No. 21-_____

IN THE

Supreme Court of the United States

GUN OWNERS OF AMERICA, INC.; GUN OWNERS FOUNDATION; VIRGINIA CITIZENS DEFENSE LEAGUE; MATT WATKINS; TIM HARMSEN; AND RACHEL MALONE,
Petitioners,

v.

MERRICK B. GARLAND, in his official capacity as Attorney General of the United States; UNITED STATES DEPARTMENT OF JUSTICE; BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES; AND MARVIN G. RICHARDSON, in his official capacity as Acting Director, Bureau of Alcohol, Tobacco, Firearms and Explosives,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

This litigation involves a 2018 Final Rule promulgated by the Bureau of Alcohol, Tobacco, Firearms and Explosives, which reversed numerous longstanding technical rulings and reinterpreted 26 U.S.C. §5845(b)'s definition of "machinegun" to criminalize the ownership of popular firearm accessories known as "bump stocks," which the agency for decades had promised law-abiding gun owners they could purchase and possess.

The courts below were unable to conclude that the agency had *properly* interpreted the statute, or that bump stocks are *actually* machineguns under the law Congress enacted. Instead, applying the framework from this Court's decision in *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984), the lower courts merely deferred to the agency, even though the context of the Final Rule is almost exclusively criminal, and even though the agency repeatedly disclaimed entitlement to deference and entreated the courts not to apply the *Chevron* doctrine. The questions presented are:

1. Whether the definition of "machinegun" found in 26 U.S.C. §5845(b) is clear and unambiguous, and whether bump stocks meet that definition?

2. Whether *Chevron* deference should be given to agency interpretations of ambiguous criminal statutes, displacing the rule of lenity?

3. Whether courts should give deference to agencies when the government expressly waives *Chevron*?

PARTIES TO THE PROCEEDINGS

Petitioners are Gun Owners of America, Inc., Gun Owners Foundation, Virginia Citizens Defense League, Matt Watkins, Tim Harmsen, and Rachel Malone, who were plaintiffs in the district court and plaintiffs-appellants in the court of appeals.

Respondents United States Department of Justice and Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") were defendants in the district court and defendants-appellees in the court of appeals. Acting Attorney General Matthew Whitaker was initially a defendant in the district court, but was later replaced by his successor, Attorney General William P. Barr. Attorney General Barr, in turn, was replaced as defendant-appellee in the court of appeals by Acting Attorney General Robert M. Wilkinson. Respondent Attorney General Merrick Garland has now replaced Wilkinson, and is being sued in his official capacity. Acting ATF Director Thomas E. Brandon was initially a defendant in the district court and a defendant-appellee in the court of appeals, but was replaced by Acting ATF Director Regina Lombardo. Respondent Acting Director Marvin G. Richardson now has replaced Lombardo as acting director, and is being sued in his official capacity.

CORPORATE DISCLOSURE STATEMENT

Gun Owners of America, Inc., Gun Owners Foundation, and Virginia Citizens Defense League have no parent corporations and have issued no stock to any publicly held corporation.

STATEMENT OF RELATED PROCEEDINGS

- *Gun Owners of America v. Barr*, No. 18A963 (U.S. Sup. Ct.) (order denying application for stay pending appeal issued March 28, 2019).

- *In re: Gun Owners of America*, No. 19-1268 (6th Cir.) (order dismissing petition for a writ of mandamus issued March 22, 2019).

- *Gun Owners of America, et al. v. Garland*, No. 19-1298 (6th Cir.) (panel opinion issued March 25, 2021; order granting petition for rehearing *en banc* issued June 25, 2021; order affirming judgment of district court by evenly divided court issued December 3, 2021).

- *Gun Owners of America, et al., v. Barr*, No. 18-1429 (W. Dist. Mich.) (opinion and order denying preliminary injunction issued March 21, 2019).

- The ATF regulations challenged in these proceedings are also the subject of challenges pending in this Court and three other federal Courts of Appeals: *Aposhian v. Garland*, No. 21-159 (S. Ct.); *Guedes v. Bureau of Alcohol, Tobacco, Firearms and Explosives*, Nos. 19-5042 & 21-5045 (D.C. Cir.);

Cargill v. Garland, No. 20-51016 (5th Cir.); and *Codrea v. Garland*, No. 21-1707 (Fed. Cir.).

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Petitioners respectfully seek a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The district court opinion denying a preliminary injunction is reported at 363 F. Supp. 3d 823 and reproduced at App.173a. The Sixth Circuit panel opinion is reported at 992 F.3d 446 and reproduced at App.76a. The order granting rehearing *en banc* and vacating the panel opinion is reported at 2 F.4th 576. The Sixth Circuit judgment affirming the district court decision by an evenly divided *en banc* court and accompanying opinions are reported at 2021 U.S. App. LEXIS 35812 and reproduced at App.1a.

JURISDICTION

The court of appeals issued its opinion on December 3, 2021. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory and regulatory provisions, set forth in the appendix, are 18 U.S.C. §922(o), 26 U.S.C. §5845(b), 27 C.F.R. §447.11, 27 C.F.R. §478.11, and 27 C.F.R. §479.11.

STATEMENT OF THE CASE

Statutory Framework. Petitioners challenge a regulation promulgated by the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF"), which reinterpreted the statutory term "machinegun" found in 26 U.S.C. §5845(b) to include popular "bump stock" accessories used on semi-automatic rifles. 83 *Fed. Reg.* 66514 (Dec. 26, 2018) ("Final Rule"). The Final Rule banned possession of bump stocks, ordered their surrender or destruction by March 26, 2019, and threatened criminal sanction for their continued possession. *Id.* at 66514, 66546.

As part of the National Firearms Act ("NFA"), Pub.L. 73-474, 48 Stat. 1236 (June 26, 1934), Congress regulated the manufacture and ownership of "machineguns," imposed registration requirements and a then-hefty $200 tax for possession, and created severe criminal penalties for violations. In the Gun Control Act ("GCA"), Pub.L. 90-618, 82 Stat. 1213 (Oct. 22, 1968) and the Firearm Owners Protection Act ("FOPA"), Pub.L. 99-308, 100 Stat. 449 (May 19, 1986), Congress added to the 1934 definition. The current definition of "machinegun" appears in 26 U.S.C. §5845(b) and, in pertinent part, reads as follows:

> The term 'machinegun' means 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.

Finally, whereas machineguns merely had been regulated under the NFA, FOPA generally banned private ownership of machineguns manufactured after that Act's effective date. *See* 18 U.S.C. §§921(a)(23), 922(o).

Bump Stocks. A bump stock is a plastic stock that replaces the traditional stock of a semi-automatic rifle such as an AR-15. However, rather than being rigid and unmoving like a traditional stock, a bump stock slides back and forth freely. Also differing from a traditional stock, a bump stock has a protruding piece of plastic known as the "extension ledge." Rather than resting on the trigger, the shooter's trigger finger extends past the trigger and rests in a fixed position on the extension ledge.

To bump fire a rifle with a bump stock, the shooter pushes the firearm forward with his support hand until the trigger finger comes into contact with and depresses the trigger. Discharging a shot, recoil causes the firearm to slide rearward, physically separating the trigger and trigger finger, allowing the trigger to mechanically "reset," readying it to fire again. Meanwhile, the shooter's forward pressure again pushes the firearm forward, again contacting the trigger with the trigger finger, again depressing the trigger, and firing another shot. This process continues, "bumping" the trigger finger on and off the trigger, depressing the trigger each time a shot is fired.

This "bump fire" technique is possible with or without a bump stock, which in no way alters the

mechanical operation of the semi-automatic firearm to which it is attached. With or without a bump stock, "bump firing" is a recreational shooting technique which must be learned, practiced, and perfected.

In 2002, ATF first evaluated a bump-stock-type device known as the Akins Accelerator, determining it was not a machinegun because the trigger functioned once for each shot. However, in 2006 ATF reclassified the device on the theory that it used an internal spring to harness the recoil energy of the firearm. ATF Rul. 2006-2. In 2009, the Eleventh Circuit deferred to that reclassification. *Akins v. United States*, 312 Fed. Appx. 197, 199 (11th Cir. 2009) (unpublished).

Thereafter, manufacturers submitted for classification bump stock devices that did not include internal springs. Between 2008 and 2017, ATF issued more than a dozen classification letters taking the position that bump stocks are not machineguns and are unregulated by federal law. App.29a. Then, in December of 2018, ATF changed course, promulgating the Final Rule, designating bump stocks as machineguns and reversing prior classification letters to the contrary.

District Court Litigation. On December 26, 2018, Petitioners filed a complaint and motion for a preliminary injunction in the U.S. District Court for the Western District of Michigan. Petitioners consist of individuals who possessed or wished to acquire bump stocks, along with gun rights organizations representing millions of gun owners nationwide, including those similarly situated to the individual

plaintiffs. Petitioners sought an injunction halting enforcement of the Final Rule prior to its effective date of March 26, 2019, asserting violations of the Administrative Procedure Act on grounds that the Final Rule conflicts with the plain text of the unambiguous statute and is arbitrary and capricious.

On March 21, 2019, the district court denied Petitioners' motion. App.173a-193a. Although all parties agreed *Chevron* deference did not apply, the court concluded "this Court cannot ... avoid *Chevron*...."[1] App.184a. The court believed Congress's grant of "authority to prescribe necessary rules and regulations" showed "inten[t] th[at] ATF speak with the force of law when addressing ambiguity or filling a space in the relevant statutes," and thus that "the Court should apply the *Chevron* analysis."[2] *Id.*

Purporting to "apply[] the ordinary tools of statutory construction"[3] and promising to analyze "[t]he statutory language in ... context," the district court examined dictionary definitions of "automatic"

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[1] The district court did not explicitly address the issue whether *Chevron* can be waived, although it recounted that the government had waived it. App.184a.

[2] Though feeling bound to apply *Chevron*, the district court referred to the doctrine as "already-questionable," noting that "[m]any members of the Supreme Court have called *Chevron* into question." App.183a n.2.

[3] The district court's opinion did not analyze how the rule of lenity might affect the Final Rule, nor did it consider whether an agency is owed deference when interpreting a criminal statute.

and found ambiguity in "whether the word 'automatically' precludes any and all application of non-trigger, manual forces ... for multiple shots to occur." App.185a. Similarly, the district court concluded that "the phrase 'single function of the trigger' ... can have more than one meaning," and "[t]he statute does not make clear whether function refers to the trigger as a mechanical device or ... the impetus for action that ensues." App.188a. Finally, the court concluded that each of ATF's interpretations constituted "a permissible interpretation" of the statute, and denied Plaintiffs' motion. App.189a. Thereafter, Petitioners unsuccessfully sought a stay of enforcement from the Sixth Circuit (Docket No. 19-1298), and then from this Court (Docket No. 18A963). Petitioners then timely appealed the district court's decision to the Sixth Circuit.

Panel Opinion. On March 25, 2021, a Sixth Circuit panel reversed the district court's denial of Petitioners' preliminary injunction motion. App.76a-172a. Writing for the court, Judge Batchelder concluded that "*Chevron* deference categorically does not apply to the judicial interpretation of statutes that ... impose criminal penalties," relying on this Court's "clear, unequivocal, and absolute" statements in *United States v. Apel*, 571 U.S. 359, 369 (2014) and *Abramski v. United States*, 573 U.S. 169, 191 (2014). App.88a, 91a. First, noting "ATF's frequent reversals on major policy issues," the panel explained that "only the people's representatives in Congress may enact federal criminal laws" that "subject ... heretofore law-abiding citizens ... to substantial fines, imprisonment, and damning social stigmas...." App.103a, 106a.

Second, observing that "'judges are experts on one thing — interpreting the law,'" the panel concluded that delegating the duty to "'say what the law is'" to "unaccountable bureaucrats" "would violate the Constitution's separation of powers and pose a severe risk to individual liberty...." App.107a, 111a, 115a. Third, the panel noted that "ambiguities in criminal statutes have always been interpreted against the government," and held that "deference in the criminal context conflicts with the rule of lenity and raises serious fair-notice concerns." App.116a-117a.

Finding that the Final Rule was not owed *Chevron* deference, the panel proceeded to interpret and apply the meaning of "single function of the trigger" within the definition of "machinegun." The panel explained that "we must decide the *best* meaning of the statute without putting a thumb on the scale in the government's favor." App.123a. Summarizing the parties' dispute, the panel noted that Petitioners read "single function of the trigger" to describe "the mechanical process (*i.e.*, the act of the trigger's being depressed, released, and reset," while the government focused on "the human process (*i.e.*, the shooter[] pulling....)." App.121a. Finding, as the district court had, that dictionary definitions "lend[] support to both interpretations," the panel then proceeded to "the context of the rest of the statute," which "weighs heavily in [Petitioners'] favor" because "the phrase plainly refers only to the 'single function *of the trigger*' ... not 'the trigger finger.'" App.124a-125a.

Having determined the phrase "single function of the trigger" describes the mechanical function of the

trigger, the panel then found that bump stocks "do[] not change the fact that the semiautomatic firearm shoots only one shot for each pull of the trigger," and "is unable to fire again until the trigger is released and the hammer ... is reset." App.126a-127a. The panel found that this Court's decision in *Staples v. United States*, 511 U.S. 600, 602 n.1 (1994), confirmed its conclusion.

Finding Petitioners were likely to succeed on the merits, the panel also held that the other elements for issuance of a preliminary injunction were met and remanded the case to the district court. App.131a-134a.

Panel Dissent. Writing in dissent, Judge White would have applied *Chevron* to the Final Rule. First, Judge White believed the Final Rule to be a "legislative rule" which typically receives deference. App.137a. Next, Judge White concluded that *Chevron* cannot be waived because it is a "standard of review," believing this Court "ha[d] not yet addressed th[e] issue" of *Chevron* waiver. App.140a and n.3. Finally, Judge White determined *Chevron* applies "to laws with criminal applications," discounting this Court's 2014 decisions in *Apel* and *Abramski* as made "'outside the context of *Chevron*-eligible interpretation.'" App.110a, 150a. Instead, Judge White relied on this Court's earlier decisions in *United States v. O'Hagan*, 521 U.S. 642 (1997) and *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687 (1995), claiming they "applied *Chevron* deference to [regulations] that carried criminal penalties." App.144a. Judge White concluded that, "[a]t most ... *Apel* and *Abramski*[]

create an implied tension with *Chevron*, *Babbitt*, and *O'Hagan*." App.154a. Judge White had no rule of lenity or fair notice concerns, finding that "[a]mple notice was provided by the notice-and-comment process." App.164a.

Applying *Chevron* deference to the Final Rule, Judge White concluded that the phrase "single function of the trigger" is ambiguous and "begs the question of whether 'function' requires our focus upon the movement of the trigger, or the movement of the trigger finger." App.166a. Similarly, Judge White believed the "word 'automatically'" is ambiguous because "the statute's text" — "automatically ... by a single function of the trigger" — "does not definitively answer ... how much human input is contemplated...." App.169a. Finding both of ATF's interpretations reasonable, Judge White would have upheld the Final Rule. App.172a.

En Banc Order. On June 25, 2021, the Sixth Circuit granted the government's Petition for Rehearing *En Banc*, vacating the panel's decision. After further briefing and argument, the court issued an "Order" without majority opinion on December 3, 2021, having "divided evenly, with eight judges voting to affirm the judgment of the district court and eight judges voting to reverse." App.3a-4a. The court's order was accompanied by two opinions "in support of affirm[ance]," each signed by five judges, and a dissent by eight judges.[4]

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[4] Judges Griffin and Donald voted to affirm the trial court, but did not join either opinion supporting that position.

En Banc Opinions Supporting Affirmance. Judge White, joined by four judges, concluded that "*Chevron* provides the standard of review," that the statute "remains ambiguous ... after exhausting the traditional tools of statutory construction,"[5] and that "ATF's interpretation ... is a permissible construction ... and is reasonable...." App.8a.[6] Although concluding that "neither party's interpretation of either term is unambiguously compelled by the statute," Judge White also determined that, "ignoring all deference, ATF's interpretation of the statute is the best one." App.26a, 31a.

Judge Gibbons did not join Judge White's opinion or its application of *Chevron* deference, writing separately that "*Chevron* application is unnecessary here" because "ATF's interpretation ... is unambiguously the best interpretation ... using ordinary tools of statutory construction." App.33a. Judge Gibbons explained that, to conclude "otherwise

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[5] Judge White continued to reject the rule of lenity as grounds for invalidating the Final Rule, acknowledging it to be "a canon of construction," but one to be applied only at "the end of the *Chevron* analysis." App.22a n.11.

[6] Judge White rejected other reasons for dispensing with *Chevron*, reiterating the conclusion from her panel dissent that the government may not waive *Chevron*, and claiming that this Court's decision in *HollyFrontier Cheyenne Refinery, LLC v. Renewabler Fuels Ass'n*, 141 S.Ct. 2172, 2180 (2021) "does not alter this conclusion." App.10a, n.6. Judge White found no separation-of-powers concern because "legislative delegation" in the criminal context "is a reality." App.17a.

would allow gun manufacturers to circumvent Congress's longtime ban on machineguns...." App.34a.

Judges White, Moore, Cole, and Stranch joined both opinions in favor of upholding the Final Rule, the first finding "*Chevron* provides the standard of review" and the other holding that "*Chevron* application is unnecessary here." App.8a, 33a.

En Banc Opinion Supporting Reversal. Supporting reversal, Judge Murphy and seven others agreed with Judge White that the Final Rule "creates a new regulatory crime" but had "concern[] with the way in which the federal government has enacted that policy into law." App.37a, 52a. Noting that, "at bottom, [this case] raises a pure question of statutory interpretation" which is "not ... particularly difficult to answer," Judge Murphy explained that this case also "implicates administrative-law questions with significance for many statutes." App.37a.

Turning first to the statutory interpretation issue, Judge Murphy found that the definition of "machinegun" unambiguously does not cover bump stocks, explaining that "[a]ll agree that a bump-stock rifle's trigger must be released and 're-engage[d]' between shots," and concluding that "[t]he firearm thus shoots one shot per trigger function." App.40a. Likewise, Judge Murphy concluded that "the difference between an 'automatic' and a 'semiautomatic' weapon ... turn[s] on a mechanical feature of its trigger," and a bump stock-equipped firearm does not "reload[] *and* refire[] with one trigger activation...." App. 41a. ATF's "head-scratching" interpretation, Judge Murphy

explained, "conflicts with basic interpretive principles" because it "rewrites the phrase 'by a single function of the trigger'" to "single pull of the trigger" and "interprets the adverb 'automatically' ... in isolation, not in context." App.42a.

Next, Judge Murphy addressed other serious problems with affirmance. First, he explained that, if Congress wishes to allow agencies to create federal crimes, it must speak clearly and explicitly while, on the other hand, *Chevron* only "comes into play when a statute *lacks* an express delegation," such as is the case here. App.50a. Second, Judge Murphy questioned the district court's finding of implied delegation, because the NFA and GCA "merely gave ... general authority to enact regulations." App.48a. Even so, Judge Murphy explained, "Congress does *not* impliedly delegate ... [the courts'] duty to interpret the criminal laws," which would violate the rule of lenity and permit an agency to "adopt the 'harsher alternative' without the 'clear and definite' statement that we usually expect." App.62a. Finally, Judge Murphy criticized application of *Chevron* through "'reflexive deference'" "without even attempting to interpret the statute...." App.71a.

Decisions of Other Courts. The Sixth Circuit is not the only appellate court to have considered the Final Rule. In *Guedes v. BATFE*, 920 F.3d 1 (D.C. Cir. 2019), the D.C. Circuit upheld the Final Rule, determining the statute to be ambiguous, finding itself bound to apply *Chevron* deference, and finding the Final Rule to be a "reasonable" interpretation. Judge Henderson dissented. *Id.* at 35.

In *Aposhian v. Barr*, 958 F.3d 969 (10th Cir. 2020), the Tenth Circuit reached similar conclusions, claiming precedent required application of *Chevron*. Judge Carson dissented. *Id.* at 991. Thereafter, the Tenth Circuit granted rehearing *en banc*, but later decided that it had "improvidently granted" the petition, reinstating the panel opinion. *Aposhian v. Wilkinson*, 989 F.3d 890, 891 (10th Cir. 2021). Five judges dissented in four separate opinions, each joined by the other dissenters. *Id.* at 891, 903, 904, 906. A petition for writ of certiorari is currently pending in this Court. *Aposhian v. Garland*, No. 21-159.[7]

In *United States v. Alkazahg*, 81 M.J. 764 (N-M Ct. Crim. App. 2021), the U.S. Navy-Marine Corps Court of Criminal Appeals overturned a conviction for possession of a bump stock, finding the government waived reliance on *Chevron* deference, and that a bump stock does not meet either criterion under the statute to be a machinegun. The government did not appeal that decision.

Finally, in *Cargill v. Garland*, 20 F.4th 1004, 2021 U.S. App. LEXIS 36905 (5th Cir. 2021), a panel of the Fifth Circuit upheld the Final Rule on the theory that the government had offered the "best interpretation of

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[7] The Tenth Circuit held separately that *Aposhian* had not demonstrated irreparable harm, after the government conceded the issue in the district court but later objected on appeal. *Id.* at 989. Here, however, the government conceded irreparable harm, the district court specifically relied on that concession, the Sixth Circuit panel found Petitioners to suffer irreparable harm, and the *en banc* court did not address the issue. App.131a, 192a.

the statute." *Id.* at *3. A petition for rehearing *en banc* is pending in the Fifth Circuit. No. 20-51016 (Jan. 28, 2021).

REASONS FOR GRANTING THE PETITION

I. THE LOWER COURTS' FINDING OF STATUTORY AMBIGUITY LED TO NUMEROUS LEGAL CONCLUSIONS IN CONFLICT WITH THIS COURT'S DECISIONS AND THE DECISIONS OF OTHER CIRCUITS.

At its core, this case presents a "pure question of statutory interpretation," and one that eight judges below concluded is "not ... particularly difficult to answer." App.37a. The question is whether common firearm accessories called "bump stocks" constitute "machineguns" under the statutory definition found in 26 U.S.C. §5845(b), and thus are banned from private possession by 18 U.S.C. §922(o).

The answer to that question is a definitive "no." A firearm equipped with a bump stock does not meet either prong of Congress's carefully-crafted and unambiguous definition of "machinegun." Such a firearm does not fire "automatically ... by a single function of the trigger," but instead fires only one round each time its trigger is mechanically "functioned." Likewise, in no sense does it function "automatically," but rather requires complex human input far in excess of a "single function of the trigger."

Unfortunately, numerous judges across four circuits muddied the waters, raising seemingly rhetorical questions such as whether the statutory phrase "function of the trigger" in fact "requires ... focus upon the movement of the trigger, or [instead] the movement of the trigger finger," and whether the statute's text "automatically ... by a single function of the trigger" might somehow silently "contemplate[] ... human input" in addition to "a single function of the trigger." App.24-25a. Finding ambiguity "where there was none," the lower courts thus found themselves "liberat[ed]"[8] to "place[] a thumb on the scale for the government[,] invoking *Chevron*" (*Aposhian v. Wilkinson*, 989 F.3d at 892 (Tymkovich, C.J., dissenting)) in deference to an allegedly "reasonable interpretation" of an unambiguous statute. App.123a.

The beneficiary of this "deference," ATF has been permitted quite literally to *replace* one word in the statute ("function") with an *entirely different word* ("pull") — claiming its textual rewrite to be the "best interpretation" of actual language Congress carefully chose. ATF was then allowed to "interpret" statutory words, in obvious disregard for the statutory context, with the effect of giving an entirely different meaning to the statute. *See* App.37a-47a, 119a-130a.

The lower courts' failure to properly interpret the statutory text created a domino effect of errors such

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[8] "There 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).

that, even if this Court thought the statute ambiguous, it would not end the matter. Rather, the lower courts' rush to find ambiguity resulted in legal conclusions in clear conflict with this Court's holdings, in addition to both creating and perpetuating circuit splits about important questions of federal law.

First, the decisions below applied *Chevron* deference to what is almost exclusively a criminal statute, in disregard for this Court's contrary holdings and in conflict with the decisions of other circuits. This application of *Chevron* uprooted and displaced the rule of lenity, in spite of this Court's decisions which teach that ambiguity in the criminal law is resolved against the government.

Second, in clear conflict with this Court's decisions and the decisions of other circuits, *Chevron* deference was forcibly applied below despite the government's express disclaimer that it is neither entitled to nor seeking any sort of deference.

Either of these important questions independently merits this Court's review. Together, they create a witches' brew of legal errors, making this Court's involvement greatly needed.[9]

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[9] Nor is there any need for this Court to delay review of the Final Rule in order to permit additional litigation of the issues. Unfortunately, the "problems" identified by Justice Gorsuch in his statement in *Guedes v. ATF*, 140 S. Ct. 789 (2020) (Gorsuch, J., statement on denial of certiorari) have not been resolved by additional percolation. If anything, they have gotten worse. Thirty-six federal appellate judges now have considered the Final Rule, and issued no fewer than fifteen carefully-considered

II. THIS COURT'S REVIEW IS NECESSARY TO RESOLVE THE LOWER COURTS' DISARRAY ABOUT WHETHER *CHEVRON* APPLIES IN THE CRIMINAL CONTEXT.

Despite the parties' agreement that the statute is unambiguous (albeit, with polar opposite views of its meaning) and that *Chevron* has no role to play in deciding this case, the district court charted its own path, concluding that 26 U.S.C. §5845(b) is hopelessly ambiguous and the court was obligated to grant *Chevron* deference to ATF's allegedly "reasonable" interpretation. App.184a, 189a. In so doing, the district court entirely failed to address the elephant in the room: the fact that the Final Rule creates a new federal felony by including bump stocks under the machinegun ban found in 18 U.S.C. §922(o).[10]

On appeal, a Sixth Circuit panel reversed the district court, concluding that deference is *never* appropriate when the government interprets a criminal law. Dissenting, Judge White took the opposite approach, concluding that *Chevron* deference must *always* be applied to agency interpretation of

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opinions exploring all sides of the issues.

[10] The Final Rule has almost exclusively criminal application. *See* App.67a ("The Gun Control Act makes it a crime to possess machine guns except those transferred or possessed under the authority of a government or those possessed before 1986."); *see also United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 518 (1992) (the NFA "has criminal applications, and we know of no other basis for determining when the essential nature of a statute is 'criminal.'").

ambiguous statutes, even when violations carry criminal sanction. App.155a, 164a. Coming to polar opposite conclusions, the panel majority and dissent each believed a discrete set of this Court's opinions to be *decisive* on the issue.

These diametrically opposed positions carried through to the *en banc* proceedings, so dividing the Sixth Circuit that it split evenly on the issue, finding itself unable to render an opinion in this case.[11] App.2a-3a. As detailed below, other courts of appeals considering the Final Rule have split similarly, albeit not evenly, on the application of *Chevron* deference to agency interpretations of criminal statutes.[12]

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[11] As a result, gun owners living within the four states in the Sixth Circuit are left with no guidance whether ATF's bump stock ban is valid, and whether possession will land them in federal prison. Since one district court cannot bind another, the answer to this question may depend entirely on which of 63 active district court judges in the Sixth Circuit is assigned to hear any given case, almost certain to generate a patchwork quilt of conflicting decisions. This Court's review would avoid such a chaotic scenario.

[12] The deference-laden process endorsed by the courts below resulted in a wholesale abdication of the judicial "duty to say what the law is." It has worked a fundamental unfairness in this case, whereby the government first declares a firearm accessory to be lawful, enticing countless law-abiding Americans to purchase it, only to reverse that position and order gun owners to destroy their hard-earned property — the government's actions sanctioned by the courts at every step through the application of *Chevron*. Not only that, both Fifth Amendment takings issues and the Second Amendment right to keep and bear arms lurk in the background of this case because, if the Final Rule is invalid, then both constitutional provisions have been violated. For example, if

To be sure, this Court has not been entirely consistent in its application of *Chevron* deference to agency interpretations of statutes that carry criminal sanction. This Court's own discordance on the issue, over a span of several decades, thus seems to lie at the root of the lower courts' confusion. This Court's review is necessary to provide the lower courts long-awaited and much-needed guidance as to what role, if any, *Chevron* has to play in judicial interpretation of the criminal law.

A. The Sixth Circuit Is Hopelessly Conflicted on *Chevron*.

In the court below, the judges opposing application of *Chevron* deference to the Final Rule relied on recent opinions from this Court establishing what they described as a "clear, unequivocal, and absolute" rule that *Chevron* never applies in the criminal context. App.59a, 91a. As Judge Batchelder noted for the panel, "'[n]ever' and 'any' are absolutes, and th[is] Court did not draw any distinctions, add any qualifiers, or identify any exceptions." App.91a.

Indeed, in 2014 this Court asserted that "we have never held that the Government's reading of a criminal statute is entitled to any deference." *Apel* at 369. Also

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bump stocks are *not*, in fact, machineguns, then they are unregulated firearm accessories used on quintessential Second Amendment "arms." *See* Brief of Montana and 17 Other States as *Amici Curiae* in Support of Plaintiff-Appellants on Rehearing *En Banc*. This case's constitutional underlay thus provides yet another reason why deference to the Final Rule is inappropriate.

that year, this Court announced that "criminal laws are for courts, not for the Government, to construe. ... ATF's old position [is] no more relevant than its current one—which is to say, not relevant at all. Whether the Government interprets a criminal statute too broadly ... or too narrowly ... a court has an obligation to correct its error." *Abramski* at 191. *See also Crandon v. United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring in judgment) ("we have never thought that the interpretation of those charged with prosecuting criminal statutes is entitled to deference."); *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004) ("we must interpret the statute consistently"); *Thompson/Center Arms Co.*, at 517 (no deference because "the NFA has criminal applications....").

On the other hand, the Sixth Circuit judges who favored deference relied on *Chevron,* which itself seemed to be "clear and unequivocal" that a "court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the ... agency." *Chevron* at 842-44; *see* App.91a. Even though *Chevron* did not "concern the possibility of any criminal sanction," the statute involved "had criminal implications." App.93a, 143a. Likewise in *Babbitt*, this Court applied "some degree of deference" to a regulation interpreting the Endangered Species Act which "includes criminal penalties." *Id.* at 703, 704 n.18. *Babbitt* also contained the Court's now-famous footnote 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." *Id.* at 704 n.18. Finally, in *O'Hagan*,

the Court upheld a criminal conviction for "fraudulent trading," applying deference to an agency regulation defining such conduct. *O'Hagan* at 669.

While the Sixth Circuit *Chevron* proponents note that *Apel* and *Abramski* did not explicitly mention *Chevron*, the *Chevron* opponents respond similarly that neither *Babbitt* nor *O'Hagan* explicitly applied *Chevron* deference.[13] While the *Chevron* proponents allege that neither *Apel* nor *Abramski* "involved *Chevron*-triggering regulations," the *Chevron* opponents note that *Babbitt* and *O'Hagan* contained clear and explicit delegations to an agency (not present here) to enact substantive regulations backed by criminal penalties. App.50a, 53a-54a, 154a.[14]

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[13] *See O'Hagan* at 679 (Scalia., J., concurring in part) (opining that "no *Chevron* deference is being given" by the majority).

[14] This case is not the first time the Sixth Circuit has struggled with the application of *Chevron* to criminal statutes. *See Esquivel-Quintana v. Lynch*, 810 F.3d 1019, 1023-24 (6th Cir. 2016) (overruled on other grounds) (noting "[a]n increasingly emergent view ... that the rule of lenity ought to apply [to] statutes that have both civil and criminal applications," referencing the "separation of powers [principle] ensuring that legislatures, not executive officers, define crimes," and opining that, without lenity, "agencies [could] 'create (and uncreate) new crimes at will,'" "threaten[ing] a complete undermining of the Constitution's separation of powers."); *id.* at 1027, 1030 (Sutton, J., dissenting) ("*Chevron* has no role to play in construing *criminal* statutes"). *See also United States v. Havis*, 907 F.3d 439, 451 (6th Cir. 2018) (Thapar, J., concurring); *Carter v. Welles-Bowen Realty, Inc.,* 736 F.3d 722, 729-36 (6th Cir. 2013) (Sutton, J., concurring).

In other words, the lower courts seem to think this Court has come down clearly and unequivocally *on both sides* of the question whether *Chevron* applies to the government's interpretation of ambiguous criminal statutes. This Court's review thus is necessary to clarify the rules that govern whether Americans may be sent to federal prison for conduct that bureaucrats — but not Congress — have declared unlawful.

B. An Entrenched Circuit Split Exists about Application of *Chevron* in the Criminal Context.

The Sixth Circuit's fracture about the application of *Chevron* to criminal statutes is no aberration. On the contrary, there is an entrenched circuit split about the impact of *Apel* and *Abramski*, and whether *Chevron* continues to apply in the criminal context. The several cases challenging the Final Rule have served only to deepen this divide.

Since 2014, three circuits have reached the same conclusion as the Sixth Circuit panel below, finding *Apel* and *Abramski* to establish definitively that no deference applies to agency interpretations of criminal statutes. Citing to *Abramski*, the Fifth Circuit noted "[t]he Supreme Court has now resolved this uncertainty, instructing that no deference is owed...." *United States v. Garcia*, 707 Fed. Appx. 231, 234 (5th Cir. 2017).

Similarly pointing to *Abramski*, the Second Circuit refused to defer to an ATF regulation regarding firearm possession by aliens, asserting that "the

Supreme Court has clarified that ... agency interpretations of criminal statutes are not entitled to deference...." *United States v. Balde*, 943 F.3d 73, 83 (2d Cir. 2019); *see also Mendez v. Barr*, 960 F.3d 80, 88 (2d Cir. 2020).

Finally, the Ninth Circuit considered an ATF interpretation of "machinegun" in *United States v. Kuzma*, 967 F.3d 959, 971 (9th Cir. 2020). Following *Abramski*'s lead and "put[ting] aside" that "ATF has taken a series of internally contradictory and arbitrary positions,"[15] the court found the meaning of 26 U.S.C. §5845(b) does not delegate to ATF "authority to promulgate underlying *regulatory* prohibitions ... enforced by a criminal statute.... On the contrary, the text of the applicable prohibitions and definitions is set forth in *statutory* language." *Id.* Relying on *Apel* and

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[15] *See Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012) ("deference is ... unwarranted ... when the agency's interpretation conflicts with a prior interpretation"); *Burlington Northern Santa Fe Ry. v. Loos*, 139 S. Ct. 893, 908-09 (2019) (Gorsuch, J., dissenting) (noting "executive agencies' penchant for changing their views about the law's meaning"); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring) (rejecting the notion that an agency can "reverse its current view 180 degrees anytime based merely on the shift of political winds and *still* prevail."); *Gallardo v. Barr*, 968 F.3d 1053, 1059-60 (9th Cir. 2020) ("ensuring that courts, rather than [agencies], interpret criminal laws precludes [agencies] 'from altering criminal laws back and forth over time.'") (citation omitted); *see also* App.62a-63a. If this Court permits ATF arbitrarily to change its technical classifications back-and-forth, time and again, without ever encountering meaningful judicial scrutiny, then law-abiding gun owners' respect for the rule of law will be greatly eroded. *See* App.68a.

Abramski, the court refused to defer to ATF's view of the statute. *Id.*

But what the Second, Fifth, and Ninth Circuits consider "resolved" and "clarified," other circuits consider unresolved. Indeed, the two circuits which have come down in favor of applying *Chevron* in the criminal context have done so in the context of the Final Rule. In *Guedes*, the D.C. Circuit conceded *Apel* and *Abramski* "signaled some wariness about deferring to the government's interpretations of criminal statutes," but believed "those statements were made outside the context of a *Chevron*-eligible interpretation," concluding "*Babbitt* ... and our court's precedents ... call for the application of *Chevron*." *Guedes*, 920 F.3d at 25.

In *Aposhian*, after acknowledging this Court's recent statements in *Apel* and *Abramski*, the Tenth Circuit chose to follow the D.C. Circuit's lead, concluding that "*Babbitt* and our court's precedents govern here....." *Aposhian*, 958 F.3d at 984. *But see Aposhian*, 989 F.3d at 901 (Tymkovich, C.J., dissenting) ("the Court's most recent decisions ... indicate[] the government's interpretation of criminal laws should not receive deference."). *See also Gutierrez-Brizuela* at 1155-56 (Gorsuch, J., concurring) ("The Supreme Court has expressly instructed us *not* to apply *Chevron* deference when an agency seeks to interpret a criminal statute ... doing so would violate the Constitution by forcing the judiciary to abdicate the job of saying what the law is....").

Finally, although finding it unnecessary to decide the issue, other courts have expressed concerns with the potential application of *Chevron* deference to criminal statutes. In *Alkazahg*, a military appellate court considered a challenge to a criminal conviction for possession of a bump stock, opining that "the Supreme Court has not provided a crystal clear answer as to whether *Chevron* deference applies in criminal cases." *Id.* at 774. Nevertheless, *Alkazahg* expressed "skeptic[ism] that ... the judiciary ... must defer to the judgment of the same executive who is prosecuting the defendant," questioned whether courts must defer to agencies "just because it is the Government's current 'permissible view,'" and noted that "[h]istorically, concentration of power is the death knell for self-government and liberty." *Id.* at 777. *See also Pugin v. Garland*, 2021 U.S. App. LEXIS 35409, *7-8, 10 and n.3 (4th Cir. 2021) (detailing the "thoughtful and ongoing debate about whether *Chevron* can apply to interpretations of criminal law, which implicates serious questions about expertise, delegation, flexibility, notice, due process, separation of powers, and more").[16]

In his statement respecting this Court's denial of certiorari in *Guedes*, Justice Gorsuch wrote that, "[t]o make matters worse, the law before us carries the possibility of criminal sanctions ... [W]hatever else one

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[16] While not the equivalent of an Article III court of appeals, the *Alkazahg* case nevertheless creates a split between appellate courts — not only on the issues of *Chevron*, waiver, and lenity, but also on the fundamental question of statutory interpretation (whether bump stocks are "machineguns").

thinks about *Chevron*, it has no role to play when liberty is at stake." *Guedes*, 140 S. Ct. at 790. This Court's review is necessary to confirm whether Justice Gorsuch's statement is correct, or if courts instead must allow agencies "to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). Without this Court's "crystal clear" guidance and direction, the confusion in the lower courts on this critical issue will continue to spread.

C. This Court Should Resolve the Conflict between *Chevron* and the Rule of Lenity to Resolve Ambiguities in Criminal Statutes.

Application of this Court's precedents addressing the interplay between *Chevron* and the rule of lenity has caused significant turmoil in the evenly divided Sixth Circuit below, and more broadly across the circuits. This Court's review is therefore necessary to clarify whether the rule of lenity, or *Chevron* deference, applies to ambiguous criminal laws.

The rule of lenity is a rule of statutory construction "perhaps not much less old than construction itself." *United States v. Wiltberger*, 18 U.S. 76, 95 (1820). It is "rooted in a constitutional principle" of due process, and "serves as a time-honored nondelegation canon."[17] Simply, lenity requires that, if Congress wishes to criminalize conduct, it must speak clearly so that ordinary persons are able to understand what is

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[17] C. R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 332 (2000).

expected of them to remain law-abiding. *See* App.60a-62a; *Babbitt* at 704 n.18; *Jones v. United States*, 529 U.S. 848, 858 (2000). Similarly, this Court has described *Chevron* as "a rule of statutory construction...." *Thompson/Center Arms Co.* at 518 n.10. Below, the government agreed. *See En Banc* Oral Argument at 20:47 ("yes, it is a tool of construction.").

However, five judges below opted to exalt *Chevron* to a far more elevated position as "the standard of review" which "may not be waived...." App.16a, 140a. Claiming that "[t]he rule of lenity does not displace *Chevron*" (App.14a), those judges allowed the opposite: for *Chevron* to displace the rule of lenity. *Cf. Aposhian* 989 F.3d at 899 (Tymkovich, C.J., dissenting) ("I am admittedly lost as to why *Chevron* gets to cut in front of the rule of lenity in the statutory interpretation line.").

Yet *Chevron* deference represents the polar opposite of, and is incompatible with, the rule of lenity. Whereas lenity resolves ambiguity in favor of the citizen, *Chevron* generally resolves ambiguity in favor of the government. If one doctrine applies, the other cannot. *See* App.72a; *Crandon* at 178 (Scalia, J., concurring) (*Chevron* "replac[es] the doctrine of lenity with a doctrine of severity.").

Thankfully, this Court never has held that *Chevron* deference takes precedence over lenity. Rather, even *Chevron* made clear that a court should always "employ[] traditional tools of statutory construction" to determine a statute's meaning before

considering deference. *Chevron* at 843 n.9. In *Kisor v. Wilkie*, 139 S.Ct. 2400 (2019), the Court was even more clear, explaining that a court "must exhaust *all* the 'traditional tools' of construction" and "only when that legal toolkit is empty" may deference even be considered. *Id.* at 2415 (emphasis added); App.69a. Just as there is no reasonable way to consider *Chevron* deference a "traditional" tool of statutory interpretation,[18] there is no reasonable basis on which to exclude the rule of lenity from a court's "traditional" interpretive "toolkit." *See* App.72a ("the rule of lenity is one of the most traditional tools in our interpretive 'toolkit.'").

Nevertheless, the Sixth, Tenth, and D.C. Circuits rejected application of lenity to the Final Rule, on the singular basis of the *Babbitt* footnote. According to these circuits, this footnote relegates the rule of lenity almost to irrelevance in criminal cases, giving priority instead to *Chevron*. App.14a-15a, 162a-164a; *Aposhian* 958 F.3d at 982-93; *Guedes*, 920 F.3d at 27.[19]

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[18] *See Aposhian*, 989 F.3d at 899 (Tymkovich, C.J., dissenting) ("*Chevron* is of recent provenance. It is a rule of interpretive convenience, rooted in notions of agency expertise and political accountability.").

[19] *But see Mendez*, 960 F.3d at 87-88 (rejecting *Chevron* and applying the rule of lenity); *United States v. One TRW, Model M14, 7.62 Caliber Rifle*, 441 F.3d 416, 420 n.3 (6th Cir. 2006) (noting the "complicated" interplay between the rule of lenity and the *Babbitt* footnote); *see also WEC Carolina Energy Sols. LLC v. Miller*, 687 F.3d 199, 203-04 (4th Cir. 2012); *In re Woolsey*, 696 F.3d 1266, 1277 (10th Cir. 2012); *Bingham, Ltd. v. United States*, 724 F.2d 921, 924-25 (11th Cir. 1984).

But as Judge Sutton previously observed, that "is a lot to ask of a footnote." *Carter* at 734) (Sutton, J., concurring and dissenting). Indeed, as Justice Scalia noted, "[t]hat [*Babbitt*] statement contradicts the many cases before and since...." *Whitman v. United States*, 574 U.S. 1003, 1005 (2014) (Scalia, J., dissenting) (citing *Leocal* and *Thompson/Center Arms*).

This Court should resolve the battle of conflicting rules. To the extent that *Babbitt's* footnote is being read to contraindicate use of the age-old rule of lenity, the decision below should be reversed and the Court's "drive-by ruling" in *Babbitt* should be clarified accordingly, or repudiated outright.

III. DESPITE THIS COURT'S SEEMINGLY CLEAR SIGNALS, A CIRCUIT SPLIT EXISTS AS TO WHETHER *CHEVRON* CAN BE WAIVED.

A. This Court Has Been Clear that No Deference Is Due when an Agency Does Not Believe Itself to Be Acting Pursuant to Delegated Authority.

In *United States v. Mead Corp.*, 533 U.S. 218 (2001), this Court explained that an agency's interpretation of a statute is entitled to deference only when it is "promulgated in the exercise of ... authority" delegated by Congress. *Id.* at 226-27. The seemingly obvious corollary is that no deference is owed when an agency denies it is applying its expertise or making a policy judgment Congress intended. Rather, in such a

case the agency merely is seeking to "give effect to the unambiguously expressed intent of Congress." *See Chevron* at 843. As Justice Gorsuch has explained, this is hardly "a surprise ... 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...." *Guedes,* 140 S. Ct. at 790. *See also Burlington* at 908 (Gorsuch, J., dissenting) ("any *Chevron* analysis here would be complicated by the government's change of heart."); *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 476-77 (1992) (finding that the Court "need not resolve the difficult issues regarding deference" because the agency requested no deference). In other words, it makes little sense for a court to tell an agency "we defer to your policy choice" only to have the agency respond: "what choice?"

The Final Rule repeatedly stressed that ATF was neither exercising policymaking authority nor claiming deference. Rather, ATF denied the existence of statutory ambiguity and claimed that "ATF believes these definitions represent the best interpretation of the statute," and "believes [its] interpretations accord with the plain meaning of th[e] [statutory] terms." 83 *Fed. Reg*. 66521, 66527.[20] The government reiterated

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[20] Below, Judge White disagreed, claiming the Final Rule invoked *Chevron* by responding to a comment with the statement that, "even if those terms are ambiguous … the Department's construction of those terms is reasonable under *Chevron*." 83 *Fed. Reg*. at 66527. App.9a. Of course, even if the Final Rule "seems of two minds" about whether *Chevron* applies, that represents a

this position again and again, insisting it was not seeking to invoke *Chevron*. *See* Notice of Supplemental Authority, R.38; Transcript, R.56; Brief for Appellees at 16; Petition for Rehearing *En Banc* at 3, 14; *en banc* oral argument at 25:25 ("we're not asserting *Chevron* ... I'm not changing that.); and 27:17 (the Final Rule's interpretation "is compelled. There are no alternatives."[21]); at 27:45 ("This isn't like *Chevron* which involved ... policy considerations; this is straight out, we think this is what the text means.").

The argument that the government waived *Chevron* was squarely presented to the district court, which acknowledged the issue in its opinion, but applied *Chevron* nonetheless. R.56; App.182a-184a. That decision is at odds with several of this Court's decisions, yet represents only one of many discordant viewpoints in the lower courts.

B. A Multi-Circuit Split Exists about whether *Chevron* Can Be Waived.

This Court has explained why *Chevron* should not apply when an agency does not seek it, since no deference should be given to an agency that is not even aware it is making a *Chevron*-eligible decision.

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situation where deference is not appropriate. *See Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1630 (2018).

[21] *See also* oral argument in *Aposhian v. Barr*, No.19-4036 (10th Cir. 2020) at 19:33 ("there's no ambiguity ... We're telling you we don't have an alternative"); *Guedes*, 920 F.3d at 21 ("if the Rule's validity turns on the applicability of *Chevron*, [ATF] would prefer that the Rule be set aside rather than upheld under *Chevron*.").

Nevertheless, there is an ongoing, multi-circuit split about whether *Chevron* deference can be waived by an agency. *See* J. Durling & E. Garrett West, *May Chevron Be Waived?*, 71 STAN. L. REV. ONLINE 183, 185 (2019). In fact, on the issue of *Chevron* waiver, there are nearly as many different answers as there are circuit courts.

For example, the Federal Circuit declined to afford *Chevron* deference when an agency did not seek it. *Texport Oil Co. v. United States*, 185 F.3d 1291, 1294 (Fed. Cir. 1999). Similarly, the Second Circuit would not apply *Chevron* when the parties agreed it did not apply. *United States v. Gayle*, 2003 U.S. App. LEXIS 26673, *13 n.4 (2d Cir. 2003); *see also New York v. United States DOJ*, 951 F.3d 84, 101 n.17 (2d Cir. 2020) ("Defendants have not claimed *Chevron* deference ... thus ... we do not consider whether ... deference might be warranted."). Relatedly, the Seventh and Ninth Circuits have applied *Chevron* when the parties agreed it applies. *See 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).

On the other hand, the Fourth and Fifth Circuits have found it necessary to determine for themselves that *Chevron* applies, even when the parties are in agreement it does. *See Sierra Club v. United States DOI*, 899 F.3d 260, 286 (4th Cir. 2018); *see also Amaya v. Rosen*, 986 F.3d 424, 430 (4th Cir. 2021) (following *Sierra Club*, but noting "the government never sought *Chevron* deference here until oral argument" and ordinarily such argument would be "deem[ed] either

waived or forfeited"); *Mushtaq v. Holder*, 583 F.3d 875, 876 (5th Cir. 2009) ("the reviewing court must determine the proper standard on its own"). The Eighth Circuit has applied *Chevron* even when the government failed to invoke it. *Sierra Club v. EPA*, 252 F.3d 943, 947 n.8 (8th Cir. 2001).

Meanwhile, the Eleventh Circuit recently noted the circuit "split on this issue," but ultimately did not decide "whether the parties can agree to bypass *Chevron*." *Martin v. SSA*, 903 F.3d 1154, 1161-62 (11th Cir. 2018); *see also Babb v. Sec'y, Dep't of Veterans Affairs*, 992 F.3d 1193, 1208 n.10 (11th Cir. 2021) ("Whether, when, and by whom *Chevron* can be waived or forfeited raises a slew of questions.").

Finally, in their bump stock opinions, the D.C. and Tenth Circuits have ignored their own precedents and applied *Chevron* even though the parties expressly disclaimed its application. In so doing, those courts have either created or perpetuated intra-circuit splits.

For example, the D.C. Circuit's opinions on *Chevron* waiver are hopelessly inconsistent, yet its more recent pronouncements generally countenance a one-way ratchet in favor of deference. In *Guedes*, the court claimed *Chevron* deference was required even though the parties agreed it was inapplicable and the "agency's lawyers" expressly disclaimed it. *Id.* at 21-22. For that holding, the court relied on its 2018 decision in *SoundExchange, Inc. v. Copyright Royalty Bd.*, 904 F.3d 41 (D.C. Cir. 2018), where it had applied *Chevron* even though the government had not invoked it. *Id.* at 54. Elsewhere, the court applied *Chevron*

when the parties agreed it applied, finding that the plaintiffs had waived any contrary "potential arguments they might have made." *Lubow v. Dep't of State*, 783 F.3d 877, 884 (D.C. Cir. 2015). It is small wonder, then, that Judge Posner colorfully accused the D.C. Circuit of having "drunk the *Chevron* Kool-Aid." A. R. Gluck & R. A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 HARV. L. REV. 1298 (Mar. 9, 2018). *But see Neustar, Inc. v. FCC*, 857 F.3d 886, 894 (D.C. Cir. 2017) (concluding the agency "forfeited any claims to *Chevron* deference [which] is not jurisdictional and can be forfeited"); *Global Tel*Link v. FCC*, 866 F.3d 397, 408 (D.C. Cir. 2017) ("With *Chevron* inapplicable ... 'we must decide for ourselves the best reading' of the statut[e]....").

Similarly, in *Hydro Res., Inc. v. United States EPA*, 608 F.3d 1131 (10th Cir. 2010), the Tenth Circuit concluded it need not consider *Chevron* deference "because, throughout the proceedings ... EPA itself hasn't claimed any entitlement to deference." *Id.* at 1146 and n.10. *See also Hays Med. Ctr. v. Azar*, 956 F.3d 1247, 1264 n.18 (10th Cir. 2020). Yet when considering the Final Rule, the Tenth Circuit applied *Chevron* in spite of the parties' agreement otherwise, claiming that *Hydro Res.* "should not be read as prohibiting our application of *Chevron*.... Simply put, 'need not' does not mean 'may not.'" *Aposhian,* 958 F.3d at 981. Then, making itself an extreme outlier among the circuits, the *Aposhian* majority weaponized *Chevron*, claiming it *should be applied* on the theory that the plaintiff had "invited" use of *Chevron* by explaining why it *should not apply*. *Id.* at 981-82 and

n.6. As Chief Judge Tymkovich put it, "*Chevron* becomes the Lord Voldemort of administrative law, 'the-case-which-must-not-be-named.'" *Aposhian*, 989 F.3d at 896.

C. This Court's Clear Statement in *HollyFrontier* Has Failed to Resolve the Circuit Split.

Last year, in *HollyFrontier*, Justice Gorsuch wrote for the Court that, while the government "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...." *Id.* at 2180. In 2020, Justice Gorsuch similarly wrote that "[t]his Court has often declined to apply *Chevron* deference when the government fails to invoke it." *Guedes*, 140 S. Ct. at 790.

This Court may have believed that *HollyFrontier* would have put the issue of *Chevron* waiver to rest, but that has not proved to be the case, as the Sixth Circuit's confusion demonstrates. Rather, writing for five judges *en banc*, Judge White insisted that *Chevron* deference *cannot* be waived and that "*Hollyfrontier* ... does not alter this conclusion," because the Court did not "hold that courts are prohibited from applying *Chevron* when an agency decides not to rely on it in litigation." App.10a n.6. Similarly, at *en banc* oral argument, Judge Griffin (who joined no *en banc* opinion) questioned "Isn't that statement ... in *HollyFrontier* ... dicta?" *En banc* oral argument at

14:40.[22] It is entirely possible that Judge Griffin's vote against following *HollyFrontier* changed the outcome below, from 9-7 to strike down the Final Rule, to the tie vote which affirmed the district court by default.

Other courts believe *HollyFrontier* to be controlling, creating a circuit split. For example, the *Alkazahg* court struck down the Final Rule "[f]ollowing ... *HollyFrontier*." *Id.* at *29-30. Likewise, the Fifth Circuit recently treated *HollyFrontier* as definitive. *Texas v. Biden*, 2021 U.S. App. LEXIS 36689, *52 (5th Cir. 2021). The D.C. Circuit also relied on *HollyFrontier* to conclude an agency "waived *Chevron* deference by expressly claiming *Skidmore* deference instead." *Novartis Pharms. Corp. v. Espinosa*, 2021 U.S. Dist. LEXIS 214824, *18 (D.C. Cir. 2021). Similarly citing to *HollyFrontier*, the Federal Circuit held that "we need not decide [*Auer's*] applicability ... because the Secretary does not invoke the doctrine." *Ortiz v. McDonough*, 6 F.4th 1267, 1275 (Fed. Cir. 2021). *See also Spicer v. McDonough*, 34 Vet. App. 310, 319 n.5 (U.S. App. Vet. Claims 2021) ("a court need not consider *Chevron* where the government decides not to raise it," relying on *HollyFrontier*).

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[22] The Sixth Circuit's refusal to find waiver of *Chevron*, in spite of *HollyFrontier*, creates a *third intra-circuit split* on *Chevron* waiver, failing to follow other Sixth Circuit cases where the court held *Chevron* can be waived. *See Tiger Lily, LLC v. United States HUD*, 5 F.4th 666, 669 (6th Cir. 2021) (unpublished); *CFTC v. Erskine*, 512 F.3d 309, 314 (6th Cir. 2008); *Help Alert W. Ky., Inc. v. TVA*, 1999 U.S. App. LEXIS 23759, *8 (6th Cir. 1999) (unpublished).

This Court's review is thus necessary to resolve whether and to what extent the government may forfeit or waive any claim to *Chevron* deference. As noted above, numerous courts have recognized the unsettled nature of the law in this area, implicitly seeking definitive answers from this Court.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

TABLE OF APPENDICES

APPENDIX A

U.S. 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, in his official capacity as Attorney General of the United States; UNITED STATES 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.

No. 19-1298

December 3, 2021, Opinion Filed

On Petition for Rehearing En Banc.
United States District Court for the Western District of Michigan at Grand Rapids;
No. 1:18-cv-01429—Paul Lewis Maloney, District Judge.

Argued: October 20, 2021
Decided and Filed: December 3, 2021

SUTTON, Chief Judge; BATCHELDER, MOORE, COLE, CLAY, GIBBONS, GRIFFIN, KETHLEDGE, WHITE, STRANCH, DONALD, THAPAR, BUSH, LARSEN, NALBANDIAN and MURPHY, Circuit Judges.[23]

COUNSEL

ARGUED: Robert J. Olson, WILLIAM J. OLSON, P.C., Vienna, Virginia, for Appellants. Mark B. Stern, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellees. **ON BRIEF:** Robert J. Olson, WILLIAM J. OLSON, P.C., Vienna, Virginia, Kerry L. Morgan, PENTIUK, COUVREUR & KOBILJAK, P.C., Wyandotte, Michigan, for Appellants. Mark B. Stern, Abby C. Wright, Brad Hinshelwood, Kyle T. Edwards, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellees. Alan Alexander Beck, San Diego, California, Stephen D. Stamboulieh, STAMBOULIEH LAW, PLLC, Olive Branch, Mississippi, Michael T. Jean, Hadan W. Hatch, NATIONAL RIFLE ASSOCIATION OF AMERICA, Fairfax, Virginia, John I. Harris III, SCHULMAN, LEROY & BENNETT PC, Nashville,

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[23] Pursuant to 6 Cir. I.O.P. 35(c), Composition of the En Banc Court, Judge Batchelder, a senior judge of the court who sat on the original panel in this case, participated in this decision. Judge Readler recused himself from participation in this decision.

Tennessee, Sebastian D. Torres, BISGAARD & SMITH LLP, Cincinnati, Ohio, Ilya Shapiro, CATO INSTITUTE, Washington, D.C., Richard A. Samp, NEW CIVIL LIBERTIES ALLIANCE, Washington, D.C., David M. S. Dewhirst, OFFICE OF THE MONTANA ATTORNEY GENERAL, Helena, Montana, Joseph G. S. Greenlee, FIREARMS POLICY COALITION, Sacramento, California, Ian Simmons, O'MELVENY & MYERS LLP, Washington, D.C., John Cutonilli, Garrett Park, Maryland, pro se, for Amici Curiae.

The En Banc Court of the Sixth Circuit Court of Appeals delivered an order. WHITE, J. (pp. 3–20), in which MOORE, COLE, CLAY, and STRANCH, JJ., joined, and GIBBONS, J. (pg. 21), in which MOORE, COLE, WHITE, and STRANCH, JJ., joined, delivered separate opinions in support of affirming the district court's judgment. MURPHY, J. (pp. 22–47), delivered a separate dissenting opinion, in which SUTTON, C.J., BATCHELDER, KETHLEDGE, THAPAR, BUSH, LARSEN, and NALBANDIAN, JJ., joined.

ORDER

Pursuant to Rule 35 of the Federal Rules of Appellate Procedure and Sixth Circuit Rule 35, a majority of the active judges of this court voted to grant *en banc* review of this case. By published order of the court, entered on June 25, 2021, rehearing en banc was granted and the previous opinion was vacated. Following argument heard by the court *en*

banc on October 20, 2021 and a conference among the judges, the court divided evenly, with eight judges voting to affirm the judgment of the district court and eight judges voting to reverse. Consequently, the judgment of the district court is AFFIRMED. *See School Dist., Pontiac v. Secretary, U.S. Dep't. Educ.,* 584 F.3d 253 (6th Cir. 2009), *Goodwin v. Ghee*, 330 F.3d 446 (6th Cir. 2003), and *Stupak-Thrall v. United States*, 89 F.3d 1269 (6th Cir. 1996). Separate opinions in favor of affirmance and in favor of reversal follow.

OPINION IN SUPPORT OF AFFIRMING THE DISTRICT COURT'S JUDGMENT

WHITE, Circuit Judge, writing in support of affirming the district court judgment. Congress defined the term, "machinegun," to mean "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). "Machinegun" also includes "the frame or receiver of any such weapon" as well as "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." *Id.*

And Congress tasked the Attorney General with administering and enforcing Chapter 53 of Title 26 of the National Firearms Act, in which the definition of

"machinegun" appears, and delegated rulemaking authority to the Attorney General to further this end. 26 U.S.C. §§ 7801(a)(2)(A), 7805(a). Congress also authorized the Attorney General to prescribe "rules and regulations as are necessary to carry out the provisions" of Chapter 44 of Title 18 of the Gun Control Act. 18 U.S.C. § 926(a). The Gun Control Act makes it unlawful to transfer or possess a "machinegun" as defined in § 5845(b). 18 U.S.C. §§ 921(a)(23), 922(o).

The Attorney General has directed the Director of the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) to administer, enforce, and exercise the functions and powers of the Attorney General with respect to Chapter 44 of Title 18 and Chapter 53 of Title 26. 28 C.F.R. § 0.130(a). On December 26, 2018, ATF published a rule clarifying that bump-stock-type devices fall within the definition of "machinegun" as defined in the National Firearms Act and the Gun

Control Act.[24] Bump-Stock-Type Devices (Final Rule), 83 Fed. Reg. 66,514, 66,543.[25]

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[24] The district court succinctly described bump-stock-type devices:

> The stock of a rifle is the portion of the weapon behind the trigger and firing mechanism and extends rearward towards the shooter. The forward part of the stock just behind the trigger provides a grip for the shooting hand. The rear end of the stock rests against the shooter's shoulder. A bump stock replaces the standard stock on a rifle. Bump stocks include an extension ledge or finger rest on which the shooter places his or her trigger finger where it is stabilized. The shooter then exerts a constant forward pressure on the barrel of the rifle using the non-trigger hand. As the rifle is pushed forward, the shooter also pulls the trigger, initiating the firing sequence. The bump stock then harnesses the rearward recoil energy from the shot causing the weapon to slide back into shooter's shoulder separating the trigger finger resting on the ledge and the trigger itself. The constant forward pressure exerted by the non-trigger hand on the barrel then pushes the weapon forward "bumping" the weapon against the stationary trigger finger. The back-and-forth sequence allows a shooter to fire a semiautomatic rifle at rates similar to automatic rifles.

Gun Owners of Am. v. Barr, 363 F. Supp. 3d 823, 828–29 (W.D. Mich. 2019).

[25] After a mass shooting in Las Vegas, Nevada, in October 2017, members of Congress and several nongovernmental organizations asked ATF to examine whether bump-stock-type devices constitute machineguns. Final Rule, 83 Fed. Reg. at 66,516. The Las Vegas shooter fired several hundred rounds in a short span of time—murdering scores of persons and wounding hundreds more—by using bump-stock-type devices attached to his rifles. *Id.*

Plaintiffs-Appellants (Gun Owners) filed this action challenging the Final Rule and sought a preliminary injunction to prevent it from going into effect. *Gun Owners of Am. v. Barr*, 363 F. Supp. 3d 823, 825–26 (W.D. Mich. 2019), *rev'd and remanded sub nom. Gun Owners of Am., Inc. v. Garland*, 992 F.3d 446 (6th Cir. 2021), *reh'g en banc granted, opinion vacated*, 2 F.4th 576 (6th Cir. 2021). The district court concluded that *Chevron*'s two-step test provides the appropriate standard of review to determine whether injunctive relief is warranted. *Id.* at 830–31 (citing *Chevron U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 842–43 (1984)). First, the district court found that Congress has not directly addressed whether bump stocks are included within the statutory term "machinegun" and that the definitional terms, "automatically" and "single function of the trigger," are ambiguous. *Id.* at 831. Second, the district court determined that the Final Rule's interpretations of "automatically" and "single function of the trigger" are permissible and its classification of bump stocks as machineguns is reasonable. *Id.* at 831–32. Concluding that Gun Owners failed to demonstrate a likelihood of success on the merits, the district court denied the motion for a preliminary injunction.[26] *Id.* at 832–33.

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[26] Before ruling on the motion, the district court correctly concluded that ATF's interpretations are not arbitrary or capricious. *Gun Owners*, 363 F. Supp. 3d at 832–33. The Final Rule acknowledges ATF's previous treatment of bump stocks as not meeting the definition of machinegun and sets forth sufficient reasons for the new interpretations. 83 Fed. Reg. 66,514, 66,517–19. The Final Rule also adequately explains why bump stocks are treated differently than other objects, such as belt loops, that can assist in bump firing, and it sufficiently responds

The district court's judgment should be affirmed. *Chevron* provides the standard of review, even though the law under consideration has criminal applications. Applying *Chevron*, Congress has not spoken to the precise question at issue and, after exhausting the traditional tools of statutory construction, § 5845(b) remains ambiguous. Because ATF's interpretation of § 5845(b) is a permissible construction of the statute and is reasonable, it is entitled to *Chevron* deference. Additionally, even without applying deference, the Final Rule provides the best interpretation of § 5845(b). Accordingly, relief to enjoin the Final Rule from going into effect is not warranted.

I. *Chevron* Applies

We apply *Chevron* when "Congress delegated authority to the agency generally to make rules carrying the force of law" and "the agency interpretation" in question "was promulgated in the exercise of that authority." *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001) ("Delegation of such authority may be shown . . . by an agency's power to engage in . . . notice-and-comment rulemaking, or by

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to the concern that semiautomatic guns without bump stocks could be improperly classified as machineguns. *Id.* at 66,533–34. Finally, regarding Gun Owners' new assertion that the political outcry following the mass shooting in Las Vegas—the likely cause of then-President Trump's call on ATF to review the matter—somehow tainted the rulemaking process, "that is hardly a reason to conclude that the Rule is arbitrary. Presidential administrations are elected to make policy." *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 920 F.3d 1, 34 (D.C. Cir. 2019).

some other indication of comparable congressional intent."). Here, Congress expressly delegated rulemaking authority to the Attorney General, who delegated this authority to the director of ATF. 18 U.S.C. § 926(a); 26 U.S.C. §§ 7801(a)(2)(A), 7805(a); 28 C.F.R. § 0.130(a). ATF then promulgated the Final Rule through notice-and-comment rulemaking, expressly invoking § 926(a) (authority to promulgate rules and regulations as are necessary to carry out provisions of the Gun Control Act), § 7801(a)(2)(A) (authority to administer and enforce provisions of the National Firearms Act), and § 7805(a) (authority to promulgate all needful rules and regulations to enforce provisions of the National Firearms Act).[27] Final Rule, 83 Fed. Reg. at 66,515–16; *see also* Bump-Stock-Type Devices, 83 Fed. Reg. 13,442, 13,443–44 (notice of proposed rulemaking). Thus, *Chevron* supplies the standard of review for assessing the validity of the Final Rule's classification of bump-stock-type devices as machineguns.[28]

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[27] Moreover, when responding to comments submitted in opposition to the proposed rule, ATF described, over several paragraphs, how *Chevron* would apply if the terms "automatically" and "single function of the trigger" were ambiguous, and how ATF's construction of these terms is reasonable under *Chevron*. Final Rule, 83 Fed. Reg. at 66,527. This "exegesis on *Chevron* would have served no purpose unless the agency intended the Rule to be legislative in character." *Guedes*, 920 F.3d at 19. Additionally, all other pertinent indicia of agency intent confirm that the Final Rule is a legislative rule. *Id.* at 18–19; *accord Aposhian v. Barr*, 958 F.3d 969, 980 (10th Cir. 2020).

[28] Gun Owners argues that ATF waived *Chevron* by disclaiming any reliance on it in this litigation. But, if we were to recognize

Gun Owners and my colleagues who argue for reversal assert that ATF's delegated authority is too general for *Chevron* deference to apply. Drawing a distinction between explicit and implied delegations to an agency, and relying on pre-*Chevron* cases, they discount precedent applying *Chevron* to regulations that have criminal applications. However, *Chevron* itself does not suggest the distinction between implicit and express delegations of rulemaking authority that underlies the opinion to reverse. 467 U.S. at 843–44 ("The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress. . . . Sometimes the legislative delegation to an agency on a particular question is implicit rather

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such litigation positions as effective waivers in the context of legislative rules, we would allow agencies to evade the Administrative Procedure Act's requirement to use the same notice-and-comment process to amend or repeal a rule as used to promulgate it. *See Guedes*, 920 F.3d at 22–23. Further, whether to apply *Chevron* is a question for the court to decide, not an agency's lawyers. *SoundExchange, Inc. v. Copyright Royalty Bd.*, 904 F.3d 41, 54 (D.C. Cir. 2018). *HollyFrontier Cheyenne Refinery, LLC v. Renewable Fuels Ass'n*, in which the Supreme Court, in a short paragraph, declined to consider whether *Chevron* deference was due, does not alter this conclusion. 141 S. Ct. 2172, 2180 (2021). *HollyFrontier* dealt only with an agency's attempt to use an unrelated rule, the validity of which was not in dispute, to demonstrate the validity of the unpublished agency orders being challenged. *Id.* That is, the Court did not address whether *Chevron* deference could be waived with respect to a disputed legislative rule. Nor did it hold that courts are prohibited from applying *Chevron* when an agency decides not to rely on it in litigation.

than explicit." (internal quotation marks and citation omitted)). And the Supreme Court has made clear that *Chevron* deference is not eliminated simply because the rulemaking authority conferred the Attorney General (and ATF, by extension) was not specified with exactitude. *Mayo Found. for Med. Educ. & Rsch. v. United States*, 562 U.S. 44, 56–57 (2011) (establishing that *Chevron* deference is appropriate when Congress delegated authority to make rules carrying the force of law generally and the agency interpretation was promulgated in the exercise of that authority, and stating "[o]ur inquiry in that regard does not turn on whether Congress's delegation of authority was general or specific").

Moreover, the Supreme Court has considered—and rejected—the premise that an implicit delegation somehow confers less authority than an explicit delegation. In *City of Arlington v. F.C.C.*, the dissent argued that *Chevron* deference should apply only where a delegation of authority covered the "specific provision" before the court. 569 U.S. 290, 322–23 (2013) (Roberts, C.J., dissenting). The majority rejected this argument, noting that the dissent could not produce "a single case in which a general conferral of rulemaking or adjudicative authority has been held insufficient to support *Chevron* deference for an exercise of that authority within the agency's substantive field." *Id.* at 306. The Court declined to adopt this proposed "massive revision of our *Chevron* jurisprudence." *Id.* We must do so today. Applying the statute to determine whether a device constitutes a machinegun is within ATF's substantive field. *See, e.g.*, *United States v. Dodson*, 519 F. App'x 344, 348 (6th

Cir. 2013); *Akins v. United States*, 312 F. App'x 197, 198 (11th Cir. 2009) (per curiam); *F.J. Vollmer Co. v. Higgins*, 23 F.3d 448, 449–50 (D.C. Cir. 1994); *York v. Sec'y of Treasury*, 774 F.2d 417, 419 (10th Cir. 1985). Additionally, the Supreme Court has rejected application of pre-*Chevron* tests in favor of "maintaining a uniform approach to judicial review of administrative action." *Mayo*, 562 U.S. at 55 (quoting *Dickinson v. Zurko*, 527 U.S. 150, 154 (1999)) (rejecting application of special pre-*Chevron* rules for reviewing Treasury regulations). Ultimately, the express/implied and specific/general distinctions have no role to play in applying *Chevron* deference.

Those who argue for reversal also claim that *Chevron* does not apply because the Final Rule may impose criminal sanctions. However, this is not what the case law says. *Chevron* itself involved an agency interpretation with criminal applications—at the time, a knowing violation of one of the disputed legislative rule's requirements was punishable by daily $25,000 fines and imprisonment for up to a year—and yet the Supreme Court applied deference. 467 U.S. at 866; *see also* 42 U.S.C. §§ 7502, 7413. In another case, *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, the Court applied *Chevron* when reviewing a legislative rule that attached criminal penalties. 515 U.S. 687, 703–04 (1995). And in yet another case, *United States v. O'Hagan*, a criminal case, the Supreme Court applied *Chevron* deference to a legislative rule despite the rule's clear criminal applications and penalties. 521 U.S. 642, 673 (1997). What these cases make clear is that *Chevron* does not

fall away simply because a challenged legislative rule has some criminal applications.[29]

The relevant question is whether Congress delegated to the agency authority to promulgate legislative rules with criminal applications. And, when the statute gives an agency broad power to enforce or administer all provisions of the statute, it is "clear" that the agency has the necessary authority to do so. *See Gonzales v. Oregon*, 546 U.S. 243, 258–59 (2006). Here, Congress broadly tasked the Attorney General with promulgating "such rules and regulations as are necessary to carry out the provisions" of the Gun Control Act—a purely criminal statute—and to "administ[er] and enforce[]" and "prescribe all needful rules and regulations for the enforcement" of the National Firearms Act—a statute with criminal applications. 18 U.S.C. §§ 924(a)(2), 926(a); 26 U.S.C. §§ 5871, 7801(a)(2)(A), 7805(a). This statutory context clearly demonstrates that Congress intended the authority delegated under the Gun Control Act and the National Firearms Act to encompass legislative rules

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[29] *United States v. Apel*, 571 U.S. 359 (2014), and *Abramski v. United States*, 573 U.S. 169 (2014), do not compel a contrary conclusion. Neither involved a legislative rule and, thus, neither involved agency interpretations that would trigger *Chevron*. Nor do they mention *Chevron*, *Babbitt*, or *O'Hagan* and, thus, *Apel* and *Abramski* should not be read to overrule this precedent. To be sure, there is an implied tension between the two lines of cases, but this is for the Supreme Court to resolve, not us. Until the Court does so, we must follow *Chevron*, *Babbitt*, and *O'Hagan*. *See Esquivel-Quintana v. Lynch*, 810 F.3d 1019, 1023–24 (6th Cir. 2016), *rev'd on other grounds sub nom. Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562 (2017).

with criminal applications. *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 920 F.3d 1, 25–26 (D.C. Cir. 2019).

Further, the rule of lenity does not displace *Chevron* simply because an agency has interpreted a statute carrying criminal penalties. The Supreme Court considered this very question in *Babbitt* and said:

> We have applied the rule of lenity in a case raising a narrow question concerning the application of a statute that contains criminal sanctions to a specific factual dispute . . . where no regulation was present. We 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.

515 U.S. at 703–04, 704 n.18 (citation omitted). To be sure, the *Babbitt* Court also hypothesized that a regulation may "provide such inadequate notice of potential liability so as to offend the rule of lenity," but this is simply an acknowledgment that a law imposing criminal sanctions—whether it be a statute or a regulation—must provide fair notice of the prohibited conduct. *Id.* at 704 n.18.

The *Babbitt* Court went on to determine that "the 'harm' regulation, which has existed for two decades and gives fair warning of its consequences," was not such a rule-of-lenity-violating regulation. *Id.* To read this sentence to mean that a regulation that breaks

from a previous interpretation likely offends the rule of lenity is to apply false logic. Although the Court suggested that a longstanding regulation could hardly be expected to offend the rule of lenity, it did not suggest the converse—that any new, contrary interpretation would, by itself, trigger doubt. And, based on the remainder of the sentence, fair warning of the regulation's consequences—in and of itself, with no relation to the age of a regulation or whether it effected a reversal in position—would undermine the rule of lenity's applicability.[30] Further, "[a]gency inconsistency is not a basis for declining to analyze the agency's interpretation under the *Chevron* framework." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005).

Here, as in *Babbitt*, there is a legislative regulation—the Final Rule—which was promulgated under authority delegated to an agency and involves the interpretation of a statute with criminal applications.[31] 83 Fed. Reg. 66,514; *see also* 18 U.S.C.

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[30] Even if the Final Rule were to be attacked in relation to its application to a specific factual dispute, it underwent the notice-and-comment process and over 186,000 comments were received, including one by Gun Owners on behalf of more than 1.5 million gun owners. The Final Rule was also published in the Federal Register. It is doubtful that these procedures provide such inadequate notice of potential liability as to offend the rule of lenity. *See Guedes*, 920 F.3d at 28.

[31] The circumstances in *Babbitt* are analogous to the circumstances here. In *Babbitt*, Congress defined the word "take" but did not further define the terms it used to define "take." 515 U.S. at 691. An agency interpreted one of the definitional terms—"harm"—to include habitat modification. The plaintiffs

§§ 924(a)(2), 926(a); 26 U.S.C. §§ 5845(b), 5871, 7801(a)(2)(A), 7805(a); 28 C.F.R. § 0.130(a). There is no dispute concerning the application of the Final Rule to a specific factual situation. Thus, under *Babbitt*, it is clear that *Chevron* deference provides the standard of review, not the rule of lenity.

My colleagues in favor of reversal suggest two other reasons why *Chevron* ought not to apply in the context of laws with criminal consequences: deferring to agency expertise may be warranted when interpreting civil statutes but not when agencies interpret laws with criminal penalties; and delegation in the criminal context violates the separation-of-powers principle. The arguments in support of these rationales are

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challenged that interpretation, arguing that Congress did not intend "take" to mean habitat modification. *Id.* at 691, 693. In the instant case, Congress defined "machinegun" using the terms "automatically" and "single function of the trigger" without further defining these terms. ATF interpreted "automatically" and "single function of the trigger" to mean, in conjunction, "a single pull of the trigger" to initiate "a self-acting or self-regulating mechanism" to allow "continuous firing without additional physical manipulation of the trigger by the shooter," which has the effect of including bump-stock-type devices as machineguns. Final Rule, 83 Fed. Reg. at 66,553–54. Gun Owners challenges this interpretation, arguing that Congress did not intend "machinegun" to include bump stocks. My colleagues favoring reversal distinguish *Babbitt* on the basis that it is an express-delegation case, whereas neither the National Firearms Act nor the Gun Control Act explicitly authorizes the Attorney General to issue regulations with criminal applications. But, again, when a statute gives an agency broad power to enforce or administer all its provisions, as is the case here, it is "clear" that the agency has the necessary authority to do so. *See Gonzales*, 546 U.S. at 258–59.

largely based on policy, analogy, and law review articles,[32] but not precedent.

There are many areas where Congress relies on agency expertise to implement laws with criminal applications. Just to name a few, we have highly technical and complex securities, tax, workplace safety, and environmental-law regimes in which the applicable agency exercises delegated authority to promulgate regulations fleshing out statutory provisions—regulations that have both civil and criminal applications. And no one contests that criminal law and procedure afford special protections to a criminal defendant that are not accorded to a civil defendant. But it does not follow that an agency's law-interpreting power falls away in the criminal context where the power was properly delegated to the agency and exercised through legislative rulemaking. To the extent my colleagues' inclination to cabin agency expertise to civil applications is motivated more by a displeasure with *Chevron*'s continued validity and legislative delegation more broadly, *Chevron* is the law and legislative delegation is a reality.

That legislative delegation is permissible undermines the separation-of-powers rationale as well. The Supreme Court has recognized Congress's delegation authority in the criminal context for over a century. For example, in *United States v. Grimaud*,

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[32] For an article expressing a contrary view, see Sanford N. Greenberg, *Who Says It's a Crime:* Chevron *Deference to Agency Interpretations of Regulatory Statutes That Create Criminal Liability*, 58 U. PITT. L. REV. 1 (1996), especially Section III.

220 U.S. 506 (1911), Congress delegated to the Secretary of Agriculture the power to promulgate rules—with criminal penalties—to preserve certain forest reserves. *Id.* at 507–09. The Secretary issued a rule prohibiting livestock grazing near these reserves without a permit. *Id.* at 509. The defendant sheep farmers were indicted for violating this rule. *Id.* They argued that the rule was unconstitutional because Congress could not "mak[e] it an offense to violate rules and regulations made and promulgated by the Secretary of Agriculture," since doing so would "delegate its legislative power to an administrative officer." *Id.* at 513. Although Congress had not declared, "in express terms," that it was unlawful to graze sheep on a forest reserve, the Supreme Court rejected the challenge. *See id.* at 521 (rejecting the argument that the rules were invalid merely "because the violation thereof is punished as a public offense").

In the ensuing decades, several Supreme Court decisions recognized that Congress may delegate legislative authority in the criminal context. *See, e.g.*, *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 406–07 (1928) ("The field of Congress involves all and many varieties of legislative action, and Congress has found it necessary to use officers of the executive branch within defined limits, to secure the exact effect intended by its acts of legislation, by vesting discretion in such officers to make public regulations interpreting a statute and directing the details of its execution, even to the extent of providing for penalizing a breach of such regulations." (citing *Grimaud*, 220 U.S. at 518) (other citations omitted)); *Yakus v. United States*, 321 U.S. 414, 418, 423–25 (1944) (upholding delegation of

authority to agency to issue price-limit regulations under Emergency Price Control Act even though violating the regulations carried criminal penalties, and rejecting non-delegation and separation-of-powers challenges by criminal defendants convicted of violating those regulations); *United States v. Mistretta*, 488 U.S. 361, 371–74, 394–96 (1989) (upholding delegation of authority to Sentencing Commission to define criminal sentencing ranges and rejecting non-delegation and separation-of-powers challenges by criminal defendant).

In *Touby v. United States*, 500 U.S. 160, 164–69 (1991), the Supreme Court upheld a delegation of legislative authority to the Attorney General (and the Attorney General to the Drug Enforcement Administration) to temporarily schedule substances under the Controlled Substances Act—a determination that carried criminal implications—and rejected arguments that this delegation violated the non-delegation doctrine or the separation of powers. The petitioners, who were convicted for manufacturing a temporarily scheduled substance, argued that because the delegated authority contemplated regulations with criminal sanctions, Congress was required to provide more specific direction than the intelligible principle normally required. *Id.* at 165–66. They also argued that allowing the Attorney General to both schedule particular drugs and prosecute individuals for manufacturing them—rather than designating a different executive to temporarily schedule the substances—violated the separation-of-powers doctrine. *Id.* at 167. Finally, the petitioners claimed that the Attorney General improperly delegated his

temporary scheduling power to the DEA. *Id.* at 169. The Court rejected all three arguments. *Id.* It concluded that under any standard the statute meaningfully constrains the Attorney General's discretion to define criminal conduct and that the separation-of-powers doctrine was not violated. *Id.* at 167–69. Similarly, in *United States v. Stevenson*, 676 F.3d 557, 565 (6th Cir. 2012), we held that the "Attorney General was properly delegated authority by Congress to enact [a] substantive rule" providing that a federal sex-offender registration statute—which imposed criminal penalties—applied retroactively to those convicted of sex crimes prior to the statute's passage. *See id.* at 563 n.3 (rejecting defendants' argument "that Congress lacked the constitutional authority to delegate this power to the Attorney General").

No one asserts that the National Firearms Act or the Gun Control Acts lacks an intelligible principle or that the Attorney General improperly delegated power to ATF. And to the extent that it is argued that Congress cannot give the Attorney General the power to implement a criminal statute through rulemaking and also enforce it, this is inconsistent with *Touby*. 500 U.S. at 167–68.

In sum, the district court correctly determined that *Chevron* provides the standard of review by which to assess the Final Rule.

II. Applying *Chevron*

The *Chevron* framework consists of two steps. At step one, we ask whether the intent of Congress is clear and, if so, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842–43. If, on the other hand, the court determines Congress has not directly addressed the precise question at issue and the statute is ambiguous with respect to the issue, then, at step two, we ask if the agency's interpretation is "based on a permissible construction of the statute." *Id.* at 843.

A. Step One

"Machinegun" is defined in the National Firearms Act and the Gun Control Act 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); 18 U.S.C. § 921(a)(23). The Final Rule defines "automatically" to mean "functioning as the result of a self-acting or self-regulating mechanism that allows the firing of multiple rounds through a single function of the trigger" and "single function of the trigger" to mean "a single pull of the trigger and analogous motions." 83 Fed. Reg at 66,553. As a result, the Final Rule defines the term "machinegun" to include bump-stock-type devices. *Id.*

To determine whether Congress has spoken directly to the precise question at issue—whether "machinegun" includes bump-stock devices—or whether the statute is silent or ambiguous regarding this issue, we employ traditional tools of statutory

construction.[33] *Chevron*, 467 U.S. at 843 n.9. Beginning with the statutes themselves, neither the National Firearms Act nor the Gun Control Act defines "automatically" or "single function of the trigger." When considering the statutory context, dictionary definitions, and everyday situations, however, both terms admit of more than one interpretation—that is, they are ambiguous. *See All. for Cmty. Media v. F.C.C.*, 529 F.3d 763, 777 (6th Cir. 2008).

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[33] The rule of lenity is a canon of construction. However, as discussed, it does not foreclose *Chevron* deference in the context of legislative rules interpreting statutes with criminal applications. Additionally, it "only serves as an aid for resolving an ambiguity," meaning that it "comes into operation at the end of the process of construing what Congress has expressed" and only "when the ordinary canons of statutory construction have revealed no satisfactory construction." *Lockhart v. United States*, 577 U.S. 347, 361 (2016); *Callanan v. United States*, 364 U.S. 587, 596 (1961). As such, perhaps the rule of lenity would have a role to play if a permissible construction of Congress's intent could not be found by the end of the *Chevron* analysis. *See Maracich v. Spears*, 570 U.S. 48, 76 (2013). But this is not the case here.

My colleagues in favor of reversal suggest that *Solid Waste Agency of N. Cook Cnty. v. Army Corps of Eng'rs* stands for the proposition that the rule of lenity must be applied at the outset to determine if the statute is unambiguous. *Solid Waste* says no such thing. In fact, its only reference to the rule of lenity comes when the Supreme Court expressly *declines* to consider the argument that the rule of lenity displaces *Chevron*. *See* 531 U.S. 159, 174 n.8 (2001). It is true that the Court declined to apply *Chevron*, but this was because the agency's interpretation of its own jurisdiction would have potentially extended beyond the outer bounds of Congress's Commerce Clause authority and created federalism—not fair notice—concerns. *Id.* at 173-74.

The phrase "single function of the trigger" is capable of two readings: one favoring the government (the "shooter-focused" reading), the other favoring Gun Owners (the "mechanical" reading). The shooter-focused reading corresponds to a single "pull" of the trigger—i.e., a single human action upon the trigger that initiates a rapid-fire sequence. Under this reading, a bump-stock-equipped rifle constitutes a machinegun because a single human action—the initial "pull" of the trigger—initiates a rapid firing sequence. The mechanical reading takes the phrase "single function of the trigger" to mean "single *depression* of the trigger." Under this view, a bump-stock-equipped rifle is not a machinegun because each bullet fired is initiated by a separate depression of the trigger, albeit one generated by the weapon's recoil. *Accord Guedes*, 920 F.3d at 29.

Both readings are plausible. "The word 'function' focuses on the 'mode of action' . . . by which the trigger operates. But that definition begs the question [] whether 'function' requires our focus upon the movement of the trigger, or the movement of the trigger finger. The statute is silent in this regard." *Aposhian*, 958 F.3d at 986 (quoting 4 OXFORD ENGLISH DICTIONARY 602 (1933));[34] *see also*

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[34] *Accord Guedes*, 920 F.3d at 29 ("A mechanical perspective, for instance, might focus on the trigger's release of the hammer, which causes the release of a round. From that perspective, a 'single function of the trigger' yields a single round of fire when a bump-stock device moves the trigger back and forth. By contrast, from the perspective of the shooter's action, the function of pulling the trigger a single time . . . yields multiple rounds of fire. . . . Neither of those interpretations is compelled (or foreclosed) by the

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 920-21 (1967) (defining "function" as an "action"). Because neither reading is "unambiguously 'compel[led]' by the statute, to the exclusion of the other one," the statute "contains a 'gap for the agency to fill.'" *Guedes*, 920 F.3d at 29–30 (quoting *Chevron*, 467 U.S. at 843, 860)).

The word "automatically" is also ambiguous. The statute provides that a machinegun is a "weapon which shoots . . . *automatically* more than one shot, without manual reloading, by a single function of the trigger." 26 U.S.C. § 5845(b) (emphasis added). Here, too, there are competing interpretations, and the text does not unambiguously foreclose either of them.

Gun Owners argues that the phrase "automatically" must mean by itself with little or no direct human control and, because a shooter must exert constant pressure to cause a bump-stock-equipped rifle to continue firing, these devices do not create weapons that shoot automatically. The government argues that "automatically" means self-acting or self-regulating. In the government's view, a bump-stock-equipped rifle is "self-acting" in the sense that once the shooter establishes the conditions necessary to begin the firing process—pulling the trigger, placing a finger on the extension ledge, and applying pressure on the barrel-shroud or fore-stock with the other hand—the bump

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term 'function' in 'single function of the trigger.' The word 'function' focuses our attention on the 'mode of action' . . . by which the trigger operates. But the text is silent on the crucial question of *which perspective* is relevant." (citations omitted)).

stock "eliminate[s] the need for the shooter to manually capture, harness, or otherwise utilize [the recoil] energy to fire additional rounds." Final Rule, 83 Fed. Reg. at 66,532.

According to dictionary definitions at the time the National Firearms Act was enacted, the word "automatically"—the adverbial form of the word "automatic"—means "[h]aving a self-acting or self-regulating mechanism that performs a required act at a predetermined point in an operation[.]" WEBSTER'S NEW INTERNATIONAL DICTIONARY 187 (2d ed. 1934); *see also* 1 OXFORD ENGLISH DICTIONARY 574 (1933) (defining "Automatic" as "[s]elf-acting under conditions fixed for it, going of itself"). The focus on a "self-regulating *mechanism*" cuts against the suggestion that the word "automatically" requires complete, as opposed to partial, automation, and lends support to ATF's classification. Further, the argument that bump-stock-equipped weapons do not fire "automatically" because they require constant forward pressure is belied by common usage of the word "automatic." For example, "an 'automatic' sewing machine still 'requires the user to press a pedal *and* direct the fabric.'" *Guedes*, 920 F.3d at 30 (citation omitted)). And an "automatic" car shifts gears on its own, but only if the driver maintains enough constant pressure on the gas pedal to reach a speed that triggers a gear shift.

As other courts have recognized, the ultimate question is how much human input is contemplated by the word "automatically." That is a question of degree

that the statute's text does not definitively answer. The D.C. Circuit's explanation captures this point well:

> The term "automatically" does not require that there be *no* human involvement to give rise to "more than one shot." Rather, the term can be read to require only that there be *limited* human involvement to bring about more than one shot. *See, e.g.*, Webster's New International Dictionary 157 (defining "automatically" as the adverbial form of "automatic"); *id.* at 156 (defining "automatic" as "self-acting or self-regulating," especially applied to "machinery or devices which perform *parts* of the work formerly or usually done by hand" (emphasis added)). But how much human input in the "self-acting or self-regulating" mechanism is too much?
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> . . . . [T]he phrase "by a single function of the trigger" . . . can naturally be read to establish only the preconditions for setting off the "automatic" mechanism, without foreclosing some further degree of manual input such as the constant forward pressure needed to engage the bump stock in the first instance. And if so, then the identified ambiguity endures. How much further input is permitted in the mechanism set in motion by the trigger? The statute does not say.

Guedes, 920 F.3d at 30-31. Thus, "automatically" is also ambiguous.

In sum, because neither party's interpretation of either term is unambiguously compelled by the statute, the statutory definition of "machinegun" contains two central ambiguities, which ATF has attempted to resolve. This leads to step two of the analysis under *Chevron*.

B. Step Two

When employing the *Chevron* framework, we do not ask if the agency's construction is the best reading of the statute. *Id.* at 843 n.11. The question is whether ATF's interpretations of "single function of the trigger" and "automatically" are permissible. *Mead*, 533 U.S. at 229.

Since 2006, ATF has interpreted "single function of the trigger" to mean "single pull of the trigger," a reading that is "consonant with the statute and its legislative history." *Akins*, 312 F. App'x at 198. When the National Firearms Act was enacted in 1934, the president of the National Rifle Association testified in a congressional hearing that any gun capable of firing more than one shot by a single pull of the trigger was a machinegun, and the House Report accompanying the bill that became the National Firearms Act said the same. *See* H.R. Rep. No. 73-1780, at 2 (1934); Final Rule, 83 Fed. Reg. at 66,518. Thus, ATF's interpretation of "single function of the trigger" is a permissible construction. *Accord Aposhian*, 958 F.3d at 988; *Guedes*, 920 F.3d at 31. Further, ATF's focus on the single human action upon the trigger is reasonable. The practical effect of the bump-stock device is to turn a semiautomatic firearm into a rapid-fire firearm that

only requires the person firing the gun to pull the trigger once.

ATF's interpretation of "automatically" as "self-acting or self-regulating" is permissible as well. Although this interpretation allows for some measure of human involvement, it accords with the everyday understanding of the term and relevant dictionary definitions from when "machinegun" was first defined in 1934 by the National Firearms Act and later slightly altered in 1968 by the Gun Control Act. For example, understanding "automatic" to allow for some human involvement, not complete autonomy, is commonplace. *Guedes*, 920 F.3d at 31; *Aposhian*, 958 F.3d at 989 ("The bump stock performs *part* of the work usually done by hand at a predetermined point in the operation, under conditions fixed for it by the shooter."). Additionally, Webster's New International Dictionary defined "automatic" as "[h]aving a self-acting or self-regulating mechanism," and dictionaries from 1965 and 1967 do the same. WEBSTER'S NEW INTERNATIONAL DICTIONARY 187 (2d ed. 1934); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 148 (1965); WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY 60 (1967). ATF's interpretation of "automatically" is therefore a permissible construction. *Accord Aposhian*, 958 F.3d at 988–89; *Guedes*, 920 F.3d at 31–32. It is also reasonable to read "automatically" to require only partial self-regulation—i.e., a mechanism that allows for an integral part of a process to be performed autonomously. Because bump-stock-type devices harness the recoil energy from each shot so that the trigger resets and continues firing without additional

physical manipulation of the trigger by the shooter, they can reasonably be understood to produce more than one shot, automatically.

In sum, § 5845(b) is ambiguous and ATF's construction of it is permissible and reasonable. The court must therefore defer to ATF's interpretation.

III. Assuming *Chevron* Does Not Apply

Assuming arguendo that *Chevron* does not apply, the district-court judgment should still be affirmed. Because ATF has been entrusted to administer both the National Firearms Act and the Gun Control Act, and its views "constitute a body of experience and informed judgment to which courts . . . may properly resort for guidance," its construction of § 5845(b) is not "outside the pale of any deference whatever." *Mead*, 533 U.S. at 227–28, 234 (quoting *Skidmore v. Swift Co.*, 323 U.S. 134, 140 (1944)). The Final Rule may warrant *Skidmore* deference, depending "upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Id.* at 228 (quoting *Skidmore*, 323 U.S. at 139–40); *see also id.* ("[C]ourts have looked to the degree of the agency's care, its consistency, formality, and relative expertness[.]" (footnotes omitted)).

In ten letter rulings issued between 2008 and 2017, ATF applied its "single pull of the trigger" interpretation to other bump-stock-type devices but ultimately concluded that the devices were not

machineguns because they did not "automatically" shoot more than one shot with a single pull. Final Rule, 83 Fed. Reg. at 66,517. None of them, however, extensively examined the meaning of "automatically." *Id.* Moreover, this position was inconsistent with the position taken by ATF in 2006, when it concluded that one such bump-stock-type device—the Akins Accelerator, which allowed the shooter to initiate an automatic firing cycle by pulling the trigger once, thereby harnessing the recoil energy of the rifle to fire more than one shot without further human input by means of internal springs within the device—was a machinegun. *Id.* After the 2017 mass shooting in Las Vegas, Nevada, ATF recognized that its earlier letter rulings failed to provide substantial or consistent legal analysis regarding the meaning of the term "automatically" and deviated from its 2006 position defining a bump-stock-type device as a machinegun,[35] which the Final Rule sets out to correct. *Id.* at 66,517–18.

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[35] Although the bump-stock-type devices described in the Final Rule harness the recoil energy of a rifle differently than the Akins Accelerator—by means of a sliding stock that allows the weapon to slide back into the shooter's shoulder after the discharge of a round and then forward into the stationary trigger finger by maintaining pressure on the barrel-shroud or fore-grip of the rifle, rather than internal springs—both are designed to the same end. They each harness a rifle's recoil energy to produce an automatic firing cycle beginning with a single pull of the trigger and continuing without additional manipulation of the trigger or significant manipulation of the firearm by the shooter until the trigger finger is withdrawn, the weapon malfunctions, or the ammunition supply is exhausted. 83 Fed. Reg. at 66,517–18. The absence of significant manipulation of the firearm distinguishes the bump stock from the pump-action shotgun.

ATF unquestionably has abundant experience and expertise in determining which devices constitute machineguns. Additionally, the Final Rule went through the highly formal process of notice and comment. And, in promulgating the Final Rule, ATF responded to over 186,000 comments—including one by Plaintiff Gun Owners on behalf of more than 1.5 million gun owners—and provided expansive reasoning for why bump stocks are machineguns, demonstrating a great degree of care in considering the issue. These factors—together with the validity of ATF's reasoning—entitle ATF's interpretation to at least *Skidmore* deference.

Finally, ignoring all deference, ATF's interpretation of the statute is the best one. According to Gun Owners and my colleagues favoring reversal, Congress meant only to prohibit weapons capable of firing more than one shot with a single mechanical depression of the trigger. This interpretation would exclude semiautomatic rifles with bump stocks attached because they fire only a single shot each time the trigger is depressed—notwithstanding that the trigger is depressed by the operation of the bump stock and the bump stock allows the shooter to fire semiautomatic rifles at the rapid rates of automatic weapons with one activation of the trigger. However, this reading neglects to account for how "automatically" and "single function of the trigger" work together as a practical matter, and therefore fails to give full meaning to the statutory definition.

When reading the key statutory terms of "machinegun" in conjunction with each other—"any

weapon which shoots," "automatically more than one shot," "by a single function of the trigger"—the definition refers to any weapon that is capable of discharging multiple rounds by means of a mechanism set in motion by a single function of the trigger. Courts have recognized "single function" to mean "single pull," as this is "consonant with the statute and its legislative history," *Akins*, 312 F. App'x at 200; and "automatically" to refer to a self-acting mechanism set in motion by a single pull of the trigger to discharge multiple rounds, *United States v. Olofson*, 563 F.3d 652, 658 (7th Cir. 2009). Moreover, as mentioned above, understanding "automatically" and "single function" to refer to, respectively, a self-regulating mechanism and a single human action is consistent with dictionary definitions from the relevant timeframe.

Thus, the best interpretation of § 5845(b) is that Congress, in defining "machinegun" as it did, intended to prohibit weapons capable of discharging multiple rounds continuously by means of a self-regulating mechanism initiated by a single human input on the trigger. This is precisely the interpretation the Final Rule provides. And, as the Final Rule thoroughly explains, this is exactly how a bump stock operates: after a shooter gets into position, a single pull of the trigger by the shooter initiates a sequence in which the bump stock harnesses and directs the firearms' recoil energy so that the firearm fires continuously without additional physical manipulation of the trigger by the shooter or any manual reloading. 83 Fed. Reg. at 66,516.

Thus, not only does ATF's interpretation warrant *Skidmore* deference, but, in the absence of all deference, and simply as a matter of statutory interpretation, it also embodies the best reading of the statute.

* * *

In sum, the rule of lenity is inapplicable. The *Chevron* framework applies to ATF's legislative regulation—the Final Rule; and because the statute is ambiguous and ATF's construction is permissible and reasonable, it warrants deference. Alternatively, ATF's interpretation of the statute is entitled to *Skidmore* deference. Finally, simply as a matter of statutory interpretation, the Final Rule embodies the best interpretation of the statute and operates to provide fair notice of that interpretation. The district court's judgment should be affirmed.

OPINION IN SUPPORT OF AFFIRMING THE DISTRICT COURT'S JUDGMENT

GIBBONS, Circuit Judge, writing in support of affirming the district court judgment. I agree with Judge White's assertion that *Chevron* applies to statutes with criminal penalties and her conclusion of the outcome under *Chevron*. I write separately, as Judge White ultimately concludes in the alternative, because *Chevron* application is unnecessary here. The ATF's interpretation of "single function of the trigger" and "automatically" is unambiguously the best

interpretation of the Gun Control Act using ordinary tools of statutory construction. Congress specifically prohibited "any part designed and intended solely and exclusively . . . for use in converting a weapon into a machinegun." 26 U.S.C. § 5845(b). As a part designed to convert a semiautomatic gun into a gun with machinegun functionality that "automatically" allows for multiple shots with a "single function of the trigger," a bump stock is unambiguously a machinegun. When a shooter pulls the trigger of a firearm fitted with a bump stock, the gun, through "a self-acting or self-regulating mechanism," 83 Fed. Reg. 246, 66514, 66519 (Dec. 26, 2018), fires "more than one shot, without manual reloading, by a single function of the trigger." 26 U.S.C. § 5845(b). Indeed, that is precisely what a bump stock is designed to allow a gun to do, and that is why people purchase bump stocks. Holding otherwise would allow gun manufacturers to circumvent Congress's longtime ban on machineguns by designing parts specifically intended to achieve machinegun functionality with a single pull of the trigger so long as the part also requires some minutia of human involvement.

DISSENT

MURPHY, Circuit Judge, dissenting. Since the early days of our Republic, it has been a bedrock legal principle that our government cannot criminalize conduct and send people to prison except through democratically passed laws that have made it through both Houses of Congress and been signed by the President. *See United States v. Hudson*, 11 U.S. 32, 34 (1812). Yet the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) has sought to ban "bump stocks" in a far different way: through a regulation adopted by a federal agency alone. Bump-Stock-Type Devices, 83 Fed. Reg. 66,514 (Dec. 26, 2018) ("Bump-Stock Rule"). By an equally divided vote, our court affirms a decision rejecting a legal challenge to the ATF's Bump-Stock Rule. I must respectfully dissent from this judgment. Nothing in Congress's two relevant statutes delegates to the ATF such broad power to expand a crime's scope through this sort of regulatory lawmaking.

In 1986, Congress amended the Gun Control Act of 1968 to make it a crime to possess a "machinegun," 18 U.S.C. § 922(o)(1), a term defined in the National Firearms Act of 1934, 26 U.S.C. § 5845(b). *Gun Owners of Am., Inc. v. Garland*, 992 F.3d 446, 450–51 (6th Cir. 2021). For years, the ATF asserted that private parties could lawfully possess the bump stocks at issue in this case because these devices did not fall within Congress's "machinegun" definition. Bump-Stock Rule, 83 Fed. Reg. at 66,516. So Americans bought millions

of dollars' worth of bump stocks. *Id.* at 66,547. Then the ATF changed its position. In the Bump-Stock Rule, the ATF agreed that the possession of bump stocks had been lawful in the past but asserted that the devices would become illegal "machineguns" on the rule's effective date. *Id.* at 66,525. There thus can be no doubt that the Bump-Stock Rule creates a new crime.

Judge Batchelder's panel opinion persuasively explained that neither the Gun Control Act nor the National Firearms Act gives the ATF the power to expand the law banning machine guns through this legislative shortcut. *Gun Owners*, 992 F.3d at 454–74. I write to add a few more thoughts on why bump stocks are not "machineguns" under these laws and why we cannot fall back on "*Chevron* deference" to save the ATF's rule. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Many people, I suspect, would not understand why anyone would want to own a bump stock, a device that helps a person shoot semiautomatic rifles at rapid rates approaching those of automatic weapons. But this case has nothing to do with the policy debate over whether Congress should have banned bump stocks after the tragic Las Vegas shooting in 2017. Despite the introduction of multiple bills, Congress opted not to pass such legislation. And while the burdensome legislative process may seem "unworkable" in today's polarized age, it is a core component of our separation of powers designed to protect the liberty of all Americans—not just bump-stock owners. *INS v. Chadha*, 462 U.S. 919, 959 (1983). Whether one favors or disfavors a policy banning bump stocks, we should all be concerned with

the way in which the federal government has enacted that policy into law.

I

This case implicates administrative-law questions with significance for many statutes. At bottom, though, it raises a pure question of statutory interpretation: Are rifles fitted with bump stocks "machineguns" under the definition in 26 U.S.C. § 5845(b)? We have long described this type of question as "the bread and butter of the work of federal courts." *Dolfi v. Pontesso*, 156 F.3d 696, 700 (6th Cir. 1998). I do not find it particularly difficult to answer.

The parties largely agree on the "basic" facts. *U.S. Bank Nat'l Ass'n v. Vill. at Lakeridge, LLC*, 138 S. Ct. 960, 966 (2018). Many rifles are either "automatic" or "semiautomatic." An "automatic" rifle continuously fires shots with one activation of the trigger, so a shooter must release the trigger to stop firing. *See Webster's Ninth New Collegiate Dictionary* 118 (1984); *Webster's New International Dictionary of the English Language* 187 (2d ed. 1934) ("*Webster's Second*"). A "semiautomatic" rifle fires only one shot with one activation of the trigger, so a shooter must release and reengage the trigger for each shot. *See Webster's Second*, *supra*, at 2274.

Automatic weapons usually fire at greater speeds than semiautomatic weapons because the shooter can hold down the trigger to keep firing and need not repeatedly release and reengage it. *See* Bump-Stock Rule, 83 Fed. Reg. at 66,516. But experts can "bump

fire" semiautomatic rifles at rates approaching those of some automatic firearms. An ATF official described bump firing as "rapid manual trigger manipulation to simulate automatic fire," Letter, R.1-4, PageID 34; the Bump-Stock Rule describes it as a "technique that any shooter can perform with training or with everyday items such as a rubber band or belt loop," 83 Fed. Reg. at 66,532. A shooter who bump fires relies on the recoil energy from the rifle's discharge to push the gun slightly backward away from the trigger finger, which remains stationary. The rifle's trigger resets as it separates from the trigger finger. The shooter then uses the non-trigger hand placed on the rifle's fore-end to push the gun (and thus the trigger) slightly forward. The trigger "bumps" into the still-stationary trigger finger, discharging a second shot. The recoil energy from each additional shot combined with the shooter's forward pressure with the non-trigger hand allows the rifle's backward-forward cycle to repeat itself rapidly. A shooter may also use a belt loop to bump fire by sticking the trigger finger inside the loop and shooting from waist level to keep the rifle more stable. *See id.* at 66,533.

A bump stock also helps a shooter engage in rapid bump firing. It replaces a semiautomatic rifle's standard stock with one that allows the rifle to slide back and forth within the stock by about 1.5 inches. *Id.* at 66,516, 66,518. This bump stock channels the recoil energy from the rifle's discharge in "constrained linear rearward and forward paths" and relieves the shooter of the need to "manually capture and direct" the recoil energy. *Id.* at 66,532. Yet a shooter still must use the non-trigger hand to put forward pressure on the

fore-end so that the rifle and trigger move forward after the recoil. *Id.* at 66,518. When the shooter's manual pressure pushes the trigger forward, it bumps into the trigger finger and discharges a second shot. The process repeats itself rapidly in the same general manner that it would were the shooter to bump fire without a bump stock. *Id.*

Given these facts, a bump stock does not qualify as a "machinegun." 26 U.S.C. § 5845(b); 18 U.S.C. § 921(23). Congress defined the word to cover both a weapon that "shoots" "automatically more than one shot" "by a single function of the trigger" and a "part" that is "designed" "exclusively" "for use in converting a weapon into a machinegun":

> The term "machinegun" means 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. The term shall also include 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). For a bump stock to be a "machinegun" under this definition, a rifle fitted with that device must qualify as one. Yet such a "bump-stock rifle" does not qualify.

To begin with, a bump-stock rifle does not shoot "more than one shot" "by a single function of the trigger." A "function" of a tangible thing is the "natural and proper action" that it performs. *Webster's Second, supra*, at 876; *American Heritage Dictionary of the English Language* 533 (1969). Put another way, a thing's "function" is "the action for which [the] . . . thing is specially fitted or used or for which [the] thing exists[.]" *Webster's Ninth, supra*, at 498. And putting a bump stock on a semiautomatic rifle does not change the "function" of its "trigger": to discharge one round per depression. All agree that a bump-stock rifle's trigger must be released and "re-engage[d]" between shots—just as occurs with ordinary bump firing. 83 Fed. Reg. at 66,516; *United States v. Alkazahg*, __ M.J. __, 2021 WL 4058360, at *5 (N-M Ct. Crim. App. Sept. 7, 2021). The firearm thus shoots one shot per trigger function. If this trigger fired more than one shot per activation, a person would more naturally refer to that result as a "malfunction" of the trigger than a "function" of it. *Cf. United States v. Olofson*, 563 F.3d 652, 658–59 (7th Cir. 2009).

Further, the discharge of more than one shot "by a single function of the trigger" does not alone make a firearm a "machinegun." The firearm must also do so "automatically." That is, it must operate "in a manner essentially independent of external influence or control," *American Heritage, supra*, at 90, or in a "self-acting or self-regulating" manner, *Webster's Ninth, supra*, at 118. What type of weapon might shoot multiple shots "by a single function of the trigger" but not do so "automatically"? The Bump-Stock Rule gave an example. A certain pump-action shotgun fires

multiple shots with one trigger depression if the shooter pumps the shotgun with the non-trigger hand to load and shoot additional shells. 83 Fed. Reg. at 66,534. Although this shotgun shoots more than one shot per trigger function, it does not do so "automatically" because the shooter must manually pump it. *Id.* This logic also disqualifies rifles equipped with bump stocks. They will fire only one shot if a shooter presses the trigger and uses no "external influence" with the non-trigger hand. *American Heritage, supra*, at 90; *Aposhian v. Wilkinson*, 989 F.3d 890, 896 (10th Cir. 2021) (en banc) (Tymkovich, C.J., dissenting). To fire additional shots, a shooter must exert manual force so that the trigger repeatedly pushes into the trigger finger. Vasquez Decl., R.7, PageID 146.

Lastly, this interpretation fits the context. The statutory text defines the word "machinegun." *See Johnson v. United States*, 559 U.S. 133, 140 (2010); *Solid Waste Agency of N. Cook Cnty. v. Army Corps of Eng'rs* (*SWANCC*), 531 U.S. 159, 171–72 (2001). And this interpretation matches how an "appropriately informed" user of the English language would distinguish a "machinegun" from an ordinary rifle. *See Van Buren v. United States*, 141 S. Ct. 1648, 1657 (2021) (citation omitted). A "machine gun" is typically viewed as "an automatic gun[.]" *Webster's Ninth*, *supra*, at 713; *Webster's Second*, *supra*, at 1474. And the difference between an "automatic" and a "semiautomatic" weapon has long turned on a mechanical feature of its trigger. If the gun automatically reloads *and* refires with one trigger activation, it is a machine gun. If it automatically

reloads the next cartridge but requires "another pressure of the trigger for each successive shot," it is a semiautomatic gun. *Webster's Ninth*, *supra*, at 1069; *see also id.* at 118; *Webster's Second*, *supra*, at 187, 2274. Because a bump-stock rifle's trigger must be reengaged for each shot, it is not a machine gun under the ordinary understanding of that term. *See Guedes v. Bureau of Alcohol, Tobacco, Firearms and Explosives*, 920 F.3d 1, 44–45 (D.C. Cir. 2019) (per curiam) (Henderson, J., concurring in part and dissenting in part).

*

The ATF's contrary view commits two errors. It rewrites the phrase "by a single function of the trigger." And it interprets the adverb "automatically" out of context.

By a Single Function of the Trigger. Although the ATF does not dispute that a bump-stock rifle's trigger must be released and reengaged for each shot, it says that the rifle shoots multiple shots "by a single function of the trigger." Its logic for this head-scratching result starts by rewriting "single function of the trigger" to mean "single pull of the trigger." Bump-Stock Rule, 83 Fed. Reg. at 66,518. From there, it says that a shooter need only "pull" the trigger once because additional shots result from the trigger pushing against the stationary trigger finger. *Id.* at 66,519.

This reading conflicts with basic interpretive principles. To rewrite "function" to mean "pull," the ATF cites a Supreme Court footnote and a snippet of

legislative history. *See id.* at 66,518. It should have started with the word's ordinary meaning. *See Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1140 (2018). Nobody would define "function" as "pull." A thing's "function" is the "action" it "is specially fitted" to perform. *Webster's Ninth*, *supra*, at 498. The ATF's use of the word "pull" wrongly changes the focus from the firearm's mechanical perspective (how does the firearm work?) to the shooter's operational perspective (how does a shooter shoot the gun?). *Gun Owners*, 992 F.3d at 470–71. Although a shooter may "pull" a trigger, it is unnatural to say that the shooter "functions" the trigger. But it is perfectly natural to say that the semiautomatic trigger properly "functions" if it shoots one shot per activation.

The ATF's sources do not help it. In *Staples v. United States*, 511 U.S. 600 (1994), the Court distinguished automatic and semiautomatic weapons in a footnote discussing background facts. *Id.* at 602 n.1. The decision otherwise addressed an issue not relevant here: whether the crime of possessing an unregistered machine gun has a *mens rea* element. *Id.* at 604–20. This footnote described an automatic weapon as one that "fires repeatedly with a single pull of the trigger," noting that "once its trigger is depressed, the weapon will automatically continue to fire until its trigger is released or the ammunition is exhausted." *Id.* at 602 n.1. Yet *Staples* did not offer a conclusive reading of the "machinegun" definition; it "merely 'offer[ed] commonsense explanations'" to distinguish the weapons. *Olofson*, 563 F.3d at 658 (citation omitted). In *Olofson*, the government itself took this view of *Staples*. There, the defendant read

Staples as if it were a statute. He argued that his rifle shot only three rounds per trigger pull and so was not a machine gun because it did not keep shooting until the trigger was released or the ammunition exhausted. *Id.* at 658–59. When rejecting this argument, the Seventh Circuit refused to replace the statute with the footnote. *Id.* at 659. I would do the same.

The ATF next turns to legislative history. The President of the National Rifle Association noted that a firearm "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." *National Firearms Act: Hearings on H.R. 9066 Before the H. Comm. on Ways & Means*, H.R. 9066, 73rd Cong. 40 (1934). "But legislative history is not the law." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1631 (2018). And the law uses the word "function."

Congress had good reason for this word choice. Even the ATF cannot stick with its own "pull" test. It recognizes that this word might exclude from the "machinegun" definition weapons that repeatedly shoot with one *push* of a button. Bump-Stock Rule, 83 Fed. Reg. at 66,534. So the ATF expands its interpretation of "function of the trigger" to cover not just a "pull" but also "analogous motions." *Id.* This change should disqualify rifles fitted with bump stocks. The shooter's act of pushing the trigger into the trigger finger is an "analogous motion" for each shot of such a rifle. The rifle thus does not shoot multiple shots by a shooter's single "pull" of or other "motion" on the trigger.

Automatically. The ATF agrees that "automatically" means operating "as the result of a self-acting or self-regulating mechanism[.]" 83 Fed. Reg. at 66,519. And, as the ATF recognized for a decade, shooters must use *manual* force with the non-trigger hand to reengage the trigger between each shot of a bump-stock rifle. *See id.* at 66,532. But the ATF now says that this rifle acts "automatically" because its bump stock mechanically channels the recoil energy, so shooters need not "manually capture and direct recoil energy" themselves. *Id.*

This view reads the word "automatically" in isolation, not in context. *See Johnson*, 559 U.S. at 139–40. "Automatically" does not modify the phrase "capture the recoil energy"; it modifies the phrase "shoots" "by a single function of the trigger." Just because one part of a rifle's operation is "automatic" does not mean that it automatically shoots by a single function of its trigger. Even semiautomatic rifles have some "automatic" features (hence their name). They use the "force of recoil and mechanical spring action to eject the empty cartridge case after the first shot and load the next cartridge" without human action. *Webster's Ninth*, *supra*, at 1069. But they do not shoot multiple shots "automatically" "by a single function of the trigger" because a shooter must use manual force to reengage the trigger for each shot. The same is true of bump-stock rifles.

The ATF's reading also leaves the statute entirely unclear concerning the amount of human involvement necessary to distinguish a "machinegun" from an ordinary firearm. I would read the statute to set a rule:

a gun shoots automatically by a single function of the trigger as long as the shooter need only manually cause the trigger to engage in a "single" function in order to fire multiple shots. *See Guedes*, 920 F.3d at 46–47 (Henderson, J., concurring in part and dissenting in part); *Aposhian*, 989 F.3d at 896 (Tymkovich, C.J., dissenting). So a typical machine gun qualifies even though the shooter pulls the trigger *and* keeps it pressed down because that combined external influence still does no more than result in one action of the trigger. I am, by contrast, at a loss over the amount of human influence that disqualifies a weapon as a machine gun under the ATF's view that "function" really means "pull." All agree that the shooter must exert "external influence" *in addition to* a single pull of the trigger. *American Heritage*, *supra*, at 90. So why does the bump-stock rifle shoot more automatically than the pump-action shotgun that also requires further human input? And why does the manual capturing of recoil energy render ordinary bump firing nonautomatic? The answers to these questions cannot be found in the amorphous law that the ATF has attempted to draft.

The ATF lastly claims that my reading conflicts with caselaw addressing a redesigned semiautomatic rifle that allows a shooter to press a switch to keep the rifle firing until the release of the switch. ATF Supp. Br. 11–12 (citing *United States v. Camp*, 343 F.3d 743 (5th Cir. 2003)). But this caselaw holds only that a traditional rifle trigger need not be the "trigger" under § 5845(b) and that the *switch* can qualify as this rifle's trigger. *Camp*, 343 F.3d at 745. Here, the ATF agrees there is just one trigger—the traditional one. A

conclusion that bump stocks do not turn ordinary semiautomatic rifles into machine guns says nothing about whether these other devices qualify.

In sum, a shooter manually reengages the trigger of a bump-stock rifle after each shot, so the rifle does not "automatically" shoot more than one shot "by a single function of the trigger."

II

The circuit courts that have upheld the Bump-Stock Rule have not suggested that the ATF's contrary view "is the better reading of the statute." *Guedes*, 920 F.3d at 30. Indeed, they have not even felt the need to *ask* which is the better reading. *Id.* They have instead held that they must review the ATF's reading under *Chevron*'s "two-step" approach. *Id.* at 17–28; *Aposhian v. Barr*, 958 F.3d 969, 979–84 (10th Cir. 2020). At step one, these courts find that "automatically" and "single function of the trigger" are sufficiently ambiguous to require courts to defer to the ATF's reading. *Aposhian*, 958 F.3d at 988–89; *Guedes*, 920 F.3d at 29–31. At step two, they hold that the ATF's reading is "permissible." *Aposhian*, 958 F.3d at 984–88; *Guedes*, 920 F.3d at 31–32.

I find three problems with this approach. *First*, the courts justify their use of *Chevron* with irrelevant cases that interpret statutes expressly delegating power to an agency to enact criminal regulations. *Second*, the courts wrongly expand *Chevron*'s domain by holding that Congress impliedly delegated to the Attorney General the power to interpret a criminal law

merely because it gave him a general authority to enact regulations. *Third*, even under *Chevron*'s regime, the courts improperly find ambiguity without attempting to figure out the statute's meaning.

A. The circuit courts wrongly allow a federal agency to create a regulatory crime without an express delegation of criminal policymaking power from Congress.

The circuit courts that uphold the Bump-Stock Rule justify their reliance on "*Chevron* deference" by citing cases that permit Congress to *expressly* delegate to an agency the power to create a regulatory standard backed by criminal penalties. *Guedes*, 920 F.3d at 24, 28 (citing *United States v. O'Hagan*, 521 U.S. 642 (1997); *Touby v. United States*, 500 U.S. 160 (1991)). Yet the deference that I view as "*Chevron* deference" traditionally arises when an agency claims that Congress has *impliedly* delegated to the agency the power to interpret the law. The use of this express-delegation caselaw in this case's implied-delegation context sets a hazardous precedent.

When Congress regulates private parties, it sometimes expressly gives a federal agency a policymaking power to adopt the governing standard of conduct. As one example, Congress told the Attorney General that he may add to the list of "controlled substances" that cannot be sold. 21 U.S.C. § 811; *Touby*, 500 U.S. at 162–64. As another, Congress told the SEC to define the "acts" that are "fraudulent" during a tender offer. 15 U.S.C. § 78n(e); *O'Hagan*, 521 U.S. at 667.

A party can challenge these express delegations in various ways. *See United States v. Mead Corp.*, 533 U.S. 218, 227 & n.6 (2001). Most notably, Congress may not give away its legislative power, so these policy-laden regulations raise separation-of-powers concerns. *Touby*, 500 U.S. at 165. For better or worse, however, the Supreme Court has rebuffed challenges to these rules under the nondelegation doctrine, even when Congress has made it a crime to violate them. *See id.* at 165–68; *United States v. Grimaud*, 220 U.S. 506, 518–22 (1911); *cf. Gundy v. United States*, 139 S. Ct. 2116, 2133–48 (2019) (Gorsuch, J., dissenting). Apart from a nondelegation challenge, a party might also argue that the agency's policy choice violates the Administrative Procedure Act because it is procedurally arbitrary or substantively contrary to Congress's instructions about the policies that the agency should adopt. *See O'Hagan*, 521 U.S. at 673; 5 U.S.C. § 706(2).

Critically, though, a party may not challenge this type of regulation on the ground that Congress did not give the agency the power to adopt it in the first place. Of course it did. Its *express* delegation leaves this statutory-interpretation question with an unambiguous answer. But that express delegation does not trigger "*Chevron* deference." *Cf. Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2148 (2016) (Thomas, J., concurring). Well before *Chevron*, the Supreme Court noted that it should defer to a regulation with "legislative effect" when Congress expressly delegated policymaking authority to the agency. *Batterton v. Francis*, 432 U.S. 416, 425 (1977); Thomas W. Merrill & Kristin E. Hickman, *Chevron's*

Domain, 89 Geo. L.J. 833, 833 n.2 (2001) (collecting cases). "*Chevron* deference" instead comes into play when a statute *lacks* an express delegation. *Chevron* held that a statutory ambiguity can represent Congress's "implicit" delegation to an agency to resolve the ambiguity. 467 U.S. at 844; *King v. Burwell*, 576 U.S. 473, 485 (2015). And it distinguished laws with these implicit delegations from those that "explicitly left a gap for the agency to fill[.]" 467 U.S. at 843–44 & 844 n.12; *see Mead*, 533 U.S. at 229.

These express-delegation cases thus are irrelevant to whether the Gun Control Act and the National Firearms Act contain implied delegations to the Attorney General. (The Acts identify the Attorney General as the enforcing official, and he has designated the ATF to act on his behalf. 28 C.F.R. § 0.130(a)(1)–(2).) Unlike in *O'Hagan* (in which Congress gave the SEC the power to define "fraudulent" acts), these Acts do not expressly give the Attorney General the power to define "machinegun." And unlike in *Touby* (in which Congress gave the Attorney General the ability to add to the list of "controlled substances"), the Acts do not expressly give the Attorney General the ability to add to a list of "machineguns." Congress instead defined "machinegun" itself.

*

If anything, the use of this express-delegation precedent in *Chevron*'s implied-delegation context marks a sharp break from past practice. The cases allowing agencies to create criminal regulations come with an important safeguard: Congress *itself* must

"make[] the violation of regulations a criminal offense and fix[] the punishment[.]" *Loving v. United States*, 517 U.S. 748, 768 (1996). So when a statute left unclear whether Congress gave an agency the power to create regulatory crimes, the Supreme Court refused to interpret the statute as granting this power. *See United States v. Eaton*, 144 U.S. 677, 687–88 (1892). Congress must act "distinctly"—i.e., clearly—if it wants to allow agencies to enact criminal rules with the force of law. *Id.* at 688; *Grimaud*, 220 U.S. at 519. This clear-statement rule established a presumption against "which Congress legislates" well before *Chevron*. *Singer v. United States*, 323 U.S. 338, 350–51 (1945) (Frankfurter, J., dissenting); Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 Harv. L. Rev. 467, 499–502 (2002). The statute in *O'Hagan*, for example, expressly made it a crime to violate "any provision of this chapter" or "any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of this chapter[.]" 15 U.S.C. § 78ff(a); *O'Hagan*, 521 U.S. at 677 n.23.

The clear-statement rule is "not a judicial sport." *Singer*, 323 U.S. at 350 (Frankfurter, J., dissenting). It reinforces a fundamental separation-of-powers principle. *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 733 (6th Cir. 2013) (Sutton, J., concurring). The Constitution allows only Congress to create crimes. *See United States v. George*, 228 U.S. 14, 22 (1913). The Supreme Court cannot create common-law crimes, *Hudson*, 11 U.S. at 34, and the President cannot create administrative crimes, *George*, 228 U.S. at 22. This

principle promotes liberty by barring the government from forcing Americans to change their behavior on threat of imprisonment unless their representatives pass a bill that survives the arduous journey through both Houses of Congress and their President signs this bill into law. *See Bond v. United States*, 564 U.S. 211, 222 (2011).

The circuit courts that use the express-delegation precedent to invoke *Chevron* flout this clear-statement rule and the separation-of-powers principle that it protects. The Bump-Stock Rule creates a new regulatory crime that bars the possession of bump stocks. Yet it does so allegedly pursuant to only an implied (not a distinct) congressional delegation of power.

The courts all agree that the Bump-Stock Rule purports to be a legislative rule that creates a new crime with the "force and effect of law"; it does not claim to be an interpretive rule that merely construes the "machinegun" ban in 18 U.S.C. § 922(o)(1). *See, e.g.*, *Guedes*, 920 F.3d at 18 (citation omitted). The crime's effective date shows as much. For a decade before the Bump-Stock Rule, the ATF issued advisory letters indicating that the bump stocks at issue here are not machine guns. Bump-Stock Rule, 83 Fed. Reg. at 66,516. Its position nurtured the creation of an entire bump-stock industry, complete with manufacturers, retailers, and consumers. *Id.* at 66,545–48. By the time of the Bump-Stock Rule, consumers had bought some $100 million worth of bump stocks. *Id.* at 66,515. If this rule merely interpreted § 922(o)(1)'s "machinegun" ban, the people

who owned bump stocks during this time would all along have been committing felonies (on the ATF's advice). *See* 18 U.S.C. § 924(a)(2). Yet the ATF did not seek to throw these bump-stock owners into prison. The Bump-Stock Rule instead purports to criminalize behavior that was *previously* lawful: "Anyone currently in possession of a bump-stock-type device is not acting unlawfully unless they fail to relinquish or destroy their device after the effective date of this regulation." 83 Fed. Reg. at 66,523; *see also id.* at 66,525, 66,530.

To enact this new regulatory crime, the ATF (the Attorney General's designee) must identify a statutory provision "distinctly" empowering the Attorney General to do so. *Eaton*, 144 U.S. at 688. But the ATF points to no such provision. That is why the circuit courts must rely on *Chevron*. *Chevron* deference applies when Congress "implicitly" delegates to an agency the power to interpret a statute. 467 U.S. at 843–44. But an implicit delegation is not a distinct one. *Carter*, 736 F.3d at 733 (Sutton, J., concurring). Under traditional principles, then, the ATF lacks the power to make criminal what was lawful. And reliance on *Chevron* throws overboard what has long been a critical check on an agency's ability to enact criminal rules: Such rules "must have clear legislative basis." *George*, 228 U.S. at 22; *cf. Whitman v. United States*, 574 U.S. 1003, 1004 (2014) (Scalia, J., respecting the denial of certiorari). The Bump-Stock Rule does not.

To be sure, Congress gave the Attorney General the general power to issue "such rules and regulations as are necessary to carry out the provisions" of the Gun Control Act. 18 U.S.C. § 926(a). And it gave the

Attorney General the general power to "prescribe all needful rules and regulations for the enforcement of" the National Firearms Act. 26 U.S.C. §§ 7805(a), 7801(a)(2)(A)(i). But these grants of general rulemaking power (which exist in most statutes) are not express delegations of power to adopt substantive criminal rules like those in *O'Hagan* and *Touby*. To the contrary, a grant of general rulemaking authority can show only Congress's *implied* delegation to an agency to resolve ambiguities under *Chevron*. *See Mayo Found. for Med. Educ. & Rsch. v. United States*, 562 U.S. 44, 57 (2011). The law in *Chevron* itself allowed the EPA administrator to "prescribe such regulations as are necessary to carry out his functions under this chapter." 42 U.S.C. § 7601(a)(1). An assertion that the Attorney General's general rulemaking power also qualified as an express delegation to establish regulatory crimes with the force of law would swallow *Chevron*'s distinction between express and implied delegations. *See* 467 U.S. at 843–44. Because these grants of rulemaking power do not "distinctly" show Congress's intent to allow the Attorney General to create a new crime (as the Bump-Stock Rule purports to do), they do not satisfy the clear-statement rule. *Eaton*, 144 U.S. at 688; *cf. George*, 228 U.S. at 20–21, 20 n.†.

Further, no other provision gives the Attorney General the power to issue a criminal rule implementing the Gun Control Act's "machinegun" ban, 18 U.S.C. § 922(o)(1), or the "machinegun" definition that it incorporates from the National Firearms Act, *id.* § 921(a)(23); 26 U.S.C. § 5845(b). This omission is telling. When the Gun Control Act

permits the Attorney General to enact rules backed by criminal sanctions, it says so expressly. Section 923, for example, requires licensed firearms distributors to keep such records "as the Attorney General may by regulations prescribe" and makes it a misdemeanor for licensees to violate its recordkeeping provisions "or the regulations promulgated thereunder." 18 U.S.C. §§ 922(m), 924(a)(3)(B). Yet the Act otherwise "contains no power authorizing [the Attorney General] to promulgate criminal regulations," such as regulations implementing § 922(o)(1)'s "machinegun" ban. Stephen P. Halbrook, *Firearms Law Deskbook* § 4:6, Westlaw (database updated Oct. 2021). Likewise, the National Firearms Act authorizes the Attorney General to issue regulations about, for example, licensing or registration requirements. 26 U.S.C. §§ 5812(a), 5822, 5841(c), 5842–44; *see also id.* §§ 5851(b), 5852(f), 5853(c), 5854. The Act also makes a violation of its own "provisions" a crime. *Id.* §§ 5861, 5871. But nothing in it allows the Attorney General to issue a legislative rule that changes the scope of its "machinegun" definition. Under normal interpretive principles, we should view the express inclusions and omissions of regulatory authority as intentional legislative choices. *See Gonzales v. Oregon*, 546 U.S. 243, 262–63 (2006); *Russello v. United States*, 464 U.S. 16, 23 (1983); Merrill & Watts, *supra*, at 471–72, 487.

One last point. For those persuaded by such things, the Gun Control Act's original drafters discarded a provision that would have given the Attorney General the power to adopt legislative rules backed by criminal sanctions. One version of the Act would have broadly attached criminal penalties to a violation of any rule or

regulation promulgated under the Act. *See* S. 917, 90th Cong. § 924(a) (as reported by Senator McClellan, Apr. 29, 1968). But Senator Griffin of Michigan led the charge in opposition to this language, explaining that "if there is one area in which we should not delegate our legislative power, it is in the area of criminal law." 114 Cong. Rec. 14,792 (1968). Senator Baker of Tennessee also explained how problematic it would be to allow a future administration to "change or alter a rule or a regulation" that is criminal "and thus place in the hands of an executive branch administrative official the authority to fashion and shape a criminal offense to his own personal liking[.]" *Id.* These senators successfully persuaded Congress to omit this "rules or regulations" catchall from what is today the penalty section in 18 U.S.C. § 924(a). *See id.* at 14,793. We disrespect its choice if we uphold a regulation like the Bump-Stock Rule that purports to create a new regulatory felony that did not exist before.

B. The circuit courts wrongly find in a generic grant of rulemaking authority an implied delegation permitting an agency to authoritatively interpret criminal laws.

Apart from their disregard of the clear-statement rule that predates *Chevron*, the circuit courts that uphold the Bump-Stock Rule wrongly rely on *Chevron*'s implied-delegation presumption even on that case's own terms. They apply its presumption solely because (1) the Attorney General has general rulemaking power under the Gun Control Act and the National Firearms Act, 18 U.S.C. § 926(a); 26 U.S.C. § 7805(a), and (2) the ATF (the Attorney General's designee)

issued the Bump-Stock Rule under that power. *See Aposhian*, 958 F.3d at 979–81. I disagree. While a generic rulemaking provision might sometimes show an implied delegation that allows an agency to resolve a statutory ambiguity through a regulation, *Mayo*, 562 U.S. at 57, such a provision does not always do so. And it falls well short of showing an implied delegation here.

Start with some background. Before *Chevron*, the Supreme Court applied a totality-of-the-circumstances test "on a statute-by-statute basis" to decide whether a statute impliedly delegated power to an agency to interpret an ambiguous provision. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 516; Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 365–72 (1986). *Chevron* might have been read to dramatically depart from this approach. Some viewed it as creating a broad rule that Congress impliedly delegated to agencies the power to resolve all ambiguous provisions across all statutes. Scalia, *supra*, at 516; *cf. City of Arlington v. FCC*, 569 U.S. 290, 296 (2013).

Yet the Court has not adopted that absolutist view. Rather, before proceeding through *Chevron*'s two-step test, it has repeatedly conducted a threshold inquiry (what some have labeled *Chevron* "step zero") that requires us to ask whether the specific statute at issue leaves the specific interpretive question for the agency or the courts to resolve. Merrill & Hickman, *supra*, at 836, 873–89. As the Court has noted, "different statutes present different reasons for considering

respect for the exercise of administrative authority or deference to it." *Mead*, 533 U.S. at 238. The Court thus will reject *Chevron* deference when a law is best read not to give the agency the power to resolve a particular question of statutory interpretation. That is true even if (as in this case) the agency issued a regulation answering that question pursuant to its general rulemaking authority.

Two examples prove my point. The Court has rejected *Chevron*'s implied-delegation presumption for "major questions" about a statute. *See King*, 576 U.S. at 485–86; *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–60 (2000). "In extraordinary cases" involving important questions, it has noted, "there may be reason to hesitate before concluding that Congress has intended such an implicit delegation." *Brown & Williamson*, 529 U.S. at 159 (citing Breyer, *supra*, at 370). Take *King*. It addressed whether the Affordable Care Act allowed individuals who bought health insurance on federal exchanges to obtain tax subsidies. 576 U.S. at 479. The agency issued a regulation answering this question under a grant of rulemaking authority. *Id.* at 483. Yet the Court refused to give *Chevron* deference to this regulation. *Id.* at 485–86. The Court reasoned that the question was of "deep 'economic and political significance,'" so it presumed that Congress would not have impliedly given the agency the power to resolve it. *Id.* at 486 (citation omitted).

The Court has also rejected *Chevron* deference for statutory issues that have traditionally fallen within the courts' interpretive domain. *See Adams Fruit Co.*

v. Barrett, 494 U.S. 638, 649 (1990); *see also Smith v. Berryhill*, 139 S. Ct. 1765, 1778–79 (2019); *Epic*, 138 S. Ct. at 1629. Take *Adams Fruit*. There, the agency issued a regulation under its rulemaking authority that narrowly interpreted a cause of action allowing private parties to sue. 494 U.S. at 649. The Court held that *Chevron* deference did not apply to this interpretation because "the scope of the judicial power vested by the statute" was for the courts, not the agency, to decide. *Id.* at 650.

Identical logic extends to the criminal laws, so these decisions make this case easy at *Chevron*'s threshold step. The Gun Control Act bans "machineguns" and imposes a potential 10-year prison sentence for violations. 18 U.S.C. §§ 922(o)(1), 924(a)(2). I would not interpret Congress's grant of rulemaking authority in the Gun Control Act (18 U.S.C. § 926(a)) or the National Firearms Act (26 U.S.C. § 7805(a)) as impliedly delegating to the Attorney General the "extraordinary authority" to invent new gun crimes. *Gonzales*, 546 U.S. at 262. Even more so than the cause of action in *Adams Fruit*, "criminal laws are for courts, not for the Government, to construe." *Abramski v. United States*, 573 U.S. 169, 191 (2014). Whatever the merits of *Chevron*'s implied-delegation presumption in the civil context, even a *Chevron* proponent calls it "preposterous" "to say that when criminal statutes are ambiguous, the Department of Justice is permitted to construe them as it sees fit[.]" Cass R. Sunstein, *Chevron Step Zero*, 92 Va. L. Rev. 187, 210 (2006). Two of our foundational principles—the separation of powers and due process—should lead us to adopt the opposite

presumption. Congress does *not* impliedly delegate to the Attorney General our duty to interpret the criminal laws. *See Gun Owners*, 992 F.3d at 464–68.

As an initial matter, a presumption that Congress impliedly gave the Attorney General the power to interpret the criminal laws would further undercut our separation of powers. The Constitution ensures that the government cannot imprison a person without a consensus from all three branches. *See Gun Owners*, 992 F.3d at 464; Caleb Nelson, *Adjudication in the Political Branches*, 107 Colum. L. Rev. 559, 561 (2007). Congress must enact a criminal law, the Attorney General must initiate a prosecution, and a court must adjudicate the case. The clear-statement rule that I have already discussed ensures that the Attorney General does not usurp *Congress's* role in this process—to enact criminal bans. *George*, 228 U.S. at 22. We should likewise adhere to canons of interpretation that ensure that the Attorney General does not usurp the *judiciary's* role—to say what the criminal laws mean. *Marbury v. Madison*, 5 U.S. 137, 177 (1803). Yet *Chevron*'s presumption that agencies get to construe ambiguous laws would allow the Attorney General to do just that by combining the prosecutorial and adjudicative powers. *See* Sunstein, *supra*, at 210.

Admittedly, it is our duty to say what civil laws mean too. But there would be nothing unusual about refusing to extend *Chevron*'s civil presumption to this criminal setting. Criminal laws have the most serious repercussions for individuals, potentially depriving them of their liberty or lives. *See United States v. Bass*,

404 U.S. 336, 348 (1971). So our legal traditions include many safeguards unique to that context. To name two, prosecutors must prove their case beyond a reasonable doubt (rather than by a preponderance of the evidence), *see In re Winship*, 397 U.S. 358, 361–64 (1970), and they cannot force defendants to testify when their testimony might subject them to criminal (as opposed to civil) liability, *see United States v. Balsys*, 524 U.S. 666, 671–72 (1998). Notably, therefore, the Supreme Court has not incorporated other civil principles that are in tension with the separation of powers into the criminal domain. Although agencies may engage in fact-finding in some civil proceedings subject to deferential judicial review, *Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm'n*, 430 U.S. 442, 455 & n.13 (1977), this agency fact-finding power falls away in "criminal matters," *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 70 n.24 (1982) (plurality opinion); Nelson, *supra*, at 610. The same logic should apply here. *Chevron* sometimes allows agencies to interpret ambiguities in civil statutes subject to deferential judicial review. *See City of Arlington*, 569 U.S. at 296. Yet an agency's law-interpreting power should likewise fall away in criminal matters. *See Esquivel-Quintana v. Lynch*, 810 F.3d 1019, 1030 (6th Cir. 2016) (Sutton, J., concurring in part and dissenting in part), *rev'd sub nom. Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562 (2017).

In addition, *Chevron*'s presumption that Congress impliedly gave the Attorney General the power to interpret the criminal laws conflicts with a preexisting due-process presumption that has long affected the

courts' interpretation of those laws. *See United States v. Davis*, 139 S. Ct. 2319, 2325 (2019). Courts presume that Congress means for criminal laws to give ordinary people "fair warning" of the conduct that the laws proscribe. *McBoyle v. United States*, 283 U.S. 25, 27 (1931). When faced with the task of choosing between two plausible "readings of what conduct Congress has made a crime," then, a court will reject the "harsher alternative" in favor of the more lenient one. *Jones v. United States*, 529 U.S. 848, 858 (2000) (quoting *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221–22 (1952)). Unlike *Chevron*, this rule of lenity "is perhaps not much less old than construction itself." *United States v. Wiltberger*, 18 U.S. 76, 95 (1820). The rule allows parties to organize their affairs confident that they can rely on the existing law until their elected representatives change it through the legislative process. *See Bass*, 404 U.S. at 348.

Chevron's implied-delegation presumption (which dates to 1984) conflicts with this fair-notice presumption (which dates to the Founding). For one thing, it would require us to presume that Congress meant to give the Attorney General the power to expand the scope of an ambiguous criminal law by adopting the "harsher alternative" without the "clear and definite" statement that we usually expect. *Jones*, 529 U.S. at 858 (citation omitted). It thus "would turn the normal construction of criminal statutes upside-down, replacing the doctrine of lenity with a doctrine of severity." *Crandon v. United States*, 494 U.S. 152, 178 (1990) (Scalia, J., concurring in the judgment). For another, it would allow an agency to depart from its longstanding interpretation of a criminal law merely

for policy reasons associated with a change in presidential administrations and merely by going through the notice-and-comment process. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981–82 (2005). Such a policy-laden expansion of the scope of prohibited conduct has no place in this criminal sphere. "[A] criminal conviction ought not to rest upon an interpretation reached by the use of policy judgments rather than by the inexorable command of relevant language." *M. Kraus & Bros., Inc. v. United States*, 327 U.S. 614, 626 (1946).

Lastly, imagine what it would mean if, as the D.C. Circuit found, the Attorney General's general rulemaking authority in 18 U.S.C. § 926(a) allows him to issue authoritative interpretations of the many crimes in § 922. *See Guedes*, 920 F.3d at 26. The Supreme Court recently interpreted the statute banning the possession of firearms by felons to require defendants to know that they are, in fact, felons. *See Rehaif v. United States*, 139 S. Ct. 2191, 2194 (2019); 18 U.S.C. §§ 922(g), 924(a)(2). Suppose that the Attorney General later issues a regulation readopting the view long held by all of the circuit courts that the statute lacked this intent element. *Rehaif*, 139 S. Ct. at 2201 (Alito, J., dissenting). If *Rehaif* is best read as endorsing one side of a debate about an ambiguous statute, would the Court have to defer to the Attorney General's regulation and return the criminal law back to a world without this *mens rea*? *See Brand X*, 545 U.S. at 982–83; *cf. United States v. Home Concrete & Supply, LLC*, 566 U.S. 478, 487–90 (2012) (plurality opinion).

Courts have also struggled to interpret the Armed Career Criminal Act, which imposes an enhanced sentence on those who illegally possess firearms and have three prior "violent felony" convictions. 18 U.S.C. § 924(e); *see, e.g.*, *Borden v. United States*, 141 S. Ct. 1817, 1821 (2021) (plurality opinion). Perhaps this was all just wasted effort. If § 926(a) gives the Attorney General the power to issue a binding regulation listing every offense that qualifies as a "violent felony," must courts defer to the Attorney General's view? I doubt any judge would take these claims seriously. But they are no different from the claim that *Chevron* applies in this case simply because § 926(a) gives the Attorney General general rulemaking authority.

In sum, the generic grants of rulemaking power on which other circuit courts have relied do not provide the "clear indication" that courts should demand before construing a criminal law to delegate our interpretive authority to the Attorney General. *SWANCC*, 531 U.S. at 172.

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The circuit courts that take the opposite view suggest that *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995), supports their conclusion that a grant of general rulemaking authority can trigger *Chevron* deference for criminal laws. *See Aposhian*, 958 F.3d at 982–83; *Guedes*, 920 F.3d at 24. *Babbitt* addressed provisions of the Endangered Species Act that made it unlawful for a party to "take" an endangered species and imposed criminal and civil penalties for violations of

this ban. 515 U.S. at 690–91, 696 n.9 (quoting 16 U.S.C. §§ 1538(a)(1)(B), 1540(a)(1), 1540(b)(1)). The statute itself defined the word "take" to include "harm," and the Secretary of the Interior issued a regulation broadly interpreting the word "harm." *Id.* at 691. When rejecting the claim that this regulation misread the statute, the Court gave deference to the Secretary's reading despite its criminal applications. *Id.* at 703–04, 704 n.18.

Yet *Babbitt* confirms that *Chevron*'s implied-delegation presumption does not apply here. While *Babbitt* cited *Chevron* in passing, it did not "rest on *Chevron*'s fiction that ambiguity in a statutory term is best construed as an implicit delegation of power to an administrative agency to determine the bounds of the law." *Cuozzo*, 136 S. Ct. at 2148 (Thomas, J., concurring). Rather, *Babbitt* is better read as an express-delegation case. The Court noted that the Secretary's regulation was entitled to "some degree of deference" not because the "take" definition was ambiguous (and so subject to *Chevron*'s presumption), but because of the "latitude" that the Act gave "the Secretary in enforcing the statute[.]" *Babbitt*, 515 U.S. at 703–04. As its support for this sentence, *Babbitt* even cited an article by Justice Breyer criticizing an implied-delegation presumption as "seriously overbroad, counterproductive and sometimes senseless." Breyer, *supra*, at 373; Sunstein, *supra*, at 239–40. Notably, moreover, Secretary Babbitt's enforcement "latitude" consisted of far more authority than the generic power to issue regulations. Most relevantly, the Act authorized civil and criminal penalties against those who violated "any regulation

issued in order to implement" the "take" prohibition. *Compare* 16 U.S.C. § 1540(f), *with id.* § 1540(a)(1) and (b)(1). Congress thus expressly gave the Secretary the power to issue regulations to "implement" that specific ban and expressly made a violation of those regulations a crime. *Id.* § 1540(b)(1). This unambiguous delegation to enact criminal legislative rules that implement the "take" provision cannot be described as an "implicit" delegation. It would meet even *Eaton*'s clear-statement rule.

In this case, by contrast, the Bump-Stock Rule attempts to "rest on *Chevron*'s fiction" by suggesting that Congress "implicitly left" to the Attorney General the power to interpret the "machinegun" definition. *Cuozzo*, 136 S. Ct. at 2148 (Thomas, J., concurring); Bump-Stock Rule, 83 Fed. Reg. at 66,527. Unlike the Endangered Species Act in *Babbitt*, however, the Gun Control Act and the National Firearms Act do not delegate to the Attorney General the specific power to issue regulations to "implement" the "machinegun" ban in 18 U.S.C. § 922(o)(1) or expressly make a violation of those implementing regulations a crime. That is why the courts that have upheld the Bump-Stock Rule rely only on the grants of general rulemaking authority in those Acts. *See Guedes*, 920 F.3d at 20–21. But those grants are not express delegations to pass criminal rules, and the enforcement "latitude" that *Babbitt* found important is absent here. 515 U.S. at 703–04.

I disagree with the other circuit courts' competing interpretation of *Babbitt*. These courts have read that decision as instead holding that—while *Chevron*'s implied-delegation presumption does not apply for

pure criminal laws—it can apply when a law has "both civil and criminal implications." *Aposhian*, 958 F.3d at 982–83. This case shows that any distinction between "pure" criminal laws and "hybrid" criminal-civil laws is a mirage. If the Court reads *Babbitt* as triggering *Chevron*'s presumption, it will reach nearly all criminal laws.

To begin with, although the "take" regulation in the Endangered Species Act has many civil applications, *see, e.g.*, 16 U.S.C. § 1540(g), the Bump-Stock Rule has "predominately criminal" ones, *Aposhian*, 989 F.3d at 905 (Eid, J., dissenting). The Gun Control Act makes it a crime to possess machine guns except those transferred or possessed under the authority of a government or those possessed before 1986. 18 U.S.C. § 922(o). No bump stocks existed in 1986, so the grandfather provision does not apply. Bump-Stock Rule, 83 Fed. Reg. at 66,535. And I doubt many governments supply their agents with bump-stock rifles. So if the Bump-Stock Rule's potentially small number of civil applications triggers *Chevron*'s implied-delegation presumption, most criminal laws will trigger it too. After all, "[s]ince the earliest years of this Nation, Congress has authorized the Government to seek parallel in rem civil forfeiture actions and criminal prosecutions based upon the same underlying events." *United States v. Ursery*, 518 U.S. 267, 274 (1996). Today, many laws include civil-forfeiture provisions that accompany their criminal bans. The Gun Control Act, for example, authorizes the Attorney General to seek forfeiture of weapons for most violations of its prohibitions. *See* 18 U.S.C. § 924(d)(1). Would this forfeiture provision trigger *Chevron*'s

presumption for, say, a regulation issued by the Attorney General interpreting the prohibition on possessing a firearm in furtherance of a "crime of violence"? *Id.* § 924(c)(1)(A).

In addition, *Babbitt* emphasized that the "take" regulation had "existed for two decades" largely unchanged from near the time of the Act's passage and so had provided "a fair warning of its consequences." 515 U.S. at 690, 691 n.2, 704 n.18. Giving some deference to this regulation, *id.* at 703, comports with the respect that courts have shown "longstanding and contemporaneous executive interpretations of law[.]" Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 Yale L.J. 908, 916 (2017) (emphasis omitted). The same cannot be said for a decision to apply *Chevron*'s presumption here because the Bump-Stock Rule departed from the ATF's decade-long view. 83 Fed. Reg. at 66,516. The Americans who invested in the bump-stock industry in reliance on that prior position might be skeptical of the claim that the ATF offered them a "fair" warning. *Babbitt*, 515 U.S. at 704 n.18; *cf. EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 257–58 (1991). This case thus shows that if *Chevron* extends to the criminal context, it would extend in full. The Attorney General could change the criminal laws for pure policy reasons. *See Brand X*, 545 U.S. at 981–82. *Babbitt* should not be read to require these results.

C. The circuit courts do not attempt to construe the statutory "machinegun" definition using traditional canons of construction before deferring to the ATF's view.

Even if *Chevron*'s two-step test applied, the circuit courts that have upheld the Bump-Stock Rule wrongly find ambiguity in the "machinegun" definition at step one without even attempting to interpret the statute themselves. *See Aposhian*, 958 F.3d at 979–81; *Guedes*, 920 F.3d at 20–21. *Chevron* does not require such judicial obsequiousness to a federal agency.

At *Chevron* step one, a court must ask whether the relevant statutory text is "ambiguous with respect to the specific issue" before the court. 467 U.S. at 843. If the text conveys an "unambiguously expressed" meaning, the court must apply it as written. *Id.*; *see, e.g.*, *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 225–29 (1994). If the text conveys no unambiguous answer, the court must proceed to *Chevron*'s second step by asking whether the agency's reading reasonably resolves the ambiguity. 467 U.S. at 843; *see, e.g.*, *Brand X*, 545 U.S. at 989–97. Like the rule of lenity, however, *Chevron* "leaves open the crucial question—almost invariably present—of how much ambiguousness constitutes an ambiguity." *United States v. Hansen*, 772 F.2d 940, 948 (D.C. Cir. 1985) (Scalia, J.).

Both the Supreme Court and our court have explained how to answer this crucial ambiguity question. A finding of ambiguity can occur only at the end of our usual interpretive process. In other words, a court must do its "best to determine the statute's meaning before giving up, finding ambiguity, and deferring to the agency." *Arangure v. Whitaker*, 911 F.3d 333, 338 (6th Cir. 2018). When engaging in this ordinary interpretive process, the court should employ

the "traditional tools of statutory construction" that it would otherwise rely on when reviewing a statutory provision without agency input. *Epic*, 138 S. Ct. at 1630 (quoting *Chevron*, 467 U.S. at 843 n.9); *see Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019). So a court must give the relevant words their ordinary meaning. *See MCI Telecomms.*, 512 U.S. at 225–28. If a word is susceptible to more than one meaning, the court must place it in its context and consider it within the statutory structure as a whole. *See Pereira v. Sessions*, 138 S. Ct. 2105, 2113, 2114–15, 2117 (2018); *Esquivel-Quintana*, 137 S. Ct. at 1570, 1572. Similarly, the court must account for the many canons of construction that routinely offer clues on the meaning of an ambiguous text. *Arangure*, 911 F.3d at 339–40 (collecting cases). The Supreme Court, for instance, has held that the canon of constitutional avoidance can render an otherwise ambiguous statute unambiguous for *Chevron* purposes. *See SWANCC*, 531 U.S. at 172–74; *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575–76 (1988).

After employing all of the traditional tools of construction in this case, I would find that the statutory "machinegun" definition unambiguously excludes bump stocks for the reasons I identified at the outset. The circuit courts that find this statutory definition ambiguous, by contrast, violate two of the Supreme Court's interpretive principles at this stage of *Chevron*.

First, these circuit courts give the type of "reflexive deference" to the ATF that the Supreme Court has

rejected when deciding whether a statute is unambiguous under *Chevron*. *Pereira*, 138 S. Ct. at 2120 (Kennedy, J., concurring); *cf. Kisor*, 139 S. Ct. at 2415. These courts identify an ambiguity and defer to the ATF based on an "interpretive puzzle" that they identify but do not even attempt to solve. *Epic*, 138 S. Ct. at 1630. Consider, for example, the reasons why the D.C. Circuit found the phrase "single function of the trigger" ambiguous. *Guedes*, 920 F.3d at 29–31. The court suggested that this phrase "admits of more than one interpretation" because it could refer to the mechanical actions of the trigger or the human actions of the shooter. *Id.* at 29. From there, however, the court made little effort to discern which of the two meanings best fits the context using any, much less all, of our traditional tools of interpretation. *Id.* at 29–31; *see Pereira*, 138 S. Ct. at 2116–18. The court thus did not ask whether one of the two possible perspectives better comports with the way in which the word "function" is normally used or with the statutory definition as a whole (both of which point to the trigger's mechanical perspective as the proper reading). *See Gun Owners*, 992 F.3d at 471; *cf. Kisor*, 139 S. Ct. at 2415.

A comparison of this "cursory analysis" to recent Supreme Court decisions shows the stark conflict in approaches. *Pereira*, 138 S. Ct. at 2120 (Kennedy, J., concurring); *see, e.g.*, *SAS Inst. Inc. v. Iancu*, 138 S. Ct. 1348, 1354–58 (2018); *Esquivel-Quintana*, 137 S. Ct. at 1568–72. In *Pereira*, for example, the relevant statute's meaning turned in part on the preposition "under." *See* 138 S. Ct. at 2117. Like the D.C. Circuit, the Court readily admitted that this "chameleon" word could

convey many distinct meanings, some of which favored the government and some of which favored the private party. *Id.* (citation omitted). Unlike the D.C. Circuit in *Guedes*, however, the Court did not call it a day at that point. Rather, it recognized that a careful textual parsing of the statute as a whole pointed to one unambiguous meaning. *Id.*; *see id.* at 2114–16. The circuit courts that found the Bump-Stock Rule ambiguous should have done the same.

Second, these circuit courts wrongly throw out the rule of lenity when interpreting the statutory "machinegun" definition at *Chevron* step one. *See Aposhian*, 958 F.3d at 982–84; *Guedes*, 920 F.3d at 27–28. The Supreme Court has told us that we must use the standard canons of construction to decide whether a statute is unambiguous at this stage. *See Epic*, 138 S. Ct. at 1630; *SWANCC*, 531 U.S. at 173–74. And the rule of lenity is one of the most traditional tools in our interpretive "toolkit." *Kisor*, 139 S. Ct. at 2415; *see Wiltberger*, 18 U.S. at 95. Well before *Chevron*, for example, the Supreme Court refused to follow a regulatory interpretation of a law with civil and criminal applications because the agency's reading would have done "violence to the well-established principle that penal statutes are to be construed strictly." *FCC v. Am. Broad. Co.*, 347 U.S. 284, 296 (1954). Within the *Chevron* framework, moreover, if a canon of construction such as the rule of lenity "resolves a statutory doubt in one direction, an agency may not reasonably resolve it in the opposite direction." *Carter*, 736 F.3d at 731 (Sutton, J., concurring). Ambiguity "in this situation is a congressional choice" in favor of a narrow

interpretation of the criminal law, "not a delegation to the agency." *Arangure*, 911 F.3d at 342. So even assuming that any ambiguity remained in the statutory "machinegun" definition, the rule of lenity would resolve that ambiguity against the Bump-Stock Rule's broad reading.

The courts that take the opposite view rely on a footnote from *Babbitt* that rejected the use of the rule of lenity when deferring to the Secretary's regulation implementing the "take" prohibition in the Endangered Species Act. 515 U.S. at 704 n.18; *see Guedes*, 920 F.3d at 27. Recall, however, that this Act includes an express delegation of criminal rulemaking authority to the Secretary to implement this prohibition. 16 U.S.C. § 1540(a)(1), (b)(1). Thus, *Babbitt* is best read as an express-delegation case, not as one that "rest[ed] on *Chevron*'s fiction" that Congress intends to give agencies interpretive authority over ambiguous texts. *Cuozzo*, 136 S. Ct. at 2148 (Thomas, J., concurring). For that type of express delegation, perhaps the rule of lenity should kick in later to govern the interpretation of the agency's implementing regulation (as *Babbitt* seemed to suggest). *See* 515 U.S. at 704 n.18; *see also M. Kraus & Bros.*, 327 U.S. at 622. But we need not decide how the rule of lenity interacts with such express delegations. This case involves *Chevron*'s fiction, not an express delegation. And the logic of the Supreme Court's precedent leaves no doubt that traditional canons of construction like the rule of lenity apply at *Chevron*'s first step. *SWANCC*, 531 U.S. at 173–74; *Arangure*, 911 F.3d at 343–44.

* * *

By continuously firing at rapid speeds with one activation of the trigger, machine guns can inflict great harm in short periods. And no doubt many people believe that rifles equipped with bump stocks share the same dangerous traits that led Congress to ban machine guns. Bump-Stock Rule, 83 Fed. Reg. at 66,520. So even though these newer devices might not fall "within the letter" of the statutory "machinegun" ban, courts may be tempted to treat them as covered anyway because they fall within its underlying "spirit." *Holy Trinity Church v. United States*, 143 U.S. 457, 459 (1892). In a country with a fluid separation of powers between the branches of government, this judicial approach of enlarging a statute through "equitable" interpretation rather than legislation might not be problematic. *See* John F. Manning, *Textualism and the Equity of the Statute*, 101 Colum. L. Rev. 1, 8 (2001). In our country, however, the judiciary has long had a narrower duty: "to apply, not amend, the work of the People's representatives." *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1726 (2017). This duty leaves the policy debate over whether to ban bump stocks where it belongs—with the legislative branch accountable to the people. And since that branch has not seen fit to ban bump stocks or give a federal agency the power to do so, I must respectfully dissent from our judgment affirming the district court's decision in this case.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt

Deborah S. Hunt, Clerk

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, in his official capacity as Attorney General of the United States; UNITED STATES 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.

No. 19-1298

Appeal from the United States District Court for the Western District of Michigan at Grand Rapids.
No. 1:18-cv-01429—Paul Lewis Maloney, District Judge.

Argued: December 11, 2019
Decided and Filed: March 25, 2021

Before: BATCHELDER, WHITE, and MURPHY, Circuit Judges.

COUNSEL

ARGUED: Robert J. Olson, WILLIAM J. OLSON, P.C., Vienna, Virginia, for Appellants. Brad Hinshelwood, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellees. **ON BRIEF:** Robert J. Olson, WILLIAM J. OLSON, P.C., Vienna, Virginia, Kerry L. Morgan, PENTIUK, COUVREUR & KOBILJAK, P.C., Wyandotte, Michigan, for Appellants. Brad Hinshelwood, Abby C. Wright, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellees. Ilya Shapiro, CATO INSTITUTE, Washington, D.C., James Bardwell, NATIONAL ASSOCIATION FOR GUN RIGHTS, Loveland, Colorado, for Amici Curiae.

BATCHELDER, J., delivered the opinion of the court in which MURPHY, J., joined. WHITE, J. (pp. 38-60), delivered a separate dissenting opinion.

OPINION

ALICE M. BATCHELDER, Circuit Judge. The question before us is whether a bump stock may be properly classified as a machine gun as defined by 26 U.S.C. § 5845(b).[1] But this case rests as much on *who* determines the statute's meaning as it does on *what* the statute means.

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[1] We will use the modern spelling of "machine gun" as two words unless quoting 26 U.S.C. § 5845(b), which spells "machinegun" as one word.

On December 26, 2018, the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF" or "Agency") promulgated a rule that classified bump stocks as machine guns, reversing its previous position. *See* Bump-Stock-Type Devices, 83 Fed. Reg. 66,514 (Dec. 26, 2018) (to be codified at 27 C.F.R. pts. 447, 478, 479) ("Final Rule"). Plaintiffs-Appellants—three gun-rights organizations, two individuals who own bump stocks, and one individual who would purchase a bump stock if not for the Final Rule—filed a motion for a preliminary injunction to prevent the Final Rule from taking effect. After finding that the ATF's interpretation was entitled to *Chevron* deference, the district court held that the Final Rule's classification of bump stocks as machine guns was "a permissible interpretation" of § 5845(b). Accordingly, the court concluded that Plaintiffs-Appellants were unlikely to succeed on the merits and denied the preliminary injunction.

Because an agency's interpretation of a criminal statute is not entitled to *Chevron* deference and because the ATF's Final Rule is not the best interpretation of § 5845(b), we REVERSE the district court's judgment and REMAND for proceedings consistent with this opinion.

I. Background

A. Statutory History of the Machine Gun

For as long as there have been firearms, there have been efforts to make them shoot faster. *See* JOHN ELLIS, THE SOCIAL HISTORY OF THE MACHINE GUN 9-14

(1986). The modern-day machine gun dates back to the nineteenth century with Richard Gatling's 1861 invention of the hand-cranked Gatling gun and Hiram Maxim's 1884 invention of the fully automatic Maxim gun. At first, these technological advances changed only the nature of warfare. But their impact soon reached the civilian world with the submachine gun becoming the weapon of choice of organized crime during the Prohibition Era. *See* David T. Hardy, *The Firearms Owners' Protection Act: A Historical and Legal Perspective*, 17 CUMB. L. REV. 585, 589-90 (1987).

Seeking to crack down on the criminal use of concealable, high-powered firearms, Congress passed the National Firearms Act of 1934, Pub. L. No. 73-474, 48 Stat. 1236 (codified as amended in I.R.C. ch. 53). *See* S. REP. NO. 73-1444, at 1-2 (1934) ("The gangster as a law violator must be deprived of his most dangerous weapon, the machine gun. Your committee is of the opinion that limiting the bill to the taxing of sawed-off guns and machine guns is sufficient at this time."). "Representing the first major federal attempt to regulate firearms," that 1934 Act levied a then-steep $200 tax (estimated at over $3,800 in today's dollars) on the purchase of a machine gun. *Lomont v. O'Neill*, 285 F.3d 9, 11-12 (D.C. Cir. 2002); Ch. 757, 48 Stat. at 1237; *see also National Firearms Act: Hearings on H.R. 9066 Before the H. Comm. on Ways and Means*, 73d Cong. 22-24 (1934) (Attorney General Homer Cummings explaining to the House Ways and Means Committee that the tax provision would permit the federal government to successfully prosecute gangsters with tax evasion, as it had done with Al Capone). That 1934 Act defined "machine gun":

> The term "machine gun" means any weapon which shoots, or is designed to shoot, automatically or semiautomatically, more than one shot, without manual reloading, by a single function of the trigger.

Ch. 757, 48 Stat. at 1236.

Thirty years later, in response to several high-profile assassinations, including those of President John F. Kennedy, Senator Robert F. Kennedy, and Dr. Martin Luther King, Jr., Congress passed the Gun Control Act of 1968, which, among other restrictions, prohibited felons, drug users, and the mentally ill from purchasing firearms. Pub. L. No. 90-618, 82 Stat. 1213 (amending 18 U.S.C. §§ 921-28 and I.R.C. ch. 53). The 1968 Act's definition of a machine gun largely adopted the 1934 Act's definition but also expanded its scope to include other parts or devices that could convert a weapon into a machine gun:

> The term "machinegun" means 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. The term shall also include the frame or receiver of any such weapon, any 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.

§ 5845(b), 82 Stat. at 1231.

Finally, in 1986, Congress passed the Firearm Owners' Protection Act, which banned civilian ownership of machine guns manufactured after May 1986, as well as any parts used to convert an otherwise legal semiautomatic firearm into an illegal machine gun. Pub. L. No. 99-308, 100 Stat. 449 (1986) (amending 18 U.S.C. §§ 921-29). The 1986 Act amended only the second part of § 5845(b):

> Section 5845(b) of the National Firearms Act (26 U.S.C. 5845(b)) is amended by striking out "any combination of parts designed and intended for use in converting a weapon into a machinegun," and inserting in lieu thereof "any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun."

§ 109(a), 100 Stat. at 460.

Thus, as currently codified, the statutory definition of a machine gun reads:

> The term "machinegun" means 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. The term shall also include 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) (2019).

While Congress has enacted other legislation during the past 30 years, both expanding and reducing gun-control measures, no law has amended the definition of a machine gun since 1986.

B. Regulatory History of the Bump Stock

Though there are different versions, all bump stocks are devices designed to assist the shooter in "bump firing," a technique that increases a semiautomatic firearm's rate of fire. The bump stock replaces the standard stock of a semiautomatic rifle, *i.e.*, the end of the rifle that rests against the shooter's shoulder. In contrast to the standard stock, which is stationary, the bump stock is a sliding stock that enables the firearm to move backwards and forwards in a "constrained linear"—*i.e.*, straight—fashion. Final Rule, 83 Fed. Reg. at 66,518. To initiate bump firing, the shooter pulls the trigger once, firing one shot, while maintaining "constant forward pressure with the non-trigger hand on the barrel-shroud or fore-grip of the rifle." *Id.* at 66,516. At the same time, the shooter also maintains constant rearward pressure with his trigger hand, while keeping his trigger finger stationary. The recoil energy from the fired shot causes the firearm to slide backward approximately 1.5 inches. *Id.* at 66,518. The forward pressure applied by

the shooter's non-trigger hand, along with the recoil energy channeled by the bump stock, causes the firearm to then slide forward. As the firearm slides forward, the trigger "bumps" against the shooter's stationary trigger finger, causing the trigger to depress and the firearm to shoot again. This second fired shot creates recoil energy once again, which again causes the bump-stock-attached firearm to slide back. The trigger is released and reset, and the process repeats.

This cycle will continue until the shooter moves his or her trigger finger, fails to maintain constant forward pressure with the non-trigger hand, the firearm malfunctions, or the firearm runs out of ammunition. As with any semiautomatic weapon, the trigger must be completely depressed, released, and then reset before it is capable of firing another shot. Only one shot is fired each time the trigger is depressed. The bump stock enables a shooter to complete this depress-release-reset cycle of the trigger faster than would otherwise be possible without the bump stock.

Though the bump-firing technique has been around for as long as there have been semiautomatic firearms,[2] the first patented bump-stock device was invented only 20 years ago. In 1998, William Akins applied for a patent for an "apparatus for accelerating the cyclic firing rate of a semi-automatic firearm."

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[2] A bump stock device is not needed to facilitate bump firing. Final Rule, 83 Fed. Reg. at 66,532-33. Rubber bands, belt loops, and even shoestrings can all facilitate bump firing and create the same continuous firing cycle that a bump-stock device creates. *Id.*

Akins v. United States, No. 8:08-cv-988, 2008 WL 11455059, at *2 (M.D. Fla. Sept. 23, 2008). Akins received Patent No. 6,101,918 on August 15, 2000, and named his new device the "Akins Accelerator." *Id.* In March 2002, Akins asked the ATF whether it would classify the Akins Accelerator as a machine gun. *Id.* After some initial confusion, the ATF confirmed that the Akins Accelerator "[did] not constitute a machinegun . . . [nor] a part or parts designed and intended for use in converting a weapon into a machinegun," and Akins began to mass produce and distribute his new device. *Id.*

In 2006, the ATF opened an investigation and, by its own admission, "overruled" its previous decision that the Akins Accelerator was not a machine gun. Final Rule, 83 Fed. Reg. at 66,517. The Agency concluded that the Accelerator's internal spring made the device a machine gun, but stated that if Accelerator owners removed the internal spring from the device, then it "would render the device a non-machinegun under the statutory definition." *Id.* Akins sued, arguing that the Agency's reversal was unreasonable, that the reversal violated due process, and that the statutory definition of machine gun was unconstitutionally vague. *See Akins v. United States*, 312 F. App'x 197, 198 (11th Cir. 2009) (per curiam). But his suit failed. *Id.*

Meanwhile, "[b]etween 2008 and 2017, [the] ATF [] issued classification decisions concluding that other bump-stock-type devices were *not* machineguns, primarily because the devices did not rely on internal springs or similar mechanical parts to channel recoil

energy." Final Rule, 83 Fed. Reg. at 66,514 (emphasis added). But, as with the Akins Accelerator, the ATF later reversed course on these nonmechanical bump stocks too.

On October 1, 2017, in Las Vegas, Nevada, a gunman from his 32nd-floor hotel room fired down on a crowd of people at a nearby concert for nearly fifteen minutes, killing 58 and wounding over 500. The gunman used bump-stock devices attached to his semiautomatic rifles to increase his rate of firing, allowing him to inflict heavy casualties in a short period of time. In response to the shooting, President Trump "direct[ed] the Department of Justice to dedicate all available resources . . . as expeditiously as possible, to propose for notice and comment a rule banning all devices that turn legal weapons into machineguns." Application of the Definition of Machinegun to "Bump Fire" Stocks and Other Similar Devices, 83 Fed. Reg. 7949 (Feb. 23, 2018).

On March 29, 2018, the Department of Justice ("DOJ") published a notice of proposed rulemaking that reinterpreted the terms "single function of the trigger" and "automatically," as used in 26 U.S.C. § 5845(b), in order to classify bump stocks as machine guns. Bump-Stock-Type Devices, 83 Fed. Reg. 13,442 (proposed Mar. 29, 2018) (to be codified at 27 C.F.R. pts. 447, 478, 479). Over 186,000 comments were submitted in response to the notice. Final Rule, 83 Fed. Reg. at 66,519. On December 26, 2018, the ATF published the Final Rule, classifying bump stocks as machine guns. *Id.* at 66,514. The Final Rule rescinded the ATF's prior classification letters permitting

nonmechanical bump stocks and held that all bump stocks must either be surrendered to the government or destroyed by March 26, 2019, in order for bump-stock owners to avoid criminal liability. *Id.*

C. Procedural History

Plaintiffs-Appellants filed suit on December 26, 2018, the same day that the Final Rule was published in the Federal Register. Plaintiffs-Appellants claimed that the Final Rule violated the Administrative Procedure Act ("APA"), the Fifth Amendment's Takings Clause, and the Fourteenth Amendment's Due Process Clause. Plaintiffs-Appellants also sought a preliminary injunction to stop the Final Rule from taking effect. The district court denied the preliminary injunction. *Gun Owners of Am. v. Barr*, 363 F. Supp. 3d 823, 834 (W.D. Mich. 2019). The court found that the ATF's interpretation was entitled to *Chevron* deference and that the Final Rule's classification of bump stocks as machine guns was "a permissible interpretation" of § 5845(b). *Id.* at 830-32.

While appealing the denial of their preliminary injunction, Plaintiffs-Appellants moved to stay the effective date of the Final Rule. We denied the requested stay, *Gun Owners of Am., Inc. v. Barr*, No. 19-1298, 2019 WL 1395502, at *1-2 (6th Cir. Mar. 25, 2019), as did the Supreme Court, *Gun Owners of Am., Inc. v. Barr*, No. 18A963, 139 S. Ct. 1406 (2019). The Final Rule took effect on March 26, 2019.

Before us now is Plaintiffs-Appellants' appeal of the district court's denial of their request for a preliminary injunction.

II. Standard of Review

"When deciding whether to issue a preliminary injunction, the district court considers the following four factors: (1) whether the movant has a 'strong' likelihood of success on the merits; (2) whether the movant would otherwise suffer irreparable injury; (3) whether issuance of a preliminary injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of a preliminary injunction." *Leary v. Daeschner*, 228 F.3d 729, 736 (6th Cir. 2000) (citation omitted). The final two factors—assessing the harm to others and weighing the public interest—"merge when the Government is the opposing party." *Wilson v. Williams*, 961 F.3d 829, 844 (6th Cir. 2020) (quoting *Nken v. Holder*, 556 U.S. 418, 435, 129 S. Ct. 1749, 173 L. Ed. 2d 550 (2009)).

"When a party appeals the denial of a preliminary injunction, we ask whether the district court abused its discretion—by, for example, applying an incorrect legal standard, misapplying the correct one, or relying on clearly erroneous facts." *Pulte Homes, Inc. v. Laborers' Int'l Union of N. Am.*, 648 F.3d 295, 305 (6th Cir. 2011). This means that we "review the district court's legal conclusions de novo and its factual determinations for clear error." *Id.* "The district court's determination of whether the movant is likely to succeed on the merits is a question of law and is

accordingly reviewed de novo." *Certified Restoration Dry Cleaning Network, LLC v. Tenke Corp.*, 511 F.3d 535, 541 (6th Cir. 2007).

III. Analysis: *Chevron* Deference

Before determining whether the ATF's interpretation of § 5845(b) prevails, we must determine what deference, if any, we must give to its interpretation. Plaintiffs-Appellants argue that an agency's construction is not, or should not be, entitled to deference when construing a *criminal* statute.[3] We agree and conclude that *Chevron* deference categorically does not apply to the judicial interpretation of statutes that criminalize conduct, i.e., that impose criminal penalties. Because the definition of machine gun in § 5845(b) applies to a machine-gun ban carrying criminal culpability and penalties, we cannot grant *Chevron* deference to the ATF's interpretation.

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[3] Plaintiffs-Appellants also argue that the ATF waived reliance on *Chevron* deference. *See Martin v. Soc. Sec. Admin. Comm'r*, 903 F.3d 1154, 1161 nn. 48-49 (11th Cir. 2018) (collecting cases from the circuit split as to whether *Chevron* deference is waivable); see also Guedes v. ATF, 140 S. Ct. 789, 790 (2020) (Gorsuch, J., concurring in the denial of cert.) (explaining that the Supreme Court "has often declined to apply Chevron deference when the government fails to invoke it"). And the ATF agrees, taking the position that, because its interpretation of § 5845(b) is the best interpretation, deference to its interpretation is "unnecessary," so it "does not rely on *Chevron* deference" in this case. Because we find, and hold, that *Chevron* deference does not apply in this case anyway (because it does not apply to criminal statutes such as we have here), we need not consider or decide the issue of waiver.

A. *Chevron* Deference

In what turned out to be a landmark decision, *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865 (1984), introduced the concept of "*Chevron* deference": an administering agency's interpretation of a statute "is entitled to deference" from the courts. "*Chevron* is rooted in a background presumption of congressional intent," that Congress intentionally delegated interpretive authority to the agency by enacting a statute with "capacious terms" rather than "plain terms." *City of Arlington v. FCC*, 569 U.S. 290, 296 (2013).

Despite becoming "the most-cited administrative law case of all time," Jonathan R. Siegel, *The Constitutional Case for Chevron Deference*, 71 VAND. L. REV. 937, 938 (2018), "*Chevron* did not appear at first to be a major decision in administrative law," Paul J. Larkin, Jr., Chevron *and Federal Criminal Law*, 32 J. L. & POL. 211, 215 n.25 (2017). "That a third of its members were sidelined"—due to the recusals of Justices Marshall, Rehnquist, and O'Connor—"reduces the likelihood that the Court intended to make a tectonic shift in administrative law." *Id.* Regardless of its perceived intent—or lack thereof—*Chevron* did just that. Under its two-step process:

> First, applying the ordinary tools of statutory construction, the court must determine whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court . . . must give effect to the unambiguously

> expressed intent of Congress. But if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

City of Arlington, 569 U.S. at 296 (quotation marks omitted) (relying on *Chevron*, 467 U.S. at 842-43). Restated a bit more succinctly: (1) is the statutory provision ambiguous and, if so, (2) is the agency's interpretation "permissible" within that ambiguity. If both steps are satisfied, the court must defer to the agency's interpretation regardless of the court's own views of the correct or better interpretation of the provision. *See Chevron*, 467 U.S. at 843-44. Later, in *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967, 982 (2005), the Court explained that *Chevron* deference means that an agency's construction is paramount to even a *prior* judicial construction, thus an agency may effectively overrule court precedent.

B. Supreme Court Precedent

The *Chevron* Court was clear and unequivocal: "When a court reviews an agency's construction of the statute which it administers . . . [and] th[at] statute is silent or ambiguous with respect to the specific issue[,] . . . [the] court may not substitute its own construction of [that] statutory provision for a reasonable interpretation made by the . . . agency." *Chevron*, 467 U.S. at 842-44 (footnote omitted). *Chevron* did not draw any distinctions or identify any exceptions.

But in 2014, the Court said, "we have *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, 134 S. Ct. 1144, 188 L. Ed. 2d 75 (2014) (emphasis added) (citing *Crandon v. United States*, 494 U.S. 152, 177, 110 S. Ct. 997, 108 L. Ed. 2d 132 (1990) (Scalia, J., concurring in the judgment)). "Never" and "any" are absolutes, and the Court did not draw any distinctions, add any qualifiers, or identify any exceptions. A few months later, in *Abramski v. United States*, 573 U.S. 169, 191, 134 S. Ct. 2259, 189 L. Ed. 2d 262 (2014), the Court quoted that same statement when rejecting a petitioner's argument that the ATF's former construction of a criminal statute should inform the Court's decision. The *Abramski* Court explained:

> The critical point is that criminal laws are for courts, not for the Government, to construe. We think ATF's old position no more relevant than its current one—which is to say, not relevant at all. Whether the Government interprets a criminal statute too broadly (as it sometimes does) or too narrowly (as the ATF used to [regarding this provision]), a court has an obligation to correct its error. Here, nothing suggests that Congress—the entity whose voice *does* matter—limited [the provision's] prohibition . . . in the way [the petitioner] proposes.

Id. (citation omitted). Thus, the Court was clear, unequivocal, and absolute in saying that it has "never held that the Government's reading of a criminal

statute is entitled to any deference." *Apel*, 571 U.S. at 369; *Abramski*, 573 U.S. at 191.

Unless the Court was mistaken in those two cases or exaggerating for effect, that bold, absolute statement means that none of the Court's prior cases applied *Chevron* deference (or any deference) to an agency's interpretation of a criminal statute. That merits some discussion.

Start with *Chevron*, which was not a criminal prosecution. The Environmental Protection Agency (EPA) was the defendant; Chevron was just an intervenor. *Chevron*, 467 U.S. at 841 n.4. In implementing the Clean Air Act, which had created a permitting program for "stationary sources" of air pollution and delegated that program to the States, the EPA promulgated regulations "allow[ing] [the] State[s] to adopt a plantwide definition of the term 'stationary source,'" a term the Act had used, but not defined. *Id.* at 840 (footnote omitted). The NRDC sued and "[t]he question presented . . . [was] whether EPA's decision to allow States to treat all of the pollution-emitting devices within the same industrial grouping as though they were encased within a single 'bubble' [wa]s based on a reasonable construction of the statutory term 'stationary source.'" *Id.* After creating the aforementioned "*Chevron* deference," *id.* at 842-45, the Court determined that the EPA's definition was permissible within the Act's ambiguity, describing it as "an effective reconciliation of the[] twofold ends" of "reducing air pollution [and protecting] economic growth," *id.* at 866 (quotation marks, editorial marks, and citation omitted).

To be sure, the Clean Air Act contains criminal penalties for—among other things such as false reporting and tampering with monitoring devices—a permitted facility's knowing violation of its permit requirements, but the *Chevron* opinion contains no reference to the Act's criminal provisions nor did the case concern the possibility of any criminal sanction. No reasonable reading of *Chevron* could stand for the proposition that the government's interpretation of a *criminal* statute is entitled to *Chevron* deference. Whether the Court intended to (silently) exclude the criminal-provision issue or merely did not consider the criminal-provision issue that was not before it, *Chevron* easily falls within the Court's proclamations in *Apel* and *Abramski* that it has never held that the government's reading of a criminal statute is entitled to deference.

The Court's traditional approach, under the modern nondelegation doctrine, has been to allow Congress to delegate to the executive branch the responsibility for defining crimes, but only so long as it speaks "distinctly." *United States v. Grimaud*, 220 U.S. 506, 519 (1911); *United States v. Eaton*, 144 U.S. 677, 688 (1892). "This clear-statement rule reinforces horizontal separation of powers . . . [and] compels Congress to legislate deliberately and explicitly before departing from the Constitution's traditional distribution of authority. *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 733 (6th Cir. 2013) (Sutton, J., concurring). Obviously, *Chevron*—which applies only where there is statutory ambiguity—is the opposite of a "clear statement."

In *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 690 (1995), the Endangered Species Act made it a crime to "take" an endangered species and the Department of the Interior's (DOI's) regulation said that such "taking" included the modification or degradation of the species' habitat. Sweet Home sought a declaratory judgment that the statute did not support that regulation, making the regulation facially invalid. *Id.* at 692. The Court did not employ a full *Chevron* analysis, though it cited *Chevron* "generally" in announcing that it did "owe some degree of deference to the [DOI]'s reasonable interpretation," due, in part, to the "latitude the [Act] gives to the [DOI] in enforcing the statute." *Id.* at 703-04; *see also id.* at 708 ("When it enacted the ESA, Congress delegated broad administrative and interpretive power to the [DOI]."). Thus, the Court appears to have been relying on the clear-statement rule's delegation of authority to the DOI as if the DOI were Congress itself. The Court also included a footnote addressing the "rule of lenity," in which it emphasized that it was not reviewing a criminal prosecution but rather a facial challenge to an administrative regulation, which did not necessarily invoke the "rule of lenity" just because "the governing statute authorize[d] criminal enforcement." *Id.* at 704 n.18 (distinguishing *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 517-18 & n.9 (1992)). While *Babbitt* certainly cited *Chevron* and used the word deference with regard to the DOI's interpretation, *Babbitt* did not discuss or decide whether *Chevron* applied nor did it analyze the challenge using *Chevron*, just as it did not decide whether the rule of lenity applied or analyze the challenge using the rule of

lenity. "The best that one can say . . . is that in *Babbitt* [] [the Court] deferred, with scarcely any explanation, to an agency's interpretation of a law that carried criminal penalties. . . . *Babbitt*'s drive-by ruling, in short, deserves little weight." *Whitman v. United States*, 574 U.S. 1003, 135 S. Ct. 352, 190 L. Ed. 2d 381 (2014) (Scalia, J., joined by Thomas, J., respecting the denial of cert.). While *Babbitt* certainly mentioned deference, it did not hold that an agency's interpretation of a criminal statute is entitled to *Chevron* deference, and thus falls within the Court's proclamations in *Apel* and *Abramski* that it had never so held.

In *United States v. O'Hagan*, 521 U.S. 642, 669 (1997), the Securities Exchange Act had criminalized "fraudulent trading," which included the use of "material nonpublic information concerning a pending tender offer," and the Securities and Exchange Commission's (SEC's) rule said that such trading was illegal even if the trader owed no duty to keep that information secret. When the government convicted O'Hagan of this, he argued that the conviction was invalid because the rule was invalid, because the SEC had exceeded its rulemaking authority. *Id.* at 666-67. The Court rejected that argument, finding that the statute expressly "delegates definitional and prophylactic rulemaking authority to the [SEC]," *id.* at 667, and explained: "Because Congress has authorized the [SEC] to prescribe legislative rules, we owe the [SEC]'s judgment more than mere deference or weight." *Id.* at 673 (quotation marks and citation omitted). Although the Court quoted *Chevron* for the proposition that it "must accord the [SEC]'s

assessment controlling weight unless it is arbitrary, capricious, or manifestly contrary to the statute," *id.* (editorial and quotation marks omitted), it did not conduct a *Chevron* analysis or present this as "*Chevron* deference." The Court's analysis relied on the statutory delegation of authority to the SEC under the clear-statement rule. *See id.* at n.19; *see also id.* at 679 (Scalia, J., concurring in part) (drawing a distinction for situations "where (as here) no *Chevron* deference is being given to the agency's interpretation"). While *O'Hagan* used the word "deference," it cannot be read to support the proposition that the agency's interpretation of a *criminal* statute receives *Chevron* deference. *O'Hagan* falls within the Court's proclamations in *Apel* and *Abramski* that it had never so held.

We are not aware of any other Supreme Court opinion that would question the proclamation in *Apel* and *Abramski*, but there are opinions that are consistent with it. In at least three cases, the Court has indicated that the rule of lenity—the practical opposite of *Chevron* deference—applies to ambiguous statutory provisions that have both civil and criminal applications, thus resolving statutory ambiguities in favor of the criminal defendant rather than the government. *See, e.g., Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004); *Thompson/Center Arms Co.*, 504 U.S. at 517-18, 518 nn.9-10 (plurality); *id.* at 519 (Scalia, J., concurring in the judgment); *SWANCC v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 173-74, 174 n.8 (2001).

Considered altogether, if we take the Court at its word, it has never held that a court must necessarily

grant *Chevron* deference to the government's interpretation of an ambiguous *criminal* statute. More to the point for present purposes, we are aware of no Supreme Court opinion that compels us to apply *Chevron* deference to the ATF's interpretation of § 5845(b) here.

C. Circuit Court Precedent

Our review of Sixth Circuit precedent reveals that we generally do not apply *Chevron* deference to an administering agency's interpretation of a criminal statute, as we have explained:

> The special deference required by *Chevron* is based on the expertise of an administrative agency in a complex field of regulation with nuances perhaps unfamiliar to the federal courts. Unlike environmental regulation or occupational safety, criminal law and the interpretation of criminal statutes is the bread and butter of the work of federal courts.

Dolfi v. Pontesso, 156 F.3d 696, 700 (6th Cir. 1998). But, considered as a whole, Sixth Circuit precedent appears to provide us with no controlling authority as to whether we *must* or *must not* apply *Chevron* deference to the definition of machine gun in § 5845(b).

To be sure, in *Esquivel-Quintana v. Lynch*, 810 F.3d 1019, 1023-24 (6th Cir. 2016), we relied on *Babbitt*, 515 U.S. at 704 n.18, to apply *Chevron* deference to the Board of Immigration Appeals' interpretation of an immigration statute with both criminal and civil

penalties. But the Supreme Court reversed that decision based on an alternative analysis and, in so doing, expressly refused to decide the applicability of *Chevron* deference. *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1572-73 (2017). Thus, our opinion in *Esquivel* is at most persuasive authority. *See CIC Servs., LLC v. IRS*, 925 F.3d 247, 257 (6th Cir. 2019), *cert. granted* 140 S. Ct. 2737, 206 L. Ed. 2d 916 (2020) (declining to follow earlier Sixth Circuit precedent that had been reversed on other grounds).

Our reasoning in *Esquivel* was that "[t]he Supreme Court has said that we must follow *Chevron* in cases involving the Board's interpretations of immigration laws." *Esquivel*, 810 F.3d at 1024 (citations omitted). But the Supreme Court has not issued similarly on-point opinions involving the definition of "machinegun" in § 5845(b). The most analogous precedent is *Thompson/Center Arms Company*, 504 U.S. at 517-18 (plurality opinion), in which the Court applied the rule of lenity (not *Chevron* deference) to statutory definitions in the National Firearms Act, 26 U.S.C. § 5845. *See also id.* at 519 (Scalia, J., concurring in the judgment).

And we have never held that *Chevron* deference applies to an agency's interpretation of a purely criminal statute, such as the ban on possessing a machine gun in 18 U.S.C. § 922(o). *See Esquivel*, 810 F.3d at 1027 (Sutton, J., concurring in part and dissenting in part) ("But all can agree that . . . *Chevron* has no role to play in the interpretation of criminal statutes."); *United States v. One TRW, Model M14, 7.62 Caliber Rifle*, 441 F.3d 416, 420 & n.3 (6th Cir.

2006) (considering an ATF ruling interpreting § 5845(b), finding the deference question unsettled, and leaving it undecided, but noting that "[t]his matter is further complicated by the fact that [] 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"). Instead, we have found that a court's deferring to an agency's interpretation of a criminal statute would be problematic, if not prohibited. *See United States v. Dodson*, 519 F. App'x 344, 349 (6th Cir. 2013) ("The ATF does not have the ability to redefine or create exceptions to Congressional statutes."); *Boettger v. Bowen*, 923 F.2d 1183, 1186 (6th Cir. 1991) ("There is no intermediary to provide further clarification between Congress and the persons who are subject to penalty."); *see also, e.g., United States v. Havis*, 907 F.3d 439, 451 (6th Cir. 2018) (Thapar, J., concurring), *rev'd en banc*, 927 F.3d 382 (6th Cir. 2019) ("How is it fair in a court of justice for judges to defer to one of the litigants? . . . Such deference is found nowhere in the Constitution—the document to which judges take an oath."); *Carter*, 736 F.3d at 732 (Sutton, J., concurring) ("*Chevron* describes how judges and administrators divide power. But power to define crimes is not theirs to divide.").

Since *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. *Compare United States v. Kuzma*, 967 F.3d 959, 971 (9th Cir. 2020), *cert. denied*, 2020 WL 7132664 (2020) ("Because criminal laws are for courts, not for the Government,

to construe, the Supreme Court has repeatedly rejected the view that the Government's reading of a criminal statute is entitled to any deference." (quotation marks and citations omitted)), *United States v. Balde*, 943 F.3d 73, 83 (2d Cir. 2019) ("[T]he Supreme Court has clarified that law enforcement agency interpretations of criminal statutes are not entitled to deference[.]"), *United States v. Garcia*, 707 F. App'x 231, 234 (5th Cir. 2017) ("The Supreme Court has now resolved this uncertainty, instructing that no deference is owed to agency interpretations of criminal statutes."), *and Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1155 (10th Cir. 2016) (Gorsuch, J., concurring) ("The Supreme Court has expressly instructed us *not* to apply *Chevron* deference when an agency seeks to interpret a criminal statute."), *with Aposhian v. Barr*, 958 F.3d 969, 982 (10th Cir. 2020), *and Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 920 F.3d 1, 25 (D.C. Cir. 2019), *cert. denied*, 140 S. Ct. 789 (2020) (acknowledging that "the Supreme Court has signaled some wariness about deferring to the government's interpretations of criminal statutes," but distinguishing *Apel* and *Abramski* and holding that *Babbitt* still "govern[s] us here").

We are not the first circuit court to review the ATF's Final Rule on bump stocks. The Tenth and D.C. Circuits have each concluded that an administering agency's interpretation of a criminal statute is entitled to *Chevron* deference, and, under that deferential standard of review, found the ATF's Final Rule a permissible interpretation of § 5845(b). Both of those courts found themselves bound by circuit precedent that an agency's interpretation of a criminal statute is

entitled to *Chevron* deference. *See Aposhian*, 958 F.3d at 982 (rejecting "a general rule against applying *Chevron* to agency interpretations of statutes with criminal law implications" because "controlling [Tenth Circuit] precedent points in the other direction"). The D.C. Circuit found that, in the securities context, it had frequently granted *Chevron* deference to the SEC notwithstanding the fact that violation of securities laws "often triggers criminal liability." *Guedes*, 920 F.3d at 24 (citations omitted). However, as discussed above, we have no comparable precedent and, in fact, our precedent suggests the opposite.[4] And, as mentioned, there is already a split among the Circuits on the meaning of *Apel* and *Abramski* and whether the Supreme Court now requires courts *not* to give any deference to agency interpretations of criminal statutes. With this decision we are joining one side of a circuit split, not creating a circuit split.

D. Whether an Agency's Interpretation of a Criminal Statute is Entitled to *Chevron* Deference

Having found that Supreme Court and Sixth Circuit precedent neither require nor foreclose a specific holding, we turn to the merits of the question. *Chevron* deference is typically justified on two rationales: (1) an

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[4] We do not hear securities cases as frequently as the D.C. and Second Circuits, and we have never reached the issue of *Chevron* deference to the SEC's interpretation of a criminal statute. *See, e.g., SEC v. Mohn*, 465 F.3d 647, 650 n.2 (6th Cir. 2006) (noting that the SEC conceded that "*de novo* review is appropriate" in that case).

administering agency is more likely than a generalist court to determine the best interpretation of a statute because of the agency's specialized "expertise" in the statute's subject matter; and (2) by employing ambiguous terms rather than clear, specific language when drafting a statute, Congress ostensibly was deliberately delegating its lawmaking responsibilities to the agency. *Arangure v. Whitaker*, 911 F.3d 333, 341-42 (6th Cir. 2018). Whatever the merits of either rationale with respect to civil statutes, *see Michigan v. EPA*, 576 U.S. 743, 760-64, 135 S. Ct. 2699, 192 L. Ed. 2d 674 (2015) (Thomas, J., concurring) (questioning the justifications of *Chevron* deference and whether such deference is constitutional), neither holds water with respect to criminal statutes. Furthermore, deference to the administering agency's interpretation of a criminal statute directly conflicts with the rule of lenity and raises serious constitutional concerns. Consequently, we must hold that no deference is owed to an agency's interpretation of a criminal statute.

1. Criminal Laws Reflect the Moral Judgments and "Expertise" of the Community

"[P]ractical agency expertise is one of the principal justifications behind Chevron deference." *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 651-52 (1990) (citing *Chevron*, 467 U.S. at 865). The Supreme Court's position has been that "agencies are more likely to get the answer right, given their expertise." *Arangure*, 911 F.3d at 341. For example, the Court justified giving *Chevron* deference to the Social Security Administration's interpretation of the Social Security Act because of "the related expertise of the

Agency," "the complexity of [the] administration" of the statute, and "the careful consideration the Agency [gave] the question over a long period of time." *Barnhart v. Walton*, 535 U.S. 212, 222 (2002).

Notwithstanding the ATF's frequent reversals on major policy issues, we understand that the Court would consider the bureaucrats at the ATF as experts in firearms technology. But that technical knowledge is inapposite to the question of what should be criminally punished and what should not. Criminal statutes reflect the value-laden, moral judgments of the community as evidenced by their elected representatives' policy decisions. *See Gregg v. Georgia*, 428 U.S. 153, 175, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976) ("In a democratic society, legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people." (cleaned up)); *Mullaney v. Wilbur*, 421 U.S. 684, 700, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975) (noting "the moral force of the criminal law"); *United States v. Bass*, 404 U.S. 336, 348, 92 S. Ct. 515, 30 L. Ed. 2d 488 (1971) ("[C]riminal punishment [] represents the moral condemnation of the community."); OLIVER WENDELL HOLMES, JR., THE COMMON LAW 50 (1881) ("[C]riminal liability . . . is founded on blameworthiness."). Since our country's founding, it has been understood that the public is both capable of and necessary to the determination of right from wrong legally and morally. *See, e.g.*, THE FEDERALIST NO. 83, at 433 (Alexander Hamilton) (G.W. Carey and J. McClellan eds., 2001) (explaining why many consider juries in criminal cases to be "essential in a representative republic," a "friendly aspect to liberty," and a necessary safeguard

against "[a]rbitrary impeachments, arbitrary methods of prosecuting pretended offences, [and] arbitrary punishments upon arbitrary convictions"); John Adams, Diary Entry Feb. 12, 1771, *in* THE WORKS OF JOHN ADAMS, VOL. II, at 254 (C.F. Adams, ed., 1850) ("The general rules of law and common regulations of society . . . are well enough known to ordinary jurors. The great principles of the constitution are intimately known; they are sensibly felt by every Briton; it is scarcely extravagant to say they are drawn in and imbibed with the nurse's milk and first air.").

Indeed, our criminal laws continue to reflect the public's moral judgments. *See Kahler v. Kansas*, 140 S. Ct. 1021, 1048 (2020) (Breyer, J., dissenting) (discussing the "deeply entrenched and widely recognized moral principles underpinning our criminal laws"); *Gregg*, 428 U.S. at 183 ("[C]apital punishment is an expression of society's moral outrage at particularly offensive conduct."). Our criminal laws, for example, incorporate gradations of punishment to account for the moral culpability of the defendant and the severity of the crime committed. And legislators have long recognized that we as a community condemn and punish a premeditated murder more harshly than one committed in the heat of passion, which in turn is punished more severely than one unintentionally committed due to negligence. *See Mullaney*, 421 U.S. at 697-98 (explaining that "the criminal law of Maine, like that of other jurisdictions, is concerned not only with guilt or innocence in the abstract but also with the degree of criminal culpability").

The training for such policy determinations does not come from a graduate school education or decades of bureaucratic experience. Rather, one develops the expertise necessary to make moral judgments from sources of a more humble and local origin: one's family and upbringing. This learning is further informed by relationships with friends and neighbors, the practice of one's faith, and participation in civic life. That this education is accessible to everyone and anyone further enhances, not diminishes, the legitimacy of these community-based judgments. That is why, from the founding, the Supreme Court has held that there can be no federal common-law crimes and that only the people's representatives in Congress may enact federal criminal laws. *See United States v. Davis*, 139 S. Ct. 2319, 2325 (2019) (quoting *United States v. Hudson*, 7 Cranch 32, 34 (1812)). And what the Supreme Court has previously said about a federal court's ability to create a crime is equally relevant to a federal agency's ability to do so: "[B]ecause criminal punishment usually represents the moral condemnation of the community, legislatures and not [agencies] should define criminal activity." *Bass*, 404 U.S. at 348.

Moreover, mastery of one field does not mean mastery of all. The ATF is not an expert on community morality, so the rationale of deferring to "agency expertise" on this question fails. And there is great risk if the responsibility of making moral condemnations is assigned to bureaucrats in the nation's capital who are physically, and often culturally, distant from the rest of the country. Federal criminal laws are not administrative edicts handed down upon the masses as

if the administrators were God delivering the Ten Commandments to Moses on Mount Sinai.

Whether ownership of a bump-stock device should be criminally punished is a question for our society. Indeed, the Las Vegas shooting sparked an intense national debate on the benefits and risks of bump-stock ownership. And because criminal laws are rooted in the community, the people determine for themselves—through their legislators—what is right or wrong. The executive enforces those determinations. It is not the role of the executive—particularly the unelected administrative state—to dictate to the public what is right and what is wrong.

The stakes of any determination are significant. Under the ATF's Final Rule, every bump-stock owner will potentially face not only a loss of liberty in the form of incarceration, but also the stigma and hardships that accompany a felony conviction. *See McMillan v. Pennsylvania*, 477 U.S. 79, 103 (1986) (Stevens, J., dissenting) (explaining that a "high standard of proof is required because of the immense importance of the individual interest in avoiding both the loss of liberty and the stigma that results from a criminal conviction"). But whether bump-stock owners—heretofore law-abiding citizens—should now potentially be subject to substantial fines, imprisonment, and damning social stigmas is a question to whose answer an expertise in firearms technology contributes nothing. So, the ATF's firearms expertise is not germane to the question of whether bump-stock ownership *should* be condemned and punished.

Finally, to the extent that the ATF is not determining what *the agency* thinks should be punished but is instead merely interpreting what *Congress* has already decided should be punished, that determination also wrongfully relies on an expertise that the ATF lacks. Rather, as we have already explained, interpreting criminal statutes falls within the expertise of the courts. *Dolfi*, 156 F.3d at 700; *see also Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 57 (1974) ("[T]he resolution of statutory or constitutional issues is a primary responsibility of courts."); *Zipf v. Am. Tel. and Tel. Co.*, 799 F.2d 889, 893 (3d Cir. 1986) ("[S]tatutory interpretation is not only the obligation of the courts, it is a matter within their peculiar expertise."). Indeed, "we judges are experts on one thing—interpreting the law." *Wilson v. Safelite Grp., Inc.*, 930 F.3d 429, 442 (6th Cir. 2019) (Thapar, J., concurring) (internal alteration omitted) (quoting *Utah v. Rasabout*, 356 P.3d 1258, 1285 (Utah 2015) (Lee, A.C.J., concurring in part and concurring in the judgment) (emphasis omitted)). So, the rationale of deferring to agency expertise does not apply here either.

In sum, for criminal statutes, where the primary question is what conduct should be condemned and punished, the first rationale of *Chevron* deference—deferring to an agency's expertise—is unconvincing because the agency's technical specialized knowledge does not assist in making the value-laden judgment underlying our criminal laws. That judgment is reserved to the people through their duly elected representatives in Congress.

2. Deference in the Criminal Context Violates the Separation of Powers

"The *Chevron* Court justified deference on the premise that a statutory ambiguity represents an 'implicit' delegation to an agency to interpret a 'statute which it administers.'" *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1629 (2018) (quoting *Chevron*, 467 U.S. at 842, 844). According to the Supreme Court, "*Chevron* thus provides a stable background rule against which Congress can legislate: Statutory ambiguities will be resolved, within the bounds of reasonable interpretation, not by the courts but by the administering agency." *City of Arlington*, 569 U.S. at 296. Courts ostensibly know that Congress is deliberately intending to delegate some of its legislative responsibilities because "Congress knows to speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge, agency discretion." *Id.*

Notwithstanding Article I's mandate that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States," U.S. CONST. art. 1, § 1., the Supreme Court has permitted Congress to delegate some of its lawmaking responsibilities to executive-branch agencies so long as Congress provides an "intelligible principle" to which the administering agency is directed to conform. *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)); *see also supra* Part III.B (discussing the "clear statement" rule). The Court is of the opinion that "in our increasingly complex society, replete with

ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives." *Id.* Generally, the Supreme Court has made this "clear statement" or "intelligible principle" standard a relatively low bar that Congress may overcome with fairly indefinite instructions. *See, e.g., Yakus v. United States*, 321 U.S. 414, 420, 427 (1944) (upholding the Emergency Price Control Act of 1942, which instructed the Price Administrator to fix prices of commodities that are "in his judgment [] generally fair and equitable"); *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 225-26 (1943) (upholding the Communications Act of 1934, which permitted the Federal Communications Commission to grant broadcast licenses "if public convenience, interest, or necessity will be served thereby"); *N.Y. Cent. Sec. Corp. v. United States*, 287 U.S. 12, 24-25 (1932) (upholding the Transportation Act of 1920, which empowered the Interstate Commerce Commission to authorize the acquisition of one railroad by another if it is in the "public interest"). At the same time, the Supreme Court has made clear that "Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested . . . if our constitutional system is to be maintained." *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529-30 (1935) (quoting *Pan. Ref. Co. v. Ryan*, 293 U.S. 388, 421 (1935)).

Therefore, a court's deferring to an executive-branch agency's interpretation of a congressional statute naturally raises separation-of-powers concerns. *See, e.g., Arangure*, 911

F.3d at 338 (explaining that "[w]hen courts find ambiguity where none exists, they are abdicating their judicial duty," "impermissibly expand[ing] an already-questionable *Chevron* doctrine," and "abrogat[ing the] separation of powers") (citations omitted); *Havis*, 907 F.3d at 452 (Thapar, J., concurring) ("[D]eference [that] would allow the same agency to make the rules and interpret the rules . . . is contrary to any notion the founders had of separation of powers."); *Lynch*, 810 F.3d at 1023-24 ("Left unchecked, deference to agency interpretations of laws with criminal applications threatens a complete undermining of the Constitution's separation of powers."). These separation-of-powers concerns have even greater force in the criminal context. *See, e.g., Davis*, 139 S. Ct. at 2325.

The "separate and distinct exercise of the different powers of government" is "essential to the preservation of liberty." THE FEDERALIST NO. 51, at 268 (James Madison or Alexander Hamilton). The separation of powers serves as "the great security against a gradual concentration of the several powers in the same department." *Id.* In addition to "protect[ing] each branch of government from incursion by the others," most importantly, "[t]he structural principles secured by the separation of powers protect the individual as well." *Bond v. United States*, 564 U.S. 211, 222 (2011).

Each branch's role and responsibility with regard to criminal statutes is clear. First, "[o]nly the people's elected representatives in the legislature are authorized to 'make an act a crime.'" *Davis*, 139 S. Ct. at 2325 (quoting *Hudson*, 7 Cranch at 34). Next, the

executive is responsible for enforcing criminal statutes, and it retains "exclusive authority and absolute discretion to decide whether to prosecute a case." *United States v. Nixon*, 418 U.S. 683, 693 (1974) (citing *Confiscation Cases*, 74 U.S. 454 (1868)). Finally, it is for the courts to "say what the law is," including the criminal law. *Marbury v. Madison*, 1 Cranch 137, 177 (1803).

Even under a well-balanced system, the power of the federal government, particularly the executive branch, is formidable. No matter how well-prepared a defendant may be, his defense will pale in comparison to the resources, institutional knowledge, and personnel available to the federal government. If we defer to the federal prosecutor's interpretation of a criminal statute, this imbalance becomes even more lopsided. Whatever separation-of-powers issues are created by the delegation of civil lawmaking, the problems are much more profound when the matter involves criminal legislation. Specifically, deferring to the executive branch's interpretation of a criminal statute presents at least three serious separation-of-powers concerns: (1) it puts individual liberty at risk by giving one branch the power to both write the criminal law and enforce the criminal law; (2) it eliminates the judiciary's core responsibility of determining a criminal statute's meaning; and (3) it reduces, if not eliminates, the public's ability to voice its moral judgments because it transfers the decision-making from elected representatives in the legislature to unaccountable bureaucrats in the executive's administrative agencies.

First, giving one branch the power to both draft and enforce criminal statutes jeopardizes the people's right to liberty. The concern over the potential abuse of power if the executive can define crimes predates our nation's founding. *See* THE FEDERALIST NO. 47, at 251 (James Madison) (quoting Baron de Montesquieu that "[t]here can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates"); 1 WILLIAM BLACKSTONE, COMMENTARIES *146 (1753) ("In all tyrannical governments, the supreme magistracy, or the right of both *making* and of *enforcing* the laws, is vested in one and the same man, or one and the same body of men; and wherever these two powers are united together, there can be no public liberty."); JOHN LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT § 143, pp. 324-25 (T. Hollis ed., 1764) (1690) ("[I]t may be too great a temptation to human frailty, apt to grasp at power, for the same persons, who have the power of making laws, to have also in their hands the power to execute them, whereby they may exempt themselves from obedience to the laws they make, and suit the law, both in its making, and execution, to their own private advantage, and thereby come to have a distinct interest from the rest of the community, contrary to the end of society and government."); *Case of Proclamations*, 12 Co. Rep. 74, 75 (K.B. 1611) ("[T]he King cannot change any part of the common law, nor create any offence by his proclamation, which was not an offence before, without Parliament.").

The executive branch plays an important role in upholding the rule of law and making society safer. But the immense power necessary to achieve those

virtuous ends necessarily means that that power is at risk of being abused. If the executive branch wants to prosecute someone for something that is not yet a crime, it could use *Chevron* deference to interpret a statute so as to criminalize the activity and then prosecute an individual for doing it. *See Whitman v. United States*, 135 S. Ct. 352, 353 (2014) (Scalia, J., concurring in denial of cert.) ("With deference to agency interpretations of statutory provisions to which criminal prohibitions are attached, federal administrators can in effect create (and uncreate) new crimes at will, so long as they do not roam beyond ambiguities that the laws contain.").

Second, it is for the judiciary to "say what the law is," *Marbury*, 1 Cranch at 177, and this remains equally, if not especially, true for criminal laws. *See Abramski*, 573 U.S. at 191 ("[C]riminal laws are for courts, not for the Government, to construe."). It is well-established that "the resolution of statutory or constitutional issues is a primary responsibility of courts." *Alexander*, 415 U.S. at 57. Notwithstanding this principle, the question of *Chevron* deference considers whether the judiciary or the executive should have the final say on an indeterminate statute's meaning. The implications of each possibility are clear. Granting the executive the right both to determine a criminal statute's meaning and to enforce that same criminal statute poses a severe risk to individual liberty. Entrusting the interpretation of criminal laws to the judiciary, and not the executive, mitigates that risk and protects against any potential abuses of government power. *See* BLACKSTONE at *268 ("[T]he public liberty . . . cannot subsist long in any state

unless the administration of common justice be in some degree separated both from the legislative and also from the executive power.").

Third, because it is the public's responsibility to determine what conduct should be condemned, *see supra* Part III.D.1, "[o]nly the people's elected representatives in Congress have the power to write new federal criminal laws." *Davis*, 139 S. Ct. at 2323. Indeed, "Congress alone has the institutional competence, democratic legitimacy, and (most importantly) constitutional authority to revise statutes in light of new social problems and preferences." *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2074, 201 L. Ed. 2d 490 (2018). However, *Chevron* deference, in this context, empowers *the agency* rather than Congress to define the scope of what should be criminalized. *Cf. Abramski*, 573 U.S. at 191 (emphasizing that "Congress," not the ATF, is "the entity whose voice *does* matter"). If Congress were "to hand responsibility for defining crimes to relatively unaccountable [public officials]," it would "erod[e] the people's ability to oversee the creation of the laws they are expected to abide" and would "leave people with no sure way to know what consequences will attach to their conduct." *Davis*, 139 S. Ct. at 2323, 2325.

Of all the separation-of-powers concerns identified, perhaps this is the most troubling: the bureaucrats at the agency are unaccountable to the public. If the agency adopts an interpretation contrary to the will of the people, what recourse does the public have? Unlike legislators, agency bureaucrats are not subject to elections and are often further protected from removal

by civil-service restrictions. Even when an agency implements the will of the public correctly, that determination may still violate the separation of powers. Because the community has the right to determine what moral wrongs should be punished—a practice that predates our Constitution—that responsibility may be entrusted to only the branch most accountable to the people: the legislature. And it may not be blithely delegated away. *See* LOCKE, § 141, at 322 ("The legislative cannot transfer the power of making laws to any other hands: for it being but a delegated power from the people, they who have it cannot pass it over to others.").

Because such deference in the criminal context would violate the Constitution's separation of powers and poses a severe risk to individual liberty, we must hold that an administering agency's interpretation of a criminal statute is not entitled to *Chevron* deference.

3. Fair Notice and the Rule of Lenity

We have established that the two principal justifications for *Chevron* deference in the civil context—deferring to an agency's subject-matter expertise and respecting Congress's delegation of its lawmaking powers—are unpersuasive in the criminal context. Nor does a third justification for *Chevron* deference fit into this criminal context: the "background presumption" of statutory interpretation that Congress means for federal agencies to resolve the ambiguities that it leaves in its statutes. *City of Arlington*, 569 U.S. at 296. Some have suggested that this interpretive presumption makes sense in light of

the judiciary's traditional mandamus practices. *See, e.g., United States v. Mead Corp.*, 533 U.S. 218, 241-43 (2001) (Scalia, J., dissenting). Whether or not true in the civil context, *cf.* Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908 (2017), the judiciary's historical interpretive principles in no way support *Chevron*'s background presumption in the criminal context. To the contrary, ambiguities in criminal statutes have always been interpreted against the government, not in favor of it. As Chief Justice Marshall noted, "[t]he rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself." *United States v. Wiltberger*, 18 U.S. 76, 95 (1820). So we would be remiss if we did not acknowledge that *Chevron* deference to an agency's interpretation of criminal statutes conflicts with the rule of lenity and raises serious concerns.

The rule of lenity instructs courts that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Rewis v. United States*, 401 U.S. 808, 812 (1971) (citation omitted). Unlike descriptive canons of statutory interpretation that help to resolve indeterminacies about a statute's intended meaning, the rule of lenity is a "purely normative" canon rooted in fair-notice concerns. CALEB NELSON, STATUTORY INTERPRETATION 110 (2011); *see also McBoyle v. United States*, 283 U.S. 25, 27, 51 S. Ct. 340, 75 L. Ed. 816 (1931) ("Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the

law intends to do if a certain line is passed."). "The rule 'applies only when, after consulting traditional canons of statutory construction, we are left with an ambiguous statute.'" *Shular v. United States*, 140 S. Ct. 779, 787 (2020) (quoting *United States v. Shabani*, 513 U.S. 10, 17 (1994)).

We have long accepted that deference in the criminal context conflicts with the rule of lenity and raises serious fair-notice concerns. *See, e.g., Lynch*, 810 F.3d at 1023-24 (explaining that "[t]he rule of lenity ensures that the public has adequate notice of what conduct is criminalized, and preserves the separation of powers by ensuring that legislatures, not executive officers, define crimes" and that if "[l]eft unchecked, deference to agency interpretations of laws with criminal applications threatens a complete undermining of the Constitution's separation of powers"); *Carter*, 736 F.3d at 729-736 (Sutton, J., concurring) (discussing how and why *Chevron* deference to agency interpretations of criminal statutes "offends the rule of lenity"); *Dodson*, 519 F. App'x at 349 n.4 ("Statutes that require agency action to clarify their terms may raise fair notice and vagueness concerns."); *One TRW, Model M14, 7.62 Caliber Rifle*, 441 F.3d at 420 n.3 (noting that giving *Chevron* deference to the ATF's interpretation is "further complicated by the fact that [] 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").

Returning to our prior consideration of *Babbitt*, 515 U.S. at 704 n.18 ("We 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."), we must recognize that the Supreme Court has never expressly reaffirmed that footnote and has indeed undercut it in subsequent cases. *See, e.g., Leocal*, 543 U.S. at 11 n.8 ("Because we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context, the rule of lenity applies."). Moreover, the scope of the *Babbitt* footnote certainly appears limited. The Court admitted that there might "exist regulations whose interpretations of statutory criminal penalties provide such inadequate notice of potential liability as to offend the rule of lenity," but that the regulation before it (in *Babbitt*) "cannot be one of them" because that regulation had "existed for two decades," which was enough time to "give[] a fair warning of its consequences." *Babbitt*, 515 U.S. at 704 n.18. What if the agency's regulation is not nearly so longstanding? Or, as in this case, what if the agency is reversing a longstanding policy? *See Guedes v. ATF*, 140 S. Ct. 789, 790, 206 L. Ed. 2d 266 (2020) (Gorsuch, J., concurring in denial of cert.) ("How, in all this, can ordinary citizens be expected to keep up—required not only to conform their conduct to the fairest reading of the law they might expect from a neutral judge, but forced to guess whether the statute will be declared ambiguous; to guess *again* whether the agency's initial interpretation of the law will be declared 'reasonable'; and to guess again whether a later and opposing agency interpretation will *also* be held 'reasonable'?"). Here, the ATF had a regulation, unaltered for nearly two decades: nonmechanical bump stocks were *not*

machine guns. *See* Final Rule, 83 Fed. Reg. at 66,531. The *Babbitt* footnote did not specify how longstanding a regulation must be in order to satisfy fair-notice concerns or whether this standard changes when an agency reverses a previous position. Thus, we face the scenario opposite to that addressed in the *Babbitt* footnote. In the end, we need not decide those questions today because we find on other grounds, for the reasons discussed *supra*, that the ATF's interpretation of § 5845(b) is not entitled to *Chevron* deference.

E. Summary

Whatever the merits of giving *Chevron* deference to an agency's interpretation of *civil* statutes, the principal rationales behind that policy cannot be extended to support giving deference to an agency's interpretation of *criminal* statutes. Declining to grant *Chevron* deference to agency interpretations of criminal statutes respects the community's responsibility to make value-laden judgments on what should be criminalized, upholds the separation of powers, complies with the rule of lenity, and avoids fair-notice concerns. Because the ATF's interpretation of § 5845(b) is not entitled to *Chevron* deference, we must determine the best meaning of the criminal statute and whether a bump stock falls within the statutory definition of a machine gun.

IV. Analysis: Statutory Interpretation

It is a "'fundamental canon of statutory construction' that words generally should be

'interpreted as taking their ordinary, contemporary, common meaning . . . at the time Congress enacted the statute.'" *Wis. Cent. Ltd.*, 138 S. Ct. at 2074 (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)). The separation of powers requires that we interpret the statute "as written," and "we may not rewrite the statute simply to accommodate [a] policy concern." *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 529, 531 (2019).

Whether a bump stock falls within § 5845(b)'s definition of a machine gun is a question of statutory interpretation, and "[t]he starting point for any question of statutory interpretation is the language of the statute itself." *United States v. Coss*, 677 F.3d 278, 283 (6th Cir. 2012) (internal quotation marks and citation omitted). In determining the meaning of a statute, we have several interpretative tools at our disposal, including contemporaneous dictionaries, the structure and context of the rest of the statute, and descriptive canons of statutory interpretation, such as *ejusdem generis*, *expressio unius*, and *noscitur a sociis*. *See Keen v. Helson*, 930 F.3d 799, 802-04 (6th Cir. 2019); *Arangure*, 911 F.3d at 339-40. For the following reasons, we find that a bump stock does not fall within the statutory definition of a machine gun.

A. "Single Function of the Trigger"

The parties dispute the meaning of the phrase "single function of the trigger," as used in § 5845(b). Plaintiffs-Appellants argue that the phrase "refers to the mechanical process through which the trigger goes (what the firearm is doing)" as opposed to "what the

shooter is doing." The ATF argues (at least at the moment) that it means "a single pull of the trigger and analogous motions." Final Rule, 83 F.R. at 66,553. The ATF claims that "function" does not refer to "the precise mechanical operation of a specific type of trigger," but rather "the action that enables the weapon to shoot," *i.e.*, "the shooter's initial pull of the trigger."

Put differently, the question is whether "function" is referring to the mechanical process (*i.e.*, the act of the trigger's being depressed, released, and reset) or the human process (*i.e.*, the shooter's pulling, or otherwise acting upon, the trigger).[5] Under the former, a bump stock does not fundamentally change the mechanical process: in order for a single shot to be fired, the trigger must be depressed, released, and reset before another shot may be fired. Under this interpretation, the bump-stock-attached semiautomatic firearm clearly is not a machine gun as

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[5] We agree with both parties that a firearm's trigger does not necessarily need to be "pulled" in order to constitute a trigger or for the firearm to constitute a machine gun. As the Final Rule aptly explains, automatic firearms can have multiple types of triggers, such as a button that is pushed or an electric switch that is flipped. Bump-Stock-Type Devices, 83 Fed. Reg. 66,534, 66,518 n.5 (Dec. 26, 2018). We employ the term "pull" because that is the most common action used to act upon a trigger. Indeed, the parties' dispute does not center on whether "function" includes the operation of a trigger that is pulled or a trigger that is pushed; both parties agree that the term encompasses both. The question is whether the statute is referring to the mechanical action of the trigger itself or the shooter's physical acting upon the trigger (regardless of the specific action the trigger requires in order to be acted upon).

it is not capable of firing more than one shot for each depressed-released-reset cycle the trigger completes.

Under the latter interpretation, the bump stock requires that the shooter pull—as in physically bend his or her finger and apply force to pull the trigger—once. After the shooter pulls the trigger once, the bump stock enables the continuous firing cycle to begin and continue without requiring the shooter to physically move his or her finger and pull the trigger again; indeed, a bump stock is successfully operated when the shooter keeps his or her trigger finger stationary. Under this interpretation, the bump-stock-attached semiautomatic firearm would be a machine gun because the firearm shoots multiple shots despite the shooter's pulling the trigger only once.

We have not previously addressed the meaning of the phrase "single function of the trigger" as used in § 5845(b).[6] The district court concluded that both interpretations were reasonable and, because it was operating under a *Chevron*-deference framework,

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[6] We have interpreted other parts of § 5845(b). *See, e.g., Dodson*, 519 F. App'x at 348-49 (discussing the change of § 5845(b) from banning only a "combination" of parts under the Gun Control Act of 1968 to banning "any" part as amended in 1986); *United States v. Carter*, 465 F.3d 658, 663-64 (6th Cir. 2006) (discussing whether the defendant could be charged with possessing a machine gun under § 5845(b) due to his possession of machine gun parts, if he was not charged with possessing a trigger mechanism); *One TRW, Model M14, 7.62 Caliber Rifle*, 441 F.3d at 419-25 (interpreting the meaning of "designed to shoot" and "can be readily restored" as used in § 5845(b)).

upheld the Final Rule as a permissible interpretation.[7] *Gun Owners of Am.*, 363 F. Supp. 3d at 832. But having determined that *Chevron* deference is not applicable in this context, we must decide the *best* meaning of the statute without putting a thumb on the scale in the government's favor.

"When interpreting the words of a statute, contemporaneous dictionaries are the best place to start." *Helson*, 930 F.3d at 802. We begin by looking to dictionaries contemporaneous with the passage of the Gun Control Act of 1968.[8] However, the dictionary

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[7] The D.C. Circuit likewise found the ATF's interpretation to be "permissible," though it did not need to decide whether the ATF's interpretation was the *best* interpretation because the court was also operating within the *Chevron*-deference framework. *See Guedes*, 920 F.3d at 31-32; *see also Akins*, 312 F. App'x at 200 (finding that the ATF's interpretation of "single function of the trigger" meaning "single pull of the trigger" was consistent enough with the statute's text and legislative history so as to survive the APA's arbitrary-and-capricious standard).

[8] We note that the Final Rule, the district court, and the D.C. Circuit all relied on dictionaries contemporaneous with the passage of the Firearms Act of 1934. *See* Final Rule, 83 Fed. Reg. at 66,519; *Gun Owners of Am.*, 363 F. Supp. 3d at 831-32; *Guedes*, 920 F.3d at 29. However, with the Gun Control Act of 1968, Congress chose to redraft 26 U.S.C. § 5845(b) in its entirety—albeit with nearly identical language to the National Firearms Act of 1934. And because we interpret the statute's meaning relying on dictionaries contemporaneous with the provision's most recently enacted language, in this case we must rely on dictionaries contemporaneous with the Gun Control Act of 1968. *See Sandifer v. U.S. Steel Corp.*, 571 U.S. 220, 226-28 (2014) (relying on the 1950 meaning of "clothes" because Congress amended the Fair Labor Standards Act in 1949, eleven years after

definition of "function" lends support to both interpretations. *See Webster's Third New International Dictionary* 920-21 (1967) (defining "function" as an "action"); *Webster's Seventh New Collegiate Dictionary* 338 (1967) (defining "function" as "the acts or operations expected of a . . . thing" and the "characteristic action of a . . . manufactured or created thing"). That is to say, because "function" means "action," dictionaries alone do not reveal whether the statute is referring to the mechanical "act" of the trigger's being depressed or the physical "act" of the

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its initial passage).

To be sure, the 1986 Gun Owners' Protection Act amended some language of § 5845(b), but Congress left the first part of the statutory definition of a machine gun untouched (including the terms "single function of the trigger" and "automatically"). *See* Pub. L. 99-308, 100 Stat. 449 (amending 18 U.S.C. §§ 921-29). Moreover, the 1986 Act expressly detailed which specific parts of § 5845(b) were being amended as opposed to the 1968 Act's enacting a new (albeit similarly worded) definition. Because these terms were not amended, reenacted, or otherwise affected by the 99th Congress in 1986, we will not look to dictionaries from 1986 to determine their meaning. *See United States v. Melvin*, 948 F.3d 848, 852 n.1 (7th Cir. 2020) (explaining that the court will rely on 1984 dictionaries for a 1984 statute that had since been amended because "the relevant portion of the statute remains the same").

Instead, we rely on 1968 dictionaries for assistance in determining the meaning of "single function of the trigger," though we do not see a material change in the meaning of "function" from 1934 to 1968 to 1986. *Cf.* 4 *Oxford English Dictionary* 602 (1933) (defining "function" as "mode of action"); *Webster's New International Dictionary* 876 (1933) (defining "function" as "natural . . . action"); *Webster's Third New International Dictionary* 920-21 (1968) (defining "function" as an "action"); *Webster's Third New International Dictionary* 920-21 (1986) (same).

shooter's pulling the trigger. *See Guedes*, 920 F.3d at 29 (finding that "function" means "action" but that "the text is silent on the crucial question of *which perspective* is relevant").

We next consider the phrase in the context of the rest of the statute to see if that illuminates which meaning of "function" Congress intended when drafting § 5845(b). *See Helson*, 930 F.3d at 803-04 (after reviewing contemporaneous dictionaries, next considering "the context provided by the rest of the statute" as "[a]nother tool of interpretation"). "Statutory interpretation is a 'holistic endeavor'—the structure and wording of other parts of a statute can help clarify the meaning of an isolated term." *Id.* at 803 (quoting *United Sav. Ass'n v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371, 108 S. Ct. 626, 98 L. Ed. 2d 740 (1988)). Here, the statutory context weighs heavily in Plaintiffs-Appellants' favor.

First, the phrase plainly refers only to the "single function *of the trigger*," § 5845(b) (emphasis added), not "the trigger finger." And if "function" is understood to mean "action," then the most natural reading of § 5845(b) would not be to read "single action of the trigger" to mean "single action of the trigger finger." Rather the best, most natural reading would be that § 5845(b) refers to the trigger itself.

Second, this interpretation is further supported by the fact that the rest of § 5845(b)'s statutory definition of a machine gun describes the firearm, not the shooter, the shooter's body parts, or the shooter's actions. Indeed, the entire definition focuses

exclusively on the firearm's design and capability. At no point does the definition mention the shooter or the shooter's actions. Nothing in the statute suggests that the phrase "single function of the trigger" refers to the shooter's pulling the trigger rather than the trigger itself.

Third, the Final Rule's interpretation that "single function of the trigger" means "single pull of the trigger and analogous motions," Final Rule, 83 Fed. Reg. at 66,554, necessarily refers to the *trigger* and not to the shooter or the shooter's act of pulling. The ATF's Rule does not interpret the phrase to mean "single pull *by* the trigger finger" or "*the shooter's* single pull of the trigger." Instead, as with the statute, the Final Rule's language refers only to the "trigger" itself without any mention of the shooter or the shooter's actions.

Finding that "function" refers to the mechanical process, we conclude that a bump stock cannot be classified as a machine gun under § 5845(b). We recognize that a bump stock increases a semiautomatic firearm's rate of firing, possibly to a rate nearly equal to that of an automatic weapon. With a bump stock attached to a semiautomatic firearm, however, the trigger still must be released, reset, and pulled again before another shot may be fired. A bump stock may change *how* the pull of the trigger is accomplished, but it does not change the fact that the semiautomatic firearm shoots only one shot for each pull of the trigger. *Guedes*, 920 F.3d at 48 (Henderson, J., concurring in part and dissenting in part). This remains true regardless of whether the shooter's finger is stationary (when operating a bump-stock-attached

semiautomatic firearm) or is moving (when operating a semiautomatic firearm without a bump stock). And it likewise remains true regardless of whether the physical force depressing the trigger comes from the shooter's trigger finger's pushing the trigger or the recoil energy of the firearm's pushing the trigger against the shooter's trigger finger. With or without a bump stock, a semiautomatic firearm is capable of firing only a single shot for each pull of the trigger and is unable to fire again until the trigger is released and the hammer of the firearm is reset.

Indeed, to the extent that the Supreme Court has spoken on the meaning of § 5845(b), its interpretation is supportive of the interpretation we adopt today. *See Staples v. United States*, 511 U.S. 600, 602 n.1 (1994) ("As used here, the terms 'automatic' and 'fully automatic' refer to a weapon that fires repeatedly with a single pull of the trigger. That is, once its trigger is depressed, the weapon will automatically continue to fire until its trigger is released or the ammunition is exhausted. Such weapons are 'machineguns' within the meaning of the Act."). The Supreme Court's language may not necessarily foreclose the ATF's interpretation. *See Guedes*, 920 F.3d at 30 (finding that *Staples* does not "compel a particular interpretation of 'single function of the trigger'"). But the Court's focus on whether the "trigger is depressed" and how many times the firearm is capable of firing until the "trigger is released" strongly suggests that the Court understood § 5845(b) as referring to the mechanical process of the depress-release-reset cycle of the trigger. *See Staples*, 511 U.S. at 602 n.1.

Given that the first bump-stock-type invention was not patented until well over a decade after the most recent amendment to § 5845(b), it would be impossible to say definitively whether the 90th Congress in 1968 or the 99th Congress in 1986 would or would not have intended to ban bump stocks as automatic weapons. "But the fact that Congress might have acted with greater clarity or foresight does not give courts a *carte blanche* to redraft statutes in an effort to achieve that which Congress is perceived to have failed to do." *United States v. Locke*, 471 U.S. 84, 95 (1985). And the statutory definition of a machine gun, as amended, excludes bump stocks because bump-stock devices do not fundamentally change the line Congress drew to distinguish automatic firearms from semiautomatic ones.

Congress could amend the statute tomorrow to criminalize bump-stock ownership, if it so wished; indeed, some states have done just that. *See, e.g.*, DEL. CODE ANN. tit. 11 § 1444(a)(6) (2020); R.I. GEN. LAWS ANN. § 11-47-8(d) (2020); WASH. REV. CODE ANN. §§ 9.41.010(3), 9.41.190, 9.41.220 (2020); N.Y. PENAL LAW §§ 265.00(26-27); 265.10, 265.01-c (2019); NEV. REV. STAT. ANN. § 202.274 (2019); CAL. PENAL CODE §§ 16930, 32900 (2019); MD. CODE ANN., CRIM. LAW §§ 4-301(f), 4-305.1, 4-306 (2019); N.J. STAT. ANN. §§ 2C:39-3(l), 39-9(j) (2019); FLA. STAT. ANN. § 790.222 (2018); HAW. REV. STAT. § 134-8.5 (2018); MASS. GEN. LAWS ANN. ch. 140, §§ 121, 131 (2018); VT. STAT. ANN. tit. 13, § 4022 (2018).

But as judges, we cannot amend § 5845(b). *See Henson v. Santander Consumer USA Inc.*, 137 S. Ct.

1718, 1726 (2017) ("[T]he proper role of the judiciary . . . [is] to apply, not amend, the work of the People's representatives."). And neither can the ATF. *See Dodson*, 519 F. App'x at 349 ("The ATF does not have the ability to redefine or create exceptions to Congressional statutes."). This is because the separation of powers requires that any legislation pass through the legislature, no matter how well-intentioned or widely supported the policy might be. *See INS v. Chadha*, 462 U.S. 919, 954 (1983) ("Amendment and repeal of statutes, no less than enactment, must conform with Art. I."). To allow otherwise would put individual liberty at serious risk. *Id.* at 950 (citing THE FEDERALIST NO. 51 (James Madison or Alexander Hamilton)).

In sum, based on the text and context of § 5845(b), and further supported by the Supreme Court's interpretation in *Staples*, we conclude that the phrase "the single function of the trigger" refers to the mechanical process of the trigger, not the shooter's pulling of the trigger. Consequently, a bump stock cannot be classified as a machine gun under § 5845(b).

B. "Automatically"

Our holding that a bump stock does not fall within the statutory definition of a machine gun because a bump stock does not cause a firearm to fire more than one shot by a single function of the trigger is sufficient to resolve this appeal. Consequently, we need not address or decide whether the ATF or

Plaintiffs-Appellants have the better interpretation of "automatically" as used in 26 U.S.C. § 5845(b).[9]

V. Remaining Preliminary Injunction Factors

Having determined that Plaintiffs-Appellants are likely to prevail on the merits, we address the three remaining factors of a preliminary injunction: (1) whether Plaintiffs-Appellants will suffer irreparable injury without an injunction; (2) whether the issuance

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[9] Courts have identified varying interpretations of "automatically" as used in § 5845(b). *Compare Aposhian*, 958 F.3d at 986-88 (finding that the term "automatically" "does not require there be *no* human involvement"), *and Guedes*, 920 F.3d at 170-72 (finding that "the term [automatically] can be read to require only that there be *limited* human involvement to bring about more than one shot"), *with Aposhian*, 958 F.3d at 996-98 (Carson, J., dissenting) (accepting the ATF's interpretation of "automatically" as meaning "self-acting" and "self-regulating," but finding that the terms "are self-explanatory—they exclude *any* manual human involvement by their very definitions," and explaining that "nonmechanical bump stocks require manual human involvement at all times as part of their underlying mechanisms"), *and Guedes*, 920 F.3d at 43-45 (Henderson, J., concurring in part and dissenting in part) (concluding that the ATF's interpretation "misreads" the term "automatically" because the "constant forward pressure with the non-trigger hand" necessary for the bump-stock-attached firearm to operate means that something more than just a single function of the trigger is needed to fire multiple shots, and because the ATF's interpretation fails to "maintain[] the longstanding distinction between 'automatic' and 'semiautomatic' in the firearms context"). *See also Aposhian*, 958 F.3d at 992 n.1 (Carson, J., dissenting) (explaining that mechanical bump stocks, such as the Akins Accelerator, use internal springs instead of constant forward pressure to propel the firearm forward and thus function differently from nonmechanical bump stocks, which require constant forward pressure).

of a preliminary injunction would cause substantial harm to others; and (3) whether the issuance of a preliminary injunction would serve the public interest. *Leary*, 228 F.3d at 736 (citation omitted). The final two factors—assessing the harm to others and weighing the public interest—"merge when the Government is the opposing party." *Wilson*, 961 F.3d at 844 (quoting *Nken*, 556 U.S. at 435). The government conceded in the district court that Plaintiffs-Appellants would suffer irreparable harm without an injunction. *Gun Owners of Am.*, 363 F. Supp. 3d at 833. And, as we stated in Part III.D.1, the Final Rule will cause bump-stock owners to either surrender or destroy their devices (the ATF estimates that the loss of property will exceed $100 million, *see* Final Rule, 83 Fed. Reg. at 66,515) or face serious fines and imprisonment. The ATF claims that the bump-stock ban will further public safety, which may be true, but that claim is undercut by the ATF's admission that "there may not have been a number of violent acts committed with bump stocks," notwithstanding the half-million bump-stock devices in circulation across the country. Final Rule, 83 Fed. Reg. at 66,538. Without an injunction, Plaintiffs-Appellants will suffer immediate, quantifiable, and serious irreparable harm, while the impact of the issuance of an injunction on public safety is only speculative based on the evidence that the ATF has provided to us and the public. And Plaintiffs-Appellants are likely to prevail on the merits. Weighing these factors together, we hold that the district court should have granted Plaintiffs-Appellants a preliminary injunction and, therefore, we reverse the district court's judgment.

However, we do not decide the scope of the injunction, except to say that the scope may not exceed the bounds of the four states within the Sixth Circuit's jurisdiction and, of course, encompasses the parties themselves. Though we disagree with the ATF's position, the ATF prevailed before the Tenth Circuit, as well as the D.C. Circuit Court, from which decision the Supreme Court denied certiorari. *See Guedes*, 920 F.3d at 6, *cert. denied* 140 S. Ct. 789, 206 L. Ed. 2d 266 (2020). If we were to permit a universal injunction (also frequently called a "nationwide injunction"), we would create an absurd situation in which the ATF must prevail in every single case brought against the Final Rule in order for its interpretation to prevail. We do not think that it is within our authority to overrule the decision of a sister circuit (or for a district court within our circuit to do so). *See Nixon*, 76 F.3d at 1388 (holding that we are not bound by "the views of our sister circuits").

While this will create a circuit split on the meaning of § 5845(b), there is value in having legal issues "percolate" in the lower courts. *See CASA de Md., Inc. v. Trump*, 971 F.3d 220, 260 (4th Cir. 2020) ("[N]ationwide injunctions limit valuable 'percolation' of legal issues in the lower courts. . . . And the value of percolation is at its apex where, as here, 'a regulatory challenge involves important or difficult questions of law.'" (quoting *L.A. Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 664 (9th Cir. 2011)). The Supreme Court has noted that it is often "preferable to allow several courts to pass on a given [issue] in order to gain the benefit of adjudication by different courts in different factual contexts." *Califano v. Yamasaki*, 442 U.S. 682,

702 (1979). Indeed, Justice Gorsuch, in his concurrence in the denial of certiorari for the *Guedes* case, stated that: "[O]ther courts of appeals are actively considering challenges to the same regulation. Before deciding whether to weigh in, we would benefit from hearing their considered judgments[.]" *Guedes*, 140 S. Ct. at 791 (Gorsuch, J., concurring in denial of cert.). The short-term uncertainty and disunity created by percolation is justified by its producing a more thorough review of the issue, which in turn should provide a stable, more accurate body of law in the long run. *See CASA de Md.*, 971 F.3d at 260 ("Nationwide injunctions limit dialogue in the lower courts, favoring quick and uniform answers to the more deliberate—and likely more accurate—method of doctrinal development that is intended under our judiciary's very design."). For these reasons, we would not purport to issue a universal or nationwide injunction, and we otherwise leave the issue of the scope of the injunction to be briefed by the parties and decided by the district court.

VI. Conclusion

Consistent with our precedent and mandated by separation-of-powers and fair-notice concerns, we hold that an administering agency's interpretation of a criminal statute is not entitled to *Chevron* deference. Consequently, the district court erred by finding that the ATF's Final Rule, which interpreted the meaning of a machine gun as defined in 26 U.S.C. § 5845(b), was entitled to *Chevron* deference. And because we find that "single function of the trigger" refers to the mechanical process of the trigger, we further hold that

a bump stock cannot be classified as a machine gun because a bump stock does not enable a semiautomatic firearm to fire more than one shot each time the trigger is pulled. Accordingly, we find that Plaintiffs-Appellants are likely to prevail on the merits and that that their motion for an injunction should have been granted.

Therefore, we REVERSE the judgment of the district court and REMAND for proceedings consistent with this opinion.

DISSENT

WHITE, Circuit Judge, dissenting. I respectfully disagree with the majority's conclusion that *Chevron* never applies to laws with criminal applications. The Supreme Court has applied *Chevron* in the criminal context in three binding decisions—*Chevron* itself, *Babbitt*, and *O'Hagan*[1]—and has never purported to overrule those cases. Although comments in subsequent decisions may create tension with these cases, they remain binding. Thus, I would apply *Chevron*. And because the statutory phrase here is ambiguous and the ATF's interpretation of that phrase is reasonable, it is entitled to deference under *Chevron*.

I . *Chevron* Applies

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[1] *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984); *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687 (1995); *United States v. O'Hagan*, 521 U.S. 642 (1997).

Chevron applies here. First, the ATF's Bump-Stock Rule is the type of "legislative" rule that usually triggers *Chevron*'s two-step framework. Second, that framework is not waivable. Third, the framework applies even though the rule carries criminal consequences. And fourth, the majority's normative arguments to the contrary are not persuasive.

A. The ATF's Rule is "Legislative"

The Administrative Procedure Act draws a "central distinction" between legislative and interpretive rules. *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1814 (2019) (quoting *Chrysler Corp. v. Brown*, 441 U.S. 281, 301 (1979)). That "distinction centrally informs the applicability of *Chevron*." *Guedes v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 920 F.3d 1, 17 (D.C. Cir. 2019). Legislative rules typically trigger *Chevron*, *Atrium Med. Ctr. v. U.S. Dep't of Health & Hum. Servs.*, 766 F.3d 560, 566 (6th Cir. 2014), while interpretive rules, in general, "enjoy no *Chevron* status as a class," *United States v. Mead Corp.*, 533 U.S. 218, 232, 121 S. Ct. 2164, 150 L. Ed. 2d 292 (2001).

Legislative rules "have the 'force and effect of law.'" *Tenn. Hosp. Ass'n v. Azar*, 908 F.3d 1029, 1042 (6th Cir. 2018) (quoting *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96 (2015)). "[I]nterpretive rules do not," *id.*, and are instead meant only "'to advise the public of the agency's construction of the statutes and rules which it administers,'" *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 99 (1995) (citation omitted). Legislative rules must be promulgated through the APA's notice-and-comment procedures, but interpretive rules

need not be. *Tenn. Hosp.,* 908 F.3d at 1042; 5 U.S.C. § 553(b).

A rule is "legislative" if it "'intends to create new law, rights, or duties.'" *Tenn. Hosp.*, 908 F.3d at 1042 (citation omitted). A rule is "interpretive" if it instead "'simply states what the administrative agency thinks the statute means, and only reminds affected parties of existing duties.'" *Id.* (citation omitted). "Because interpretive rules cannot 'effec[t] a substantive change in the regulations,' a rule that 'adopt[s] a new position inconsistent with any'" of the agency's existing regulations "is necessarily legislative." *Id.* (alterations in original) (quoting *Guernsey Mem'l Hosp.*, 514 U.S. at 100). Congress's authorization of an agency to "proceed through notice-and-comment rulemaking" is a "'very good indicator' that Congress intended" rules passed through that procedure "to carry the force of law." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125, 195 L. Ed. 2d 382 (2016).

The ATF's rule is "legislative." See Bump-Stock-Type Devices, 83 Fed. Reg. 66,514 (Dec. 26, 2018). To start, it went through formal notice-and-comment rulemaking, *id.* at 66,517, a strong sign that the agency intended to speak with the force of law, *Encino Motorcars*, 136 S. Ct. at 2122, 2125. It also adopted a position inconsistent with previous interpretations of "machinegun." From 2008 to 2017, several ATF classification letters said that certain bump-stock devices were not "machineguns" because they "did not rely on internal springs or similar mechanical parts to channel recoil energy." 83 Fed. Reg. at 66,516. The Bump-Stock Rule treats these

devices as "machineguns," *id.* at 66,531, creating new obligations that previously did not exist, *see id.* at 66,516 (noting that previously, "[i]ndividuals . . . have been able to legally purchase these devices"). Although the 2008-2017 interpretations were issued through classification letters, not legislative regulations, this change still strongly suggests that the ATF meant to create new rights or duties. *Cf. Tenn. Hosp.*, 908 F.3d at 1042.

Further, as the D.C. Circuit recently observed, "[a]ll pertinent indicia of agency intent confirm that the Bump-Stock Rule is a legislative rule." *Guedes*, 920 F.3d at 18. The rule's text evinces an intent to change rights and obligations. At several points, it speaks in terms of prospective, post-enactment changes in the law. *See, e.g.*, 83 Fed. Reg. at 66,514 (warning that bump-stock devices "will be prohibited when this rule becomes effective"); *id.* at 66,523 ("Anyone currently in possession of a bump-stock-type device is not acting unlawfully unless they fail to relinquish or destroy their device after the effective date of this regulation."). The rule also expressly invoked *Chevron, id.* at 66,527, and relied on several statutory provisions delegating legislative authority to the Attorney General, *id.* at 66,515, 66,527 (citing 18 U.S.C. § 926(a); 26 U.S.C. §§ 7801(a)(2)(A) & 7805(a)); *see also Guedes*, 920 F.3d at 18-19 (reasoning that the ATF's discussion of Chevron and invocation of these statutory provisions strongly signal that the ATF meant to use its legislative authority). "When an agency acts pursuant to an express delegation that directs the agency to issue regulations or set permissible standards, the resulting rule is generally . . .

considered to be legislative." *Tenn. Hosp.*, 908 F.3d at 1043. The ATF did that here, and its rule is legislative.

Because the rule is legislative, it is the type of rule to which *Chevron*'s two-step framework typically applies. We apply *Chevron* when "Congress delegated authority to the agency generally to make rules carrying the force of law" and "the agency interpretation" in question "was promulgated in the exercise of that authority." *Mead*, 533 U.S. at 226-27. Both prerequisites are satisfied here. Congress expressly delegated rulemaking authority to the Attorney General, *see* 18 U.S.C. § 926(a); 26 US.C. §§ 7801(a)(2)(A) & 7805(a), and the ATF exercised that authority through notice-and-comment rulemaking, *see Encino Motorcars*, 136 S. Ct. at 2125 ("When Congress authorizes an agency to proceed through notice-and-comment rulemaking, that 'relatively formal administrative procedure' is a 'very good indicator' that Congress intended the regulation to carry the force of law, so Chevron should apply." (quoting Mead, 533 U.S. at 229-30)).[2] The Bump-Stock

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[2] As the Fourth Circuit recently put it, "[w]hen an agency's interpretation 'derives from notice-and-comment rulemaking,' it will 'almost inevitably receive *Chevron* deference.'" *Sierra Club v. U.S. Army Corps of Eng'rs*, 909 F.3d 635, 644 (4th Cir. 2018) (citation omitted). We have frequently said the same. *See, e.g., Zurich Am. Ins. Grp. v. Duncan ex rel. Duncan*, 889 F.3d 293, 301-02 (6th Cir. 2018) ("Section 718.305(b)(2) was adopted after notice-and-comment rulemaking, and therefore is analyzed under the two-step framework that the Supreme Court articulated in *Chevron*[.]" (citations omitted)); *Sierra Club v. Env't Prot. Agency*, 793 F.3d 656, 665 (6th Cir. 2015) ("Where petitioner challenges an agency's interpretation of a statute promulgated after

Rule is "firmly within *Chevron*'s domain." *Guedes*, 920 F.3d at 21.

But two issues remain. First, Plaintiffs argue that the government has "waived" *Chevron*. Second, the majority concludes that *Chevron* does not apply in criminal contexts. Neither issue precludes *Chevron* deference because *Chevron* is not waivable, and the Supreme Court has applied *Chevron* to legislative rules with criminal applications.

B . *Chevron* Cannot Be Waived

The government disclaims any reliance on *Chevron*. *See* Appellees' Br. at 15-16 ("Plaintiffs' extended discussion of *Chevron* deference . . . likewise fails to advance their claims. Deference is unnecessary where, as here, the Rule properly interprets the statute . . . . The government thus does not rely on *Chevron*

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notice-and-comment rulemaking, we assess the lawfulness of the interpretation under the familiar two-step *Chevron* framework."); *Sierra Club v. ICG Hazard, LLC*, 781 F.3d 281, 287 (6th Cir. 2015) ("[W]e defer to the agency's interpretation, provided that interpretation was promulgated via notice-and-comment rulemaking or a formal adjudication . . . ." (citations omitted)); *Spectrum Health Continuing Care Grp. v. Anna Marie Bowling Irrevocable Trust Dated June 27, 2002*, 410 F.3d 304, 319 (6th Cir. 2005) ("[A]gency action resulting from notice-and-comment rule-making or formal adjudications is entitled to judicial deference." (citing *Mead*, 533 U.S. at 230)); *Owensboro Health, Inc. v. Sec'y of Health & Hum. Servs.*, 706 F. App'x 302, 306 (6th Cir. 2017) ("When an agency engages in statutory interpretation with the force of law, such as through notice-and-comment rulemaking, we afford the agency deference." (citing *Chevron*, 467 U.S. 837 (1984)).

deference, but if this Court were to employ that framework, plaintiffs would still not be entitled to a preliminary injunction."). Plaintiffs argue that the government waived *Chevron* here. The D.C. Circuit addressed a similar claim in *Guedes*, 920 F.3d at 21-23, and persuasively explained that *Chevron* may not be waived in this context.[3]

There are several problems with concluding that *Chevron* can be waived. To start, Chevron is not a right or privilege that belongs to a party; it is a standard of review, as we have repeatedly recognized.[4] It is well-established that a "'party cannot waive the proper standard of review by failing to argue it.'" *Hubbell v. FedEx SmartPost, Inc.*, 933 F.3d 558, 571 (6th Cir. 2019) (citation omitted). "Such a determination remains for this court to make for itself." *K&T Enters., Inc. v. Zurich Ins. Co.*, 97 F.3d 171, 175 (6th Cir. 1996). That same principle applies to *Chevron*.

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[3] The Supreme Court has not yet addressed this issue. At least one Justice disagrees with the waiver analysis in *Guedes*. *See Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 140 S. Ct. 789, 790 (2020) (Gorsuch, J., concurring in denial of certiorari) (arguing that the D.C. Circuit's conclusion on *Chevron* waiver "was mistaken").

[4] *See, e.g., Keeley v. Whitaker*, 910 F.3d 878, 885 (6th Cir. 2018) (describing *Chevron* as a "standard of review"); *Nat'l Truck Equip. Ass'n v. Nat. Highway Traffic Safety Admin.*, 711 F.3d 662, 668 (6th Cir. 2013) (same); *Estate of Gerson v. Comm'r.*, 507 F.3d 435, 438 (6th Cir. 2007) (same); *TNS, Inc. v. NLRB*, 296 F.3d 384, 393 (6th Cir. 2002) (same); *United States v. Hopper*, 941 F.2d 419, 421-22 (6th Cir. 1991) (same).

Allowing *Chevron* to be waived would also contravene "basic precepts of administrative law." *Guedes*, 920 F.3d at 22. When a legislative rule is passed through notice-and-comment rulemaking, an agency may not reverse that rule without once more undergoing the notice-and-comment process. *See Perez*, 575 U.S. at 101 ("[A]gencies [must] use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance."). Likewise, if an agency seeks to reverse its position, that decision will be reviewed for arbitrariness. 5 U.S.C. § 706(2)(A). A "waiver regime" would allow for an end-run around these requirements:

> A waiver regime, moreover, would allow an agency to vary the binding nature of a legislative rule merely by asserting in litigation that the rule does not carry the force of law, even though the rule speaks to the public with all the indicia of a legislative rule. Agency litigants then could effectively amend or withdraw the legal force of a rule without undergoing a new notice-and-comment rulemaking. That result would enable agencies to circumvent the Administrative Procedure Act's requirement "that agencies use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance." [*Perez*, 575 U.S. at 101]. And an agency could attempt to secure rescission of a policy it no longer favors without complying with the Administrative Procedure Act, or perhaps could avoid the political accountability that would attend its own policy

> reversal by effectively inviting courts to set aside the rule instead.

Guedes, 920 F.3d at 22-23.

Thus, we must independently determine whether *Chevron* applies.[5]

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[5] Our decision in *Commodity Futures Trading Comm'n v. Erskine*, 512 F.3d 309, 314 (6th Cir. 2008) does not compel a contrary result. In *Erskine*, the CFTC sued the defendants under the Commodity Exchange Act, which gave the CFTC jurisdiction over "futures contracts" involving certain foreign exchange transactions. *Id.* at 310-13. The key issue was whether the statutory term "futures contracts" encompassed the type of transaction at issue in the CFTC's lawsuit. *Id.* at 313. The CFTC never issued any type of rule or formal adjudication defining the term, and in the district court, it made no *Chevron* argument. *Id.* at 314. But on appeal, its lawyers argued that their interpretation of the term was entitled to *Chevron* deference. *Id.* The defendants responded with three arguments: (1) the CFTC "waived any reliance on *Chevron* deference by failing to raise it to the district court"; (2) Congress never delegated to the CFTC the power to define the term, and *Chevron* depends on delegation; and (3) the CFTC had never defined the term in "a rule-making or in an adjudication, which would provide for *Chevron* deference, but has merely asserted its preferred definition during the course of litigation," a position that could not garner *Chevron* deference due to lack of "administrative formality." *Id.* (citations omitted). In a single sentence, we stated that we agreed with the defendants on each point: "We agree with [defendants] on each of [their] points and conclude that the CFTC is not entitled to *Chevron* deference on this issue." *Id.*

Although *Erskine* appears to voice agreement with the suggestion that *Chevron* arguments may be forfeited, it offered no discussion on the issue. More importantly, the issue was not necessary to its holding and thus constituted dictum. *See Freed v. Thomas*, 976 F.3d 729, 738 (6th Cir. 2020) ("[D]ictum is anything

C . *Chevron* and Criminal Laws

The majority concludes that *Chevron* never applies to laws with criminal applications. It first determines that the relevant caselaw leaves the question open and then puts forth three normative reasons why *Chevron* ought not apply. I disagree with the majority's discussion of the caselaw and with its proffered rationales.

1. The Caselaw

To start, *Chevron* itself involved an agency interpretation that had criminal implications. The issue in *Chevron* was the meaning of the term "stationary source" in the Clean Air Act. 467 U.S. at 840. Under the statutory regime, private parties in certain states had to obtain a permit when they added a new "major stationary source" of air pollution. *Id.* The EPA issued a regulation providing that industrial plants did not add a new "source" when they added new pieces of pollution-emitting equipment unless the alteration increased the total emissions in the plant. *Id.* The National Resources Defense Council sued, arguing that a new permit was needed whenever a new pollution-emitting device emitting over 100 tons of

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'not necessary to the determination of the issue on appeal.'" (quoting *United States v. Swanson*, 341 F.3d 524, 530 (6th Cir. 2003))). The *Erskine* court found that the prerequisite to *Chevron*—congressional delegation—was absent, and it also found that the agency had not taken any actions that could have triggered *Chevron* to begin with. Thus, the panel's unarticulated acceptance of the defendant's waiver argument was not necessary to its conclusion.

pollutants was added. *Id.* at 841 n.3, 859. At the time, knowing violation of the permit requirement was punishable by daily $25,000 fines and imprisonment for up to a year. 42 U.S.C. § 7502(a)(1), (b)(6) (1982); *id.* § 7413(c)(1) (1982). Still, the Court applied deference. *Chevron*, 467 U.S. at 866.

In *United States v. O'Hagan*, 521 U.S. 642, 667, 673 (1997), a criminal case, the Court applied *Chevron* deference to an SEC regulation that carried criminal penalties. There, a lawyer was convicted of seventeen counts of fraudulent trading in connection with a tender offer, in violation of § 14(e) of the Exchange Act and SEC Rule 14e-3(a), after engaging in several stock transactions based on material non-public information he obtained through his firm's assistance with a tender offer. *Id.* at 647-49. The Supreme Court rejected his challenge to the scope of Rule 14e-3(a), and applied *Chevron* to the rule, despite its clear criminal applications. *See id.* at 673 ("Because Congress has authorized the Commission, in § 14(e), to prescribe legislative rules, we owe the Commission's judgment 'more than mere deference or weight.'. . . [W]e must accord the Commission's assessment 'controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute.'" (second alteration in original) (quoting *Chevron*, 467 U.S. at 844) (other citation omitted)).[6]

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[6] The majority suggests that *O'Hagan* did not apply *Chevron* deference, yet it also recognizes that the Court (1) cited *Chevron*, (2) while citing *Chevron*, recognized that the agency's legislative rule was entitled to "more than mere deference or weight," and (3) applied deference to the rule. Majority Op. at 13-14. The *O'Hagan*

court cited *Chevron*, held that the SEC's regulation was entitled to "controlling weight" unless it was "manifestly contrary to the statute," determined that the regulation was *not* contrary to the statute, and applied deference. 521 U.S. at 673. If that does not count as applying *Chevron* deference, what does? *See also Mead*, 533 U.S. at 230 & n.12 (stating that the "overwhelming number of our cases applying *Chevron* deference have reviewed the fruits of notice-and-comment rulemaking or formal adjudication," and listing *O'Hagan* among the "rulemaking cases" where *Chevron* deference applied); *Valenzuela Gallardo v. Barr*, 968 F.3d 1053, 1060 (9th Cir. 2020) (noting that the Court "grant[ed] *Chevron* deference" in *O'Hagan*); *Guedes*, 920 F.3d at 24 (same); Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 874 n.220 (2001) (same).

The majority also tries to distinguish *O'Hagan* on the basis that it did not involve a purely criminal statute. *See* Majority Op. at 14. ("While *O'Hagan* used the word 'deference,' it cannot be read to support the proposition that the agency's interpretation of a *criminal* statute receives *Chevron* deference." (emphasis in original)). This point relies on the assumption that the ATF's Bump-Stock Rule only interpreted a purely criminal statute. Throughout its opinion, the majority appears to repeatedly make this assumption. *See, e.g., id.* at 13 ("While *Babbitt* certainly mentioned deference, it did not hold that an agency's interpretation of a criminal statute is entitled to *Chevron* deference . . . ."); *id.* at 15 ("[W]e have never held that *Chevron* deference applies to an agency's interpretation of a purely criminal statute, such as the ban on possessing a machine gun in 18 US.C. § 922(o)."). That assumption is incorrect. Although Congress, in 1986, criminally banned private individuals from possessing machineguns not already lawfully possessed before May 19, 1986, 18 U.S.C. § 922(o), the Bump-Stock Rule does not purport to interpret this criminal provision. Rather, it interprets the word "machinegun" in the definition section of 26 U.S.C. § 5845(b)—a definition that has both civil and criminal applications. *See Guedes*, 920 F.3d at 40 & n.7 (Henderson, J., concurring in part and dissenting in part) ("[T]he 26 U.S.C. § 5845(b) definition of 'machinegun' has both civil and criminal enforcement implications."); *Aposhian v. Barr*, 958 F.3d 969, 982

Neither *Chevron* nor *O'Hagan* addressed the interaction between *Chevron* and the rule of lenity, but the Court squarely addressed the issue in *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687 (1995). There, the Court reviewed a regulation interpreting the definition of the word "take" in the Endangered Species Act (ESA). *Id.* at 690. The ESA made it illegal to "take" certain endangered species and attached criminal penalties for knowingly doing so. *Id.* at 691-93, 696 n.9. Congress defined "take" to include several verbs, including "harm," but did not define what "harm" meant. *Id.* at 691. The Department of Interior promulgated a regulation defining "harm" to include habitat degradation. *Id.* The plaintiffs challenging the regulation argued that

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(10th Cir. 2020) (the ATF's bumpstock regulation "carrie[s] both civil and criminal implications"); *id.* at 998-99 (Carson, J., dissenting) (same). For example, § 922(o)'s criminal ban has exceptions for those making transfers "under the authority of" any department or agency of the United States. 18 U.S.C. § 922(o)(2)(A). This exception allows certain arms dealers to possess and transfer machineguns when they intend to sell them to police departments or government agencies. *See* 27 C.F.R. § 179.105 (discussing requirements for such dealers); *United States v. Ardoin*, 19 F.3d 177, 178 (5th Cir. 1994) ("In 1989, Ardoin also became a Colt distributor for law enforcement agencies. As a distributor, he was able to sell to law enforcement agencies any class of weapons, including machineguns, as long as he maintained his Class III license."). For those exempted, § 5845(b)'s definition of "machinegun" carries civil implications as well. *See United States v. Hamblen*, 239 F. App'x 130, 133 (6th Cir. 2007) (noting registered machinegun dealers must pay "a special occupation tax"); *Guedes*, 920 F.3d at 40 & n.7 (Henderson, J., concurring in part and dissenting in part) (pointing out that § 5845(b) has civil forfeiture and tax implications (citing 26 U.S.C. § 5872(a))).

Chevron deference was improper because the ESA included criminal penalties and, therefore, the rule of lenity should apply instead. *Id.* at 704 n.18. The Court rejected the argument and applied Chevron, despite the statute's criminal penalties. *Id.* at 703-04, 704 n.18.[7]

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[7] As with *O'Hagan*, the majority asserts that *Babbitt* did not "discuss or decide whether Chevron applied nor did it analyze the challenge using Chevron . . . ." Majority Op. at 13. That is incorrect. The *Babbitt* Court reversed a split decision of the D.C. Circuit and vindicated the view of the dissenting appellate judge, who applied *Chevron*. *Babbitt*, 515 U.S. at 694-95. From the start of its discussion onward—after recognizing that the ESA failed to define the word "harm," *id.* at 691—the Court framed the question as whether the Department of Interior's regulation was *reasonable* or *permissible*, a question that only makes sense if the Court was operating within *Chevron*'s domain, *see, e.g., id.* at 696 n.9 (framing discussion by noting that the Court was "assessing the reasonableness of the regulation"); *id.* at 697 ("The text . . . provides three reasons for concluding that the Secretary's interpretation *is reasonable*." (emphasis added)); *id.* at 699 (noting that Congressional intent "supports the *permissibility* of the Secretary's 'harm' regulation" (emphasis added)); *id.* at 700 (noting that "the Secretary's definition of 'harm' is reasonable"); *id.* at 702 (stating that the regulation "permissively interprets" the word "harm"). If any doubt was left, the Court cleared it on page 703 of the opinion, where it (1) recognized that Congress had not "unambiguously" defined the word "harm" (*Chevron* Step One); (2) concluded that the DOI's interpretation was reasonable (*Chevron* Step Two); and (3) found it unnecessary to decide if the DOI's interpretation was the best one, because the fact that the interpretation was reasonable "suffice[d] to decide this case:"

> We need not decide whether the statutory definition of "take" compels the Secretary's interpretation of "harm," because our conclusions that Congress did not unambiguously manifest its intent to adopt respondents' view and that the Secretary's interpretation is reasonable suffice to decide this case. *See generally Chevron U.S.A.*

Chevron, *Babbitt*, and *O'Hagan* all involved "legislative" regulations issued through notice-and-comment rulemaking—i.e., regulations that

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Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

Id. at 703. The Court repeated its invocation of *Chevron* when summarizing its conclusion at the end of the opinion. *Id.* at 708. It was also clear to the three dissenting Justices that the majority was applying *Chevron*. *See id.* at 715 (Scalia, J., dissenting) ("In my view petitioners must lose—the regulation must fall—even under the test of *Chevron* . . ., so I shall assume that the Court is correct to apply *Chevron*."). Numerous subsequent courts and commentators—including the Supreme Court—have recognized the same. *See, e.g., Mead*, 533 U.S. at 230 & n.12 (listing *Babbitt* as a case that "appl[ied] *Chevron* deference" to "the fruits of notice-and-comment rulemaking"); *Guedes*, 920 F.3d at 27 (describing *Babbitt* as applying *Chevron*); *Aposhian*, 958 F.3d at 982 (same); *see also Valenzuela Gallardo*, 968 F.3d at 1060; *Competitive Enter. Inst. v. United States Dep't of Transp.*, 863 F.3d 911, 915 n.4 (D.C. Cir. 2017); *United States v. Atandi*, 376 F.3d 1186, 1189 (10th Cir. 2004); *United States v. Kanchanalak*, 192 F.3d 1037, 1047 n.17 (D.C. Cir. 1999); 33 WRIGHT AND MILLER, FEDERAL PRACTICE AND PROCEDURE § 8427 n.12 (2d ed. Oct. 2020) (describing *Babbitt* as "applying *Chevron* deference to the Secretary's definition of 'take' under the Endangered Species Act"); William N. Eskridge & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations From* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1135-36 n.178 (2008) (listing *Babbitt* as an example of a "prominent *Chevron* case[]"); Note, *Justifying the* Chevron *Doctrine: Insights From the Rule of Lenity*, 123 HARV. L. REV. 2043, 2062 (2010) ("In a later case, [*Babbitt*,] the Court did grant *Chevron* deference to an agency interpretation of the Endangered Species Act, despite the fact that the Act could be both civilly and criminally enforced.")

trigger *Chevron*'s deferential framework.[8] In two 2014 cases that did *not* involve legislative regulations, the Court made statements that could be taken to question whether *Chevron* applies in the criminal context. *United States v. Apel*, 571 U.S. 359, 369 (2014) ("[W]e have never held that the Government's reading of a criminal statute is entitled to any deference."); *Abramski v. United States*, 573 U.S. 169, 191 (2014) ("[C]riminal laws are for the courts, not for the Government, to construe. . . . We think ATF's old position no more relevant than its current one-which is to say, not relevant at all. Whether the Government interprets a criminal statute too broadly (as it sometimes does) or too narrowly (as the ATF used to . . .), a court has an obligation to correct its error." (citing *Apel*, 571 U.S. at 369)). These statements are at the core of the majority's argument.

But *Apel* and *Abramski* never mention *Chevron*, *Babbitt*, or *O'Hagan*. Nor would they be expected to because neither involved agency interpretations that would trigger *Chevron* to begin with. *Abramski* involved informal agency guidance (ATF "circulars"). 573 U.S. at 183 n.8, 191; *id.* at 198 n.3, 202 (Scalia, J., dissenting). And *Apel* involved internal guidance documents (DOJ manuals and Air Force JAG opinions)

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[8] In *Chevron*, the regulation at issue was an EPA "final rule" promulgated after notice and comment. 467 U.S. at 840-41; 46 Fed. Reg. 50766, 50767-68 (Oct. 14, 1981). *O'Hagan* also involved a "final rule," promulgated by the SEC after a notice-and-comment period. 521 U.S. at 668; 45 Fed. Reg. 60410, 60410-11 (Sep. 12, 1980)). The same goes for the rule in *Babbitt*. 515 U.S. at 691 n.2; 40 Fed. Reg. 44412, 44413 (Sep. 26, 1975); 46 Fed. Reg. 54748, 54748 (Nov. 4, 1981).

that the Court expressly noted were "not intended to be binding." 571 U.S. at 368.[9] Thus, the Court's statements in both cases do not undermine *Chevron*'s applicability here because the agency guidance documents were not entitled to *Chevron* deference in the first place. *See Atrium Med. Ctr.*, 766 F.3d at 567 ("'[I]nterpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law' and were not promulgated via notice and comment rulemaking, 'do not warrant *Chevron*-style deference.'" (quoting *Christensen v. Harris County*, 529 U.S. 576, 587, 120 S. Ct. 1655, 146 L. Ed. 2d 621 (2000))).

Because the statements in *Apel* and *Abramski* "were made outside the context of a *Chevron*-eligible interpretation," *Guedes*, 920 F.3d at 25, they do not resolve our question. Rather, *Chevron*, *O'Hagan*, and *Babbitt* control. Those cases demonstrate that when the Court has considered legislative rules promulgated through notice and comment, it has applied *Chevron* even when the rules have criminal implications. *See id.* (noting that in *Babbitt*, "[w]hen directly faced with the question of *Chevron*'s applicability to an agency's

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[9] *See id.* at 368-69 (quoting portion of DOJ's U.S. Attorneys' Manual stating, "'The Manual provides only internal Department of Justice guidance. It is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law . . . .'" (citation omitted)); id. at 369 (quoting preface to Air Force internal guidance—opinions from the Judge Advocate General—stating that the opinions "'are good starting points but should not be cited as precedence [sic] without first verifying the validity of the conclusions by independent research.'" (alteration in original) (citation omitted)).

interpretation of a statute with criminal applications through a full-dress regulation, the Court adhered to *Chevron*." (citation omitted)); *Aposhian*, 958 F.3d at 984 ("*Babbitt* . . . govern[s] here, where ATF has promulgated a regulation through formal notice-and-comment proceedings.").

The majority recognizes that in *O'Hagan* and *Babbitt*, the Supreme Court applied deference to regulations with criminal applications, Majority Op. at 12-14, but insists that neither case applied *Chevron* deference. As noted above, that is mistaken. *See supra* at 44-46 nn.6-7.[10] The majority also cites three

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[10] Although it never fully articulates the point, the majority also appears to suggest that *O'Hagan* and *Babbitt* relied on a purported "clear-statement" rule—rather than *Chevron*—to apply deference. Majority Op. at 12-14. It is clear that neither *Babbitt* nor *O'Hagan* relied on any clear-statement rule to apply deference. Neither opinion ever mentions a "clear-statement rule," and nothing in either opinion suggests that the decision to apply deference was based on any such rule. The majority cites nothing to support its assertion that *Babbitt* "appears to have been relying on the clear-statement rule's delegation of authority to the DOI as if the DOI were Congress itself." *Id.* at 12-13. As to *O'Hagan*, the majority cites a footnote from the opinion that says nothing about relying on a "clear-statement rule." *Id.* at 13-14 (citing *O'Hagan*, 521 U.S. at 673 n.19).

Rather, the *Babbitt* and *O'Hagan* Courts simply recognized that Congress had delegated legislative authority to the agencies in question. Delegation is a necessary prerequisite to *Chevron* deference, but it is not a sufficient condition for deference. Otherwise, an agency could issue any regulation—even one completely contrary to the statute—so long as Congress clearly delegated authority to that agency. That, of course, is not the law, and nothing about *O'Hagan* or *Babbitt* suggests that the Court viewed proper delegation as sufficient on its own to trigger

pre-2014 cases that, it suggests, "indicated that the rule of lenity—the practical opposite of *Chevron* deference—applies to ambiguous statutory provisions that have both civil and criminal applications." Majority Op. at 14. However, none of those cases says that the rule of lenity trumps *Chevron*—a position that *Babbitt* expressly rejected.

For example, the majority cites *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 517-18 nn.9-10 (1992), which applied the rule of lenity to an ambiguous provision of the National Firearms Act. But in *Thompson/Center* there was no agency regulation that addressed the statutory "question presented" in the case—a point the opinion explicitly noted, *id.* at 518 n.9—so the Court never had to choose between *Chevron* and the rule of lenity. Indeed, *Babbitt* later distinguished *Thompson/Center Arms* on that very basis:

> We have applied the rule of lenity in a case raising a narrow question concerning the application of a statute that contains criminal sanctions to a specific factual dispute—whether pistols with short barrels and attachable shoulder stocks are short-barreled rifles—*where no regulation was present. See United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 517-18, and n.9 (1992). We have never suggested that the rule of lenity should provide the standard for reviewing facial challenges to

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deference.

> administrative *regulations* whenever the governing statute authorizes criminal enforcement.

515 U.S. at 704 n.18 (emphasis added). *Babbitt*'s discussion of *Thompson/Center Arms* makes clear that cases discussing the rule of lenity where no regulation is present are of little relevance here, and that when a case *does* involve a legislative regulation, *Chevron* applies.[11]

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[11] *See also Guedes*, 920 F.3d at 26 ("*Babbitt* later made clear that the Court in *Thompson/Center* had no occasion to apply *Chevron*[.]. . . *Babbitt* implies that *Chevron* should apply in a case—like this one—involving an interpretation of the National Firearms Act where a regulation *is* present."); *Aposhian*, 958 F.3d at 983 (*Babbitt*'s discussion of *Thompson/Center* suggests that "where a regulation *is* at issue, . . . *Chevron*, not the rule of lenity, should apply.").

The other two pre-2014 cases the majority cites are also inapposite. The first, *Leocal*, never mentions *Chevron*, did not involve a regulation, and only discussed the rule of lenity in dictum. *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004); *see also Esquivel-Quintana v. Lynch*, 810 F.3d 1019, 1024 (6th Cir. 2016) (noting that *Leocal*'s discussion of the rule of lenity was dictum and declining to follow it in light of *Babbitt*'s holding), *rev'd on other grounds sub nom. Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562 (2017). The second, *SWANCC v. U.S. Army Corps of Eng'rs*, is also inapposite. It declined to apply *Chevron* on an unrelated basis: there, the agency's interpretation of its own jurisdiction under the Clean Water Act would have potentially extended beyond the outer bounds of Congress's Commerce Clause authority and would have created federalism concerns. 531 U.S. 159, 173-74 (2001). The opinion's only reference to the rule of lenity comes when the Court expressly *declines* to consider the argument that the rule of lenity displaces *Chevron*. *See id.* at 174 n.8 ("Because violations of the [Clean Water Act] carry criminal penalties, petitioner invokes the rule of lenity as another basis for

On its way to distinguishing *Chevron*, *O'Hagan*, and *Babbitt*, the majority suggests that *Apel* and *Abramski* "unequivocal[ly]" establish that the Court has never applied deference to an agency's interpretation in the criminal context.[12] Majority Op. at 11. But as discussed, *Apel* and *Abramski* do not resolve the issue because neither involved *Chevron*-triggering regulations; and without such regulations, no deference is warranted. Further, because neither decision even mentioned *Chevron*—or *Babbitt* or *O'Hagan*—they should not be read to overrule the Court's holdings in those cases.

The same is true of the other Supreme Court cases the majority cites. Aside from *SWANCC*—which did not discuss the issue presented here other than in declining to address it—none of the cited cases mentions *Chevron*, *O'Hagan*, or *Babbitt*. At most, their statements, like those in *Apel* and *Abramski*, create an implied tension with *Chevron*, *Babbitt*, and *O'Hagan*.

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rejecting the [agency's] interpretation of the CWA. We need not address this alternative argument." (citations omitted)).

[12] The majority asserts that *Apel* and *Abramski*'s "absolute statement means that none of the Court's prior cases applied *Chevron* deference (or any deference)" to an agency's regulations in the criminal context. Majority Op. at 11. But right after making that assertion, the majority recognizes that the Court has done just that. *See id.* at 12-14 (recognizing that *Babbitt* and *O'Hagan* applied deference to regulations carrying criminal penalties). It is difficult to reconcile these dissonant statements, unless we assume that *Apel* and *Abramski* silently revised the historical fact that the Court applied deference in *Babbitt*, *O'Hagan*, and *Chevron*. As a subordinate federal court, we may not make that kind of assumption. *See infra* at 49-50.

In essence, the majority—and Plaintiffs—seem to argue that this tension allows us to disregard the earlier binding authority.[13]

But it is the Supreme Court's prerogative, not ours, to deem one of its decisions overruled by implication. *See Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."); *Agostini v. Felton*, 521 U.S. 203, 237-38 (1997) (directing lower courts not to "conclude our more recent cases have, by implication, overruled an earlier precedent" (citing *Rodriguez de Quijas*, 490 U.S. at 484)); *Hohn v. United States*, 524 U.S. 236, 252-53 (1998) ("Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality."). *Abramski* and

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[13] See Majority Op. at 12-14, 27-28 (recognizing that *O'Hagan* and *Babbitt* applied deference in criminal contexts, but later suggesting that the Supreme Court has "undercut [*Babbitt*] in subsequent cases"); Appellants' Br. at 18 (arguing that the *Guedes* opinion incorrectly "relies on cases decided in the 1990's," while "*Apel* and *Abramski* represent the Supreme Court's most recent pronouncements in this area that is continually evolving further away from agency deference and towards exclusive judicial review"). The dissent in *Guedes* did the same. *See* 920 F.3d at 41 (Henderson, J., concurring in part and dissenting in part) (noting that *Babbitt* is not "the last word on this topic," and adding that the Court's "most recent decisions indicate" that it would not apply *Chevron* to statutes or rules with criminal sanctions).

Apel "did not purport to overrule" *Babbitt* or *O'Hagan*, and "[i]n situations like this, where an advocate insists . . . new Supreme Court decision[s] undermine[] . . . previous decision[s], the earlier decision[s] stand[] until the Court says otherwise." *United States v. Bradley*, 969 F.3d 585, 591 (6th Cir. 2020) (citation omitted).

We hewed to that rule in *Esquivel-Quintana*, 810 F.3d at 1023-24, the only published opinion from our Circuit to directly address the apparent tension between these two groups of cases.[14] See *id.* (noting that, despite an increasingly prominent view (based on statements from cases like *Abramski*) that the rule of lenity ought to trump *Chevron* in the criminal context, "the Supreme Court has not made it the law," and "[t]o the contrary, . . has reached the opposite conclusion" in *Babbitt*); *id.* at 1024 ("[W]e do not read dicta in *Leocal* and subsequent cases as overruling *Babbitt*, or requiring that we apply the rule of lenity here . . . . As

[14] The majority correctly notes that *Esquivel-Quintana*—reversed on other grounds—is no longer binding. But it "continues to be entitled to (at the very least) persuasive weight." *CIC Servs., LLC v. Internal Revenue Serv.*, 936 F.3d 501, 507 (6th Cir. 2019) (Thapar, J., dissenting from denial of rehearing en banc). We routinely cite cases that have been vacated or reversed on other grounds as persuasive precedent. *See, e.g. United States v. Ruffin*, 783 F. App'x 478, 483 (6th Cir. 2019); *Youngblood v. Dalzell*, 925 F.2d 954, 959 n.3 (6th Cir. 1991); *Meeks v. Ill. Cent. Gulf R.R.*, 738 F.2d 748, 751 (6th. Cir. 1984).

an 'inferior' court, our job is to adhere faithfully to the Supreme Court's precedents.").[15]

2. The Majority's Independent Rationales Against Applying *Chevron*

Concluding that the question remains open, the majority provides three independent reasons why *Chevron* ought not apply in this context. I disagree with its proffered rationales.

a. The "Community Expertise" Rationale

The majority first reasons that because criminal laws involve moral judgments, agency expertise is irrelevant when laws have criminal penalties. Instead, the majority asserts, the true "experts" are community members who have learned morality from their faith

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[15] In *Dolfi v. Pontesso*, 156 F.3d 696, 700 (6th Cir. 1998), we discussed *Chevron*'s applicability to criminal laws in a way that supports the majority's view. *See id.* ("Judicial deference under *Chevron* in the face of statutory ambiguity is not normally followed in criminal cases. The rule of lenity requires a stricter construction of 'ambiguity in a criminal statute,' not deference." (citations omitted)). But this statement was dictum. Before making it, we noted that the agency regulations in that case were "as silent on the [legal] issue as the statute itself." *Id.* Because there was no regulation purporting to interpret the statutory ambiguity, *Dolfi*'s brief discussion of *Chevron* was unnecessary to its holding. *Dolfi* also never mentioned *O'Hagan* or *Babbitt*. Perhaps for those reasons, neither of the two opinions in *Esquivel-Quintana* mentioned *Dolfi*, despite the in-depth discussions both opinions offered on this issue. *See Esquivel-Quintana*, 810 F.3d at 1023-24; *id.* at 1027-32 (Sutton, J., concurring in part and dissenting in part).

and families, as opposed to "bureaucrats" with graduate degrees. Majority Op. at 18-21.[16]

But there are many areas where agency expertise is relevant to laws with criminal applications. For example, we have highly technical and complex tax, securities, and environmental-law regimes (which sometimes carry criminal penalties), where individuals' morality, faith, or family values do not provide the same expertise as does a technical background in the area. *Cf. Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1156 (10th Cir. 2016) (Gorsuch, J., concurring) (observing that agency interpretations of statutes with both civil and criminal applications fall within a "category that covers a great many (most?) federal statutes today"). The majority fails to account for the vast regulatory frameworks created by Congress, which are replete with highly technical and

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[16] *See id.* at 18-19 ("[W]e understand that the [Supreme] Court would consider bureaucrats at the ATF as experts in firearms technology. But that technical knowledge is inapposite to the question of what should be criminally punished and what should not. Criminal statutes reflect the value-laden, moral judgments of the community as evidenced by their elected representatives' policy decisions. . . . . Since our country's founding, it has been understood that the public is both capable of and necessary to the determination of right from wrong legally and morally. . . . The training for such policy determinations does not come from a graduate school education or decades of bureaucratic experience. Rather, one develops the expertise necessary to make moral judgments from sources of a more humble and local origin: one's family and upbringing. This learning is further informed by relationships with friends and neighbors, practicing one's faith, and participation in civic life.").

complex regulations that may carry criminal punishments.

The dispute here is highly technical: the issue is whether a firearm can only constitute a "machinegun" if it fires a rapid stream of bullets with a single depression of the trigger, or whether a firearm can also be a "machinegun" if it is equipped with a device that allows it to fire a rapid stream of bullets with a single pull of the trigger, despite involving a separate trigger depression for each bullet fired. That is a question focused on mechanics, not morals. The majority never explains how this issue involves morality, other than noting in the abstract that criminal laws involve "value-laden, moral judgments." Majority Op. at 18.

But morality cannot explain why *Chevron* deference is permissible in civil, but not criminal, contexts. One could just as easily argue that all laws, criminal or civil, reflect value-laden moral judgments. *See generally* Cass R. Sunstein & Adrian Vermeule, *The Morality of Administrative Law*, 131 HARV. L. REV. 1924 (2018); *cf. Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991) ("'The law . . . is constantly based on notions of morality . . . .'" (citation omitted)); *Veazie v. Williams*, 49 U.S. 134, 154 (1850) ("'All laws stand on the best and broadest basis, which go to enforce moral and social duties.'" (citation omitted)). The majority's morality-based reasoning fails to coherently explain why *Chevron* applies to civil but not criminal contexts. Extended to its logical conclusion, it simply amounts to an attack on the validity of *Chevron* and legislative delegation more broadly. *Cf. Gutierrez-Brizuela*, 834 F.3d at 1156 (Gorsuch, J., concurring) ("[T]ry as I

might, I have a hard time identifying a principled reason why the same rationale[s] [for declining *Chevron* in the criminal context do not] also apply to statutes with purely civil application."). But *Chevron* is still the law, and legislative delegation is a reality.

b. The Separation of Powers Rationale

The majority next argues that delegation in the criminal context violates the separation of powers. Majority Op. at 24-26. The Supreme Court and our Circuit have held that it does not.

The Supreme Court has recognized Congress's delegation authority in the criminal context for over a century. For example, in *United States v. Grimaud*, 220 U.S. 506 (1911), Congress delegated to the Secretary of Agriculture the power to promulgate rules-with criminal penalties-to preserve certain forest reserves. *Id.* at 507-09. The Secretary issued a rule prohibiting livestock grazing near these reserves without a permit. *Id.* at 509. The defendants, sheep farmers, were indicted for violating this rule. *Id.* They argued that the rule was unconstitutional because Congress could not "mak[e] it an offense to violate rules and regulations made and promulgated by the Secretary of Agriculture," since doing so would "delegate its legislative power to an administrative officer." *Id.* at 513. The Supreme Court rejected the challenge. *See id.* at 521 (rejecting the argument that the rules were invalid merely "because the violation thereof is punished as a public offense").

In the ensuing decades, several Supreme Court decisions recognized that Congress may delegate legislative authority in the criminal context. *See, e.g., J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 406-07 (1928) ("The field of Congress involves all and many varieties of legislative action, and Congress has found it necessary to use officers of the executive branch within defined limits, to secure the exact effect intended by its acts of legislation, by vesting discretion in such officers to make public regulations interpreting a statute and directing the details of its execution, even to the extent of providing for penalizing a breach of such regulations." (citing *Grimaud*, 220 U.S. at 518) (other citations omitted)); *Yakus v. United States*, 321 U.S. 414, 418, 423-25 (1944) (upholding delegation of authority to agency to issue price-limit regulations under Emergency Price Control Act even though violating the regulations carried criminal penalties, and rejecting non-delegation and separation-of-powers challenges by criminal defendants convicted of violating those regulations); *United States v. Mistretta*, 488 U.S. 361, 371-74, 394-96 (1989) (upholding delegation of authority to Sentencing Commission to define criminal sentencing ranges, rejecting non-delegation and separation-of-powers challenges by criminal defendant).

In *Touby v. United States*, 500 U.S. 160, 164-69 (1991), the Court upheld a delegation of legislative authority to the Attorney General to schedule substances under the Controlled Substances Act—a determination that carried criminal implications—and rejected arguments that this delegation violated the non-delegation doctrine or the separation of powers.

And in *United States v. Stevenson*, 676 F.3d 557, 565 (6th Cir. 2012), we held that the "Attorney General was properly delegated authority by Congress to enact [a] substantive rule" providing that a federal sex-offender registration statute—which imposed criminal penalties—applied retroactively to those convicted of sex crimes prior to the statute's passage. *See id.* at 563 n.3 (rejecting defendants' argument "that Congress lacked the constitutional authority to delegate this power to the Attorney General").

The majority acknowledges some of these decisions, Majority Op. at 22, yet still concludes that it would violate the separation of powers "[i]f Congress were 'to hand responsibility for defining crimes to relatively unaccountable [public officials]'. . . . Because the community has the right to determine what moral wrongs should be punished . . . that responsibility may be entrusted to only the branch most accountable to the people: the legislature. And it may not be blithely delegated away." *Id.* at 25-26 (citations omitted).[17] Whatever the merits of that view, it is not in accord with the holdings of the Supreme Court and our Circuit.

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[17] The majority is not consistent on this point. *Compare* Majority Op. at 12 ("The Court's traditional approach, under the modern nondelegation doctrine, has been to allow Congress to delegate to the executive branch the responsibility for defining crimes . . . .") *with id.* at 26 ("Because the community has the right to determine what moral wrongs should be punished . . . that responsibility may be entrusted to only the branch most accountable to the people: the legislature. And it may not be blithely delegated away.").

c. The Rule of Lenity and Fair Notice Rationale

Finally, the majority argues that ambiguous statutes with criminal penalties ought to be subject to the rule of lenity, rather than *Chevron*. Majority Op. at 26-28. If we were writing on a blank slate, this argument might carry some weight. But the Supreme Court rejected it in *Babbitt*; no case has purported to overrule *Babbitt*; and as a subordinate court, we must follow *Babbitt*.

Further, I disagree with the suggestion that applying *Chevron* would offend the fair notice that the rule of lenity promotes. The D.C. Circuit persuasively rejected this argument:

> *Chevron* promotes fair notice about the content of criminal law. It applies only when, at Congress's direction, agencies have followed "relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force." *Mead*, 533 U.S. at 230. Importantly, such procedures, which generally include formal public notice and publication in the Federal Register, do not "provide such inadequate notice of potential liability as to offend the rule of lenity." *Babbitt*, 515 U.S. at 704 n.18. . . . [I]f the [ATF's] Rule is a valid legislative rule, all are on notice of what is prohibited.

Guedes, 920 F.3d at 28. The notice-and-comment process in this case clearly functioned to inform the public of the intended prohibition. The ATF received

over 186,000 comments regarding the proposed rule before it went into effect. 83 Fed. Reg. at 66,519. One of the plaintiffs in this case—Gun Owners of America—submitted a comment challenging this rule before it went into effect on behalf of "more than 1.5 million gun owners."[18] Ample notice was provided by the notice-and-comment process.

In sum, I would apply *Chevron*. *Chevron* itself involved a law with criminal penalties, as did *O'Hagan* and *Babbitt*. The only way to get out from under the weight of these binding decisions is to suggest that *Abramski* and *Apel* silently overruled them. However, only the Supreme Court may do that. And we certainly may not depart from those binding precedents based on normative disagreements with them.

II. Applying *Chevron*

The *Chevron* framework consists of two steps. First, if the statute is unambiguous—i.e., "if 'Congress has directly spoken to the precise . . . issue' in the text of the statute"—we apply the statute's clear meaning. *Hernandez v. Whitaker*, 914 F.3d 430, 433 (6th Cir. 2019) (quoting *Chevron*, 467 U.S. at 842-43)). If the statute is ambiguous, we ask if the agency's interpretation is "'based on a permissible construction of the statute.'" *Id.* (quoting *Chevron*, 467 U.S. at 843).

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[18] *See* Gun Owners of Am., Comment Letter on the Proposed Rulemaking Entitled "Application of the Definition of Machinegun to 'Bump Fire' Stocks and Other Similar Devices" (received Jan. 12, 2018), https://www.regulations.gov/document?D=ATF-2018-0001-4434.

1. A. The Statute is Ambiguous

A statutory phrase is ambiguous when its terms "admit of two or more reasonable ordinary usages." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 989 (2005); *see also All. for Cmty. Media v. F.C.C.*, 529 F.3d 763, 777 (6th Cir. 2008) (noting that a statutory phrase is ambiguous "when 'to give th[e] phrase meaning requires a specific factual scenario that can give rise to two or more different meanings of the phrase.'" (alteration in original) (quoting *Beck v. City of Cleveland*, 390 F.3d 912, 920 (6th Cir. 2004))). The statutory phrase at issue here—the definition of "machinegun," as applied to bump-stocks—is capable of two or more meanings.

The statute defines "machinegun" as follows:

> The term "machinegun" means 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. The term shall also include 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). As the majority observes, there are two key sources of dispute over the statute's

meaning: first, the phrase "single function of the trigger," and second, the word "automatically." Both are ambiguous.

"Single Function of the Trigger." I agree that the phrase "single function of the trigger" is capable of two readings: one favoring the government (the "shooter-focused" reading), the other favoring Plaintiffs (the "mechanical" reading). The shooter-focused reading corresponds to a single "pull" of the trigger—i.e., a single human action upon the trigger that initiates a rapid-fire sequence. Under this reading, a bump-stock-equipped rifle constitutes a machinegun because a single human action—the initial "pull" of the trigger—initiates a rapid firing sequence. The mechanical reading takes the phrase "single function of the trigger" to mean "single *depression* of the trigger." Under this view, a bump-stock-equipped rifle is not a machinegun because each bullet fired is initiated by a separate depression of the trigger, albeit one generated by the weapon's recoil. *Accord Guedes*, 920 F.3d at 29; Majority Op. at 30.

Both readings are plausible. "The word 'function' focuses on the 'mode of action' . . . by which the trigger operates. But that definition begs the question of whether 'function' requires our focus upon the movement of the trigger, or the movement of the trigger finger. The statute is silent in this regard." *Aposhian*, 958 F.3d at 986 (quoting 4 OXFORD ENGLISH

DICTIONARY 602 (1933)).[19] *See also* Majority Op. at 31-32 (looking to contemporaneous dictionaries from around 1968—when the Gun Control Act of 1968 was passed—and finding that the "dictionary definition of 'function' lends support to both interpretations. . . . [B]ecause 'function' means 'action,' dictionaries alone do not reveal whether the statute is referring to the mechanical 'act' of the trigger's being depressed or the physical 'act' of the shooter's pulling the trigger." (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 920-21 (1967); WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY 338 (1967))).

Because the statutory text is ambiguous, "the statute contains a 'gap for the agency to fill.'" *Guedes*, 920 F.3d at 29 (quoting *Chevron*, 467 U.S. at 843)). The majority reasons that § 5845(b)'s statutory context shows that the mechanical reading is the better interpretation, emphasizing its focus on the word "trigger," overall focus on the gun's design and parts, and lack of comparable reference to the shooter. Majority Op. at 32-33. But "[a]t *Chevron*'s first step, we

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[19] *See also Guedes*, 920 F.3d at 29 ("A mechanical perspective, for instance, might focus on the trigger's release of the hammer, which causes the release of a round. From that perspective, a 'single function of the trigger' yields a single round of fire when a bump-stock device moves the trigger back and forth. By contrast, from the perspective of the shooter's action, the function of pulling the trigger a single time . . . yields multiple rounds of fire. . . . Neither of those interpretations is compelled (or foreclosed) by the term 'function' in 'single function of the trigger.' The word 'function' focuses our attention on the 'mode of action' . . . by which the trigger operates. But the text is silent on the crucial question of *which perspective* is relevant." (citations omitted)).

do not ask which . . . interpretation[] is the better reading of the statute. Rather, we ask whether either of those interpretations is unambiguously 'compel[led]' by the statute, to the exclusion of the other one." *Guedes*, 920 F.3d at 30 (alteration in original) (quoting *Chevron*, 467 U.S. at 860). Here, "the answer is no." *Id.*

"Automatically." The word "automatically" is also ambiguous. The statute provides that a machinegun is a "weapon which shoots . . . *automatically* more than one shot, without manual reloading, by a single function of the trigger." 26 U.S.C. § 5845(b) (emphasis added). Here, too, there are competing interpretations, and the text does not unambiguously foreclose either of them.

Plaintiffs argue that the phrase "automatically" must mean "'by itself with little or no direct human control.'" Appellants' Br. at 24 (citation omitted). They reason that since a shooter must exert constant pressure to cause a bump-stock-equipped rifle to continue firing, these devices do not create a weapon that "shoots automatically." *Id.* 23-25. The government responds that "automatically" means "self-acting or self-regulating." Appellees' Br. at 28. In the government's view, a bump-stock-equipped rifle is "self-acting" in the sense that once the shooter establishes the conditions necessary to begin the firing process—pulling the trigger, placing a finger on the extension ledge, and applying "pressure on the barrel-shroud or fore-stock with the other hand"—the "bump stock . . . [can] repeatedly perform its basic purpose: 'to eliminate the need for the shooter to manually capture, harness, or otherwise utilize th[e]

[recoil] energy to fire additional rounds.'" *Id.* at 28-29 (second and third alterations in original) (quoting 83 Fed. Reg. at 66,532)).

According to dictionary definitions at the time the National Firearms Act was issued, the word "automatically"—the adverbial form of the word "automatic"—means "[h]aving a self-acting or self-regulating mechanism that performs a required act at a predetermined point in an operation[.]" WEBSTER'S NEW INTERNATIONAL DICTIONARY 187 (2d ed. 1934); see also 1 OXFORD ENGLISH DICTIONARY 574 (1933) (defining "Automatic" as "[s]elf-acting under conditions fixed for it, going of itself"). The focus on a "self-regulating *mechanism*" cuts against the suggestion that the word "automatically" requires complete, as opposed to partial, automation, and lends support to the government's view. Further, Plaintiffs' argument that bump-stock-equipped weapons do not fire "automatically" because they require constant forward pressure is belied by common usage of the word "automatic." For example, "an 'automatic' sewing machine still 'requires the user to press a pedal *and* direct the fabric.'" *Guedes*, 920 F.3d at 30 (citation omitted)). And an "automatic" car shifts gears on its own, but only if the driver maintains enough constant pressure on the gas pedal to reach a speed that triggers a gear shift.

As other courts have recognized, the ultimate question is how much human input is contemplated by the word "automatically." That is a question of degree that the statute's text does not definitively answer. The D.C. Circuit's explanation captures this point well:

> The term "automatically" does not require that there be *no* human involvement to give rise to "more than one shot." Rather, the term can be read to require only that there be *limited* human involvement to bring about more than one shot. *See, e.g.*, Webster's New International Dictionary 157 (defining "automatically" as the adverbial form of "automatic"); *id.* at 156 (defining "automatic" as "self-acting or self-regulating," especially applied to "machinery or devices which perform *parts* of the work formerly or usually done by hand" (emphasis added)). But how much human input in the "self-acting or self-regulating" mechanism is too much?
>
> . . . . [T]he phrase "by a single function of the trigger" . . . can naturally be read to establish only the preconditions for setting off the "automatic" mechanism, without foreclosing some further degree of manual input such as the constant forward pressure needed to engage the bump stock in the first instance. And if so, then the identified ambiguity endures. How much further input is permitted in the mechanism set in motion by the trigger? The statute does not say.

Guedes, 920 F.3d at 30-31. Thus, this term is also ambiguous.

B. The ATF's Interpretation Is Reasonable

At the second step of the *Chevron* analysis, we ask whether "the agency's [reading] is based on a

permissible construction of the statute." *Chevron*, 467 U.S. at 843. The ATF's interpretation of both phrases-"single function of the trigger" and "automatically"-are permissible constructions, and they are reasonable.

The ATF's shooter-focused interpretation of "single function of the trigger" is reasonable. The ATF has viewed the phrase to mean "single *pull* of the trigger" since 2006, when it determined that a spring-coiled bump-stock-the "Akins Accelerator"-was a "machinegun." 83 Fed. Reg. at 66,517. In 2009 the Eleventh Circuit held that this reading was "consonant with the statute and its legislative history." *Akins v. United States*, 312 F. App'x 197, 200 (11th Cir. 2009); *see also Aposhian*, 958 F.3d at 988 (agreeing with *Akins* that this reading is permissible); *Guedes*, 920 F.3d at 31 (same). In 1934, when the National Firearms Act was enacted, the president of the National Rifle Association testified in a congressional hearing that the term "machine gun" included any gun "'capable of firing more than one shot by a single pull of the trigger, a single function of the trigger.'" 83 Fed. Reg. at 66,518 (citation omitted). The House Report accompanying the bill that became the National Firearms Act said that the bill "'contains the usual definition of a machine gun as a weapon designed to shoot more than one shot . . . by a single pull of the trigger.'" *Guedes*, 920 F.3d at 31 (quoting H.R. Rep. No. 73-1780, at 2 (1934)). Further, the ATF's focus on the human factor is reasonable. The practical effect of the bump-stock device is to turn a semi-automatic firearm into a rapid-fire firearm that only requires the person firing the gun to pull the trigger once.

The ATF's interpretation of "automatically" is also reasonable. It allows for *some* human involvement, but that "accords with the everyday understanding of the word 'automatic.'" *Id.* The interpretation also fits within some of the relevant dictionary definitions that existed at the time the National Firearms Act was enacted in 1934—first defining "machinegun"—and when the Gun Control Act of 1968 slightly altered that definition.[20] In 1934, Webster's New International Dictionary defined "automatic" as "[h]aving a self-acting or self-regulating *mechanism*." WEBSTER'S NEW INTERNATIONAL DICTIONARY 187 (2d ed. 1934) (emphasis added). Dictionaries from 1965 and 1967 do the same. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 148 (1965); WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY 60 (1967). It is reasonable to read the phrase "automatically" as requiring only a *partial* self-regulation—i.e., a mechanism that allows for an integral *part* of a process to be performed autonomously.

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In sum, *Chevron* deference applies to the ATF's legislative regulation, the statute is ambiguous, and the ATF's construction is reasonable and warrants deference. I therefore respectfully dissent.

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[20] The 1968 definition dropped the word "semiautomatically" from the 1934 definition and added references to various parts that, together, could convert a firearm into a machinegun. *See* Majority Op. at 4.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

GUN OWNERS OF AMERICA, et al., Plaintiffs,	)
	) No. 1:18-cv-1429
-v-	)
	) Honorable Paul L.
WILLIAM P. BARR, et al., Defendants.	) Maloney
	)

OPINION AND ORDER DENYING PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

On December 26, 2018, the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), a part of the Department of Justice, published a Final Rule re-interpreting undefined terms found in the statutory definition of the word "machinegun." 83 Fed. Reg. 66514 (Dec. 26, 2018). As a result of the new interpretation, devices commonly known as "bump stocks" fall under the statutory definition of "machinegun." Members of the public are not allowed to possess machine guns manufactured after 1986. The Final Rule requires bump stock owners to dispose of their devices by March 26, 2019. After March 26, people who possess a bump stock can be charged with a felony.

Plaintiffs filed a lawsuit challenging the Final Rule. Along with their complaint, Plaintiffs filed a motion for

a preliminary injunction (ECF No. 9) asserting a likelihood of success on their asserted violations of the Administrative Procedures Act (APA). Because Congress has not spoken on the matter and the statutory terms are ambiguous, Plaintiffs have not demonstrated a likelihood of success on the merits of their administrative law claims and their motion for a preliminary injunction must be denied.

I.

After Plaintiffs filed their motion for a preliminary injunction (ECF No. 9), Defendants filed a response (ECF No. 34) and Plaintiffs filed a reply (ECF No. 37). Defendants subsequently filed a Notice of Supplemental Authority. (ECF No. 38.) On February 25, 2019, Judge Dabney Friedrich of the District Court for the District of Columbia issued a memorandum opinion denying a motion for a preliminary injunction in the firstfiled action challenging the Final Rule. *See Guedes v. AFT*, 356 F. Supp. 3d 109 (D.D.C. Feb. 25, 2019).[1] The Court takes judicial notice of Judge Jill Parrish's decision to deny a preliminary injunction in another challenge to the Final Rule, which was filed in the United States District Court in Utah. *See Aposhian v. Barr*, No. 2:19-cv-37, 2019 WL 1227934 (D. Utah Mar. 19, 2019). The Court held a hearing on this motion in this case on March 6, 2019.

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[1] As of the date of this Opinion, Westlaw had not yet included page numbers to Judge Friedrich's decision. Where necessary, this Court cites to the page numbers in the slip opinion.

The standards for a preliminary injunction are well-settled. Preliminary injunctions are governed by Rule 65. The decision to grant or deny a preliminary injunction falls within the district court's discretion. *McGirr v. Rehme*, 891 F.3d 603, 610 (6th Cir. 2018). A court considers four factors when deciding whether to issue an injunction: (1) the moving party's chances of success on the merits; (2) the irreparable harm to the moving party without an injunction; (3) the substantial harm to the public were an injunction granted; and (4) whether an injunction would serve the public's interest. *Id.* (citing *S. Glazer's Distrib. of Ohio, LLC v. Great Lakes Brewing Co.*, 860 F.3d 844, 849 (6th Cir. 2017)). Each of the four factors is not a prerequisite for an injunction, rather, courts must balance the factors when deciding whether to issue an injunction. *Great Lakes Brewing*, 860 F.3d at 849. When the government is a party, the final two factors for a preliminary injunction merge. *Nken v. Holder*, 556 U.S. 418, 435 (2009) (involving a request for a stay); *Osorio-Martinez v. Attorney Gen. of the United States*, 893 F.3d 153, 178 (3d Cir. 2018) (involving a request for a preliminary injunction).

The Supreme Court has cautioned that a "preliminary injunction is an extraordinary remedy never awarded as of right" and that courts "'must balance the competing claims of injury and must consider the effect on each party with the granting or withholding of the requested relief.'" *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008) (citation omitted). Where a plaintiff has no likelihood of success on the merits, a preliminary injunction should be denied. *Great Lakes Brewing*; *see Gonzales v. Nat'l Bd.*

of Med. Examiners, 225 F.3d 620, 625 (6th Cir. 2000) ("Although no one factor is controlling, a finding that there is simply no likelihood of success on the merits is usually fatal.").

II.

A.

With the framework for the relief requested in Plaintiffs' motion in mind, the Court considers the historical and statutory backdrop for this dispute.

Prohibition, the "noble experiment," lasted from 1920 to 1933. The criminalization of intoxicating liquors created a lucrative, illegal market for alcoholic beverages. During these years, local gangs evolved and organized into criminal enterprises to exploit the demand for illegal alcohol. As these criminal organizations expanded, so too did the danger those organizations posed to each other and the public. Among the weapons adopted and used by these criminal organizations were rapid-fire, hand-held guns, like the Thompson submachine gun, a weapon that began production in the 1920s and could fire several hundred rounds a minute. In 1929, Tommy guns were used in the infamous St. Valentine's Day Massacre, an incident where members of one Chicago gang dressed like police officers killed seven members of a rival gang. On February 20, 1933, Congress proposed the Twenty-First Amendment, which was adopted by the required number of States on December 5, and the experiment with prohibition ended. The

threat to the public from criminal organizations, however, remained.

Congress began to address the threat that rapid-fire weapons pose to the public, an effort that has continued for decades. A year after Prohibition ended, Congress enacted the National Firearms Act (NFA) as an attempt to protect the public from the dangers posed by military-type weapons likely to be used for criminal purposes. *See United States v. Thompson / Ctr. Arms Co.*, 504 U.S. 505, 517 (1992) ("It is of course clear from the face of the Act that the NFA's object was to regulate certain weapons likely to be used for criminal purposes, ..."); *United States v. Peterson*, 476 F.2d 806, 810 (9th Cir. 1973) ("We have concluded from a perusal of the legislative history of the act that Congress was well aware of the rampant destruction of property and dangers to life and limb faced by the public through the use of converted military type weaponry and the street variety of homemade instruments and weapons of crime and violence."). Congress imposed a tax on both the making and the transfer of NFA firearms. Following the assassinations of Senator Robert Kennedy and Dr. Martin Luther King, in 1968 Congress amended the NFA by enacting the Gun Control Act (GCA), which, among other things, expanded the NFA's definition of "machinegun." Finally, in 1986, Congress enacted the Firearm Owners Protection Act (FOPA), which makes it "unlawful for any person to transfer or possess" a newly manufactured machine gun. 18 U.S.C. § 922(c). The FOPA references the NFA's definition of machine gun. *Id.* § 921(a)(23). When ATF issued its Final Rule in December 2018, Congress defined "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. The term shall also include the frame or receiver of such weapon, any part designed and intended solely and exclusively, or combination of parts designed an 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 possession or under the control of a person.

26 U.S.C. § 5845(b).

Congress has identified the Attorney General of the United States as the officer responsible for the administration and enforcement of Chapter 53 of Title 26 of the United States Code. 26 U.S.C. § 7801(2)(A)(i). The definition of "machinegun" is located in Chapter 53. Congress has also authorized the Attorney General to promulgate rules and regulations necessary to carry out the provisions of Chapter 44 of Title 18, the portion of the United States Code concerning the unlawful acts involving firearms. 18 U.S.C. § 926(a). In turn, the Attorney General has identified the Direction of the Bureau of Alcohol, Tobacco, Firearms and Explosives as responsible for administering, enforcing, and exercising the functions and powers of the Attorney General with respect to Title 18 Chapter 44 and Title 26 Chapter 53. 28 U.S.C. § 0.130(A)(1) and (2).

Exercising this delegated authority, ATF has provided both formal and informal guidance

concerning firearm devices. In a few instances, ATF has promulgated Final Rules concerning a firearm device. *See, e.g.*, ATF Rul. 2006-2 (Final Rule determining the Akins Accelerator bump stock was a machine gun). More commonly, ATF issues informal letters. ATF encourages, but does not require, manufacturers to seek informal rulings or classification letters prior to offering devices for sale. *See Sig Sauer, Inc. v. Jones*, 133 F. Supp. 3d 364, 367 n.2 (D.N.H. 2015). Both regulatory actions—Final Rules and informal letters—have been challenged in federal courts. *E.g., Akins v. United States*, 312 F. App'x 197 (11th Cir. 2009) (per curiam) (affirming Final Rule); *Sig Sauer, Inc. v. Brandon*, 826 F.3d 598 (1st Cir. 2016) (affirming classification letter).

B.

As occurred in the 1930s and then again in the 1960s, a well-publicized shooting provided the impetus for further review of federal restrictions on firearms. On October 1, 2017, a gunman in Las Vegas, Nevada, fired over one thousand rounds of ammunition into a crowd gathered for a concert. Fifty-eight people died and several hundred were wounded by the gunfire. The gunman reportedly employed bump-stock devices on several of his weapons. Following this tragic event, members of Congress, a number of non-governmental organizations, and eventually the President of the United States urged AFT to re-examine its prior considerations of bump stocks.

On December 26, 2017, the Department of Justice published an advanced notice of proposed rulemaking

concerning bump-stock devices. On March 29, 2018, the Department published a notice of proposed rulemaking. The Department received over 185,000 comments, with the comments supporting the proposed rules exceeding those opposing the proposed rules at about a two-to-one ratio.

To appreciate how the new interpretation of the definition of machine gun implicates bump-stock devices, one must understand how the device works. The stock of a rifle is the portion of the weapon behind the trigger and firing mechanism and extends rearward towards the shooter. The forward part of the stock just behind the trigger provides a grip for the shooting hand. The rear end of the stock rests against the shooter's shoulder. A bump stock replaces the standard stock on a rifle. Bump stocks include an extension ledge or finger rest on which the shooter places his or her trigger finger where it is stabilized. 83 Fed. Reg. at 66516. The shooter then exerts a constant forward pressure on the barrel of the rifle using the non-trigger hand. *Id.* As the rifle is pushed forward, the shooter also pulls the trigger, initiating the firing sequence. *Id.* at 66532. The bump stock then harnesses the rearward recoil energy from the shot causing the weapon to slide back into shooter's shoulder separating the trigger finger resting on the ledge and the trigger itself. The constant forward pressure exerted by the non-trigger hand on the barrel then pushes the weapon forward "bumping" the weapon against the stationary trigger finger. The back-and-forth sequence allows a shooter to fire a semiautomatic rifle at rates similar to automatic rifles.

In the Final Rule, the ATF amended its regulations to clarify that bump-stock devices are machine guns, as that term is defined in the National Firearms Act and the Gun Control Act "because such devices allow a shooter of a semiautomatic firearm to initiate a continuous firing cycle with a single pull of the trigger." 83 Fed. Reg. at 66515. The Final Rule advances two definitions, both interpreting portions of the statutory definition of machine gun. First, the Final Rule interprets the phrase "single function of the trigger" to mean "single pull of the trigger." *Id.* at 66518. Second, the Final Rule interprets the term "automatically" to mean "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." *Id.* at 66519. Based on the two interpretations, the Final Rule clarifies that the term "machinegun" extends to devices like bump stocks that permit a semiautomatic weapon to shoot more than one shot with a single pull of the trigger "by harnessing the recoil energy" "so that the trigger resets and continues firing without additional physical manipulation of the trigger by the shooter." *Id.*

III.

A.

To prevail on this motion for a preliminary injunction, Plaintiffs must demonstrate a likelihood of success on the merits. Accordingly, the Court considers what Plaintiffs must prove to prevail on the alleged violations of the APA.

The APA authorizes federal courts to review agency decisions and set aside those agency actions that are arbitrary and capricious or are in excess of the agency's statutory authority. 5 U.S.C. § 706(2)(A) and (C); *see Tennessee Hosp. Ass'n. v. Azur*, 908 F.3d 1029, 1037 (6th Cir. 2018). The Sixth Circuit has instructed that when an agency's decision depends on its construction of a federal statute, courts must determine what level of deference to afford that decision and then whether the decision exceeded the agency's statutory authority. *See Atrium Med. Ctr. v. United States Dept. of Health and Human Servs.*, 766 F.3d 560, 566 (6th Cir. 2014). If necessary, courts then evaluate the agency's reasoning to determine if the decision was arbitrary and capricious. *Id.*

The level of deference a court must afford to the agency's decision depends on whether "Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law[.]" *United States v. Mead*, 533 U.S. 218, 229 (2001); *see Atrium Med. Ctr.*, 766 F.3d at 566-67; *United States v. One TRW, Model M14, 7.62 Caliber Rifle*, 441 F.3d 416, 419-20 (6th Cir. 2006); *accord Sierra Club v. United States Army Corps of Eng'rs*, 909 F.3d 635, 643 (4th Cir. 2018). Following *Chevron, U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), agency decisions that meet a two-part test are afforded deference if the decision is "permissible," meaning that the decision is "within the bounds of reasonable interpretation." Id. at 842-43; *see Arangure v. Whitaker*, 911 F.3d 333, 338 (6th Cir. 2018); *Tennessee Hosp. Ass'n.*, 908 F.3d at 1037-38. But, when Congress did not expect the agency's

decision to carry the force of law, the decision is afforded deference only to the extent of its persuasiveness, *i.e., Skidmore* deference. *Mead*, 533 U.S. at 228; *see Atrium Med. Ctr.*, 766 F.3d at 566-67.

Neither party attempts to navigate the hazardous waters of *Chevron/Skidmore*.[2] The two recent denials of motions for preliminary injunctions referenced above both afforded AFT deference, one relying on *Chevron* and the other relying on a *Skidmore*-like approach.[3] Here, both parties merely refer the Court to the statutory language of the APA. Defendants have explicitly stated that they do not contend that this Court should apply *Chevron* deference to the Final Rule. (ECF No. 38 Notice of Supplement Authority PageID.302.) In their brief, Defendants simply defend ATF's interpretations as reasonable. Plaintiffs rely on the standard set forth in the APA and cite *Radio Association on Defending Airway Rights v. United States Department of Transportation*, 47 F.3d 794, 802 (6th Cir. 1995). *Radio Association* cites and relies on *Motor Vehicle Manufacturers Association of the United States v. State Farm Mutual Automobile Insurance Company*, 463 U.S. 29, 43 (1983). Problematic for

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[2] The Sixth Circuit recently described the status of *Chevron* as "already-questionable," *Arangure*, 911 F.3d at 338, and noted that "[m]any members of the Supreme Court have called *Chevron* into question, *id.* at n.3.

[3] In *Guedes*, Judge Friedrich discusses "the familiar *Chevron* framework," *slip op.* at 13-15, and then applied *Chevron*, *id.* at 18-25. In *Aposhian*, Judge Parris found that the Final Rule was "interpretive" 2019 WL 1227934, at *3, and concluded that the Final Rule reached the "best interpretation, *Id*. at *4 and *5.

Plaintiffs, *Motor Vehicle Manufacturers* was published a year before *Chevron*. While the parties might like to avoid *Chevron/Skidmore*, this Court cannot. This Court must apply the law as it is set forth by the Supreme Court and the Sixth Circuit, both of which have set forth guidelines for determining when *Chevron* or *Skidmore* applies to challenges brought under the APA.

Should any deference be afforded to the interpretation in the Final Rule, *Chevron* not *Skidmore* would apply. The statutory scheme suggests that Congress intended the ATF speak with the force of law when addressing ambiguity or filling a space in the relevant statutes. Federal courts must follow the *Chevron's* framework if "'Congress delegated authority to the agency generally to make rules carrying the force of law' *and* agency interpretation was 'promulgated in the exercise of that authority.'" *Atrium Med. Ctr.*, 766 F.3d at 566. Congress has delegated the authority to administer and enforce the statutes to the Attorney General, including the authority to prescribe necessary rules and regulations. 18 U.S.C. § 926(a)26 U.S.C. § 7801(A)(2)(A); *Akins*, 312 F. App'x at 198; *Freedom Ordnance Mfg., Inc.*, No. 3:16-cv-243, 2018 WL 7142127, at *5 n.6 (S.D. Ind. Mar. 27, 2018). The Attorney General then delegated the authority to ATF. 28 C.F.R. §0.130(a). Using the formal rulemaking process, ATF reviewed the statute and promulgated both new interpretations and new regulations. The use of formal rulemaking procedures further suggests the Court should apply the *Chevron* analysis. *See Mead*, 533 U.S. at 229-30. And, although not determinative, ATF interpreted the NFA and GCA as containing a

congressional delegation of authority. 83 Fed. Reg. at 66527.

When applying *Chevron*, courts perform a two-step test. *Arangure*, 911 F.3d at 337 (citing *City of Arlington v. F.C.C.*, 569 U.S. 290, 296 (2013)). First, the court must determine whether "Congress has directly spoken to the precise question at hand." *Chevron*, 467 U.S. at 842. Second, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. As part of the second step, courts consider whether the agency's rule is arbitrary or capricious or contrary to the statute. *Mayo Found. for Med. Educ. and Research v. United States*, 562 U.S. 44, 53 (2011).

For the first step, the Court determines any ambiguity in the statute by applying the ordinary tools of statutory construction. *Arangure*, 911 F.3d at 337. A statute is ambiguous when "to give th[e] phrase meaning requires a specific factual scenario that can give rise to two or more different meanings of the phrase." *All. for Cmty. Media v. F.C.C.*, 529 F.3d 763, 777 (6th Cir. 2008) (quoting *Beck v. City of Cleveland, Ohio*, 390 F.3d 912, 920 (6th Cir. 2004)). The statutory language must be viewed in context, not in isolation. *Id.* Although Congress defined the term "machinegun," it did not further define words or phrases used in that that definition. More specifically, Congress did not further define either the word "automatically" or the phrase "single function of the trigger." But, the lack of a definition does not necessarily mean that Congress

was silent on the specific issue. *Arangure*, 911 F.3d at 337 n.2. And, the lack of a definition does not require the conclusion that the statute is ambiguous. *Id.* at 338.

The Court concludes that Congress has not directly addressed the precise question at issue. Congress has not indicated whether bump stocks are included in the statutory definition of machine gun. *See e.g., Mayo Found.*, 562 U.S. at 52 ("The statute does not define the term "student," and does not otherwise attend to the precise question whether medical residents are subject to FICA.").

B.

When applied to bump stocks, the precise question at hand, the statutory definition of machine gun is ambiguous with respect to the word "automatically." When bump stocks are considered, the phrase "shoots . . . automatically more than one shot, without manual reloading, by a single function of the trigger," has more than one possible meaning. In the statute, "automatically" functions as an adverb modifying the verb "shoots." Relying on definitions from the 1930s, the ATF, 83 Fed. Reg. at 66519, and Defendants interpret the word to mean "the result of a self-acting or self-regulating mechanism." Citing contemporary definitions, Plaintiffs contend the term automatically means the device works "by itself with little or no direct human control."

Fairly summarized, the parties' dispute is whether the forward pressure exerted by the shooter using the

non-trigger hand requires the conclusion that a bump stock does not shoot automatically. The statutory definition of machine gun does not answer this specific question. Dictionaries contemporary with the enactment of the NFA do not conclusively resolve the issue. The statute is ambiguous as to whether the word "automatically" precludes any and all application of non-trigger, manual forces in order for multiple shots to occur. Read in context, a weapon is a machine gun when more than one shot occurs without manual reloading. Putting forward pressure on the barrel with the non-trigger hand is not manual reloading. Judge Friedrich observed, many "automatic" devices require some degree of manual input. *Guedes*, *slip op.* at 22. And, as Judge Parrish noted, machine guns which indisputably shoot automatically often require physical manipulation by the shooter, including constant rearward pressure on the trigger. *Aposhian*, 2019 WL 1227934, at *5. Accordingly, the Court concludes, with respect to the word "automatically," the statutory definition of machine gun is ambiguous.

AFT's interpretation of the word "automatically" is a permissible interpretation. The interpretation is consistent with judicial interpretations of the statute. *See United States v. Olofson*, 563 F.3d 652, 658 (7th Cir. 2009). And, Plaintiffs have not established that ATF's interpretation exceeds the agency's statutory authority. Accordingly, ATF's interpretation is entitled to *Chevron* deference.

C.

When applied to bump stocks, the statutory definition of machine gun is ambiguous with respect to the phrase "single function of the trigger." Within the statutory context, the phrase can have more than one meaning. Defendants and ATF define "single function of the trigger" as "single pull of the trigger." Their interpretation considers the external impetus for the mechanical process. Plaintiffs define the phrase as the mechanical process which causes each shot to occur. The statute does not make clear whether function refers to the trigger as a mechanical device or whether function refers to the impetus for action that ensues. Both interpretations are reasonable under the statute. And, dictionaries from the 1930s provide no helpful guidance. *See Guedes*, *slip op.* at 19-20.

Courts interpreting the statute reinforce the conclusion that the disputed phrase is ambiguous. In a footnote in *Staples v. United States*, 511 U.S. 600, 602 n.2 (1994), the Supreme Court described automatic weapons as a weapon that "fires repeatedly with a single pull of the trigger." In *United States v. Fleischli*, 305 F.3d 643, 655 (7th Cir. 2002), the Seventh Circuit rejected, as "puerile," the defendant's argument that his minigun did not have a trigger, another term not defined in the statute. The court joined other circuits "in holding that a trigger is a mechanism used to initiate a firing sequence." *Id.* (collecting cases). The two interpretations are not mutually exclusive. ATF's interpretation finds support in *Staples* while Plaintiffs' interpretation finds support in *Fleischli*. And, in *Fleischli*, the court noted that dictionary definitions of "trigger" include both the mechanism itself and the act

or event that serves as impetus for the ensuing action. *Id.* at 656.

ATF's interpretation of the phrase "single function of the trigger" is a permissible interpretation. It is consistent with judicial opinions interpreting the statute. Plaintiffs have not established that ATF exceeded its authority. ATF has been interpreting the disputed phrase in a similar manner at least since 2006. *See* ATF Rul. 2006-2; *Akins*, 312 F. App'x at 200.

IV.

Because this Court is bound to follow *Chevron*, and because this Court has concluded that the interpretations in the Final Rule must be afforded deference, the Court considers Plaintiffs' arguments that the interpretations are, nevertheless, arbitrary and capricious.[4] The Court finds ATF's interpretations are not arbitrary and capricious.

A.

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[4] For one of its arguments, Plaintiffs contend the new interpretation is arbitrary and capricious because it will allow semiautomatic weapons to be classified as machine guns. In this section, II(E), Plaintiffs pose at least eight rhetorical questions. Many of the questions assume that one person owns both a semiautomatic weapon and a bump stock. But, after March 26, no one is supposed to own a bump stock. Therefore, the premise of those questions is flawed. Plaintiffs also asks whether future administrations might ban semiautomatic weapons. Plaintiffs have advanced a "slippery slope," a logical fallacy that avoids the question presented and shifts to a more extreme hypothetical.

Plaintiffs argue that rubber bands and belt loops can be used to accomplish the same bump-fire sequence as bump stocks.

ATF's interpretations are not arbitrary and capricious because rubber bands and belt loops could be used to increase the rate of fire in a semiautomatic weapon. ATF specifically addressed this argument in the Final Rule. 83 Fed. Reg. at 66532-33. Rubber bands and belt loops are not parts or devices "designed and intended" as parts for a firearm. And, as ATF points out, rubber bands and belt loops do not harness the recoil energy when a shot is fired. The final phrase in the definition of machine gun does include the words "combination of parts from which a machinegun can be assembled." 28 U.S.C. § 5845(b). Plaintiffs' fear is not well-founded. AFT's interpretations of the statute—the definitions of "automatically" and "single function the trigger"—which extends to devices specially designed and marketed for the purpose of increasing the rate of fire of a semiautomatic weapon will not pose a danger of prosecution to individuals who own a semiautomatic weapon and also happen to own pants or elastic office supplies. "[N]othing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid unjust or an absurd conclusion[.]" *In re Chapman*, 166 U.S. 677, 680 (1897).

B.

Plaintiffs assert the new interpretation is arbitrary and capricious because ATF previously concluded that bump stocks were not machine guns.

The United States Supreme Court has rejected a rule that changes in statutory interpretations by agencies are necessarily arbitrary and capricious. *See Motor Vehicle Mfgs. Ass'n*, 463 U.S. at 42. Rules promulgated by agencies do not "last forever" and agencies have "ample latitude" to establish rules in response to changing times and circumstances. *Id.* (citation omitted). The standard for reviewing an agency's rule or interpretation of a statute does not change just because the agency reversed course and altered its prior interpretation. *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 514-15 (2009). When an agency changes an earlier rule it must "provide [a] reasoned explanation for its action" and it must "display [an] awareness that it *is* changing positions." *Id.* at 515. The agency must always set forth good reasons for a new rule. *Id.* But, when the agency departs from a prior rule, it need not explain why the "reasons for the new policy are *better* than the reasons for the old one." *Id.* ATF has met its burden. ATF acknowledged how it previously treated bump stocks. 83 Fed. Reg. at 66517. Among other reasons, ATF concluded that its prior considerations "did not provide substantial or consistent legal analysis regarding the meaning of the term 'automatically[.]'" *Id.* at 66518. ATF then set forth sufficient reasons for its new interpretations.

V.

The Court concludes that Plaintiffs have not demonstrated a likelihood of success on the merits of their APA challenges to ATF's Final Rule. With this determination, Plaintiffs' motion for a preliminary

injunction will be denied. Defendants concede that Plaintiffs will suffer irreparable harm without an injunction. (Pl. Resp. at 27 n.16 PageID.279.) The two remaining factors do not weigh heavily in favor of Plaintiffs, if at all. Congress restricts access to machine guns because of the threat the weapons pose to public safety.[5] Restrictions on bump stocks advance the same interest. All of the public is at risk, including the smaller number of bump stock owners.

Most of Plaintiffs' arguments on the final two elements are merely extensions of the first and second elements of a preliminary injunction. Plaintiffs identify the adverse impact on the liberty and property interests of bump-stock owners as supporting the public's interest in a preliminary injunction. The property interest identified overlaps completely with the second element for a preliminary injunction, irreparable harm. Plaintiffs contend that the Final Rule jeopardizes a bump-stock owner's right to bear arms. That assertion overlaps with the merits element; Plaintiffs' assume bump stocks are protected by the right to bear arms. At least one circuit court, post *Heller*, has found that machine guns are not protected bearable arms under the Second Amendment. *Hollis v. Lynch*, 827 F.3d 436, 451 (5th Cir. 2016). Plaintiffs also assert that the public has an interest in the proper exercise of legislative power and that the Final Rule

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[5] ATF did not "waive" this justification in the Final Rule. ATF made several references to public safety as a justification for the interpretation in the portion of the Final Rule addressing the public's comments. *See* 83 Fed. Reg. at 66520 and 66529.

exceeds ATF's statutory authority. Again, that interest overlaps entirely with the merits of Plaintiffs' claim.

Accordingly, the balance of the four factors weighs against Plaintiffs and the Court declines to issue a preliminary injunction.

ORDER

For the reasons provided in the accompanying Opinion, Plaintiffs' motion for a preliminary injunction (ECF No. 9) is **DENIED**.

IT IS SO ORDERED.

Date: March 21, 2019

/s/ Paul L. Maloney
Paul L. Maloney
United States District Judge

Statutory Provisions Involved

18 U.S.C. § 922(o)

(1)Except as provided in paragraph (2), it shall be unlawful for any person to transfer or possess a machinegun.

(2)This subsection does not apply with respect to—

(A) a transfer to or by, or possession by or under the authority of, the United States or any department or agency thereof or a State, or a department, agency, or political subdivision thereof; or

(B) any lawful transfer or lawful possession of a machinegun that was lawfully possessed before the date this subsection takes effect.

26 U.S.C. § 5845(b)

Machinegun

The term "machinegun" means 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. The term shall also include 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.

Regulatory Provisions Involved

A. 27 C.F.R. § 447.11

Meaning of terms.
When used in this part and in forms prescribed under this part, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof, terms shall have the meanings ascribed in this section. Words in the plural form shall include the singular, and vice versa, and words imparting the masculine gender shall include the feminine. The terms "includes" and "including" do not exclude other things not enumerated which are in the same general class or are otherwise within the scope thereof.

* * *

Machinegun. A "machinegun", "machine pistol", "submachinegun", or "automatic rifle" is a firearm 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. The term shall also include 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. For purposes of this definition, the term "automatically" as it modifies "shoots, is designed to shoot, or can be readily restored to shoot," means functioning as the result of a self-acting or selfregulating mechanism that allows the firing of multiple rounds through a single function of the

trigger; and "single function of the trigger" means a single pull of the trigger and analogous motions. The term "machinegun" includes a bump-stock-type device, *i.e.*, a device that allows a semi-automatic firearm to shoot more than one shot with a single pull of the trigger by harnessing the recoil energy of the semi-automatic firearm to which it is affixed so that the trigger resets and continues firing without additional physical manipulation of the trigger by the shooter.

B. 27 C.F.R. § 478.11

Meaning of terms.
When used in this part and in forms prescribed under this part, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof, terms shall have the meanings ascribed in this section. Words in the plural form shall include the singular, and vice versa, and words importing the masculine gender shall include the feminine. The terms "includes" and "including" do not exclude other things not enumerated which are in the same general class or are otherwise within the scope thereof.

* * *

Machine gun. 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. The term shall also include 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 machine gun, and any combination of parts from which

a machine gun can be assembled if such parts are in the possession or under the control of a person. For purposes of this definition, the term "automatically" as it modifies "shoots, is designed to shoot, or can be readily restored to shoot," means functioning as the result of a self-acting or selfregulating mechanism that allows the firing of multiple rounds through a single function of the trigger; and "single function of the trigger" means a single pull of the trigger and analogous motions. The term "machine gun" includes a bump-stock-type device, *i.e.*, a device that allows a semi-automatic firearm to shoot more than one shot with a single pull of the trigger by harnessing the recoil energy of the semi-automatic firearm to which it is affixed so that the trigger resets and continues firing without additional physical manipulation of the trigger by the shooter.

C. 27 C.F.R. § 479.11

Meaning of terms.
When used in this part and in forms prescribed under this part, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof, terms shall have the meanings ascribed in this section. Words in the plural form shall include the singular, and vice versa, and words importing the masculine gender shall include the feminine. The terms "includes" and "including" do not exclude other things not enumerated which are in the same general class or are otherwise within the scope thereof.

* * *

Machine gun. Any weapon which shoots, is designed to shoot, or canbe readily restored to shoot, automatically

more than one shot, without manual reloading, by a single function of the trigger. The term shall also include 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 machine gun, and any combination of parts from which a machine gun can be assembled if such parts are in the possession or under the control of a person. For purposes of this definition, the term "automatically" as it modifies "shoots, is designed to shoot, or can be readily restored to shoot," means functioning as the result of a self-acting or self-regulating mechanism that allows the firing of multiple rounds through a single function of the trigger; and "single function of the trigger" means a single pull of the trigger and analogous motions. The term "machine gun" includes a bump-stock-type device, *i.e.*, a device that allows a semi-automatic firearm to shoot more than one shot with a single pull of the trigger by harnessing the recoil energy of the semi-automatic firearm to which it is affixed so that the trigger resets and continues firing without additional physical manipulation of the trigger by the shooter.