No. 19-1298

In the United States Court of Appeals
for the Sixth Circuit

GUN OWNERS OF AMERICA, INC., GUN OWNERS FOUNDATION, VIRGINIA CITIZENS DEFENSE LEAGUE, MATT WATKINS, TIM HARMSEN, RACHEL MALONE,
Plaintiffs-Appellants,

GUN OWNERS OF CALIFORNIA, INC.,
Movant,

v.

MERRICK B. GARLAND, U.S. Attorney General, in his official capacity as Attorney General of the United States, U.S. DEPARTMENT OF JUSTICE, BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, REGINA LOMBARDO, in her official capacity as Acting Director, Bureau of Alcohol, Tobacco Firearms, and Explosives,
Defendants-Appellees.

On Appeal from the United States District Court for the
Western District of Michigan

APPELLANTS' SUPPLEMENTAL BRIEF

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STATEMENT

This case was previously briefed, and argued to a panel of this Court on December 11, 2019. The panel's decision was issued on March 25, 2021. Thereafter, on June 25, 2021, the Court ordered the case reheard en banc, and instructed the parties to file supplemental briefing in this matter. Appellants offer these further arguments and authorities to supplement their prior briefing in this matter.

ARGUMENT

I. *Chevron* Deference Does Not Apply In This Case.

A. *Chevron* Does Not Apply Because the Statute Is Not Ambiguous.

Even if *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), might apply to an agency interpretation of a statute, *Chevron* "deference is not due unless a 'court, employing traditional tools of statutory construction,' is left with an unresolved ambiguity." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1630 (2018). There is no ambiguity in the statute here. Throughout this litigation, Appellants consistently have claimed that the statutory text in 18 U.S.C. Section 921(a)(23) defining "machinegun" is clear and unambiguous, and that it does not include bump stocks. *See* Brief for Appellants ("Opening Brief") at 22. Meanwhile, the government has repeatedly flip-flopped on the issue of ambiguity. *See* Opening Brief at 6, 35-38. On the one hand, the government has expressly

disavowed *Chevron* and does not seek deference, obviously realizing the problems associated with vague criminal statutes that change in meaning based on nothing more than an administration's political agenda. On the other hand, the government remains fully aware that it has not offered anything even close to the best or most natural reading of the statute, and that its best chance at victory instead lies in the wholesale abdication by courts of their role to "say what the law is" — deferring to an interpretation that everyone knows is not the best reading of the statute.

Judge Kethledge has opined that "[t]here is nothing so liberating for a judge as the discovery of an ambiguity." R. Kethledge, Ambiguities and Agency Cases: Reflections After (Almost) Ten Years on the Bench, 70 VAND. L. REV. EN BANC 315, 316 (2017). Both of the other circuits that have upheld the Final Rule reached that conclusion based on the premise that the statute is entirely ambiguous, and that the Final Rule offers merely a "permissible" reading of the text. *Guedes v. BATFE*, 920 F.3d 1, 32 (D.C. Cir. 2019); *Aposhian v. Barr*, 958 F.3d 969, 989 (10th Cir. 2020).

Likewise, Judge Kethledge has advised that "[i]t matters very much ... that judges work very hard to identify the best objective meaning of the text before giving up and declaring it ambiguous." Ambiguities and Agency Cases at 319. However, falling far short of "'employing'" all the "'traditional tools of statutory construction'" before throwing in the towel (*Epic Sys. Corp.* at 1630), the district court devoted only

two brief paragraphs of analysis before concluding that "the word 'automatically' ... is ambiguous." Opinion and Order Denying Plaintiffs' Motion for a Preliminary Injunction, R.48, Page ID#464 ("Opinion"). The court provided even less analysis before concluding that "ATF's interpretation of the phrase 'single function of the trigger' is a permissible interpretation." Opinion, R.48, Page ID#466. In neither case did the district court wrestle with the meaning of the statute or apply it to bump stocks, seemingly content to simply affirm the agency's decision.

While paying lip service to the axiom that "statutory language must be viewed in context, not in isolation" (Opinion, R.48, Page ID#463), the district then did exactly the opposite, teasing individual words cut from the text and concluding that each of those words — linguistic orphans, divorced from their statutory context — has no fixed meaning.[1] First, the court asserted that "the word 'automatically'"[2] does not "preclude[] any and all application of non-trigger, manual forces in order for

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[1] The Supreme Court explicitly rejects this sort of analysis: "[t]he definition of words in isolation [] is not necessarily controlling in statutory construction. ... Interpretation of a word or phrase depends upon reading the whole statutory text…." *Dolan v. United States Postal Serv.*, 546 U.S. 481, 486 (2006); *United States v. One TRW, Model M14, 7.62 Caliber Rifle*, 441 F.3d 416, 422 (6th Cir. 2006) (relying on "[t]he statutory canon of construction *noscitur a sociis*, or 'it is known by its associates'....").

[2] Concluding ATF's reading of the phrase "single function of the trigger" was clearly erroneous, the panel did not need to reach the question of whether a bump stock-equipped firearm fires "automatically."

multiple shots to occur." Opinion, R.48, Page ID#465. On the contrary, the statute does not ban firearms which function merely "automatically" (*i.e.*, all semi-automatic firearms) but rather "automatically ... ***by a single function of the trigger***."[3] *See generally* Opening Brief. Because it is undisputed that a semi-automatic firearm equipped with a bump stock requires more than "a single function of the trigger" in order to fire multiple rounds "automatically," it is not a machinegun. *See* Memorandum in Support of Plaintiffs' Motion for a Preliminary Injunction, R.10, Page ID#174 ("Memorandum in Support") ("Click, bang, click" versus "Click, bang, bang, bang, click."). Second, the court below stripped the word "function" from the statute,[4] claiming that "[t]he *statute does not make clear whether function*

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[3] The Court of Appeals for the D.C. Circuit committed the same error, likening a bump stock to an "'automatic'" sewing machine, which "'requires the user to press a pedal *and* direct the fabric.'" *Guedes* at 30 (emphasis added). Once again, this ignores the language "automatically ... ***by a single function of the trigger***."

[4] Ultimately, Judge White's dissent suffers the same infirmity as the district court's opinion, because it asks "whether 'function' requires our focus upon the movement of the trigger, or the movement of the trigger finger." *Gun Owners of America v. Garland* Opinion ("Op.") at 56 (emphasis added) (quoting *Aposhian* at 986); *see also Guedes* at 31. To even raise this question is to ignore the plain language of the statute, which clearly requires a "single function of the trigger."

Likewise, Judge White asked "how much human input is contemplated by the word 'automatically,'" concluding "[t]hat is a question of degree that the statute's text does not definitively answer." Op. 58; *see also* Brief in Opposition to Plaintiffs' Motion for Preliminary Injunction, R.34, Page ID#271 ("Opp. Br."). Again, that ignores the plain text, as Congress provided *exactly* how much "input is contemplated" — "automatically ... by a single function of the trigger." If a weapon

refers to the trigger ... or ... to the impetus for action that ensues." Opinion, R.48, Page ID#465-66 (emphasis added). The court again overlooked the statutory context, which refers not just to "function" but also to the "function ***of the trigger***." Because a semi-automatic firearm equipped with a bump stock fires only one round by a "single function ***of the trigger***," it is not a machinegun.

The district court's finding of ambiguity was premised almost entirely on the existence of conflicting dictionary definitions for various excised statutory words. *See also* Op. at 56-58 (White, J., dissenting) (comparing dictionary definitions). However, "[i]t should take a great deal more than a couple of competing dictionary definitions to cast aside [] statutory-interpretation." Ambiguities and Agency Cases at 319. *See also* Op. at 31-32 ("dictionaries alone do not" answer the question).[5]

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requires more "input" than a "single function of the trigger" in order to fire "automatically," then it is not a machinegun.

As Appellants' counsel explained at oral argument to the panel, if the trigger of an *actual* machinegun is held to the rear using a zip tie, the weapon will continue to fire even if the shooter literally walks away. *See Staples v. United States*, 511 U.S. 600, 603 (1994); *see also* Memorandum in Support, R.10, Page ID#179. But when the same zip tie is applied to a firearm equipped with a bump stock, the weapon will fire only one round, because its continued operation requires not only a separate "function of the trigger" for each round that is fired, but also "the shooter's additional manual input," what Judge Henderson called "a single function *plus*." *Guedes* at 35, 43-45 (Henderson, J., dissenting); *Aposhian* at 996-98 (Carson, J., dissenting).

[5] The panel used several other "interpretative tools" (Op. 29) to confirm its reading of the statute, including other sections within the statutory scheme (Op. 32), reviewing existing case law (Op. 33), and examining the rule of lenity (Op. 26).

It was error for the district court to conclude that the statutory definition of "machinegun" is ambiguous without conducting any serious analysis of the text. Since firearms equipped with bump stocks require far more variable human input, technique, and guidance than a "single function of the trigger" in order to fire repeatedly,[6] they do not operate "automatically." Since semi-automatic firearms equipped with bump stocks require a separate "function of the trigger" for each round that is fired, they similarly are not machineguns.

[6] Yet even if ATF is granted *Chevron* deference and permitted to "expand" and "revise" the statutory phrase "single function of the trigger" to now be "single pull of the trigger," the agency would still lose. That is because a firearm equipped with a bump stock fires only one round for each "function" **or** "pull" of the trigger. A semi-automatic firearm does not, like a machinegun, fire multiple rounds when its trigger is held to the rear. Even with a bump stock the trigger must be released and "pulled" again between shots. *See* Memorandum in Support, R.10, Page ID#175; Op. at 33. In fact, as Appellants have explained, when shooting a firearm equipped with a bump stock, every time a round is fired "the trigger lose[s] contact with the finger and manually reset[s]." Final Rule at 66517. *See also Freedom Ordnance Mfg. v. Brandon*, 2018 U.S. Dist. LEXIS 243000 (S.D. In. 2018) ("the user's trigger finger is *separated from the trigger* due to the recoil of the firearm between each shot....") (emphasis added); *see also Guedes* at 49 (Henderson, J., dissenting); Opening Brief at 11, 34. In order to fire another round, the trigger finger must re-engage the trigger. Thus, a bump stock permits firing "through a rapid series of trigger pulls." *Id.* at 8.

B. *Chevron* Does Not Apply Because This Is a Criminal Statute.

The panel correctly concluded that "no deference is owed to an agency's interpretation of a criminal statute."[7] Op. 18. This is hardly a surprising conclusion given that, recently, the Supreme Court twice has stated exactly that in so many words. In *United States v. Apel*, 571 U.S. 359, 369 (2014), the Court announced that "we have never held that the Government's reading of a criminal statute is entitled to any deference." Then, in *Abramski v. United States*, 573 U.S. 169, 191 (2014), the Court added that "criminal laws are for courts, not for the Government, to construe ... ATF's ... position ... is ... not relevant at all" and "a court has an obligation to correct [the agency's] error."

There is no way to read these statements other than as the panel did, providing a "clear, unequivocal, and absolute" statement of the law. Op. 11. Likewise, there is simply no way to reconcile the Court's statements with the district court's

[7] It is not questioned that this case involves a purely criminal statute (*i.e.*, possess a machinegun, go to jail). *See* Op. at 15. To be sure, this case involves the definition of the term "machinegun" located in the Internal Revenue Code as part of the National Firearms Act (purportedly a taxing statute) at 26 U.S.C. Section 5845(b). But at issue is not registration or payment of a tax to possess a *legal* machinegun under the NFA. Rather, the application at issue here is the Gun Control Act complete ban on modern "machinegun[s]," located at 18 U.S.C. Section 922(o), and accompanying definition located in 18 U.S.C. Section 921(a)(23) which incorporates the NFA definition. Such *illegal* machineguns cannot be registered at all under the NFA, and the penalty for possessing such a firearm is a maximum of 10 years imprisonment. 18 U.S.C. Section 924(a)(2).

application of *Chevron* to a criminal statute.[8] In fact, although the parties briefed *Apel* and *Abramski* to the district court (Notice of Supplemental Authority, R.38, Page ID#302; Reply Brief in Support of Plaintiffs' Motion for Preliminary Injunction, R.37, Page ID#287 ("Reply"); Transcript of Hearing on Plaintiffs' Motion for Preliminary Injunction, R.56, Page ID#498, 500 ("Transcript")), that court's opinion fails even to mention them. Similarly, to apply *Chevron* deference to the Final Rule, this Court would be required to ignore *Apel*, and *Abramski* — a case involving the *very same agency and the very same statute* as here — in favor of "throwing bones" left from older Supreme Court opinions which are at best unclear, and which involved altogether different statutory schemes.[9] Instead, this Court should do exactly what

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[8] The panel explained that, "[s]ince *Apel* and *Abramski*, other federal courts have split as to whether those opinions *mandate* that a court may not, or merely *permit* that it need not, defer to an agency's interpretation of a criminal statute." Op. 16. Tellingly, nearly all such opinions support the panel's decision, reading *Apel* and *Abramski* to foreclose use of *Chevron* in the criminal context. In fact, the *only* opinions to have come down on the other side of the issue have been in cases challenging the bump stocks Final Rule at issue here. That is not altogether surprising, given the topic involved — "a simple four-letter word: guns." *See Mai v. United States*, 974 F.3d 1082, 1097 (9th Cir. 2020) (VanDyke, J., dissenting).

[9] Dissenting from the panel's conclusion that deference is not appropriate in the criminal context, Judge White pointed to *United States v. O'Hagan*, 521 U.S. 642 (1997). While Judge White believed the Court had "applied *Chevron* deference" in that case, the panel believed that any deference the Court may have given *O'Hagan* was something other than *Chevron* deference. Op. 14, 43; *see also Guedes* at 24. Notably, Justice Scalia agreed, writing in dissent that he did not believe that the *O'Hagan* majority was applying *Chevron* deference: "here[] no *Chevron* deference

the panel did — "take the [Supreme] Court at its word" that bureaucrats are not entitled to "any deference" when interpreting criminal law. Op. at 14.

C. A President's Political Objectives Do Not Receive *Chevron* Deference.

One of the primary justifications for judicial deference to bureaucratic interpretations of ambiguous statutes is that agencies sometimes are believed to have specialized "expertise" in "highly technical" areas of the law. *See Atrium Med. Ctr. v. United States HHS*, 766 F.3d 560, 568 (6th Cir. 2014). But if that is the case, then this Court would do far better to defer to the numerous and repeated technical classification letters issued by ATF's Firearms Technology Branch from 2008 to 2017, all of which concluded that bump stock devices are not machineguns under

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is being given to the agency's interpretation." *O'Hagan* at 679 (Scalia, J., dissenting). If the *O'Hagan* majority had disagreed with this characterization of its analysis, surely it would have clarified the issue and made it more obvious that it was applying deference under *Chevron*.

Likewise, Judge White relied on *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687 (1995), theorizing that *Chevron* had been applied there, because the decision "vindicated the view of the dissenting appellate judge, who applied *Chevron*," and the Court's use of words like "reasonable" and "permissible" which "only makes sense if the Court was operating within *Chevron*'s domain." Op. 45 n.7. But once again, the *Babbitt* Court provided no clear (much less definitive) statement. At best, *O'Hagan*'s and *Babbitt*'s utilization of *Chevron* is clear as mud, while *Apel* and *Abramski* are plain as day.

Interestingly, Judge White rejected *Apel* and *Abramski*'s application here, on the ground that those decisions "never mention *Chevron*...." Op. at 46. But likewise, neither did *Babbitt* and *O'Hagan* explicitly rely on *Chevron*. The dissent provides no explanation why older cases should apply while newer cases should be ignored.

federal law. *See* Complaint for Declaratory and Injunctive Relief, R.1, Page ID#14-16 ("Compl."). Until ATF was ordered by the Department of Justice to reverse its classification of bump stocks, its firearms "experts" (and just about everyone else, *see* Compl., R.1, Page ID#17-19) recognized[10] that firearms equipped with bump stocks are not machineguns because they require "*continuous multiple inputs by the user* for each successive shot" in order to operate. *Id.*, Page ID#15 (emphasis added).

Then, in early 2018, President Trump unilaterally declared that bump stocks *should be* machineguns. Turning on a dime, ATF immediately began to claim that bump stocks *are* machineguns, contradicting the agency's earlier factual statements by now claiming that bump stocks permit "continuous firing initiated by a *single action by the shooter*."[11] Petition for Rehearing *En Banc* at 1-2 (emphasis added); *see*

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[10] Nearly contemporaneously with issuance of the Final Rule, ATF's lawyers were busy arguing in federal court that bump stocks were *not* machineguns (an argument adopted by that court), because they "require[] the shooter to manually pull and push the firearm in order for it to continue firing ... in rapid succession. ... the rapid fire sequence in bump firing is contingent on shooter input ... rather than mechanical input, and is thus not an automatic function of the weapon." *Freedom Ordnance Mfg, Inc., v. Brandon*, No. 16-243 2018 WL 7142127 (S.D. In. 2018), ATF Brief in Support of Cross Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment, ECF #28 at 22.

[11] ATF did not hide its purely political motivation "to interpret the definition of 'machinegun' ... *such that it includes* ... bump-stock[s]...." 83 *Fed. Reg.* 66543 (emphasis added). Indeed, the Final Rule did not merely adopt a new regulatory interpretation of "machinegun," but purported to explicitly ban bump stocks by name, on the theory that the statute did not "clearly exclude[]" them. 27 C.F.R. Section

also Reply, R.37, Page ID#291-92, 294-95; Opening Brief at 39-40 (for a discussion of ATF's continually conflicting factual statements about how bump stocks operate).

The agency's volte-face was precipitated not by any new industry innovation or different technical analysis. Rather, ATF was ordered point blank by the President of the United States to simply "writ[e] out" bump stocks, and the agency did what it was told, "[c]arrying out that directive ... to adopt th[e] Final Rule." Opp. Br., R.34, Page ID#253, 260. Thus, even if there was a reason to "defer" to ATF's decision here, the Court would not be deferring to *the agency's* institutional firearm knowledge or expertise, but instead to the political agenda *of a former president*. That is not the rule of law, but rather "'the King [] creat[ing] an[] offence by ... proclamation, which was not an offence before.'" *Whitman v. United States*, 574 U.S. 1003, 1004 (2014) (Scalia, J., dissenting from denial of certiorari).

Of course, President Trump never claimed to possess any technical expertise about firearms to which this Court should defer, and "[t]here is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes."

478.11; Opp. Br., R.34, Page ID#266. As ATF admitted in *Guedes*, "[a]bsent the revised definition ... ATF could not 'restrict'" bump stocks. *Guedes v. ATF*, No. 18-2988, ECF #16, Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for Preliminary Injunction at 33. Yet an agency cannot "reverse its current view 180 degrees anytime based merely on the shift of political winds and *still* prevail." *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring).

Clinton v. City of N.Y., 524 U.S. 417, 438 (1998). Nor may an agency "rewrit[e] ... unambiguous statutory terms" to suit "bureaucratic policy goals." *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 325-26 (2014). Rather, "[o]nly the people's elected representatives in Congress have the power to write new federal criminal laws." *United States v. Davis*, 139 S. Ct. 2319, 2323 (2019).

The President's decision to declare bump stocks to be machineguns *conflicts with* all prior agency technical decisions on the subject by the government's subject matter experts. This Court should not be deferential, but rather highly skeptical, of any agency's purported "interpretation" of a statute that has been politically forced upon it from above. *See* Memorandum in Support, R.10, Page ID#190.

D. Congress Did Not Delegate to ATF the Authority to Define or Redefine the Term "Machinegun."

In addition to the requirement that a statute be ambiguous, *Chevron* does not apply unless "it appears that Congress delegated authority to the agency," and "the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001); *see also Chevron* at 843. This prerequisite "must be determined by the court on its own before *Chevron* can apply," and a court should not "defer to an agency's interpretation of an ambiguous provision unless Congress wants us to...." *City of Arlington, Tex. v.*

F.C.C., 569 U.S. 290, 322 (2013). In all cases, "[a]gency authority may not be lightly presumed." *Michigan v. EPA*, 268 F.3d 1075, 1082 (D.C. Cir. 2001). Indeed, where, as here, "an agency claims to discover in a long-extant statute an unheralded power to regulate" items that heretofore were unregulated, "we typically greet its announcement with a measure of skepticism. We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'" *Util. Air Regulatory Group v. EPA* at 324. *See also Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 480-81 (1992) (explaining that, when the government's "position … has not been altogether consistent," the agency's "persuasive power" is "diminish[ed]"); *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 734 (6th Cir. 2013) (Sutton, J., concurring).

Below, the district court found ATF's source of authority to stem from 18 U.S.C. § 926(a) (Opinion, R.48, Page ID#462), which provides that "[t]he Attorney General may prescribe only such rules and regulations as are necessary to carry out the provisions of this chapter." To this, the dissent adds 26 U.S.C. § 7805(a),[12] which provides that "the Secretary shall prescribe all needful rules and regulations for the

[12] As noted above, this case does not involve the definition of a *lawful* machinegun for purposes of taxation and registration under Title 26, but rather a determination of what constitutes an *unlawful* machinegun under Title 18, which contains the much narrower delegation of authority.

enforcement of this title," and Section 7801(a)(2)(A), which states that "[t]he administration and enforcement of the following provisions... shall be performed by ... the Attorney General." *See* Op. at 40; 83 *Fed. Reg*. 66515.

Each of these statutes delegates (at best) general authority for ATF to enforce federal gun laws, and in no way can be read to provide explicit (or even implicit) authority to determine which sorts of devices *should* constitute machineguns under federal law, especially where such classifications are dependent upon revision of the text itself. *See Aposhian v. Wilkinson*, 989 F.3d 890, 900 n.6 (10th Cir. 2021) (Tymkovich, J., dissenting) ("if Congress wants to give the executive branch discretion to define criminal conduct, it must speak 'distinctly.' ... Here, we ... are having to infer from *ambiguity*, not an express delegation, that Congress implicitly authorized ATF to define criminal conduct."). *See also* Opening Brief at 12.

E. Even if the Statute Were Ambiguous, Then It Is Unconstitutionally Vague. Alternatively, the Rule of Lenity Applies.

As the panel noted, when a criminal statute is found to be ambiguous, not only does *Chevron* deference not apply *in favor of* the government, but also "ambiguities in criminal statutes have always been interpreted *against* the government...." Op. 26 (emphasis added). It is axiomatic that criminal law must be written so that "men of common intelligence [need not] guess at its meaning...." *Connally v. General Constr.*

Co., 269 U.S. 385, 391 (1926). As Appellants argued, if what constitutes a machinegun is suddenly now ambiguous,[13] it must be struck down on due process vagueness grounds (a constitutional imperative)[14] or, in the alternative, the rule of lenity (as a judicial rule of statutory construction derived from the common law) should apply. Opening Brief at 35-38.

Having found the statute to be clear,[15] the majority found it unnecessary to decide whether the rule of lenity and "serious fair-notice concerns" render the Final

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[13] *See Aposhian v. Wilkinson* at 906 (Carson, J., dissenting) ("[t]he National Firearms Act [] is not ambiguous. It has been on the books for nearly ninety years and its definition of a 'machinegun' has proven workable." ; *see also* Opening Brief at 38 (collecting cases where the definition of "machinegun" has been found to be unambiguous); *see also United States v. Davis* at 2337 (Kavanaugh, J., dissenting) (calling it a "surprising conclusion" that a "federal law that has been applied so often for so long with so little problem" is "today, after 33 years and tens of thousands of federal prosecutions ... unconstitutional because it is supposedly too vague.").

[14] *See Davis* at 2323 ("When Congress passes a vague law, the role of courts ... is not to fashion a new, clearer law to take its place, but to treat the law as a nullity and invite Congress to try again."). The majority in *Davis* found the statute at issue ambiguous and vague, and struck it down. *Id.* at 2336. On the other hand, the dissent concluded the statute was not ambiguous in the first place. *Id.* at 2337. There is no middle ground for a court to find a statute to be vague, but leave it in effect.

[15] *See also Aposhian v. Wilkinson* at 898 (Tymkovich, J., dissenting) ("*Chevron* only kicks in once the traditional tools of interpretation have been exhausted. ... We still have one left in our toolbox: the rule of lenity. And it 'is more than up to the job of solving today's interpretive puzzle.'").

Rule invalid.[16] Op. 27-28. Similarly, a prior panel of this Court, although ultimately not deciding whether to defer under *Chevron* to "ATF Rulings" as to which items constitute machineguns, nevertheless hinted against it: "[t]his matter is further complicated [because] we are interpreting a criminal statute, and under the rule of lenity, ambiguities are generally resolved in favor of the party accused of violating the law, even in a civil proceeding." *United States v. One TRW* at 420 n.3.[17]

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[16] The majority additionally found it unnecessary to wrestle with the Supreme Court's conflicting statements on the rule of lenity, including the Court's statement in *Babbitt* that "[w]e have never suggested that the rule of lenity should provide the standard for reviewing facial challenges to administrative regulations whenever the governing statute authorizes criminal enforcement." *Babbitt* at 704 n.18; Op. 27. Judge White responded that "no case has purported to overrule" this statement and, "as a subordinate court, we must follow *Babbitt*." Op. 54 (White, J., dissenting). Of course, as the panel majority noted, other statements by the Court directly conflict with *Babbitt*, such as that when a statute "has both criminal and noncriminal applications[,] we must interpret the statute consistently, [and] whether we encounter its application in a criminal or noncriminal context, the rule of lenity applies." *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004). *See also Clark v. Suarez Martinez*, 543 U.S. 371, 380 (2005); *Whitman v. United States* at 1005 (2014) (Scalia & Thomas, JJ., respecting the denial of certiorari) (opining that Babbitt's "drive-by" foot-note "contradicts the many cases before and since holding that, if a law has both criminal and civil applications, the rule of lenity governs its interpretation in both settings.").

[17] Judge White asserted that the rule of lenity should not apply to invalidate the Final Rule because ATF's formal rulemaking process has provided adequate notice to the public that ATF now considers bump stocks to be machineguns. Op. 54. Of course, even if this were so, "notice" is only one aspect of the " two ideas" on which "[t]he rule of lenity is premised," the other being that "'legislatures and not courts should define criminal activity.'" *Babbitt* at 704 n.18. Likewise, "[v]ague laws contravene the 'first essential of due process of law' that statutes must give people 'of common intelligence' fair notice of what the law demands of them," and "also

II. This Court May Not Apply *Chevron* Deference, Because the Government Has Repeatedly and Expressly Waived It.

Because it had concluded "that *Chevron* deference does not apply in this case," the panel did "not consider or decide the issue of waiver." Op. at 9 n.3. Thus, even if this Court were to decide that *Chevron* theoretically might apply in a case such as this, it could not give deference *here*, because the government has repeatedly and expressly waived it. *See* Notice of Supplemental Authority, R.38, Page ID#302; Transcript, R.56, Page ID#498; Opinion, R.48, Page ID#461-462; Brief for Appellees, ECF #29 at 16; Petition for Rehearing En Banc, ECF #55-1 at 3, 14. In *Guedes*, "the government went so far as to indicate that ... if the Rule's validity turns on the applicability of *Chevron*, it would prefer that the Rule be set aside rather than upheld under *Chevron*." *Guedes* at 21. Yet the district court failed to even consider the waiver issue. *See* Opening Brief at 14.

At least twice, this Court has held that parties which fail to invoke *Chevron* deference forfeit any ability to rely on it. *See CFTC v. Erskine*,[18] 512 F.3d 309, 314

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undermine the Constitution's separation of powers and the democratic self-governance it aims to protect," by "hand[ing] responsibility for defining crimes to relatively unaccountable police, prosecutors, and judges, eroding the people's ability to oversee the creation of the laws they are expected to abide." *Davis* at 2325.

[18] In dissent, Judge White questions whether *Erskine* is precedential, first claiming that it merely "*appears to voice agreement* with the suggestion that *Chevron* arguments may be forfeited...." Op. at 43 n.5 (emphasis added). On the contrary, the

(6th Cir. 2008) (finding that the agency had "waived any reliance on *Chevron* deference by failing to raise it to the district court."); *Help Alert W. Ky., Inc. v. TVA*, 1999 U.S. App. LEXIS 23759, *8 (6th Cir. 1999, unpublished) ("the plaintiffs advance their *Chevron* argument for the first time on appeal — and issues not raised before the district court generally may not be raised on appeal.").[19] Here, the government

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Court in *Erskine* did not merely "appear to" agree, but rather stated unequivocally "[w]e agree." *Erskine* at 314. Second, Judge White claims that the conclusion on waiver was "dictum," on the theory that it was but one of several reasons for the Court's conclusion that *Chevron* did not apply. But on that theory, each of the panel's conclusions would be dictum, and none of them would be binding. Finally, Judge White criticizes the *Erskine* court for "offer[ing] no discussion on the issue," but that is not the case, as the Court first explained the defendant's position on the issue, and then stated its agreement.

[19] Other courts similarly have declined to give deference when an agency does not seek it. *See Texport Oil Co. v. United States*, 185 F.3d 1291, 1294 (Fed. Cir. 1999) (superseded by statute); *Hydro Res., Inc. v. United States EPA*, 608 F.3d 1131, 1146 n.10 (10th Cir. 2010); *Global Tel*Link v. FCC*, 866 F.3d 397, 407-08 (D.C. Cir. 2017). Likewise, courts have applied *Chevron* when the parties agree it applies. *See, e.g., Kikalos v. Comm'r*, 190 F.3d 791, 796 (7th Cir. 1999); *Humane Soc'y of the United States v. Locke*, 626 F.3d 1040, 1054 n.8 (9th Cir. 2010); *Lubow v. Dep't of State*, 783 F.3d 877, 884 (D.C. Cir. 2015). Still other courts have found it necessary to determine for themselves that *Chevron* applies, even when the parties are in agreement that it does. *See Sierra Club v. United States DOI*, 899 F.3d 260, 286 (4th Cir. 2018); *Mushtaq v. Holder*, 583 F.3d 875, 876 (5th Cir. 2009). Finally, perpetuating its inter-circuit split on the issue, the D.C. Circuit at least once applied *Chevron* even though the government had not invoked it. *SoundExchange, Inc. v. Copyright Royalty Bd.*, 904 F.3d 41, 54 (D.C. Cir. 2018). But (aside from the bump stock cases litigated in other circuits around the country) Appellants are aware of no court that has forcibly applied *Chevron* when litigants on both sides have expressly disclaimed its application. *See Guedes* at 22; *Aposhian v. Barr* at 982 (applying *Chevron* on the theory that the Appellant somehow had opened the door by having

did not merely overlook invocation of *Chevron*, but rather "expressly disclaimed" it. *See Guedes* at 21.[20] In order to apply *Chevron* here, this Court not only would need to overrule its prior decisions that *Chevron* can be forfeited, but also would need to find that *Chevron* cannot be knowingly and intentionally waived.

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argued that *Chevron* does *not* apply).

[20] Judge White's dissent also questions the propriety of a rule permitting the government to waive *Chevron*, on the theory that "*Chevron* ... is a standard of review" which cannot be waived. Op. at 41. *Cf. SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1364 (2018) (Breyer, J., dissenting) ("I do not mean that courts are to treat [*Chevron*] like a rigid, black-letter rule of law, instructing them always to allow agencies leeway to fill every gap in every statutory provision. ... Rather, I understand *Chevron* as a rule of thumb, guiding courts in an effort to respect that leeway which Congress intended the agencies to have."). Indeed, to call *Chevron* a "standard of review" seems odd, because this would mean that an appellate court must review lower court interpretations of statutes de novo, but bureaucratic interpretations of statutes for basically an abuse of discretion. Such a notion flips the role of courts on its head. On the contrary, it hardly seems disadvantageous to have judges — rather than bureaucrats — determine the correct meaning and application of a criminal statute.

Like Judge White's dissent, the D.C. Circuit claimed that it had no choice but to apply *Chevron* because a court "'retains the independent power to identify and apply the proper construction of governing law.'" *Guedes* at 22. Ironically, as eager as the court was to reach "the proper construction of governing law," it then used *Chevron* to defer to ATF and thus avoid having to determine "the proper construction of governing law." Yet as Justice Gorsuch explained, it is hardly "a surprise that the government can lose the benefit of *Chevron* in situations like [this]. If the justification for *Chevron* is that 'policy choices' should be left to executive branch officials ... then courts must equally respect the Executive's decision *not* to make policy choices in the interpretation of Congress's handiwork." *Guedes v. ATF*, 140 S. Ct. 789, 790 (2020) (Gorsuch, J., Statement on denial of certiorari).

Most importantly, application of *Chevron* deference here would require the Court to ignore the Supreme Court's most recent definitive statement that *Chevron* can be waived. In an opinion issued just over a month ago (only hours before this Court's grant of *en banc* review), Justice Gorsuch, writing for a majority of six justices, explained that, while the government had "asked the court of appeals to defer to its understanding under *Chevron* ... the government does not ... repeat that ask here.... We therefore decline to consider whether any deference might be due its regulation." *HollyFrontier Cheyenne Ref., LLC v. Renewable Fuels Ass'n*, 141 S. Ct. 2172, 2021 U.S. LEXIS 3399, *19 (2021). Likewise, even the dissenting justices rejected the notion that "HollyFrontier wins because its reading is *possible*" (*i.e.*, *Chevron* deference), but instead sought to "assess[] the best reading of the phrase...." *Id.* at *30 (Barrett, J., dissenting) (emphasis original).[21] An even stronger argument against *Chevron* applies here, because in this case the government has never asked for deference at any stage of the litigation, but rather has expressly disavowed it.

[21] Judge White reported that "[t]he Supreme Court has not yet addressed this issue" of whether *Chevron* can be waived. Op. at 41 n.3. *HollyFrontier* now has definitively put the issue to rest. Should this Court have been inclined to grant *Chevron* deference to the Final Rule, it no longer may do so based on the *HollyFrontier* opinion, issued contemporaneously with this Court's grant of *en banc* review. In such case, the Court should determine its June 25, 2021 grant of rehearing was improvidently granted, vacate that order, and reinstate the panel's opinion. *See* March 5, 2021 Order in *Aposhian v. Wilkinson*, No. 19-4036 (10th Cir. 2021).

Justice Gorsuch's opinion for the Court in *HollyFrontier* did not break new ground, but rather reiterated a position that he has taken repeatedly in the past. For example, in his "statement" in *Guedes*, Justice Gorsuch noted that "[t]his Court has often declined to apply *Chevron* deference when the government fails to invoke it." *Guedes v. ATF*, 140 S. Ct. at 790 (Gorsuch, J., Statement concerning denial of certiorari). Likewise, writing in dissent in *Burlington Northern Santa Fe Ry. v. Loos*, 139 S. Ct. 893 (2019), Justice Gorsuch disagreed with the majority's ultimate conclusion, but nevertheless agreed with the majority's methodology, writing that "the Court today buckles down to its job of saying what the law is," refusing to apply *Chevron* deference after the government "devoted scarcely any of its briefing to *Chevron*" and, "[a]t oral argument .... didn't even mention the case until the final seconds — and even then 'hate[d] to cite' it." *Id.* at 908-09. It is entirely reasonable to assume that the five justices who joined Justice Gorsuch in *HollyFrontier* were aware of his prior statements in *Guedes* and *Burlington*.

In sum, even if this Court finds that *Chevron* might be applicable, it cannot apply *Chevron* here without overruling its own precedents and ignoring the Supreme Court's recent definitive statement in *HollyFrontier*. Without the *Chevron* crutch, the Court must decide "the best reading" of the statute. And, as discussed above, no circuit judge has been willing to claim that ATF's "interpretation" is best.

III. Deference Here Will Only Further Embolden ATF's Lawless Actions.

As the panel majority noted, ATF is an agency with a history of "frequent reversals on major policy issues." Op. 18. Indeed, permitting ATF to reimagine bump stocks as machineguns in this case will have serious future repercussions, some of which are already occurring. Appellants explained that, under the Final Rule, all semi-automatic firearms could one day qualify as machineguns.[22] Opening Brief at 46.[23] *See also Guedes*, 920 F.3d at 44-45 (Henderson, J., dissenting); *see also Brief of the Cato Institute and Firearms Policy Coalition as Amici Curiae* at 8-11 (discussing other threats posed by the Final Rule).

Over the years, ATF repeatedly has classified certain items and firearms to be lawful and thus permissible to sell. Then, once the industry and gun owners have

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[22] Ironically, ATF discounted the concern that "single pull of the trigger" could be used to classify semiautomatic firearms as machineguns, focusing not on its language from the Final Rule, but on the statutory language "single function of the trigger" — "the shooter must release the trigger before another round is fired ... the result of a separate function of the trigger." *See* 83 *Fed. Reg.* 66534.

[23] The district court rejected this argument as a "'slippery slope.'" Opinion, R.48, Page ID#467. Yet just over a year later, a federal district court in Nevada overrode the protections of the Protection in Lawful Commerce in Arms Act to permit suit against the manufacturer of a semiautomatic AR-15 rifle, on the theory that it "is plausible" that a semiautomatic AR-15 is, in fact, a fully automatic machinegun because its stock can be removed and a bump stock added. *See* Appellants' 28j Letter, ECF #44; *Parsons v. Colt*, No. 2:19-cv-01189, ECF #98 at 8-11; *see also* ECF #115 (order denying motion for reconsideration).

invested time, energy, and capital into production and sale, ATF professes a bureaucratic "oopsie," declares the same items or firearms in fact to be illegal contraband, and demands that they be surrendered or destroyed. *See, e.g.*, C. Neubauer, "Gun makers baffled by ATF criteria," The Washington Times (Jan. 2, 2012). This pattern has repeated itself so frequently and identically that it is increasingly believed by the firearms community to be a deliberate tactic by the agency (rather than a result of mere bureaucratic ineptness).

While, historically, ATF's about-faces have involved relatively small manufacturers and number of firearms or accessories, in recent years they have expanded exponentially. The Final Rule, for example, applies to at least *half a million* lawfully owned bump stocks. In May of this year, ATF issued a Notice of Proposed Rulemaking, blatantly seeking to rewrite the statutory text "the frame or receiver" (*singular*) of every firearm to now be "frames or receivers" *(plural*) (86 *Fed. Reg.* 27720), meaning that common firearms now could be comprised of over a dozen "firearms" that each require serialization, record-keeping, and a background check to purchase.[24]

[24] *See* Gun Owners of America, Inc. Comments on "Definition of 'Frame or Receiver' and Identification of Firearms," June 4, 2021.

Then, in June, ATF released a subsequent Notice of Proposed Rulemaking designed to require NFA registration of up to ***40 million*** popular "pistol braces,"[25] revoking more than a decade of ATF rulings that such devices do not transform handguns into short-barreled rifles under the NFA.

Enough is enough. The federal courts cannot stand idly by while ATF continues to evade the statutes Congress wrote through cutesy "interpretations" of the text, thereafter rubber stamped by judges through use of *Chevron* deference. The statutory definition of "machinegun" has a clear and unambiguous meaning, and it ***obviously*** does not include bump stocks. It is "emphatically the duty" of this Court to find and declare the meaning of the text.

CONCLUSION

For the reasons stated in the now-vacated panel opinion, along with the reasons stated in Appellants' Supplemental Brief and its prior briefing to the panel,[26] this

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[25] *See* "Handguns, Stabilizing Braces, and Related Components," Congressional Research Service (April 19, 2021) at 2 ("unofficial estimates suggest that there are between 10 and 40 million stabilizing braces and similar components already in civilian hands").

[26] Appellants do not address the remaining three factors for issuance of a preliminary injunction here. Presumably this Court has not granted review to decide that bump stock owners have not suffered irreparable harm. To the extent it is necessary to do so, Appellants refer the Court to the arguments made in their prior briefing to the panel.

Court should reverse the district court's decision below, denying Appellants' Motion for a Preliminary Injunction, and order that a preliminary injunction[27] should issue, enjoining Appellees from enforcing the Final Rule.

Respectfully submitted,

[27] The panel concluded a nationwide injunction was inappropriate, and instructed the district court to issue an injunction no broader than "the bounds of the four states within the Sixth Circuit's jurisdiction and, of course, [] the parties themselves." Op. 36. However a nationwide injunction is appropriate in an APA case such as this. The Attorney General, Department of Justice, and ATF are "the parties" to this case. Likewise, the organizational plaintiffs herein represent their members and supporters, comprised of gun owners across the nation who are similarly situated to the individual plaintiffs here. Nor are there varying sets of facts that make relief appropriate for some bump stock owners, but not others.

Moreover, if the Final Rule was not enjoined nationwide, the situation would be unworkable, as a bump stock would transform from an unregulated piece of plastic in this circuit into an illegal machinegun if it crossed state lines. Indeed, some of the individual plaintiffs do not reside in this circuit. Although federal authorities might be enjoined from prosecuting those parties, state and local authorities would still be free to harass them on the grounds that the Final Rule was still in effect and bump stocks were still machineguns somewhere else. Prudence dictates that a checkerboard approach to enforcement of federal criminal firearms law is an unacceptable result.

Finally, by its very terms, 5 U.S.C. Section 706(2) requires that a "reviewing court shall ... hold unlawful and set aside agency action" that is "not in accordance with law...." *See also Harmon v. Thornburgh*, 878 F.2d 484, 495 n.21 (D.C. Cir. 1989) ("When ... agency regulations are unlawful, the ordinary result is that the rules are vacated — not that their application to the individual petitioners is proscribed.").

/s/ Robert J. Olson

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CERTIFICATE OF COMPLIANCE

IT IS HEREBY CERTIFIED:

1. That the foregoing Appellants' Supplemental Brief complies with the Court's June 25, 2021 briefing letter, because it does not exceed twenty-five pages, excluding the parts of the brief exempted by Rule 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect version 18.0.0.200 in 14-point Times New Roman.

/s/ Robert J. Olson
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Counsel for Appellants

Dated: July 26, 2021

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing Appellants' Supplemental Brief was made, this 26th day of July 2021, by the Court's Case Management/Electronic Case Files system upon all parties or their counsel of record.

/s/ Robert J. Olson
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