21-5045

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

DAMIEN GUEDES, *et al.*,
Plaintiffs-Appellants,

v.

BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, *et al.*,
Defendants-Appellees,

Appeal from the U.S. District Court for the District of Columbia
Civil Case No. 18-cv-2988-DLF

BRIEF OF APPELLANTS

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JURISDICTION

Jurisdiction in the District Court was based upon 28 U.S.C. § 1331. Jurisdiction in this Court is based upon 28 U.S.C. § 1291. This appeal is from the final judgment of the District Court and the related memorandum opinion and order, entered on February 19, 2021, and disposing of all claims. Order, ECF No. 73 [JA __]; Opinion, ECF No. 74 [JA __] (provisionally reported at *Guedes v. ATF*, 2021 WL 663183 (D.D.C. 2021)). Notice of appeal was timely filed on February 19, 2021. Notice of Appeal, Dkt. No. 75 [JA __].

ISSUES PRESENTED

1. Whether the definition of "machinegun" in 26 U.S.C. § 5845(b) and 18 U.S.C. § 921(a)(23) encompasses bump-stock devices as interpreted by ATF in its December 26, 2018 Final Rule?

2. Whether the formulation and application of ATF's revised interpretation of "machinegun" is arbitrary and capricious in general and as applied to bump stocks?

3. Whether the Government waived *Chevron* deference either by expressly rejecting its application throughout this case or by failing to

recognize or exercise any interpretive discretion regarding language it viewed as plain?

4. Whether the district court erred in applying *Chevron* deference rather than the rule of lenity to uphold ATF's interpretation of a statute having both criminal and civil application?

5. Whether application of *Chevron* deference in the circumstances of this case violates the separation of powers and due process under the Constitution?

STATEMENT OF THE CASE

This case is a challenge to ATF's Final Rule that reclassified bump stocks as "machineguns" under 26 U.S.C. § 5845(b) and 18 U.S.C. § 921(a)(23) and mandated their surrender or destruction under threat of criminal prosecution. *Bump-Stock-Type Devices,* 83 FED. REG. 66,514 (Dec. 26, 2018). Although ATF claimed it was merely interpreting the plain meaning of the statutory definition of a "machinegun"—after apparently being confused for decades—it has found little traction for that claim. Instead, even courts upholding the Final Rule have held that the definition is ambiguous, declined to offer their own construction, and instead, over ATF's express and repeated objection, applied *Chevron*

deference to uphold ATF's newly expansive reading of the statute. That approach, by various courts including this one, is wrong for numerous reasons, including, *inter alia*, that the statutory language precludes ATF's newfound reading and that *Chevron* deference is inappropriate in this case in any event.

A. Statement of Facts

The National Firearms Act of 1934 ("NFA") defined the term "machinegun" as "any weapon which shoots, or is designed to shoot, automatically or semiautomatically, more than one shot, without manual reloading, by a single function of the trigger." Pub. L. 73-474, § 1(b), 48 Stat. 1236, 1236. Congress narrowed that definition in 1968 by removing the previous reference to semiautomatic fire and adding a further sentence concerning parts or combinations of parts that could produce a machinegun, Gun Control Act of 1968 ("GCA"), Pub. L. 90-618, § 5845(b), 82 Stat. 1213, 1231, and then further modified that additional sentence regarding parts in the Firearms Owners' Protection Act of 1986, Pub. L. 99-308, § 109(a), 100 Stat. 449. Accordingly, for the last 53 years as to the primary definition, and the last 35 years as to the remainder of the definition, a "machinegun" has been defined as:

> any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also include the frame or receiver of any such weapon, any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun, and any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person.

26 U.S.C. § 5845(b). The Firearms Owners' Protection Act also incorporated this definition into various provisions of federal criminal law. *See* 18 U.S.C. § 921(a)(23) ("The term 'machinegun' has the meaning given such term in section 5845(b) of the National Firearms Act[.]"); 18 U.S.C. § 922(o) ("unlawful for any person to transfer or possess a machinegun"—a crime punishable by up to 10 years' imprisonment under 18 U.S.C. § 924(a)(2)).

For decades both before and after the GCA narrowed the definition of a machinegun, the Treasury Department and later the Justice Department via ATF have understood the definition to be fairly narrow and to exclude many firearms that were able to fire rapidly but did so through multiple functions of the trigger or were not fully automatic after a single function of the trigger. For example, the Treasury Department in 1955 ruled that certain Gatling guns were not machineguns. Rev. Rul.

55-528, 1955-2 C.B. 482, 1955 WL 9410. Such firearms used a hand crank or an *electric motor* to drive a "cam action to perform the functions of repeatedly cocking and firing the weapon." *Id.* But while recognizing that they were the "forerunner[s] of fully automatic machine guns," and obviously could fire at a high rate of speed, the Department concluded they did not meet the statutory requirement of automatically or even semiautomatically shooting "more than one shot with a single function of the trigger." *Id.* The previously recognized limits on the definition of machinegun are even more stark regarding motor-driven Gatling guns, also included in that ruling and held *not* to be machineguns. While such firearms might indeed have been automatic, they functioned via a rotating cam that repeatedly pressed upon and released the trigger of the firearm. The only way that could have been excluded is because it involved more than "a single function of the trigger." While ATF many years later repudiated that portion of the earlier ruling and held that so-called mini-guns (partly comparable to motor-driven Gatling guns) were indeed machine guns, ATF Ruling 2004-5, https://tinyurl.com/ATFRuling2004-5 (holding that electric-motor-operated firearms, including Gatling guns, are machineguns but that

crank-driven cam-operated Gatling guns still are not), it is the earlier ruling that actually has interpretive significance given its timing prior to Congress's 1968 narrowing of the definition of machinegun to remove "semiautomatically" from the statute. And even that revised ruling left intact the interpretation that a manually cranked Gatling gun was not a machinegun.

ATF's narrow reading of the statute continued well into the current era, particularly with respect to the devices at issue in this case: "bump stocks." Bump stocks are parts that replace the standard stock of firearms to assist with a shooting technique known as "bump firing," whereby the trigger of a firearm is repeatedly bumped against a stationary trigger finger. Between each bump of the trigger, the recoil of the firearm is allowed to move the trigger backwards and away from the trigger finger, thus releasing the trigger and resetting it to await the next bump from the shooter manually pushing the firearm forward again and bumping the trigger into renewed contact with the stationary trigger finger.[1]

[1] Bump-stock-type devices do not change the function of a firearm to which they are attached. For example, the fire control group of a

But not all bump stocks are the same. Some, such as the Akins Accelerator, are spring-loaded and automatically force the firearm's trigger forward for each subsequent shot. ATF Ruling 2006-02 at 2, https://tinyurl.com/ATF2006-2. When using a spring-loaded device, a

> shooter pulls the trigger which causes the firearm to discharge. As the firearm moves rearward in the composite stock, the shooter's trigger finger contacts the stock. The trigger mechanically resets, and the device, which has a coiled spring located forward of the firearm receiver, is compressed. Energy from this spring subsequently drives the firearm forward into its normal firing position and, in turn, causes the trigger to contact the shooter's trigger finger.

Id.

ATF has previously classified that subspecies of bump-stock, *i.e.*, a spring-loaded device, as a machinegun because it automatically moves forward to re-engage the trigger on its own, without any manual input

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semiautomatic AR-15 has three main components: the trigger, disconnector, and hammer. When the firearm is set to fire, the hammer rests on the internal edge of the trigger. Pulling the trigger releases the hammer, which strikes the firing pin and results in a single round being discharged. While the empty casing is being ejected from the firearm, the bolt carrier slides rearwards and the hammer is pushed back towards the disconnector. The disconnector grabs and holds the hammer, preventing it from firing another round without the trigger being "reset." Indeed, unlike with a machinegun, keeping the trigger depressed *prevents* the gun from firing again because the disconnector keeps hold of the hammer. *See generally*, Pls.' Statement of Facts, ECF No. 62-2 [JA __].

from the shooter in pushing the body of the firearm and the trigger forward to fire the next shot. As ATF once correctly recognized, such a spring-loaded device automatically forcing the trigger forward for subsequent shots is quite different than an unsprung bump stock that requires manual input to force the trigger forward such that it bumps into a stationary trigger finger and fires a subsequent shot.[2]

The bump stocks at issue in this case are of the unsprung variety, meaning that manual force, rather than a mechanical spring, moves the trigger forward after each time it is reset so that it bumps into a stationary trigger finger and fires a subsequent shot. Such a device is neither "automatic" nor involves merely a single function of the trigger. Rather, it involves multiple functions of the trigger—caused by a bump

[2] While ATF may have had a point that the Akins Accelerator operated "automatically," it still ultimately missed the mark regarding whether it involved only a single function of the trigger. When initially reviewed, ATF determined that the Akins Accelerator did not convert a semiautomatic weapon into a machine gun because it involved multiple functions of the trigger. 83 FED. REG. 66,514, 66,517. In changing its determination, it focused not on the number of functions or pulls of the trigger, but on whether subsequent operation of the trigger was "automatic" and ignored whether subsequent shots using such a device involve more than a "single" function of the trigger. *Id.*

for each shot fired—with such functions caused by the ongoing manual input of the shooter, rather than automatically.

Until recently, this was ATF's understanding as well. *See* Letter from Richard W. Marianos, ATF Assistant Director Public and Governmental Affairs, to Rep. Ed Perlmutter, at 2 (Apr. 16, 2013), https://tinyurl.com/MarianosATFLetter.

Indeed, ATF consistently and repeatedly asserted that bump stocks are *not* machineguns and do not convert semiautomatic firearms into machineguns in ten different letter rulings from 2008 to 2017, *see Bump-Stock-Type Devices*, 83 FED. REG. 66,514, 66,517 (Dec. 26, 2018), and in court. In *Freedom Ordnance Mfg. v. Brandon*, No. 3:16-cv-00243-RLY-MPB (S.D. Ind.), for example, ATF argued that the unsprung bump stocks were not machineguns because bump firing:

> requires the shooter to manually pull and push the firearm in order for it to continue firing. Generally, the shooter must use both hands—one to push forward and the other to pull rearward—to fire in rapid succession. While the shooter receives an assist from the natural recoil of the weapon to accelerate subsequent discharge, the rapid fire sequence in bump firing is contingent on shooter input in pushing the weapon forward, rather than mechanical input, and is thus not an automatic function of the weapon.

Br. in Supp. of Mot. for Summ. J. at 22, ECF No. 28.

ATF was correct then, and its earliest and narrowest interpretations are fully consistent with the plain meaning of the statutory definition.

B. RULEMAKING

ATF's correct interpretation of the statutory definition of a machinegun, however, came to an end in the wake of the 2017 mass shooting in Las Vegas, which many have claimed (though the FBI has never confirmed) was committed using rifles equipped with bump stocks. Despite having initially stood by its earlier rulings that bump stocks were not machineguns under the relevant statutes, ATF eventually folded to pressure from President Trump and claimed that it had a newfound understanding of the "plain meaning" of the statutory definition that would now encompass bump stocks. Br. of *Amicus Curiae* the Cato Institute at 4-8, *Guedes v. ATF* (No. 19-296) (U.S. Supreme Court) (Oct. 3, 2019), https://tinyurl.com/CatoGuedesAmicus.

On March 29, 2018, ATF published a Notice of Proposed Rulemaking (NPRM). *Bump-Stock-Type Devices*, 83 FED. REG. 13,442 (March 29, 2018). In the NPRM, ATF purported to "clarify that 'bump fire' stocks, slide-fire devices, and devices with certain similar

characteristics (bump-stock-type devices) are 'machineguns' as defined by the [NFA and GCA] because such devices allow a shooter of a semiautomatic firearm to initiate a continuous firing cycle with a single pull of the trigger." *Id.* The NPRM incorrectly stated that these "devices convert an otherwise semiautomatic firearm into a machinegun by functioning as a self-acting or self-regulating mechanism that harnesses the recoil energy of the [firearm] in a manner that allows the trigger to reset and continue firing without additional physical manipulation of the trigger by the shooter." *Id.* ATF received numerous comments pointing out the errors of its proposed redefinition.

On December 26, 2018, ATF published the Final Rule reinterpreting the elements of the definition of "machinegun" in a manner it claimed encompassed bump stocks and meant they were illegal machineguns. 83 FED. REG. 66,514. The Final Rule added a new paragraph to the regulatory definition of machinegun:

> **§ 447.11 Meaning of terms.** *Machine gun.* . . . For purposes of this definition, the term "automatically" as it modifies "shoots, is designed to shoot, or can be readily restored to shoot," means functioning as the result of a self-acting or self-regulating mechanism that allows the firing of multiple rounds through a single function of the trigger; and "single function of the trigger" means a single pull of the trigger and analogous motions. The term "machine gun" includes a bump-

> stock-type device, i.e., a device that allows a semi-automatic firearm to shoot more than one shot with a single pull of the trigger by harnessing the recoil energy of the semi-automatic firearm to which it is affixed so that the trigger resets and continues firing without additional physical manipulation of the trigger by the shooter.

Id. at 66,553–54.

ATF's new definition proposes that "function of the trigger" be defined as the action of the shooter in "pull[ing]" or otherwise moving the trigger, rather than as the mechanical operation of the trigger mechanism itself, as the statutory text more naturally reads.

ATF's expanded definition of "automatically" now includes the vague and malleable notion of a merely "self-regulating" mechanism that makes it easier in some ill-defined way to "shoot more than one shot with a single pull of the trigger," notwithstanding the need for continuous manual input beyond the initial "single function of the trigger."

Because the Final Rule represented a dramatic change in interpretation, ATF provided a 3-month grace period of non-enforcement to allow the public to bring themselves into compliance with its newfound understanding of the law. 83 FED. REG. at 66,514. The details of how persons who owned bump stocks could bring themselves into

compliance—by surrender or destruction of such devices—were also set out in the Final Rule. *Id.* at 66,517.

C. Proceedings and Disposition Below

Given the short time frame between the adoption of the Final Rule and its effective enforcement date, litigation of the issues in this case was necessarily rushed to protect innocent owners who had suddenly been declared felons and faced criminal prosecution if they did not quickly comply with ATF's edicts.

On December 18, 2018, Plaintiffs filed their Complaint and moved for a preliminary injunction. Compl., ECF No. 1 [JA __-__]; Pls. Mot. Prelim. Inj., ECF No. 2 [JA __-__]. The Complaint sought declaratory and injunctive relief alleging, *inter alia*, that ATF exceeded its authority and acted arbitrarily and capriciously. Compl. ¶ 6.

On December 26, 2018, Plaintiffs filed an Amended Complaint. [Dkt. No. 9]. On February 25, 2019, the District Court denied Plaintiffs' motion for a preliminary injunction. Order, ECF No. 26 [JA __]. The court held that that the statute was ambiguous, and that *Chevron* deference applied despite the fact that no party invoked *Chevron* and all

agreed it was inapplicable. Opinion at 2–3, ECF No. 27. Plaintiffs filed a notice of appeal later that day. Notice of Appeal, ECF No. 28, [JA __-__].

This Court considered this case along with *Firearms Policy Coalition, Inc. v. ATF* (No. 19-5043) and *Codrea v. ATF* (No. 19-5044), received expedited briefing and argument, and then affirmed the denial of a preliminary injunction on April 1, 2019. *Guedes v. ATF*, 920 F.3d 1 (D.C. Cir. 2019).[3]

In a *per curiam* opinion over the dissent of Judge Henderson, this Court held that the Final Rule was not an interpretive rule as ATF had consistently maintained, but a legislative rule by which ATF exercised delegated legislative power from Congress. *Id.* at 18–20. Holding that the statute was ambiguous as the district court had concluded, it then held that because the Final Rule was a legislative rule it must be given *Chevron* deference and that such deference could not be waived or

[3] The Firearms Policy Coalition voluntarily dismissed its appeal regarding a separate issue, proceeded on remand, and later resolved the case independent of this action. The *Codrea* case was litigated and decided together with this case on remand and is now on appeal in the Federal Circuit due to a claim for just compensation under the Takings Clause (via the Little Tucker Act) that was raised by the *Codrea* plaintiffs though not by the parties here. *See* Docketing Statement at 2–3, ECF No. 74 [JA __] (discussing different paths for appellate jurisdiction).

forfeited by the government during litigation. *Id.* at 20–24. This Court then held that *Chevron* deference, which does not apply to criminal statutes, nonetheless could apply in the case of a mixed-use statute such as the one in this case, relying on *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, 515 U.S. 687 (1995), and *Competitive Enterprise Institute v. DOT*, 863 F.3d 911 (D.C. Cir. 2017). This Court further rejected application of the rule of lenity to any ambiguity in the statute, holding that *Chevron* deference was merely an ordinary canon of construction that applied to resolve ambiguity *before* the rule of lenity could be invoked. *Id.* at 27–28. Finally, this Court concluded that ATF's expanded definition of "machinegun" was "permissible" under *Chevron* and deferred to that definition. *Id.* at 31.

Judge Henderson dissented in relevant part, writing that the Final Rule "impermissibly adds to the language" of the statutory definition of "machinegun," thereby expanding the reach of Congress's definition. *Id.* at 35 (Henderson, J., concurring in part and dissenting in part). She rejected the majority's reliance on *Chevron*, noting that recent cases such as *United States v. Apel*, 571 U.S. 359, 369 (2014), and *Abramski v. United States*, 573 U.S. 169, 191 (2014), have rejected deference to the

government regarding criminal statutes. *Guedes*, 920 F.3d at 35 (Henderson, J., concurring in part and dissenting in part). She agreed with Justice Scalia's view in *Whitman v. United States*, 135 S. Ct. 352, 353 (2014) (Scalia, J, joined by Thomas, J., statement respecting denial of certiorari), that ambiguities in criminal or mixed-use laws are not for agencies to resolve, at least absent a clear statement expressly delegating the resolution of such ambiguities or intended gaps. *Guedes*, 920 F.3d at 42 (Henderson, J., concurring in part and dissenting in part). Finding no such clear statement, she concluded that "*Chevron* is inapplicable." *Id.*

On August 29, 2019, Plaintiffs petitioned the United States Supreme Court for a writ of certiorari. The government, while opposing the petition, nonetheless agreed with Plaintiffs/Petitioners that *Chevron* should not have applied in this case. Br. for Resp'ts in Opp'n at 14, *Guedes v. ATF*, (No. 19-296) (U.S. Supreme Court), https://tinyurl.com/GuedesBIO. Rather, the government asserted that ATF's application of the statutory definition of machinegun is the best interpretation of the statute. *Id.* It added that "ATF has never proceeded by legislative rule in determining whether particular devices are machine guns, it has not asserted the statutory authority to do so, and it

did not do so here," and that this Court "erred in concluding otherwise." *Id.*

On March 2, 2020 the Supreme Court denied certiorari. *Guedes v. ATF*, 140 S. Ct. 789 (2020). Justice Gorsuch issued an accompanying statement explaining that while a grant of certiorari was premature, he nonetheless agreed that *Chevron* "has nothing to say about the proper interpretation of the law before us." *Id.* at 789 (Gorsuch, J., statement regarding denial of certiorari); *see also id.* at 789-90 (discussing the many errors of applying *Chevron* deference in this case). He further expressed the hope and expectation that this Court and others would reconsider the erroneous application of *Chevron* deference to the Final Rule. *Id.* at 790–91.

On remand, this case and the contemporaneous and related *Codrea v. ATF*, No. 1:18-cv-03086-DLF (D.D.C.), were scheduled to be briefed together and the parties agreed to consolidated briefs and responses in order to avoid unnecessary duplication. Thereafter, Plaintiffs filed a Second Amended Complaint, the government moved for summary judgment, and Plaintiffs cross-moved for summary judgment. Second Am. Compl., ECF No. 58, [JA __-__]; Defs.' Mot. Summ. J., ECF No. 61

[JA __-__]; Pls. Cross Mot. Summ. J., ECF No. 62 [JA __-__]. After briefing, the District Court declined to hear oral argument, granted the government's motion for summary judgment, and denied Plaintiffs' motion for summary judgment on February 19, 2021. Order, ECF No. 73 [JA __-__]. The District Court held that this Court's previous ruling in this case foreclosed Plaintiffs' claims that ATF waived *Chevron* or that the rule of lenity prevents *Chevron*'s application. *Guedes v. ATF*, No. 18-CV-2988 (DLF), 2021 WL 663183, at *5–*6 (D.D.C. Feb. 19, 2021). And the District Court held that *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), itself foreclosed Plaintiffs' claims that *Chevron* deference is unconstitutional. *Id.* at *4. The court then upheld the Final Rule under *Chevron*, determining that the statutory definition of "machinegun" is ambiguous and that ATF's interpretation is permissible. *Id.* at *5. The court also disposed of several other claims not relevant to this appeal, including a claim for just compensation under the Takings Clause sought by the *Codrea* plaintiffs but not by the *Guedes* plaintiffs. *Id.* at *9–*11.

Appellants timely filed their notice of appeal on February 19, 2021. Notice of Appeal, ECF No. 75 [JA __-__].

SUMMARY OF ARGUMENT

I. The Final Rule's reinterpretation of the statutory definition of machinegun is contrary to the plain meaning and common understanding of the words in the statute itself and thus is unlawful. The redefinition of the phrase "single function of the trigger" to mean a single "pull" of the trigger improperly shifts the language from a trigger-centric focus on the mechanical operation of the trigger, however accomplished, to a shooter-centric focus on the act of "pulling" the trigger, which is only one of many things that can *cause* a trigger to function, but is not itself a "function of the trigger."

Similarly, the Final Rule's expansion of the phrase "shoot . . . automatically" to encompass not merely shooting by a "self-acting" mechanism, but also by a an indecipherably vague and malleable "self-regulating" mechanism has no historical, grammatical, or contextual support. Indeed, in context, an "automatic" firearm has always been understood as one that would continue shooting so long as the trigger was pressed and held, not one that required the trigger to be released and re-engaged for each shot. ATF's revised interpretation that anything that makes shooting subsequent shots "easier" or removes any small

component of manual input to the control or stabilization of the firearm, is constitutes "automatic" firing is incoherent, overbroad, and would vitiate all meaning between automatic and semi-automatic firearms.

The traditional and narrower interpretation of the definition of machinegun was long the view of ATF and was ratified by Congress in 1968 when it narrowed the definition of machinegun while leaving in place earlier narrow rulings even under the originally broader version of the definition.

And apart from the traditional and common understanding of the definition of a machinegun, the alternative definition offered by the Final Rule is unreasonable, particularly as applied to bump stocks. Not only are the definitions inapplicable to the manner in which bump stocks actually function, they are overbroad, would encompass far more firearms and parts than ATF acknowledges, and are inconsistently applied in the Final Rule.

II. Even assuming the redefinitions in the Final Rule were not totally foreclosed by the statute, but might fit into some range of ambiguity, this Court was incorrect in its earlier determination to afford the Final Rule *Chevron* deference.

ATF never invoked *Chevron* deference for its Final Rule, correctly denies that the rule is legislative, failed to exercise any legislative discretion that it might have had, and it is improper to impose the presumption of legislative action on an agency that vehemently denies a reliance on deference to non-existent judgments. Whether never actually exercised or waived, this Court should not have relied on *Chevron* deference to uphold the Final Rule.

Additionally, because the definition of machinegun has direct criminal applications, *Chevron* deference is inappropriate and the rule of lenity applies instead to resolve any supposed ambiguities. To hold otherwise, particularly regarding the definition of a crime, would be a violation of separation of powers and the delegation doctrine as applied.

Finally, even if *Chevron* were applied, the Final Rule is arbitrary and capricious because ATF failed to recognize any supposed discretion when rejecting various comments and proposed alternatives, because the rule was a foregone conclusion based on political pressure rather than reasoned analysis or judgment, and because the Final Rule merely replaces one supposedly ambiguous term—"automatically"—with a more ambiguous phrase.

ARGUMENT

I. The Final Rule Is Inconsistent with the Statutory Definition of a Machinegun.

"It's a 'fundamental canon of statutory construction' that words generally should be 'interpreted as taking their ordinary meaning at the time Congress enacted the statute.'" *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019) (quoting *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018)) (brackets and ellipses omitted). ATF ignored that fundamental cannon twice over when it interpreted "single function of the trigger" and "automatically" so broadly that they now include more than one function of the trigger and *semi*automatic fire.

A. "Single function of the trigger" refers to the mechanical action of the trigger.

The District Court held that the phrase "single function of the trigger" was ambiguous and that it was reasonable to interpret it as a single "pull" of the trigger. Opinion at 11, ECF No. 74 [JA __]. That approach, however, improperly shifted the language from a trigger-centric focus on the movement of the trigger, however accomplished, to a shooter-centric focus of the behavior or intent of the person. The

language of the statute, however, maintains a focus on the mechanical action of firearm not on its operator.

When the definition of a machine gun was narrowed by the 1968 GCA, "function" was defined as "action," WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 920–21 (1967), "the acts or operations expected of a . . . thing," WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY 338 (1967), and the "characteristic action of a . . . manufactured or created thing," *id.* In the statutory definition of "machinegun," "function" thus most reasonably refers to the mechanical action of the trigger. After all, the trigger, not the human pulling it, is a "manufactured or created thing." *Id.*

The Sixth Circuit panel in *Gun Owners of Am., Inc. v. Garland*, 992 F.3d 446 (6th Cir. 2021) (vacated and *en banc* rehearing pending), correctly analyzed the language and agreed that it was trigger-focused, not shooter-focused, which necessarily would exclude bump stocks from the definition of a machinegun. That court noted, for example, that the statute refers to the "single function of *the trigger,*" § 5845(b) (emphasis added), and is consistent with the rest of § 5845(b)'s definition of "machinegun," which "describes the firearm, not the shooter, the

shooter's body parts, or the shooter's actions." 992 F.3d at 471. "Indeed, the entire definition focuses exclusively on the firearm's design and capability," and never refers to "the shooter or the shooter's actions." *Id.*

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

As noted earlier, *supra* at 7–9, a "single function of the trigger" concludes when one function ends so another may begin. Once a trigger is pulled, the function of the trigger is complete when the hammer is released, and a shot is fired. For the trigger to perform any additional function it must be released, and the hammer must be reset to await a subsequent function of the trigger to fire an additional shot. *See* Br. for Appellants at 5–7 & Images 1–8, *Guedes v. ATF* (No. 19-5042) (D.C. Cir.). It is the release of the trigger that terminates the initial function of an

ordinary trigger and allows a second or subsequent function to occur. Indeed, the Final Rule itself acknowledges that releasing a trigger constitutes a separate and second "function" of the trigger when it discusses binary triggers. 83 FED. REG. at 66,534.[4]

Any subsequent bump, pull, or other interaction between the shooter's finger and the trigger, causing the trigger once again to traverse its range of motion, causes a second or subsequent function of the trigger, not a continuation of the initial completed function. As ATF conceded in the rulemaking, "additional physical manipulation of the trigger" results in an additional "function of the trigger." 83 FED. REG. at 66,519. And ATF acknowledges that "bumping" the trigger "re-engage[s]" the trigger, 83 FED. REG. at 66,516, and that "bumping" the trigger is the functional equivalent of "pulling" it. Thus, "a semiautomatic rifle equipped with a bump stock *cannot* fire more than one round with a *single* function of the trigger" because "the trigger of a semiautomatic rifle must release the hammer for each individual discharge." *Guedes*, 920 F.3d at 47 (Henderson, J., concurring in part and dissenting in part).

[4] For a binary trigger, the trigger resets on its own after the initial shot is fired. Releasing the trigger causes an additional shot to be fired.

Who or what causes the trigger function is beside the point. The object of the word "function" is the trigger itself, not the operator of the firearm. *See Guedes v. ATF*, 920 F.3d 1, 44 n. 13 (D.C. Cir. 2019) (Henderson, J., concurring in part and dissenting in part). The structure of the sentence and relevant past interpretations both support this trigger-centric definition. *Id.*; *Akins v. United States*, 312 Fed. App'x. 197 (11th Cir. 2009) (unpublished) (explaining how ATF did not initially consider Akins Accelerators to be machineguns because they involved multiple functions of the trigger, but then how ATF reversed course to focus on a "single pull"); 83 FED. REG. at 66,515 ("The Department, however, has revised the definition of 'single function of the trigger" to mean 'single pull of the trigger'"); *see also Staples v. United States*, 511 U.S. 600, 602 n.1 (1994) (focusing on whether the "trigger is depressed" and how many times the firearm can shoot until the "trigger is released"). Because the Final Rule takes a contrary shooter-focused approach, it is inconsistent with the statutory language.

B. "Automatically" refers to a self-acting mechanism.

At the time of the 1968 GCA and the 1934 NFA, "automatically" was understood as referring to the operation of a "self-acting"

mechanism—not merely a vaguely "self-regulating" mechanism. An automatic firearm was understood as a firearm that fired continuously until the trigger was released or the ammunition exhausted. *See, e.g.*, WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY 127 (2d. ed. 1964) (defining "automatic" and "automatical" as "1. conducted or carried on by self-acting machinery; as, automatic operations."; defining "automatic pistol, automatic rifle, etc." as "a pistol, rifle, etc. that uses the force of the explosion of a shell to eject the empty cartridge case and place the next cartridge into the breech so that shots are fired in rapid succession until the trigger is released."); THE SHORTER OXFORD ENGLISH DICTIONARY 135 (3d ed. 1944) (1973 reprint) (defining "Automatic," in relevant part, as "1. lit. Self-acting, having the power of motion or action within itself 1812. 2. Going by itself; esp. of machinery and its movements, which produce results otherwise done by hand, or which simulate human or animal action 1802."); 1 THE OXFORD ENGLISH DICTIONARY 574 (1933) (1970 reprint) (defining "Automatic," in relevant part, as "1. lit. Self-acting, having the power of motion or action within itself. … 2. Self-acting under the conditions fixed for it, going of itself. Applied esp. to machinery and its movements, which produce results

otherwise done by hand ….”); *cf.* John Quick, DICTIONARY OF WEAPONS AND MILITARY TERMS 40 (1973) (automatic fire: “continuous fire from an automatic gun, lasting until pressure on the trigger is released”).

Many courts have confirmed that automatic firearms are defined by their ability to shoot more than one shot “automatically” after only the expressly specified initiating action—*i.e.*, “by a single function of the trigger.” *See Staples*, 511 U.S. at 602 n. 1 (“As used here, the terms ‘automatic’ and ‘fully automatic’ refer to a weapon that fires repeatedly with a single pull of the trigger. That is, once its trigger is depressed, the weapon will automatically continue to fire until its trigger is released or the ammunition is exhausted.” (emphasis added)); *Hollis v. Lynch*, 827 F.3d 436, 440 n.2 (5th Cir. 2016) (a machinegun “fir[es] more than one round per trigger-action” and a semiautomatic firearm “fires only one round per trigger-action.”); *Kolbe v. Hogan*, 849 F.3d 114, 158 (4th Cir. 2017) (Traxler, J., dissenting) (“[S]emiautomatic firearms require that the shooter pull the trigger for each shot fired, while . . . ‘machine guns’ do not require a pull of the trigger for each shot and will [shoot] as long as the trigger is depressed.”) (citing *Staples*, 511 U.S. at 602 n.1).

ATF long shared this common understanding of "automatically." *See, e.g.*, ATF Ruling 2004–5, https://tinyurl.com/ATFRuling2004-5 ("'automatic' is defined to include 'any firearm in which a single pull and continuous pressure upon the trigger (or other firing device) will produce rapid discharge of successive shots[.]'") (quoting George C. Nonte, Jr., FIREARMS ENCYCLOPEDIA 13 (Harper & Rowe 1973)). Contemporaneous dictionaries, the general public, and ATF's experts all agreed on this definition of "automatically" because it reflects the plain meaning and public understanding of the word.

Using the ordinary meaning of the words in the statute, as we must, *New Prime Inc.*, 139 S. Ct. at 539, "[a] 'machinegun,' then, is a firearm that shoots more than one round by a single trigger pull without manual reloading," and not "a firearm that shoots more than one round 'automatically' by a single pull of the trigger **AND THEN SOME** (that is, by 'constant forward pressure with the non-trigger hand')." *Guedes*, at 33 (Henderson, J. concurring in part and dissenting in part) (emphasis in original).

ATF's contrary interpretation is not even remotely plausible, much less the "plain" or "best" reading of what it means to "shoot . . .

automatically more than one shot . . . by a single function of the trigger." While it may in some sense be a plausible definition of shooting "semiautomatically"—a term previously included in, but eventually removed from, the definition of machinegun—firearms that fired "automatically" were, are, and always have been understood as a far narrower class of firearms that continue to expend available ammunition so long as the trigger remained depressed.

C. Congress in 1968 ratified a narrow reading of the definition of machinegun.

While the NFA originally defined "machine gun" as "any weapon which shoots, or is designed to shoot, automatically or semiautomatically, more than one shot, without manual reloading, by a single function of the trigger," Pub. L. No. 73-474, ch. 757, 48 Stat. 1236, the GCA in 1968 deleted "or semiautomatically" from the definition of "machinegun," Gun Control Act, tit. II, § 201 (codified at 26 U.S.C. § 5845(b)), to exclude semiautomatic rifles from the definition. At the same time, Congress added new language including parts or devices used to convert a weapon into a machine gun and addressed a variety of other issues that expanded coverage of the NFA.

What is significant about the 1986 narrowing of the first sentence of the definition and incorporation of the second is that it took place after the Treasury Department's 1955 Ruling on Gatling Guns. *See supra*, at 4–5. That 1955 ruling on both crank- and motor-driven Gatling guns thus was the extant view when Congress *narrowed* the definition of machinegun. Despite having responded to numerous concerns from court cases and filling various other perceived gaps in the statute, Congress in 1968 did not question the narrow prior construction of the first sentence, did not object to the Gatling gun ruling, and hence effectively incorporated that narrow interpretation into the meaning of the statute —or at least confirmed and narrowed the existing "public meaning" of the statute at the time.

"Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change[.]" *Lorillard v. Pons*, 434 U.S. 575, 580 (1978); *see also Boeing Co. v. United States*, 537 U.S. 437, 456 (2003) ("The fact that Congress did not legislatively override 26 CFR § 1.861–8(e)(3) (1979) in enacting the FSC provisions in 1984 serves as persuasive evidence that Congress regarded that regulation as a correct

implementation of its intent"). That presumption is even stronger where Congress amends the precise definition at issue in a way that strengthens, rather than weakens, the earlier interpretation.

D. The Final Rule's definitions are unreasonable as applied to bump stocks and are overbroad.

Even under ATF's wrongly expanded definitions, bump stocks are not properly categorized as machineguns. As discussed above, "bump firing" is simply a technique for sequentially pulling the trigger of a semiautomatic firearm by using the recoil energy of one shot to assist in moving the trigger away from a stationary trigger finger, thus releasing the trigger and allowing it to reset and be ready for a subsequent operation or function of the trigger to fire the next shot. As ATF itself recognizes, skilled shooters can use this technique with *any* semiautomatic firearm and with or without a bump stock. 83 FED. REG. at 66,532–33 (acknowledging thousands of comments showing that "bump firing" is a "technique that any shooter can perform with training or with everyday items such as" "rubber bands, belt loops, string, or even people's fingers").

All a bump stock does is provide some play between the forward portion of the firearm and the stock so that the recoil of any given shot

can, depending on the amount of pressure being applied by the shooter, cause the trigger to slide backward and away from the trigger finger, thus releasing the trigger. It does *not* use that recoil to then re-engage the trigger, and absent further manual input, no further shots would be fired. Only if the shooter pushes the body of the firearm forward again will the trigger "re-engage" with the stationary trigger finger on the hand holding the stock will the firearm fire another round. 83 FED. REG. at 66,532–33; *see also* Pls.' Statement of Facts ¶ 1, ECF No. 62-2 [JA __] (linking to a video showing the operation of bump stocks that was verified for accuracy by a former ATF administrator).

To avoid the obvious mismatch between the statute and the actual operation of bump stocks, ATF argued below that a bump stock allows a firearm to "function automatically" by making it "easier to bump fire" because it controls recoil and ensures more linear motion of the firearm. Def. Summ. J. Mem. at 14, ECF No. 61-1 [JA __]. Making it easier to bump-fire a firearm, however, is hardly the test in the statute or even in the Final Rule. It does not speak to whether each subsequent round requires an additional function of the trigger to fire, and it does not explain why making the operation of a weapon "easier" constitutes

shooting via a self-acting or self-regulating mechanism. At best, ATF's discussion perhaps describes the mechanical stabilization of a firearm, but not the automatic shooting of that firearm. Indeed, *any* stock stabilizes a rifle in much the same way—it controls the distance and linearity of recoil. Pls.' Statement of Facts ¶ 2, ECF No. 62-2 [JA __] (citing Hlebinsky Declaration discussing how fixed stock and other innovations stabilize a firearm to allow more rapid or accurate successive shots). Given that ATF claims that all the other means of facilitating the bump-firing of a semiautomatic firearm do not convert that firearm into an illegal machinegun, it is impossible to find a statutory basis for why this one means of making such action easier has crossed some new yet unknowable line from semiautomatic to automatic.

ATF also sought to dodge the obvious necessity of multiple functions of the trigger by claiming that the first function of the trigger initiated a "firing cycle" that required no further affirmative action by the shooter and hence no further "pull" of the trigger. But that, too, is absurd, given that subsequent shots indeed require affirmative action by the shooter in pushing the body of the firearm forward to bump the trigger into the finger. And regardless of how subsequent functions of the trigger

are accomplished, the trigger must interact with the trigger finger anew for each shot fired. Suggesting that the "firing cycle" of repeatedly bumping the trigger into the trigger finger through the manual exertion of forward pressure is initiated by a "single" function of the trigger is akin to saying that a journey of a thousand steps is *initiated* by a single step and therefore *accomplished* by that step.

The Final Rule's new definitions are also overbroad in that they ultimately make the concept of a "semiautomatic" weapon meaningless, since semiautomatics are self-regulating in the sense that they reduce the manual effort needed to manage the firing sequence, the stabilization of the barrel, and the control of recoil. Furthermore, if a "single" pull of the trigger includes the first trigger-pull in a sequence made *easier* by some component that relieves the amount of manual input required for subsequent shots, then every modern semiautomatic firearm is a machinegun, and the definitions in the Final Rule conflict with the statutory scheme permitting such firearms. *Cf.* 18 U.S.C. § 921(a)(28) (defining "semiautomatic rifle"). Since the 1930s, numerous innovations have made it easier to shoot consecutive rounds, including improved stocks, pistol grips, recoil compensators, adjustable tension for triggers,

binary triggers, and improved bipods or tripods, among others. Pls.' Statement of Facts ¶ 2, ECF No. 62-2 (describing Hlebinsky affidavit discussing evolution of firearms technology).[5] Each of these technologies reduces the manual activity and attention required by a shooter to control the firearm or release and re-engage the trigger, and hence would make firing subsequent shots "automatic" under the Final Rule's limitless definitions. And, under ATF's reading, the easier "firing sequence" for multiple shots would, of course, be *initiated* by the first shot in the sequence, regardless how many other times the trigger is subsequently engaged by the shooter.

That the Final Rule sought to limit the applications of its overbroad definitions by inconsistently ignoring them when inconvenient demonstrates the vagueness of the definitions and ATF's results-driven application of those definitions. Regarding binary triggers, for example, ATF claimed below that releasing the trigger is analogous to pulling the trigger and hence constitutes a second "function" of the trigger. But that

[5] Similarly, other simple physical aids, such as a belt-loop, a rubber band, any fixed stock itself, or a padded shooting jacket, likewise facilitate bump-firing by constraining movement of the firearm, maintaining linearity during recoil, controlling the distance of recoil, and myriad other things a shooter otherwise would have do through greater manual effort.

the binary trigger "automatically" resets surely makes it easier to fire the second shot and removes the manual input needed to first release the trigger that otherwise would be required before a second shot could be fired using a traditional trigger. Under ATF's logic, it thus initiates an "automatic" firing sequence with the initial pull regardless whether there is a subsequent analogous motion. ATF's rationale for distinguishing binary triggers thus is identical to the rationale it *rejected* regarding bump stocks: that the repeated release and subsequent bumps of the trigger are properly considered second and subsequent functions.[6]

II. If the Statute Is Ambiguous, the Final Rule Is Invalid.

Although this Court's earlier decision in the preliminary-injunction appeal addressed various *Chevron* issues, that decision should not be considered binding on a subsequent panel in this case given the unusual circumstances of the ruling, the lack of controversy on such issues between the parties, and the impact of recent Supreme Court cases.

[6] The greater irony is that binary triggers actually facilitate bump-firing consecutive shots far more efficiently than bump-stocks do. A single pull of a binary trigger would fire the first shot and, if a shooter held the firearm with a light to moderate grip, the recoil alone would cause the release of the trigger and fire the second shot without further manual input. With a bump stock and an ordinary trigger the recoil merely causes the trigger to reset, not to fire again.

As a general matter, a preliminary decision should not preclude revisiting those issues on summary judgment. *See Pitt News v. Pappert,* 379 F.3d 96, 105 (3d Cir. 2004) (Alito, J.) ("In the typical situation—where the prior panel stopped at the question of likelihood of success—the prior panel's legal analysis must be carefully considered, but it is not binding on the later panel").

Furthermore, ATF never sought, and expressly eschewed, *Chevron* deference, so the issue has never been properly litigated in this case. Justice Gorsuch has correctly pointed out the substantial error of the applying *Chevron* deference in this case, and that alone should be sufficient grounds for this Court to reconsider its earlier decision. *Guedes*, 140 S. Ct. at 789–90 (Gorsuch, J., statement regarding denial of certiorari).

Intervening precedent since the prior decision also provides strong grounds for reconsidering the earlier *Chevron* rulings. As the Supreme Court recently held, arguments adopted *sua sponte* without being raised or endorsed by a party violate the general principle of party representation. *United States v. Sineneng-Smith*. 140 S. Ct. 1575, 1579 (2020) ("But as a general rule, our system 'is designed around the premise

that [parties represented by competent counsel] know what is best for them, and are responsible for advancing the facts and argument entitling them to relief.'") (citation omitted; alteration in original); *id.* at 1578 ("[T]he appeals panel departed so drastically from the principle of party presentation as to constitute an abuse of discretion.").

If the panel nonetheless views the earlier decision in this case as binding on the *Chevron* issues, Plaintiffs would respectfully renew their request that the case go directly to the *en banc* Court or, if the panel itself agrees that the earlier rulings were error, be presented to the rest of the Court for a potential *Irons* footnote. *See, e.g.*, *Irons v. Diamond*, 670 F.2d 265, 267–68 & n.11 (D.C. Cir. 1981).

With those considerations in mind, Plaintiffs will address the *Chevron* issues for the first time before this Court.

A. *Chevron* deference was waived.

As ATF has repeatedly stated, it does not invoke deference for its interpretive rule, it did not do so in the rulemaking, and on numerous occasions it affirmatively denied having exercised the sort of discretion that leads to deference for an agency's legislative choices. *See, e.g.*, Br. for the Resp'ts. in Opp'n at 14, 20–27, *Guedes v. ATF* (No. 19-296) (U.S.

Supreme Court). And it likewise denied having any delegated "legislative" gap-filling authority regarding the definition of "machinegun." *Id.* at 25.

This Court in its earlier opinion concluded that *Chevron* deference could not be waived because "*Chevron* is not a 'right' or 'privilege' belonging to a litigant," but is "instead a doctrine about statutory meaning—specifically, about how courts should construe a statute." *Guedes*, 920 F.3d at 22. From that understanding, it continued to hold that if a rule is legislative—as it considered the Final Rule to be—the rule's validity is reviewed "under the Chevron framework." *Id.* That conclusion did not take into account ATF's contrary views on the issue, what it understood to have taken place in the rulemaking, or its own understanding of the scope of its delegated discretion because this Court held that the "proper subject of [its] review is what the agency actually did, not what the agency's lawyers later say the agency did." *Id.*[7]

The decision also could not have considered a subsequent Supreme Court decision refusing to apply *Chevron* deference where the

[7] The "agency" and its lawyers in this case, however, are both part of the Department of Justice, so that distinction carries little weight here.

government failed to invoke it. *HollyFrontier Cheyenne Ref., LLC v. Renewable Fuels Ass'n*, 141 S. Ct. 2172, 2180 (2021) (Gorsuch, J., writing for six justices) (while the government had "asked the court of appeals to defer to its understanding under *Chevron* . . . the government does not . . . repeat that ask here. . . . We therefore decline to consider whether any deference might be due its regulation."); *see also id.* at 2184 (Barrett, J., dissenting, writing for three Justices) (rejecting the notion that "HollyFrontier wins because its reading is *possible*" and instead seeking to "assess[] the best reading of the phrase" for themselves) (emphasis original). That intervening precedent alone is enough to reconsider and reject the prior panel's holding regarding waiver.

In any event, *Chevron* deference is not appropriate where the government has disavowed having exercised discretion and does not seek to defend any supposedly legislative judgments the courts would impute to it against its express statements to the contrary. ATF is correct that it did not engage in legislative rulemaking as far as the definitional questions are concerned. It repeatedly disclaimed having any leeway to implement alternative approaches to bump stocks because it understood

its discretion to be *foreclosed* by its erroneous view of plain meaning of the statute.

That this Court, 920 F.3d at 17–19, incorrectly viewed the Final Rule as legislative because ATF selected a future starting date and clumsily declared that conduct would "become" illegal after that date should not guide a panel's current view of the matter. In purporting to have suddenly "discovered" that the plain and true meaning of the statute was contrary to decades of agency interpretation and public guidance, ATF was faced with a due process dilemma. It certainly could not have begun immediate enforcement actions against all the persons it had repeatedly assured that bump stocks were legal. That would have been a grotesque violation of due process. So it created a grace period. The decision whether and how to implement a grace period were, of course, "legislative" in nature. But those "legislative" components of the rulemaking did not extend to ATF's interpretation of the operative words of the definition of "machinegun," regarding which ATF claimed it had no discretion at all. Were those details alone being challenged, they would more plausibly trigger *Chevron* deference as judgement-driven gap-filling measures.

Nor does the Final Rule's brief discussion of *Chevron*, 83 FED. REG. at 66,527, suffice to invoke deference to ATF's interpretive opinions regarding the meaning of the definition of "machinegun." What the agency said about *Chevron* was that because it believed its definition was correct (and required) by the statute, it was definitionally "reasonable" under *Chevron*. But saying, in effect, that because ATF believes it should prevail at *Chevron* step one, it necessarily would win at step two, is oxymoronic. To even reach *Chevron* step two, the agency and a court would need to recognize that the language is ambiguous and reasonably admits of *more than one meaning*. An agency saying it thinks option A is reasonable because there is no option B is not an exercise of *discretion*, legislative or otherwise, it is a legal conclusion about what the meaning of the law *is*, rather than what it *should be* in the event of a choice.

ATF's reading of the term machinegun was never a *judgment* call in the rulemaking, was never understood by ATF as a judgment call, and in all instances the agency claimed to believe it was acting according to the binding terms of the law, not its own legislative or policy discretion. The government's express waivers and descriptions of its own action as involving an interpretive, rather than a legislative, rule deserve far more

of this Court's deference than its interpretation of a statute that literally defines a substantive element of a criminal offense.

B. *Chevron* deference is inappropriate for statutes with criminal applications, and the rule of lenity requires ambiguities to be read narrowly.

While Plaintiffs maintain that the plain and best meaning of the statutory definition of machinegun affirmatively excludes the definitions proffered in the Final Rule, at a minimum Plaintiffs have demonstrated serious ambiguity. Indeed, the fact that the Final Rule contradicts eight decades of interpretations by Treasury and ATF is more than sufficient to illustrate that, at best, the statute's meaning is not apparent or discernable by reasonable persons. If it took government experts over 80 years to "discover" the supposed plain meaning of the statute, surely the average citizen could not have been expected to do better—and to be sure, there is no evidence that the public has ever shared Appellees' expansive reading of the statutory terms. Any alternative conclusion implies that the many lawyers and firearms experts making the decisions all those years were unreasonable and somehow incapable of reading a plain and reputedly common definition that they applied repeatedly in numerous cases and rulings.

Regarding how to address such statutory ambiguity, all parties in this case agree that *Chevron* deference does not apply to criminal statutes. And while they disagree on the amount of ambiguity that must exist to trigger the rule of lenity, they agree that if other ordinary tools of judicial interpretation fail to resolve a sufficient ambiguity, the rule of lenity applies, not *Chevron* deference. This Court, however, concluded that *Chevron* deference could indeed apply to statutes having mixed civil and criminal applications and that *Chevron* took precedence over the rule of lenity to resolve any ambiguities. *Guedes*, 920 F.3d at 25–27. Both conclusions were mistaken.

The rule of lenity is one of "the most venerable and venerated of interpretive principles," *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 731 (6th Cir. 2013) (Sutton, J., concurring), and is deeply "rooted in a constitutional principle," Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 332 (2000). As Chief Justice Marshall observed, the rule of lenity "is perhaps not much less old than construction itself. It 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." *United States v. Wiltberger*, 18 U.S. 76, 95 (1820).

Narrow construction of ambiguous criminal laws is especially important in the administrative context. Because agencies have a natural tendency to broadly interpret the statutes they administer, deference in the criminal context "would turn the normal construction of criminal statutes upside-down, replacing the doctrine of lenity with a doctrine of severity." *Crandon v. United States*, 494 U.S. 152, 178 (1990) (Scalia, J., concurring).

One central purpose of lenity is to avoid improper delegation of lawmaking authority in the criminal realm. Sunstein, 67 U. CHI. L. REV. at 332. The rule of lenity "is not a rule of administration," but "a rule of statutory construction whose purpose is to help give authoritative meaning to statutory language." *United States v. Thompson/Ctr. Arms Co.*, 504 U.S. 505, 518 n.10 (1992).

Lenity is an interpretive rule that resolves ambiguity in favor of potential defendants and is part of the traditional toolkit for determining the meaning of statutory language. "Rules of interpretation bind all interpreters, administrative agencies included. That means an agency,

no less than a court, must interpret a doubtful criminal statute in favor of the defendant." *Carter*, 736 F.3d at 731 (Sutton, J., concurring). Lenity thus comes before applying any questionable inference that Congress intentionally delegated legislative authority to executive agencies through ambiguous drafting. "If you believe that *Chevron* has two steps, you would say that the relevant interpretive rule—the rule of lenity—operates during step one. Once the rule resolves an uncertainty at this step, 'there [remains], for *Chevron* purposes, no ambiguity . . . for an agency to resolve.'" *Id.* at 731 (Sutton, J., concurring) (alteration in original) (quoting *INS v. St. Cyr*, 533 U.S. 289, 320 n.45 (2001)). Put differently, the "ancient maxim" of lenity, *Wiltberger*, 18 U.S. at 95, applied at step one, ensures that "*Chevron* leaves the stage," i.e., there is no step two. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1630 (2018).

In its prior ruling, this Court, relying on *Babbitt*, 515 U.S. 687, and without briefing on the matter, determined that *Chevron* deference could indeed apply to a statute that had criminal applications where it also had civil applications. 920 F.3d 1, 24. Its reliance on *Babbitt*, however, was misplaced.

"[W]ith scarcely any explanation," *Babbitt* deferred "to an agency's interpretation of a law that carried criminal penalties" and "brushed the rule of lenity aside in a footnote." *Whitman*, 135 S. Ct. at 353 (Scalia J., joined by Thomas, J., respecting denial of certiorari). But *Babbitt*'s "drive-by ruling . . . deserves little weight" because it "contradicts the many cases before and since holding that, if a law has both criminal and civil applications, the rule of lenity governs its interpretation in both settings." *Id.* at 353–54. Before *Babbitt,* for example, a plurality in *Thompson/Center* refused to defer to the ATF's interpretation of the NFA and applied the rule of lenity to provisions with civil and criminal applications—despite Justice Stevens's dissent. 504 U.S. at 517–18; *see also Staples*, 511 U.S. at 619 n.17 (lenity would have applied to any ambiguity regarding mens rea requirement).

Nine years after *Babbitt*, in an immigration case, a majority of the Court endorsed the plurality opinion in *Thompson/Center* and held that the rule of lenity applied to 18 U.S.C. § 16 (defining "crime of violence") because the statute has both criminal and civil applications. *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004) ("Even if § 16 lacked clarity on this point, we would be constrained to interpret any ambiguity in the statute

in petitioner's favor . . . whether we encounter its application in a criminal or noncriminal context, the rule of lenity applies."). The Court did not even cite to *Babbitt*'s dubious footnote.

Ten years further on, the Court continued to apply lenity and reject deference for statutes with criminal and civil applications. *United States v. Apel*, 571 U.S. 359, 369 (2014) ("[W]e have never held that the Government's reading of a criminal statute is entitled to any deference."); *Abramski v. United States*, 573 U.S. 169, 191 (2014) (ATF's interpretation of a Gun Control Act prohibition is "not relevant at all"; "criminal laws are for courts, not for the Government, to construe.").

Consistent precedent before and after *Babbitt* demonstrates that reading it to invert the priority of lenity and *Chevron* "is a lot to ask of a footnote, more it seems to me than these four sentences [of the footnote] can reasonably demand." *Carter*, 736 F.3d at 734 (Sutton, J., concurring).

This Court in its earlier ruling also got things backwards when it concluded that *Chevron* was a canon of construction that applied *before* resort to the rule of lenity. *See* 920 F.3d at 27. *Chevron* deference is nothing of the sort, but rather is an application of the implied delegation

of legislative authority thought to accompany ambiguities that could not otherwise be resolved by all other ordinary canons of construction.

Chevron deference is based on the dubious inference that ambiguous statutory language was intended to delegate authority to the Executive Branch to make the relevant legislative decisions left unanswered by the statute. *See Chevron*, 467 U.S. at 843–44, 865–66 (addressing agency "'formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress'"; "Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit"; statutory gaps requiring "reconciling conflicting policies" can result from congressional failure to "consider the question" or inability to "forge a coalition on either side of the question"; applying deference for "resolving the competing interests" Congress inadvertently or intentionally failed to resolve).

Putting aside the myriad problems with *implying* such a delegation from congressional imprecision or failure of bicameral agreement, *Chevron* does not purport to be a tool to discover the meaning of statutory language and applies only where the meaning of the statute is sufficiently indeterminate as to leave more than one plausible reading.

From such indeterminacy, *Chevron* presumes an implied desire by Congress to have the Executive Branch make the *policy* choice as to which meaning *should* be selected. That delegation, however, is improper in the context of a statute with criminal applications and remains unexercised where the agency denies any ambiguity or policy discretion in the first place, or simply refuses to make the substantive policy choice presented by any ambiguity.

That *Chevron* deference depends on such inferred delegation is all the more reason to apply other rules of construction first. "Only after a court has determined a challenged statute's meaning can it decide whether the law sufficiently guides executive discretion to accord with Article I." *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (plurality opinion).

Gundy was far from an outlier in that approach. The Supreme Court has long instructed lower courts to apply the traditional tools of statutory interpretation, including other substantive canons, before deferring under *Chevron*. *See Bond v. United States*, 572 U.S. 844, 859–60 (2014) (applying the federalism canon to resolve ambiguity); *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Engineers*, 531 U.S.

159, 172–73 (2001) (federalism canon again); *Miller v. Johnson*, 515 U.S. 900, 923 (1995) (constitutional avoidance canon); *INS v. St. Cyr*, 533 U.S. at 320 n.45 (retroactivity canon) (abrogated on other grounds by statute). Applying the rule of lenity here is thus required by *Gundy*—which had not yet been decided when this Court first addressed this issue—and is consistent with these other precedents, too.

Furthermore, if trumped by *Chevron* deference, the separation-of-powers function of the rule of lenity would be severely compromised.

> Making something a crime is serious business. It visits the moral condemnation of the community upon the citizen who engages in the forbidden conduct, and it allows the government to take away his liberty and property. The rule of lenity carries into effect the principle that only the legislature, the most democratic and accountable branch of government, should decide what conduct triggers these consequences. By giving unelected commissioners and directors and administrators carte blanche to decide when an ambiguous statute justifies sending people to prison, [*Chevron* deference] diminishes this ideal.

Carter, 736 F.3d at 731 (Sutton, J., concurring); *see also Whitman*, 135 S. Ct. at 354 (statement of Scalia & Thomas, JJ., respecting the denial of certiorari) ("[E]qually important, [the rule of lenity] vindicates the principle that only the *legislature* may define crimes and fix punishments. Congress cannot, through ambiguity, effectively leave that

function to the courts—much less to the administrative bureaucracy.") (emphasis in original).[8]

As the Supreme Court recognizes, "when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221–22 (1952); *see also Lewis v. United States*, 445 U.S. 55, 65 (1980) ("[T]he touchstone" of the lenity principle "is statutory ambiguity."); *United States v. Gradwell*, 243 U.S. 476, 485 (1917) ("[B]efore a man can be punished as a criminal under the Federal law his case must be 'plainly and unmistakably' within the provisions of some statute.") (citations omitted).[9]

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[8] The "first principle" of criminal law requires that crimes be explicitly and unambiguously specified in advance by statute. *Liparota v. United States*, 471 U.S. 419, 424 (1985) ("The definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute." (citation omitted)).

[9] The Supreme Court has long held that "when there are two rational readings of a criminal statute, one harsher than the other, [the Court is] to choose the harsher only when Congress has spoken in clear and definite language." *McNally v. United States*, 483 U.S. 350, 359–60 (1987); *see Yates v. United States*, 135 S. Ct. 1074, 1087–88 (2015)

Because the rule of lenity is an interpretive canon implementing constitutional and pre-constitutional principles, it applies before *Chevron* deference. It is one of the tools for deciding whether a statute with criminal applications is sufficiently ambiguous to pose an improper delegation to the executive. Indeed, the canon is expressly designed to *prevent* delegation of such a choice in the criminal context, and thus is at complete odds with any delegation merely implied from ambiguity.

The burden thus properly rests upon the government to show that the statute "plainly" covers the conduct supposedly criminalized, not on potential defendants to show overly severe ambiguity.

This case presents sufficient ambiguity for lenity to apply—indeed, any level of ambiguity in a criminal statute that is sufficient to allow *Chevron* deference and the "legislative" enactment of crimes by the Executive Branch is sufficiently serious to trigger the rule of lenity. While courts themselves should strive to resolve minor ambiguities when reading a statute, at the point a court is willing to throw up its hands and pass the ball to the Executive Branch to legislatively define crimes, it

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(plurality opinion); *Skilling v. United States*, 561 U.S. 358, 410–11 (2010); *Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 409 (2003).

should be willing to look first to the rule of lenity. At a minimum, it should do so as a matter of constitutional avoidance given the serious separation of powers concerns raised by allowing the Executive Branch to define crimes. *See Miller*, 515 U.S. at 923 ("[W]e have rejected agency interpretations to which we would otherwise defer where they raise serious constitutional questions.").

At the end of the day, *Chevron* deference is not a means for a court to interpret a statute, not a canon of construction, and not even part of *Chevron* step one. Rather, it is an allocation of authority to legislatively supplement a statute only after traditional interpretive principles fail to resolve a statute's meaning. Lenity, by contrast, is a traditional interpretive principle, and would apply before deferring to an agency to "legislatively" define terms in a criminal statute.

C. If *Chevron* deference governs despite the criminal applications of the statute and the government's affirmative rejection of any legislative authority, then it is unconstitutional as applied.

Given the separation of powers and delegation concerns discussed above in connection with the rule of lenity, application of *Chevron* deference here would be unconstitutional. Whether this Court views this as a matter of constitutional avoidance, or as an argument for later

review in the Supreme Court, the unavoidable fact is that *Chevron*, particularly as applied in this case, does considerable violence to separation of powers and represents a meaningful abdication of the judicial power to say what the law is. *See PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 139 S. Ct. 2051, 2057 (2019) (Thomas, J., joined by Gorsuch, J., concurring in the judgment) ("The decision below rested on the assumption that Congress can constitutionally require federal courts to treat agency orders as controlling law, without regard to the text of the governing statute. A similar assumption underlies our precedents requiring judicial deference to certain agency interpretations. *See* [*Chevron,* 467 U.S. 837]. This case proves the error of that assumption and emphasizes the need to reconsider it."); *Pereira v. Sessions*, 138 S. Ct. 2105, 2121 (2018) (Kennedy, J., concurring) ("it seems necessary and appropriate to reconsider, in an appropriate case, the premises that underlie *Chevron* and how courts have implemented that decision.") (citations omitted); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149–58 (10th Cir. 2016) (Gorsuch, J., concurring) (sharply criticizing *Chevron* on separation of powers grounds); Paul J. Larkin Jr., Chevron *and Federal Criminal Law*, 32 J.L. & POL. 211, 218–19 & n.31

(2017) (citing articles critical of *Chevron*); Jack M. Beermann, Chevron *at the Roberts Court: Still Failing After All These Years*, 83 FORDHAM L. REV. 731, 750 (2014) (*Chevron* doctrine "an incoherent, imprecise, and arbitrarily applied set of principles for reviewing agency statutory construction").

And because *Chevron* concerns implied delegations of legislative authority, it is difficult, to say the least, to reconcile an implied delegation of legislative discretion based on silence or ambiguity with a requirement that any delegation of such power be accompanied with sufficiently intelligible principles to guide the exercise of that discretion.[10] This case thus squarely presents the very concerns that have led several members of the Supreme Court to express a willingness to reconsider the questionable evolution of delegation doctrine. *Gundy*, 139 S. Ct. at 2131 (Gorsuch, J. dissenting) (joined by Roberts, C.J. and Thomas, J.).

Whatever the broader objections to *Chevron* in general, if *Chevron* deference is now to apply to the criminal law and is to be imposed upon

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[10] The clear statement rule concerning delegations of rulemaking authority that involve criminal statutes is one way to attempt such reconciliation. See, *e.g.*, *United States v. Grimaud*, 220 U.S. 506, 519 (1911); *Touby v. United States*, 500 U.S. 160, 165–67 (1991); *Carter*, 736 F.3d at 734 (Sutton, J., concurring).

the government over its express objection, it truly has gone too far and should be held unconstitutional, at least as applied.

D. The Final Rule is unreasonable, arbitrary, and capricious.

Even assuming ambiguity and that lenity does not apply, *Chevron* deference cannot save the Final Rule. "Agency action is arbitrary and capricious 'if the agency has relied on factors which Congress has not intended it to consider, . . . [or] offered an explanation for its decision that runs counter to the evidence before the agency.'" *Animal Legal Def. Fund, Inc. v. Perdue*, 872 F.3d 602, 611 (D.C. Cir. 2017) (citation omitted). Here, the agency failed to recognize or exercise any supposed legislative discretion.

First, because the government repeatedly claimed that it was bound by the plain meaning of the statute, even if deference to a "legislative" definition of machinegun were appropriate, no legislative discretion was exercised. *See, e.g.*, *Guedes*, 920 F.3d at 39 n.6 (Henderson, J., concurring in part and dissenting in part) ("I would note that the ATF in fact declared that the Rule's interpretations of 'single function of the trigger' and 'automatically' 'accord with the plain meaning of those

terms.'" (quoting Final Rule, 83 FED. REG. at 66,527 (emphasis added)).").[11]

It is a fundamental truism that an agency that does not understand itself to have discretion cannot be deemed to have exercised such discretion. *Webb v. Bladen*, 480 F.2d 306, 310 (4th Cir. 1973) ("A failure to recognize the existence of authority to exercise discretion does not amount to its exercise."). If the Court again determines that the statutory definition is ambiguous and that ATF was perhaps *permitted* to legislatively define machinegun as it did, but not *required* to do so, then

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[11] *See also* 83 FED. REG. at 66,529–36 ("The bump-stock-type device rule is not a discretionary policy decision based upon a myriad of factors that the agency must weigh, but is instead based only upon the functioning of the device and the application of the relevant statutory definition."; "the materials and evidence of public safety implications that commenters seek have no bearing on whether these devices are appropriately considered machineguns based on the statutory definition."; rejecting various alternatives to the reclassification, stating that "the Department has concluded that the NFA and GCA require regulation of bump-stock-type devices as machineguns, and that taking no regulatory action is therefore not a viable alternative to this rule."; "This is because the statutory definition alone determines whether a firearm is a machinegun. The Department believes that the final rule makes clear that a bump-stock-device will be classified as a machinegun based only upon whether the device satisfies the statutory definition."; "Because bump-stock-type devices are properly classified as "machineguns" under the NFA and GCA, the Department believes that ATF must regulate them as such, and that the recommended alternatives are not possible unless Congress amends the NFA and GCA.").

all of the Final Rule's responses rejecting proposed alternatives due to a lack of discretion rest on a false assumption. *See DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1911 (2020) (rejecting repeal of DACA because Acting Secretary of DHS "did not appear to appreciate the full scope of her discretion").

As with the recent DACA decision, the failure to recognize discretion would invalidate the Final Rule, as ATF itself seemingly conceded in previous briefings acknowledging that the failure to recognize the existence of any "legislative" discretion would render its Final Rule arbitrary and capricious. Reply in Supp. Defs.' Mot. Summ. J. at 18–19, ECF No. 66 [JA __-__].

The failure to understand and exercise discretion is, of course, arbitrary and capricious regardless of how one imagines such discretion *would have been* exercised. Even if ATF believed its interpretation was the best interpretation of the language, it did not claim to consider the policy implications or the alternatives in the event it were not constrained by the statute. ATF gave no consideration whatsoever to many alternatives that would still be compatible with such an *unconstrained* interpretation, for example grandfathering certain bump

stocks in precisely the manner actual machineguns were grandfathered.[12]

Second, the rulemaking resulted from a foregone conclusion, not reasoned judgment. President Trump declared he would "write out" bump-stock devices "myself because I'm able to." President Donald J. Trump, *Remarks at a Meeting with Members of Congress on School and Community Safety* 23 (Feb. 28, 2018), https://tinyurl.com/TrumpRemarks. Pre-ordained rulemaking outcomes reversing past reasoned determinations are arbitrary and capricious and not entitled to deference. "The agency's statement must be one of 'reasoning'; it must not be just a [foregone] 'conclusion[.]'" *Butte Cnty. v. Hogen*, 613 F.3d 190, 194 (D.C. Cir. 2010) (citation omitted). The Final Rule appears to stem from political compulsion, not agency expertise. Political determinations in criminal statutes must be made by Congress, not the President.

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[12] *Cf.* ATF Ruling 82-8 at 143–44, https://www.atf.gov/file/58146/download ("SM10 and SM11A1 pistols and the SAC carbine are machine guns as defined in Section 5845(b) of the Act. … [T]his ruling will not be applied to SM10 and SM11A1 pistols and SAC carbines manufactured or assembled before June, 21, 1982.").

Third, the new definition on its own terms is arbitrary and capricious in its treatment of the phrase "shoot . . . automatically." The district court the first time around endorsed ATF's expansion of the word automatically to mean "'functioning as the result of a self-acting or self-regulating mechanism,'" but then found that expansion itself to be ambiguous because "[a]utomatic devices regularly require some degree of manual input" and "[b]ecause [neither] the statute [nor the regulation] . . . specif[ies] how much manual input is too much." *Guedes v. ATF*, 356 F. Supp. 3d 109, 131 (D.D.C. 2019). It endorsed it yet again at summary judgment, holding that "the definition of 'automatically' does not mean that an automatic device must operate without *any* manual input." *Guedes v. ATF*, No. 18-CV-2988 (DLF), 2021 WL 663183, at *6 (D.D.C. Feb. 19, 2021) (emphasis in original). Of course, the word "automatically" does mean that, following a "single function of the trigger," the device must operate without any further manual input. But regardless, defining a supposedly ambiguous term with an even more ambiguous concept conflating automatic and manual is arbitrary and capricious.

CONCLUSION

Whether because the statutory language precludes the interpretation proffered in the Final Rule or because statutory ambiguity triggers the rule of lenity rather than *Chevron* deference, the Final Rule is unlawful. This Court should reverse the decision below and direct entry of judgment for plaintiffs.

Respectfully Submitted,

s/ Erik S. Jaffe

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I hereby certify that the foregoing Brief of Appellants complies with the type-face requirements of Fed. R. App. P. 32(a)(5) & (6) and the 13,000 word type-volume limitation of Fed. R. App. P. 32(a)(7)(b) and 32(a)(7)(B) in that it uses Century Schoolbook 14-point type and contains 12,930 words, excluding the table of contents, table of authorities, and certificates of counsel. The number of words was determined through the word-count function of Microsoft Word.

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I hereby certify that the foregoing Brief of Appellants submitted in PDF format via the ECF system was scanned using the current version of Norton Internet Security and no viruses or other security risks were found.

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I hereby certify that, on this 1st day of September, 2021, I caused the foregoing Brief of Appellants to be served via the ECF system on all counsel therein:

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