No. 21-159

In the Supreme Court of the United States

W. CLARK APOSHIAN, PETITIONER

v.

MERRICK B. GARLAND, ATTORNEY GENERAL, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
BRIAN M. BOYNTON
Acting 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 court of appeals correctly determined that the district court did not abuse its discretion in denying petitioner's 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

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Statutes, regulations, and rule:

Miscellaneous—Continued: Page

In the Supreme Court of the United States

No. 21-159

W. CLARK APOSHIAN, PETITIONER

v.

MERRICK B. GARLAND, ATTORNEY GENERAL, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-58a) is reported at 958 F.3d 969. An order of the court granting rehearing en banc (Pet. App. 74a-77a) is reported at 973 F.3d 1151. A subsequent order of the court vacating the grant of rehearing, reinstating the panel opinion, and reissuing the judgment (Pet. App. 78a-115a) is reported at 989 F.3d 890. The opinion of the district court (Pet. App. 59a-73a) is reported at 374 F. Supp. 3d 1145.

JURISDICTION

The judgment of the court of appeals was entered on March 5, 2021. The petition for a writ of certiorari was filed on August 2, 2021. 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, that definition has also encompassed parts that can be used to convert a weapon into a machinegun. See Gun Control Act of 1968, Pub. L. No. 90-618, Tit. II, sec. 201, § 5845(b), 82 Stat. 1231. A "machinegun" thus includes "the frame or receiver of any such weapon, any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun, and any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person." 26 U.S.C. 5845(b).

Congress first regulated the sale 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 con-

stitute 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 with "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 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

[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.

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," 26 U.S.C. 5845(b), turns on whether they allow a shooter to fire "automatically more than one shot * * * by a single function of the trigger," *ibid.*

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).[2] 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

---

[2] https://go.usa.gov/xpbEX.

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 armed with semiautomatic weapons and bump stock devices of the type at issue here murdered 58 people and wounded 500 more in Las Vegas. 83 Fed. Reg. at 66,516. 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 resources 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.[3] The final rule—which is at issue in this case—amended ATF's regulations to address the terms "single function of the trigger" and "automatically" as used in the definition of "machinegun," in order to clarify that bump stock devices are machineguns under 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

---

[3] 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).

"'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 its 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 can be 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 classifying certain bump stocks as not machineguns. See 83 Fed. Reg. at 66,514, 66,523, 66,530-66,531, 66,549. The agency also provided in-

structions 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 ninety 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. Petitioner purchased a bump stock before ATF published its final rule. Pet. App. 8a. In January 2019, petitioner brought this action under the judicial review provisions of the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, seeking to set aside the final rule and to enjoin it from taking effect. Pet. App. 8a, 63a.

On March 15, 2019, the district court denied petitioner's motion for a preliminary injunction. Pet. App. 59a-73a. Petitioner had contended that ATF lacks rulemaking authority to issue any binding interpretations of the statutory definition of "machinegun" and that the interpretation adopted by the agency in the final rule "conflict[s] with the statutory language." *Id.* at 65a. The court found that petitioner was unlikely to succeed on either ground. *Id.* at 64a-65a. As to the first, the court explained that the final rule "is merely interpretive in nature." *Id.* at 66a n.7; see *Perez* v. *Mortgage Bankers Ass'n*, 575 U.S. 92, 97 (2015) (explaining that "[i]nterpretive rules 'do not have the force and effect of law'") (citation omitted). And the court observed that petitioner himself did "not dispute that the ATF, under the direction of the Attorney General, is empowered to interpret" the relevant statutes. Pet. App. 66a.

The district court also determined that ATF's final rule "represents the best interpretation of the statute."

Pet. App. 71a; see *id.* at 67a-71a. In particular, the court determined that the phrase "single function of the trigger" in the definition of "machinegun," 26 U.S.C. 5845(b), is best understood to include a "single pull of the trigger," Pet. App. 68a—and not, as petitioner had contended, to refer exclusively to a single "mechanical movement of the trigger," *ibid.* The court also agreed with the final rule's interpretation of the term "automatically" to mean "as the result of a self-acting or self-regulating mechanism." *Id.* at 69a. That definition, the court explained, was "borrowed, nearly word-for-word, from dictionary definitions contemporaneous to the [National Firearms Act]'s enactment" and "accords with past judicial interpretation." *Id.* at 69a-70a. The court thus rejected petitioner's argument that "[b]ecause bump-stock-type devices require constant forward pressure by the shooter's non-trigger hand," the weapon "does not fire 'automatically.'" *Id.* at 70a. The court observed that "even weapons uncontroversially classified as machine guns require at least some ongoing effort by an operator," and that petitioner did "not argue that the constant rearward pressure applied by a shooter's trigger finger in order to *continue* firing a machine gun means that it does not fire 'automatically.'" *Ibid.* The court declined petitioner's invitation to draw an "atextual line" between such devices and bump stocks, all of which require "some * * * ongoing physical actuation" to fire continuously. *Id.* at 70a-71a.

4. The court of appeals affirmed, with Judge Carson dissenting. Pet. App. 1a-58a. The court later granted a petition for rehearing en banc and vacated the panel opinion. *Id.* at 74a-77a. After further briefing and argument, the court vacated the grant of rehearing and

reinstated the panel opinion, with Judge Carson and four other judges dissenting. *Id.* at 78a-115a.

a. The panel majority, unlike the district court and contrary to ATF's position in the litigation, concluded that the final rule is a "legislative rule," by which ATF purportedly "intended to change the legal rights and obligations of bump-stock owners." Pet. App. 13a-14a. The majority emphasized that certain statements in the preamble to the final rule contemplated that possession of a bump stock would become unlawful only after the rule took effect; that the preamble discussed *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); and that the final rule was published in the Code of Federal Regulations. See Pet. App. 14a-15a.

The panel majority then determined that this Court's decision in *Chevron* and its progeny provided the appropriate "framework" for evaluating petitioner's challenge to the final rule. Pet. App. 12a. Petitioner had contended that, although the rule (in his view) is a legislative rule, *Chevron* does not apply because the government had "waived" that doctrine or, alternatively, because "*Chevron* deference is inapplicable where the government interprets a statute that imposes criminal liability." *Id.* at 16a, 19a. The majority rejected both contentions. It stated that an "agency's say so" does not control whether the court of appeals itself may independently determine that *Chevron* is applicable, *id.* at 16a, and that this Court's precedent is inconsistent with petitioner's proposed "general rule against applying *Chevron* to agency interpretations of statutes with criminal law implications," *id.* at 19a (discussing *Babbitt* v. *Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995)).

Applying *Chevron*, the panel majority held that the statute is ambiguous on the "precise question at issue," Pet. App. 24a (quoting *Chevron*, 467 U.S. at 842), and that ATF had reasonably interpreted the terms "automatically" and "single function of the trigger" to cover bump stocks. See *id.* at 25a-33a. The majority observed that ATF's interpretation of the phrase "'single function of the trigger' * * * accords with how some courts have read the statute," as well as with how those words were understood at the time of the enactment of the National Firearms Act. *Id.* at 31a. The majority further observed that the rule's interpretation of "automatically" accords with the "everyday understanding of the word 'automatic.'" *Id.* at 32a (citation omitted). The majority also viewed ATF's interpretation as properly "focus[ing] the inquiry about what needs to be automated precisely where the statute does: the ability of the trigger function to produce 'more than one shot, without manual reloading.'" *Id.* at 33a (citation omitted).

Finally, the panel majority held that petitioner had not only failed to demonstrate a likelihood of success on the merits but also had "not met the other prerequisites for preliminary relief." Pet. App. 34a. In particular, the majority rejected petitioner's theory that he could demonstrate irreparable harm by relying on his allegation that the final rule "was issued in violation of * * * the separation of powers." *Ibid.* The majority noted that petitioner's opening brief on appeal had advanced only statutory arguments and that, in any event, the "generalized" harm of a purported violation of the constitutional separation of powers would be insufficient for petitioner to meet his burden of showing that he personally would suffer irreparable injury absent an in-

junction. *Id.* at 34a-35a.[4] The majority also concluded that the remaining preliminary-injunction factors favored the government, noting that the final rule "supports the safety of the public in general and the safety of law enforcement officers and first responders." *Id.* at 37a (citation omitted).

b. Judge Carson dissented. Pet. App. 38a-58a. He would have held that the statutory definition of "machinegun" unambiguously excludes a semiautomatic rifle equipped with a nonmechanical bump stock, on the theory that "the trigger on such a firearm must still 'function' every time a shot is fired," even though the shooter need only pull the trigger a single time to fire continuously. *Id.* at 39a. In his view, such a weapon also does not fire more than one shot "automatically" through a single function of the trigger "[b]ecause the user of the firearm must also apply constant forward pressure with his or her nontrigger hand." *Id.* at 40a (emphasis omitted). Having concluded that the statute is unambiguous, Judge Carson also stated that he would have declined to apply *Chevron* because the government had "disavowed any reliance on *Chevron*" in the litigation, *id.* at 52a, and because the "definition of 'machinegun' in the [National Firearms Act] 'carries the possibility of criminal sanctions,'" *id.* at 53a (citation omitted).

c. On September 4, 2020, the court of appeals granted petitioner's motion for rehearing en banc, vacated the panel opinion, and ordered supplemental

---

[4] In the district court, the government had stated that the loss of petitioner's bump stock would be irreparable, and the district court had treated the irreparable-harm factor as undisputed. Pet. App. 36a, 64a. As the court of appeals explained, however, petitioner did not advance any "loss-of-property argument" on appeal. *Id.* at 36a.

briefing addressing several questions about the final rule and *Chevron*. Pet. App. 74a-77a. After further briefing and argument, however, the court determined that rehearing had been improvidently granted; the court therefore vacated its rehearing order, reinstated the panel opinion, and reissued the judgment. *Id.* at 78a-80a. Five judges dissented. *Id.* at 80a-115a. The dissenting judges would have reversed, principally on the theory that the statutory definition unambiguously excludes bump stocks. See *id.* at 82a, 86a-90a (Tymkovich, J., dissenting); *id.* at 107a (Eid, J., dissenting); *id.* at 111a (Carson, J., dissenting).

ARGUMENT

Petitioner contends (Pet. 3-4) that the court of appeals erred in applying *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to uphold ATF's final rule, in which the agency interpreted the definition of "machinegun" in the National Firearms Act, 26 U.S.C. 5845(b), to encompass bump stocks—devices designed to permit semiautomatic rifles to fire continuously with a single pull of the trigger. Petitioner does not ask this Court to address directly whether bump stocks are machineguns under the statute. Instead, petitioner urges (Pet. 22) the Court to grant review of several abstract questions concerning *Chevron*, including whether an agency may "waive" *Chevron* deference and whether *Chevron* applies to agency interpretations of statutes with criminal penalties. See Pet. 15-32.

This case, however, does not turn on the application of *Chevron*. As the district court correctly held, ATF's interpretation reflects the best understanding of the statutory language. Whether the agency's interpretation is eligible for *Chevron* deference is therefore aca-

demic. Moreover, the decision below does not conflict with any decision of this Court or another court of appeals. The purported "circuit split" (Pet. 4) invoked by petitioner rests on a vacated decision by a divided panel of the Sixth Circuit, which has granted rehearing en banc to consider a challenge to ATF's final rule. In light of those and other still-pending proceedings, petitioner identifies no compelling basis to grant review now.

This case would also be an unsuitable vehicle in which to address issues concerning *Chevron*. Neither petitioner nor the government accepts the premise that the final rule was an exercise of delegated authority to resolve a statutory ambiguity. To the contrary, ATF promulgated the rule to advise the public of ATF's own corrected interpretation of the "machinegun" definition, not to impose any new legal obligations that the statutory scheme itself did not already create. Petitioner's *Chevron* questions would also make no practical difference to the result in this case because the court of appeals separately held that petitioner failed to carry his burden of establishing any irreparable harm. The Court recently denied a petition for a writ of certiorari raising similar questions in a similar interlocutory posture. *Guedes* v. *ATF*, 140 S. Ct. 789 (2020) (No. 19-296). The same course is warranted here.

A. Petitioner Has Failed To Show A Likelihood Of Success

The court of appeals correctly concluded that the district court did not abuse its discretion in denying petitioner's motion for a preliminary injunction because petitioner has failed to demonstrate a likelihood of success on the merits. Petitioner principally contended below that the final rule is inconsistent with the statute. Pet. App. 10a. As ATF recognized, however, the terms "automatically" and "single function of the trigger" in the

definition of "machinegun," 26 U.S.C. 5845(b), are best understood to encompass bump stock devices, which are designed to permit a semiautomatic weapon to be fired continuously with a single pull of the trigger.

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" in order to assist manufacturers with "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. *NFA Handbook* 41. ATF has made explicit, however, that "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 evaluating how to classify those devices, the agency considers whether they shoot (1) "automatically more than one shot" (2) "by a single function of the trigger." 26 U.S.C. 5845(b).

In 2002, when ATF first evaluated the Akins Accelerator, the agency initially 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. See *Staples* v. *United States*, 511 U.S. 600, 602 n.1 (1994) (noting that the National Firearms Act treats a weapon that "fires repeatedly with a single pull of the trigger" as a machinegun, in contrast to "a weapon that fires only one shot with each pull of the trigger"). 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 & Means on H.R. 9066*, 73d Cong., 2d

Sess. 40 (1934) (statement of Karl T. Frederick, President, National Rifle Association of America). 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, not—as petitioner contended below—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.

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 was 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).

2. As demonstrated above, 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 district court was therefore correct to conclude that the final rule reflects the "best interpretation" of the terms "automatically" and "single function of the trigger" and that petitioner is not likely to succeed in challenging the rule as inconsistent with the statute. Pet. App. 67a-68a;

see *id.* at 71a. The court of appeals reached the same result under *Chevron*, concluding that the disputed statutory language is ambiguous and that the final rule is a reasonable resolution of that ambiguity. See *id.* at 24a-33a. Although the court should not have applied *Chevron*, any analytical error made no difference to the result below and does not warrant further review.

The court of appeals' mistaken reliance on *Chevron* was premised on viewing the final rule as a "legislative" rule. Pet. App. 13a-16a. As this Court has explained, legislative rules "have the 'force and effect of law,'" while interpretive rules do not. *Perez* v. *Mortgage Bankers Ass'n*, 575 U.S. 92, 96 (2015) (quoting *Chrysler Corp.* v *Brown*, 441 U.S. 281, 303 (1979)). 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." *Id.* at 97 (quoting *Shalala* v. *Guernsey Mem. Hosp.*, 514 U.S. 87, 99 (1995)); see *Azar* v. *Allina Health Servs.*, 139 S. Ct. 1804, 1811 (2019); *Kisor* v. *Wilkie*, 139 S. Ct. 2400, 2420 (2019) (opinion of Kagan, J.). Legislative rules are generally adopted through notice-and-comment procedures and are generally eligible to receive *Chevron* deference. See, *e.g.*, *United States* v. *Mead Corp.*, 533 U.S. 218, 232 (2001).

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.

In concluding otherwise, the court of appeals emphasized that the preamble to the final rule refers to *Chevron*; that the rule includes an effective date; and that ATF published the rule in the Code of Federal Regulations. Pet. App. 14a-15a. None of those considerations, alone or together, supports disregarding ATF's own position that the rule is merely interpretive. The preamble's discussion of *Chevron* establishes at most that the agency believed its interpretation would be upheld in litigation even if the statutory language were deemed to be 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 publication of a rule in the Code of Federal Regulations does not thereby make the rule legislative. See Gov't C.A. Br. 37-42. In any event, petitioner does not ask this Court to address whether the rule is legislative or interpretive, and that question—which is highly specific to the particulars of this ATF rulemaking—would not warrant the Court's review even if petitioner had sought it.

B. Petitioner Does Not Identify Any Division Of Authority Warranting Review At This Time

Petitioner does not identify any conflict of authority within the courts of appeals that would warrant this Court's review at the present time. ATF's final rule has been challenged in three other circuits. In *Guedes* v. *ATF*, 920 F.3d 1 (2019), cert. denied, 140 S. Ct. 789

(2020), the D.C. Circuit upheld the final rule in an interlocutory appeal from the denial of a preliminary injunction. The Fifth Circuit is presently reviewing a decision in which a district court likewise upheld the final rule and denied any injunctive relief. See *Cargill* v. *Barr*, 502 F. Supp. 3d 1163, 1170-1171, 1198 (W.D. Tex. 2020), appeal pending, No. 20-51016 (5th Cir. argued Oct. 6, 2021). As petitioner notes (Pet. 3-4), a divided panel of the Sixth Circuit declined to afford the final rule *Chevron* deference and held it to be inconsistent with the "best interpretation of § 5845(b)" in *Gun Owners of America, Inc.* v. *Garland*, 992 F.3d 446, 450 (2021). But the Sixth Circuit later granted the government's petition for rehearing en banc in that appeal and vacated the panel decision. *Gun Owners of Am., Inc.* v. *Garland*, 2 F.4th 576, 577 (2021) (No. 19-1298). The en banc Sixth Circuit heard oral argument on October 20, 2021.[5]

In *United States* v. *Alkazahg*, No. 202000087, 2021 WL 4058360 (Sept. 7, 2021), 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. The U.S. Navy-Marine Corps Court of Criminal Appeals is not the highest court in the military justice system, however, because

---

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

its decisions are subject to review by the U.S. Court of Appeals for the Armed Forces. See 10 U.S.C. 867.[6]

Any suggestion that a "circuit split" (Pet. 4) exists on the validity of the final rule is therefore incorrect. The decision below is consistent with the only other circuit court decision on the books, *Guedes* v. *ATF*, *supra*, as well as with multiple district court decisions. To be sure, the Tenth and D.C. Circuits upheld the final rule under the *Chevron* framework, see *Guedes*, 920 F.3d at 17-32; Pet. App. 14a-15a, while several district courts have upheld the rule as the best interpretation of the statute, see Pet. App. 67a; *Cargill*, 502 F. Supp. 3d at 1190, 1194. But the fact that multiple courts have rejected challenges to the final rule both with and without reliance on *Chevron* only underscores that the validity of the rule does not turn on the application of *Chevron*.

C. Petitioner's *Chevron* Questions Do Not Warrant This Court's Review, Especially In This Case

As previously noted, petitioner does not actually ask this Court to resolve the core statutory question addressed by ATF in the final rule—*i.e.*, whether bump stocks are "machinegun[s]" under the National Firearms Act, 26 U.S.C. 5845(b). Petitioner instead frames the case as presenting three methodological questions about *Chevron*: whether courts should defer to an agency's interpretation of a statute under *Chevron* if the agency "affirmatively disavows *Chevron* deference," whether *Chevron* "applies to statutes with criminal-law applications," and whether the rule of lenity takes prec-

---

[6] As of the filing of this brief, the deadline for the Judge Advocate General to decide whether to seek further review of that decision by the U.S. Court of Appeals for the Armed Forces has not yet passed. 10 U.S.C. 867(a)(2); see CAAF R. 19(a)(1) (60-day deadline).

edence over *Chevron* if such a statute is ambiguous. Pet. i. Those questions do not warrant further review, and this case would be an unsuitable vehicle in which to address them.

1. a. Petitioner contends (Pet. 19) that the court of appeals erred in applying *Chevron* in the face of the agency's express disavowal of any reliance on that doctrine and, further, that the courts of appeals are in "disarray on the question whether *Chevron* deference can be waived." See Pet. 15-22. Petitioner's chief support for that claim appears to be the dissenting opinions below, which are not law and which do not establish any "conflict[] * * * in the circuits about the validity of the ATF regulation," Pet. 19. Nor would review be warranted to address any purported disagreement *within* the Tenth or D.C. Circuits. See Pet. 19-20; cf. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").

Petitioner's other examples (Pet. 21 & n.5) only underscore why review is not warranted. In several, the reviewing court concluded that the correct result did not depend on whether *Chevron* applied—as is also true here. See *Babb* v. *Secretary, Dep't of Veterans Affairs*, 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). One

of petitioner's 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 announced by the agency only in litigation, not in a rulemaking or an adjudication, *id.* at 314.

More broadly, petitioner's waiver 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). The second is whether a reviewing court is *required* to forgo any consideration of *Chevron* if the government does not invoke that doctrine in litigation. Whatever the correct answer to the first question—the government contended below that *Chevron*, which rests on a presumption of congressional intent, is not generally susceptible to litigation waiver or forfeiture, see Gov't C.A. Supp. En Banc Br. 5—petitioner has failed to explain why the government's litigation choices would altogether disable a reviewing court from making its own independent judgment about how best to apply this Court's *Chevron* precedents. See Pet. App. 16a (stating that the applicability of *Chevron* does not turn on an "agency's say so"); 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).

b. Petitioner next contends (Pet. 23) that the court of appeals erred in applying *Chevron* to ATF's final rule because "the statute at issue has criminal-law applications." But petitioner again fails to identify any substantial conflict of authority on that issue, or any other compelling basis for review.

This Court has applied *Chevron* deference to agency interpretations of statutes with potential "criminal-law applications." Pet. 23. 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 conse-

quences, see *id.* at 703, 704 n.18; see also 16 U.S.C. 1540(b)(1).

Petitioner contrasts (Pet. 26) 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. In *Apel*, for example, 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; cf. *Abramski*, 573 U.S. at 191 (no deference to interpretation in decades-old, non-binding guidance documents that the agency no longer followed). Those decisions underscore that a "vast body of administrative interpretation" exists 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*.

Petitioner errs in suggesting (Pet. 28) that the Court previously granted review of this issue in *Esquivel-Quintana* v. *Lynch*, 137 S. Ct. 1562 (2016). The question presented there was whether a conviction for a particular form of sexual abuse under state law constituted "sexual abuse of a minor" for purposes of the definition of an "aggravated felony" in the Immigration and Nationality Act, 8 U.S.C. 1101(a)(43)(A). See *Esquivel-Quintana*, 137 S. Ct. at 1567. That question—unlike pe-

titioner's challenge to ATF's final rule—had intractably divided the courts of appeals, which had reached conflicting results in evaluating similar state laws. See Pet. at 13-17, *Esquivel-Quintana*, *supra* (No. 16-54) (collecting cases). And the petition for a writ of certiorari asked the Court to address the merits of the dispute—unlike the present petition, which seeks review of hypothetical *Chevron* questions and does not ask the Court to resolve whether bump stocks are machineguns.

Petitioner's reliance (Pet. 29) on the separation of powers is equally unavailing. Congress may prescribe criminal penalties for the violation of a regulation, the precise content of which is left to an agency, without violating the constitutional separation of powers:

> There is no absolute rule * * * against Congress' delegation of authority to define criminal punishments. We have upheld delegations whereby the Executive or an independent agency defines by regulation what conduct will be criminal, so long as Congress makes the violation of regulations a criminal offense and fixes the punishment, and the regulations "confine themselves within the field covered by the statute."

Loving v. *United States*, 517 U.S. 748, 768 (1996) (brackets omitted) (quoting *United States* v. *Grimaud*, 220 U.S. 506, 518 (1911)); cf. Pet. 30 (acknowledging that this Court has upheld Congress's constitutional authority to delegate "to the executive branch some responsibility for defining crimes").

c. Finally, petitioner asks (Pet. 32) this Court to consider "the proper interplay between *Chevron* and the rule of lenity." But even petitioner acknowledges (*ibid.*) that this issue is "subsidiary" to his other arguments concerning *Chevron*, and petitioner does not suggest

that the lenity question would merit the Court's review on its own. And for good reason: petitioner points to no conflict among the circuits, instead criticizing the panel's specific treatment of the issue here. Pet. 32-34.

2. In any event, this case would be an unsuitable vehicle in which to address petitioner's *Chevron* questions for multiple reasons.

First, entertaining petitioner's *Chevron* questions in this case would be anomalous because both parties agree that *Chevron* does not apply, albeit for different reasons. In the proceedings below, petitioner principally argued that the statutory language unambiguously forecloses ATF's interpretation, while the government argued that the final rule is an interpretive rule to which *Chevron* does not apply. See Pet. App. 10a, 12a; see also pp. 20-21, *supra*. Now, petitioner would apparently have this Court assume both that the statute is ambiguous, contrary to his own position below, and that the final rule is legislative rather than interpretive, contrary to the government's position—because those premises are necessary for any *Chevron* question to arise under the circumstances of this case. The Court should decline petitioner's invitation to address potentially difficult *Chevron* questions under artificial premises that neither party fully endorses.

Second, resolving petitioner's *Chevron* questions in his favor would make no practical difference to the outcome in this appeal. In affirming the district court's denial of a preliminary injunction, the court of appeals concluded that petitioner had not only failed to demonstrate a likelihood of success on the merits, but also had failed to carry his burden of showing irreparable harm in the absence of an injunction. See Pet. App. 34a (observing that the court "could affirm * * * solely on"

likelihood-of-success grounds, but determining that petitioner also "has not met the other prerequisites for preliminary relief"). In particular, the court of appeals rejected petitioner's argument that he had satisfied the irreparable-harm requirement by alleging that the final rule violates the separation of powers; the court also held that petitioner had waived reliance on any other theory. *Id.* at 24a-36a. Petitioner does not seek review of that holding here, and it furnishes a separate barrier to granting any injunctive relief.

Third, 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 denial of certiorari). A departure from that principle would be particularly unwarranted here. As noted above, a panel of the Fifth Circuit and the en banc Sixth Circuit are presently considering similar challenges to the same final rule. See pp. 22-23, *supra*. Those proceedings may bear on whether this or any other challenge to the final rule warrants further review. For example, if those courts were to determine that the rule reflects the best interpretation of the statute (as the government urges), then petitioner's *Chevron* questions would be all the more academic. See *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); cf. *Guedes*, 140 S. Ct. at 791 (statement of Gorsuch, J.) (explaining that the "interlocutory petition" in *Guedes* did not merit review, both because any errors "might yet be corrected before final judgment" and because this Court would benefit from "hearing the[] considered

judgments" of other courts of appeals). At a minimum, the interlocutory posture of this case and the ongoing proceedings in other courts of appeals vitiate any suggestion that the final rule must be reviewed now or not at all.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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

NOVEMBER 2021