No. 21-1215

In the Supreme Court of the United States

GUN OWNERS OF AMERICA, ET AL, PETITIONERS,

v.

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

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

BRIEF OF AMICI CURIAE STATES OF MONTANA, WEST VIRGINIA, AND 20 OTHER STATES IN SUPPORT OF PETITIONERS

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Paul J. Larkin, Jr., *Chevron and Federal Criminal Law*, 32 J. L. & POL. 211 (2017) 17

Antonin Scalia, *Foreword: The Importance of Structure in Constitutional Interpretation*, 83 NOTRE DAME L. REV. 1417 (2008) 6

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INTRODUCTION AND INTEREST OF AMICI CURIAE[1]

Amici Curiae States of Montana, West Virginia, Alabama, Alaska, Arizona, Arkansas, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Nebraska, New Hampshire, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, and Wyoming ("the States"), represented by their respective Attorneys General, seek to preserve the fundamental and inalienable rights of their citizens to keep and bear arms. This right is essential to the maintenance of a free republic. *See* ANTONIN SCALIA, SCALIA SPEAKS 32 (Christopher Scalia, et al. eds., 2017) ("Our Founders, having witnessed firsthand the indignities and abuses that overeager governments can impose on their own citizens, believed in a citizen's right to bear arms for protection against, among other things, the state itself."). Yet here, the Bureau of Alcohol, Tobacco, and Firearms' (ATF) erroneous rulemaking would abridge that right by immediately transforming hundreds of thousands of law-abiding gun owners in the States into criminals. *See Wooden v. United States*, No. 20-5279, slip op. at 49 (Mar. 7, 2022) (Gorsuch, J., concurring) ("Any new national laws restricting liberty require the assent of the people's representatives and thus input from the country's "many parts, interests and classes." (quoting THE FEDERALIST NO. 51, at 324 (J. Madison)). Actions like the ATF's do not just violate important principles of administrative law. They also illustrate how the government can endanger fundamental

[1] Amici timely notified counsel for all parties of their intention to file this brief.

rights through creeping, incremental, and seemingly benign regulatory depredations.

In *Gun Owners of America, Inc. v. Garland*, 992 F.3d 446 (6th Cir. 2021), a panel of the Sixth Circuit correctly concluded that bump stock accessories do not transform commonly-used semi-automatic firearms into "machineguns" that are banned by the National Firearms Act of 1934 (NFA) Pub. L. No. 73-474, 48 Stat. 1236 (codified at 26 U.S.C. § 5845(b)), Gun Control Act of 1968 (GCA) Pub. L. No. 90-618, 82 Stat. 1213 (amending 18 U.S.C. §§ 921-28), and the Firearm Owners Protection Act of 1986, Pub. L. No. 99-308, 100 Stat. 449 (1986) (amending 18 U.S.C. §§ 921-29). The ATF's Final Rule on *Bump-Stock-Type Devices*, 83 Fed. Reg. 66,514 (Dec. 26, 2018) ("Final Rule") thus contravened federal law—as well as longstanding ATF policy—by classifying bump stocks as machine guns and informing owners of bump stocks that they must surrender or destroy their bump stocks to avoid criminal liability.

But the Sixth Circuit vacated the panel's opinion when the full court granted the government's Petition for Rehearing *En Banc*. The en banc court, however, split evenly, so it could only issue an order affirming the district court. *Gun Owners of Am., Inc. v. Garland*, 19 F.4th 890, 896 (6th Cir. 2021). A strong, eight-judge dissent accompanied the court's order. *Id.* at 910–28 (Murphy, J., dissenting) Among other things, the dissent explained why a bump stock would not qualify as a "machinegun" under the plain text of the statute—and why *Chevron* deference

would not apply. *Id.* In particular, Congress had not given the ATF the power to define a regulatory crime, and the statute was unambiguous after applying ordinary canons of construction (including the rule of lenity). *Id.* Judge White, the panel's lone dissenter, penned an en banc concurrence joined by four judges. *Id.* at 896. (White, J., concurring); *Garland*, 992 F.3d at 475 (White, J. dissenting).

SUMMARY OF ARGUMENT

Semiautomatic rifles are some of America's most popular firearms. Millions of law-abiding gun owners depend on these rifles for security, safety, and sporting purposes. Bump stocks replace the standard stock of these firearms and assist the shooter in "bump firing," which increases the rate of fire. They do not transform semi-automatic rifles into automatic machineguns.

This Court should not defer to the ATF's interpretation of "machinegun" to include bump stocks. Deference under *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865 (1984), should not apply to agency interpretations of *criminal* statutes. *See United States v. Cong. of Indus. Orgs.*, 335 U.S. 106, 142 (1948) ("Blurred signposts to criminality will not suffice to create it.") (Rutledge, J., concurring). Instead, under the rule of lenity, the Court should interpret any ambiguity in the statute in favor of liberty. The en banc dissent aptly noted that, "[s]ince 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." *Garland*, 19 F.4th at 910 (Murphy, J., dissenting) (citing *United States v. Hudson*, 11 U.S. 32, 34 (1812)). "As the framers understood, "subjecting … men to punishment for things which, when they were done, were breaches of no law … ha[s] been, in all ages, the favorite and most formidable instrumen[t] of tyranny." *Wooden*, slip. op. at 48 (Gorsuch, J., concurring) (quoting THE FEDERALIST NO. 84, at 511–512 (C. Rossiter ed. 1961) (A. Hamilton)). *Nor does Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995), compel deference to the ATF. *See Garland*, 19 F.4th at 900–02 (White, J., concurring). *Babbitt* didn't deal with a criminal statute; nor did it apply a traditional *Chevron* analysis.

To be sure, the Court's messaging on these complicated issues has not always been crystal clear. *Compare United States v. Apel*, 571 U.S. 359 (2014) (The Court "ha[s] never held that the Government's reading of a criminal statute is entitled to any deference."), *with United States v. O'Hagan*, 521 U.S. 642, 673 (1997) (applying *Chevron* to a legislative rule with criminal applications and penalties). The Court should thus take this opportunity to remove all doubt that "criminal laws are for courts, not for the Government, to construe." *Abramski v. United States*, 573 U.S. 169, 191 (2014).

The Court also not defer to the ATF's interpretation because it implicates the fundamental right to

keep and bear arms. The Final Rule effectively transforms commonly owned firearms into banned machineguns simply because of the use of non-mechanical bump stock accessories. This interpretation categorically expands the text of the criminal statute in a way that Congress couldn't possibly have intended. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). And it expands criminal liability at the expense of Second Amendment rights, diminishing the latter absent a sufficient and compelling justification. When the ATF—or any agency—invades protected rights by interpreting statutes too broadly, this Court should step in. *See Abramski*, 573 U.S. at 191.

An inherent tension exists between affording *Chevron* deference to an agency's interpretation of criminal statutes and the rule of lenity. *See Garland*, 19 F.4th at 900 n.6 (White, J., concurring). The Court should grant the petition and clarify that federal agencies may not expand the scope of a Congressionally-enacted criminal statute through regulatory lawmaking.

ARGUMENT

Many things make the United States exceptional. But only a few things operate to preserve it. "[T]he right to keep and bear arms [is] among those fundamental rights *necessary* to our system of ordered liberty." *McDonald v. City of Chi.*, 561 U.S. 742, 778 (2010) (emphasis added). But as the late Justice Scalia was fond of pointing out, a Bill of Rights isn't worth the paper it's printed on without a mechanism

for enforcing it. *See* Antonin Scalia, *Foreword: The Importance of Structure in Constitutional Interpretation*, 83 NOTRE DAME L. REV. 1417, 1418 (2008) ("Structure is everything."). One such mechanism is the separation of powers. *See* THE FEDERALIST NO. 51, at 349. (J. Cooke ed. 1961) (J. Madison) ("[T]he great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others."). Executive agencies enforce laws passed by Congress. Although Congress sometimes delegates authority to the agencies to fill in gaps or lend expertise in complicated matters, these agencies are not permitted to use their limited policymaking authority to invent new law—particularly when their decisions impose criminal penalties and implicate fundamental constitutional rights.

I. The Court should clarify the interplay between *Chevron* and the rule of lenity.

A. *Babbitt* doesn't mandate *Chevron* deference for criminal statutes.

This Court has never held that *Chevron* applies to criminal statutes. *See Abramski*, 573 U.S. at 191 (citing *United States v. Apel*, 571 U.S. 359, 369 (2014)). The en banc concurrence incorrectly relied on *Babbitt* to conclude that *Chevron* applies to nearly *all* legislative rules that go through notice-and-comment rulemaking—including those interpreting criminal statutes. *Garland*, 19 F.4th at 900–04

(White, J., concurring). And the concurrence is hardly the first court to misread *Babbitt* in that way. *See, e.g.*, *Silva v. Garland,* 27 F.4th 95, 112 (1st Cir. 2022); *Aposhian v. Barr*, 958 F.3d 969, 983 (10th Cir. 2020); *Guedes v. ATF*, 920 F.3d 1, 25 (D.C. Cir. 2019). The Court should grant certiorari to clarify *Babbitt*'s limited applicability.

To be clear, *Babbitt* didn't involve a criminal statute. Rather, it concerned criminal *penalties* attendant to a massive civil enforcement scheme administered, in part, by the Department of Interior—the Endangered Species Act (ESA). *See Babbitt*, 515 U.S. at 690; *see generally* The Legal Framework of the Endangered Species Act (ESA), Congressional Research Service June 5, 2019, https://fas.org/sgp/crs/misc/IF11241.pdf. So to the extent it can be called an agency deference case at all, *Babbitt* was more about an agency's traditional authority to interpret ambiguous civil statutes—with a few ancillary criminal consequences that would necessarily flow from that interpretation.

Although the *Babbitt* Court agreed with the agency's statutory interpretation, it didn't engage in a full *Chevron* analysis. Nor did the Court suggest that *Chevron* would apply to criminal statutes broadly. *Babbitt*, 515 U.S. at 703 (noting only that the Court "owe[d] some degree of deference to the [agency's] reasonable interpretation"). The Court instead found the agency's interpretation reasonable under the plain text, structure, and purpose of the statute. *Id.* at 703–05. And because "Congress delegated broad

administrative and interpretive power to the [agency]," *id.* at 708, the Court deferred to the agency's reasonable interpretation. *Id.* at 603. The statutory text and structure revealed that Congress intended the agency—which could leverage its "expertise and attention to detail that exceeds the normal province of Congress"—to make complex policy choices about "defining and listing [of] endangered and threatened species." *Id.* at 708. Given that the challenged interpretation was reasonable and that Congress had "entrusted the [Agency] with broad discretion," the Court declined to disturb the agency's interpretation. *See id.* at 708.

Courts may not, however, pay similar courtesies to agency interpretations of criminal statutory schemes, and *Babbitt* recognized as much. *See id.* at 704 n.18 (confirming that the Court's analysis was only aimed at a "facial challenge[] to administrative regulations" rather than a criminal prosecution). To be sure, *Babbitt* cited generally to *Chevron*. *See id.* at 703. But it conducted no *Chevron* analysis, and it independently concluded that the agency's statutory interpretation was textually reasonable *before* remarking that it owed some undefined level of deference to the agency's interpretation. *See id.* at 697–701, 703–04, 708. *Babbitt*, in other words, is sharply limited to its specific statutory context. *See Garland*, 19 F.4th at 924 (Murhpy, J., dissenting) ("Unlike the [ESA] in *Babbitt*, however, the Gun Control Act and the [NFA] 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."). It did not introduce an entirely novel rule that *Chevron* deference is due whenever courts review criminal statutes that agencies administer.

The Court's more recent decisions in *Apel* and *Abramski* also support this narrow reading of *Babbitt*. In *Apel*, this Court clarified that it "ha[s] never held that the Government's reading of a criminal statute is entitled to any deference." 571 U.S. at 369. It agreed again in *Abramski*, explaining why agencies' criminal statutory interpretations are immaterial:

> 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 … 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.

573 U.S. at 191. *Apel* and *Abramski* leave only a sharply confined reading of *Babbitt*. Whatever doubt *Babbitt* once cast on the question, subsequent cases have confirmed that *Chevron* doesn't apply to criminal statutes. Congress delimits the totality of criminal conduct; executive agencies may go no further.

The en banc concurrence banishes discussion of *Apel* and *Abramski* to a footnote. *Garland*, 19 F.4th at 900 n.6 (White, J., concurring). It categorizes them as irrelevant because they did not involve legislative regulations (that is, rules that bind the public and have the force of law). *Id.* But the concurrence's dichotomy between legislative and interpretive rules is of no moment, especially given that neither *Apel* or *Abramski* relied on a rule's interpretive nature in refusing deference. What matters is whether the statute is criminal in nature. If the answer is yes, then *Chevron* doesn't apply regardless of whether the agency interpreting the statute has done so through notice-and-comment rulemaking. *Apel* and *Abramski* make this clear.[2]

As Justice Scalia wrote, "[t]he best that one can say … is that in *Babbitt* [], [the Court] deferred, with scarcely an 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, 1005 (2014) (Scalia, J., respecting the denial of cert.). But *Babbitt* has nevertheless flummoxed the lower courts for years now—so the Court should take this opportunity to set things right.

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[2] This is not to say that executive agencies play no role in defining and interpreting criminal statutes—when Congress has "distinctly" delegated authority to do so. *See United States v. Grimaud*, 220 U.S. 506, 519 (1911). Agencies interpret and enforce criminal statutes all the time. But that doesn't mean courts owe deference to those interpretations.

B. The rule of lenity supersedes *Chevron* analysis.

"The 'rule of lenity' is a new name for an old idea—the notion that 'penal laws should be construed strictly.'" *Wooden*, slip. op at 45 (Gorsuch, J., concurring) (quoting The Adventure, 1 F. Cas. 202, 204, F. Cas. No. 93 (No. 93) (CC Va. 1812) (Marshall, C. J.)); *see also* 1 William Blackstone, *Commentaries on the Laws of England* 88 (4th Ed. 1770) ("Penal statutes must be construed strictly") Although a long-established canon of construction, this Court has not set a uniform method for applying it. *See* Scalia & Garner, *supra*, at 298–99 (citing *e,g*., *Reno v. Koray*, 515 U.S. 50, 60 (1995); *Smith v. United States*, 508 U.S. 223, 239 (1993); *Muscarello v. United States*, 524 U.S. 125, 139 (1998)); *see also Wooden*, slip op. at 50 (Gorsuch, J., concurring) (noting that "the most basic of these controversies" surrounding the rule of lenity is "the degree of ambiguity required to trigger [it]"). Nor has this Court been consistent with the interplay between it and *Chevron*. That's why it should now clarify that courts must apply the rule of lenity *before* conducting *Chevron* analysis. *See, e.g.*, *Negusie v. Holder*, 555 U.S. 511, 518 (2009) ("[T]he rule of lenity … may be persuasive in determining whether a particular agency interpretation is reasonable."); *see also Wooden*, slip op. at 53–54 (Gorsuch, J., concurring) ("The right path is the more straightforward one. Where the traditional tools of statutory interpretation yield no clear answer, the judge's next step isn't to legislative history or the law's unexpressed purposes. The next step is to lenity.").

Like *Chevron*, the rule of lenity presumes that two reasonable interpretations of a statute exist. But the similarity stops there. The rule of lenity gives the benefit of the doubt to a criminal defendant instead of the government. But *Chevron* is the mirror opposite: it gives the benefit of the doubt to the *agency*, even if an individual might reach a reasonable, but different, interpretation of a rule. The doctrines are thus operating at cross-purposes: giving "persuasive effect" to the government's interpretation of criminal statutes "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, 177-78 (1990) (Scalia, J., concurring in the judgement).

The en banc concurrence would only invoke the rule of lenity "'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.'" *Gun Owners of Am., Inc. v. Garland*, 2021 U.S. App. LEXIS 35812, at *19 n.10 (6th Cir. Dec. 3, 2021) (quoting *Lockhart v. United States*, 577 U.S. 347, 361 (2016)). There's nothing wrong with this pronouncement as a general matter. *See* Scalia & Garner, *supra*, at 298. But in this context, it reverses the hierarchy by employing *Chevron* step two analysis as part of the initial method of construction—relegating the rule of lenity to second-class status. Rather, to trigger *Chevron* analysis, courts must first apply the traditional tools of statutory construction, *Epic Sys. Corp. v. Lewis*, 138

S. Ct. 1612, 1630 (2018) (citing *Chevron* 467 U.S. at 843 n.9)—including the rule of lenity.

Babbitt itself implied that the rule of lenity would have implications in other contexts. *See* 515 U.S. at 704 n.18. The en banc concurrence recognized that "the *Babbitt* Court [] hypothesized that a regulation may 'provide such inadequate notice of potential liability so as to offend the rule of lenity.'" *Garland*, 19 F.4th at 901 (White, J., concurring) (quoting *Babbitt*, 515 U.S. at 704 n.18). But it went no further, rationalizing that the language was "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.*

First, that's an incomplete explanation—the rule of lenity "does not coincide with the constitutional requirement of fair notice." Antonin Scalia & Brian A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 296–97 (2012). It's primarily "a rule of statutory construction whose purpose is to help give authoritative meaning to statutory language." *Id.* at 297–98. Important concepts like fair notice and separation of powers are implicated when courts don't utilize it in the regular course of statutory interpretation.

Second, as mentioned above, *Babbitt* failed to substantively address the rule of lenity. That failure is another reason why the Court should give *Babbitt* a narrow reading in the criminal context. *See Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 734 (6th Cir.

2013) (Sutton, J., concurring) (suggesting that *Chevron* deference does not defeat the rule of lenity).

Third, even if Judge White correctly read *Babbitt*'s holding, the regulation at issue in *Babbitt* is distinguishable from the Bump-Stock Rule. "*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.'" *Garland*, 19 F.4th at 925 (Murphy, J., dissenting) (quoting *Babbitt*, 515 U.S. at 690, 691 n.2, 704 n.18). In contrast, "the Bump-Stock Rule departed from the ATF's decade-long view." *Id.* at 925. Because of that departure, "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." *Id.; see also Wooden*, slip op. at 48 (Gorsuch, J., concurring) ("[L]enity's emphasis on fair notice … is about protecting an indispensable part of the rule of law—the promise that, whether or not individuals happen to read the law, they can suffer penalties only for violating standing rules announced in advance."). "[T]raditional notions of fairness inherent in our system of criminal justice prevent the Government from proceeding with [a] prosecution" when the accused relied on longstanding administrative "guidance" about the "meaning and requirements of the [criminal] statute" in question. *United States v. Pennsylvania Indus. Chem. Corp.*, 411 U.S. 655, 674, (1973).And truth be told, a rule favoring lenity over *Chevron* deference shows greater fidelity to the Court's precedents than *Babbitt* did. Three years be-

fore *Babbitt*, in *United States v. Thompson/Center Arms Co.*, the Court interpreted the phrase "making" a "firearm" as used in the NFA. 504 U.S. 505 (1992) (interpreting 26 U.S.C. § 5821). Applying the rule of lenity, the plurality construed the statute narrowly under the rule of lenity; the defendant had not "made" a firearm by packaging an unregulated pistol with a kit that allowed for conversion into a firearm that would be regulated under federal law. *Id.* at 517-18. The plurality did not defer to ATF's contrary interpretation of the text. *Id.*

Even the concurrence below recognized that "there is an implied tension between the two lines of cases" of *Apel/Abramski* and *Chevron/Babbitt*. 19 F.4th at 900 (White, J., concurring). But it demurred that it must follow *Chevron* and *Babbitt*, reasoning that it's "for the Supreme Court to resolve." *Id.* This Court should grant review to take on that task. It should hold that *Chevron* does not erase the rule of lenity's longstanding protection against surprise criminal liability.

II. Applying *Chevron* to a criminal statute implicates serious separation-of-powers concerns.

"Closely related to its fair notice function is lenity's role in vindicating the separation of powers." *Wooden*, slip op. at 48 (Gorsuch, J., concurring). This Court and others have admonished both the executive and judicial branches not to intrude on Congress's power to determine criminal activity. *See*

e.g., *id.* at 49; *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820); *Whitman*, 574 U.S. at 1004.

The "ATF has no authority to substitute its moral judgment concerning what conduct is worthy of punishment for that of Congress." *Aposhian v. Wilkinson*, 989 F.3d 890, 900 (10th Cir. 2021) (Tymkovich, C.J., dissenting from denial of rehearing en banc); *accord Gun Owners*, 992 F.3d at 462 ("Whether ownership of a bump-stock device should be criminally punished is a question for our society …. 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."). To defer to an agency's interpretation of a criminal statute would threaten the "horizontal separation of powers." *Carter*, 736 F.3d at 733 (Sutton, J., concurring); *see also United States v. Bass*, 404 U.S. 336, 348, (1971) (per Marshall, J.) ("[B]ecause of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity"). As Chief Justice Marshall explained:

> [The rule of lenity] is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment.

Wiltberger, 18 U.S. at 95; *see also Wooden*, slip. op. at 49 (Gorsuch, J., concurring) (lenity helps safeguard the separation of powers by "preventing judges from intentionally or inadvertently exploiting 'doubtful' statutory 'expressions' to enforce their own sensibilities.").

In practice, this would allow agencies like the Department of Justice—which houses the ATF—to interpret and enforce criminal statutes more and more broadly until a court concluded its interpretation was *un*reasonable. *See Whitman*, 574 U.S. at 1004 ("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."); *cf.* Kent Barnett & Christopher J. Walker, *Chevron Step Two's Domain*, 93 NOTRE DAME L. REV. 1441, 1459 (2018) (finding that agency interpretations prevail under *Chevron* in over 75% of cases); Paul J. Larkin, Jr., *Chevron and Federal Criminal Law*, 32 J. L. & POL. 211, 212 (2017) ("[S]ometimes who adopts a rule of law is more important than what that rule provides."). In other words, those charged with prosecuting crimes would become increasingly responsible for defining them. Although prosecutors bear "a very specific responsibility" to interpret a statute "in order to decide when to prosecute," courts "have never thought that the interpretation of those charged with prosecuting criminal statutes is entitled to deference." *Crandon v. United States*, 494 U.S. 152, 177 (1990) (Scalia, J.,

concurring in the judgment, *cited with approval in Apel*, 571 U.S. at 369

This muddled system of criminal justice would be "preposterous," blending prosecutorial and adjudicatory power in a way that "would violate established traditions and threaten liberty itself." Cass Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 210 (2006). "[I]f agencies are free to ignore the rule of lenity, the state could make an act a crime in a remote statement issued by an administrative agency. The agency's pronouncement need not even come in a notice-and-comment rule. All kinds of administrative documents, ranging from manuals to opinion letters, sometimes receive *Chevron* deference." *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 731-32 (6th Cir. 2013) (Sutton, J., concurring) (citing *Barnhart v. Walton*, 535 U.S. 212, 221-22 (2002)); *see also* Scalia & Garner, *supra*, at 301 ("[A] fair system of laws requires precision in the definition of offenses and punishments. The less the courts insist on precision, the less legislatures will take the trouble to provide it.").

III. An agency's interpretation of a statute should receive no deference when it further diminishes fundamental rights.

The ATF's interpretation of § 5845(b) should also garner no deference because the statute regulates an area affecting the fundamental right to keep and bear arms. *See Ezell v. City of Chi.*, 651 F.3d 684, 703 (7th Cir. 2011) (heightened scrutiny applies to governmental actions alleged to infringe enumerated

constitutional rights such as the Second Amendment); *cf. Jackson v. City & Cnty. of S.F.*, 746 F.3d 953, 967 (9th Cir. 2014) (restrictions on ammunition may burden the core Second Amendment right of self-defense); *Ezell*, 651 F.3d at 704 (holding that the right to possess firearms implied a corresponding right to access firing ranges for the purpose of maintaining firearm proficiency). As discussed above, *Chevron* should not apply to criminal statutes. But even under the *Chevron* framework, implication of a fundamental right should render ATF's interpretation unreasonable.

Although somewhat novel, several of the Court's existing doctrines support this rationale. For example, this Court has long recognized in the constitutional doubt canon that courts should construe statutes to avoid interpretations—even reasonable ones—that raise serious constitutional concerns. *See Crowell v. Benson*, 285 U.S. 22, 62 (1932). Courts rightly assume that Congress avoids legislating by inference when an interpretation triggers separation of powers concerns. *Cf. United States v. Bass*, 404 U.S. 336, 349 (1971) ("[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance. Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States."). Elsewhere, when deciding between competing interpretations, the Court has recognized that "Congress does not … hide elephants in mouseholes." *Whitman*, 531 U.S. at 468; *see also King v. Burwell*, 135 S. Ct. 2480, 2491, 2494 (2015)

(courts do not apply *Chevron* deference to statutory interpretations that implicate "major questions").

Chevron and the rule of lenity are, likewise, based on how courts choose between two interpretations of a statute. These doctrines and canons all overlap to some extent—based largely on the idea that certain circumstances tilt the interpretive scales against the government's power. *See, e.g.,* Scalia & Garner, *supra*, at 426 (arguing that "treating [the rule of lenity] as a clear statement rule would comport with the original basis for the canon); *id.* at 426 (noting that the constitutional doubt canon is an example of the clear statement rule).

The States suggest that any notion of an interpretation's reasonableness under *Chevron* must necessarily include consideration of fundamental rights. *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 58 (2011) (quoting *Chevron*, 467 U.S. at 844) ("[T]he second step of *Chevron* ... asks whether the … rule is a 'reasonable interpretation' of the statutory text."). That is, interpretations like the ATF's should be *per se* unreasonable when they impair fundamental rights—and particularly so in the criminal law context. At the very least, the Court should grant the petition to provide much-needed clarity between *Chevron* and the rule of lenity when constitutional rights are implicated.

Chevron deference is premised on the notion that the statute in question is "ambiguous with respect to the specific issue." *Chevron*, 467 U.S. at 843. In the

ordinary case, the "clear statement" rule suggests that if a statute is ambiguous whether it implicates a fundamental constitutional right, then reviewing courts should err on the side of liberty. Courts already do this in the criminal law context under to the rule of lenity. *Negusie*, 555 U.S. at 518 ("[T]he rule of lenity … may be persuasive in determining whether a particular agency interpretation is reasonable."). *Chevron* allows agencies to flip that rule on its head.

While "*Chevron* allows agencies to choose among competing reasonable interpretations of a statute; it does not license interpretive gerrymanders under which an agency keeps parts of statutory context it likes while throwing away parts it does not." *Michigan v. EPA*, 576 U.S. 743, 754 (2015); *see also Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324, 134 S. Ct. 2427, 2444 (2014) (agency's interpretation is unreasonable if it would bring about an enormous and transformative expansion in agency's regulatory authority without clear congressional authorization).

When properly applied, "*Chevron*'s second step can and should be a meaningful limitation on the ability of administrative agencies to exploit statutory ambiguities, assert farfetched interpretations, and usurp undelegated policymaking discretion." *Glob. Tel*Link v. FCC*, 866 F.3d 397, 418 (D.C. Cir. 2017) (Silberman, J., concurring) (citing, *e.g., Michigan*, 576 U.S. at 763 (Thomas, J., concurring) ("Although we hold today that [the agency] exceeded even the extremely permissive limits on agency power set by our precedents, we should be alarmed that it felt suf-

ficiently emboldened by those precedents to make the bid for deference that it did here.")); *see also Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014) (scuttling an agency's bid to acquire newly discovered authority "in a long-extant statute … [over] 'a significant portion of the American economy.'") (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)).

Because the Final Rule effectively re-wrote the NFA to outlaw (hitherto lawful) firearms owned by at least a half-million law-abiding Americans, *see Gun Owners*, 992 F.3d at 471–73, the ATF's interpretation deserves no deference. Agencies' sweeping statutory *re*-interpretations should always arouse judicial suspicion, but capricious course changes that criminalize previously lawful and constitutionally protected behavior should have to endure the cold light of judicial scrutiny.

Here, the ATF attempted to rewrite a statute to serve its stated policy goals with no evidence that Congress intended such an interpretation. *See Gun Owners*, 992 F.3d at 472. The panel correctly recognized that bump stocks are merely "devices designed to assist the shooter" in firing a semiautomatic rifle. *Id.* at 451. The Final Rule itself recognized that the bump-firing method has been around as long as semiautomatic firearms, *id.* at 452, and a bump stock isn't even a necessary ingredient to effectuate the technique. *Id.* n.2 ("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.") (citing Final Rule, 83 Fed. Reg. at 66,532–33). If Congress had wanted to categorically expand the NFA to cover semiautomatic firearms that use a bump-stock accessory, it would—and must—have done so explicitly.

"Government is not free to impose its own new policy choices on American citizens where Constitutional rights are concerned." *Miller v. Bonta*, No. 19-cv-1537 BEN (JLB), 2021 U.S. Dist. LEXIS 105640 at *122-23 (S.D. Cal. June 4, 2021). The Second Amendment's guarantee of the right to keep and bear arms is the "true palladium of liberty." *District of Columbia v. Heller*, 554 U.S. 570, 606 (2008) (quoting 2 *Blackstone's Commentaries* 143 (St. George Tucker ed., 1803)). And this right is "'deeply rooted in this Nation's history and tradition.'" *McDonald*, 561 U.S. at 768 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)). It "elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Heller*, 554 U.S. at 635; *see also Miller*, U.S. Dist. LEXIS 105640 at *106 (these rights include "home defense, militia use, sporting competitions, hunting, target practice, and other lawful uses.").

In *Heller*, the Court recognized that the Second Amendment protects weapons "in common use" (as opposed to "dangerous and unusual weapons"). *Id.* at 627 (citing, *e.g.*, Blackstone 4 Commentaries on the Laws of England 148-149 (1769)); *see also Caetano v. Massachusetts*, 577 U.S. 411 (2016) (Alito, J., concurring) ("[T]he pertinent Second Amendment inquiry is

whether [the firearms in question] are commonly possessed by law-abiding citizens for lawful purposes today."); *United States v. Miller*, 307 U.S. 174, 178 (1939) (implying that a weapon that is commonly owned and that is useful for the common defense for a militia member is protected by the Second Amendment).

Bump stocks are most often used in conjunction with one of the most popular firearms in America, the AR-15 semiautomatic rifle. *See Miller*, 2021 U.S. Dist. LEXIS 105640, at *2 (S.D. Cal. June 4, 2021) ("Like the Swiss Army Knife, the popular AR-15 rifle is a perfect combination of home defense weapon and homeland defense equipment."). These "ordinary, popular, modern rifles" are not "bazookas, howitzers, or machineguns." *Miller*, 2021 U.S. Dist. LEXIS 105640 at *3-4. And although bump stocks increase an AR-15's rate of fire, they do not transform it into a Tommy Gun:

> [T]he AR-15 is not like the M-16 because one is a fully automatic machinegun and one is not …. The AR-15 has no minimum rate of fire. Consequently, the AR-15 type rifle may be fired slowly or up to a hypothetical maximum rate of 300 to 420 rounds per minute, assuming no pause for reloading (which by itself is a purely unrealistic hypothetical assumption). Compare this to "[a] modern machine gun [that] can fire more than 1,000 rounds per minute, allowing a

> shooter to kill dozens of people within a matter of seconds."

Miller, 2021 U.S. Dist. LEXIS 105640 at *101–02 (quoting *United States v. Henry*, 688 F.3d 637, 640 (9th Cir. 2012)). Bump stocks aren't machine guns. But they implicate fundamental rights and a loss of liberty for many Americans. The ATF's interpretation most certainly is an elephant. *Cf. Whitman*, 531 U.S. at 468.

* * *

Regardless of the analytical framework the Court employs, the ATF's interpretation is wrong. Myriad reasons support the Sixth Circuit's panel decision invalidating the Final Rule. The ATF is entitled to no deference in interpreting criminal statutes, both because Congress holds the exclusive power to define criminal offenses and because the rule of lenity mandates a narrow reading of ambiguous criminal statutes. ATF's interpretation is particularly untenable when it interprets a statute to foreclose the exercise of fundamental rights exercised by hundreds of thousands of law-abiding Americans.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted.

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