No. 21-1215

In the Supreme Court of the United States

GUN OWNERS OF AMERICA, INC., ET AL., PETITIONERS

v.

MERRICK B. GARLAND, ATTORNEY GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General
MARK B. STERN
MICHAEL S. RAAB
ABBY C. WRIGHT
BRAD HINSHELWOOD
KYLE T. EDWARDS
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the district court abused its discretion in denying petitioners' request for a preliminary injunction in this challenge to a final rule interpreting the term "machinegun," 26 U.S.C. 5845(b), to encompass devices known as bump stocks, which permit users to fire a semiautomatic rifle continuously with a single pull of the trigger.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 14
A. The judgment below is correct and consistent with the results reached by every circuit court to have considered the final rule 15
B. Petitioners' two *Chevron* questions do not warrant further review 22
C. Further review would be especially unwarranted in this interlocutory posture 32
Conclusion 33

TABLE OF AUTHORITIES

Cases:

Abramski v. *United States*, 573 U.S. 169 (2014) 26, 28
Akins v. *United States*, 312 Fed. Appx. 197 (11th Cir.), cert. denied, 557 U.S. 942 (2009) 5, 7, 16, 20
Amaya v. *Rosen*, 986 F.3d 424 (4th Cir. 2021) 30
Aposhian v. *Barr*, 958 F.3d 969 (10th Cir. 2020), vacated on reh'g, 973 F.3d 1151 (10th Cir. 2020), reinstated, 989 F.3d 890 (10th Cir. 2021), petition for cert. pending, No. 21-159 (filed Aug. 2, 2021) 21, 22, 24
Azar v. *Allina Health Servs.*, 139 S. Ct. 1804 (2019) 23
Babb v. *Secretary*, 992 F.3d 1193 (11th Cir. 2021) 30
Babbitt v. *Sweet Home Chapter of Cmtys. for a Great Oregon*, 515 U.S. 687 (1995) 26
CFTC v. *Erskine*, 512 F.3d 309 (6th Cir. 2008) 30, 31

Cases—Continued: Page

Cargill v. *Garland*,
20 F.4th 1004 (5th Cir. 2021), petition for reh'g pending, No. 20-51016 (filed Jan. 28, 2022) 21, 22, 32
Chevron U.S.A. Inc. v. *NRDC, Inc.*,
467 U.S. 837 (1984) 9, 14, 26
City of Arlington v. *FCC*, 569 U.S. 290 (2013) 31
Crandon v. *United States*, 494 U.S. 152 (1990) 27
Edelman v. *Lynchburg Coll.*,
535 U.S. 106 (2002) 23
Estate of Sanford v. *Commissioner*,
308 U.S. 39 (1939) 31
Exxon Shipping Co. v. *Baker*, 554 U.S. 471 (2008) 32
Guedes v. *ATF*:
920 F.3d 1 (D.C. Cir. 2019), cert. denied,
140 S. Ct. 789 (2020) 21, 22, 24
140 S. Ct. 789 (2020) 15, 30
HollyFrontier Cheyenne Ref., LLC v. *Renewable Fuels Ass'n*, 141 S. Ct. 2172 (2021) 31
McCutchen v. *United States*,
14 F.4th 1355 (Fed. Cir. 2021) 21
Mendez v. *Barr*, 960 F.3d 80 (2d Cir. 2020) 28
Muscarello v. *United States*,
524 U.S. 125 (1998) 29
Mushtaq v. *Holder*, 583 F.3d 875 (5th Cir. 2009) 30
New York v. *United States Dep't of Justice*,
951 F.3d 84 (2d Cir. 2020), cert. dismissed,
141 S. Ct. 1291 (2021) 30
Perez v. *Mortgage Bankers Ass'n*,
575 U.S. 92 (2015) 23
Sash v. *Zenk*, 428 F.3d 132 (2d Cir. 2005),
cert. denied, 549 U.S. 920 (2006) 28

Cases—Continued: Page

Sierra Club v. *EPA*,
252 F.3d 943 (8th Cir. 2001) 30
Staples v. *United States*, 511 U.S. 600 (1994) 17, 29
United States v. *Alkazahg*,
No. 202000087, 2021 WL 4058360
(N-M. Ct. Crim. App. Sept. 7, 2021) 22
United States v. *Apel*, 571 U.S. 359 (2014) 26
United States v. *Balde*,
943 F.3d 73 (2d Cir. 2019) 27
United States v. *Camp*,
343 F.3d 743 (5th Cir. 2003) 20
United States v. *Garcia*,
707 Fed. Appx. 231 (5th Cir. 2017) 27
United States v. *Kuzma*,
967 F.3d 959 (9th Cir.), cert. denied,
141 S. Ct. 939 (2020) 28
United States v. *Mead Corp.*,
533 U.S. 218 (2001) 23
United States v. *O'Hagan*, 521 U.S. 642 (1997) 25, 26
United States v. *Olofson*,
563 F.3d 652 (7th Cir.), cert. denied,
558 U.S. 948 (2009) 19
United States v. *Wells*, 519 U.S. 482 (1997) 29
Virginia Military Inst. v. *United States*,
508 U.S. 946 (1993) 32
Wisniewski v. *United States*,
353 U.S. 901 (1957) 29, 31

Constitution, statutes, regulations, and rule:

U.S. Const. Amend. V 9
Act of June 26, 1934, ch. 757, 48 Stat. 1236 2
Administrative Procedure Act,
5 U.S.C. 701 *et seq.* 9

Statutes, regulations, and rule—Continued: Page

Clean Air Act, 42 U.S.C. 7401 *et seq.* (1982):
42 U.S.C. 7413(c)(1) 25
42 U.S.C. 7502(a)(1) 25
42 U.S.C. 7502(b)(6) 25
Firearms Owners' Protection Act, Pub. L. No. 99-308, 100 Stat. 449:
§ 101(6), 100 Stat. 450 (18 U.S.C. 921(a)(23)) 2
§ 102(9), 100 Stat. 452-453 (18 U.S.C. 922(*o*)) 2
Gun Control Act of 1968, Pub. L. No. 90-618, Tit. II, sec. 201, § 5845(b), 82 Stat. 1231 2
National Firearms Act, 26 U.S.C. 5801 *et seq.* 2
26 U.S.C. 5841(c) 3
26 U.S.C. 5845(b) ..... *passim*
Public Safety and Recreational Firearms Use Protection Act, Pub. L. No. 103-322, Tit. XI, Subtit. A, 108 Stat. 1996:
§ 110102, 108 Stat. 1996-1998 3
§ 110105, 108 Stat. 2000 3
10 U.S.C. 867 22
15 U.S.C. 78n(e) 26
15 U.S.C. 78ff(a) 26
16 U.S.C. 1540(b)(1) 26
18 U.S.C. 4 28
18 U.S.C. 921(a)(30) (2000) 3
18 U.S.C. 922(v) (2000) 3
18 U.S.C. 926(a) 7
26 U.S.C. 7801(a)(2)(A)(i) 7
26 U.S.C. 7805(a) 7
27 C.F.R.:
Section 447.11 ..... 7, 8
Section 478.11 ..... 7, 8

Regulations and rule—Continued: Page

Section 479.11 ..... 7, 8

28 C.F.R.:

Section 0.130(a)(1) 7

Section 0.130(a)(2) 7

Sup. Ct. R. 10 22

Miscellaneous:

ATF, U.S. Dep't of Justice:

National Firearms Act Handbook (Apr. 2009) 3, 15, 16

Ruling 2006-2 (Dec. 13, 2006), go.usa.gov/xpbEX 5

82 Fed. Reg. 60,929 (Dec. 26, 2017) 6

83 Fed. Reg. 7949 (Feb. 23, 2018) 6, 7

83 Fed. Reg. 13,442 (Mar. 29, 2018) 7

83 Fed. Reg. 66,514 (Dec. 26, 2018) ..... *passim*

H.R. Rep. No. 1780, 73d Cong., 2d Sess. (1934) 17

H.R. Rep. No. 495, 99th Cong., 2d Sess. (1986) 3

National Firearms Act: Hearings Before the House Comm. on Ways and Means on H.R. 9066, 73d Cong., 2d Sess. (1934) 17

S. Rep. No. 1444, 73d Cong., 2d Sess. (1934) 17

In the Supreme Court of the United States

No. 21-1215

GUN OWNERS OF AMERICA, INC., ET AL., PETITIONERS

v.

MERRICK B. GARLAND, ATTORNEY GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The order of the en banc court of appeals affirming the district court's judgment by an equally divided vote and the opinions respecting that order (Pet. App. 1a-75a) are reported at 19 F.4th 890. The en banc court's earlier order vacating the panel decision and granting rehearing is reported at 2 F.4th 576. The vacated panel opinion (Pet. App. 76a-172a) is reported at 992 F.3d 446. An earlier order of the court of appeals denying petitioners' motion for a stay pending appeal is not published in the Federal Reporter but is available at 2019 WL 1395502. The opinion of the district court (Pet. App. 173a-193a) is reported at 363 F. Supp. 3d 823.

JURISDICTION

The judgment of the court of appeals was entered on December 3, 2021. The petition for a writ of certiorari was filed on March 3, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

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). Since 1968, the term has also been defined to encompass 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 or possession of machineguns in 1934 as part of the internal revenue laws. See Act of June 26, 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, 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. § 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 for 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 particular weapons or devices constitute machineguns as defined above. 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 (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," 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.

2. a. In 2004, a federal ban on certain semiautomatic "assault weapons" expired.[1] Since that time, ATF has received a growing number of classification requests from inventors and manufacturers seeking to

---

[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.

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); see *id.* at 66,516 ("Shooters use [these] devices with semiautomatic firearms to accelerate the firearms' cyclic firing rate to mimic automatic fire."). 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 exhausted.'" *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. It explained that interpreting the phrase "single function of the trigger" in 26 U.S.C. 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 (Dec. 13, 2006), go.usa.gov/xpbEX. 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," on the theory that, without the spring, the device would no longer operate "automatically." 83 Fed. Reg. at 66,517.

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 decisions 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.

b. In 2017, a shooter used semiautomatic weapons equipped with bump stock devices of the type at issue here 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 February 20, 2018, after the comment period had ended, President Trump issued a memorandum concerning bump stocks to the Attorney General. See 83 Fed. Reg. 7949 (Feb. 23, 2018). The President instructed the Department of Justice "to dedicate all available re-

sources to complete the review of the comments received, and, as expeditiously as possible, to propose for notice and comment a rule banning all devices that turn legal weapons into machineguns." *Ibid.*

On March 29, 2018, the Attorney General published a notice of proposed rulemaking regarding amendments to the definition of "machinegun" in three ATF regulations, 27 C.F.R. 447.11, 478.11, and 479.11. See 83 Fed. Reg. 13,442, 13,457 (Mar. 29, 2018). The notice stated that ATF's post-2006 classification letters addressing bump stock devices 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 stock devices 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); see *id.* at 13,447 (observing that ATF's classifications between 2008 and 2017 "did not reflect the best interpretation of the term 'automatically'"). The notice proposed to "clarify that all bump-stock-type devices are 'machineguns'" under the applicable statutory definitions. *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.[2] The final rule—which is at issue in this case—amended ATF's regulations to address the

---

[2] By delegation, ATF may exercise the Attorney General's authority to prescribe rules and regulations to carry out the National Firearms Act, the Gun Control Act, and other firearms legislation. See 18 U.S.C. 926(a); 26 U.S.C. 7801(a)(2)(A)(i), 7805(a); 28 C.F.R. 0.130(a)(1) and (2).

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 26 U.S.C. 5845(b). 83 Fed. Reg. 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. The agency also determined that 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," notwithstanding ATF's erroneous prior bump-stock classifications. *Id.* at 66,519; see *id.* at 66,531. In the agency's view, those definitions "represent the best interpretation of the statute." *Id.* at 66,521; see *id.* at 66,553-66,554 (amending 27 C.F.R. 447.11, 478.11, and 479.11 to incorporate those definitions of "single function of the trigger" and "automatically").

The agency further explained that, upon review, it had concluded that bump stocks qualify as machineguns under those definitions. Bump stocks enable a shooter to engage in a firing sequence that is "automatic." 83 Fed. Reg. 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-shroud 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.

Consistent with the amended regulations, ATF rescinded its prior letters concluding that certain bump stocks were not machineguns. See 83 Fed. Reg. at 66,514, 66,523, 66,530-66,531, 66,549. 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, and it specified that the rule would not take effect until 90 days after publication in the *Federal Register*. *Id.* at 66,530. The agency stated that individuals who complied with the rule "will not be in violation of the law or incarcerated as a result." *Id.* at 66,539.

3. Petitioners—Gun Owners of America, Inc., three of its individual members, and two other gun-owner advocacy groups—brought this action in the Western District of Michigan to challenge ATF's final rule. Compl. ¶¶ 10-15. The complaint asserts claims under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, and the Fifth Amendment. Compl. ¶¶ 132-151. In December 2018, petitioners sought a preliminary injunction, based solely on their APA claims, to prevent the rule from taking effect. See D. Ct. Doc. 10, at 3-5 (Dec. 26, 2018).

The district court denied petitioners' motion for a preliminary injunction. Pet. App. 173a-193a. Although neither party had asked the court to apply the *Chevron* framework, the court viewed itself as obligated by precedent to do so. *Id.* at 182a-184a; see *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837, 842-843 (1984). Under that two-step framework, the court took the view that

the term "automatically" is ambiguous, insofar as Congress did not clearly speak to the degree to which a device may be treated as firing automatically even if it requires some "application of non-trigger, manual forces in order for multiple shots to occur." Pet. App. 187a. The court further determined that ATF's interpretation of that term to encompass bump stock devices was "permissible" and entitled to deference. *Ibid.* The court also took the view that "the statutory definition of machine gun is ambiguous with respect to the phrase 'single function of the trigger,'" and concluded that ATF had reasonably resolved the perceived ambiguity in interpreting that phrase to include a "'single pull of the trigger.'" *Id.* at 188a. The court therefore determined that petitioners are not likely to succeed in showing that the final rule is contrary to the statutory definition. *Id.* at 189a. The court also held that petitioners are not likely to succeed in showing that the rule is arbitrary or capricious, *id.* at 189a-191a, and that the balance of equities does not favor petitioners, observing that bump stocks place "[a]ll of the public * * * at risk," *id.* at 192a.

4. The district court denied petitioners' motion for a preliminary injunction on March 21, 2019, which was several days before the rule was scheduled to take effect. Pet. App. 193a; see 83 Fed. Reg. at 66,514. Before the district court's decision, petitioners had filed a petition in the court of appeals for a writ of mandamus, seeking an order that would have required the district court to enjoin the rule pending a decision on petitioners' preliminary-injunction motion. 19-1268 Pets. C.A. Mandamus Pet. 1 (Mar. 19, 2019). In the same filing, petitioners had asked the court of appeals itself to stay the rule pending any future appeal. *Ibid.*

On March 22, 2019, after the district court's decision, the court of appeals dismissed petitioners' mandamus petition as moot and denied petitioners' motion for a stay, without prejudice to renewing the motion in the event of an appeal. 19-1268 C.A. Order 1-2. Petitioners filed a notice of appeal and renewed their request for a stay pending appeal. 19-1298 Pets. C.A. Stay Mot. 3-4. On March 25, the court of appeals denied petitioners' motion for a stay, holding that petitioners had failed to show a "likelihood of an abuse of discretion" and that "the public interest in safety supports the denial of a stay pending appeal." 2019 WL 1395502, at *1.

Petitioners then applied to Justice Sotomayor for a stay of the rule pending appeal. 18A963 Appl. 1-3. Justice Sotomayor referred petitioners' application to the Court, which denied it on March 28, 2019, without noted dissent. 139 S. Ct. 1406 (No. 18A963).

5. After vacating a divided panel opinion that would have reversed and remanded for entry of a preliminary injunction (Pet. App. 76a-172a), the en banc court of appeals affirmed the district court's order by an equally divided vote (*id.* at 1a-4a).

a. In the vacated panel decision, the panel majority concluded that the district court had erred in applying the *Chevron* framework because, in the majority's view, that framework is "categorically" inapplicable when an agency interprets a statute "that impose[s] criminal penalties." Pet. App. 88a. The majority acknowledged that both circuit precedent and prior decisions of this Court had granted *Chevron* deference to agency interpretations of statutes carrying both civil and criminal penalties, see *id.* at 92a-97a, but it found those cases distinguishable on the ground that they did not involve a

"purely criminal statute," *id.* at 98a. The majority proceeded to analyze the statute without deference to the agency's interpretation and concluded that bump stocks do not "fall within the statutory definition of a machine gun," on the theory that firing continuously with a bump stock involves more than a "'single function of the trigger.'" *Id.* at 120a; see *id.* at 120a-129a. Judge White dissented, explaining that she would have applied the *Chevron* framework and affirmed the denial of a preliminary injunction. *Id.* at 134a-172a.

b. The government filed a petition for rehearing en banc, arguing in part that the panel decision was inconsistent with decisions of the Tenth and D.C. Circuits rejecting similar challenges to the same final rule. 19-1298 Gov't C.A. Reh'g Pet. 1-2. The en banc court of appeals granted the government's motion and vacated the panel opinion. 2 F.4th 576.

c. After additional briefing and argument, the en banc court of appeals affirmed the district court's judgment by an equally divided 8-8 vote. Pet. App. 1a-4a. Judges White and Gibbons issued opinions in support of affirmance (*id.* at 4a-33a, 33a-34a), and Judge Murphy issued a dissenting opinion (*id.* at 35a-75a).

Judge White, joined by four of her colleagues, stated that "*Chevron* supplies the standard of review for assessing the validity" of ATF's final rule. Pet. App. 9a; see *id.* at 3a. Although the government had not invoked *Chevron* in the litigation, Judge White stated that whether and how to apply that doctrine was ultimately "a question for the court to decide, not an agency's lawyers." *Id.* at 10a n.6. She also explained that the sharp civil/criminal distinction drawn in the vacated panel decision is "not what the case law says," emphasizing that

"*Chevron* itself" involved a statute with criminal penalties. *Id.* at 12a. And Judge White agreed with the district court that, under *Chevron*, the agency's interpretation of the statute was reasonable. *Id.* at 20a-29a. She further concluded that, in any event, "ATF's interpretation of the statute is the best one" even "ignoring all deference." *Id.* at 31a. She explained that the definition of machinegun is best read to encompass "any weapon that is capable of discharging multiple rounds by means of a mechanism set in motion by a single function of the trigger." *Id.* at 31a-32a.

Judge Gibbons, joined by four of her colleagues, generally agreed with Judge White's view of *Chevron* but wrote separately to emphasize that applying that framework is "unnecessary here" because, as Judge White concluded in the alternative, "ATF's interpretation of 'single function of the trigger' and 'automatically' is unambiguously the best interpretation of the Gun Control Act using ordinary tools of statutory construction." Pet. App. 33a; see *id.* at 3a. Judge Gibbons explained that firing more than one shot without manual reloading, by a single function of the trigger, is "precisely what a bump stock is designed to allow a gun to do, and that is why people purchase bump stocks." *Id.* at 34a. And Judge Gibbons warned that petitioners' contrary view would "allow gun manufacturers to circumvent Congress's longtime ban on machineguns by designing parts specifically intended to achieve machinegun functionality with a single pull of the trigger so long as the part also requires some minutia of human involvement." *Ibid.*

Judge Murphy, joined by the other seven dissenting judges, would have held that bump stocks do not qualify as machineguns because rifles equipped with bump stocks fire continuously only if the trigger is reengaged

by contact with the shooter's stationary finger, which in turn requires the application of some "manual force" from the "non-trigger hand." Pet. App. 41a; see *id.* at 40a-47a. The dissenting judges also would not have applied the *Chevron* framework to ATF's interpretation of a statute with criminal penalties. See *id.* at 48a-68a.

ARGUMENT

Petitioners briefly assert (Pet. 14-15) that the definition of "machinegun" in the National Firearms Act, 26 U.S.C. 5845(b), excludes bump stocks that allow semiautomatic rifles to fire continuously at rates of hundreds of bullets per minute with a single pull of the trigger. The courts below correctly rejected that argument, as has every other court of appeals to consider it. And in this Court, petitioners do not develop their statutory argument in any detail.

Instead, petitioners principally argue (Pet. 16-37) that this Court should grant certiorari to decide two abstract questions about *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837 (1984): Whether an agency may "waive" *Chevron* deference in litigation, and whether *Chevron* is categorically inapplicable to statutes for which Congress has authorized criminal penalties. But this case would be a particularly unsuitable vehicle for addressing those questions. Throughout this litigation, the government has consistently maintained that *Chevron* is not applicable. Instead, the government has argued that the rule reflects the best interpretation of the statutory definition of "machinegun," wholly apart from any deference. Every court of appeals judge who wrote or joined an opinion supporting the judgment below agreed. See Pet. App. 31a-32a (opinion of White, J.); *id.*

at 33a-34a (opinion of Gibbons, J.). Whether ATF's interpretation is eligible for *Chevron* deference is thus academic.

The judgment below also does not conflict with any decision of this Court or another court of appeals. Indeed, because the Sixth Circuit affirmed the denial of a preliminary injunction by an equally divided vote, this interlocutory case thus far has not resulted in any precedential decision at all. The Fifth, Tenth, and D.C. Circuits have rejected similar challenges to the same final rule, and this Court has already declined to review the D.C. Circuit's decision. See *Guedes* v. *ATF*, 140 S. Ct. 789 (2020) (No. 19-296). It should do the same here.[3]

A. The Judgment Below Is Correct And Consistent With The Results Reached By Every Circuit Court To Have Considered The Final Rule

The court of appeals correctly affirmed the district court's denial of a preliminary injunction. As ATF explained in adopting the final rule, the definition of "machinegun," 26 U.S.C. 5845(b), is best understood to encompass bump stock devices. That question of statutory interpretation is not the subject of any conflict of authority warranting this Court's review.

1. As explained above (see p. 3, *supra*), ATF has established a process that allows inventors and manufacturers to obtain a classification of their devices that will provide "the agency's official position concerning the status of the firearms under Federal firearms laws." *NFA Handbook* 41. ATF has made clear, however, that

---

[3] A petition for a writ of certiorari seeking review of the Tenth Circuit's decision remains pending. See *Aposhian* v. *Garland*, No. 21-159 (filed Aug. 2, 2021).

"classifications are subject to change if later determined to be erroneous or impacted by subsequent changes in the law or regulations." *Ibid.* ATF regularly receives classification requests for devices with rates of fire comparable to machineguns. In classifying those devices, the agency considers whether (a) "by a single function of the trigger" they (b) fire "automatically more than one shot," 26 U.S.C. 5845(b). ATF correctly determined that bump stocks satisfy both requirements.

a. In 2002, when ATF first evaluated the Akins Accelerator, it concluded that the "single function" language was not satisfied where the device is configured so that the trigger repeatedly bumps the shooter's stationary finger. 83 Fed. Reg. at 66,517. In reclassifying that device in 2006, however, ATF recognized that a "single function of the trigger" includes a "single pull of the trigger." See *ibid.* Like the bump stocks at issue here, the Akins Accelerator bump stock enabled the weapon to recoil within the stock, "permitting the trigger to lose contact with the finger" and reset itself. *Ibid.* "Springs in the Akins Accelerator then forced the rifle forward, forcing the trigger against the finger" in a back-and-forth cycle that enabled continuous firing. *Ibid.* The Akins Accelerator "was advertised as able to fire approximately 650 rounds per minute." *Ibid.* In *Akins* v. *United States*, 312 Fed. Appx. 197 (per curiam), cert. denied, 557 U.S. 942 (2009), the Eleventh Circuit upheld ATF's interpretation of "single function of the trigger," and ATF has applied that interpretation consistently since then.

ATF's interpretation of the phrase "single function of the trigger" reflects the common-sense understanding of how most weapons are fired: by the shooter's pull

on a curved metal trigger. Indeed, this Court has described the statute in exactly those terms, explaining that a "machinegun" under the National Firearms Act is a weapon that "fires repeatedly with a single pull of the trigger." *Staples* v. *United States*, 511 U.S. 600, 602 n.1 (1994).

The same understanding was prevalent when Congress first enacted the definition of "machinegun" in 1934. The relevant committee report noted that the legislation "contain[ed] the usual definition of machine gun as a weapon designed to shoot more than one shot without reloading and by a single pull of the trigger." H.R. Rep. No. 1780, 73d Cong., 2d Sess. 2 (1934); accord S. Rep. No. 1444, 73d Cong., 2d Sess. 1-2 (1934) (reprinting House committee report's "detailed explanation" of the bill's provisions, including the quoted language). The then-president of the National Rifle Association had proposed during earlier hearings that a machinegun should be defined as a weapon "which shoots automatically more than one shot without manual reloading, by a single function of the trigger." *National Firearms Act: Hearings Before the House Comm. on Ways and Means on H.R. 9066*, 73d Cong., 2d Sess. 40 (1934) (statement of Karl T. Frederick, President, Nat'l Rifle Ass'n of Am.). Explaining that proposal, he stated that "[t]he distinguishing feature of a machine gun is that by a single pull of the trigger the gun continues to fire as long as there is any ammunition," and that any weapon "which is capable of firing more than one shot by a single pull of the trigger, a single function of the trigger, is properly regarded, in my opinion, as a machine gun." *Ibid.*

The question under the statute is thus whether the shooter initiates the automatic firing with a single function of the trigger, not—as petitioners suggest (Pet. 14)—whether the trigger moves after that initial function. With respect to the typical protruding curved trigger on a semiautomatic rifle, the action that initiates the firing sequence is the shooter's pull on the trigger. On an unmodified semiautomatic weapon, that single pull results in the firing of a single shot. For a subsequent shot, the shooter must release his pull on the trigger so that the hammer can reset and the shooter can pull the trigger again. But on a machinegun—including a weapon equipped with a bump stock—that same single pull of the trigger initiates a continuous process that fires bullets until the ammunition is exhausted. Once the trigger has performed its function of initiating the firing sequence in response to the shooter's pull, the weapon fires "automatically more than one shot, without manual reloading," 26 U.S.C. 5845(b). The fact that bump stocks automate the back-and-forth movement of the trigger rather than the internal movement of the hammer does not take them outside the statutory definition.

b. The only interpretive change in the 2018 rule concerns the term "automatically." In reclassifying the bump stocks at issue here, ATF recognized that it had not previously provided "substantial or consistent legal analysis regarding the meaning of the term 'automatically.'" 83 Fed. Reg. at 66,518. The agency explained that the crucial question is whether the "firing sequence is 'automatic,'" *id.* at 66,519, and that its prior classification letters had either provided no analysis of that issue or had erroneously focused on the absence of "mechanical parts or springs" in concluding that certain

bump stocks are not machineguns, *id.* at 66,518. ATF explained in the rule that a weapon fires "'automatically'" when it fires "as the result of a self-acting or self-regulating mechanism that allows the firing of multiple rounds." *Id.* at 66,554; accord *United States* v. *Olofson*, 563 F.3d 652, 658 (7th Cir.), cert. denied, 558 U.S. 948 (2009). A bump stock, by design, meets that definition. Its basic purpose is "to eliminate the need for the shooter to manually capture, harness, or otherwise utilize th[e] [recoil] energy" of each shot "to fire additional rounds," by "'directing the recoil energy of the discharged rounds into the space created by the sliding stock,'" ensuring that the rifle moves in a "'constrained linear rearward and forward path[]'" to enable continuous fire. 83 Fed. Reg. at 66,532 (citation omitted).

c. ATF's final rule correctly interprets the component terms of the statutory definition of "machinegun," correctly applies those interpretations to conclude that bump stocks are machineguns, and persuasively explains that ATF's prior classification of those devices as non-machineguns was erroneous. The six members of the court of appeals who authored or joined opinions in support of affirmance were therefore correct to conclude that "ATF's interpretation of the statute is the best one." Pet. App. 31a (opinion of White, J.); see *id.* at 33a (opinion of Gibbons, J.) ("The ATF's interpretation of 'single function of the trigger' and 'automatically' is unambiguously the best interpretation of the Gun Control Act using ordinary tools of statutory construction.").

2. Petitioners assert (Pet. 14-15) that the statute unambiguously excludes bump stock devices. But they fail to develop that argument in any meaningful way. Indeed, despite notionally seeking this Court's review of the question whether bump stocks meet the statutory

definition (Pet. i), petitioners devote only a few short paragraphs to attempting to rebut the careful textual analysis, summarized above, that ATF gave in adopting the final rule. Those cursory arguments are unavailing.

The final rule does not "replace" the word "function" with the word "pull," Pet. 15 (emphasis omitted), but rather reasonably confirms the agency's prior view that a "single function of the trigger" includes a "single pull of the trigger." See pp. 16-18, *supra*. That view is consistent with both ordinary language and common-sense understandings of how guns work, and it was the basis for ATF's decision to classify the original Akins Accelerator as a machinegun. The Eleventh Circuit upheld that classification in a decision this Court declined to review. *Akins* v. *United States*, *supra*.

Petitioners' contrary reading of the phrase "single function of the trigger," which would apparently exclude any device in which the trigger is mechanically engaged more than once in response to a single pull of the trigger (see Pet. 14), is impossible to square with *Akins*. Petitioners' interpretation would also call into question the status of other weapons described in the final rule, which automate a weapon's firing sequence in response to a single trigger pull, see 83 Fed. Reg. at 66,517-66,518 & n.4, as well as comparable devices found to be machineguns by other courts of appeals, see, *e.g.*, *United States* v. *Camp*, 343 F.3d 743, 744-745 (5th Cir. 2003).

Petitioners are also wrong to contend (Pet. 14) that a rifle equipped with a bump stock does not function "automatically" because it requires "complex human input" beyond a single pull of the trigger. The only additional human input a bump stock requires after the initial trigger pull is forward pressure by the shooter on the front of the weapon with the non-trigger hand. But

even prototypical machineguns require the shooter to maintain pressure on the weapon after the initial pull—in that case, backward pressure on the trigger. A firearm operates "automatically" whether it requires constant backward pressure on the trigger or constant forward pressure on the front of the weapon. Either way, the weapon is "self-acting under conditions fixed for it." 83 Fed. Reg. at 66,519 (brackets and citation omitted). And as Judge Gibbons explained, "[h]olding otherwise would allow gun manufacturers to circumvent Congress's longtime ban on machineguns by designing parts specifically intended to achieve machinegun functionality with a single pull of the trigger so long as the part also requires some minutia of human involvement." Pet. App. 34a.

3. The question whether bump stocks are machineguns is not the subject of any conflict of authority warranting further review. The judgment below is consistent with the result reached by three other courts of appeals, which have rejected similar challenges to the same final rule. In *Guedes* v. *ATF*, 920 F.3d 1 (2019) (per curiam), cert. denied, 140 S. Ct. 789 (2020), the D.C. Circuit upheld the rule in an appeal from the denial of a preliminary injunction. The Tenth Circuit did the same in *Aposhian* v. *Barr*, 958 F.3d 969 (2020), vacated on reh'g, 973 F.3d 1151 (10th Cir. 2020), reinstated, 989 F.3d 890 (10th Cir. 2021), petition for cert. pending, No. 21-159 (filed Aug. 2, 2021). And the Fifth Circuit upheld the rule in an appeal from a final judgment in ATF's favor. See *Cargill* v. *Garland*, 20 F.4th 1004 (2021), petition for reh'g pending, No. 20-51016 (filed Jan. 28, 2022).[4]

---

[4] The Federal Circuit also rejected takings claims asserted by former bump-stock owners. See *McCutchen* v. *United States*, 14 F.4th 1355, 1357-1358 (2021).

Notably, the Fifth Circuit upheld the final rule as the best interpretation of the statute and therefore found it unnecessary to address whether *Chevron* applies. See *Cargill*, 20 F.4th at 1009-1014 & n.4. The D.C. and Tenth Circuits upheld the final rule under the *Chevron* framework. See *Guedes*, 920 F.3d at 17-32; *Aposhian*, 958 F.3d at 979-989. That trio of results, in which several courts of appeals all reached the same bottom-line conclusion with and without relying on *Chevron*, underscores that the validity of the rule does not turn on the application of *Chevron*.

In *United States* v. *Alkazahg*, No. 202000087, 2021 WL 4058360 (Sept. 7, 2021) (cited at Pet. 13), the U.S. Navy-Marine Corps Court of Criminal Appeals concluded that bump stocks do not satisfy the definition of "machinegun" in the National Firearms Act and, therefore, that a servicemember's possession of such a device did not violate the Uniform Code of Military Justice. See *id.* at *16. Although the court found the statutory definition of "machinegun" ambiguous, see *id.* at *11-*12, it stated that the relevant terms are "best read" not to encompass bump stocks, *id.* at *12. But the U.S. Navy-Marine Corps Court of Criminal Appeals is not the highest court in the military justice system, see 10 U.S.C. 867, and the U.S. Court of Appeals for the Armed Forces has not yet considered the question. The erroneous decision in *Alkazahg* thus does not create a conflict warranting this Court's review. See Sup. Ct. R. 10.

B. Petitioners' Two *Chevron* Questions Do Not Warrant Further Review

Petitioners' second and third questions, to which most of the petition is devoted (see Pet. 17-37), are abstract methodological questions about *Chevron*. Entertaining those questions in this case would be anomalous, both

because all parties agree that *Chevron* does not apply, albeit for different reasons, and because deference is unnecessary to sustain the final rule, which reflects the best interpretation of the statute. Cf. *Edelman* v. *Lynchburg Coll.*, 535 U.S. 106, 114 (2002) (observing that "there is * * * no point in asking what kind of deference, or how much," an agency's interpretation should receive if the agency has adopted "the position [the Court] would adopt" without deference). In any event, petitioners' *Chevron* questions also do not warrant further review.

1. As the government has maintained throughout this litigation, *Chevron* does not apply here. The district court's contrary conclusion rested on the premise that, in the final rule, ATF was "speak[ing] with the force of law," *i.e.*, adopting a regulation with legal force and effect independent of the statute itself. Pet. App. 184a; cf. *id.* at 8a-9a (opinion of White, J.). That premise is unsound.

Agency rules that carry the force and effect of law are known as "legislative rules." *Perez* v. *Mortgage Bankers Ass'n*, 575 U.S. 92, 97 (2015); see *Azar* v. *Allina Health Servs.*, 139 S. Ct. 1804, 1811 (2019). Legislative rules are generally eligible to receive *Chevron* deference. See, *e.g.*, *United States* v. *Mead Corp.*, 533 U.S. 218, 232 (2001). By contrast, interpretive rules "do not have the force and effect of law." *Perez*, 575 U.S. at 97 (citation omitted). Interpretive rules instead serve as a form of guidance, informing "the public of [an] agency's construction of the statutes and rules which it administers." *Ibid.* (citation omitted).

The final rule here is interpretive, not legislative. ATF's rulemaking notice makes clear that the only source of legal force for the prohibition on bump stocks

is Congress's statutory ban on new machineguns, not the rule itself. See, *e.g.*, 83 Fed. Reg. at 66,529 ("[T]he impetus for this rule is the Department's belief, after a detailed review, that bump-stock-type devices satisfy the statutory definition of 'machinegun.'"); *ibid.* ("ATF must * * * classify devices that satisfy the statutory definition of 'machinegun' as machineguns."); *id.* at 66,535 ("[T]he Department has concluded that the [National Firearms Act] and [Gun Control Act] require regulation of bump-stock-type devices as machineguns."). Thus, ATF determined that bump stocks *are* machineguns under the statute, not that the agency had discretionary authority under the statute to classify them as machineguns.

Some courts have incorrectly concluded that the final rule is legislative because the preamble refers to *Chevron*, 83 Fed. Reg. at 66,527; because the rule includes an effective date; and because the rule was issued via notice and comment and published in the Code of Federal Regulations. See *Aposhian*, 958 F.3d at 979-981; *Guedes*, 920 F.3d at 17-20. None of those considerations, alone or together, supports disregarding ATF's own position that the rule is merely interpretive. The preamble's brief discussion of *Chevron* establishes at most that the agency believed its interpretation would be upheld even if the statutory language were deemed ambiguous; the agency included an effective date to advise the public of the date on which it would begin to enforce its revised interpretation; and neither the use of notice and comment nor publication in the Code of Federal Regulations makes an otherwise interpretive rule legislative. See Gov't Br. in Opp. at 22-24, *Guedes*, *supra* (No. 19-296).

Petitioners' *Chevron* questions would arise only if the rule were eligible for deference under that framework. But petitioners do not address the distinction between legislative and interpretive rules and do not ask this Court to address the question whether the final rule is legislative. That question—which turns on the particular details of this specific rulemaking—does not warrant this Court's review. And the presence of that case-specific antecedent question would make this an inappropriate vehicle in which to consider petitioners' *Chevron* questions even if those questions otherwise warranted review.

2. In any event, petitioners' *Chevron* questions do not warrant review even on their own terms. Petitioners first seek review of whether the *Chevron* framework applies to "criminal statutes." Pet. i; see Pet. 17-29. But petitioners fail to identify any conflict of authority on that question. At bottom petitioners' attack on the application of *Chevron* to agency interpretations of statutes carrying potential criminal penalties is "largely based on policy, analogy, and law review articles, but not precedent." Pet. App. 16a-17a (opinion of White, J.) (footnote omitted).

a. This Court has applied *Chevron* deference to agency interpretations of statutes with criminal applications. Indeed, that was true in *Chevron* itself, in which the Court deferred to an agency's interpretation of the term "stationary source" for purposes of a permitting requirement in the Clean Air Act, 42 U.S.C. 7502(a)(1) and (b)(6) (1982). A knowing violation of that requirement was a federal crime. 42 U.S.C. 7413(c)(1) (1982). Similarly, in *United States* v. *O'Hagan*, 521 U.S. 642 (1997), this Court applied *Chevron* in an insider-

trading prosecution to defer to the Securities and Exchange Commission's interpretation of a statute administered by the Commission. The statutory scheme prohibits "fraudulent, deceptive, or manipulative acts and practices" in connection with tender offers, 15 U.S.C. 78n(e); authorizes the Commission to define those terms by regulation, *ibid.*; and makes willful violations of the agency's rules a felony, 15 U.S.C. 78ff(a). This Court afforded "controlling weight" to the Commission's regulation. *O'Hagan*, 521 U.S. at 673 (quoting *Chevron*, 467 U.S. at 844). And in *Babbitt* v. *Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995), the Court applied *Chevron* to uphold an agency's interpretation of ambiguous statutory language, even though a violation carried criminal consequences, see *id.* at 703, 704 n.18; see also 16 U.S.C. 1540(b)(1).

Petitioners contrast (Pet. 19-20) those decisions with the Court's later observation that "criminal laws are for courts, not for the Government, to construe," *Abramski* v. *United States*, 573 U.S. 169, 191 (2014), as well as the Court's statement that it has "never held that the Government's reading of a criminal statute is entitled to any deference," *United States* v. *Apel*, 571 U.S. 359, 369 (2014). But *Abramski* and *Apel* did not involve agency regulations with any claim to *Chevron* deference. *Abramski* declined to defer to decades-old, non-binding guidance documents that the agency no longer followed. 573 U.S. at 191. And in *Apel*, the defendant sought to rely on certain statements in the United States Attorneys' Manual, a collection of "'internal * * * guidance'" for federal prosecutors that is "not intended to be binding." 571 U.S. at 368-369 (citation omitted). Those de-

cisions underscore that there is a "vast body of administrative interpretation" to which *Chevron* simply does not apply. *Crandon* v. *United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring in the judgment) (emphasis omitted). But they do not call into question the applicability of *Chevron* to rules like the ones at issue in *Chevron*, *O'Hagan*, and *Sweet Home*.

b. Petitioners contend (Pet. 22-24) that the courts of appeals are divided on the question whether *Chevron* may apply when an agency interprets a statute carrying criminal penalties, but the decisions petitioners identify do not demonstrate any such conflict.

In *United States* v. *Garcia*, 707 Fed. Appx. 231 (2017) (per curiam), the Fifth Circuit stated that *Abramski* "resolved" that "no deference is owed to agency interpretations of criminal statutes," *id.* at 234. But the court also characterized the regulation at issue there as "interpretive." *Ibid.* (citation omitted); see p. 23, *supra* (discussing the distinction between legislative and interpretive rules). And to the extent the court construed *Abramski* to hold that *Chevron* is categorically inapplicable to regulations with potential criminal applications, that understanding is unsound for the reasons given above; the panel adopted it without the benefit of any briefing on the question, see, *e.g.*, Gov't C.A. Br. at 20-44, *Garcia*, *supra* (No. 16-40475); and the decision was unpublished and non-precedential.

In *United States* v. *Balde*, 943 F.3d 73 (2019), the Second Circuit likewise observed that, in light of *Abramski*, the court was "not required to defer to" the same regulation that was at issue in *Garcia*. See *id.* at 83 (citing *Garcia*, *supra*). But that observation was merely dicta, offered "[i]n any event," *ibid.*, after the court had already rejected the defendant's arguments

for multiple other reasons. Likewise, in *Mendez* v. *Barr*, 960 F.3d 80 (2020), the Second Circuit merely declined to defer to the Board of Immigration Appeals' interpretation of a criminal statute that the Board is not charged with administering, see *id.* at 88 (discussing 18 U.S.C. 4), without addressing any broader question about *Chevron* and criminal statutes. And in other cases, which the *Balde* and *Mendez* panels did not discuss or purport to overrule, the Second Circuit has applied *Chevron* in a "criminal context" (Pet. 22). See, *e.g.*, *Sash* v. *Zenk*, 428 F.3d 132, 135 (2d Cir. 2005) (Sotomayor, J.) (deferring to Bureau of Prisons regulation interpreting sentence-administration statute), cert. denied, 549 U.S. 920 (2006).

In *United States* v. *Kuzma*, 967 F.3d 959, cert. denied, 141 S. Ct. 939 (2020), the Ninth Circuit construed a portion of Section 5845(b) not at issue here in rejecting a defendant's challenge to his conviction for unlawfully possessing a machinegun. See *id.* at 968-970 (interpreting the phrase "designed to shoot"). In rejecting the defendant's argument that alleged inconsistencies in ATF's interpretation showed that the relevant language was unconstitutionally vague, the court repeated *Abramski*'s statement that "criminal laws are for courts, not for the Government, to construe." *Id.* at 971 (quoting *Abramski*, 573 U.S. at 191). But the court emphasized that the operative language at issue there was found in the statute, see *ibid.*, and the court did not decide any question about deference—much less suggest that *Chevron* is categorically inapplicable to agency interpretations of statutes carrying criminal penalties.

Finally, petitioners' contention that that the Sixth Circuit itself is "[h]opelessly [c]onflicted" on the issue is unfounded. Pet. 19 (emphasis omitted). Petitioners

point to the proceedings in this case, *ibid.*, which did not produce a precedential opinion; a prior panel decision that this Court vacated on other grounds, Pet. 21 n.14; and dissenting and concurring opinions by individual judges, *ibid.* None of those examples represents an authoritative statement of the Sixth Circuit's views. And in any event, any internal disagreement within the circuit would not be a sound basis for further review by this Court. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

c. To the extent petitioners seek this Court's review of any separate question concerning the interaction of *Chevron* and the rule of lenity (Pet. 26-29), that question also does not warrant further review in this case. Any such question would arise only if, contrary to both parties' view, *Chevron* applies to the ATF's final rule. The Court should decline petitioners' invitation to address a potentially significant question about *Chevron* in such an artificial posture.

In addition, the rule of lenity does not apply here on its own terms. This Court has explained that "[t]he simple existence of some statutory ambiguity * * * is not sufficient to warrant application of th[e] rule, for most statutes are ambiguous to some degree." *Muscarello* v. *United States*, 524 U.S. 125, 138 (1998). Instead, what is required is a "grievous ambiguity," such that, at the end of the interpretive process, the Court can still make "no more than a guess" as to what Congress intended. *Id.* at 138-139 (quoting *Staples*, 511 U.S. at 619 n.17, and *United States* v. *Wells*, 519 U.S. 482, 499 (1997)). No

court has found Section 5845(b) to be grievously ambiguous with respect to bump stocks.[5]

3. Petitioners separately seek review of the question whether "courts should give deference to agencies when the government expressly waives *Chevron*." Pet. i; see Pet. 29-37. But petitioners' attempts (Pet. 32-36 & n.22) to identify a division of authority on that question only underscore why further review is unwarranted. In several of the decisions invoked by petitioners, the reviewing court concluded that the correct result did not depend on whether *Chevron* applied—as is also true here.[6] One of petitioners' examples involved the altogether different question whether an agency must invoke *Chevron* in a rulemaking in order to rely on it later in litigation. See *Sierra Club* v. *EPA*, 252 F.3d 943, 947 n.8 (8th Cir. 2001). And another, *CFTC* v. *Erskine*, 512 F.3d 309 (6th Cir. 2008), involved an interpretation that had been

---

[5] This Court already denied review of the same lenity question in *Guedes* v. *ATF*, *supra*. The petition in that case sought review of the question "[w]hether *Chevron* deference, rather than the rule of lenity, takes precedence in the interpretation of statutory language defining an element of various crimes where such language also has administrative applications." Pet. at i, *Guedes*, *supra* (No. 19-296).

[6] See *Babb* v. *Secretary*, 992 F.3d 1193, 1208 n.10 (11th Cir. 2021) (stating that questions about *Chevron* and waiver could be left "for another day"); *Amaya* v. *Rosen*, 986 F.3d 424, 431 n.4 (4th Cir. 2021) (stating that the court would "reach the same conclusion * * * even after affording *Chevron* deference," because the agency's interpretation was "unreasonable"); *New York* v. *United States Dep't of Justice*, 951 F.3d 84, 101 n.17, 124 (2d Cir. 2020) (upholding agency's action even while declining to consider *Chevron*), cert. dismissed, 141 S. Ct. 1291 (2021); *Mushtaq* v. *Holder*, 583 F.3d 875, 877 (5th Cir. 2009) (stating that the court "need not resolve" whether *Chevron* or *Skidmore* deference applied because petitioner's "claim fails under either standard").

announced by the agency only in litigation, not in a rulemaking or an adjudication, *id.* at 314. Petitioners also perceive (Pet. 33) "intra-circuit splits" on *Chevron* and waiver in the D.C., Tenth, and Sixth Circuits, but this Court's review is not warranted to address such intra-circuit disagreements, which the petition in any event overstates. See *Wisniewski*, 353 U.S. at 902.

More broadly, petitioners' arguments conflate two distinct questions. The first is whether a reviewing court *may* decline to consider the application of *Chevron* if the court concludes that the government has waived or forfeited arguments in favor of *Chevron* deference in litigation. See, *e.g.*, *HollyFrontier Cheyenne Ref., LLC* v. *Renewable Fuels Ass'n*, 141 S. Ct. 2172, 2180 (2021) (discussed at Pet. 35-37). The second is whether a reviewing court *must* forgo any consideration of *Chevron* if the government does not invoke that doctrine in litigation. Whatever the correct answer to the first question, petitioners have failed to explain why the government's litigation choices should categorically preclude a reviewing court from making its own independent judgment about how best to apply this Court's *Chevron* precedents. Cf. *City of Arlington* v. *FCC*, 569 U.S. 290, 310 (2013) (Breyer, J., concurring in part and concurring in the judgment) ("The question whether Congress has delegated to an agency the authority to provide an interpretation that carries the force of law is for the judge to answer independently."); *id.* at 317 (Roberts, C.J., dissenting) (same); *Estate of Sanford* v. *Commissioner*, 308 U.S. 39, 51 (1939) ("We are not bound to accept, as controlling, stipulations as to questions of law.").

C. Further Review Would Be Especially Unwarranted In This Interlocutory Posture

Further review is also unwarranted for two reasons specific to the current posture of this case. First, the court of appeals affirmed the judgment below by an equally divided vote. Pet. App. 3a-4a. As a result, the court's affirmance is not precedential. See, *e.g.*, *Exxon Shipping Co.* v. *Baker*, 554 U.S. 471, 484 (2008) (explaining that, when this Court is equally divided, the resulting affirmance "is not precedential"). Second, the case is in an interlocutory posture: an appeal from the denial of a preliminary injunction. This Court does not ordinarily grant review of interlocutory decisions. See, *e.g.*, *Virginia Military Inst.* v. *United States*, 508 U.S. 946, 946 (1993) (Scalia, J., respecting the denial of the petition for a writ of certiorari). If the district court rejects petitioners' challenge in a final judgment, and if the court of appeals affirms that judgment, petitioners will have the opportunity to seek further review in this Court. Those proceedings should be allowed to play out and may well bear on whether this or any other challenge to the final rule warrants further review. For example, in light of the Fifth Circuit's recent decision in *Cargill*, *supra*, upholding the final rule as the best interpretation of the statute, the lower courts may well conclude in further proceedings that *Chevron* is irrelevant or inapplicable, which would render petitioners' *Chevron*-related questions all the more academic.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General
BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General
MARK B. STERN
MICHAEL S. RAAB
ABBY C. WRIGHT
BRAD HINSHELWOOD
KYLE T. EDWARDS
Attorneys

MAY 2022