons stated in her earlier dissent. *Id.* at 76. Judge Walker also dissented from the denial of rehearing en banc, and he wrote separately to criticize what he viewed as agency "overreach." *Id.* at 77; see *id.* at 76-94. Judge Walker also observed that the D.C. Circuit's decision in this case conflicts with decisions by the Fifth and Sixth Circuits holding the rule unlawful on lenity grounds. See *id.* at 87-89 (citing *Cargill* v. *Garland*, 57 F.4th 447 (5th Cir. 2023) (en banc), petition for cert. pending, No. 22-976 (filed Apr. 6, 2023), and *Hardin* v. *ATF*, 65 F.4th (6th Cir. 2023), petition for cert. pending, No. 23-62 (filed July 21, 2023)).

**ARGUMENT**

Petitioners are correct (Pet. 3-5) that this case presents an important question of statutory interpretation that has divided the courts of appeals and that warrants further review by this Court. But the only question properly presented in the petition in this case is identical to the question presented in the government's pending petition for a writ of certiorari in *Garland* v. *Cargill*, No. 22-976, which is already fully briefed. Petitioners identify no sound reason to prefer their later-filed petition over the government's petition in *Cargill*, or to complicate the Court's consideration of the question presented by granting review in both cases. To the contrary, this case suffers from at least two vehicle problems not present in *Cargill*. Accordingly, the petition in

this case should be held pending the Court's consideration of the government's petition in *Cargill* and then disposed of as appropriate.

1. The question whether a bump stock device is a machinegun as defined by 26 U.S.C. 5845(b) has divided the courts of appeals. In the decision below, the D.C. Circuit upheld ATF's interpretive rule setting forth the agency's view that the statutory definition of "machinegun," 26 U.S.C. 5845(b), encompasses bump stocks, which permit a shooter to convert a semiautomatic rifle into a weapon capable of firing hundreds of bullets in response to a single pull of the trigger. The D.C. Circuit held that the rule reflects "the best reading" of the statutory definition. Pet. App. 13.

The D.C. Circuit's decision accords with the result reached by the Tenth Circuit in a parallel challenge to the same rule. In that case, the Tenth Circuit affirmed the denial of a preliminary injunction after concluding that the plaintiff had failed to "show[] that ATF acted beyond its authority" in adopting the rule. *Aposhian* v. *Barr*, 958 F.3d 969, 979 (2020), vacated on reh'g, 973 F.3d 1151 (2020), reinstated, 989 F.3d 890 (2021), cert. denied, 143 S. Ct. 84 (2022). The Tenth Circuit reached that result by applying the "the test established by *Chevron*," *ibid.* (citation omitted), and concluding that "ATF's interpretation is reasonable," *id.* at 985.

By contrast, the Fifth Circuit held in a fractured en banc decision that "an Act of Congress is required to prohibit bump stocks." *Cargill* v. *Garland*, 57 F.4th 447, 450 n.* (2023), petition for cert. pending, No. 22-976 (filed Apr. 6, 2023). The only rationale on which a majority of members of the en banc court could agree was "lenity." *Ibid.* Eight members of the court would have held that "federal law unambiguously fails to cover

non-mechanical bump stocks," but eight other members disagreed for various reason. *Ibid.*

The Sixth Circuit has also relied on the rule of lenity to hold that bump stocks are not machineguns. *Hardin* v. *ATF*, 65 F.4th 895, 901 (2023), petition for cert. pending, No. 23-62 (filed July 21, 2023). In *Hardin*, the court observed that the question whether bump stocks are machineguns has already occasioned "22 opinions * * * fully explor[ing] all aspects of the issue in nearly 350 pages of text." *Id.* at 898. The question had also previously divided the Sixth Circuit itself; the court had granted rehearing en banc in an earlier case only to divide evenly, which had the effect of affirming a district court's order declining to enjoin the rule. See *Gun Owners of Am., Inc.* v. *Garland*, 19 F.4th 890, 896 (2021), cert. denied, 143 S. Ct. 83 (2022).

2. The question of statutory interpretation presented in this case is the same as the question on which the government has already filed two certiorari petitions, which remain pending. Under the circumstances, the petition in this case should be held pending the Court's consideration of the government's earlier-filed petition in *Cargill* and then disposed of as appropriate.

a. On April 6, 2023, the government filed a petition for a writ of certiorari to review the judgment of the Fifth Circuit in *Cargill*. See *Garland* v. *Cargill*, No. 22-976. That petition has been fully briefed since June 21, 2023, and the respondent has urged the Court to grant the government's petition. See Resp. Br. in Support of Cert. at 2, *Cargill*, *supra* (No. 22-976) ("Cargill agrees with the Solicitor General that the Court should grant

the petition.").[2] On July 21, 2023, the government also filed a petition for a writ of certiorari in *Hardin*, asking that the petition be held pending this Court's consideration of the government's petition in *Cargill*. See *Garland* v. *Hardin*, No. 23-62. Petitioners filed the instant petition on June 14, 2023.

As petitioners do not appear to dispute (see Pet. 3), the question of statutory interpretation presented here is in substance identical to the question presented in the government's petition in *Cargill*. Petitioners identify no reason for the Court to prefer this case to that one as a vehicle for resolving that question, and none exists. *Cargill* squarely and cleanly presents the relevant question of statutory interpretation. See Pet. at 30, *Cargill*, *supra* (No. 22-976) (*Cargill* Pet.). Here, in contrast, at least two case-specific considerations counsel against plenary review.

First, the D.C. Circuit rejected some of petitioners' arguments about the application of the statute to bump stocks because those arguments were inconsistent with the district court's factual conclusions about how bump stocks function. See Pet. App. 19-20 & n.5. The court emphasized that petitioners "did not properly dispute these facts" in their summary-judgment filings and that petitioners had "conceded" that "they were not challenging" the district court's conclusions on appeal. *Id.* at 19-20. Judge Wilkins's opinion concurring in the denial of rehearing en banc thus emphasized that petitioners' attempt to dispute those conclusions was "at least doubly forfeited." *Id.* at 73. Those case-specific questions about whether and to what extent petitioners have

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[2] Amici supporting petitioners in this case have likewise urged the Court to grant the government's petition in *Cargill*, while holding the petition here. See Gun Owners of Am. et al. Amici Br. 5.

forfeited some relevant arguments could complicate this Court's consideration of the question presented.

Second, although the decision below specifically declined to rely on *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837 (1984), petitioners devote a substantial portion of their petition to *Chevron*-related issues. See Pet. 20-24, 29-32. Petitioners suggest that they would follow the same approach to merits briefing if this Court granted plenary review—indeed, they go so far as to suggest (Pet. 29) that the Court should consider whether to "overrule *Chevron*" in this case if it does not reach that issue in *Loper Bright Enterprises, Inc.* v. *Raimondo*, cert. granted, No. 22-451 (May 1, 2023). But because the D.C. Circuit declined to rely on *Chevron*, this case does not properly present any question about the *Chevron* doctrine. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view."). And there is no sound reason to complicate the Court's review of the question of statutory interpretation that has divided the courts of appeals by granting review in a case where the petitioners' briefing is likely to focus on ancillary issues that are not properly presented.

Petitioners assert (Pet. 3 n.1) that even if the Court grants review in *Cargill*, it would "benefit from hearing from Petitioners in this case as well as the parties in *Cargill*." But the Court does not typically grant duplicative petitions merely to allow additional litigants to participate as parties—particularly where, as here, the second petition suffers from significant vehicle issues. If the Court grants the government's petition in *Cargill*, petitioners (and all other interested individuals and organizations) would be free to participate as amici. And in any event, petitioners do not identify any germane

arguments they would present that are not adequately presented in *Cargill*. To the contrary, petitioners extensively rely on the reasoning of the opinions in *Cargill*. See Pet. 4, 9, 17, 19, 21, 22, 24, 25, 26, 27, 28, 31, 32, 33. Granting review in *Cargill* would afford the Court an opportunity to review that same reasoning directly.

b. Petitioners propose a second question asking whether any ambiguity in the statutory definition "should be construed against the Government." Pet. i. That question does not independently warrant review. To the extent petitioners intend that question to encompass issues concerning *Chevron*, those issues are not properly presented. And to the extent petitioners ask this Court to decide whether the rule of lenity applies as a matter of statutory construction, that issue is fairly encompassed within the first question presented here and in the government's petition in *Cargill*. See Sup. Ct. R. 14.1(a); Gov't Cert. Reply Br. at 3-5, *Cargill*, *supra* (No. 22-976) (*Cargill* Reply). Indeed, this Court routinely considers the potential application of the rule of lenity in the absence of a separate question specifically raising it. See, *e.g.*, *Shular* v. *United States*, 140 S. Ct. 779, 787 (2020); *Shaw* v. *United States*, 580 U.S. 63, 71-72 (2016).

3. Petitioners also contend (Pet. 24-29) that the D.C. Circuit erred in holding that ATF's final rule reflects the best interpretation of the statute in light of its text, context, purpose, and history. As the government has explained at length in its filings in *Cargill*, that is wrong. See *Cargill* Pet. 15-26; *Cargill* Reply 5-7. A rifle modified with a bump stock—and thus the bump stock itself—is a "machinegun" as Congress defined that term because the bump stock creates a weapon that "fires automatically more than one shot * * * by a sin-

gle function of the trigger." 26 U.S.C. 5845(b). After the shooter pulls or otherwise engages the trigger a single time, the device is designed to channel the recoil energy of each shot into a back-and-forth cycle that causes the trigger to bump repeatedly against the shooter's stationary finger, continuously firing until all the ammunition is exhausted. See *Cargill* Pet. 16-17; 83 Fed. Reg. at 66,516, 66,553-66,554. The Fifth and Sixth Circuits' contrary decisions threaten to create a dangerous loophole in the federal prohibition on machineguns. *Cargill* Pet. 29-30.

## CONCLUSION

The petition for a writ of certiorari should be held pending this Court's consideration of the petition for a writ of certiorari in *Garland* v. *Cargill*, No. 22-976, and then disposed of as appropriate.

Respectfully submitted.

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SEPTEMBER 2023