No. 22-976

IN THE
Supreme Court of the United States

MERRICK B. GARLAND, ATTORNEY GENERAL, *ET AL.*,
Petitioners,
v.
MICHAEL CARGILL, *Respondent*.

On Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

Brief *Amicus Curiae* of Gun Owners of America, Gun Owners Foundation, Gun Owners of California, Heller Foundation, Tennessee Firearms Association, Tennessee Firearms Foundation, Virginia Citizens Defense League, Grass Roots North Carolina, Rights Watch International, America's Future, U.S. Constitutional Rights Legal Defense Fund, and Conservative Legal Defense and Education Fund in Support of Respondent

JOHN I. HARRIS III
SCHULMAN, LEROY & BENNETT, P.C.
3310 West End Ave., Ste. 460
Nashville, TN 37203

WILLIAM J. OLSON*
JEREMIAH L. MORGAN
ROBERT J. OLSON
WILLIAM J. OLSON, P.C.
370 Maple Ave. W., Ste. 4
Vienna, VA 22180
(703) 356-5070
wjo@mindspring.com

January 29, 2024
*Counsel of Record
Attorneys for *Amici Curiae*

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INTEREST OF THE *AMICI CURIAE*[1]

Gun Owners of America, Inc. ("GOA"), Gun Owners Foundation ("GOF"), Gun Owners of California, Heller Foundation, Tennessee Firearms Association, Tennessee Firearms Foundation, Virginia Citizens Defense League ("VCDL"), Grass Roots North Carolina, Rights Watch International, America's Future, U.S. Constitutional Rights Legal Defense Fund, and Conservative Legal Defense and Education Fund are nonprofit organizations, exempt from federal income tax under either section 501(c)(3) or 501(c)(4) of the Internal Revenue Code. These entities, *inter alia*, participate in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law.

Many of the *amici* organizations have members and supporters who were affected by the ATF's Bump Stock Rule reinterpreting the definition of "machinegun," and all are deeply concerned about ATF's usurpation of legislative power in rewriting and changing the meaning of a federal criminal statute.

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[1] It is hereby certified that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

Many of these *amici* have filed two *amicus curiae* briefs in this case in the Fifth Circuit.[2]

Additionally, GOA, GOF, and VCDL filed a challenge to the Bump Stock Rule in the U.S. District Court for the Western District of Michigan, which initially resulted in a decision by a Sixth Circuit panel enjoining the Rule (the first judicial decision against the Rule). The vacated panel opinion below described the GOA litigation as follows:

> [I]n March 2021, a Sixth Circuit panel granted a preliminary injunction against the Rule, holding that the Rule is not entitled to *Chevron* deference and is not the best interpretation of the NFA. *Gun Owners of Am., Inc. v. Garland,* 992 F.3d 446, 450 (6th Cir. 2021). However, the Sixth Circuit vacated that decision, 2 F.4th 576 (6th Cir. 2021) (en banc), and an evenly divided en banc court affirmed the district court's judgment upholding the Rule. No. 19-1298, --- F.4th ----..., 2021 WL 5755300 (6th Cir. Dec. 3, 2021) (en banc).... [*Cargill v. Garland*, 20 F.4th 1004, 1006 n.2 (5th Cir. 2021).]

GOA's petition for certiorari was denied. *Gun Owners of America, Inc. v. Garland*, 143 S. Ct. 83 (2022).

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[2] *See* *Amicus* Brief of Gun Owners of America, *et al.* in Support of Petition for Rehearing *En Banc* (Feb. 4, 2022); *Amicus* Brief of Gun Owners of America, *et al.* on Rehearing *En Banc* (Aug. 1, 2022).

Many of these *amici* also filed an *amicus* brief in two other challenges to the Bump Stock Rule. *See Aposhian v. Garland*, U.S. Supreme Court No. 21-159 (Sept. 3, 2021), *Amicus* Brief of Gun Owners of America, *et al.*; and *Guedes v. ATF*, U.S. Supreme Court No. 22-1222 (July 20, 2023), Amicus Brief of Gun Owners of America, *et al.* in Support of Petition for Certiorari.

STATEMENT OF THE CASE

A bumpstock is a type of stock that can be attached to a semi-automatic rifle not to enable, but to facilitate "bump firing"[3] — a shooting technique that allows a shooter to fire a semi-automatic firearm quickly. *See Gun Owners of America, Inc. v. Garland*, 19 F.4th 890, 911 (6th Cir. 2021) (Murphy, J., dissenting). Over a 9-year period, the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") issued 15 letters stating its official position that a bumpstock neither constituted a machinegun nor transformed a semi-automatic rifle into a machinegun under 26 U.S.C. § 5845(b), 18 U.S.C. § 921(a)(23), and 18 U.S.C. § 922(o). *See* J.A. 16-68. In reliance on that clear authority, hundreds of thousands of American citizens lawfully purchased bumpstocks, at a price in the range of $200 or more each, for their recreational use.

During the many years that bumpstocks were lawfully owned, there is no record of bumpstocks ever

[3] Bump firing can be performed with or without a bumpstock.

having been used in a criminal setting.[4] However, on October 1, 2017, bumpstocks were found in the room of Stephen Paddock at the Mandalay Bay Hotel in Las Vegas, Nevada. Despite Petitioners' representation to this Court that bumpstock-equipped rifles were used (Pet. Br. at 9), no ATF or FBI or Las Vegas Police report on the incident has been identified which concluded that the semi-automatic rifles equipped with bumpstocks found in the hotel room were **actually used** in the shooting.[5]

Nevertheless, gun control advocates immediately sought congressional legislation to ban bumpstocks. Bills were introduced in Congress, but none was enacted.[6] Absent legislation to criminalize bumpstocks, President Donald Trump directed ATF to take action against bumpstocks, forcing it to reverse its longstanding position that they are not machineguns.[7]

On December 26, 2017, ATF published an Advance Notice of Proposed Rulemaking ("ANPRM") entitled "Application of the Definition of Machinegun to 'Bump Fire' Stocks and Other Similar Devices," 82 *Fed. Reg.*

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[4] *See* ATF Deputy Chief, Disclosure Division Peter J. Chisholm May 1, 2019 letter to attorney Stephen Stamboulieh.

[5] *See*, *e.g.*, FBI, Key Findings of the Behavioral Analysis Unit's Las Vegas Review Panel (LVRP) (undated); *cf.* Pet Br. at 9.

[6] *See, e.g.*, H.R. 3947, 115th Cong.

[7] *See* Memorandum from Donald Trump to the Attorney General (Feb. 20, 2018), J.A. 90-31.

60,929 (Dec. 26, 2017). That ANPRM generated 115,916 comments, mostly negative.[8] *See* Appendix 114a. On March 29, 2018, ATF published a Notice of Proposed Rulemaking ("NPRM") entitled "Bump-Stock-Type Devices," 83 *Fed. Reg.* 13,442 (Mar. 29, 2018). That NPRM generated over 186,000 comments, again mostly negative.[9] *See* 83 *Fed. Reg.* at 66,519. Exactly one year after its ANPRM, on December 26, 2018, ATF published its final rule, effective on March 26, 2019. *See* "Bump-Stock-Type Devices," 83 *Fed. Reg.* 66,514 (Dec. 26, 2018). The ATF rule criminalized manufacture and sale of bumpstocks, as well as private possession of what ATF estimated to be 519,927 bumpstocks that were in private hands, ordering those who had lawfully acquired them in accordance with prior ATF ruling letters to either destroy them or surrender them to law enforcement.

On the same day as the final rule was issued, December 26, 2018, *amici* GOA, GOF, VCDL, and others filed a Complaint and Motion for Preliminary Injunction in the U.S. District Court for the Western District of Michigan. On March 21, 2019, the District Court denied Plaintiffs' Motion for a Preliminary Injunction. An Emergency Motion for Stay of Agency Action was sought from the Sixth Circuit, which was denied on March 25, 2019. An Emergency Application

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[8] With respect to the ANPRM, *Amicus* GOA filed comments on January 9, 2018; *Amicus* GOF filed comments on January 18, 2018.

[9] With respect to the NPRM, *Amicus* GOF filed comments on May 9, 2018; *Amicus* GOA filed comments on May 15, 2018.

for Stay Pending Appellate Review was filed in this Court on March 25, 2019, and denied on March 28, 2019. *See Gun Owners of America, Inc. v. Barr*, 139 S. Ct. 1406 (2019). A panel of the Sixth Circuit reversed the district court's denial of injunctive relief on March 25, 2021. *En banc* review was sought and granted, and an evenly divided Sixth Circuit court, by rule, affirmed the district court opinion on December 3, 2021. *See Gun Owners of America, Inc. v. Garland*, 19 F.4th 890 (6th Cir. 2021). The matter was remanded to district court and has been stayed, pending a decision of this Court in this case.

The case now before this Court was commenced on March 25, 2019, when Respondent filed an action in the U.S. District Court for the Western District of Texas seeking to enjoin enforcement of the Bump Stock Rule which caused him to surrender to ATF the bumpstocks that he had previously acquired and owned legally. Following a trial at which the only live witness was an ATF firearms expert, the district court denied injunctive relief and dismissed the case. The district court, in short, found that the Bump Stock Rule was consistent with the best reading of the relevant statutory language defining a machinegun, and was within the authority of the ATF to promulgate. *See Cargill v. Barr*, 502 F. Supp. 3d 1163, 1198-99 (W.D. Tex. 2020).

On appeal, a Fifth Circuit panel unanimously affirmed the district court, essentially adopting the relevant findings of the district court's opinion and concluding that ATF's newest interpretation of the definition of "machine gun" was also its "best

interpretation." *Cargill v. Garland*, 20 F.4th 1004, 1006 (5th Cir. 2021). On rehearing *en banc*, the Fifth Circuit reversed in a 13-3 decision, concluding:

> The definition of "machinegun" as set forth in the National Firearms Act and Gun Control Act does not apply to bump stocks. And if there were any doubt as to this conclusion, we conclude that the statutory definition is ambiguous, at the very least. The rule of lenity therefore compels us to construe the statute in Cargill's favor. Either way, we must reverse. [*Cargill v. Garland*, 57 F.4th 447, 451 (5th Cir. 2023).]

STATEMENT

For many years, Americans were told by ATF that they could purchase bumpstocks lawfully, and they did — by the hundreds of thousands. Then, based on the unverified assumption that bumpstocks were used in a horrific shooting, they were told they must destroy them or turn them in to law enforcement. The bumpstock is a mere firearm accessory but, with "a stroke of the pen," it was deemed contraband. If a firearm is capable of being banned whenever it is used illegally, as the years go by, the Second Amendment will be whittled down to nothing. When government exercises such arbitrary power over the People to deprive them of a mere firearm accessory, it loses not just the respect and confidence of the People, it also loses the consent of the governed.

ATF's rulemaking did not just declare bumpstocks to be prohibited when attached to or stored with compatible semi-automatic rifles, as it could have done pending the outcome of litigation challenging the rule. Rather, ATF took the radical step of deeming a mere piece of plastic to be contraband. Thus, when federal courts, including this Court, refused to enjoin ATF's enforcement, it put Americans in the untenable position of either destroying their lawfully acquired property or risking felony prosecution — even before challenges were decided on the merits. Thus, even if this Court now strikes down the rule, as these *amici* urge it to do, that ruling will not compensate owners of bumpstocks for their losses — not only the cost of the bumpstock, but also their freedom to own firearm accessories — due to a shameless exercise of arbitrary government power.

SUMMARY OF ARGUMENT

Over the span of almost a decade, ATF issued 15 letters ruling that bumpstocks were lawful to manufacture, purchase, and own, as they in no way constituted machineguns under 26 U.S.C. § 5845. Bumpstocks were used in recreational shooting and never constituted a threat to anyone as they were never known to have been used in any crime. Nonetheless, the shooting that occurred at the Mandalay Bay Hotel in Las Vegas, Nevada on October 1, 2017, put into motion a political process whereby President Donald Trump ordered ATF to issue a new rule which completely reversed its long-standing interpretation of that statute. Without any new legislation, and even without any proof that

bumpstocks were actually used in Las Vegas, politics trumped law, and the definition of machinegun was twisted to cover bumpstocks. Immediately, owners of bumpstocks were compelled to destroy property they lawfully acquired or risk becoming felons.

ATF was compelled by Presidential order to take the position that it had completely and repeatedly misread the statute defining machineguns. Pretending that its fresh look at the law and legislative history revealed new insights into what Congress really had intended, it asserted that the position it was ordered to take was, coincidentally, the best possible construction of machinegun, resulting in bumpstocks being deemed contraband. Petitioners' Brief sought to obscure President Trump's role in demanding the change, falsely implying that it was ATF's decision, and President Trump only had ordered the matter be expedited. Thus, unlike the findings of certain lower courts, ATF's new politicized position is certainly not entitled to *Chevron* deference — and really deserves neither deference nor respect.

Congress defined machinegun as: "any weapon which shoots, is designed to shoot, or can readily be restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger." ATF first asserts that single "function" of the trigger should really be understood to mean single "pull" of the trigger, in large part based on bits of legislative history cobbled together. When a regulatory agency is compelled to change the words of a statute to justify a new interpretation, it should be a red flag that it is about to act in a lawless manner.

Congress' definition focused on "the trigger" as the firearm component whose "single function" creates automatic fire. ATF's substitution of the word "pull" changes focus away from the trigger's function to the shooter's involvement.

While the statute requires that a machinegun must "shoot automatically ... by a single function of the trigger," Petitioners ask this Court to interpret the word "automatically" without regard to the rest of the statutory phrase. Petitioners would have this Court conclude that automatic means anything that facilitates rapid fire — even if that firing is due to the shooter's actions rather than what Congress required.

Petitioners seek to obscure the fact that machinegun triggers work in a fundamentally different way than triggers in semi-automatic rifles by focusing on rates of fire. However, any semi-automatic rifle can be bump fired, even without a bumpstock. If ATF is able to change the statutory definition of machinegun at will, it opens the door to a future President ordering ATF to ban all semi-automatic rifles. Thus, interpreting the definition of machinegun as Petitioners seek would not only ban a constitutionally protected firearm accessory, it would go far to lay the predicate for future gun bans in violation of the Constitution, which this Court can and should avoid.

ARGUMENT

I. ATF'S POLITICALLY ORDERED REVERSAL OF ITS LONG-HELD POSITION IS NOT THE "BEST" INTERPRETATION OF A CRIMINAL STATUTE.

Congress has defined a "machinegun" as "any weapon which shoots, is designed to shoot, or can readily be restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger." 26 U.S.C. § 5845(b). This definition was adopted in 18 U.S.C. § 922 — the statute criminalizing possession of most machineguns. For nearly a decade, ATF interpreted this language consistently, ruling that bumpstocks were not machineguns.

Suddenly, in 2017, ATF changed its position. ATF did not just tweak its position — it reversed it 180 degrees. Insofar as ATF was not beginning with a blank slate, as it would when working to interpret some new congressional enactment, Petitioners must persuade this Court to sanction two separate decisions by ATF:

> (i) ATF's **repudiation** of its own consistent, long-standing interpretation of the unchanged congressional statutory definition of a "machinegun"; and
> (ii) ATF's **adoption** of a new and novel interpretation of what constitutes a machinegun, based on a political Presidential

directive, without any intervening legislative change.

Petitioners want this Court to believe that all of ATF's rulings applying the machinegun definition to bumpstocks until 2017 were completely wrong as a matter of law, and that ATF's new position merely corrects that persistent error. Nevertheless, Petitioners make no real effort to explain what actually caused ATF to develop its new position. To be sure, Petitioners discuss the Las Vegas shooting and the technical process by which ATF implemented its new policy. Then, Petitioners strongly imply that ATF's action was internally generated, as it asserts: "After the Las Vegas attack, **ATF decided** to conduct notice-and-comment rulemaking to reconsider its position on bump stocks." Pet. Br. at 9 (emphasis added). Petitioners say not one word about **what caused** ATF to adopt its new position.

It is beyond question that the interpretive change was made by ATF under orders from President Donald Trump — but this critical fact cannot be found in Petitioners' Opening Brief. Indeed, Petitioners' Opening Brief makes but one reference to President Trump and that is in the Statement of the Case: "President Trump then issued a memorandum directing ATF to complete the rulemaking process expeditiously." Pet. Br. at 9. Thus, Petitioners characterize President Trump as a mere expediter of a decision reached solely by ATF. The truth is quite different. President Trump not only expedited ATF's reconsideration — but he also **ordered ATF to change its position**. ATF conducted no independent

re-interpretation of the statute — rather, it made the change it was told to make, and then sought to justify it as best it could. In its Opening Brief, Petitioners sought to sanitize the record of the fact that ATF's new position was forced upon ATF by President Trump — a purely political and arbitrary decision.

It is, of course, possible that President Trump's new interpretation could have come as a result of some new insight from White House Counsel or others tasked by President Trump to reassess the matter. If that had happened, surely Petitioners would have explained that process. However, Petitioners make no such showing. The public record provides only a few insights into how President Trump's thinking developed on bumpstocks. Some inferences can be drawn from his statements at a White House conference with congressional leaders to develop a gun control bill:

> And don't worry about bumpstocks. We're getting rid of it.... I'll do that myself because I'm able to ... without going through Congress. ["Trump: 'We're getting rid' of 'bump stocks,'" *Washington Post video* (beginning at 2:15) (Feb. 28, 2018).]

The political path for President Trump had been made easier a few months before when, on October 17, 2017, the National Rifle Association announced it favored additional regulation of bumpstocks, followed immediately by statements from White House Press Secretary Sarah Huckabee Sanders that the President

was open to that discussion.[10] President Trump blamed President Obama for ATF's prior rulings on bumpstocks, further demonstrating the political, rather than legal, nature of his decision.[11] Indeed, there is absolutely no indication that President Trump's directive to ATF was anything but a political decision, in no way based on an effort to faithfully implement this criminal law as enacted by Congress.

The point *amici* seek to make here is not that it was inherently wrong for the President, as head of one of the political branches of government, to issue a political order to an agency. The point, rather, is two-fold. First, when a government agency is ordered to implement a political decision, it should not be viewed as the decision of the agency. Here, Petitioners do not rely on *Chevron* deference, but in other litigation on this rule, courts have based their decisions on *Chevron* deference, stating that it cannot be waived by the government, as it constitutes a rule that courts must

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[10] C. Wilson, "NRA comes out in favor of restrictions on bump stocks," *Yahoo!news* (Oct. 5, 2017) ("The White House and National Rifle Association both came out in favor of reviewing regulations of bump fire stocks....").

[11] *See* "Presidential Memorandum on the Application of the Definition of Machinegun to "Bump Fire" Stocks and Other Similar Devices," *The White House* (Feb. 20, 2018) ("Although the Obama Administration repeatedly concluded that particular bump stock type devices were lawful to purchase and possess, I sought further clarification of the law restricting fully automatic machineguns.").

apply.[12] However, there is no predicate for *Chevron* deference when an agency is not applying its expertise, but rather was just following orders. This is doubly true, as here, when the order was actually to disregard the agency's expertise.

Second, when a political decision is reached by the Executive Branch, having the effect of broadening the scope of a criminal statute, it should be viewed with the greatest skepticism by the courts. Indeed, here Petitioners ask this Court to adopt ATF's new interpretation, even though it was only following orders to implement an arbitrary, political Presidential directive. It would be a serendipitous coincidence indeed if a decision forced on an agency in this manner just so happened to implement the very best, but entirely novel, legal interpretation of a criminal statute.

II. A BUMPSTOCK DOES NOT ENABLE A SEMI-AUTOMATIC RIFLE TO FIRE MULTIPLE ROUNDS BY A SINGLE FUNCTION OF THE TRIGGER.

To prevail, Petitioners must demonstrate, *inter alia*, that a semi-automatic rifle equipped with a

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[12] *See, e.g.*, *Guedes v. BATFE*, 920 F.3d 1, 21 (D.C. Cir. 2019); *Aposhian v. Barr*, 958 F.3d 969, 981 (10th Cir. 2020). Some of these *amici* filed an *amicus* brief in a case now pending before this Court involving reconsideration of *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984). *See* Brief *Amicus Curiae* of Gun Owners of America, Inc., *et al.*, *Loper Bright v. Raimondo*, U.S. Supreme Court No. 22-241 (July 24, 2023).

bumpstock enables the semi-automatic rifle to fire more than one shot "by a single function of the trigger." 26 U.S.C. § 5845(b). It should be a warning sign that Petitioners' primary argument to meet the "single function" requirement requires it to recast the words of the statute. In fact, as soon as Petitioners quote the statute to begin their argument, they suggest that it would be better understood if a different word ("pull") were substituted for "function," and most of Petitioners' brief thereafter addresses the statute as rewritten by them to make their case. *See* Pet. Br. at 17-21.

Petitioners suggest that, because some "[c]ontemporaneous sources from the period surrounding the enactment of the National Firearms Act" conflated the terms, using "'function of the trigger' and 'pull of the trigger' interchangeably," this Court should too. *Id.* at 14. But to accept such an invitation would revive the district court's fatal analytical errors and impose those errors nationwide. Repeating the district court's smattering of sources, Petitioners rely heavily on legislative history, but fail to cite a single case where legislative history was relied on to change the wording of penal statutory text. Indeed, Congress enacted the text of the statute — not the committee report transmitting the bill to the floor.

Petitioners' reliance (Pet. Br. at 20) on Justice Scalia's treatise Reading Law is misplaced — as nowhere does it support the government's rewriting a penal statute to encompass conduct not covered by the statutory text. Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts § 66,

at 388 (2012). Quite to the contrary, Justice Scalia wrote that quoting from legislative history is "no more persuasive ... than ... to quote from the *Wall Street Journal*...." *Id.* Instead, he noted, "[r]ather than resolving uncertainty, legislative history normally induces it." *Id.* Unsurprisingly, that is precisely the purpose for which Petitioners offer legislative history here — to muddle the meaning of an otherwise unambiguous statute.

Quite opposite to the approach advanced by Petitioners, when interpreting statutes, courts "start ... with the statutory text," bearing in mind the oft-repeated maxim that "legislative history is not the law." *BP Am. Prod. Co. v. Burton*, 549 U.S. 84, 91 (2006); *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1814 (2019). Rather, "[u]nless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning." *Burton* at 91. Moreover, "[e]ven if Congress did not foresee all of the applications of the statute, that is no reason not to give the statutory text a fair reading." *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1143 (2018).

By selecting the phrase "single function of the trigger," Congress enacted a statute with a specific meaning not to be disturbed by shifting political winds. No doubt, during the many years it consistently interpreted the statute not to include bump stocks, ATF was fully aware of the legislative history on which Petitioners now rely. In other words, neither the statute nor the legislative history has changed — rather, Petitioners' political agenda has.

As is the case today, at the time of the passage of the National Firearms Act ("NFA"), the ordinary meaning of the term "function" was "[t]he special kind of activity proper to anything; *the mode of action* by which it fulfils its purpose."[13] In contrast, contemporaneous dictionaries defined "pull" to mean "[a]n act of pulling or drawing towards oneself with force: a general term, including both a momentary pluck, wrench, or tug, and *a continued exercise of force*."[14] By 1933, the phrase "pull the trigger" already had entered American vernacular. Accordingly, one dictionary entry for "pull" stated: "The act of pulling the trigger of a fire-arm; also, the force required to pull the trigger."[15] Notably absent was any claim of synonymity with or relatedness to "function."

Petitioners cannot seriously argue that the Congress of the 1930s had no access to common dictionaries or no understanding of the differences between words. Nor can Petitioners claim that the ordinary, mechanistic meaning of "function" as used in the statute speaks to the **shooter's** application of force, especially when "pull"[16] would have been the clear choice to implicate such conduct. Rather, "pull" revisionism implies the discrete action of a human,

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[13] *Function*, The Oxford English Dictionary, vol. IV at 602 (1933) (emphasis added).

[14] *Pull*, The Oxford English Dictionary, vol. VIII at 1576 (1933) (emphasis added).

[15] *Id.*

[16] Or "push," for that matter. *See* Pet. Br. at 14.

while "function" textualism implies the operations of a mechanical device. But this Court need not only imply a mechanical reading, as the statute demands it expressly.

The statute identifies "**the trigger**" as the relevant component whose "single function" creates automatic fire, not "**the shooter**" or anything else. 26 U.S.C. § 5845(b) (emphasis added). But by shifting focus away from **the trigger**, Petitioners' proposed statutory revision may as well read "single pull *of* ***the shooter.***" Such a theory stretches the statute's words beyond their breaking point. By clearly identifying "the trigger" as the central (indeed, only) object to be analyzed, Congress directed attention to a self-contained mechanical system that operates in a defined and repeatable manner. How an individual operates this defined and repeatable system has no bearing on what the system actually does and how it goes about accomplishing it.

The historical record corroborates Congress' deliberate, mechanistic choice in defining "machinegun." First, Petitioners claim that the NRA President "originated" the phrase "single function of the trigger" during the 1934 drafting sessions.[17] Pet. Br. at 18. This is incorrect. Rather, the phrase existed prior to the NFA hearings, most notably within the

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[17] Petitioners latch onto this statement as though it constituted something like an admission against interest. However, the NRA did not oppose regulating machineguns in 1934 and, after the Las Vegas shooting, did not oppose regulating bumpstocks. *See* Section I, *supra*.

Uniform Machine Gun Act ("UMGA"), a model law that defined a machinegun as "a weapon of any description by whatever name known, loaded or unloaded, from which more than five shots or bullets may be rapidly, or automatically, or semi-automatically discharged from a magazine, by a **single function** of the firing device."[18] The UMGA, in turn, favored the phrase "single function" as used in a 1929 Pennsylvania law regulating machine guns, as opposed to other states' laws, which contained phrases such as "one continuous pull of the trigger."[19]

In other words, competing definitions of "machinegun" existed at the state level several years prior to the NFA's passage. The UMGA adopted one such phrasing, which later reappeared in the NFA. Again, the choice of statutory words was deliberate.

Second, the original text of the NFA that President Roosevelt signed into law defined machineguns as weapons which shoot "automatically **or semiautomatically**, more than one shot, without manual reloading, by a single function of the trigger."[20] As Patrick J. Charles notes in his *amicus* brief supporting Petitioners, the inclusion of "semiautomatically" caused significant confusion

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[18] Uniform Machine Gun Act at 6 (1932) (emphasis added).

[19] Uniform Machine Gun Act, *supra*, at 10, 11 (citing N.Y. Laws 1931, ch.792).

[20] National Firearms Act of 1934, Pub. L. No. 73-474, § 1(b), 48 Stat. 1236 (emphasis added).

among citizens concerned about the legality of their commonly owned rifles.[21]

In an apparent effort to address this confusion, a number of statutory **interpretations** issued by one NRA official and a handful of federal officials in the years following the NFA's passage all claimed the NFA did not mean what it said, and that the statute actually read "single pull of the trigger."[22] These interpretations even found their way into military officials' subsequent guidance as to World War II-era "war trophies" captured overseas; according to these officials, certain war trophies were machineguns if they discharged a number of "shots or bullets ... with **one continuous pull of the trigger**."[23]

But these post-adoption interpretations do not shed light on the plain meaning of the terms Congress chose. As the district court observed with regards to failed legislative efforts to ban bumpstocks after the Las Vegas shooting, relying on later actions to shed light on an earlier Congress would "present 'a particularly dangerous ground on which to rest an interpretation of a prior statute.'" *Cargill v. Barr*, 502 F. Supp. 3d 1163, 1191 (W.D. Tex. 2020). Indeed, such *ex post facto* opinions "provide no insight into the intentions of a previous Congress." *Id.*

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[21] Brief for Patrick J. Charles as *Amicus Curiae* Supporting Petitioners at 21-23, *Garland v. Cargill* (Dec. 22, 2023).

[22] *Id.*

[23] *Id.* at 27 (emphasis added).

Rather than focusing on opinions from a number of nonlegislative officials, congressional action (and inaction) in the years and decades following the NFA bears emphasis. Indeed, Congress had ample opportunity to amend its definition of "machinegun" to include a "single pull of the trigger" if Congress had intended that interpretation in the first place. On the contrary, Congress declined to amend *or even supplement* "single function of the trigger" each time it passed subsequent gun legislation, from the Federal Firearms Act of 1938, Gun Control Act of 1968, and Firearms Owners' Protection Act of 1986, to the Brady Handgun Violence Prevention Act of 1993, and most recently, the Bipartisan Safer Communities Act of 2022.

In stark contrast to congressional refusal to alter or supplement the phrase "single function of the trigger," Congress eventually **did** amend the definition of "machinegun" by "delet[ing] the phrase 'or semiautomatically'" from the statute in 1968. *Cargill*, 502 F. Supp. 3d at 1173. Yet neither the district court nor Petitioners have explained why this altered definition should not exclude semi-automatic firearms equipped with bumpstocks in their entirety.

III. A BUMPSTOCK DOES NOT ENABLE A SEMI-AUTOMATIC RIFLE TO FIRE MULTIPLE ROUNDS AUTOMATICALLY BY A SINGLE FUNCTION OF THE TRIGGER.

By law, a "machinegun" must "shoot, **automatically** more than one shot, without manual reloading, **by a single function of the trigger**." 26

U.S.C. § 5845(b) (emphasis added). Both the district court and Petitioners plucked the term "automatically" from its context and analyzed it alone. *See* Pet. Br. at 31. The Fifth Circuit rightly rejected this approach, stating: "we must remember that the phrase 'by a single function of the trigger' modifies the adverb 'automatically.'" *Cargill*, 57 F.4th at 463. Thus, "automatically" must be understood in relation to how the trigger functions, and nothing else.

Petitioners first assert that the term "automatically" means "self-acting or self-regulating." Pet. Br. at 31. Then, Petitioners conclude that the entire bumpstock-equipped firearm is "self-acting or self-regulating" because an external mechanism (the shooter's actions) facilitates repeated fire with a stationary finger. *Id.* However, it is the mechanical function **of the trigger** that must generate "automatic[]" fire — not the shooter. In a typical machinegun, multiple rounds are fired by an internal process accomplished by the trigger's interaction with an auto-sear, allowing multiple rounds to fire "automatically ... by a single function of the trigger."[24]

To reinforce its free-standing definition, Petitioners cite colloquial applications of the term "automatic" in several other contexts and conclude that the mere elimination of any "work that the shooter would otherwise need to perform" suffices to create "automatic" fire. Pet. Br. at 32. But such a rule would reclassify all bump firing — even without a

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[24] *See, e.g.*, M. Rittman, "How an AR-15 Works," *YouTube*, at 4:00-4:57 (Aug. 10, 2022).

bumpstock — as generating "automatic" fire, since the technique eliminates the "work that the shooter would otherwise need to perform" to operate the trigger conventionally.[25] Petitioners fail to explain just how a semi-automatic firearm can also be an "automatic" one, depending on how the operator manipulates it.

Compounding their error, Petitioners baldly assert "no meaningful difference" between (i) the rearward pressure on the trigger of a machinegun, and (ii) the forward pressure on a rifle equipped with a bumpstock. *Id.* at 34. The difference is found in the requirements of the statute — the first example involves an actual "function of the trigger," while the second is entirely untethered from trigger functionality.

It is this statutory untethering that allows Petitioners to assert that whether a firearm fires "'automatically' depends on the degree of human input that it requires." *Id.* at 35. In addition to being contrary to law, Petitioners' theory fails to identify any sort of limiting principle or line to be drawn at just how much or how little human input suffices to create "automatic" fire. Of course, "[a] know-it-when-you-see-it test is no good if one court sees it and another does not." *Bridge Aina Le'a, LLC v. Haw. Land Use Comm'n*, 141 S. Ct. 731, 732 (2021) (Thomas, J., dissenting from denial of certiorari). There is no justification to develop an amorphous "degree-of-input"

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[25] *See, e.g.*, TotallyRAD!, "The PSA AK-V Is the Bump Fire King," *YouTube* (Nov. 26, 2022); Eatallthebirds, "How to Bump Fire an AR-15/M4," *YouTube* (July 10, 2016).

test when the statute provides clear interpretative guidance.

Unperturbed by the statute's foreclosure of their argument, Petitioners then contrive an "implausible loophole" under the Fifth Circuit's interpretation of the term "automatically." Pet. Br. at 35. The Fifth Circuit's faithful adherence to the statute does no such thing. Petitioners posit that replacement of a select-fire machinegun's selector switch with a button that one could press and hold to access automatic fire would fall outside the statute's reach. *See id.* at 36. Not so. By manipulating the mechanical function of the fire control group to make the button the trigger, the firearm still would fire "automatically ... by a *single function of the trigger*" and therefore be a "machinegun." 26 U.S.C. § 5845(b) (emphasis added).

Petitioners also make false claims about rifle fire. First, they attempt to distinguish between (i) bump firing using unmodified semi-automatic firearms from (ii) bump firing with bumpstocks, with the puzzling claim that shooters of unmodified rifles must "control the recoil." However, rifles with bumpstocks also have appreciable recoil that must be controlled. Pet. Br. at 37.[26] Second, Petitioners conclude that "maintaining continuous fire with a bump stock involves essentially the same degree of human input as using a conventional machinegun." *Id.* Even the district court knew better, explaining that bumpstocks require enough additional input such that, "even with ...

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[26] *But see, e.g.*, "The PSA AK-V Is the Bump Fire King," *supra*; "How to Fire an AR-15/M4," *supra*.

extensive experience, firing a weapon equipped with a bump stock d[oes] not come naturally, and require[s] practice...." *Cargill*, 502 F. Supp. 3d at 1176.

Finally, even if "automatically" can mean "self-acting or self-regulating" without any reference to the trigger, Petitioners fail to recognize the significance of Congress' removal of the word "semiautomatically" from the statute in 1968. When removed, the term "semiautomatic" was generally understood to mean "that [which] employs gas pressure or force of recoil and mechanical spring action in ejecting the empty cartridge case after the first shot and in loading the next cartridge from the magazine but that requires release and another pressure **of the trigger** for firing each successive shot."[27] This definition fits the mechanical operation of a bumpstock-equipped rifle precisely — which requires repeated "release and ... pressure of the trigger"[28] to operate, irrespective of how the shooter goes about accomplishing the task. Congress' removal of the word "semiautomatically" further undermines Petitioners' flawed interpretation of the term "automatically."

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[27] "*Semiautomatic*," Webster's Third New International Dictionary of the English Language Unabridged at 2063 (1961) (emphasis added).

[28] *Semiautomatic*, *supra*.

IV. ATTACHING A BUMPSTOCK TO A SEMI-AUTOMATIC RIFLE DOES NOT MAKE IT A MACHINEGUN.

Unable to demonstrate that semi-automatic rifles equipped with bumpstocks meet the "single function of the trigger" or "automatically" statutory requirements, Petitioners are reduced to what is really a policy argument — that bumpstocks facilitate rapid fire which **sure seems to make them a lot like a** machinegun. But rapid fire does not a machinegun make.

Petitioners' effort to equate bumpstocks with machineguns based on rates of fire (*see* Pet. Br. at 40) is a red herring designed to divert attention from the fact that Congress did not define machineguns by rate of fire. *See* 26 U.S.C. § 5845(b). Assume an actual machinegun was mechanically adjusted to fire only **one round every 10 seconds** — by Petitioners' argument about rate of fire, would it still be a machinegun?

Petitioners correctly argue that bumpstocks "facilitate rapid fire" (Pet. Br. at 2, 16), but that too is not the statutory test. Petitioners fail to admit the significance of the fact that bumpstocks only "facilitate" that of which all semi-automatic firearms are capable — being bump fired.[29] A belt loop "facilitates" more rapid bump fire, but ATF is not now

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[29] *See, e.g.*, "The PSA AK-V Is the Bump Fire King," *supra*; "How to Bump Fire an AR-15/M4," *supra.*

(at least not yet) seeking to rule them illegal.[30] A shooter can bump fire using nothing more than the shooter's hands. That means, **attaching a bumpstock to a rifle does not make bump firing possible** — it only facilitates it and makes it more controllable. The ATF expert who was found highly persuasive by the district court admitted this fact by explaining that "[i]t is much more difficult to bump fire a weapon without a stock or without some additional accessory compared to firing with a bump-stock." *Cargill*, 502 F. Supp. 3d at 1176.

The triggers in an unmodified, semi-automatic AR-15 and a semi-automatic AR-15 equipped with a bumpstock operate identically.[31] The trigger in an actual machinegun works quite differently. Petitioners disregard this fundamental difference.

Semi-automatic Trigger. Once pulled, the trigger releases an internal spring-loaded hammer that strikes a firing pin which, in turn, strikes a loaded cartridge, causing it to fire and the bullet to be expelled from the rifle. This hammer remains in its "fired" position until the firearm's gas system forcibly presses the hammer back downwards against the trigger. The "disconnector" contained within the trigger catches the depressed hammer, retaining it in place so that it does not fall again and fire another

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[30] *See* Gun Owners of America Supplemental Amicus Brief, Fifth Circuit rehearing *en banc*, at 16-17 (Aug. 1, 2022).

[31] *See, e.g.*, Rittman, *supra*, at 1:55-3:58 (providing an excellent visualization of a semi-automatic trigger in action).

round. Significantly, the disconnector retains the hammer and prevents subsequent fire until the shooter loosens finger pressure, causing the trigger to **physically travel forwards** until the disconnector disengages and allows the hammer to jump into place against the trigger. This hammer jump from the disconnector back to the trigger produces an audible click and signals mechanical readiness for a subsequent shot. The process producing this audible click is known as the trigger "reset."[32] The trigger physically travels inwards towards the shooter to fire a shot, and then it travels back outwards away from the shooter to "reset."

Machinegun Trigger. A machinegun's trigger will not physically travel forwards and backwards to mechanically reset after each shot of automatic fire, because an internal mechanism disables the trigger's disconnector entirely.[33]

By way of analogy, the semi-automatic trigger, whether equipped with a bumpstock or not, occupies one of two locational states during firing, akin to the 0s and 1s of binary code. At its ready position, the trigger rests in state 0, and when pulled to fire a shot, it physically moves to state 1. Accordingly, in order to empty a hypothetical magazine of 5 rounds, whether via bumpstock assistance or not, the semi-automatic trigger travels back and forth as follows: 0-1-0-1-0-1-0-1-0-1. Each 0 to 1 to 0 is a complete, distinct

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[32] *See* Rittman, *supra*, at 3:49.

[33] *See* Rittman, *supra*, at 4:00-4:56.

mechanical "function" undisturbed by the presence or absence of a bumpstock. Indeed, all that a bumpstock does is allow the mechanical forward-rearward function to occur more quickly. In contrast, the machinegun's "binary" code is rather simple. In order to empty that same hypothetical 5-round magazine, or a 10- or 30-round magazine for that matter, only one physical trigger travel (and thus one "function") occurs: 0-1. This is what the statute terms a "single function of the trigger."

Bumpstocks do not change the inherent semi-automatic function of a trigger; they merely enable quicker semi-automatic trigger "resets" and therefore achieve potentially higher rates of semi-automatic fire. Each "reset" is a separate function of the trigger, and thus bumpstocks do not fire multiple rounds with a single function of the trigger, and thus, most certainly, are not machineguns.

V. PETITIONERS' INTERPRETATION OF MACHINEGUN CREATES A CONFLICT WITH THE SECOND AMENDMENT.

Petitioners have asked this Court to sanction ATF's total reversal of its longstanding position that a bumpstock is not a machinegun based on its new interpretation of a statute. Respondents, and *amici* here, have demonstrated how badly flawed that interpretation is, and now ask the Court also to consider the adverse consequences of adopting the Government's position.

If ATF's rule based on President Trump's order is upheld, it would make the scope of criminal laws subject to change in each Presidential election. If one President can order ATF to reverse position on bumpstocks, what would stop another President from directing ATF to reverse its position that a semi-automatic rifle is not a machinegun? Semi-automatic rifles can be bump fired with or without a bumpstock. If rate of fire should be a central consideration for what constitutes a machinegun (*see* Pet. Br. at 40-42), then a semi-automatic rifle which can be bump fired could be deemed a machinegun. And, if ATF can be pressured to change longstanding legal positions by Presidents, then the basic distinction between machineguns and semi-automatic rifles will be threatened as well.

Anti-gun groups are working hard to ban semi-automatic rifles without the need for legislation, such as litigation apparently sponsored by the Brady Center against Century Arms based on a shooting that occurred at a festival in Gilroy, California on July 28, 2019.[34] *See* Complaint, *Towner v. Century Arms*, No. 2:22-cv-00145-wks (D. Vt. July 28, 2022). The Plaintiffs alleged that the WASR-10 semi-automatic rifle (an AK-47-style rifle):

> constitutes a "machinegun" even if designed to fire in a semi-automatic fashion, because ... it "posess[es] design features which facilitate full

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[34] *See* C. Edwards, "In new lawsuit, gun control group claims semi-automatic rifles should be classified as machine guns," *Bearing Arms* (Aug. 2, 2022).

> automatic fire by a simple modification or elimination of existing component parts." ... Whether or not the Rifle used in the Attack was, in fact, modified to fire in a fully automatic fashion, its ready susceptibility to such modification rendered it a "machinegun" as sold, prohibiting its sale to the general public. [*Towner*, Complaint ¶¶ 67, 69.]

If it is here established that a President could order ATF to ban bumpstocks, that precedent could later be used against semi-automatic rifles based on the theory advanced in *Towner*. As this Court has observed: "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

Thus, although the case before the Court is solely one of statutory construction, the Second Amendment lurks in the background. Whether treated as accessories or firearm components, bumpstocks fall well within the Second Amendment's textual protection of arms. As early as *United States v. Miller*, 307 U.S. 174, 181, 182 (1939), this Court has recognized that the Second Amendment protects not just operable weapons but also the ancillary equipment carried on the person that is useful for their operation. Moreover, "the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence

at the time of the founding," *District of Columbia v. Heller*, 554 U.S. 570, 582 (2008), and "that general definition covers modern instruments that facilitate armed self-defense." *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 28 (2022). A bumpstock fits this definition, as one may "'wear, bear, or carry [it] … upon the person.'" *Id.* at 32 (quoting *Heller* at 584). Under this basic definition, too, the Second Amendment should extend to bumpstocks.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

JOHN I. HARRIS III
SCHULMAN, LEROY & BENNETT, P.C.
3310 West End Ave.
Suite 460
Nashville, TN 37203

WILLIAM J. OLSON*
JEREMIAH L. MORGAN
ROBERT J. OLSON
WILLIAM J. OLSON, P.C.
370 Maple Ave. W., Ste. 4
Vienna, VA 22180
(703) 356-5070
wjo@mindspring.com
Attorneys for *Amici Curiae*
**Counsel of Record*

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