No. 19-1298

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GUN OWNERS OF AMERICA, et al.,
Plaintiffs-Appellants,

v.

MERRICK GARLAND, et al.,
Defendants-Appellees,

Appeal from the United States District Court
for the Western District of Michigan at Grand Rapids
(No.1:18-cv-01429)

BRIEF OF MONTANA AND 17 OTHER STATES AS AMICI CURIAE IN SUPPORT OF PLAINTIFF-APPELLANTS ON REHEARING *EN BANC*

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INTEREST OF AMICI

Amici Curiae States of Montana, Alabama, Arizona, Arkansas, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Nebraska, Ohio, South Carolina, South Dakota, Texas, Utah, West Virginia, and Wyoming ("the States") represented by their respective Attorneys General, seek to preserve the fundamental and inalienable right to keep and bear arms for their citizens. 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."). In this case, the Bureau of Alcohol, Tobacco, and Firearms' (ATF) erroneous rulemaking would immediately transform hundreds of thousands of law-abiding gun owners residing in the States into criminals. The panel majority correctly denied that attempt, and this Court should now affirm that decision, en banc.

SUMMARY OF ARGUMENT

Semiautomatic rifles are some of the most popular firearms in America—utilized by millions of law-abiding gun owners 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. The panel correctly concluded that the use of bump stock accessories does not transform these commonly-used firearms into "machineguns" as defined 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). *Gun Owners of Am., Inc. v. Garland*, 992 F.3d 446 (6th Cir. 2021). 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 informing owners of bump stocks that they must surrender or destroy their bump stocks to avoid criminal liability.

The panel importantly held that the ATF's interpretation of "machinegun" as defined in 26 U.S.C. § 5845(b), was not entitled to deference under *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865 (1984). The Supreme Court has never mandated that courts must defer to agency interpretations of *criminal* statutes. "[C]riminal laws are for courts, not for the Government, to construe." *Abramski v. United States*, 573 U.S. 169, 191 (2014).

Regardless of whether *Chevron* applies to criminal statutes such as the NFA, the ATF's interpretation is entitled to no deference because it implicates the fundamental right to keep and bear arms. The ATF's 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). But it also expands criminal liability at the expense of Second Amendment rights, diminishing the latter absent a sufficient and compelling justification. Surely the federal

agency tasked with regulating Second Amendment rights should read its enforcement statutes narrowly. But when the ATF—or any agency—invades protected rights by interpreting statutes too broadly, "a court has an obligation to correct its error." *Abramski*, 573 U.S. at 191.

The panel did, and this Court, sitting en banc, should do so too.

ARGUMENT

Many things make the United States exceptional. But only a few things actually function 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.[1] 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. While Congress sometimes delegates authority to

[1] *See* Antonin Scalia, *Foreword: The Importance of Structure in Constitutional Interpretation*, 83 Notre Dame L. Rev. 1417, 1418 (2008) ("[Provisions of the 1977 Constitution of the Union of Soviet Socialist Republics] were not worth the paper they were printed on, as are the human rights guarantees of a large number of still-extant countries governed by Presidents-for-Life. They are what the Framers of our Constitution called 'parchment guarantees,' because the *real* constitutions of those countries - the provisions that establish the institutions of government - do not prevent the centralization of power in one man or one party, thus enabling the guarantees to be ignored. Structure is everything.").

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. *Chevron* Deference Doesn't Apply to Criminal Statutes

The Supreme 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 panel dissenter, however, incorrectly relied on *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995), to conclude that *Chevron* applies to nearly *all* legislative rules that go through notice-and-comment rulemaking—including those interpreting criminal statutes. *Gun Owners*, 992 F.3d at 475–77, 479–85 (White, J., dissenting). But *Babbitt* does not support such a rule. That case didn't involve a criminal statute, but rather criminal penalties attendant to 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.

Although the Court adopted the same statutory interpretation as the agency, it did not 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 found the 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.

Criminal statutory schemes, however, do not require or permit courts to pay similar courtesies to agency interpretations, 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 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. And courts may not extrapolate from *Babbitt* a rule that *Chevron* deference is due whenever courts review criminal statutes administered by agencies. As Justice Scalia aptly noted, "[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.). *Babbitt*'s failure to address other important canons of construction, namely the "rule of lenity," necessitates a narrow reading. *Babbitt*, 515 U.S. at 704 n.18; *see also 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).

Both *Apel* and *Abramski* support this narrow reading of *Babbitt*. In *Apel*, the 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. The Court agreed 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* cast on the question, subsequent cases have confirmed that *Chevron* does not apply to criminal statutes. Congress delimits the totality of criminal conduct; executive agencies may go no further.

The panel dissent asserts that *Apel* and *Abramski* are irrelevant and fail to answer the question of whether *Chevron* applies in the criminal context because they did not involve legislative regulations. *Gun Owners*, 992 F.3d at 482 (White, J., dissenting). But the dissent's dichotomy between legislative and interpretive rules is of no moment. What matters is

whether the statute is criminal in nature. If the answer is yes, then *Chevron* does not apply regardless of whether the agency interpreting the statute has done so through notice-and-comment rulemaking. *Apel* and *Abramski* make this clear.[2]

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). 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. *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). While 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). This would be "preposterous" and blend 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).

II. Courts Need Not Afford Deference to the ATF's Broad Interpretations of Its Enforcement Statutes Because Those Interpretations Implicate Fundamental Rights Protected by the Second Amendment.

[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 generally 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.

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 such, any interpretation—whether inside or outside the *Chevron* framework—must recognize 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"). Especially when regulating constitutionally protected behavior, courts rightly assume that Congress avoids legislating by inference. Because the Final Rule effectively re-wrote the statute 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 panel rightly refused to defer to the ATF's interpretation. 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.

Although the panel correctly determined that *Chevron* does not apply to criminal statutes like § 5845(b), the Final Rule also cannot survive proper application of the *Chevron* framework. Notably, "the second step of *Chevron* … asks whether the … rule is a 'reasonable interpretation' of the statutory text." *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 58 (2011) (quoting *Chevron*, 467 U.S. at 844). 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). 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 sufficiently 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 to require permits "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)).

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 there have been semiautomatic firearms, *id.* at 452, and a bump stock is not even needed to effectuate this 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.

Bump-stocks are accessories. They are not firearms and are not regulated by the NFA. Nor do they somehow transform standard semiautomatic firearms into machineguns under the NFA. *Id.* at 471 ("A bump stock may change *how* the pull of the trigger is accomplished, but it does not change the fact that the semiautomatic firearm shoots only one shot for each pull of the trigger.") (citing *Guedes v. BATFE*, 920 F.3d 1, 48 (D.C. Cir. 2019) (Henderson, J., concurring in part and dissenting in part)). And even when utilizing bump stock accessories, semiautomatic rifles remain just semiautomatic rifles. The ATF's interpretation thus expands the NFA to cover semiautomatic rifles owned and used by law-abiding Americans because they use the bump stock accessory. The en banc Court should reaffirm that this executive encroachment on a constitutional right is unacceptable.

"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 the ATF's interpretation most certainly is an elephant. *See Whitman*, 531 U.S. at 468.

CONCLUSION

Regardless of the analytical framework the Court employs, the ATF's interpretation is wrong. Myriad reasons support the panel's decision invalidating the Final Rule. The ATF is entitled to no deference in interpreting criminal statutes, and that is particularly true when it interprets a statute that regulates the exercise of fundamental rights. This Court should adopt the panel's decision.

Respectfully submitted this 2nd day of August, 2021.

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/s/David M.S. Dewhirst
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CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system on August 2, 2021.

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/s/David M.S. Dewhirst
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