IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

W. Clark Aposhian, Plaintiff-Appellant, v. William Barr, Attorney General of the United States, et al., Defendants-Appellees.	: : : : : : : : : : : :	No. 19-4036

PLAINTIFF-APPELLANT'S SUPPLEMENTAL BRIEF

INTERLOCUTORY APPEAL FROM THE JUDGMENT OF
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

No. 2:19-cv-00037-JNP
THE HONORABLE JILL N. PARRISH
DISTRICT JUDGE

Oral Argument Is Requested

October 5, 2020

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Chevron deference is a substantive canon of construction meant to favor an agency's interpretation of an ambiguous statute, on the assumption that Congress gave the agency interpretive latitude that merits respect by a court. So, *Chevron* deference arises *only* when an agency is acting as Congress envisioned. When an agency attempts to contradict a statute, does not act with a unified voice, or fails to bring to bear its substantive expertise, *Chevron* deference is inapplicable. Moreover, *Chevron* does not apply when an agency declines to invoke it because (under the theory of *Chevron*) that latitude is part of what Congress gave the agency. If a court were to override an agency's decision to eschew deference, it would be disregarding the latitude that Congress bestowed on the agency. This Court should therefore accept ATF's view that *Chevron* is inapplicable to the Final Rule in this case, *Bump-Stock-Type Devices*, 83 Fed. Reg. 66514 (Dec. 26, 2018).

The Rule of Lenity, by contrast, is a constitutionally-mandated substantive canon of construction that resolves any ambiguity in a statute in favor of a defendant whenever it has potential criminal consequences. Lenity guarantees that the public has fair notice of a statute's reach, and it ensures that an agency may not exercise the unique Congressional prerogative of defining the scope of crimes. Lenity thus takes precedence over *Chevron* deference. Even if *Chevron* might resolve ambiguity differently in the absence of lenity, since ATF's Final Rule expands the scope of a statutory criminal provision, lenity mandates rejection of the Final Rule.

Just as there is no reason to defer to an agency's interpretation when it declines deference, so too a court should accept an agency's concession that a factual showing of irreparable harm has been made. Factual concessions are binding, even on courts, because they relieve parties of their burdens of proof. ATF's agreement that Mr. Aposhian suffered irreparable harm here must be accepted by the Court.

Finally, ATF did not exercise its unique expertise concerning the operation and classification of firearms in drafting the Final Rule. Indeed, ATF rejected the consistent interpretation of its firearms examiners and its own longstanding position when it crafted the rule. *Chevron* deference should not apply for this reason as well.

I. THE SUPREME COURT INTENDED FOR THE *CHEVRON* FRAMEWORK TO OPERATE AS A CONDITIONAL CANON OF STATUTORY CONSTRUCTION

The *Chevron* framework is a substantive canon of construction that applies in only limited circumstances. There is no prescriptive definition for the phrases "standard of review," "tool of statutory interpretation," or even "analytical framework." Instead, these are all *descriptive* terms meant to encompass a wide variety of doctrines, canons, principles, guides, or even just rules of thumb that all try to arrive at the same result—figuring out the meaning of statutes.

Looking to how *Chevron* deference operates in practice, it can best be described as a substantive canon of construction. However, the Supreme Court has made clear that *Chevron* only applies in limited circumstances as a tool for discerning statutory meaning. When those circumstances are absent at the outset, such as where an agency has adopted a legislative rule that it has no authority to promulgate, courts must not apply it.

The *Chevron* case itself provides the clearest picture of the framework's intended function. In discussing *Chevron* step one, the Court emphasized that the "judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n. 9 (1984). "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Id*.

Thus, *Chevron* is a tool of construction premised on Congressional *intent*. Where ambiguity exists, it presupposes that Congress "left a gap for the agency to fill," and the agency, not the court, has "more than ordinary knowledge respecting the matters subjected to agency regulations." *Id*. (citation omitted). It also presupposes that the agency may make "reasonable policy choice[s]" because the Executive Branch is "directly accountable to the people." *Id*. at 845, 865. Stated differently, *Chevron* deference is a rule of construction that applies only "when it appears that Congress delegated authority to the agency" "and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001). "A premise of *Chevron* is that when Congress grants an agency the authority to administer a statute by issuing regulations with the force of law, it presumes the agency will *use* that authority to resolve ambiguities in the statutory scheme." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016) (emphasis added).

Because it is meant to discern Congressional intent, the Court has often refused to apply *Chevron* deference when its "essential premises" are inapplicable and

Congressional intent points against its application. *See Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1629 (2018). First, *Chevron* cannot apply when Congressional intent contradicts the "implicit delegation to an agency." *Id*. (citation omitted). "*Chevron* deference is based on, and finds legitimacy as, a congressional delegation of interpretive authority. An agency interpretation warrants such deference only if Congress has delegated authority to definitively interpret a particular ambiguity in a particular manner. Whether Congress has done so must be determined by the court on its own before *Chevron* can apply." *City of Arlington, Tex. v. F.C.C.*, 569 U.S. 290, 321-22 (2013). "In other words, we do not defer to an agency's interpretation of an ambiguous provision unless Congress wants us to, and whether Congress wants us to is a question that courts, not agencies, must decide." *Id*. at 322.

Second, the Court will not defer when an agency's expertise is not implicated. The Court has often emphasized that deference presupposes agency expertise. *See Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) ("[B]road deference is all the more warranted when, as here, the regulation concerns a complex and highly technical regulatory program, in which the identification and classification of relevant criteria necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns.") (citation omitted); *Barnhart v. Walton*, 535 U.S. 212, 225 (2002) ("The statute's complexity, the vast number of claims that it engenders, and the consequent need for agency expertise and administrative experience lead us to read the statute as delegating to the Agency considerable authority to fill in, through

interpretation, matters of detail related to its administration."). But it has also refused to employ deference when agency expertise was not implicated by a particular question.

For instance, in *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990) the Court refused to defer to the Secretary of Labor's interpretation of whether a private right of action existed under a statute "because Congress has expressly established the Judiciary and not the Department of Labor as the adjudicator of private rights of action arising under the statute." "Congress clearly envisioned, indeed expressly mandated, a role for the Department of Labor in administering the statute by requiring the Secretary to promulgate standards implementing [] motor vehicle provisions," but the provision at issue was far outside that expertise. *Id*. at 650. In other words, Congress's implicit delegation is dependent on whether the agency has the requisite expertise. *See id.*

Similarly, in *Metro. Stevedore Co. v. Rambo*, 521 U.S. 121, 137 n. 9 (1997), the Court refused to defer to the Director of the Office of Workers' Compensation Programs concerning the Administrative Procedure Act's burden of persuasion. This was because the "APA is not a statute that the Director is charged with administering." *Id*. After all, discerning burdens of persuasion is a uniquely judicial exercise. *See id.*

And in *Gonzales v. Oregon*, 546 U.S. 243, 257 (2006), the Court refused to defer to the Attorney General's interpretation of a regulatory provision because it just repeated the statutory language. The Court said, "An agency does not acquire special authority to interpret its own words when, instead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase the statutory language." *Id*. In other words, because the agency had not *used* its expertise in resolving the question, the Court would

not conclude that Congress meant for statutory questions to be resolved using the *Chevron* framework. *See id.*

Third, deference is improper when the agency fails to clearly articulate its political choice. *Chevron* relied on a Congressional judgment that "policy choices should be left to Executive Branch officials directly accountable to the people" and not the judiciary. *Epic Sys. Corp.*, 138 S. Ct. at 1630 (citation omitted). But this premise "becomes a garble" when the Executive articulates "no single position on which it might be held accountable." *Id*. "In these circumstances, [the Court] will not defer." *Id*.

Chevron is thus a limited substantive canon of construction that only applies in specific circumstances. When it applies it can, as was seen in the panel decision, have determinative effect. But *Chevron* does not apply in circumstances where Congress has not empowered the agency to fill statutory gaps.

Of course, Congress must first have delegated substantive rulemaking authority to the agency. *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). *Chevron* does not apply in this case at all because, as ATF conceded, Congress never granted it the legislative authority to "determine[] the scope of the criminal prohibition on machinegun possession" in the first place. (Appellees' Br. at 41.) Indeed, ATF's position here is that the Final Rule is a mere "interpretive" statement. (Appellees' Br. at 38, 40-41.) However, as the panel correctly determined—the rule is substantive. *Aposhian v. Barr*, 958 F.3d 969, 979-80 (10th Cir. 2020). But the panel erred in failing to recognize the implication of this status. Because the rule is substantive, ATF's concession about the scope of its own authority means that the rule is invalid as it exceeds the agency's authority.

II. *CHEVRON* DEFERENCE DEPENDS ON INVOCATION BY THE AGENCY BEFORE THIS COURT MAY APPLY IT

No matter how it is classified, *Chevron* deference is an interpretive doctrine that will not apply whenever the agency declines to ask the Court for deference. While this Court has framed this issue as one of "waive[r]," that descriptor is an awkward fit. Ultimately, *Chevron* applies only in instances where the agency has requested it based on its expertise and only when the agency speaks with a clear position. If the agency does not, a court "will not defer," whether it deems the issue "waived" or simply inapplicable. *See Epic Sys. Corp.*, 138 S. Ct. at 1630.

As this Court previously recognized while sitting en banc, deference will not be granted to an agency that does not ask for it because *Chevron*'s premises about Congressional intent are absent. *See Hydro Res., Inc. v. E.P.A.*, 608 F.3d 1131, 1146 (10th Cir. 2010). "[D]eference traditionally has been justified, at least in part, on an assumption that the agency in question has 'specialized experience and broader investigations and information available to' it than do judges," but that "expertise" hardly warrants deference when the agency has disclaimed reliance on it. *Id*. at 1146 n. 10 (quoting *Mead Corp.*, 533 U.S. at 234). Panels of this Court, including a decision issued shortly before the panel opinion, have correctly followed that rule and refused to apply *Chevron* deference when an agency has not adequately sought it. *See Hays Med. Ctr. v. Azar*, 956 F.3d 1247, 1264 n. 18 (10th Cir. 2020).

Moreover, the Supreme Court recently applied this reasoning in refusing to grant *Chevron* deference to an agency in *Cty. of Maui, Hawaii v. Hawaii Wildlife Fund*, 140 S.

Ct. 1462, 1474 (2020). Writing for six members of the Court, Justice Breyer noted that "[n]either the Solicitor General nor any party has asked us to give … *Chevron* deference to EPA's interpretation of the statute," before refusing to give any "particular attention to [the EPA's] views in light of the agency's expertise in a given area, its knowledge gained through practical experience, and its familiarity with the interpretive demands of administrative need." *Id*. While not using the terms "waiver" or "forfeiture," the Court plainly understood the basic premise that an agency's interpretation of law gets no special "attention" when the agency itself does not assert it has special "expertise." *See id.*

Thus, as Justice Gorsuch recently noted in a statement regarding a denial of certiorari in a closely-related challenge to the Final Rule, the Supreme Court "has often declined to apply *Chevron* deference when the government fails to invoke it." *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 140 S. Ct. 789, 790 (2020) (citing authorities). "Nor is it a surprise that the government can lose the benefit of *Chevron* in situations like these and ours. If the justification for *Chevron* is that policy choices should be left to executive branch officials directly accountable to the people, then courts must equally respect the Executive's decision not to make policy choices in the interpretation of Congress's handiwork." *Id*. (citation omitted).

Finally, the party-presentation principle strongly supports the notion that *Chevron* should only arise when the *agency* invokes it. As the Supreme Court noted in May, the "principle of party presentation" serves as a fundamental limit on a court's authority. *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020). "Courts … do not, or should not, sally forth each day looking for wrongs to right. They wait for cases to come

to them, and when cases arise, courts normally decide only questions presented by the parties." *Id*. (citation omitted). And this Court, en banc, previously emphasized that it must not apply deference "when a party chooses not to pursue [the] legal theory potentially available to it[.]" *Hydro Res., Inc.*, 608 F.3d at 1146 n. 10 (citation omitted). This "caution" "flows from a recognition of [the Court's] dependence on the adversarial process to test the issues for our decision and from concern for the affected parties to whom we traditionally extend notice and an opportunity to be heard on issues that affect them." *Id*. Of course a party's failure to seek deference in one case would not prevent it from seeking deference in another case on the same issue in the future.

The outcome would be the same even if this Court were to classify *Chevron* as a standard of review or an analytical framework. No matter how it is described, *Chevron* operates identically to guide how courts interpret statutes. And no matter how the Court treats it, *Chevron* can change the result of how a court construes a statute. But, in any event, *Chevron* deference applies only when its "essential premises" are present. *See Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1629 (2018). And that would remain true even if it were regarded as a standard of review. *Cf. Salve Regina Coll. v. Russell*, 499 U.S. 225, 233-34 (1991) ("deference to [a] district court's determination of state law" inconsistent with "independent appellate review"). Thus, this Court's independent appellate review may not succumb to *Chevron*'s call for deference, as a standard of review or otherwise, because deferring when the essential premises are absent fails to serve the underlying purposes of the doctrine.

Chevron deference does not apply when the agency declines to invoke it. And this is not simply a permissive rule of forfeiture. Instead, *Chevron*, as a tool for figuring out Congress's intent, is just inapplicable when the *agency* itself declares that it lacks the expertise to which a court may defer.

Finally, there is little doubt that ATF deliberately declined to invoke *Chevron* in this case. As the district court noted, ATF and DOJ "repeatedly stressed that they neither request, nor believe their interpretations are entitled to, any measure of deference." (Aplt. App. at A133 n. 8; *see also* Aplt. App. at A103 (ATF arguing that "agencies are not ordinarily entitled to deference" "in contexts … such as the interpretation of criminal statutes") (citing *Burrage v. United States*, 571 U.S. 204, 216 (2014)).) Indeed, the panel opinion referred to the "agreement" of the litigants and the "protest[s]" of ATF itself that *Chevron* analysis was improper. *Aposhian*, 958 F.3d at 979. Thus, just as in *Cty. of Maui, Hawaii*, 140 S. Ct. at 1474, there is no reason to apply deference here.

III. THE RULE OF LENITY APPLIES INSTEAD OF *CHEVRON* DEFERENCE WHEN THE SAME STATUTORY PROVISION IMPOSES CIVIL AND CRIMINAL PENALTIES

Lenity is another rule of construction, but one that dates back at least to the 15th Century and jurist William Paston's pronouncement that penalties should not increase through interpretation. *See A Discourse Upon the Exposicion & Understandinge of Statutes*, Thomas Egerton Additions 155 (Samuel E. Thorne ed. 1942) ("[W]hen the law is penall, for in those it is true that Paston saiethe, *Poenas interpretatione augeri non debere*[.]"). In simpler terms, any "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Skilling v. United States*, 561 U.S. 358, 410 (2010).

Lenity is a tiebreaking canon, but unlike *Chevron*, it exists not just out of solicitude to agency expertise, but out of constitutional necessity. "This venerable rule not only vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed. It also places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead." *United States v. Santos*, 553 U.S. 507, 514 (2008) (plurality op.).

Two constitutional principles underlie lenity: due process and the separation of powers. "Application of the rule of lenity ensures that criminal statutes will provide fair warning concerning conduct rendered illegal and strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability." *Liparota v. United States*, 471 U.S. 419, 427 (1985). It is "a sort of 'junior version of the vagueness doctrine'" that "ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered." *United States v. Lanier*, 520 U.S. 259, 266 (1997) (citation omitted). Lenity also promotes liberty by ensuring the separation of powers: the legislature criminalizes conduct and sets statutory penalties, and the judiciary sentences defendants within the applicable statutory framework. *United States v. Bass*, 404 U.S. 336, 348 (1971). Overall, lenity "embodies 'the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should.'" *Id.* at 347.

Like deference, lenity applies as a way to get at Congress's intent about the scope of a statute. "Although the rule of lenity is not to be applied where to do so would conflict with the implied or expressed intent of Congress, it provides a time-honored

interpretive guideline when the congressional purpose is unclear." *Liparota*, 471 U.S. at 427. And like deference it thus applies only when the meaning of the statute remains ambiguous after exhausting other modes of interpretation. *See id.*

But lenity takes "priority" over agency deference for two main reasons. First, lenity allows courts to avoid constitutional concerns inherent in applying ambiguous statutes against a criminal defendant. In this way, lenity and constitutional avoidance operate symbiotically when criminal statutes are ambiguous. *See United States v. Davis*, 139 S.Ct. 2319, 2333 (2019) (describing the doctrines as "traditionally sympathetic" to one another). Both canons avoid construing ambiguity against criminal defendants in violation of due process and the separation of powers. *Id.* ("Applying constitutional avoidance to narrow a criminal statute, as the Court has historically done, accords with the rule of lenity.").

No similar constitutional concerns necessitate deference, which lacks *any* constitutional underpinning—indeed which may be unconstitutional—and is rooted instead in a rebuttable presumption concerning Congress's intent. *See Kisor v. Wilkie*, 139 S.Ct. 2400, 2412 (2019). This presumption, in the criminal context, must give way to the most lenient reading. *United States v. Wiltberger*, 18 U.S. 76, 95 (1820); *see also M. Kraus & Bros. v. U.S.*, 327 U.S. 614, 621-22 (1946) (plurality) (holding, one year after deciding *Seminole Rock*, that "the same strict rule of construction that is applied to statutes defining criminal action" must apply to agency's rules with criminal sanctions); *United States v. Phifer*, 909 F.3d 372, 383 (11th Cir. 2018) (holding that *Auer v. Robbins*,

519 U.S. 452 (1997), and its progeny do not apply in criminal cases); *United States v. Moss*, 872 F.3d 304, 308, 314 (5th Cir. 2017) (same).

Again, Congress must state its intent clearly if it wishes to criminalize conduct. "[C]riminal laws are for courts, not for the Government, to construe." *Abramski v. United States*, 573 U.S. 169, 191 (2014). Indeed, the Supreme Court has said emphatically, "[W]e have never held that the Government's reading of a criminal statute is entitled to any deference." *United States v. Apel*, 571 U.S. 359, 369 (2014). When Congressional intent is unclear concerning a statute, and ambiguity would "'effectively' license[the Court] to write a brand-new law," the Court "cannot accept that power in a criminal case, where the law must be written by Congress." *Santos*, 553 U.S. at 523 (Scalia, J., plurality op. joined by Souter, Ginsburg, JJ.). Thus, when confronted with ambiguity in this context, the Court must rely on the rule of lenity, and *not* agency deference. *See United States v. Thompson/Ctr. Arms Co.*, 504 U.S. 505, 518, 518 n. 9 (1992).

Second, as a matter of statutory interpretation, a court cannot defer to an agency until after it empties its "legal toolkit" of "all the 'traditional tools' of construction." *Kisor*, 139 S.Ct. at 2418. Lenity is a traditional rule of statutory construction in this Court's toolkit. *Thompson/Ctr. Arms Co.*, 504 U.S. at 518. So, like other "presumptions, substantive canons and clear-statement rules," lenity must "take precedence over conflicting agency views." *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 731 (6th Cir. 2013) (Sutton, J., concurring) (collecting precedents that prioritize various interpretive tools over deference). Agency deference must come last—if it plays any role at all—because "an agency, no less than a court, must interpret a doubtful criminal statute

in favor of the defendant." *Id.* Indeed, the Court has applied lenity *first* before discussing whether deference should apply. *Thompson/Ctr. Arms Co.*, 504 U.S. at 518, 518 n. 9.

When a statute with criminal penalties is ambiguous, "doubts are resolved in favor of the defendant." *Bass*, 404 U.S. at 347. There is no room for deference. No binding precedent requires this Court to discard lenity in favor of deference. *See Guedes*, 140 S.Ct. at 790 (Gorsuch, J., statement regarding denial of cert.) (arguing deference "has no role to play when liberty is at stake" and announcing that the Court's waiting to consider a case "afflicted with the same problems ... should not be mistaken for lack of concern").

In dictum addressing a facial challenge to a regulation that carried both civil and criminal penalties, in an opinion written by Justice Stevens, the Court said it had "never suggested that the rule of lenity should provide the standard for reviewing facial challenges to administrative regulations whenever the governing statute authorizes criminal enforcement." *Babbitt v. Sweet Home Chapter of Cmts. for a Great Ore.*, 515 U.S. 687, 704 n. 18 (1995). Despite this missive, the Court also refused to apply the rule of lenity because the regulation at issue in the case had "existed for two decades and gives a fair warning of its consequences." *Id*.

The *Babbitt* footnote likely arose from Justice Stevens's view that statutes with both criminal and civil consequences *could* have different meanings in different contexts. *See Santos*, 553 U.S. at 522-23 (Scalia, J., plurality op. joined by Souter, Ginsburg, JJ.) (criticizing Justice Stevens's view that "judges can give the same statutory text different meanings in different cases"); *id*. at 525, 528, n. 7 (Stevens, J., concurring) (arguing that the "same word can have different meanings in the same statute," and that a particular

provision could have different "applications" when used in different factual scenarios to "reflect[] the intent of the enacting Congress"). Indeed, the *Babbitt* footnote accepted that the rule of lenity *would* apply "in a case raising a narrow question concerning the application of a statute that contains criminal sanctions to a specific factual dispute," even when the litigants were not being prosecuted. 515 U.S. at 704 n. 18. Since *Babbitt*, the Court has fully repudiated Justice Stevens's premise, saying, "Because we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context, the rule of lenity applies." *Leocal v. Ashcroft*, 543 U.S. 1, 12 n. 8 (2004). The Court has strongly cautioned against "the dangerous principle that judges can give the same statutory text different meanings in different cases." *Clark v. Martinez*, 543 U.S. 371, 386 (2005).

Unsurprisingly, Justice Scalia, joined by Justice Thomas, later described *Babbitt*'s footnote as a "drive-by ruling" that "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." *Whitman v. United States*, 574 U.S. 1003 (2014) (Scalia, J., statement respecting denial of certiorari) (citing *Leocal*, 543 U.S. at 11-12 n. 8; *Thompson/Ctr. Arms*, 504 U.S. at 518 n. 10). And when this Court last considered this question en banc, 10 members of the Court determined that *Babbitt* did not foreclose the application of the rule of lenity when interpreting agency regulations. *N.L.R.B. v. Oklahoma Fixture Co.*, 332 F.3d 1284, 1287 (10th Cir. 2003) (reading *Babbitt* to require a consideration of "the extent to which Congress has charged the agency with administering the criminal statute"). In short, the

last word from the Supreme Court is clear—no matter *Babbitt*'s dictum, "the rule of lenity applies," not deference to an agency. *See Leocal*, 543 U.S. at 11-12 n. 8.

IV. THIS COURT SHOULD HONOR ATF'S FACTUAL CONCESSION CONCERNING THE PRESENCE OF IRREPARABLE INJURY

"It goes without saying that an injunction is an equitable remedy." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311 (1982). "The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held." *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). "Given this limited purpose, and given the haste that is often necessary if those positions are to be preserved, a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits. A party thus is not required to prove his case in full at a preliminary-injunction hearing." *Id*. Indeed, given these equitable concerns, in weighing the traditional injunction factors, courts should issue preliminary "findings of fact," which are "not binding at trial on the merits." *Id*.

One element of traditional preliminary injunction analysis—irreparable harm—safeguards the "public consequences" of issuing a preliminary injunction. *Weinberger*, 456 U.S. at 312. A court "balances the conveniences of the parties and possible injuries to them according as they may be affected by the granting or withholding of the injunction." *Yakus v. United States*, 321 U.S. 414, 440 (1944). Maintaining the status quo is the basic "purpose of the preliminary injunction," because "[a]ny injury resulting from a preliminary injunction that merely preserves the status quo is not a judicially inflicted injury." *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 977-

78 (10th Cir. 2004) (opinion of the court) (en banc). And irreparable harm is a *factual* showing made out by the parties. *See Weinberger*, 456 U.S. at 312.

While a court need not accept *legal* concessions, it must accept *factual* concessions. "Judicial admissions are formal, deliberate declarations which a party or his attorney makes in a judicial proceeding for the purpose of dispensing with proof of formal matters or of facts about which there is no real dispute." *Asarco, LLC v. Noranda Mining, Inc.*, 844 F.3d 1201, 1212 (10th Cir. 2017) (citation omitted). "[A] judicial admission ... is conclusive in the case." *Christian Legal Soc. Chapter of the Univ. of California, Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 677-78 (2010); *see also Oscanyan v. Arms Co.*, 103 U.S. 261, 263 (1881) ("The power of the court to act in the disposition of a trial upon facts conceded by counsel is as plain as its power to act upon the evidence produced."); *Ferguson v. Neighborhood Housing Services.*, 780 F.2d 549, 551 (6th Cir. 1986) ("[U]nder federal law, stipulations and admissions in the pleadings are generally binding on the parties and the Court. Not only are such admissions and stipulations binding before the trial court, but they are binding on appeal as well.").

Because a showing of irreparable harm is an *evidentiary* burden by the movant, an opposing party can concede it. Indeed, irreparable harm is a factual showing meant only to justify immediate intervention by the court. *See Weinberger*, 456 U.S. at 311. When the non-movant concedes that such a showing has been made, the flexible and minimal evidentiary showings required for an injunction have been met. *See id.* The non-moving party's concessions should be "conclusive," even on appeal. *See CLS*, 561 U.S. at 677-

78. Otherwise the movant is placed in an impossible position—reasonably proceeding without proving undisputed facts, yet later called to account for evidentiary insufficiency.

The underlying equitable purposes of preliminary injunctions support this conclusion. Particularly where, as here, the injunction does nothing more than preserve the status quo, there is no harm to any party if the court accepts the parties' view that irreparable harm is present. Indeed, in such circumstances, the court has done nothing more than accept the parties' recognition that the "public consequences" of withholding the injunction causes injury. *See Weinberger*, 456 U.S. at 312. Thus, when all parties agree that irreparable harm is present, and the trial court accepts that agreement, an appellate court should not set that evidentiary conclusion aside.

V. DEFERENCE IS IMPROPER BECAUSE THE BUMP-STOCK FINAL RULE IS NEITHER THE PRODUCT OF ATF'S EXPERTISE NOR A CONSISTENT INTERPRETIVE POSITION

Recall that *Chevron* deference is inappropriate when an agency is not exercising its expertise when issuing a regulation. *See, e.g.*, *Gonzales*, 546 U.S. at 257; *Metro. Stevedore Co.*, 521 U.S. at 137 n. 9; *Adams Fruit Co.*, 494 U.S. at 649. Recall also that deference is inappropriate when the agency articulates "no single position on which it might be held accountable." *Epic Sys. Corp.*, 138 S. Ct. at 1630; *see also INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n. 30 (1987) (an interpretation that "conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view") (citation omitted).The Bump Stock Final Rule runs afoul of both of these premises, and thus deference is improper.

First, ATF disregarded its own technical expertise in writing the rule. Congress presumed ATF's expertise lay in the technical operation of a firearm, which is why it vested the agency with the authority to issue classification rulings. *See* 26 U.S.C. § 7801(a)(2)(B) (delegating ATF authority to issue "rulings and interpretations"). And "between 2008 and 2017" ATF exercised that authority and "issued classification decisions concluding that other bump-stock-type devices were not machineguns, primarily because the devices did not rely on internal springs or similar mechanical parts to channel recoil energy." *Bump-Stock-Type Devices*, 83 FR at 66514. Indeed, after physically examining the device, ATF concluded that the bump stock at issue in this case "has no automatically functioning mechanical parts or springs and performs no automatic mechanical function when installed." (Aplt. App. at A69). Accordingly, ATF said that the device "is a firearm part and is not regulated as a firearm under [the] Gun Control Act or the National Firearm Act." (Aplt. App. at A69.). Even *after* the October 2017 Las Vegas shooting, ATF Acting Director Thomas E. Brandon testified that he had consulted with "technical experts," "firearms experts" and "lawyers" within the ATF, and the consensus within the agency was that "bump stocks" "didn't fall within the Gun Control Act and the National Firearms Act." *See Something, Say Something: Oversight of the Parkland Shooting and Legislative Proposals to Improve School Safety: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. (Mar. 14, 2018) (testimony of Acting Director Brandon). Nevertheless, the agency issued the Final Rule at the insistence of the President and the Acting Attorney General, overruling the experts within the agency. *See*

id. ATF thus was not exercising its expertise when it issued the Final Rule, and deference is improper for this reason as well.

Second, ATF's inconsistent interpretation is not owed deference. ATF consistently interpreted the statutory language to *exclude* bump stocks when exercising its classification authority. *See Bump-Stock-Type Devices*, 83 FR at 66514. This consistent interpretation across administrations of both political parties was based on the agency's physical examination of these devices and its expertise in the area. (*See* Aplt. App. at A69.) Only now has ATF suddenly changed course. The statute did not change, nor did the way a bump stock operates. ATF simply changed its mind. ATF's new interpretation is thus not entitled to deference.

CONCLUSION

The district court opinion should be vacated, and this Court should direct entry of a preliminary injunction.

October 5, 2020

Respectfully,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with the page limits set by this Court in its September 4, 2020 en banc order. It is printed in Times New Roman, a proportionately spaced 13-point font, and is 20 pages or fewer in length. I relied on my word processor, Microsoft Word, to obtain the count.

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CERTIFICATE OF SERVICE

I hereby certify that the original and 16 copies were mailed by Federal Express to the Clerk of the Court at the Byron White U.S. Courthouse, 1823 Stout St., Denver, Colorado 80257. On October 5, 2020 this document was electronically filed using the Tenth Circuit's CM/ECF system, which sent notification of such filing to all counsel of record.

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