No. 21-159

IN THE

Supreme Court of the United States

W. CLARK APOSHIAN, *Petitioner*,
v.
MERRICK B. GARLAND, ATTORNEY GENERAL, *ET AL.*,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

Brief *Amicus Curiae* of Gun Owners of America, Gun Owners Fdn., Virginia Citizens Defense League, Tennessee Firearms Association, Grass Roots North Carolina, Oregon Firearms Federation, Arizona Citizens Defense League, Heller Fdn., and Conservative Legal Def. and Ed. Fund in Support of Petitioner

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INTEREST OF THE *AMICI CURIAE*[1]

Gun Owners of America, Inc., Virginia Citizens Defense League, Tennessee Firearms Association, Grass Roots North Carolina, Oregon Firearms Federation, and Arizona Citizens Defense League are nonprofit social welfare organizations, exempt from federal income tax under Internal Revenue Code ("IRC") section 501(c)(4). Gun Owners Foundation, Heller Foundation, and Conservative Legal Defense and Education Fund are nonprofit educational and legal organizations, exempt from federal income tax under IRC section 501(c)(3).

Amici organizations were established, *inter alia*, for the purpose of participating in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law.

Three of these *amici*, Gun Owners of America, Gun Owners Foundation, and Virginia Citizens Defense League, together with certain individuals brought suit in the U.S. District Court for the Western District of Michigan to enjoin the same ATF rulemaking being

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[1] It is hereby certified that counsel for Petitioner filed a blanket consent, and counsel for Respondents consented to the filing of this brief; that counsel of record for all parties received notice of the intention to file this brief at least 10 days prior to its filing; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

challenged in this case. There, the district court upheld the regulation, but on March 25, 2021, a divided panel of the Sixth Circuit reversed and remanded with an opinion written by Judge Alice M. Batchelder. *Gun Owners of America, Inc. v. Garland*, 992 F.3d 446 (6th Cir. 2021). The Sixth Circuit granted rehearing *en banc* on June 25, 2021, which is now being briefed, with oral argument scheduled for October 20, 2021.

Other *amici* are state-level nonprofit organizations which, collectively, have members and supporters numbering in the hundreds of thousands throughout the country. These organizations exist in order to promote and support the right to keep and bear arms under the Second Amendment and corresponding state constitutional provisions, as well as to provide and promote training and education to both the public and government officials regarding technical and legal aspects of firearms. Each *amici* organization has members and supporters who were affected by the ATF's regulation reinterpreting the definition of "machinegun," and were deprived of their right to own bump stocks as a result.

The use of *Chevron* deference in deciding cases involving ATF's interpretation of criminal firearms statutes is of significance and increasing importance to the *amici* organizations, their members, and their supporters. The members of the *amici* organizations have a strong interest in having the Court resolve these broader questions, given the severe criminal penalties for violations of federal firearms laws, the administrative reclassification of lawfully owned

firearms and accessories as contraband, and the effects of the same on the right to keep and bear arms.

STATEMENT OF THE CASE

In January 2019, the Petitioner filed an action in the U.S. District Court for the District of Utah seeking, among other remedies, a preliminary injunction to enjoin enforcement of a regulation promulgated by the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") which reclassified so-called "bump stocks" as "machineguns" in 26 U.S.C. § 5845(b). *See* Final Rule, *Bump-Stock-Type Devices*, 83 *Fed. Reg.* 66514 (Dec. 26, 2018). The district court denied the preliminary injunction, holding that the ATF's interpretation of the statutory language was the best reading of the statute. Petitioner then filed an interlocutory appeal in the U.S. Court of Appeals for the Tenth Circuit, challenging the denial of a preliminary injunction.

On appeal, a divided panel of the Tenth Circuit upheld the denial of a preliminary injunction, but applied and expressly relied upon *Chevron* deference without addressing the best meaning of the statutory language in § 5845(b). The panel majority noted that the parties themselves were "oddly in agreement" that *Chevron* should not apply in deciding the case. Petition Appendix ("App.") 12a. Yet panel majority went on first to conclude that *Chevron*, rather than traditional tools of statutory interpretation, should be used at the outset, announcing the court's task to determine merely whether the ATF "'acted within its authority'" in promulgating the Final Rule. *Id.*

Having determined that *Chevron* applied, all aspects of the panel majority's opinion were built upon that assumption. The panel also rejected arguments in favor of applying the rule of lenity, and that *Chevron* should not apply in light of the parties having disavowed its applicability.

The panel majority ultimately found that the ATF's rewriting of the statutory term "single function of the trigger" into "single pull of the trigger" was a permissible "interpretation" of the statute, and that the agency's conclusion that a bump stock fired "automatically" was reasonable in light of the panel majority's view that this "term ... is ambiguous" — at least when extracted and considered independently of its statutory context. App. 25a-33a. The panel majority reached this conclusion despite the parties themselves arguing that the statutory language was unambiguous.

On September 4, 2020, the Tenth Circuit entered an order granting a petition for review *en banc*, indicating that a majority of the active, non-recused judges wished to rehear the matter. App. 74a. In this order, the court below went so far as to direct the parties to address specific questions regarding *Chevron* deference, including whether it could be waived by the government, whether a court "must" follow it (as a standard of review), whether it is applicable to statutes having both civil and criminal implications, and whether the Final Rule is particularly dependent upon facts within the expertise of the ATF. App. 75a-76a. After supplemental briefing, on March 5, 2021, the court below entered an

order vacating its prior order granting the petition for review *en banc*, and reinstating the panel opinion, without any explanation from the majority which reversed its original decision to rehear the matter *en banc*. App. 78a. Five judges dissented, strongly opining, *inter alia*, that the case should be reheard *en banc* given the importance of the issues it raises, and that the panel decision erred by looking for ambiguity where none existed in order to justify the application of *Chevron* deference. App. 80a.

The Petitioner now seeks a writ of certiorari to the Tenth Circuit in order to address the questions of (1) whether courts should defer under *Chevron* to an agency interpretation of federal law when the federal government affirmatively disavows *Chevron* deference; (2) whether the *Chevron* framework applies to statutes with criminal-law applications; and (3) whether, if a court determines that a statute with criminal-law applications is ambiguous, the rule of lenity requires the court to construe the statute in favor of the criminal defendant, notwithstanding a contrary federal agency construction. Petition for Certiorari ("Pet.") at i.

SUMMARY OF ARGUMENT

Courts of appeals, including the one below, have improperly chosen to use *Chevron* deference to decide multiple cases involving bump stocks, despite the parties having argued in each case that the relevant statutory language is unambiguous, despite the fact that Congress never gave ATF authority to create new substantive prohibitions, despite the fact that the

statutory prohibition at issue carries stiff criminal penalties, and despite the principle that a court should apply traditional tools of statutory interpretation before resorting to *Chevron* deference. The court below failed to fulfill its responsibility to "say what the law is" in the face of an agency-made regulation which contradicts both the statutory language and the agency's prior interpretations made by apolitical experts. Instead, the court improvidently deferred to a wholesale re-writing of the meaning of the term "machinegun" under § 5845(b), which was a direct result of a president's political agenda after a national tragedy, and not an act of an agency's subject matter expertise pursuant to a technical analysis.

This case also raises much broader issues, with implications far beyond bump stocks, for the hundreds of thousands of members and supporters of the *amici* organizations. The ability of the ATF (or any executive branch agency) to reinterpret and effectively change the statutory definitions of entire categories of firearms puts all members of these organizations — and all law-abiding firearm owners — in a state of continuous and ongoing confusion and peril.[2] These issues can already be seen on the horizon, as ATF moves toward reinterpreting definitions of commonly

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[2] In 2013, nearly a decade ago, it was estimated that Americans owned between 262 million and 310 million firearms, of which 28 million were semi-automatic rifles. *See* E. W. Hill, "How Many Guns are in the United States: Americans Own between 262 Million and 310 Million Firearms," *Urban Publications*, Cleveland State University (2013). These numbers are generally understood to have grown substantially since 2013.

owned firearms far more numerous than bump stocks.[3]

ARGUMENT

I. *CHEVRON* DEFERENCE IS NOT BEING UTILIZED BY LOWER COURTS AS THIS COURT INTENDED.

A. *Chevron* Deference Cannot Apply if All Parties Allege a Lack of Ambiguity.

At the foundation of this Court's landmark decision in *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865 (1984) is the directive that, if Congress speaks directly to the precise matter at issue, that is the end of the inquiry. Likewise, it should be the end of the inquiry for an executive branch agency charged with administering the statute. In other words, if a statutory provision is unambiguous, then *Chevron* deference is categorically inapplicable. Under step one of the two-step analysis set forth in *Chevron*, the question whether an agency's interpretation is reasonable should never be reached when there is no ambiguity.

In this case, as in the case brought by certain of these *amici* — *GOA v. Garland* now before the Sixth Circuit *en banc* — the government has consistently

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[3] *See*, *e.g.,* ATF's Notice of Proposed Rulemaking issued in May 2021 (86 *Fed. Reg.* 27720), proposing to reinterpret the very foundational definitions of what is a "firearm" by drastically broadening the meaning of the terms "frame" and "receiver" that have existed for decades.

taken the position that the meaning of the term "machinegun" as defined in 26 U.S.C. § 5845(b) clearly includes bump stocks and, for that reason, that *Chevron* deference is inapplicable. Notwithstanding its multiple earlier classification letters, in which ATF determined with equal vigor and conviction that bump stocks were unambiguously *not* machineguns, the ATF is now, if nothing else, quite certain that bump stocks are machineguns — no deference to its expertise being required.

Similarly, the Petitioner in the present case, as well as the plaintiffs-appellants in the other bump stock cases, have consistently — and in great technical and linguistic detail — made the argument that the statutory definition of "machinegun" unambiguously excludes bump stocks, as the trigger must "function" for each shot fired when a bump stock is utilized. The lower courts thus have been left not with situations calling for clear application of *Chevron* deference in the face of indeterminate language, but instead with language that all parties contend is unambiguous (albeit for different reasons). One would think that if the parties have gone to the effort to interpret the statute they believe is ambiguous, a court at least owes them a duty to use the traditional tools of statutory construction to see if one of them is correct.

Yet the result in this case (as well as in a third bump stock case to reach the courts of appeals, *Guedes v. ATF*, 920 F.3d 1 (D.C. Cir. 2019), *cert. denied*, 140 S. Ct. 789 (2020)) was that the appellate court adopted both a methodology and result espoused by neither side, and in effect deferred to nobody despite invoking

and purporting to apply *Chevron* deference.

Indeed, if the court below truly had been concerned with deferring to the agency's expertise with the statute at issue, then perhaps it should have deferred to the agency's conclusion that the statute was clear. Paradoxically, the approach used by the court below was exactly the opposite of deference. *See Guedes v. ATF*, 140 S. Ct. 789, 790 (2020) (Gorsuch, J., statement concerning denial of certiorari) ("courts must equally respect the Executive's decision *not* to make policy choices in the interpretation of Congress's handiwork").

The use of *Chevron* deference cannot possibly be the right approach in a case where the agency litigant itself expressly alleges, across multiple cases in multiple circuits addressing precisely the same subject, that the statutory language is unambiguous and expressly disavows that its views should receive deference.

B. The Final Rule Is Entirely Political and Contradicts All Agency Expertise.

Even if ambiguity did exist and *Chevron* deference were applicable, one of the main 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. *Chevron* at 865 (acknowledging that Congress may deliberately permit agencies to fill gaps in broader statutory schemes, owing to their "great expertise" in a particular area);

see also Atrium Med. Ctr. v. United States HHS, 766 F.3d 560, 568 (6th Cir. 2014). But, if that is the case, then the court below would have done 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 unwaveringly concluded that bump stock devices are not machineguns under federal law.

Prior to ATF being ordered by the Department of Justice to reverse its classification of bump stocks, the agency's firearms "experts" (and just about everyone else) recognized 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.[4] Then, in early 2018, under political pressure following the October 1, 2017 Las Vegas shooting, President Trump unilaterally declared that bump stocks should be machineguns. Turning on a dime, ATF immediately — with no change to the underlying statutory definition — 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. *See GOA v. Garland*, Petition for Rehearing *En Banc* (May 10, 2021) at 1-2. This precipitous change was not based on any new technical analysis or classification letters issued by ATF's firearm experts, but rather came straight from the top, through a formal notice-

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[4] *See GOA v. Garland*, Exhibit 20. http://lawandfreedom.com/wordpress/wp-content/uploads/2019/01/Plaintiffs-Complaint-Exhibits.pdf.

and-comment rulemaking.

The agency's volte-face was precipitated not by any change made by Congress to the statutory language, nor any new industry innovation or new technical analysis. Rather, ATF was ordered point-blank by the President of the United States to simply make bump stocks into illegal machineguns, and the agency did what it was told. Thus, even if there were a reason for the court below to have "deferred" to ATF's decision here, it should have deferred to the agency's institutional firearm knowledge and expertise, instead of deferring to the political agenda of a 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., respecting denial of certiorari). 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).

Of course, President Trump never claimed to possess any technical expertise about firearms to which any court should defer, and "[t]here is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes." *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 unilateral 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. The court below should not have been deferential, but rather highly skeptical, of the agency's purported "interpretation" of a statute that had been politically forced upon it from above, particularly when it completely reversed the agency's prior course, and the agency's lawyers at different times have claimed a lack of ambiguity in both directions.

II. COURTS BELOW ARE USING *CHEVRON* AS A CRUTCH TO AVOID PROPER JUDICIAL INTERPRETATION OF STATUTORY LANGUAGE.

Chevron deference has become a tool of avoidance used by lower courts to shirk their responsibility to "say what the law is."[5] As a simple illustration, one need only survey the results of the three bump stock cases that have been reviewed by the courts of appeals. Of the thirteen appellate court judges who have provided reasons for their respective decisions in the bump stock cases (D.C. Circuit, 6th Circuit, and 10th Circuit), eight have sided with the plaintiffs and determined the ATF's interpretation to be simply wrong, while five have applied *Chevron* and deferred

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[5] *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 177 (1803).

to the ATF, despite ATF's insistence that the statute is unambiguous. *Not a single appellate judge*, whether in the majority or in dissent, has stated that the ATF's interpretation is the "best" or the "correct" understanding of the statute.

Judge Kethledge of the Sixth Circuit 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). Indeed, both of the circuits that have upheld the ATF's Final Rule regarding bump stocks 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. ATF* at 32 (D.C. Cir. 2019); *Aposhian v. Barr*, 958 F.3d 969, 989 (10th Cir. 2020). Yet 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.

The court below fell well short of applying *all* the traditional tools of statutory construction to find the "best" meaning of the statute, prematurely throwing in the towel in favor of simply deferring to the recently-reversed interpretation of an agency that claims no ambiguity in the statute. The court below began by softly and superficially characterizing the ATF's process as merely "revisiting" its multiple, prior analyses of bump stocks, and then described the ATF's actions as a decision to "clarify" the terms

"automatically" and "single function of the trigger." *Aposhian v. Barr* at 976. The court below went on to dismiss the government's complete disclaimer that *Chevron* should apply, as well as the district court's decision to set aside *Chevron* and attempt to find the best meaning of the statute. Instead, the circuit court decided that it should apply *Chevron* to answer a largely irrelevant question that nobody had asked — whether the ATF "acted within its authority" in issuing the Final Rule.

Moving forward in total reliance on this brief and perfunctory conclusion that *Chevron* applies, and having implicitly excused itself from any notion of attempting to discern the meaning of the statutory language itself, the court below moved much more freely in its opinion. With relatively little initial discussion, the court below simply assumed that the ATF's rewriting of the statutory language from "single function of the trigger" to "single pull of the trigger" is a reasonable "interpretation" of the statute, permitting the court to avoid recognizing the agency's wholesale revision of the statute.

Having decided that *Chevron* was the correct tool, and having decided without further reflection that "function" and "pull" can be synonymous if the ATF says they are, the panel below went on to search for — or perhaps more accurately stated, create — ambiguity in the statutory language that none of the litigants believe is ambiguous. *See Aposhian v. Wilkinson*, 989 F.3d 890, 892 (10th Cir. 2021) (Tymkovich, J., dissenting) ("the panel majority went looking for ambiguity where there was none.").

Ignoring the statutory requirement that a machinegun must function "automatically ... by a single function of the trigger," the court below required only that it fire "automatically" — to be determined in isolation by whatever a particular dictionary says the word "automatically" means generically. App. 28a. Divorced from its statutory context, the panel was free to declare bump stocks to be machineguns even though they require far more "human involvement" than a "single function of the trigger" in order to operate.

Simply put, the conclusion by the court below that the statutory definition of "machinegun" is ambiguous — without conducting any serious analysis of the text or the ATF's alteration thereof — demonstrates at least the need for greater judicial restraint in applying *Chevron* deference. 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, and they do not operate "automatically ... by a single function of the trigger," because they require the trigger to function each time a round is fired. The willingness of courts to defer quickly and readily to agency "interpretations" that contradict the plain text results in plainly erroneous decisions such as that below, wherein statutory terms with clear meaning (should courts care to find it) are summarily given the stamp of "ambiguity" in order to empower judges to avoid being required to determine the best meaning of a statute.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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