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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PETITION FOR WRIT OF CERTIORARI

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]

[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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