No. 23-62

In the Supreme Court of the United States

MERRICK B. GARLAND, ATTORNEY GENERAL, ET AL., PETITIONERS

v.

SCOTT A. HARDIN

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

REPLY BRIEF FOR THE PETITIONERS

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

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The Sixth Circuit erred in holding that the National Firearms Act's definition of a "machinegun," 26 U.S.C. 5845(b), does not include bump stock devices, which transform a semiautomatic rifle into a weapon capable of firing hundreds of bullets per minute in response to a single pull of the trigger. Although respondent defends the Sixth Circuit's decision, he agrees with the government that the question whether bump stocks are machineguns as defined in Section 5845(b) warrants this Court's review. Resp. Br. 2-3, 8, 10-11.

For the reasons explained in the petition for a writ of certiorari (Pet. 13), the government's pending petition for a writ of certiorari in *Garland* v. *Cargill*, No. 22-976 (filed Apr. 6, 2023), would provide a more suitable vehicle for considering that question. In *Cargill*, the en banc Fifth Circuit held that the statutory definition of "machinegun," 26 U.S.C. 5845(b), does not encompass

bump stocks. *Cargill* v. *Garland*, 57 F.4th 447, 450 n.* (2023), petition for cert. pending, No. 22-976 (filed Apr. 6, 2023). The Sixth Circuit issued its judgment in this case approximately four months later, and the panel majority aligned itself with the Fifth Circuit while declining to "repeat[] the intricacies" of the many prior opinions addressing the same question. Pet. App. 5a; see *id.* at 4a, 10a-12a. Granting review in *Cargill* would place the Fifth Circuit's reasoning directly before this Court. The government has accordingly urged the Court to grant the petition in *Cargill* and to hold the petition in this case pending the Court's disposition of *Cargill*. See Pet. 13.

Respondent requests (Br. 3) that the Court grant the government's petitions in both *Cargill* and this case. But doing so would needlessly complicate the proceedings for no apparent benefit. The underlying question of statutory interpretation is the same in both cases—namely, "[w]hether a bump stock device is a 'machinegun' as defined in 26 U.S.C. 5845(b) because it is designed and intended for use in converting a rifle into a machinegun, *i.e.*, into a weapon that fires 'automatically more than one shot * * * by a single function of the trigger.'" Pet. I; accord Pet. at I, *Cargill*, *supra* (No. 22-976). That question fairly encompasses the subsidiary issue of whether or how to apply lenity principles in interpreting Section 5845(b). See Cert. Reply Br. at 3-5, *Cargill*, *supra* (No. 22-976). Respondent is therefore mistaken insofar as he suggests (Br. i, 3, 11-13) that the Court should add an additional question about lenity.

Respondent also asserts (Br. 13) that, "in stark contrast to *Cargill*," this case presents a distinct question concerning the intersection of "the *Chevron* deference

doctrine" and criminal law because the district court in this case relied in part on *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837 (1984), to reject respondent's challenge to the rule. See Pet. App. 25a-26a. That contention is unfounded in multiple respects.

First, this case does not present any occasion to address the application of *Chevron* to a statute carrying criminal penalties because the interpretive rule at issue here does not implicate *Chevron* in the first place. *Chevron* applies only when Congress vests an agency with authority to resolve an ambiguity or fill a gap in a statute the agency administers, and the agency exercises that authority. See, *e.g.*, *United States* v. *Mead Corp.*, 533 U.S. 218, 229-231 (2001). That prerequisite is not satisfied here. The Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) issued its interpretive rule to inform the public of the agency's considered view that bump stocks *are* machineguns as Congress defined that term in Section 5845(b)—not that the agency had (or was exercising) discretionary authority to classify them as such. See Gov't C.A. Br. 30-31; see also, *e.g.*, Br. in Opp. at 20-27, *Guedes* v. *ATF*, 140 S. Ct. 789 (2020) (No. 19-296). ATF therefore was not "making possession of such devices a crime" (Resp. Br. 14), but rather recognizing that bump stocks are already encompassed within the existing statutory prohibition.

Second, and in any event, the district court's invocation of *Chevron* does not distinguish this case from *Cargill*, or otherwise weigh in favor of respondent's proposal to grant review in both cases, because both the Fifth and Sixth Circuits concluded that *Chevron* does not apply, and the government has not challenged that aspect of the courts' decisions. See Pet. App. 5a-10a; *Cargill*, 57 F.4th at 464-469 (plurality opinion).

If anything, respondent's effort to inject *Chevron* into this case is a further reason to hold the petition here and grant plenary review solely in *Cargill*. Respondent's brief in support of certiorari suggests that he would devote a substantial portion of any merits brief to irrelevant *Chevron* issues. Indeed, respondent goes so far as to suggest (Br. 3) that the Court should consider whether to "overrule *Chevron*" in this case. But as respondent appears to recognize (see *ibid.*), the Court has already granted review in *Loper Bright Enterprises* v. *Raimondo*, 143 S. Ct. 2429 (2023), to consider whether to overrule the *Chevron* framework or to modify it in certain respects. Respondent identifies no sound reason to consider an additional and potentially overlapping *Chevron* question here, where the Sixth Circuit declined to apply *Chevron* and both parties agree that *Chevron* does not apply.

Finally, respondent is mistaken to suggest that the government has made any "request for a stay" from this Court in this case. Resp. Br. 3; see *id.* at 17. As the petition notes (at 11), the parties filed a joint motion in the district court for a stay of further proceedings pending the disposition of the government's certiorari petition in *Cargill*. The district court granted the parties' motion and ordered that the proceedings be stayed "pending further order of this Court," *i.e.*, pending further order of the district court itself. 6/22/23 D. Ct. Order 1. To the extent that respondent now seeks relief from that stay, the appropriate forum in which to do so would be the district court. To the extent that respondent means to argue that the Court should reject the government's request to hold this petition, that argument lacks merit. The question of statutory interpretation presented here is identical to the question presented in

the government's petition in *Cargill*. See p. 2, *supra*. If the Court grants certiorari in *Cargill*, it would be appropriate for the Court to hold the petition in this case because the Court's decision in *Cargill* will affect the correct disposition of this case.

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be held pending the Court's disposition of the petition for a writ of certiorari in *Garland* v. *Cargill*, No. 22-976 (filed Apr. 6, 2023), and then disposed of as appropriate.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General

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