No. 21-____

In the Supreme Court of the United States

W. CLARK APOSHIAN,
Petitioner,
v.

MERRICK GARLAND, Attorney General of the United States; U.S. DEPARTMENT OF JUSTICE; BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES; and MARVIN RICHARDSON, Acting Director, Bureau of Alcohol, Tobacco, Firearms, and Explosives,
Respondents.

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Since this Court's 1984 decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), federal courts have deferred under certain circumstances to reasonable agency interpretations of ambiguous statutory terms. The question of statutory construction at the root of this case is the meaning of the term "machinegun," a term defined at 26 U.S.C. § 5845(b). In 2018, the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) reversed course and issued regulations that reinterpreted "machinegun" more expansively than it had previously. The court of appeals upheld the regulations, deferring under *Chevron* to ATF's statutory interpretation despite the fact that (1) the federal government repeatedly insisted that its interpretation was not entitled to *Chevron* deference, and (2) almost all of Section 5845(b)'s applications call for criminal sanctions.

The Questions Presented are:

(1) Whether courts should defer under *Chevron* to an agency interpretation of federal law when the federal government affirmatively disavows *Chevron* deference.

(2) Whether the *Chevron* framework applies to statutes with criminal-law applications.

(3) Whether, if a court determines that a statute with criminal-law applications is ambiguous, the rule of lenity requires the court to construe the statute in favor of the criminal defendant, notwithstanding a contrary federal agency construction.

PARTIES TO THE PROCEEDING

Petitioner W. Clark Aposhian was the plaintiff in the district court and the plaintiff-appellant in the court of appeals.

Respondents U.S. Department of Justice and Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) were defendants in the district court and defendants-appellees in the court of appeals. Acting Attorney General Matthew Whitaker was initially a defendant in the district court but was later replaced by his successor, William P. Barr. Barr was in turn replaced as defendant-appellee in the court of appeals by Acting Attorney General Robert M. Wilkinson. Respondent Attorney General Merrick Garland has replaced Wilkinson and is being sued in his official capacity only. Acting ATF Director Thomas E. Brandon was initially a defendant in the district court and a defendant-appellee in the court of appeals but was replaced as defendant-appellee in the court of appeals by Acting ATF Director Regina Lombardo. Respondent Marvin Richardson has replaced Lombardo and is being sued in his official capacity only.

STATEMENT OF RELATED PROCEEDINGS

- *Aposhian v. Barr*, No. 19-4036 (10th Cir.) (panel opinion issued May 7, 2020; order granting petition for rehearing *en banc* issued September 4, 2020; order vacating the September 4 order and reinstating the panel opinion over four dissents by five judges of the *en banc* court issued March 5, 2021).

- *Aposhian v. Barr*, No. 19-37 (D. Utah) (opinion issued and final judgment entered March 15, 2019).

- The ATF regulations challenged in these proceedings are also the subject of challenges pending in three other federal appeals courts: *Guedes v. Bureau of Alcohol, Tobacco, Firearms and Explosives*, Nos. 19-5042 & 21-5045 (D.C. Cir.); *Cargill v. Garland*, No. 20-51016 (5th Cir.); and *Gun Owners of America, Inc. v. Garland*, No. 19-1298 (6th Cir.).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The panel opinion of the court of appeals is reported at 958 F.3d 969 and is reproduced at App.1a. The district court's opinion is reported at 374 F. Supp. 3d 1145 and is reproduced at App.59a. The order of the court of appeals granting rehearing *en banc* and vacating the panel opinion is reported at 973 F.3d 1151 and is reproduced at App.74a. The order of the court of appeals vacating the grant of rehearing *en banc* as improvidently granted, reinstating the panel opinion, and directing the Clerk to reissue the judgment as of March 5, 2021, is reported at 989 F.3d 890 and reproduced at App.78a.

JUDGMENT

The court of appeals issued its judgment on March 5, 2021. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

26 U.S.C. § 5845(b) states:

> The term "machinegun" means any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot,

> without manual reloading, by a single function of the trigger. 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 control of a person.

18 U.S.C. § 922(o)(1) states:

> Except as provided in paragraph (2), it shall be unlawful for any person to transfer or possess a machinegun.

18 U.S.C. § 924(a)(2) states in relevant part:

> Whoever knowingly violates subsection ... (o) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

Relevant regulations are set out in the Appendix.

INTRODUCTION

This Petition raises purely legal issues of exceptional importance regarding the scope of deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Relying on *Chevron* deference, a sharply divided Tenth Circuit panel upheld the challenged ATF regulation at issue here—despite the fact that the agency itself expressly disavowed such deference and defended the regulation as the best reading of the plain language of the statute at issue. In both the appeals court and the district court, the Government affirmatively insisted that ATF was not entitled to *Chevron* deference because the statute's language is unambiguous. App.12a, App.68a n.8. The panel majority, however, would not take no for an answer and granted the Government deference over its protestations. App.13a.

The decision below is all the more startling since the statute at issue imposes criminal penalties for violations. The panel majority held that the agency's construction of a criminal statute is entitled to *Chevron* deference, provided that Congress has delegated rulemaking authority to the agency and the agency promulgates its interpretation by means of formal rulemaking. App.19a–24a. The panel held further that the rule of lenity is inapplicable in cases to which *Chevron* applies. App.20a.

These rulings conflict with decisions from this Court and from other federal appeals courts. For instance, in March a divided Sixth Circuit panel preliminarily enjoined enforcement of the ATF

regulation at issue here; it disagreed with the Tenth Circuit's rulings in this case on all three issues raised in this Petition. *See Gun Owners of Am., Inc. v. Garland*, 992 F.3d 446 (6th Cir. 2021). The Sixth Circuit in June granted the federal government's petition for rehearing *en banc* (thereby vacating the panel decision), 2 F.4th 576 (6th Cir. June 25, 2021), and has scheduled the *en banc* argument for October.

The circuit split on the ATF regulation at issue reflects long-percolating divisions among the circuits. Review of the decision below is warranted to provide the lower courts with much-needed guidance on the scope of *Chevron* deference.

Moreover, resolution of the legal issues here is likely outcome determinative. Unlike the district court, in upholding the ATF's regulation, the panel majority below never suggested that ATF's construction was the best reading of the statute. Rather, it simply deferred to ATF's rule as a *reasonable* interpretation of an ambiguous statute. App.25a. But eight federal appeals court judges have now issued opinions evaluating ATF's interpretation of the statute without placing a *Chevron* thumb on the scale in the Government's favor. *Every one of those judges* has concluded ATF's interpretation is incorrect.

Petitioners respectfully submit that this Court should grant this Petition and hold *Chevron* inapplicable.

STATEMENT

Petitioner is challenging a 2018 ATF regulation that construes the meaning of "machinegun," as used in federal criminal statutes. In an effort to prevent criminal use of machine guns[1] and other high-powered firearms, Congress passed the National Firearms Act of 1934 (NFA), Pub. L. No. 73-474, 48 Stat. 1236 (June 26, 1934). The NFA imposed a very steep tax on the purchase of a machine gun. That tax provision was effectively a criminal statute; Congress concluded that many gangsters would obtain machine guns without paying the tax and then could be prosecuted for tax evasion. *Gun Owners of America*, 992 F.3d at 450.

In 1986, Congress passed the Firearm Owners' Protection Act, Pub. L. No. 99-308, 100 Stat. 449 (May 19, 1986), which banned civilian ownership of machine guns manufactured after May 1986, as well as any parts used to convert an otherwise legal semiautomatic firearm into an illegal machine gun. The ban is codified at 18 U.S.C. § 922(o).

The statutory definition of a "machinegun" has remained constant since 1986. The definition reads in pertinent part, "The term 'machinegun' means any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger." 26 U.S.C. § 5845(b). Disagreements over the proper construction of the

[1] We use the modern spelling of "machine gun" as two words, unless quoting sources.

statute have focused on the word "automatically" and the phrase "single function of the trigger."

Bump Stocks. Designed for people with limited hand mobility (*e.g.*, due to arthritis), a bump stock replaces the standard stock of a semi-automatic rifle. To initiate bump firing, the shooter "maintain[s] constant forward pressure with the non-trigger hand on the barrel-shroud or fore-grip of the rifle, and maintain[s] the trigger finger on the device's extension ledge with constant rearward pressure." Final Rule, *Bump-Stock-Type Devices*, 83 Fed. Reg. 66,518 (Dec. 26, 2018)(quoting the NPRM). While keeping his trigger finger stationary in front of the trigger on the bump stock's extension ledge, the shooter also maintains constant rearward pressure with his trigger hand. The recoil energy from the fired shot causes the firearm to slide backward; forward pressure applied by the shooter's non-trigger hand must then fight the recoil to initiate the next shot. As the non-trigger hand pushes the firearm forward, the trigger "bumps" against the shooter's stationary trigger finger, causing the trigger to depress and the firearm to shoot again.

As with any semi-automatic weapon, the trigger must be *completely* depressed, released, and then reset between each shot. A shooter can neither bump fire with one hand, nor hold down the trigger to fire multiple shots. A bump stock's extension ledge just helps keep a shooter's finger stationary in order to complete the trigger's depress-release-reset cycle somewhat faster than is easily done without an extension ledge.

The first patented bump stock used internal springs to create the "bump"-firing sequence after the shooter pulled the trigger once. In 2002, ATF determined that the device fell outside the statutory definition of a machine gun because it "did not modify how a semiautomatic rifle's trigger 'moves' with each shot." *Guedes v. Bureau of Alcohol, Tobacco, Firearms and Explosives*, 920 F.3d 1, 37 (D.C. Cir. 2019)(Henderson, J., dissenting). In 2006, ATF overruled its prior decision, determining that the internal spring mechanism in such stocks "made the device a machine gun." *Gun Owners of America*, 992 F.3d at 452. But ATF stated that if "the internal spring [were removed] from the device, then it 'would render the device a non-machinegun under the statutory definition.'" *Id.* (quoting Final Rule, *Bump-Stock-Type Devices*, 83 Fed. Reg. 66,514, 66,517 (Dec. 26, 2018)(to be codified at 27 C.F.R. pts. 447, 478, and 479)). "Between 2008 and 2017, … ATF … 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." 83 Fed. Reg. at 66,514 (emphasis added). Instead, these devices rely on the shooter's non-trigger hand to overcome recoil energy.

The Final Rule. ATF reversed course in 2018, concluding (via formal regulation) that non-mechanical bump stocks should be reclassified as machine guns. *See* Final Rule, *Bump-Stock-Type Devices*, 83 Fed. Reg. 66,514 (Dec. 26, 2018). That reversal followed a horrific tragedy in October 2017, in which a highly skilled, lone gunman fired semi-automatic rifles equipped with bump stocks from a

Las Vegas hotel room, killing 58 people and wounding more than 500. In response, President Trump "direct[ed] the Department of Justice to dedicate all available resources … as expeditiously as possible, to propose for notice and comment a rule banning all devices that turn legal weapons into machineguns." Presidential Documents, *Application of the Definition of Machinegun to "Bump Fire" Stocks and Other Similar Devices*, 83 Fed. Reg. 7,949 (Feb. 20, 2018).

The Final Rule amended regulations at 27 C.F.R. §§ 447.11, 478.11, and 479.11 to change ATF's interpretation of the statutory definition of a machine gun. Federal law states that a weapon is a "machinegun" if it "automatically" fires more than one shot "by a single function of the trigger." 26 U.S.C. § 5845(b); *see* 18 U.S.C. § 921(23) (incorporating § 5845(b)'s definition into the criminal code). The Final Rule amended the pertinent regulations to construe "single function of the trigger" as meaning "a single pull of the trigger and analogous motions" and to construe "automatically" (as it modifies "shoots, is designed to shoot, or can be readily restored to shoot") as meaning "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." *See* 27 C.F.R. § 447.11. ATF concluded that § 5845(b)'s definition of "machinegun" includes non-mechanical bump stocks. 83 Fed. Reg. at 66,515. It asserted that such devices permit users to initiate an automatic firing sequence with a single "pull" of the trigger and "analogous motions"—notwithstanding that the trigger resets for each shot. *Id.*

ATF's Final Rule took effect on March 26, 2019. ATF estimated that Americans possessed up to 520,000 previously legal non-mechanical bump stocks. Notice of Proposed Rulemaking, *Bump-Stock-Type Devices*, 83 Fed. Reg. 13,442, 13,451 (March 29, 2018). The Final Rule required those devices to be destroyed or abandoned by March 26, 2019. 83 Fed. Reg. at 66,546.

Petitioner Files Suit. Petitioner W. Clark Aposhian purchased a non-mechanical bump stock at a time when ATF publicly confirmed that possession of such devices was entirely legal. In January 2019, Petitioner challenged the Final Rule by filing suit in federal district court in Utah against the Attorney General, the Department of Justice, ATF, and the ATF's Director. He argued, among other things, that ATF lacked statutory authority to issue regulations with the force of law regarding the scope of the machine gun ban; that ATF violated the Constitution's separation-of-powers mandate by attempting to exercise such power in the absence of congressional authorization; that ATF's construction of 26 U.S.C. § 5845(b) is contrary to the statute's mandate; and that the statute violates the nondelegation doctrine to the extent that it grants ATF broad discretion to determine the scope of criminal law. The next day, Petitioner filed a motion for a preliminary injunction against enforcement of the Final Rule.

The district court denied the motion. App.59a–73a. The court noted that "[t]he parties do not dispute that Mr. Aposhian will experience irreparable harm if the injunction is denied." App.64a. Because the

government stipulated to irreparable harm, Petitioner did not submit evidence in support of his irreparable-harm claim, and the court did not address that factor in determining whether to grant a preliminary injunction. App.64a n.4. Instead, the sole basis for the district court's ruling was its conclusion that Petitioner "has not carried his burden of showing a substantial likelihood of success on the merits." App.64a–65a. Petitioner surrendered his bump stock to ATF when the injunction was denied. ATF agreed to keep the device and not destroy it pending the final resolution of this lawsuit.

The district court noted that the Government "went out of [its] way to avoid citing *Chevron* and its progeny, and repeatedly stressed that [it] neither request[s], nor believe[s] [its] interpretations [of Section 5845(b)] are entitled to, any measure of deference." App.67a n.8 (citing Defs.' Mem. in Opp'n (ECF No. 25 at 29)). The court did not decide whether the Government's explicit waiver of *Chevron* deference precluded it from applying *Chevron*. It held that resort to *Chevron* was unnecessary "because the Final Rule's clarifying definitions reflect the best interpretation of the statute." *Id.*

Tenth Circuit Rulings. A divided Tenth Circuit panel affirmed. App.1a–58a. The majority opinion did not address which party's position "reflect[s] the best interpretation" of Section 5845(b). Instead, it held that Congress authorized ATF to issue binding regulations implementing the NFA, App.15a, that Section 5845(b) is "ambiguous," App.25a–31a, and thus that ATF's interpretation of the statute is entitled to *Chevron* deference. Applying

Chevron, the majority concluded that Petitioner failed to demonstrate a likelihood of success on the merits because, under *Chevron* Step Two, "ATF's Final Rule sets forth a reasonable interpretation of the statute's ambiguous definition of 'machinegun.'" App.33a.

The majority rejected the argument, pressed by all parties, that because the Government had disavowed reliance on *Chevron*, the court should abide by that waiver. App.16a–18a. It held that although the Government's disavowal of *Chevron* deference means that a court is not *required* to apply *Chevron*, a court is still *permitted* to do so. App.16a. The majority decided that it would exercise that discretion—reasoning that Petitioner had himself "invited" the court to apply *Chevron* deference by citing the decision in urging its inapplicability. App.17a–18a. (Petitioner, indeed, cited *Chevron* but only to argue that it would be inappropriate to apply *Chevron* deference, given that Section 5845(b) unambiguously supports his position.) The court added that it might well have applied *Chevron* even if Petitioner had not "invited" it to do so. App.18a–19a n.6.

The appeals court also rejected the argument, pressed by both Petitioner and the Government, that "*Chevron* deference is inapplicable where the government interprets a statute that imposes criminal liability." App.19a. And it held that the rule of lenity can never trump application of *Chevron* deference. App.19a–21a. Relying on this Court's decision in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995), App.19a–20a, the majority stated that where an

agency has issued a formal regulation interpreting a statute over which it "has both civil and criminal enforcement authority, *Babbitt* suggests that *Chevron*, not the rule of lenity, should apply." App.20a–21a.

The court acknowledged that this Court's decisions in *Abramski v. United States*, 573 U.S. 169 (2014), and *United States v. Apel*, 571 U.S. 359 (2014), "signaled some wariness about deferring to the government's interpretations of criminal statutes." App.23a (quoting *Guedes*, 920 F.3d at 25). But it agreed with the D.C. Circuit's *Guedes* decision that *Babbitt* controls over *Abramski* and *Apel* when, as here, a federal agency "has promulgated a regulation through formal notice-and-comment proceedings." App.23a–24a.

The panel majority held alternatively that Petitioner failed to satisfy the other prerequisites for obtaining a preliminary injunction. App.34a–38a. While acknowledging that the Government stipulated that Petitioner satisfied the irreparable harm requirement, the majority concluded that the stipulation did not relieve Petitioner of his burden of demonstrating irreparable harm—and that he had failed to satisfy that burden. App.36a.

Judge Carson dissented. App.39a–58a. He would have held that Section 5845(b)'s definition of "machineguns" unambiguously excludes non-mechanical bump stocks. App.42a–51a. In particular, he concluded that Petitioner's bump stock does not "automatically" fire multiple shots following a single function of the trigger, because only one shot is fired

unless the shooter *also* applies constant forward pressure with his or her non-trigger hand to reset and depress the trigger again. App.49a.

He also concluded that application of *Chevron* deference was inappropriate even if the word "automatically" and the phrase "single function of the trigger" had been ambiguous, for two separate reasons. First, he argued that the Government's disavowal of *Chevron* deference "should have prevented the majority from applying the controversial doctrine." App.52a. Quoting Justice Gorsuch, he stated, "[I]f 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.* (quoting *Guedes v. Bureau of Alcohol, Tobacco, Firearms and Explosives*, 140 S. Ct. 789, 790 (2020) (statement of Gorsuch, J., respecting denial of certiorari) (emphasis in original)). Second, he argued that *Chevron* is inapplicable because possession of a machine gun carries possible criminal sanctions. App.53a. Because this Court has held that criminal laws are for courts, not for the Government, to construe, and because a statute with both civil and criminal applications should have a single meaning regardless of how it is being applied, "the logical result is that we must also not apply *Chevron* [deference] when a statute has both civil and criminal applications." App.54a.

The Tenth Circuit granted Petitioner's request for rehearing *en banc* and vacated the panel decision. App.74a–77a. The court directed the parties, in their

supplemental briefs, to respond to several questions set out in the order; a majority of those questions focused on whether *Chevron* deference is applicable under the facts of this case. App.75a–76a.

On March 5, 2021, the appeals court voted 6-5 to vacate the order granting rehearing *en banc* as improvidently granted, to reinstate the panel opinion, and to reissue the panel's judgment as of March 5, 2021. App.78a–115a. Four of the five dissenting judges filed opinions dissenting from the decision to vacate, and all five (Chief Judge Tymkovich and Judges Hartz, Holmes, Eid, and Carson) joined each of the four opinions. For instance, Chief Judge Tymkovich forcefully explained that the court of appeals should have honored the Government's waiver of *Chevron*, like it would for any other party, and that, accordingly, "[i]n this case … [the court] must do what courts have done for centuries and interpret the statute the old-fashioned way: de novo." App.95a. He also disagreed that "*Chevron* gets to cut in front of the rule of lenity in the statutory interpretation line," especially given that the rule of lenity "addresses core constitutional concerns: fair notice and the separation-of-powers." App.96a. Judge Eid's dissent focused on an additional point. Because 18 U.S.C. § 922(o) effectively bans private ownership of machine guns (a ban enforced by the threat of up to ten years' imprisonment), the civil enforcement provisions almost never come into play. Judge Eid stated that it would be particularly inappropriate to apply *Chevron* deference to an agency's construction of a statute whose applications are overwhelmingly criminal. App.109a.

REASONS FOR GRANTING THE PETITION

I. THE PANEL'S DECISION TO GRANT *CHEVRON* DEFERENCE DESPITE THE AGENCY'S WAIVER CONFLICTS WITH DECISIONS OF THIS COURT AND IS INCONSISTENT WITH *CHEVRON*'S RATIONALE

At the heart of *Chevron*'s "principle of deference to administrative interpretations" is a judicial assumption that when a "statute is silent or ambiguous with respect to the specific issue" at hand, 467 U.S. at 843, Congress intended to delegate authority to the administering agency to resolve the issue "within the limits of that delegation," *id.* at 865. In such a case, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Id.* at 844. But "[i]f the intent of Congress is clear, that is the end of the matter; for the court, *as well as the agency*, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842–43 (emphasis added).

From the italicized language in the passage above, it is clear that the administering agency, no less than a court, must first attempt to ascertain, "employing traditional tools of statutory construction, … [whether] Congress had an intention on the precise question at issue … ." *Id.* at 843 n. 9. If so, "that intention is the law and must be given effect" by the agency. *Id.* It follows that when an agency concludes that Congress's intent with respect to a statutory provision is unambiguous, it has, perforce, also concluded that Congress did not leave "a gap for the agency to fill." *Id.* at 843. In other words, the agency

itself has determined that Congress did not delegate any interpretive authority to the agency to which a court can, let alone must, defer.

ATF made clear in its rulemaking that it believes the relevant statutory terms are not ambiguous and that its interpretation "accord[s] with the plain meaning of those terms" and represents the "best interpretation of the statute." 83 Fed. Reg. at 66,527, 66,518.[2] And in defending the regulation before the panel below, the Government continued to insist that its statutory construction is not entitled to *Chevron* deference, arguing repeatedly that "there's no ambiguity," and that "we're giving the correct reading, the plain meaning of the statutory terms." *See* Oral Arg. at 14:17–25, 17:42–55, *Aposhian v. Barr*, 19-4036 (10th Cir. 2020). Indeed, in a parallel case in the D.C. Circuit challenging the same ATF

[2] ATF further stated that "even if those terms are ambiguous … the Department's construction of those terms is reasonable under *Chevron*." 83 Fed. Reg. at 66,527. But this is nothing more than the agency's musing that its interpretation would be reasonable even if the relevant statutory terms were ambiguous. Again, in determining that the terms of the statute are not ambiguous, the agency had no interpretive discretion to exercise; the interpretation it rendered was "the end of the matter." *Chevron*, 467 U.S. at 843. Emphasizing repeatedly that "there's no ambiguity," the Government argued before the Tenth Circuit panel: "We're telling you we don't have an alternative … . The statute covers these devices, period, end of story. Our hands are tied on that." Oral Arg. at 19:33–20:03, *Aposhian v. Barr*, 19-4036 (10th Cir. 2020). And, in all events, when an agency appears to be of "two minds," leading to a "garble" of positions, *Chevron* deference is unwarranted. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1630 (2018).

regulation, the Government went even further, telling the D.C. Circuit that "if the validity of its rule (re)interpreting the machinegun statute 'turns on the applicability of *Chevron*, it would prefer that the [r]ule be set aside rather than upheld.'" *Guedes*, 140 S. Ct. at 789 (Gorsuch, J., statement regarding denial of certiorari).

In *United States v. Mead Corp.*, 533 U.S. 218 (2001), this Court held that *Chevron* deference 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." *Id.* at 226–27. An administering agency that sees no ambiguity in interpreting a statutory provision is obviously *not* exercising delegated interpretive authority; it is simply "giv[ing] effect to [what it believes to be] the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842–43. So, the agency has no choice but to disavow—to waive—*Chevron* deference to its interpretation. And an agency's waiver of *Chevron* deference should be binding on a court reviewing the agency's statutory interpretation. As Justice Gorsuch recently put it: "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." *Guedes*, 140 S. Ct. at 790. This is especially true when the agency's decision not to make policy choices is based on its

determination that Congress did not delegate any choices for it to make.[3]

Justice Gorsuch further noted that "[t]his Court has often declined to apply *Chevron* deference when the government fails to invoke it." *Guedes,* 140 S. Ct. at 790 (citing authorities); *see also Cnty. of Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1474 (2020) ("Neither the Solicitor General nor any party has asked us to give … *Chevron* deference to EPA's interpretation of the statute."); *Est. of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 477 (1992). If an administering agency can *forfeit* its claim to *Chevron* deference by declining to assert it, then surely the agency can *waive Chevron* deference by affirmatively disavowing it.[4] *Cf. HollyFrontier Cheyenne Ref., LLC*

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[3] Given that the agency's waiver here reflects its determination that it lacked statutory authority to issue a legislative rule entitled to deference, *City of Arlington v. FCC*, 569 U.S. 290 (2013), suggests that the courts must defer to ATF's request for non-deference to the extent there is any ambiguity. *See id.* at 300–01 (explaining that questions about what "subject matters" an agency "may … regulate and under what conditions … are all questions to which the *Chevron* framework applies"). Thus, *Chevron* may command deference to an agency's decision that it is not entitled to *Chevron* deference. If such deferential nondeference is circular, it reflects a problem endemic to *Chevron* itself and further supports this Court's review.

[4] As this Court has explained, "forfeiture is the failure to make the timely assertion of a right, waiver is 'the intentional relinquishment or abandonment of a known right.'" *United States v. Olano*, 507 U.S. 725, 733 (1993); *see also Guedes*, 920 F.3d at 22 (finding "no reason that the same limitations on forfeiture of *Chevron* should not also govern waiver of *Chevron*.").

v. Renewable Fuels Ass'n, 141 S. Ct. 2172, 2180 (2021).

The courts of appeals, however, are in disarray on the question whether *Chevron* deference can be waived by the Government. *See, e.g.*, James Durling & E. Garrett West, *May* Chevron *Be Waived?*, 71 STAN. L. REV. ONLINE 183, 183 (2019). The multiple conflicting opinions in the circuits about the validity of the ATF regulation at issue here display this disarray.

Start with the opinions below in just this case. No fewer than seven Judges addressed the waiver question in four separate opinions, with five Judges concluding that *Chevron* deference can be waived and two Judges concluding it cannot. *See* App. 16a–18a (panel majority); 52a–53a (Carson, J., dissenting); 90a–95a (Tymkovich, C.J., dissenting); 111a–113a (Carson, J., dissenting). And as the panel majority conceded, the Tenth Circuit's prior decisions are not "entirely consistent" on their approach to *Chevron* waiver. App.18a n.6; *compare Am. Wild Horse Pres. Campaign v. Jewell*, 847 F.3d 1174, 1187 (10th Cir. 2016) (treating *Chevron* as a "two-part standard of review," which is not waivable), *with Hays Med. Ctr. v. Azar*, 956 F.3d 1247, 1264 n.18 (10th Cir. 2020)("[T]he Secretary's perfunctory and fleeting invocation of *Chevron* waives his argument for *Chevron* deference."), *and Hydro Res., Inc. v. E.P.A.*, 608 F.3d 1131, 1146 (10th Cir. 2010) (en banc) (" [W]hen the agency doesn't ask for deference to its statutory interpretation, 'we need not resolve the … issues regarding deference which would be lurking in other circumstances.'" (quoting *Est. of Cowart*, 505 U.S. at 477)).

The D.C. Circuit is similarly riven on the issue. In *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 920 F.3d 1, 22 (D.C. Cir. 2019), the panel majority upheld the same ATF rule at issue here, rejecting the agency's waiver of *Chevron* deference. The court concluded that "an agency's lawyers … cannot waive *Chevron* if the underlying agency action 'manifests its engagement in the kind of interpretive exercise to which review under *Chevron* generally applies.'" *Id.* at 23 (quoting *SoundExchange, Inc. v. Copyright Royalty Bd.*, 904 F.3d 41, 54 (D.C. Cir. 2018)). But in *Global Tel*Link v. FCC*, 866 F.3d 397, 408 (D.C. Cir. 2017), the court held that *Chevron* had been waived because "the agency no longer [sought] deference," *id.* at 407. "[I]t would make no sense for this court to determine whether the disputed agency positions advanced in the Order warrant *Chevron* deference when the agency has abandoned those positions." *Id.* at 408; *see also Judge Rotenberg Educ. Ctr., Inc. v. United States Food & Drug Admin.*, 20-1087, 2021 WL 2799891, at *3 (D.C. Cir. July 6, 2021) (noting that "[o]rdinarily" the court would apply *Chevron* but "[i]n this case, the FDA did not invoke *Chevron* deference or even cite the case in its briefing. Perhaps this is because the agency concluded that the relevant statutes are unambiguous."). The D.C. Circuit has also held that a private litigant challenging an administering agency's interpretation of a statute can forfeit an objection to *Chevron* deference. *See Lubow v. U.S. Dep't of State*, 783 F.3d 877, 884 (D.C. Cir. 2017) ("[A] party … can forfeit an argument against deference by failing to raise it."). That a private litigant can forfeit *Chevron* objections but an agency seemingly cannot waive *Chevron* deference in the D.C. Circuit is yet another way

Chevron places a thumb on the scale in favor of the Government, shaping litigation in an often decisive manner in its favor.

The other circuits that have addressed the issue are also divided on whether *Chevron* deference can be waived.[5] As the Fourth Circuit has observed, "[c]ourts and scholars continue to grapple with the circumstances in which *Chevron* deference can be forfeited or waived." *Amaya v. Rosen*, 986 F.3d 424, 430 n. 4 (4th Cir. 2021).

Finally, a word about the panel majority's theory that it was justified in rejecting the Government's express waiver of *Chevron* deference because *Petitioner himself* had "invited" the court to

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[5] *Compare State of New York v. Dep't of Justice*, 951 F.3d 84, 101 n.17 (2d Cir. 2020) (applying de novo review and explaining that defendants did not claim "*Chevron* deference … and, thus, … we do not consider whether any such deference might be warranted."); *Commodity Futures Trading Comm'n v. Erskine*, 512 F.3d 309, 314 (6th Cir. 2008) ("[T]he CFTC waived any reliance on *Chevron* deference by failing to raise it to the district court."), *with Amaya v. Rosen*, 986 F.3d 424, 430 (4th Cir. 2021) (stating that "the government never sought *Chevron* deference here until oral argument," but circuit precedent seemed to require "evaluat[ing] whether *Chevron* deference applies, and, if so, apply[ing] it, whether or not the parties raise the issue."); *Sierra Club v. E.P.A.*, 252 F.3d 943, 947 n.8 (8th Cir. 2001)("[T]he petitioners cite no authority, and the Court can find none, for the proposition that EPA waives deferential review under *Chevron* if it fails to specifically analyze in its final rule whether it considered [the statute] to be ambiguous."); *see also Babb v. Sec'y, Dep't of Veterans Affairs*, 992 F.3d 1193, 1208 n. 10 (11th Cir. 2021) (deciding to "leave … for another day" a "slew of questions" about "[w]hether, when, and by whom *Chevron* can be waived or forfeited"); *Martin v. Soc. Sec. Admin., Comm'r*, 903 F.3d 1154, 1161 (11th Cir. 2018)("Other circuits have split on this issue.").

invoke *Chevron* deference *against Petitioner* when he argued in the district court that the rule at issue was not entitled to *Chevron* deference. Chief Judge Tymkovich, writing for five judges in dissenting from the en banc court's denial of rehearing, rightly lampooned the panel's "invitation" rationale:

> This theory of waiver is untenable. Under the panel majority's theory, a party that challenges an agency's interpretation of a rule is forced to dance around *Chevron*, even where the government has not invoked it. *Chevron* becomes the Lord Voldemort of administrative law, "the-case-which-must-not-be-named." And litigants bold enough to expressly oppose *Chevron* in their briefing will be left guessing whether their reference to the case was fleeting or perfunctory enough to avoid making an invitation. All the while, courts are given a troubling amount of freedom when deciding whether to use *Chevron*—discretion that will dictate the outcome in many cases.

App. 91a.

In sum, the question whether an agency can waive *Chevron* deference lies at the threshold not only of this case but of many cases across the full spectrum of administrative law. And the circuit courts are mired in disagreement and confusion on the issue. This Court should therefore grant review now to clear up this confusion and prevent it from spreading further.

II. THE PANEL'S DECISION TO DEFER TO AN AGENCY'S INTERPRETATION OF A STATUTE WITH CRIMINAL APPLICATIONS RAISES SERIOUS CONSTITUTIONAL CONCERNS AND WARRANTS REVIEW

A. The Panel's Deference to an Agency Interpretation of a Criminal Statute Conflicts with Decisions from Other Appeals Courts

The panel majority held that a federal agency's construction of an ambiguous federal statute is entitled to deference from the courts—provided that Congress has delegated rulemaking authority to the agency and the agency promulgates its interpretation by means of formal rulemaking—regardless of whether the statute at issue has criminal-law applications. App.19a–24a. That holding directly conflicts with decisions from other federal appeals courts. Review is warranted to resolve the conflict among the circuits.

In *United States v. Balde*, 943 F.3d 73 (2d Cir. 2019), the Second Circuit rejected a claim that it should defer to an ATF regulation that sought to clarify when an alien should be deemed "in the United States" for purposes of a criminal immigration statute. The court explained that deference was unwarranted because "the Supreme Court has clarified that law enforcement agency interpretations of criminal statutes are not entitled to deference." 943 F.3d at 83. The appeals court expressed its no-deference holding in unequivocal terms: "Whether the Government interprets a criminal statute too broadly (as it sometimes does) or too narrowly …, a court has

an obligation to correct the error." *Id.* (quoting *Abramski*, 573 U.S. at 191).

Likewise, a panel of the Ninth Circuit has categorically rejected claims that the courts should defer to an agency's construction of criminal statutes—and it did so in connection with its consideration of the meaning of 26 U.S.C. § 5845(b), the very statute at issue here. *See United States v. Kuzma*, 967 F.3d 959 (9th Cir. 2020). Although the ATF interpretation at issue was expressed in informal guidance, the Ninth Circuit's unequivocal language indicates that the panel's ruling would have been the same even if ATF had construed the statute through a formal regulation. *Id.* Indeed, the court stated that ATF lacked authority to issue formal regulations interpreting Section 5845(b):

> This is not a situation in which an agency has been delegated authority to promulgate underlying *regulatory* prohibitions, which are then enforced by a criminal statute prohibiting willful violations of those regulations.… On the contrary, the text of the applicable prohibitions and definitions is set forth in *statutory* language. Because "criminal laws are for the courts, not for the Government, to construe," the Supreme Court has repeatedly rejected the view "that the Government's reading of a statute is entitled to any deference."

Id. (emphasis in original) (quoting *Abramski*, 573 U.S. at 191).

Earlier this year, a Sixth Circuit panel enjoined enforcement of the ATF regulation at issue here, finding that: (1) ATF's construction of Section 5845(b) (or any statute having both civil and criminal applications) is not entitled to *Chevron* deference from the courts; and (2) non-mechanical bump stocks are not properly classified as "machineguns" under the best reading of the statute. *Gun Owners of America*, 992 F.3d at 468, 472. Citing the Tenth Circuit's decision in this case, the panel acknowledged:

> [T]here is already a split among the Circuits on the meaning of *Apel* and *Abramski* and whether the Supreme Court now requires courts not to give any deference to agency interpretations of criminal statutes. With this decision we are joining one side of a circuit split, not creating a circuit split.

Id. at 460.[6]

In contrast, the D.C. Circuit fully supports the Tenth Circuit's pro-deference position. In *Guedes*, the appeals court rejected a challenge to the ATF's regulation, holding that the agency's construction of Section 5845(b) was "permissible" under the *Chevron* framework. 920 F.3d at 24–29, 32. In doing so, the court found no "general rule against applying *Chevron* to agency interpretations of statutes that have criminal-law implications." *Id.* at 24.

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[6] As noted supra at 3, on June 25, 2021, the Sixth Circuit granted the government's petition for rehearing *en banc* and vacated the panel decision.

The appeals courts are thus in deep conflict regarding *Chevron*'s applicability to the interpretation of criminal statutes. This Court should resolve this crucial and abiding conflict.

B. The Circuit Split Results from This Court's Conflicting Decisions on *Chevron* Deference to Agency Interpretations of Criminal Statutes

Review is particularly warranted because the circuit conflict likely arose as a result of inconsistent decisions issued by this Court. Until the Court steps in, the lower courts are likely to continue to interpret those inconsistent signals differently and to widen the existing conflict.

Courts that continue to endorse judicial deference to agency construction of criminal statutes (including the D.C. and Tenth Circuits) point to this Court's 1995 *Babbitt* decision. That decision applied the *Chevron* framework to (and ultimately upheld as "reasonable") a regulation interpreting the term "take" in the Endangered Species Act, even though the statute has both criminal and civil applications. 515 U.S. at 703–04. The Court explicitly rejected a claim that "the rule of lenity should foreclose any deference to the Secretary's interpretation of the ESA because the statute includes criminal penalties"—at least where the interpretation is set out in a formal regulation. *Id.* at 704 n.18.

In contrast, this Court more recently has held categorically that "criminal laws are for courts, not for the Government, to construe." *Abramski*, 573 U.S. at 191. The D.C. and Tenth Circuits acknowledged that

this Court's recent *Abramski* and *Apel* decisions "signaled some wariness about deferring to the government's interpretations of criminal statutes," *Guedes*, 920 F.3d at 25, and App.23a. But they ultimately ruled that *Babbitt*'s reasoning should prevail because neither *Abramski* nor *Apel* was "directly faced with the question of *Chevron*'s applicability to an agency's interpretation of a statute with criminal applications through a *full-dress regulation*." *Id*. (emphasis in original).

Courts concluding that *Abramski* and *Apel* are the controlling precedents note that they are the more recent decisions and point to their unequivocal language. *See, e.g.*, *Kuzma*, 967 F.3d at 971 (stating that ATF's construction of a criminal statute has "no bearing on the statute's underlying meaning" and asserting (with reference to *Abramski* and *Apel*) that "the Supreme Court has repeatedly rejected the view that the Government's reading of a criminal statute is entitled to any deference' "); *Balde*, 943 F.3d at 83 (declining to defer to an ATF regulation construing a criminal statute and citing *Abramski* in support of its assertion that "the Supreme Court has clarified that law enforcement agency interpretations of criminal statutes are not entitled to deference"); *Gun Owners of America*, 992 F.3d at 455 (quoting *Apel*'s statement that "we have never held that the Government's reading of a criminal statute is entitled to any deference," 571 U.S. at 369, and observing that "'[n]ever' and 'any' are absolutes, and the Court did not draw any distinctions, add any qualifiers, or identify any exceptions," *Gun Owners of America*, 992 F.3d at 455.

Review is warranted to provide badly needed guidance to the lower courts: does *Babbitt* supply the definitive word regarding applicability of *Chevron* to statutes with criminal-law applications, or is *Babbitt*'s footnote regarding the interplay of *Chevron* and the rule of lenity nothing more than a "drive-by ruling" that "deserves little weight"? *Whitman v. United States*, 135 S. Ct. 352, 354 (2014) (statement of Justice Scalia, joined by Justice Thomas, respecting the denial of certiorari). This and similar questions have often been raised in the lower courts. *See, e.g.*, *Valenzuela Gallardo v. Barr*, 968 F.3d 1053, 1062 (9th Cir. 2020); *United States v. Havis*, 907 F.3d 439, 451 (6th Cir. 2018) (Thapar, J., concurring); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1156 (10th Cir. 2016) (Gorsuch, J., concurring); *Esquivel–Quintana v. Lynch*, 810 F.3d 1019, 1027–32 (6th Cir. 2016) (Sutton, J., concurring in part and dissenting in part); *Carter v. Welles–Bowen Realty, Inc.*, 736 F.3d 722, 729–36 (6th Cir. 2013) (Sutton, J., concurring). And this Court has already found the issue worthy of review; it granted the certiorari petition in *Esquivel-Quintana v. Lynch*, 137 S. Ct. 368 (Mem.), 369 (2016), and heard argument on the scope of *Babbitt*. The Court ultimately held, however, it had "no need to resolve whether the rule of lenity or *Chevron* receive[d] priority" because the statute at issue was unambiguous. *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1572 (2017). Accordingly, this Court has found these issues worthy of its consideration but has so far not provided clear answers. *See Whitman*, 135 S. Ct. at 254 (statement of Scalia, J., noting "receptive[ness]" to addressing such issues in the future).

C. The Panel Decision Ignores Important Separation-of-Powers Principles and Is Fundamentally Unfair to Defendants

Review is also warranted because the decision below is inconsistent with rights traditionally afforded criminal defendants. Under the Constitution, "[o]nly the people's elected representatives in the legislature are authorized to 'make an act a crime.'" *United States v. Davis*, 139 S. Ct. 2319, 2325 (2019) (quoting *United States v. Hudson*, 7 Cranch (11 U.S.) 32, 34 (1812)). The decision below disregards that rule; it permits executive branch officials to prosecute individuals for conduct that the reviewing judge concludes is not proscribed by any statute. As Justice Gorsuch recently counseled, "Before courts may send people to prison, we owe them an independent determination that the law actually forbids their conduct. A 'reasonable' prosecutor's say-so is cold comfort in comparison." *Guedes*, 140 S. Ct. at 790 (statement of Justice Gorsuch respecting denial of certiorari). Whatever one's views of *Chevron* deference in the civil context, it has no proper place in the criminal law. *Apel*, 571 U.S. at 369.

True, a statute may have both civil and criminal applications. But even if, in the civil context, Congress can sometimes be presumed to have authorized a federal agency "to make rules carrying the force of law[,]" *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001), any such presumption is antithetical to criminal law, where personal liberty is at stake. And because courts assign a single meaning to a single law, regardless of whether a reviewing court is addressing it in a civil or criminal law context,

Clark v. Martinez, 543 U.S. 371, 380 (2005), no presumption of delegated law-making power can be read into hybrid civil-criminal statutes.

The Court has on occasion authorized Congress to transfer to the executive branch some responsibility for defining crimes. *See, e.g.*, *United States v. Grimaud*, 220 U.S. 506 (1911); *Touby v. United States*, 500 U.S. 160 (1991); *United States v. O'Hagan*, 521 U.S. 642 (1997). But in each instance, the Court has insisted that any such delegation be explicit; it has never *presumed* congressional delegation of authority to create new crimes. *See, e.g.*, *Grimaud*, 220 U.S. at 519 (Congress must speak "distinctly" if it wishes to delegate authority to define criminal conduct). This clear-statement rule is designed to protect individual liberty and at the same time reinforce separation-of-powers principles embedded in the Constitution.Congress has provided no such clear statement here. It has granted the Justice Department and ATF general authority to administer gun-control laws, including the prohibition on possessing machine guns. 18 U.S.C. § 926(a) ("The Attorney General may prescribe only such rules and regulations as are necessary to carry out the provisions of this chapter.") In the absence of an explicit grant of authority to define criminal conduct, the Justice Department and ATF have no such authority.

Chevron deference is often justified based on agency expertise. An administering agency is thought better equipped than a generalist court to determine the best interpretation of a statute because of its specialized expertise in the statute's subject matter. *See, e.g., Pension Benefit Guar. Corp. v. LTV Corp.*,

496 U.S. 633, 651–52 (1990). Whatever the merits of that rationale in the civil context, it is unpersuasive in the criminal-law realm. "Criminal statutes reflect the value-laden, moral judgments of the community as evidenced by their elected representatives' policy decisions," *Gun Owners of America*, 992 F.3d at 461 (citing *Gregg v. Georgia*, 428 U.S. 153, 175 (1976)), not technical knowledge.

Whether ownership of non-mechanical bump stocks should be criminally punished is a question to be determined by the legislative branch (via congressionally enacted statutes), not by the unelected bureaucracy. And it "emphatically" is the constitutional "duty" of federal judges "to say what the law is." *Marbury v. Madison*, 1 Cranch (5 U.S.) 137, 177 (1804). But judges who apply *Chevron* deference to an agency interpretation of a criminal statute are abandoning that duty by issuing judgments that assign controlling weight to a non-judicial entity's interpretation of the statute.

Applying the *Chevron* framework to statutes with criminal applications is also fundamentally unfair to criminal defendants. The executive branch is, by definition, a party in every criminal case. Thus, when courts defer to executive-branch constructions of ambiguous criminal statutes, they are displaying a bias that systematically favors prosecutors and harms defendants. Even the *appearance* of potential bias toward a litigant violates the Due Process Clause. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 886–87 (2009). Individuals should not be subjected to criminal trials, with their liberty at stake, where the prosecutor, in effect, also serves as the judge.

Given the fundamental unfairness of such procedures, it is no wonder that the Court has held categorically that "criminal laws are for courts, not for the Government, to construe." *Abramski*, 573 U.S. at 191. Review is warranted not only to correct the Tenth Circuit's failure to adhere to that fundamental precept, but to resolve the conflict in the lower courts on this important issue.

III. THE LOWER COURTS NEED GUIDANCE REGARDING THE PROPER INTERPLAY BETWEEN *CHEVRON* AND THE RULE OF LENITY

If the Court determines that *Chevron* deference applies to agency constructions of statutes with both civil and criminal applications, a subsidiary issue arises: what is the proper interplay between *Chevron* and the rule of lenity? The rule of lenity is a centuries-old canon of statutory construction holding that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Skilling v. United States*, 561 U.S. 358, 410 (2010).

The Tenth Circuit assigned no weight to the rule of lenity. Citing *Babbitt*, it held that where an agency's construction of an ambiguous statute is set out in a formal regulation, "*Chevron*, not the rule of lenity, should apply." App. 21a. That determination separately warrants this Court's review; it is wholly inconsistent with the framework that this Court has established for applying *Chevron*.

The first step in *Chevron*'s familiar two-step process for determining whether to defer to an agency interpretation is this

> First, *applying the ordinary tools of statutory construction*, the court must determine "whether Congress has directly spoken to the precise question at issue. If the intent is clear, that is the end of the matter; for the court, as well as the agency must give effect to the unambiguously expressed intent of Congress."

City of Arlington, 569 U.S. at 296 (quoting *Chevron*, 467 U.S. at 842–843) (emphasis added).

Given its lengthy pedigree, the rule of lenity fits comfortably within *Chevron*'s definition of an "ordinary tool[] of statutory construction." Thus, *City of Arlington* dictates that the rule of lenity should be taken into account during *Chevron* Step One (in which courts are directed to determine whether the intent of the statute is clear, thereby obviating any occasion to defer to an agency interpretation of the statute at issue). The decision below, by eliminating any role for the rule of lenity, directly conflicts with that prescribed analytical method.

This Court has explained that the rule of lenity is "premised on two ideas":

> First, a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed; second, legislatures and not courts should define criminal activity.

Babbitt, 515 U.S. at 704 n.18 (citations and quotations omitted). Both of those concerns are

implicated here. If, as the Tenth Circuit majority suggests, Section 5845(b) is ambiguous, then permitting ATF to determine that the statute criminalizes possession of bump stocks permits the executive branch to usurp Congress's role. And in every case in which *Chevron* matters (*i.e.*, cases in which a reviewing court concludes that Congress did *not* intend the construction adopted by a federal agency), that is exactly what happens.

More importantly, contrary to the Government's claim, ATF's regulation does *not* provide "fair warning" of the line that may not be crossed. As Chief Judge Tymkovich explained in his dissent below, "The government expects an uncommon level of acuity from average citizens to know that they must conform their conduct not to the statutory language, but to the interpretive gap-filling of an agency which may or may not be upheld by a court." App.97a. And Justice Gorsuch has argued that citizens should not be "forced to guess whether the statute will be declared ambiguous; to guess again whether the agency's initial interpretation of the law will be declared 'reasonable'; and to guess *again* whether a later and opposing agency interpretation will also be held 'reasonable.'" *Guedes*, 140 S. Ct. at 790 (statement of Justice Gorsuch respecting denial of certiorari).

Review is warranted to provide the lower courts much-needed guidance on the proper interplay between *Chevron* and the rule of lenity.

IV. THIS CASE IS WELL-SUITED FOR ADDRESSING WHETHER *CHEVRON* CAN BE WAIVED AND WHETHER IT APPLIES TO CRIMINAL STATUTES

This case provides a particularly attractive vehicle for addressing threshold legal issues regarding the scope of *Chevron* deference. There are no disputed factual issues; the parties disagree only about the proper interpretation of a federal criminal statute, the extent to which the Government can waive *Chevron*, and which branch of government has primary responsibility for undertaking the interpretation of the criminal statute at issue here.

Most importantly, whether *Chevron* deference applies here is likely outcome determinative. In rejecting Petitioner's claim that ATF improperly construed § 5845(b), the Tenth Circuit did not address whether ATF's construction was the best reading of the statute. Rather, it held that § 5845 is ambiguous and that ATF prevails under *Chevron* Step Two because ATF adopted a reasonable construction of an ambiguous statute. App.33a. If, as Petitioner alleges, the Tenth Circuit erred by applying *Chevron*, then at the very least the case should be remanded with directions that Petitioner's claims be reconsidered under the proper legal standard.[7]

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[7] The panel majority also found that Petitioner did not demonstrate that he would suffer irreparable harm in the absence of a preliminary injunction. App.34a–36a. That finding does not present an obstacle to granting review. As the district judge noted, Respondents stipulated that Petitioner satisfied the irreparable-harm requirement, App.64a, and thus Petitioner was under no obligation to submit evidence of such harm in support of his motion for a preliminary injunction. In light of

Moreover, ATF's construction of § 5845(b) is very likely *not* the best reading of that statute. In the three circuits that have addressed the Final Rule (the Sixth, Tenth, and D.C. Circuits), eight appellate judges have written or joined opinions expressing a view on the best reading of § 5845(b)—that is, opinions that construed the statute without applying *Chevron* deference. *All eight* held that the best reading supports Petitioner's position: § 5845(b)'s definition of a machine gun is not ambiguous, and non-mechanical bump stocks do not fall within it. *See Guedes*, 920 F.3d at 46–48 (Henderson, J., dissenting); *Gun Owners of America*, 992 F.3d at 469–73 (Batchelder, J., joined by Murphy, J.); App.79a–90a (Tymkovich, C.J., joined by Hartz, Holmes, Eid, and Carson, JJ., dissenting from decision to vacate *en banc* order).

The interlocutory posture of this case should not deter this Court from addressing these issues now. In the 17 months since this Court denied review in *Guedes*, additional courts of appeals (as noted above) have given "their considered judgments" on the threshold *Chevron* issues raised in this case. *Guedes*, 140 S. Ct. 791 (2020) (statement of Justice Gorsuch respecting denial of certiorari). Judges on the Sixth and Tenth Circuits have issued a total of eight thoughtful opinions—two panel majority opinions and six dissents in this case and in *Gun Owners of America*—that this Court did not have the benefit of considering in *Guedes*. Those several opinions provide the Court with an ample body of judicial thought to

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that stipulation, there is no credible basis for denying relief to Petitioner if the Court were to rule in his favor on either of the Questions Presented. *See* App.55a–57a (Carson, J., dissenting).

draw upon in addressing whether *Chevron* can be waived and whether it applies to statutes with criminal applications. And these opinions are in addition to the *many* others addressing these threshold *Chevron* issues outside of the context of the ATF rule at issue here. *See,* supra at 19–22, 24–29.

Further, the threshold *Chevron* issues raised in this Petition are "important and clear-cut issue[s] of law that [are] fundamental to further conduct of the case." STEPHEN M. SHAPIRO, et al., SUPREME COURT PRACTICE § 4.18, 455 (11th ed. 2019); *see United States v. Gen. Motors Corp.*, 323 U.S. 373, 377 (1945). As counsel for the Government explained to the en banc Tenth Circuit, the "end result" of the district court's analysis in this case "is essentially a legal determination" and there was no "impediment to [the en banc] court deciding [the] questions" presented. Oral Arg. at 55:00–55:20, *Aposhian v. Wilkinson*, 19-4036 (10th Cir. Jan. 27, 2021) (en banc). Nor is there any impediment to this Court's deciding these questions. And, given the lack of factual disputes, future proceedings in this case may be particularly dependent on the legal conclusions reached by the Tenth Circuit thus far. *Cf. Guedes v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 18-CV-2988 (DLF), 2021 WL 663183, at *4 (D.D.C. Feb. 19, 2021) (embracing the legal conclusions that had "already been addressed in detail by the D.C. Circuit" during interlocutory review.). So, there is little reason for this Court to wait before resolving the existing circuit split and providing much-needed guidance on these issues.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT
No. 19-4036

W. CLARK APOSHIAN,
Plaintiff - Appellant,
v.

WILLIAM BARR, Attorney General of the United States; UNITED STATES DEPARTMENT OF JUSTICE; THOMAS E. BRANDON, Acting Director Bureau of Alcohol Tobacco Firearms and Explosives; BUREAU OF ALCOHOL TOBACCO FIREARMS AND EXPLOSIVES,
Defendants - Appellees.

CATO INSTITUTE and FIREARMS POLICY COALITION; DUE PROCESS INSTITUTE,
Amicus Curiae.

Appeal from the United States District Court
for the District of Utah
(D.C. No. 2:19-CV-00037-JNP-BCW)

Filed: May 7, 2020

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Brad Hinshelwood, Attorney, Civil Division, United States Department of Justice, Washington, DC (Joseph H. Hunt, Assistant Attorney General, Civil Division, United States Department of Justice, Washington, DC; John W. Huber, United States Attorney, Office of the United States Attorney for the District of Utah, Salt Lake City, Utah; Mark B. Stern, Michael S. Raab, and Abby C. Wright, Attorneys, Civil Division, United States Department of Justice, Washington, DC, with him on the briefs), appearing for Appellees.

Ilya Shapiro, Washington, DC, for Amicus Curiae Cato Institute.

John D. Cline, San Francisco, California, for Amicus Curiae Due Process Institute.

Before **BRISCOE**, **MORITZ**, and **CARSON**, Circuit Judges.

BRISCOE, Circuit Judge.

Plaintiff-Appellant W. Clark Aposhian has filed an interlocutory appeal from the district court's denial of his motion for a preliminary injunction. The district court concluded that Mr. Aposhian had not shown a likelihood of success on the merits of his challenge to a rule promulgated by the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) that classifies bump stocks as machine guns under the National Firearms Act (NFA), 26 U.S.C. §§ 5801–5872. *See* Bump-Stock-Type Devices, 83 Fed. Reg. 66,514 (Dec. 26, 2018) (Final Rule). The Final Rule was

promulgated to clarify the definition of "machinegun" as found in 26 U.S.C. § 5845(b).[1] It is that definition of machine gun and the Final Rule that are the focus of this appeal. Exercising jurisdiction pursuant to 28 U.S.C. § 1292(a)(1), we agree with the outcome reached by the district court that Mr. Aposhian has failed to establish a likelihood of success on the merits of his challenge to the Final Rule, and we affirm the denial of preliminary injunctive relief.

I.

Statutory Framework

The NFA (i) regulates the production, dealing in, possession, transfer, import, and export of covered firearms; (ii) creates a national firearms registry; and (iii) imposes taxes on firearms importers, manufacturers, and dealers, as well as specified transfers of covered firearms. 26 U.S.C. §§ 5801-5861. Failure to comply with the NFA's requirements results in penalties and forfeiture and subjects the violator to the general enforcement measures available under the internal revenue laws. *Id.* §§ 5871–5872.

"Machinegun[s]" are subject to regulation and registration under the NFA. *Id.* § 5845(a). The NFA defines a "machinegun" 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." *Id.* § 5845(b). The definition also includes "the frame or receiver of any such weapon," as well as "any part" or "combination of parts designed and intended, for use

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[1] We use the two-word spelling of machine gun except when quoting sources.

in converting a weapon into a machinegun," and "any combination of parts from which a machinegun can be assembled" as long as those "parts are in the possession or under the control of a person." *Id.*

Congress expressly charged the Attorney General with the "administration and enforcement" of the NFA, *id.* § 7801(a)(1), (a)(2)(A), and provided that the Attorney General "shall prescribe all needful rules and regulations for the enforcement of" the NFA, *id.* § 7805; *see id.* § 7801(a)(2)(A).

The Gun Control Act of 1968 (GCA), 18 U.S.C. § 921 et seq., as amended by the Firearm Owners' Protection Act, Pub. L. No. 99-308, 100 Stat. 449 (1986), imposes both criminal prohibitions and a regulatory licensing scheme on certain firearm transactions. *See* 18 U.S.C. § 922 (criminal prohibitions); *id.* § 923 (licensing scheme). The GCA incorporates by reference the definition of machine gun in the NFA. *See id.* § 921(a)(23). The GCA also expressly delegates administrative and rulemaking authority to the Attorney General to "prescribe only such rules and regulations as are necessary to carry out the provisions of this chapter." *Id.* § 926(a). The Attorney General has delegated the responsibility for enforcing and administering the NFA and the GCA to ATF. *See* 28 C.F.R. § 0.130(a).

Under 18 U.S.C. § 922(o), it is "unlawful for any person to transfer or possess a machinegun." Conversely, many firearms requiring a distinct pull of the trigger to shoot each bullet are lawful. *See generally id.* § 922; 26 U.S.C. § 5845. Over time, ATF has promulgated regulations and issued rulings defining various terms in the NFA and GCA and classifying weapons and parts as machine guns.

Regulation of Bump Stocks

A "bump stock" is a device that replaces the standard stationary stock of a semiautomatic rifle—the part of the rifle that generally rests against the shooter's shoulder—with a sliding, non-stationary stock that permits the shooter to rapidly increase the rate of fire, approximating that of an automatic weapon. Final Rule at 66,516. A bump stock does so by channeling the recoil energy from each shot "into the space created by the sliding stock (approximately 1.5 inches) in constrained linear rearward and forward paths." *Id.* at 66,518. The bump stock "harnesses the firearm's recoil energy as part of a continuous back-and-forth cycle that allows the shooter to attain continuous firing" following a single pull of the trigger, producing a rapid bumping of the trigger against the shooter's stationary finger. *Id.* at 66,533. That design allows the shooter, by maintaining constant rearward pressure on the device's extension ledge[2] with the trigger finger as well as forward pressure on the front of the gun, to fire bullets continuously and at a high rate of fire to "mimic automatic fire." *Id.* at 66,516. This continuous cycle of fire-recoil-bump-fire lasts until the shooter releases the trigger by removing his finger from the extension ledge, the weapon malfunctions, or the ammunition is exhausted. *Id.* at 66,519.

The Attorney General, exercising his regulatory authority, first included a bump stock device—the Akins Accelerator—within the statutory definition of "machinegun" in 2006. *See* ATF Ruling 2006-2; *see also*

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[2] The extension ledge or "finger rest" is where the "shooter places the trigger finger while shooting the firearm." Final Rule at 66,516.

Akins v. United States, 312 F. App'x 197, 199 (11th Cir. 2009). The Akins Accelerator, unlike many bump stocks, used "an internal spring" to "reposition and refire" the firearm. *Akins*, 312 F. App'x at 198. ATF later limited the devices it defined as machine guns by concluding that bump stocks that operated without an internal spring were not machine guns. Final Rule at 66,514.

On October 1, 2017, a shooter in Las Vegas, Nevada, used multiple semiautomatic rifles equipped with bump stocks to fire several hundred rounds of ammunition into a crowd of concert attendees within a short period of time. *Id.* at 66,516.[3] The " 'rapid fire' operation" of the shooter's weapons enabled by the bump stocks left 58 dead and approximately 500 wounded. *Id.* In response, President Trump directed the Department of Justice "to propose for notice and comment a rule banning all devices that turn legal weapons into machineguns." Application of the Definition of Machinegun to "Bump Fire" Stocks and Other Similar Devices, 83 Fed. Reg. 7,949, 7,949 (Feb. 20, 2018). ATF then revisited the status of bump stocks, reviewed its earlier determinations for bump-stock-type devices issued between 2008 and 2017, and decided to clarify by the rulemaking process the statutory terms "automatically" and "single function of the trigger" as applied in defining what is or is not a machine gun. Final Rule at 66,514–66,515.

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[3] Because ATF had not regulated certain types of bump stocks under the NFA or GCA, they were not marked with a serial number or other identification markings. As a result, individuals were able to legally purchase bump stocks without undergoing background checks or complying with any other federal regulations applicable to firearms. Final Rule at 66,516.

On March 29, 2018, then-Attorney General Sessions issued a Notice of Proposed Rulemaking that suggested "amend[ing] the [ATF] regulations to clarify that [bump stocks] are 'machineguns' " under 26 U.S.C. § 5845(b). *See* Bump-Stock-Type Devices, 83 Fed. Reg. 13,442 (March 29, 2018).

ATF promulgated its Final Rule on December 26, 2018. Regarding the statutory definition of machine gun, the Final Rule provided that the NFA's use of "the term 'automatically' as it modifies 'shoots, is designed to shoot, or can be readily restored to shoot,' " 26 U.S.C. § 5845(b), "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." Final Rule at 66,553–66,554 (codified at 27 C.F.R. §§ 447.11, 478.11, 479.11). The Final Rule further defined "single function of the trigger," 26 U.S.C. § 5845(b), to mean "a single pull of the trigger and analogous motions." Final Rule at 66,553–66,554 (codified at 27 C.F.R. §§ 447.11, 478.11, 479.11).

Given those definitions, the Final Rule concluded that the statutory term "'machinegun' includes a bump-stock-type device"—that is, "a device that allows a semiautomatic firearm to shoot more than one shot with a single pull of the trigger by harnessing the recoil energy of the semiautomatic 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.* (codified at 27 C.F.R. §§ 447.11, 478.11, 479.11).

For its authority to promulgate the Final Rule, ATF relied on both the "plain meaning" of the NFA and the Attorney General's delegation to the agency to administer and enforce the NFA and GCA. *Id.* at

66,527. In addition, ATF stated that if 26 U.S.C. § 5845(b) is ambiguous, the Final Rule "rests on a reasonable construction." *Id.* (citing and invoking *Chevron U.S.A., Inc. v. Nat. Res. Def. Counsel*, 467 U.S. 837 (1984)). ATF explained that although Congress defined "machinegun" in the NFA, "it did not further define the components of that definition ... Congress thus implicitly left it to the [Attorney General] to define 'automatically' and 'single function of the trigger' in the event those terms are ambiguous." *Id.*

ATF stated that the Final Rule would become "effective" on March 26, 2019, ninety days after promulgation. *Id.* at 66,514. ATF stated further that individuals would be subject to "criminal liability only for possessing bump-stock-type devices after the effective date of regulation, not for possession before that date." *Id.* at 66,525. Bump-stock owners were directed to destroy their devices or leave them at an ATF office by March 26, 2019. *Id.* at 66,514.

Procedural History

Mr. Aposhian purchased a Slide Fire bump stock before the Final Rule was promulgated. He filed suit against various governmental officers and agencies challenging the Final Rule as unconstitutional and in violation of the Administrative Procedure Act (APA), arguing that the Final Rule contradicts an unambiguous statute, 26 U.S.C. § 5845(b), and mistakenly extends its statutory definition of "machinegun" to cover bump stocks. The government also argued the statute is unambiguous but that the Final Rule is merely interpretive and, as so, reflects the best interpretation of the statutory text. For its part, the district court did not specifically opine on whether the statute was ambiguous or not.

Ultimately, the district court denied Mr. Aposhian's motion for a preliminary injunction, concluding that because the Final Rule represented the best reading of the statute, Mr. Aposhian was not likely to succeed on the merits of his challenge. Aplt. App. at 181. Because it concluded that Mr. Aposhian was unlikely to succeed on the merits, the district court did not reach the other three preliminary-injunction factors. *See id.* at 175. Mr. Aposhian filed a notice of appeal and sought an injunction pending appeal from this court, which was denied. *Id.* at 226.

II

We review the district court's denial of a preliminary injunction for abuse of discretion. *Wilderness Workshop v. BLM*, 531 F.3d 1220, 1223 (10th Cir. 2008). "An abuse of discretion occurs 'only when the trial court bases its decision on an erroneous conclusion of law or where there is no rational basis in the evidence for the ruling.' " *Utah Licensed Beverage Ass'n v. Leavitt*, 256 F.3d 1061, 1065 (10th Cir. 2001) (quoting *Hawkins v. City and Cty. of Denver*, 170 F.3d 1281, 1292 (10th Cir. 1999)). "Thus, we review the district court's factual findings for clear error and its conclusions of law de novo." *Fish v. Kobach*, 840 F.3d 710, 723 (10th Cir. 2016).

"A preliminary injunction is an extraordinary remedy, the exception rather than the rule." *United States ex rel. Citizen Band Potawatomi Indian Tribe v. Enter. Mgmt. Consultants, Inc.*, 883 F.2d 886, 888 (10th Cir. 1989). "To obtain a preliminary injunction, the movant must show: (1) a substantial likelihood of success on the merits; (2) irreparable harm to the movant if the injunction is denied; (3) the threatened injury outweighs the harms that the preliminary

injunction may cause the opposing party; and (4) the injunction, if issued, will not adversely affect the public interest." *Gen. Motors Corp. v. Urban Gorilla, LLC*, 500 F.3d 1222, 1226 (10th Cir. 2007). The third and fourth factors "merge" when, like here, the government is the opposing party. *Nken v. Holder*, 556 U.S. 418, 435 (2009). "[B]ecause a preliminary injunction is an extraordinary remedy, the [movant's] right to relief must be clear and unequivocal." *Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 356 F.3d 1256, 1261 (10th Cir. 2004) (internal quotation marks omitted).

III

To obtain preliminary injunctive relief, Mr. Aposhian must demonstrate a substantial likelihood of success on the merits of his challenge to the Final Rule. While his complaint raises both constitutional and APA claims, he does not cite to any constitutional provision or section of the APA in the portion of his opening brief discussing his likelihood of success on the merits. It is clear, however, that Mr. Aposhian's merits arguments in this court concern only issues of statutory interpretation. Specifically, he contends that he has demonstrated a substantial likelihood of success on the merits because ATF's interpretation of 26 U.S.C. § 5845(b) contradicts the unambiguous language of the statute. Aplt. Br. at 13. He also argues that because the statute is unambiguous, ATF had no authority to promulgate a rule defining its terms. *Id.* at 30. In the alternative, Mr. Aposhian contends that

any ambiguity in the statute must be construed in his favor under the rule of lenity.[4] *Id.* at 37.[5]

Because Mr. Aposhian is challenging ATF's authority to promulgate the Final Rule, the APA governs our review. *See WildEarth Guardians v. United States Fish and Wildlife Serv.*, 784 F.3d 677, 683 (10th Cir. 2015) (noting that the APA applies "when asking whether an agency has acted within its authority"); see also *Citizens' Comm. to Save Our Canyons v. Krueger*, 513 F.3d 1169, 1176 (10th Cir. 2008) (stating that the APA "governs judicial review of agency actions"). As relevant to the arguments here, we may only set aside agency action that is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(C). We

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[4] Under the rule of lenity, courts "interpret ambiguous statutes ... in favor of criminal defendants." *United States v. Gay*, 240 F.3d 1222, 1232 (10th Cir. 2001). "The rule of lenity 'is a rule of last resort [and] the mere assertion of an alternative interpretation is not sufficient to bring the rule into play.' " *Id.* (quoting *United States v. Blake*, 59 F.3d 138, 140 (10th Cir. 1995)).

[5] Mr. Aposhian states in a footnote in his reply brief that his "claim is that the Final Rule was issued in violation of Articles I, § 1, I, § 7, and II, § 3, on theories related to the vesting clauses, bicameralism and presentment, non-divestment and separation of powers principles." Aplt. Rep. Br. at 27 n.1 (citing his complaint). Not only does Mr. Aposhian fail to cite any caselaw supporting these arguments, these constitutional theories are absent from his opening brief. We routinely "decline[ ] to consider arguments that are not raised, or are inadequately presented, in an appellant's opening brief," *Bronson v. Swensen*, 500 F.3d 1099, 1104 (10th Cir. 2007), and it is well settled that we do not ordinarily review issues raised for the first time in a reply brief, *Sylvia v. Wisler*, 875 F.3d 1307, 1332 n.7 (10th Cir. 2017). We see no reason to deviate from those principles here.

conclude that Mr. Aposhian has not shown that ATF acted beyond its authority and has thereby failed to demonstrate a substantial likelihood of success under the APA.

A

At the outset, we must determine what standard we are to apply in addressing the Final Rule's conclusion that bump stocks are "machineguns" under the statutory definition. When confronted with this question of statutory interpretation and what if any weight the district court should accord ATF's interpretation under its Final Rule, the parties seemed oddly in agreement. Mr. Aposhian argued repeatedly against the application of *Chevron* deference, citing *Chevron* in his motion for a preliminary injunction to argue that ATF's construction of the statute should be rejected, Aplt. App. at 44–45, and devoting the entirety of his reply brief to argue the Final Rule fails under both step one and step two of *Chevron*, *see id.* at 111–19. And, as the district court noted in its memorandum opinion and order denying the motion for a preliminary injunction, the government "went out of [its] way to avoid citing *Chevron* and its progeny and repeatedly stressed that [the defendants] neither request, nor believe their interpretations are entitled to, any measure of deference." *Id.* at 177 n.8. In the end, the district court did not apply the *Chevron* framework. *Id.* Rather, it concluded that the Final Rule represented the best interpretation of the statute. *Id.* at 181.

Generally, however, "we apply the test established by *Chevron* ... when asking whether an agency has acted within its authority." *WildEarth*, 784 F.3d at 683 (emphasizing that appellate review under

APA § 706(2)(C) proceeds under the *Chevron* framework). If *Chevron* applies, we first ask if the statute is ambiguous concerning whether bump stocks can be considered "machineguns." If so, we sustain the Final Rule's conclusion that bump stocks are machine guns as long as the Final Rule's conclusion is reasonable. *See Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 218 (2009). At this second step, an "agency need not adopt ... the best reading of the statute, but merely one that is permissible." *Dada v. Mukasey*, 554 U.S. 1, 29 n.1 (2008). On the other hand, if *Chevron*'s two-step framework is inapplicable, we accept ATF's interpretation only if it is the best reading of the statute. While the parties protest the applicability of *Chevron* on various grounds, we conclude that the Final Rule warrants consideration under the *Chevron* framework.

(i)

Initially, the applicability of *Chevron* depends on what kind of rule the Final Rule represents. There is a "central distinction" under the APA between legislative rules and interpretive rules. *Chrysler Corp. v. Brown*, 441 U.S. 281, 301 (1979); *see* 5 U.S.C. § 553(b), (d). Legislative rules generally receive *Chevron* deference, whereas interpretive rules "enjoy no *Chevron* status as a class." *United States v. Mead Corp.*, 533 U.S. 218, 232 (2001).

A legislative rule is one that "is promulgated pursuant to a direct delegation of legislative power by Congress and ... changes existing law, policy, or practice." *Rocky Mountain Helicopters, Inc. v. F.A.A.*, 971 F.2d 544, 546 (10th Cir. 1992). A legislative rule affects individual rights and obligations, and, if it is

"the product of certain procedural requisites," it has the force and effect of law. *Chrysler Corp.*, 441 U.S. at 301–02. An interpretive rule, on the other hand, "attempts to clarify an existing rule but does not change existing law, policy, or practice." *Rocky Mountain Helicopters*, 971 F.2d at 546–47. An interpretive rule simply " 'advise[s] the public of the agency's construction of the statute and rules which it administers.' " *Sorenson Commc'ns, Inc. v. F.C.C.*, 567 F.3d 1215, 1222 (10th Cir. 2009) (quoting *Shalala v. Guernsey Mem. Hosp.*, 514 U.S. 87, 99 (1995)).

The government contends—and the district court found—that the Final Rule is merely interpretive. *See* Aple. Br. at 37–38; Aplt. App. at 176. But "[t]he agency's own label for its action is not dispositive." *Sorenson*, 567 F.3d at 1223. Instead, "[t]he court must rely upon the reasoning set forth in the administrative record and disregard *post hoc* rationalizations of counsel." *Id.* at 1221. Here, "[a]ll pertinent indicia of agency intent confirm that the [Final] Rule is a legislative rule." *Guedes v. Bur. of Alcohol, Tobacco, Firearms & Explosives*, 920 F.3d 1, 18 (D.C. Cir. 2019) (reviewing the Final Rule under the *Chevron* framework).

First, the Final Rule demonstrates that ATF intended to change the legal rights and obligations of bump-stock owners. The Final Rule directed bump-stock owners to either destroy or surrender to ATF any bump stock in their possession and stated that "[t]he rule would criminalize only future conduct, not past possession of bump-stock-type devices that ceases by the effective date of this rule." Final Rule at 66,525. The Final Rule announced that a person "in possession of a bump-stock-type device" in fact "*is not*

acting unlawfully unless they fail to relinquish or destroy their device *after* the effective date of this regulation." *Id.* at 66,523 (emphasis added). This effort to " 'directly govern[ ] the conduct of members of the public, affecting individual rights and obligations' " is "powerful evidence" that ATF intended the Final Rule to be a binding application of its rulemaking authority. *Guedes*, 920 F.3d at 18 (quoting *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 172 (2007)).

ATF, when promulgating the Final Rule, "further evinced its intent to exercise legislative authority by expressly invoking the *Chevron* framework and then elaborating at length as to how *Chevron* applies to the [Final] Rule." *Id.* at 18–19 (noting that ATF's "exegesis" on *Chevron* "would have served no purpose unless the agency intended the [Final] Rule to be legislative in character"). Moreover, the Final Rule expressly invoked two separate delegations of legislative power, one under the NFA, 26 U.S.C. § 7805, and one under the GCA, 18 U.S.C. § 926(a). *See* Final Rule at 66,515. These provisions, according to the Final Rule, give the Attorney General "the responsibility for administering and enforcing the NFA and GCA," which he has delegated to ATF. *Id.*

In addition, the Final Rule was published in the Code of Federal Regulations (CFR). By statute, administrative rules published in the CFR are limited to those "having general applicability and legal effect." 44 U.S.C. § 1510. For all of these reasons, it is evident that the Final Rule intends to speak with the force of law.

Ordinarily, legislative rules are entitled to *Chevron* deference. *See Sinclair Wyoming Refining Co. v. EPA*, 887 F.3d 986, 991 (10th Cir. 2017).

Nonetheless, the parties assert that *Chevron* deference is inappropriate here. Mr. Aposhian argues that *Chevron* deference has been waived by the government because the government has disavowed any reliance on *Chevron* throughout this litigation. Aplt. Br. at 42–43. Next, the parties (including the government) submit that *Chevron* deference is inapplicable when the government interprets a statute that imposes criminal liability. *See* Aplt. Br. at 44; Aple. Br. at 40. Neither of these objections to applying *Chevron* are likely to succeed in the context of the Final Rule, particularly when one recalls the citation to and reliance on *Chevron* when the Final Rule was promulgated.

(ii)

Mr. Aposhian relies on our decision in *Hydro Resources, Inc. v. EPA*, 608 F.3d 1131 (10th Cir. 2010), to argue that the government has waived any reliance on *Chevron* deference and that we must abide by that waiver. Aplt. Br. at 42, 43. In *Hydro Resources*, we reviewed de novo the Environmental Protection Agency's interpretation of a statute because "throughout the proceedings before the panel and ... the *en banc* court, [the agency] itself ha[d]n't claimed any entitlement to deference." *Id.* at 1146. We noted that "[i]n these circumstances, when the agency doesn't ask for deference to its statutory interpretation, 'we *need not* resolve the ... issues regarding deference which would be lurking in other circumstances.' " *Id.* (emphasis added) (quoting *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 477 (1992)). However, this passage should not be read as prohibiting our application of *Chevron* merely on the agency's say so. Simply put, "need not" does not mean "may not."

Moreover, *Hydro Resources* did not address a scenario where, like here, a party *other* than the government invokes the *Chevron* framework.

We addressed this specific scenario in *TransAm Trucking, Inc. v. Admin. Review Bd.*, 833 F.3d 1206, 1212 n.4 (10th Cir. 2016), and held that the *Chevron* framework applies, including deference at *Chevron* step two. The dissent in *TransAm* criticized the majority for making "a wholly uninvited foray into step two of *Chevron* land," *id.* at 1216 (Gorsuch, J., dissenting), because "the only party to mention *Chevron* ... was [the plaintiff], and then only in a footnote in its brief and then only as part of an argument that the statute is *not* ambiguous," *id.* (emphasis in original). The majority nonetheless applied both steps of *Chevron* and gave the agency's interpretation of the statute deference, *id.* at 1212, defending its application of *Chevron* deference by stating, "We received our invitation from TransAm [to apply the *Chevron* framework] in its opening brief ... TransAm, the appellant in this matter, relied on *Chevron* to argue the [agency's] construction of the [statute] should be rejected." *Id.* at n.4.

This case is akin to *TransAm*. While the government has declined to invoke *Chevron* throughout the course of this litigation, *see* Aple. Br. at 16 (arguing that "plaintiff's discussion of *Chevron* deference has no bearing on the disposition of this suit"), Mr. Aposhian, like the plaintiff in *TransAm*, relies on *Chevron* in his opening brief to argue that ATF's construction of the statute should be rejected. In contending that ATF's interpretation "contradicts the statute itself," Aplt. Br. at 13 (capitalization omitted), Mr. Aposhian cites *Chevron*, arguing that the inquiry is whether the

statute " 'has directly spoken to the precise question at issue,' and, if so, 'that is the end of the matter; for the court as well as the agency must give effect to the unambiguously expressed intent of Congress,' " *id.* at 14 (quoting *Chevron*, 467 U.S. at 842–43). The plaintiff in *TransAm* likewise cited *Chevron* "as part of an argument that the statute is *not* ambiguous" (*Chevron* step one), 833 F.3d at 1216 (Gorsuch, J., dissenting), yet the majority still concluded that the plaintiff provided an "invitation" to apply both steps of the *Chevron* framework, *id*. at 1212 n.4. Our "invitation" to apply the *Chevron* framework in this case is even clearer than in *TransAm*, given that Mr. Aposhian (1) cites *Chevron* in the text of his opening brief rather than in a footnote; and (2) relied on *Chevron* in his motion for a preliminary injunction at the district court, Aplt. App. at 44–45, and in his motion for an injunction pending appeal, *id.* at 150. Because Mr. Aposhian has invoked *Chevron* throughout the course of this litigation, his objection to *Chevron* deference based on the *government's* waiver is unlikely to succeed.[6]

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[6] While Mr. Aposhian has clearly presented an "invitation" to apply the *Chevron* framework under *TransAm*, we note that our cases are not entirely consistent as to whether such an invitation is necessary. *Compare Am. Wild Horse Pres. Campaign v. Jewell*, 847 F.3d 1174, 1187 (10th Cir. 2016) (describing *Chevron* as a "two-part *standard of review*") (emphasis added), *with Hays Med. Ctr. v. Azar*, __ F.3d __, No. 17-3232, 2020 WL 1922595, at *13 n.18 (10th Cir. Apr. 21, 2020) (concluding that *Chevron* can be waived where, unlike here, its "invocation" is merely "perfunctory and fleeting"). To the extent that *Chevron* is a standard of review, we would need no invitation to apply it. *See Gardner v. Galetka*, 568 F.3d 862, 879 (10th Cir. 2009) ("It is one thing to allow parties to forfeit claims, defenses, or lines of argument; it would be quite

(iii)

Next, the parties contend that *Chevron* deference is inapplicable where the government interprets a statute that imposes criminal liability. *See* Aplt. Br. at 44 (" '[C]riminal laws are for courts, not for the Government, to construe.' ") (quoting *Abramski v. United States*, 573 U.S. 169, 191 (2014)); Aple. Br. at 40 (same). According to Mr. Aposhian, "ATF's rejection of deference in favor of the rule of lenity" is required by our precedent and constitutional limitations. Aplt. Br. at 44. Mr. Aposhian also relies on *United States v. Apel*, 571 U.S. 359, 369 (2014), for the proposition that "we have never held that the Government's reading of a criminal statute is entitled to any deference." Mr. Aposhian, however, has failed to demonstrate a likelihood of success in establishing a general rule against applying *Chevron* to agency interpretations of statutes with criminal law implications. Rather, controlling precedent points in the other direction.

In *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995), the Supreme Court reviewed a regulation interpreting a term in the Endangered Species Act (ESA), which, like the regulation in this case, carried both civil and criminal implications. The challengers argued that *Chevron* deference was inappropriate because the ESA included criminal penalties. *See id.* at 704 n.18. The Court disagreed, holding that it would defer "to the

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another to allow parties to stipulate or bind us to application of an incorrect legal standard...."); *see also Guedes*, 920 F.3d at 22 ("The 'independent power' to identify and apply the correct law presumably includes application of the *Chevron* framework when determining the meaning of a statute."

Secretary's reasonable interpretation" under *Chevron*. *Id.* at 703–04.

Babbitt also rejected the argument "that the rule of lenity should foreclose any deference to the [agency's] interpretation of the [statute] because the statute includes criminal penalties." *Id.* at 704 n.18. The Court reasoned,

> The rule of lenity is premised on two ideas: First, " 'a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed' "; second, "legislatures and not courts should define criminal activity." We have applied the rule of lenity in a case raising a narrow question concerning the application of a statute that contains criminal sanctions to a specific factual dispute—whether pistols with short barrels and attachable shoulder stocks are short-barreled rifles—*where no regulation was present*. *See United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 517–518, and n. 9 (1992). We have *never* suggested that the rule of lenity should provide the standard for reviewing facial challenges to administrative *regulations* whenever the governing statute authorizes criminal enforcement.

Id. (emphasis added) (citation omitted). Thus, as in this case, where a regulation *is* at issue, *and* the agency (here, ATF) has both civil and criminal

enforcement authority, *Babbitt* suggests that *Chevron*, not the rule of lenity, should apply.

Our circuit precedent is in accord. In *NLRB v. Oklahoma Fixture Co.*, 332 F.3d 1284, 1287 (10th Cir. 2003) (en banc), we noted that "it is not entirely clear exactly how the *Chevron* analysis is affected by the presence of criminal liability in a statute being interpreted by an agency." Nonetheless, we concluded that, under *Babbitt*, it was appropriate to give "some deference" under *Chevron* to the National Labor Relations Board's interpretation of an exception to a criminal prohibition on employer payments to labor organizations in the Labor Management Reporting Act. *Id.* (noting that "the degree of deference may be dependent upon considerations of the agency's particular expertise and the policies implicated by the criminal statute in question, as well as the extent to which Congress has charged the agency with administering the criminal statute"). Accordingly, we looked at whether the agency's interpretation was "a reasonable or permissible one" and was "not in conflict with interpretive norms regarding criminal statutes." *Id.* & n.5 (stating that "criminal statutes must be construed narrowly, and that exceptions to those statutes must be construed broadly"). We concluded that the agency's interpretation was reasonable and gave deference to its interpretation of the "criminal provision" at issue.[7] *Id.* at 1287, 1291. And contrary to Mr. Aposhian's assertion, the majority in *Oklahoma*

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[7] Notably, in contrast with the regulation in *Babbitt* and the regulation at issue here, the NLRB's interpretation in *Oklahoma Fixture* carried *only* criminal implications. 332 F.3d at 1291 n.1. (Briscoe, J., concurring).

Fixture did not apply, or even mention, the rule of lenity. *See id.* at 1287–90.

We later gave deference under *Chevron* to a "reasonable" ATF regulation interpreting 18 U.S.C. § 922(g), despite the "criminal nature of that statute." *United States v. Atandi*, 376 F.3d 1186, 1189 (10th Cir. 2004) (stating that "we unquestionably owe 'some deference' to the ATF's regulation") (quoting *Okla. Fixture*, 332 F.3d at 1286–87, and citing *Babbitt*, 515 U.S. at 703). We emphasized that, as in this case, ATF "had been delegated authority to implement" § 922 by virtue of 18 U.S.C. § 926(a), *id.* (noting that § 926(a) "authoriz[es] 'such rules and regulations as are necessary to carry out the provisions of this chapter' "), and we again did not invoke the rule of lenity. *See id.*[8]

We once again gave deference under *Chevron* to an agency's interpretation of a statute with criminal implications in *United States v. Hubenka*, 438 F.3d 1026, 1032–34 (10th Cir. 2006). In *Hubenka*, a jury found the defendant guilty of violating the Clean Water Act, and the defendant contended that "his activities ... l[ay] beyond the reach of the [statute]" as interpreted by the Army Corps of Engineers. *Id.* at 1028. We nonetheless applied the *Chevron* framework and did not invoke the rule of lenity. *Id.* at 1031 ("When a case involves an agency's interpretation of a statute it administers, this court uses the two-step

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[8] In *York v. Secretary of the Treasury*, 774 F.2d 417, 419 (10th Cir. 1985), we recognized ATF's "enforcement power" under 26 U.S.C. § 7805(a) "to interpret 26 U.S.C. § 5845(b)," the statute at issue in this case, "which provides that a 'machine gun' includes '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.' "

approach announced in *Chevron*....”). We held that the Army Corps of Engineers’ “tributary rule [was] a permissible interpretation of the [statute].” *Id.* at 1034. Therefore, we stated that, “under *Chevron*, we must defer to the Corps’ interpretation of the statute” despite the criminal implications of the rule. *Id.* at 1034 (affirming the defendant’s conviction). In sum, this court has repeatedly given agency interpretations with criminal law implications deference.

To be sure, the Supreme Court has recently “signaled some wariness about deferring to the government’s interpretations of criminal statutes.” *Guedes*, 920 F.3d at 25 (citing *Abramski*, 573 U.S. at 191, and *Apel*, 571 U.S. at 369). But as the D.C. Circuit explained in *Guedes*, those statements “were made outside the context of a *Chevron*-eligible interpretation.” *Id.* Specifically,

> [i]n *Abramski*, the Court declined to extend deference to informal guidance documents published by [ATF]. *See* 573 U.S. at 191. And in *Apel*, the Court declined to defer to an interpretation contained in “Executive Branch documents” that were “not intended to be binding.” 571 U.S. at 368. When directly faced with the question of *Chevron*’s applicability to an agency’s interpretation of a statute with criminal applications through a *full-dress regulation*, the Court adhered to *Chevron*. *See Babbitt*, 515 U.S. at 704 n.18.

Id. (emphasis added). *Babbitt* and our court’s precedents govern here, where ATF has promulgated a regulation through formal notice-and-comment

proceedings. Under those precedents, Mr. Aposhian has failed to demonstrate a likelihood of success in establishing a rule against deference to agency interpretations with criminal law implications.

B

Because the precedents cited call for the application of *Chevron*, we now examine the Final Rule under *Chevron*. We first ask whether the agency-administered statute is ambiguous on the "precise question at issue." *Chevron*, 467 U.S. at 842. If the statute's meaning is unambiguous, then we need go no further. If we find ambiguity, our caselaw instructs us to proceed to *Chevron*'s second step and ask whether the agency has provided a "permissible construction" of the statute. *Id.* at 843. There, "the task that confronts us is to decide, not whether [the agency's interpretation is] the best interpretation of the statute, but whether it represents a reasonable one." *Atl. Mut. Ins. Co. v. Comm'r*, 523 U.S. 382, 389 (1998).

The NFA and GCA both define "machinegun" to mean "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." 26 U.S.C. § 5845(b); *see* 18 U.S.C. § 921(a)(23). The definition of "machinegun" also includes "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 Final Rule determines that semiautomatic rifles equipped with bump stocks are "machineguns"

because they "function[ ] as the result of a self-acting or self-regulating mechanism that allows the firing of multiple rounds" through "a single pull of the trigger." Final Rule at 66,553. Applying *Chevron*, the statutory definition of "machinegun" is ambiguous, and ATF's interpretation is reasonable. Mr. Aposhian therefore is unlikely to succeed on the merits of his challenge to the Final Rule.

(i)

For the first step, to ascertain whether Congress clearly stated its intent on the precise statutory question at issue, courts should "apply[ ] the ordinary tools of statutory construction." *City of Arlington v. FCC*, 569 U.S. 290, 296 (2013). "These tools include examination of the statute's text, structure, purpose, history, and relationship to other statutes." *Harbert v. Healthcare Servs. Grp., Inc.*, 391 F.3d 1140, 1147 (10th Cir. 2004). "Ambiguity is a creature not of definitional possibilities but of statutory context." *Brown v. Gardner*, 513 U.S. 115, 118 (1994). Under this analysis, we agree with the D.C. Circuit that two features of the statutory definition of "machinegun" render it ambiguous. The first is the phrase "single function of the trigger," and the second is the word "automatically." *Guedes*, 920 F.3d at 29.

"Single Function of the Trigger"

When applied to bump stocks, the statutory definition of machine gun is ambiguous with respect to the phrase "single function of the trigger." That is because, within the statutory context, the phrase can have more than one meaning. *See id.* ("[T]he statutory phrase 'single function of the trigger' admits of more than one interpretation."). Mr. Aposhian defines the

phrase to mean a mechanical act of the trigger. Aplt. Br. at 26 (arguing that "[c]ourts have emphasized that a trigger's function is defined by how it mechanically operates, not by how the shooter engages it"). The government (and ATF), however, define "single function of the trigger" as "single pull of the trigger," Aple. Br. at 14, which "considers the external impetus for the mechanical process." *Gun Owners of Am. v. Barr*, 363 F. Supp. 3d 823, 832 (finding "the statutory definition of machine gun" to be "ambiguous with respect to the phrase 'single function of the trigger' ").[9]

As the D.C. Circuit explained,

> The first interpretation would tend to exclude bump-stock devices: while a semiautomatic rifle outfitted with a bump stock enables a continuous, high-speed rate of fire, it does so by engendering a rapid bumping of the trigger against the

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[9] The dissent states that ATF's interpretation of "single function of the trigger" to mean "single pull of the trigger" refers only to the action of the trigger and not the volitional action of the shooter. Dissent at 7. The parties argue otherwise. Specifically, Mr. Aposhian and the government agree that ATF's interpretation refers to the action of the shooter's trigger finger. *See* Aplt. Br. at 25 (arguing that the Final Rule conflicts with the statute because it redefines "single function of the trigger" to mean only the "deliberate and volitional act of the user pulling the trigger") (quotations omitted); Aple. Br. at 20 (arguing that the statute "is concerned with the *shooter's act* of pulling the trigger") (emphasis added). Because the parties do not argue that ATF's interpretation refers to the action of the trigger, that argument is waived. *See Wyoming v. Livingston*, 443 F.3d 1211, 1216 (10th Cir. 2006). We acknowledge the parties' agreement on this issue, not to support our conclusion that the statute is ambiguous, but rather to explain why we do not address the argument that is the focus of the dissent.

> shooter's stationary finger, such that each bullet is fired because of a distinct mechanical act of the trigger. The second interpretation would tend to include bump-stock devices: the shooter engages in a single pull of the trigger with her trigger finger, and that action, via the operation of the bump stock, yields a continuous stream of fire as long she keeps her finger stationary and does not release it.

Guedes, 920 F.3d at 29.

Within the statutory context, the phrase could have either meaning. The word "function" focuses on the "mode of action," 4 Oxford English Dictionary 602 (1933), or "natural ... action," Webster's New International Dictionary 876 (1933), by which the trigger operates. But that definition begs the question of whether "function" requires our focus upon the movement of the trigger, or the movement of the trigger finger. The statute is silent in this regard. "In light of those competing, available interpretations, the statute contains a 'gap for the agency to fill.' " *Guedes*, 920 F.3d at 29 (quoting *Chevron*, 467 U.S. at 843).

Mr. Aposhian argues that "single function of the trigger" plainly means a mechanical movement of the trigger, asserting that Congress understood when it enacted the NFA that there was a "difference in the internal mechanism that allowed a machinegun to fire multiple rounds continuously with one function of the trigger and a semiautomatic weapon, which fires only one round with each function of the trigger." Aplt. Br. at 36. But this distinction in no way requires a "function" to be a mechanical action. In fact, the definition Congress gave to the term "semiautomatic

rifle" in the GCA is "any repeating rifle which utilizes a portion of the energy of a firing cartridge to extract the fired cartridge case and chamber the next round, and which requires a separate *pull* of the trigger to fire each cartridge." 18 U.S.C. § 921(a)(28) (emphasis added). We conclude the statutory definition of machine gun is ambiguous with respect to the phrase "single function of the trigger."

"Automatically"

Similarly, the statutory term "automatically" is ambiguous when applied to bump stocks. In the statute, "automatically" functions as an adverb modifying the verb "shoots." Relying on definitions from the 1930s, the government and the Final Rule interpret the word to mean "the result of a self-acting or self-regulating mechanism." Final Rule at 66,519. Mr. Aposhian counters that because the shooter must maintain constant rearward pressure on the extension ledge with the trigger finger and constant forward pressure with the non-trigger hand for the bump stock to work, a bump stock cannot shoot "automatically." Aplt. Br. at 22–23. Essentially, "the parties' dispute is whether the ... pressure exerted by the shooter ... requires the conclusion that a bump stock does not shoot automatically." *Gun Owners*, 363 F. Supp. 3d at 831.

The statutory text does not answer this question. The term "automatically," however, does not require there be *no* human involvement to give rise to "more than one shot." Webster's New International Dictionary provides that "automatically" is the adverbial form of "automatic," meaning "[h]aving a self-acting or self-regulating mechanism that performs a required act at a *predetermined point* in an

operation." Webster's New International Dictionary 187 (2d ed. 1934) (emphasis added); *see also* Webster's New International Dictionary 156 (1933) (defining "automatic" as "self-acting or self-regulating," especially applied to "machinery or devices which perform *parts* of the work formerly or usually done by hand") (emphasis added). Similarly, the Oxford English Dictionary defines the term to mean "[s]elf-acting *under conditions fixed for it*, going of itself." 1 Oxford English Dictionary 574 (1933) (emphasis added). Therefore, under its ordinary meaning, the term can be read to permit limited human involvement to bring about "more than one shot." As the D.C. Circuit explained,

> [A] quite common feature of weapons that indisputably qualify as machine guns is that they require both a single pull of the trigger *and* the application of constant and continuing pressure on the trigger after it is pulled. We know, therefore, that the requirement of some measure of additional human input does not render a weapon nonautomatic.

Guedes, 920 F.3d at 30 (emphasis in original) (citation omitted). But how much human input is too much? The statute does not say.

Mr. Aposhian cites *Staples v. United States*, 511 U.S. 600, 602 n.1 (1994), for the proposition that the shooter's manual manipulations of the weapon clearly do not meet the definition of "automatically." *See* Aplt. Br. at 18, 21. Reliance on *Staples* is misplaced. *Staples* concerned the necessary mens rea element for a conviction for possession of an unregistered machine gun under the NFA. 511 U.S. at 604. At the beginning of the opinion, the Court provided a footnote explaining

how it was using certain terms in the opinion, including "automatic" and "semi-automatic." *Id.* at 602 n.1. It stated,

> [a]s 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. Such weapons are "machineguns" within the meaning of the Act. We use the term "semiautomatic" to designate a weapon that fires only one shot with each pull of the trigger, and which *requires no manual manipulation* by the operator to place another round in the chamber after each round is fired.

Id. (emphasis added).

As the Seventh Circuit explained in *United States v. Olofson*, 563 F.3d 652, 657 (7th Cir. 2009), the statutory definition of these terms was not at issue in *Staples*, and the Court was not purporting to interpret the statute. Instead, "the Court simply was providing a glossary for terms frequently appearing in the opinion." *Id.* Moreover, the Court did not suggest that "automatic" firing excluded *all* "manual manipulation" of the gun, as Mr. Aposhian maintains. The Court mentioned "manual manipulation" only in connection with placing another round in the chamber. *Staples*, 511 U.S. at 602 n.1. Precluding "manual manipulation" to put another round in the chamber is not inconsistent with the statutory definition of a machine gun, which shoots more than one shot "without manual reloading," 26 U.S.C. § 5845(b).

In sum, the statutory definition of machine gun contains two central ambiguities, both of which ATF has attempted to resolve. Accordingly, we proceed to *Chevron*'s second step.

(ii)

When, as here, Congress leaves an implicit statutory gap, we ask at step two "whether the [regulation] is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843. " '[T]he agency's interpretation need not be the only one it could have adopted, or the one that this court would have reached had the question initially arisen in a judicial proceeding.' " *Anderson v. Dep't of Labor*, 422 F.3d 1155, 1181 (10th Cir. 2005) (quoting *Salt Lake City v. W. Area Power Admin.*, 926 F.2d 974, 978 (10th Cir. 1991)).

ATF's interpretation of "single function of the trigger" to mean "single pull of the trigger" is a permissible reading of the statute. *See Guedes*, 920 F.3d at 31 (concluding ATF's interpretation of "single function of the trigger" is permissible); *Gun Owners*, 363 F. Supp. 3d at 832 (same). ATF's interpretation accords with how some courts have read the statute. For example, in *Akins*, the Eleventh Circuit held that ATF's reading of "single function of the trigger" to mean "single pull of the trigger" was "consonant with the statute and its legislative history." 312 F. App'x at 200 (concluding that the Akins Accelerator, a type of bump stock, was reasonably classified as a machine gun). In addition, the Final Rule's interpretation "accords with how the phrase 'single pull of the trigger' was understood at the time of the enactment of the [NFA]." *Guedes*, 920 F.3d at 31. The Final Rule cites a congressional hearing for the NFA where the

then-president of the National Rifle Association testified that the term "machine gun" included any firearm "capable of firing more than one shot by a single *pull* of the trigger, a single *function* of the trigger." Final Rule at 66,518 (emphasis added). Further, the House Report accompanying the bill that eventually became the NFA states that the bill "contains the usual definition of a machine gun as a weapon designed to shoot more than one shot ... by a single *pull* of the trigger." H.R. Rep. No. 73-1780, at 2 (1934) (emphasis added).

Nonetheless, the dissent states that if the Final Rule does refer to the motion of the trigger finger—a proposition the parties do not dispute—then the regulation is invalid as being broader than the unambiguous NFA. Dissent at 8 n.3. This assertion is contrary to authority in this circuit. Specifically, this court has looked to a shooter's volitional actions to determine whether automation was obtained with a "single function of the trigger" under the NFA. *See United States v. Oakes*, 564 F.2d 384, 388 (10th Cir. 1977). In *Oakes*, we held that a "gun was a machine gun within the [NFA's] statutory definition" because "the *shooter* could, by fully *pulling* the trigger ... obtain automation with a single trigger *function*." *Id.* (emphasis added). Thus, rather than being broader than the NFA, ATF's interpretation of "single function of the trigger" accords with how this court has interpreted the statute.

ATF's interpretation of "automatically" is likewise permissible. The Final Rule's "definition accords with the everyday understanding of the word 'automatic.'" *Guedes*, 920 F.3d at 31. That is, the bump stock "performs a required act at a predetermined point" in the firing sequence by directing the recoil

energy into the space created by the sliding stock. The bump stock is also "self-acting under conditions fixed for it." The shooter's positioning of the trigger finger on the extension ledge and application of forward pressure on the front of the gun provide the conditions necessary for the bump stock to repeatedly perform its purpose: to eliminate the need for the shooter to manually capture the recoil energy to fire additional rounds. We therefore disagree with the dissent's contention that a bump stock cannot be "automatic" because it will not work without constant forward pressure. Dissent at 12. The bump stock performs *part* of the work usually done by hand at a predetermined point in the operation, under conditions fixed for it by the shooter.

In addition, ATF's interpretation focuses the inquiry about what needs to be automated precisely where the statute does: the ability of the trigger function to produce "more than one shot, without manual reloading." 26 U.S.C. § 5845(b); *see Guedes*, 920 F.3d at 31–32. Further, ATF's interpretation tracks the interpretation reached by the Seventh Circuit, where the court interpreted the term to require a "self-acting mechanism" without requiring more. *Olofson*, 563 F.3d at 658; *see also Guedes*, 920 F.3d at 32; *Gun Owners*, 363 F. Supp. 3d at 832 (holding that ATF's "interpretation [of the term 'automatically'] is consistent with judicial interpretations of the statute").

Because ATF's Final Rule sets forth a reasonable interpretation of the statute's ambiguous definition of "machinegun," it merits our deference. Mr. Aposhian has not demonstrated a likelihood of success on the merits of his challenge to the Final Rule.

IV

Although we could affirm the district court's denial of preliminary injunctive relief solely on the ground that Mr. Aposhian has failed to demonstrate a substantial likelihood of success on the merits, we also conclude that Mr. Aposhian has not met the other prerequisites for preliminary relief.

Irreparable Harm

At the district court, "[t]he parties [did] not dispute that Mr. Aposhian will experience irreparable harm if the injunction is denied." Aplt. App. at 175. They did "disagree about what that irreparable harm is." *Id.* at n.4. Mr. Aposhian argued only that he would "be harmed by being forced to comply with a rule that has been promulgated in contravention of constitutional principles of separation-of-powers." *Id.* The government conceded only that the irreparable harm was the loss of Mr. Aposhian's bump stock. *Id.*

On appeal, Mr. Aposhian again contends that he will suffer irreparable harm because the Final Rule was issued in violation of his constitutional rights—specifically, the separation of powers doctrine. Aplt. Br. at 48. The government now asserts that Mr. Aposhian will not suffer irreparable harm, contending that there is no support for the proposition that a generalized separation-of-powers violation constitutes irreparable harm. Aple. Br. at 44. We agree with the government that Mr. Aposhian has not met his burden of demonstrating irreparable harm.

Mr. Aposhian relies on our holding in *Free the Nipple-Fort Collins v. City of Fort Collins*, 916 F.3d 792, 806 (10th Cir. 2019), where we held that "[w]hat makes an injury 'irreparable' is the inadequacy of, and the difficulty of calculating, a monetary remedy after

a full trial." We noted that "[a]ny deprivation of any constitutional right fits that bill." *Id.* But in the merits portion of his opening brief, Mr. Aposhian does not cite to a single constitutional provision or rely on any constitutional theory to argue that the Final Rule is invalid; rather, his arguments focus on whether the Final Rule contradicts the statute.[10] We cannot conclude that Mr. Aposhian has shown irreparable harm based on the deprivation of a constitutional right when he does not even raise a constitutional challenge to the Final Rule in this court.

Even if Mr. Aposhian had properly raised a constitutional argument, he has not cited a single case where a generalized separation of powers, by itself, constituted irreparable harm. To the contrary, our cases finding that a violation of a constitutional right alone constitutes irreparable harm are limited to cases involving individual rights, not the allocation of powers among the branches of government. *See, e.g.*, *Free the Nipple*, 916 F.3d at 806 (alleged equal protection violation); *Awad v. Ziriax*, 670 F.3d 1111, 1119 (10th Cir. 2012) (alleged First Amendment violation); *see generally* 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, FED. PRAC. & PROC. § 2948.1 (3d ed. 2019) ("When an alleged deprivation of a constitutional right is involved, such as the *right to free speech or freedom of religion*, most courts hold that no further showing of irreparable harm is necessary.") (emphasis added). For these reasons, he has not met his burden

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[10] As noted, the constitutional arguments Mr. Aposhian raised for the first time in a footnote in his reply brief are waived. *Sylvia*, 875 F.3d at 1332 n.7

of demonstrating that he would suffer irreparable harm absent an injunction.

The dissent asserts that the government has waived any argument as to irreparable harm by conceding in the district court that Mr. Aposhian would suffer irreparable harm. Our precedent says otherwise. For instance, in *Dominion*, the parties stipulated in a contract that a breach of an exclusivity provision would give rise to irreparable harm and warrant injunctive relief. 356 F.3d at 1261. The district court relied solely on the parties' stipulation to find that the plaintiff had met its burden of demonstrating irreparable harm. *Id.* at 1266. We reversed, concluding that the "stipulation without more is insufficient to support an irreparable harm finding." *Id.* The same holds true here.

We emphasize that it is *Mr. Aposhian's* burden to demonstrate irreparable harm. *Awad*, 670 F.3d at 1128 n.14 (noting that the plaintiff has the "burden under [each of] the four preliminary injunction factors"). While the government stated in the district court that the loss of Mr. Aposhian's bump stock would constitute irreparable harm, Mr. Aposhian has never made a loss-of-property argument. Therefore, he has waived this argument and cannot rely on it to satisfy his burden.[11]

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[11] In any event, we note that the loss of a bump stock cannot constitute irreparable harm because Mr. Aposhian could be awarded compensatory damages. *See Salt Lake Tribune Pub. Co., LLC v. AT&T Corp.*, 320 F.3d 1081, 1105 (10th Cir. 2003) ("Irreparable harm, as the name suggests, is harm that cannot be undone, such as by an award of compensatory damages or otherwise.").

Harm to the Government and the Public Interest

Mr. Aposhian has also failed to meet the remaining prerequisites for a preliminary injunction. Specifically, he has not shown that the threatened injury outweighs the harms that the preliminary injunction will cause the government or that the injunction, if issued, will not adversely affect the public interest. These factors "merge" when the government is the opposing party. *Nken*, 556 U.S. at 435.

Mr. Aposhian argues that the "balance of equities" favors an injunction, stating that the public interest weighs in his favor because the public has an interest in protecting an individual's constitutional rights. Aplt. Br. at 49–50. But Mr. Aposhian has not argued that the Final Rule violates an *individual* constitutional right. Moreover, the public has a strong interest in banning the possession and transfer of machine guns, including bump stocks. The ban supports the safety of the public in general, *see* Final Rule at 66,515, and the safety of law enforcement officers and first responders, *id.* at 66,551.

Mr. Aposhian counters that because he is a law-abiding citizen, "ATF cannot plausibly suggest that public safety demands that he be deprived of his device any longer." Aplt. Br. at 50. The government's general public safety concerns, however, still apply to Mr. Aposhian. Congress has prohibited Mr. Aposhian, no less than any other individual, from owning a bump stock. *See Gun Owners*, 363 F. Supp. 3d at 834 ("Congress restricts access to machine guns because of the threat the weapons pose to public safety ... All of the public is at risk, including the smaller number of bump stock owners."). We conclude, and the dissent does not disagree, that Mr. Aposhian has failed to demonstrate that the threatened injury to him

outweighs the harm that the preliminary injunction may cause to the government or that the injunction will not adversely affect the public interest.

V

For the foregoing reasons, we affirm the district court's denial of a preliminary injunction.

CARSON, J., dissenting.

In our Republic, Congress has the power to make and change laws. U.S. Const. art. I. Yet that preferred route often takes a back seat to a more expedient one. As is now often the case, the Executive Branch steps in and seeks to remedy an unpopular or poorly drafted law through an administrative regulation. And to be sure, the Executive can do so when the law is ambiguous; the Supreme Court has made as much clear. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 837 (1984).

But regardless of the Executive's ability to repair ambiguous laws, *unambiguous* laws—no matter how problematic or out of favor—are out of its reach. See Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1630 (2018) (explaining that Chevron deference is unwarranted when "traditional tool[s] of statutory construction" are "up to the job of solving [a statute's] interpretive puzzle"); Big Horn Coal Co. v. Sadler, 924 F.3d 1317, 1322 (10th Cir. 2019) ("[I]f Congress has spoken 'directly' to the 'precise question at issue,' the inquiry ends, and we must give effect to the express intent of Congress." (quoting Chevron, 467 U.S. at 842)). Thus, when a party challenges a regulation that implements an unambiguous law in court, the Judiciary must be mindful that neither it nor the

Executive has the power to make the law. See Sessions v. Dimaya, 138 S. Ct. 1204, 1228 (2018) (Gorsuch, J., concurring). Rather, those two branches "must respect the role of the Legislature, and take care not to undo what it has done." King v. Burwell, 135 S. Ct. 2480, 2496 (2015). In short, Congress must fix any flaw that may exist in a particular piece of unambiguous legislation; the Executive and the Judiciary may not do so no matter how tempting the fix may be.

Today we encounter an example of unambiguous legislation that neither the Executive nor the Judiciary may cast asunder: the National Firearms Act (NFA), 26 U.S.C. §§ 5801–72. As the majority notes, that law regulates "machinegun[s]," which comprise "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." 26 U.S.C. § 5845(b). That clear language leaves little wiggle room. The word "automatically," for instance, takes on its usual definition and refers to mechanisms that are "self-acting or self-regulating" rather than mechanisms that are *not* self-acting or self-regulating. And the phrase "single function of the trigger" speaks only about the trigger itself; the phrase mentions nothing about the external stimulus that interacts with the trigger. Thus, to qualify as a machine gun under the NFA, a firearm must satisfy at least two conditions: (1) the *trigger itself* must "function" only once to fire more than one shot, and (2) the *mechanism that allows the trigger* to "function" only once must be "self-acting or self-regulating."

As I explain below, a semiautomatic firearm equipped with a bump stock satisfies neither of those conditions. For one thing, the trigger on such a firearm must still "function" every time a shot is fired. And in

any event, the bump stock—at least the nonmechanical variety—is not "self-acting or self-regulating" on the trigger. Why? Because the user of the firearm *must also* apply constant forward pressure with his or her nontrigger hand for the bump stock to work.[1] So does a bump stock increase the speed by which the user can fire rounds? Yes. But does that mean the firearm to which it is attached is a machine gun under the NFA? No.

Yet the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) now thinks so. In the wake of the tragic Las Vegas shooting, ATF promulgated a final administrative rule in late 2018 that classifies "bump-stock-type devices" as "machinegun[s]" under the NFA. *See* Bump-Stock-Type Devices, 83 Fed. Reg. 66,514 (Dec. 26, 2018) (the Bump-Stock Rule). ATF declared that a machine gun includes

> a device that allows a semiautomatic firearm to shoot more than one shot with a single pull of the trigger by harnessing the recoil energy of the semiautomatic 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.

That rule cannot withstand judicial scrutiny. As applied, the Bump-Stock Rule focuses on the user's trigger finger instead of the trigger itself, which flouts the phrase "single function *of the trigger*" in the NFA.

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[1] Mechanical bump stocks use slightly different mechanisms. The Akins Accelerator, for instance, uses internal springs instead of constant forward pressure to propel the firearm forward.

26 U.S.C. § 5845(b) (emphasis added). The Bump-Stock Rule also fails to consider that the user must apply constant forward pressure with his or her nontrigger hand (a task that requires a fair amount of strength and dexterity) to make the bump stock work, which runs afoul of the word "automatically" in the NFA. Our inquiry should begin and end with that straightforward statutory analysis.

I therefore must respectfully dissent from the majority's conclusion that the NFA's definition of a machine gun is ambiguous as applied to bump stocks and that we must uphold the Bump-Stock Rule through Chevron deference. Neither the Judiciary nor the Executive has the power to make or change law by creating an ambiguity where none exists. To do so (as both ATF did and the majority does today) subverts the constitutional prerogatives of each branch of government.

To be clear: I express no opinion on whether the Second Amendment protects bump stocks, nor do I express an opinion about whether any American citizen even has a valid reason to own a bump stock. Neither of those inquiries is before us today, and I do not base my dissent on any personal convictions about how a court should answer them. Rather, I dissent simply because the unambiguous language of the NFA establishes that Plaintiff W. Clark Aposhian is likely to succeed on the merits of his challenge to the Bump-Stock Rule. And in any event, even if the NFA's language *were* ambiguous, I cannot endorse the majority's decision to uphold the Bump-Stock Rule through Chevron deference. Applying Chevron is misguided for two distinct reasons: ATF disavowed that doctrine in its briefing, and the definition of "machinegun" in the NFA carries criminal

consequences. Finally, ATF waived its argument that Plaintiff will not suffer any irreparable harm, which simply bolsters the conclusion that Plaintiff is entitled to preliminary injunctive relief.[2]

I.

Consider again how a nonmechanical bump stock operates. The bump stock replaces the standard stock of a rifle—the part of the gun that rests against a shooter's shoulder. A shooter pulls the trigger. The kickback or recoil causes the gun to slide backward. The shooter keeps his or her trigger finger stationary, maintaining backward pressure on the trigger. At the same time, the shooter must also apply forward pressure with his or her non-shooting hand. This process of forward pressure with one hand and backward pressure with the other causes the firearm to slide back and forth rapidly, which bumps the stationary finger against the moving trigger. The result: the trigger resets rapidly, which causes the rifle to fire many shots over a short time. Bump-Stock Type Devices, 83 Fed. Reg. at 66,516.

ATF believes that process transforms a firearm into a weapon that shoots more than one shot "automatically ... by a single function of the trigger." 26 U.S.C. § 5845(b). To get there, ATF first clarified in the Bump-Stock Rule that the word "automatically" means "functioning as the result of a self-acting or self-regulating mechanism that allows the firing of

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[2] The majority relies on the reasoning in the D.C. Circuit's opinion in Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 920 F.3d 1 (D.C. Cir. 2019), cert. denied, 140 S. Ct. 789 (2020). I agree with Judge Henderson's thoughtful and well-crafted partial dissent in that case.

multiple rounds through a single function of the trigger." Bump-Stock-Type Devices, 83 Fed. Reg. at 66,553; see also 27 C.F.R. § 447.11. It next clarified that the phrase "single function of the trigger" means "single pull of the trigger and analogous motions." Bump-Stock-Type Devices, 83 Fed. Reg. at 66,553; see also 27 C.F.R. § 447.11. And it finally concluded that those clarifying definitions cover bump stocks:

> [W]hen a shooter who has affixed a bump-stock-type device to a semiautomatic firearm pulls the trigger, that movement initiates a firing sequence that produces more than one shot. And *that firing sequence is "automatic"* because the device harnesses the firearm's recoil energy in a continuous back-and-forth cycle that allows the shooter to attain continuous firing *after a single pull of the trigger*, so long as the trigger finger remains stationary on the device's ledge (as designed).

Bump-Stock-Type Devices, 83 Fed. Reg. at 66,519 (emphases added).

I take no issue with ATF's definitions that clarify the meanings of "automatically" and "single function of the trigger." But as I explain below, *applying* those definitions to nonmechanical bump stocks cannot lead to ATF's preferred result. I discuss each in turn.

A.

I begin with the phrase "single function of the trigger." As mentioned, the Bump-Stock Rule defines that phrase to mean "a single pull of the trigger and analogous motions." 27 C.F.R. § 447.11. When one

dissects that language, the reason it cannot apply to bump stocks becomes apparent.

To start, I agree with the majority that the word "function" means "action." Webster's New International Dictionary 876 (1933). That much is clear. But I part ways with the majority when it concludes that the "statute is silent" (and therefore ambiguous) as to whether that action centers on "the movement of the trigger, or the movement of the trigger finger."

In fact, the statute speaks clearly: the function/action must be "of the trigger." The NFA mentions *nothing* about trigger finger or any other "external impetus" that happens to interact with the trigger. Guedes v. Bur. of Alcohol, Tobacco, Firearms & Explosives, 920 F.3d 1, 43 (D.C. Cir. 2019) (Henderson, J., concurring in part and dissenting in part) (observing that the word "function" in the NFA "focus[es] on how the trigger acts"). And given that omission, we must presume "that [the] legislature says ... what it means and means ... what it says"—that is, we must presume that the function/action of the trigger itself is the only variable that matters. Henson v. Santander Consumer USA Inc., 137 S. Ct. 1718, 1725 (2017) (alterations in original) (quoting Dodd v. United States, 545 U.S. 353, 357 (2005)). By concluding otherwise and allowing an inquiry into the trigger *finger*, the majority effectively "replac[es] the actual text" of the NFA "with speculation as to Congress' intent." Magwood v. Patterson, 561 U.S. 320, 334 (2010). That the majority cannot do without taking on a legislative role. As a result, Congress's use of the phrase "single function of the trigger" in the NFA can mean *only* "single action of the trigger" and *not* "single

action of the trigger finger." The clear language ties our hands.

Necessarily, then, ATF's *interpretation* of the phrase "single function of the trigger"—i.e., "single pull of the trigger and analogous motions"—can refer *only* to the action of the trigger and *not* the trigger finger. See Guedes, 920 F.3d at 43 (D.C. Cir. 2019) (Henderson, J., concurring in part and dissenting in part) ("[N]othing in the [Bump-Stock] Rule's definition refers to a shooter's finger or a volitional action."). That is the only way for ATF's interpretation to remain valid. Otherwise, ATF's interpretation would contradict the unambiguous NFA—the interpretation would refer to the trigger finger, while the statute refers to the trigger alone—and "[a] regulation in conflict with the terms of an unambiguous statute will not be sustained." Burnet v. Marston, 57 F.2d 611, 612 (D.C. Cir. 1932).[3]

That limitation on the phrase "single pull of the trigger and analogous motions" sounds the death knell for ATF's new take on bump stocks. For as I alluded to above, a semiautomatic rifle equipped with a bump stock simply does *not* use a single function of the trigger to fire more than one shot.

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[3] The majority points out that the parties agree that ATF's interpretation refers to the action of the shooter's trigger finger. But that agreement does not help the majority in any way. Again, if the regulation *does* refer to the motion of the trigger finger, the regulation is invalid because it conflicts with the unambiguous NFA. Burnet, 57 F.2d at 612 ("While the [agency] was clothed with authority to promulgate regulations, [it] was not authorized to add to or take from the plain language of the statute, for, 'where the intent is plain, nothing is left to construction.' " (quoting United States v. Fisher, 6 U.S. (2 Cranch) 358, 386 (1805))). I simply choose to give the regulation the benefit of the doubt.

To illustrate, first consider the basic mechanics of a semiautomatic rifle that lacks a bump stock. The trigger on that type of rifle must necessarily "pull" backwards and release the rifle's hammer—the part of a rifle that sets in motion how the bullet leaves the barrel—every time that the rifle discharges. See Plaintiff-Appellant's App'x A73–A74. The rifle cannot fire a second round until both the trigger and hammer reset. Only then can the trigger "pull" backwards once more and reinitiate the entire firing process from the beginning.

A bump stock cannot change that process. The trigger on a semiautomatic rifle equipped with a bump stock still pulls backwards every time that the rifle fires. The only difference is that recoil—not the operator's finger—causes that pull. See Guedes, 920 F.3d at 48 (Henderson, J., concurring in part and dissenting in part) ("A semiautomatic rifle shoots a single round per pull of the trigger and the bump stock changes only *how* the pull is accomplished." (emphasis in original)). Again, the NFA demands that we look only to how the trigger acts. And given that the trigger functions every time a semiautomatic rifle equipped with a bump stock fires a round, such a rifle unambiguously cannot be a machine gun under the NFA *even if* the operator's trigger finger remains stationary.

Contrasting a bump-stock-equipped rifle with the machine gun that the majority references from our decision in United States v. Oakes, 564 F.2d 384 (10th Cir. 1977), reinforces my point. The gun in Oakes contained two "projections" in the area that a traditional trigger usually occupies. Id. at 388. The first was a "forward" projection "curved so as to fit the finger in a normal fashion"—in other words, it looked

like and functioned as a regular trigger. Id. The second projection was "seated behind" the forward one and "curved in a manner so that at its extremity it would be pushed if the [shooter fully pulled the forward projection] to contact." Id. In sum, when the shooter fully pulled the first projection/trigger, the second projection activated and "fully automated the gun." Id.

The question in Oakes was whether that interplay between the two projections allowed the gun to fire more than one shot "by a single function of the trigger"; the government argued it did, while the gun owner argued that the gun's "two triggers" meant it did not. Id. at 387 n.2, 388. Contra the majority's suggestion today, the ultimate answer to that question did not hinge on the shooter's volitional actions in any way. Indeed, the holding of Oakes that the weapon fit the bill of a machine gun under the NFA boiled down to the fact that "fully pulling the trigger"—that is, the forward projection—allowed the gun to automatically fire rounds. Id. at 388. That rationale endures even if one focuses on the shooter's trigger finger or the trigger itself: both the finger and the trigger on such a gun "pulled" just once to fire more than one round even though a second, posterior projection factored into the weapon's automatic mechanism. See id. We should thus draw little guidance from the language in Oakes that speaks in terms of the shooter's actions rather than the trigger's actions. The distinction between the two concepts made no difference to the holding, so that specific language in Oakes is no more than imprecise dicta. Tokoph v. United States, 774 F.3d 1300, 1303 (10th Cir. 2014) ("[A] panel of this court is bound by a *holding* of a prior panel of this court but is not bound by a prior panel's *dicta*." (alteration and emphasis in

original) (quoting Bates v. Dep't of Corr., 81 F.3d 1008, 1011 (10th Cir. 1996))).

Viewed under that lens, Oakes supports my position. That case tracks the text of the NFA: it does not defy the congressional determination that the trigger itself must function just once to fire more than one shot. As I explain above, however, a rifle equipped with a bump stock does not fit that rubric. That type of rifle continues to use multiple functions of the trigger itself even though the shooter must take only a single volitional action. A bump stock, in other words, changes only *how* a trigger pulls; it does not change the fact that the trigger itself *must* function every shot. Under the unambiguous language of the NFA, that means that a bump stock cannot transform a semiautomatic rifle into a machine gun.

B.

The word "automatically" in the NFA unearths an even-more-obvious flaw in the ATF's bump-stock ban.

As a reminder, I take no issue with the ATF's interpretation of that word—i.e., "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." 27 C.F.R. § 447.11. That interpretation "reflects the ordinary meaning of that term at the time of the NFA's enactment in 1934," and that same ordinary meaning continues to this day. Bump-Stock-Type Devices, 83 Fed Reg. at 66,519; see also Webster's New International Dictionary 187 (2d ed. 1934) (defining "automatic" as "[h]aving a self-acting or self-regulating mechanism that performs a required act at a predetermined point in an operation"); Automatic, Merriam-Webster.com

Dictionary, https://www.merriam-webster.com/dictionary/automatic (last visited Mar. 30, 2020) (defining "automatic" as "having a self-acting or self-regulating mechanism").

The problem is again one of application. A nonmechanical bump stock is not a "self-acting or self-regulating mechanism"; the constant forward pressure that the shooter must apply with his or her nontrigger hand prevents that label.[4]

In coming to this conclusion, I do no more and no less than take the words "self-acting" and "self-regulating" at face value. If a mechanism is self-acting, it acts by itself. If it is self-regulating, it regulates itself. A nonmechanical bump stock does neither. By design, that type of bump stock *requires* manual human input—constant forward pressure with the nontrigger hand—to act. And it *requires* that same manual human input to regulate its actions. Without the constant forward pressure, a nonmechanical bump stock simply will not work; the firearm to which it is attached will fire only one shot even with the stationary trigger finger applying constant backward

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[4] In her dissent, Judge Henderson *does* question the ATF's actual interpretation of the word "automatically." See Guedes, 920 F.3d at 42 (Henderson, J., concurring in part and dissenting in part) ("Although the [Bump-Stock] Rule ... correctly interprets 'single function of the trigger,' it misreads 'automatically.' "). But her reasons for that belief also stem from the constant forward pressure that the shooter must apply with his or her nontrigger hand. Id. at 43–45. Thus, no matter if the interpretation or application of the word "automatically" is the ultimate problem, the important point is that the "extra" physical input from the nontrigger hand prevents us from classifying nonmechanical bump-stock-type devices as machine guns.

pressure. A nonmechanical bump stock is therefore not "*self*-acting" or "*self*-regulating."

That straightforward logic also highlights the flaws underlying the majority's attempt at fashioning an ambiguity from the word "automatically." Again, the terms "self-acting" and "self-regulating" are self-explanatory—they exclude *any* manual human involvement by their very definitions. So the majority is simply wrong when it says that the NFA is ambiguous by failing to delineate the precise amount of necessary human input. The ordinary, dictionary definition of "automatically" makes the answer clear: none.

The D.C. Circuit tried to make the majority's exact point by example. It observed, for instance, that even automatic weapons "require both a single pull of the trigger *and* the application of constant and continuing pressure on the trigger after it is pulled." Guedes, 920 F.3d at 30 (majority opinion) (emphasis in original). It also analogized an automatic firearm to an automatic sewing machine that "requires the user to press a pedal *and* direct the fabric." Id. (emphasis in original). Because these automatic devices require *some* human interaction, the D.C. Circuit posited that the word "automatically" remains ambiguous as to the precise amount of human input that word permits.

But examples such as these only prove my ultimate point. Unlike a nonmechanical bump stock, the human involvement in a fully automatic firearm and an automatic sewing machine is not a part of their *mechanisms themselves*. Instead, the involvement is in some way extrinsic to their actual mechanisms. And that makes all the difference, because the terms "self-acting" and "self-regulating" *only* modify the word "mechanism." See 27 C.F.R. § 447.11 ("[T]he term

'automatically' ... means functioning as the result of a *self-acting or self-regulating mechanism*...." (emphasis added)). The continued pressure on the trigger of an automatic firearm, for example, is not part of the internal mechanism that keeps feeding cartridges into and ejecting cartridges out of the firearm's chamber at a rapid pace. The constant pedal-pressure on an automatic sewing machine is the same way: although that pressure keeps the automatic process going, the pressure is not itself part of the engineered mechanism that forces the needle to bob up and down. Directing the fabric through an automatic sewing machine is an even clearer example, because even if the sewer stops feeding fabric, the automatic mechanism can continue to operate.

By contrast, nonmechanical bump stocks require manual human involvement at all times as part of their underlying mechanisms. As I've previously explained, these types of bump stocks increase a user's firing rate through recoil. And recoil is impossible without constant forward pressure from the user's nontrigger hand. The former hinges on the latter: no manual human input, no recoil. In other words, manual human input is a necessary element of a nonmechanical bump stock's actual mechanism, which separates this type of bump stock from the examples that the D.C. Circuit put forth.

For all of these reasons, a nonmechanical bump stock is not a "self-acting or self-regulating mechanism." And because it is not self-acting or self-regulating, the firearm to which it is attached is unambiguously not one that shoots "automatically."

C.

In sum, both the word "automatically" and the phrase "single function of the trigger" in the NFA are unambiguous as applied to nonmechanical bump stocks. Plaintiff is thus likely to succeed on the merits of his challenge to the Bump-Stock Rule.

II.

Because the NFA's terms are unambiguous, the majority inappropriately applied Chevron deference to the Bump-Stock Rule. But even if that statute were ambiguous, at least two other reasons counsel against applying Chevron.

First, the government explicitly disavowed any reliance on Chevron. That alone should have prevented the majority from applying the controversial doctrine. As Justice Gorsuch recently observed in another case about the Bump-Stock Rule, "[i]f 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." Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 140 S. Ct. 789, 790 (2020) (statement of Gorsuch, J., respecting denial of certiorari) (emphasis in original) (quoting Epic Sys. Corp., 138 S. Ct. at 1630). By doing the exact opposite—that is, turning a blind eye to the government's request and applying Chevron anyway—the majority "place[s] an uninvited thumb on the scale in favor of the government." Id. (statement of Gorsuch, J., respecting denial of certiorari). That concerns me, especially given that both the Supreme Court and our Circuit have "often declined to apply Chevron deference when the government fails to

invoke it" or otherwise rely on it. Id. (statement of Gorsuch, J., respecting denial of certiorari); see also, e.g., Hays Med. Ctr. v. Azar, __ F.3d __, No. 17-3232, 2020 WL 1922595 at *13 n.18 (10th Cir. Apr. 21, 2020); Hydro Res., Inc. v. EPA, 608 F.3d 1131, 1146 (10th Cir. 2010). If any of our precedent holds otherwise, see, e.g., TransAm Trucking, Inc. v. Admin. Review Bd., 833 F.3d 1206, 1212 n.4 (10th Cir. 2016), perhaps the day will soon come when the Supreme Court definitively overrules it.

Second, because the definition of "machinegun" in the NFA "carries the possibility of criminal sanctions," Chevron is likewise inapplicable. Guedes, 140 S. Ct. at 790 (statement of Gorsuch, J., respecting denial of certiorari); see also 18 U.S.C. § 922(o)(1) ("[I]t shall be unlawful for any person to transfer or possess a machinegun."); 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."). I need not belabor the point; many other jurists have written about this concern in great detail. See, e.g., Guedes, 140 S. Ct. at 790 (statement of Gorsuch, J., respecting denial of certiorari); Guedes, 920 F.3d at 39–42 (Henderson, J., concurring in part and dissenting in part); Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1155–57 (10th Cir. 2016) (Gorsuch, J., concurring); Esquivel-Quintana v. Lynch, 810 F.3d 1019, 1027–32 (6th Cir. 2016) (Sutton, J., concurring in part and dissenting in part), rev'd on other grounds sub nom. Esquivel-Quintana v. Sessions, 137 S. Ct. 1562 (2017). Suffice to say that when, as here, a law carries both civil and criminal consequences, applying Chevron can lead to troubling and unintended outcomes. After all, "[b]ecause a single law should have a single meaning, the 'lowest common denominator'—including all rules

applicable to the interpretation of criminal laws—governs all of its applications." Esquivel-Quintana, 810 F.3d at 1028 (Sutton, J., concurring in part and dissenting in part) (quoting Clark v. Martinez, 543 U.S. 371, 380 (2005)). That approach is the only way to ensure that the law takes on "the least liberty-infringing interpretation." Id. Thus, since "[t]he Supreme Court has expressly instructed us *not* to apply Chevron deference when an agency seeks to interpret a criminal statute," Gutierrez-Brizuela, 834 F.3d at 1155 (Gorsuch, J., concurring) (emphasis in original), the logical result is that we must also not apply Chevron when a statute has both civil and criminal applications.

With that said, the majority correctly observes that, more than once, we have given at least *some* deference to an agency's interpretation of a statute carrying criminal repercussions. See, e.g., United States v. Hubenka, 438 F.3d 1026, 1032–34 (10th Cir. 2006); United States v. Atandi, 376 F.3d 1186, 1189 (10th Cir. 2004); NLRB v. Okla. Fixture Co., 332 F.3d 1284, 1287 (10th Cir. 2003) (en banc). And despite the Supreme Court's recent guidance condemning Chevron in the criminal sphere, some courts (like the majority today) believe that the Supreme Court's language in an earlier case muddies the waters. Compare Abramski v. United States, 573 U.S. 169, 191 (2014) ("[C]riminal laws are for courts, not for the Government, to construe."), and 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."), with Babbitt v. Sweet Home Chapter of Cmties. for a Great Or., 515 U.S. 687, 703–04 & n.18 (1995) ("[W]e owe some degree of deference to [the agency's] reasonable interpretation"

of a "statute [that] includes criminal penalties."). See also Guedes, 920 F.3d at 25 (majority opinion) (drawing fine lines between Abramski, Apel, and Babbitt to give Chevron a foothold when a statute carrying criminal repercussions is at play).

Against this backdrop, my hope is that the Supreme Court will one day take up this issue to give us clear guidance for future cases. Whatever the benefits of Chevron are, none come to mind by forcing courts to expand the doctrine to statutes that bring about dual civil and criminal consequences.

III.

As a final point, I disagree with the majority's conclusion that Plaintiff has not met his burden of proving that he would suffer irreparable harm absent an injunction. My reason is simple: the government conceded outright in the district court that Plaintiff would suffer irreparable harm by complying with the regulation. When a party intentionally relinquishes or abandons a theory in the district court, "we usually deem it waived and refuse to consider it" on appeal. Richison v. Ernest Group, Inc., 634 F.3d 1123, 1127 (10th Cir. 2011). We should follow that rule; hold the government to its intentional waiver; and conclude that Plaintiff, given that waiver, has met his burden of establishing irreparable harm.

The majority retorts that our decision in Dominion Video Satellite, Inc. v. EchoStar Satellite Corp., 356 F.3d 1256 (10th Cir. 2004), forbids that conclusion. The majority is mistaken. True enough, we held in Dominion that a party moving for a preliminary injunction could not establish irreparable harm simply by invoking a contractual stipulation to that fact. Id. at 1261, 1266. Even so, the opposing party

in Dominion had argued in the district court that the question of irreparable harm should not hinge on the contractual stipulation alone. See, e.g., id. at 1261 (observing that the district court, "[i]n making its irreparable harm determination," rejected some of the moving party's arguments "[b]ased on evidence presented by" the opposing party); id. (noting the district court's belief that the opposing party's expert witnesses "persuasively demonstrated" the moving party would suffer a quantifiable loss). And therein lies the pivotal difference between Dominion in our case today: the opposing party in Dominion never intentionally waived its position on irreparable harm in court, while the opposing party in our case (ATF) *did* waive its position in court. A prelitigation stipulation that a party later challenges once the conflict comes to a head is far different than conceding an element of a claim to a judge. In short, the majority compares apples and oranges.

At bottom, the majority's position means that a party with the burden of proof cannot overcome its burden by pointing out that the opposing party conceded an element of the claim in court. As one would expect, that alarming consequence skirts circuit precedent. See, e.g., Johnson v. Spencer, 950 F.3d 680, 708 (10th Cir. 2020) (concluding that defendants who had relied on claim preclusion as a defense met their burden of proof on two of the three requisite elements because the opposing party "concede[d] ... the second and third elements"); United States v. Sinks, 473 F.3d 1315, 1321 (10th Cir. 2007) (observing that the government can concede elements of the plain error standard of review, which a criminal defendant has the burden of proof to establish). And given that precedent (and, for that matter, common judicial practice), the

fact that Plaintiff and ATF had different views in the district court about the *type* of irreparable harm at issue is irrelevant. Because ATF conceded point blank that Plaintiff would suffer *some* irreparable harm—one of the four elements of any preliminary injunction—Plaintiff's failure to correctly identify the exact parameters of that harm has no legal effect.[5]

The majority thus fails to posit a defensible reason for rewarding ATF's about-face on appeal. And I myself cannot think of any good reason to do so when strong counterarguments—for example, that bump stocks are unique pieces of property, that the Bump-Stock Rule can lead to criminal consequences, and so on—suggest that ATF would (or at least should) lose on the irreparable-harm element in any event. I would therefore hold ATF to its intentional waiver and conclude that Plaintiff will suffer irreparable harm from the Bump-Stock Rule.[6]

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[5] The same logic applies to the majority's argument that a court's ability to award Plaintiff compensatory damages for his bump stock precludes his harm from being irreparable. Even if the majority is correct—and I am not convinced it is, especially given that ATF has argued in at least one other case that bump stock owners are ineligible for compensation, Lane v. United States, No. 3:19-CV-01492-X, 2020 WL 1513470, at *1 (N.D. Tex. Mar. 30, 2020)—that nuance makes no difference today. Again, because ATF conceded irreparable harm, Plaintiff's purported ability to receive compensatory damages does not matter.

[6] Absent waiver, I agree that Plaintiff cannot use our holding in Free the Nipple-Fort Collins v. City of Fort Collins, 916 F.3d 792 (10th Cir. 2019), that "[a]ny deprivation of any constitutional right" amounts to irreparable harm. Id. at 806. Plaintiff makes no constitutional arguments today (he only makes statutory and administrative arguments), so the language from Free the Nipple goes nowhere from the start. With that said, in an

IV.

For all these reasons, I would reverse the district court's denial of a preliminary injunction. I respectfully dissent.

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appropriate case, we should consider revisiting (or at least limiting) that specific holding from Free the Nipple. Allowing *any* deprivation of *any* constitutional right to serve as per se irreparable harm is a far-too-powerful tool in most cases.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

W. CLARK APOSHIAN,
Plaintiff,

v.

WILLIAM P. BARR,[1]
Attorney General of the United States, *et al.*,
Defendants.

Case No. 2:19-cv-37
District Judge
Jill N. Parrish

MEMORANDUM DECISION AND ORDER DENYING MOTION FOR PRELIMINARY INJUNCTION

This matter comes before the court on plaintiff W. Clark Aposhian's Motion for Preliminary Injunction filed on January 17, 2019. (ECF No. 10). Defendants filed an opposition on February 6, 2019, (ECF No. 25), to which Mr. Aposhian replied on February 11, 2019, (ECF No. 26). The court heard oral argument for this motion on February 14, 2019. On the basis of that hearing, the parties' memoranda, a review of relevant law, and for the reasons below,

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[1] This action was initially commenced against the former Acting Attorney General Matthew Whitaker in his official capacity. By operation of Federal Rule of Civil Procedure 25(d), Mr. Barr was automatically substituted upon his confirmation as Attorney General of the United States.

plaintiff's Motion for Preliminary Injunction is denied.

I. BACKGROUND

A. Regulatory Framework of Machine Guns and Bump-Stock-Type Devices

Congress began regulating machine guns with its passage of the National Firearms Act of 1934 (the "NFA"). That act defined such weapons as follows:

> The term "machinegun"[2] means any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. 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 Gun Control Act of 1968 (the "GCA") incorporated this definition by reference into the criminal code. *See* 18 U.S.C. § 921(23) ("The term 'machinegun' has the meaning given such term in section 5845(b) of the National Firearms Act ....").

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[2] The relevant statutes utilize an outmoded, one-word "machinegun" spelling. Except when quoting statutory language, this order uses the more contemporary, two-word "machine gun" spelling.

Today, with limited exceptions, it is "unlawful for any person to transfer or possess a machinegun." 18 U.S.C. § 922(o).

In 2006, the Bureau of Alcohol, Tobacco, Firearms, and Explosives (the "ATF") ruled that a bump-stock-type device[3] called the Akins Accelerator qualified as a machine gun. The Akins Accelerator employed internal springs to harness the weapon's recoil energy to repeatedly force the rifle forward into the operator's finger. In labeling the Akins Accelerator a machine gun, the ATF interpreted the statutory language "single function of the trigger" to mean "single pull of the trigger." The inventor of the Akins Accelerator subsequently challenged this interpretation in federal court. After the district court rejected the challenge, the Eleventh Circuit Court of Appeals affirmed, concluding that the ATF's interpretation was "consonant with the statute and

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[3] "Shooters use bump-stock-type devices with semiautomatic firearms to accelerate the firearms' cyclic firing rate to mimic automatic fire. These devices replace a rifle's standard stock [the component of a rifle that rests against the shooter's shoulder] and free the weapon to slide back and forth rapidly, harnessing the energy from the firearm's recoil either through a mechanism like an internal spring or in conjunction with the shooter's maintenance of pressure (typically constant forward pressure with the non-trigger hand on the barrel-shroud or fore-grip of the rifle, and constant rearward pressure on the device's extension ledge with the shooter's trigger finger).... [W]hen a bump-stock-type device is affixed to a semiautomatic firearm, the device harnesses and directs the firearm's recoil energy to slide the firearm back and forth so that the trigger automatically re-engages by 'bumping' the shooter's stationary finger without additional physical manipulation of the trigger by the shooter." 83 Fed. Reg. at 66516.

its legislative history." *See Akins v. United States*, 312 F. App'x 197, 200 (11th Cir. 2009).

From 2008 to 2017, the ATF issued ten letter rulings in response to requests to classify bump-stock-type devices. Applying the "single pull of the trigger" interpretation, these rulings found that the devices at issue—including Mr. Aposhian's Slide Fire device—indeed allowed a shooter to fire more than one shot with a single pull of the trigger. However, because the subject devices did not rely on internal springs or other mechanical parts to channel recoil energy like the Akins Accelerator, the ATF concluded that they did not fire "automatically" within the meaning of the statutory definition.

B. The Final Rule

On October 1, 2017, a lone shooter employing multiple semi-automatic rifles with attached bump-stock-type devices fired several hundred rounds of ammunition into a crowd in Las Vegas, Nevada, killing 58 people and wounding roughly 500 more. Following this event, members of Congress urged the ATF to examine whether devices like the one used in the attack were actually machine guns prohibited by law. On December 26, 2017, the Department of Justice (the "DOJ") published an Advanced Notice of Proposed Rulemaking (ANPRM), soliciting comments and manufacturer/retailer data regarding bump-stock-type devices. *See* Application of the Definition of Machinegun to "Bump Fire" Stocks and Other Similar Devices, 82 Fed. Reg. 60929 (Dec. 26, 2017). On February 20, 2018, the President issued a memorandum directing the Attorney General "to dedicate all available resources to complete the review of the comments received, and, as expeditiously as

possible, to propose for notice and comment a rule banning all devices that turn legal weapons into machineguns." Application of the Definition of Machinegun to "Bump Fire" Stocks and Other Similar Devices; Memorandum for the Attorney General, 83 Fed. Reg. 7949 (Feb. 23, 2018).

On March 29, 2018, the DOJ published a notice of proposed rulemaking (NPRM). *See* Bump-Stock-Type Devices, 83 Fed. Reg. 13442 (Mar. 29, 2018). Following a period of public comment, the DOJ issued a Final Rule on December 26, 2018 that (1) formalizes the ATF's longstanding interpretation of "single function of the trigger" to mean "single pull of the trigger"; (2) interprets "automatically" to mean "as the result of a self-acting or self-regulating mechanism that allows the firing of multiple rounds through a single pull of the trigger"; and (3) concluding that bump-stock-type devices are machine guns proscribed by the statutory scheme as interpreted by the Final Rule. *See* Bump-Stock-Type Devices, 83 Fed. Reg. 66514 (Dec. 26, 2018). The Final Rule directs owners of bump-stock-type devices to either destroy or surrender them to the ATF before the Final Rule goes into effect on March 26, 2019. 83 Fed. Reg. 66515.

Mr. Aposhian lawfully purchased and continues to own a Slide Fire bump-stock-type device. On January 16, 2019, Mr. Aposhian filed suit against the Attorney General of the United States, the DOJ, the Director of the ATF, and the ATF. (ECF No. 2). On January 17, 2019, Mr. Aposhian filed this motion for preliminary injunction seeking to enjoin the Final Rule from going into effect on March 26, 2019. (ECF No. 10).

II. PRELIMINARY INJUNCTION STANDARD

To obtain preliminary injunctive relief, a movant must establish: "(1) a substantial likelihood of success on the merits; (2) irreparable harm to the movant if the injunction is denied; (3) the threatened injury outweighs the harm that the preliminary injunction may cause the opposing party; and (4) the injunction, if issued, will not adversely affect the public interest." *Gen. Motors Corp. v. Urban Gorilla, LLC*, 500 F.3d 1222, 1226 (10th Cir. 2007).

III. ANALYSIS

The parties do not dispute that Mr. Aposhian will experience irreparable harm if the injunction is denied.[4] And though they offer short arguments related to the third and fourth prongs of the preliminary injunction analysis, the parties devote the lion's share of their memoranda to the merits prong.

As explained below, Mr. Aposhian has not

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[4] They do, however, disagree about what that irreparable harm is. Mr. Aposhian suggests that, absent an injunction, he will be harmed by being forced to comply with a rule that has been promulgated in contravention of constitutional principles of separation-of-powers. Defendants concede only that Mr. Aposhian's harm is the loss of his Slide Fire device, which, they assert, is irreplaceable because no entity presently manufactures such a device. Although it is clearly the case that the threatened infringement of a plaintiff 's *individual* constitutional rights will satisfy the irreparable harm prong, the court can find no basis in law for the proposition that a generalized separation-of-powers violation gives rise to an injury on the part of an individual citizen. Regardless, articulating the precise harm becomes necessary only when weighing the threatened injury against the harm caused by the preliminary injunction (*i.e.*, the third prong). Because Mr. Aposhian's motion fails on the first prong—likelihood of success on the merits—the court need not resolve this dispute.

carried his burden of showing a substantial likelihood of success on the merits. As a result, his motion for a preliminary injunction must be denied.

This court's review of the Final Rule is governed by the Administrative Procedure Act (the "APA"), 5 U.S.C. § 706(2)(A)–(C).[5] Under this framework, Mr. Aposhian asserts two general arguments. First, that Congress has not empowered the Attorney General[6] to interpret the NFA and the GCA. And second, that the Final Rule's interpretations conflict with the statutory language. The court addresses each challenge in turn.

A. Interpretive and Rulemaking Authority

Mr. Aposhian argues that the Final Rule was issued in excess of statutory jurisdiction because the NFA does not vest the Attorney General or the ATF

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[5] Mr. Aposhian also raises a vague constitutional challenge supported by citations to cases involving the nondelegation doctrine. To the degree that Mr. Aposhian intended to assert a nondelegation challenge, the court can confidently reject any argument that the statutory grant of interpretive authority at issue here is devoid of an intelligible principle upon which the ATF may act. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472–76 (2001). To the extent Mr. Aposhian instead meant to assert a general separation-of-powers challenge to the Final Rule, such a challenge is subsumed by the APA's directive that a reviewing court set aside agency action taken "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." § 706(2)(C).

[6] The Attorney General has delegated, "[s]ubject to the direction of the Attorney General and Deputy Attorney General," the responsibility for administering and enforcing the NFA and the GCA to the ATF—an agency within the Department of Justice. *See* 28 CFR § 0.130(a)(1)–(3).

with rulemaking authority. In response, the defendants argue, and the court agrees, that the Final Rule does no more than interpret undefined statutory terms.[7] Although the Attorney General and ATF promulgated their interpretations through the more laborious, formal notice-and-comment process, the use of that procedure does not alter the Final Rule's interpretive character. And Mr. Aposhian does not dispute that the ATF, under the direction of the Attorney General, is empowered to interpret and administer both the NFA and the GCA. *See* Pl.'s Mot. for Prelim. Inj. (ECF No. 10 at 6); 18 U.S.C. § 926(a); 26 U.S.C. § 7801(a)(2); *Guedes v. ATF*, No. 18-cv-2988 (DLF), 2019 WL 922594 at *9 n.3 (D.D.C. Feb. 25, 2019) (rejecting challenges to the Final Rule's interpretations and the ATF's interpretive authority, noting the "ATF's clear authority to interpret and administer" the relevant statutes).

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[7] Although the Final Rule is merely interpretive in nature, it appears, contrary to Mr. Aposhian's argument, that the Attorney General has indeed been granted rulemaking authority under the NFA. Mr. Aposhian is correct that 26 U.S.C. § 7805(a) declares that "the Secretary [of the Treasury] shall prescribe all needful rules and regulations for the enforcement of this title[.]" But he fails to account for the statutory language in § 7801(a)(2)(A), which functionally substitutes "Attorney General" for "Secretary of the Treasury" in § 7805(a) insofar as the rulemaking at issue relates to, among other weapons, machine guns. § 7801(a)(2)(A), (A)(ii) ("[T]he term 'Secretary' or 'Secretary of the Treasury' shall, when applied to [§ 7805, to the extent § 7805 relates to the enforcement and administration of Chapter 53, governing machine guns], mean the Attorney General ...."). And the Attorney General's rulemaking authority under the GCA is beyond question. 18 U.S.C. § 926(a) ("The Attorney General may prescribe only such rules and regulations as are necessary to carry out the provisions of this chapter ....").

In addition to his explicit statutory authority, the Attorney General has been implicitly delegated interpretive authority to define ambiguous words or phrases in the NFA and the GCA. Congress did not define "automatically" or "single function of the trigger," and when Congress leaves terms in a statute undefined, the agency charged with administering that statute has been implicitly delegated the authority to clarify those terms.[8]

B. Final Rule Interpretations

The Final Rule interprets "single function of the trigger" to mean "single pull of the trigger" and analogous motions, and it interprets "automatically" to mean "as the result of a self-acting or self-regulating mechanism that allows the firing of

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[8] The notion that an undefined or ambiguous term amounts to an implicit delegation of interpretive power is borne, unmistakably, from the administrative law doctrine announced by *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). In setting forth this principle in its memorandum in opposition, however, defendants went out of their way to avoid citing *Chevron* and its progeny, and repeatedly stressed that they neither request, nor believe their interpretations are entitled to, any measure of deference. *See* Defs.' Mem. in Opp'n (ECF No. 25 at 29) (citing *United States v. Apel*, 571 U.S. 359, 369 (2014) (remarking that the Supreme Court has never accorded deference to an agency's internal reading of a criminal statute)). This opinion is puzzling because it is far from settled that an agency is entitled to no deference when its interpretations implicate criminal liability. *See United States v. White*, 782 F.3d 1118, 1135 n.18 (10th Cir. 2015) (collecting Supreme Court and Tenth Circuit cases applying at least some deference to interpretations that affect criminal penalties). The court need not confront this deference dilemma here because the Final Rule's clarifying definitions reflect the best interpretation of the statute.

multiple rounds through a single pull of the trigger." 83 Fed. Reg. Having supplied those definitions, the Final Rule clarifies that bump-stock-type devices—like the Slide Fire device owned by Mr. Aposhian—are machine guns proscribed by law. The court examines each interpretation in turn.

1. "Single Function of the Trigger"

The statutory language "single function of the trigger" gives rise to the parties' dispute about what "function" means.[9] Mr. Aposhian contends that "function" refers to the mechanical movement of the trigger, while the Final Rule adopts a shooter-focused interpretation. Because bump-stock-type devices operate through multiple movements of the trigger (by rapidly "bumping" the trigger into the operator's finger), a mechanically-focused interpretation would omit bump-stock-type devices from the statute's definition.

The court finds that "single pull of the trigger" is the best interpretation of "single function of the trigger," a conclusion similarly reached by the Eleventh Circuit Court of Appeals. *See Akins v. United States*, 312 F. App'x 197, 200 (11th Cir. 2009) ("The interpretation by the [ATF] that the phrase 'single function of the trigger' means a 'single pull of the trigger' is consonant with the statute and its legislative history."); *see also Guedes*, 2019 WL 922594 at *10 ("Tellingly, courts have instinctively reached for the word 'pull' when discussing the

[9] The court in *Guedes* noted, and this court agrees, that "dictionaries from the time of the NFA's enactment are of little help in defining a 'single function of the trigger.' " *Guedes*, 2019 WL 922594 at *9.

statutory definition of 'machinegun.' ").

Moreover, it makes little sense that Congress would have zeroed in on the mechanistic movement of the trigger in seeking to regulate automatic weapons. The ill sought to be captured by this definition was the ability to drastically increase a weapon's rate of fire, not the precise mechanism by which that capability is achieved. At oral argument, defendants persuasively argued that the unusual choice of "function" is intentionally more inclusive than "pull." Thus, "function" was likely intended by Congress to forestall attempts by weapon manufacturers or others to implement triggers that need not be pulled, thereby evading the statute's reach.[10]

2. "Automatically"

The Final Rule interprets "automatically" to mean "as the result of a self-acting or self-regulating mechanism that allows the firing of multiple rounds through a single pull of the trigger." This interpretive language is borrowed, nearly word-for-word, from dictionary definitions contemporaneous to the NFA's enactment. *See* 83 Fed. Reg. 66519. The 1934 *Webster's New International Dictionary* defines the adjectival form "automatic" as "[h]aving a self-acting or self-regulating mechanism that performs a required act at a predetermined point in an operation[.]" 187 (2d ed. 1934); *see also* 1 *Oxford English Dictionary* 574 (1933) (defining "automatic" as "[s]elf-acting under conditions fixed for it, going of itself").

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[10] The Final Rule's interpretation does use "pull," but avoids the issue above by interpreting " 'single function of the trigger' to mean 'single pull of the trigger' *and analogous motions*[.]" 83 Fed. Reg. at 66515 (emphasis added).

And as with "a single pull of the trigger," the Final Rule's interpretation of "automatically" accords with past judicial interpretation. *See United States v. Olofson*, 563 F.3d 652, 658 (7th Cir. 2009) (relying on the same dictionary definitions to conclude that "the adverb 'automatically,' as it modifies the verb 'shoots,' delineates how the discharge of multiple rounds from a weapon occurs: as the result of a self-acting mechanism ... that is set in motion by a single function of the trigger and is accomplished without manual reloading.").

Mr. Aposhian's argument in opposing the propriety of this interpretation is difficult to follow, but it appears to relate to the requisite degree of automaticity. Specifically, he suggests that "[i]f a firearm requires separate physical input, even if not directed to the *trigger mechanism*, this still disrupts the automatic firing of each successive shot." (ECF No. 10 at 9) (emphasis in original). Because bump-stock-type devices require constant forward pressure by the shooter's non-trigger hand on the barrel or the shroud of the rifle, Mr. Aposhian argues, it does not fire "automatically."

But even weapons uncontroversially classified as machine guns require at least some ongoing effort by an operator. And Mr. Aposhian does not argue that the constant rearward pressure applied by a shooter's trigger finger in order to *continue* firing a machine gun means that it does not fire "automatically." Under Mr. Aposhian's view, it seems, the statute encompasses machine guns that require some, but not too much, ongoing physical actuation. But neither the statute nor the contemporaneous understanding of "automatic" provides any basis for an interpretation

that restricts the degree of shooter involvement in an automatic process. As illustrated by the atextual line urged by Mr. Aposhian, any limit on the degree of physical input would invariably be supplied of whole cloth in service of one's desired result.

The Final Rule's interpretation of "automatically" is consistent with its ordinary meaning at the time of the NFA's enactment and accords with judicial interpretation of that language. Thus, it represents the best interpretation of the statute.

3. Classification of Bump-Stock-Type Devices as Machine Guns

Mr. Aposhian does not appear to argue that the interpretations above, if valid, would not permit the classification of his Slide Fire device as a machine gun. He does, however, request more aggressive judicial review of the Final Rule because of its allegedly political impetus, and because it represents a change in the ATF's position (*i.e.*, some devices previously ruled by the ATF to not be machine guns are now brought within the statutory ambit).

But the Supreme Court's modern administrative law jurisprudence expressly rejects both propositions. *See F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 523 (2009) (rejecting argument that heightened scrutiny applies to a "policy change [that] was spurred by significant political pressure from Congress"); *Lockheed Martin Corp. v. Admin. Review Bd., Dep't of Labor*, 717 F.3d 1121, 1131 (10th Cir. 2013) ("The Supreme Court has rejected the notion that an agency's interpretation of a statute it administers is to be regarded with

skepticism when its position reflects a change in policy."). Indeed, an agency's change in position need only be accompanied by the agency's acknowledgement that its position has changed, along with an explanation that "the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better, which the conscious change of course adequately indicates." *F.C.C.*, 556 U.S. at 515 (emphasis in original).

The ATF's change in policy easily meets this standard. The Final Rule unambiguously acknowledges that the ATF is changing its position with respect to certain bump-stock-type devices, and explains that the ATF's prior rulings excluding those devices from the definition of machine gun "did not provide substantial or consistent legal analysis regarding the meaning of the term 'automatically,' as it is used in the NFA and GCA." 83 Fed. Reg. 66518. And the court has already determined that the definitions leading to the classification changes are permissible under, and in fact represent the best interpretation of, the statute. In sum, neither the alleged political genesis of the Final Rule nor the fact that it reflects a change in agency policy serve to undermine the Final Rule's validity.

Having found that each component of the Final Rule represents the best interpretation of the statute, the court cannot find that Mr. Aposhian is likely to succeed on the merits of his challenge to the Final Rule. Absent such a showing, an injunction may not issue.

IV. ORDER

For the reasons articulated, plaintiff's Motion for Preliminary Injunction is DENIED.

Signed March 15, 2019

BY THE COURT

Jill N. Parrish
United States District Court Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT
No. 19-4036

W. CLARK APOSHIAN,
Plaintiff - Appellant,
v.

WILLIAM BARR, Attorney General of the United States; UNITED STATES DEPARTMENT OF JUSTICE; THOMAS E. BRANDON, Acting Director Bureau of Alcohol Tobacco Firearms and Explosives; BUREAU OF ALCOHOL TOBACCO FIREARMS AND EXPLOSIVES,
Defendants - Appellees.

CATO INSTITUTE and FIREARMS POLICY COALITION; DUE PROCESS INSTITUTE,
Amicus Curiae.

Appeal from the United States District Court
for the District of Utah
(D.C. No. 2:19-CV-00037-JNP-BCW)

ORDER

Filed: September 4, 2020

Before **TYMKOVICH**, Chief Judge, **BRISCOE**, **LUCERO**, **HARTZ**, **HOLMES**, **MATHESON**, **BACHARACH**, **PHILLIPS**, **MORITZ**, **EID**, and **CARSON**, Circuit Judges.*

This matter is before us on Appellant's *Petition for Rehearing En Banc* ("Petition"). We also have a response from Appellees, and Appellant has filed a motion for leave to file a reply in support of the Petition. As an initial matter, Appellant's motion for leave to file a reply is DENIED as unnecessary.

The Petition and response were circulated to all non-recused active judges of the court. A poll was called, and a majority of the non-recused active judges voted to rehear this matter en banc. Accordingly, the Petition is GRANTED, the court's May 7, 2020 judgment is VACATED, and this matter is REOPENED. *See* Fed. R. App. P. 35(a); *see also* 10th Cir. R. 35.6 (noting the effect of the grant of en banc rehearing is to vacate the judgment and to restore the case on the docket).

Although this entire case will be reheard en banc, the parties shall specifically address the following question[s] in supplemental memorandum briefs:

1. Did the Supreme Court intend for the *Chevron* framework to operate as a standard of review, a tool of statutory interpretation, or an analytical framework that applies where a government agency has interpreted an ambiguous statute?

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* The Honorable Carolyn B. McHugh is recused in this matter.

2. Does *Chevron* step-two deference depend on one or both parties invoking it, i.e., can it be waived; and, if it must be invoked by one or both parties in order for the court to apply it, did either party adequately do so here?

3. Is *Chevron* step-two deference applicable where the government interprets a statute that imposes both civil and criminal penalties?

4. Can a party concede the irreparability of a harm; and, if so, must this court honor that stipulation?

5. Is the bump stock policy determination made by the Bureau of Alcohol, Tobacco and Firearms peculiarly dependent upon facts within the congressionally vested expertise of that agency?

Appellant's supplemental memorandum brief shall be filed and served within 30 days of the date of this order, and shall be no longer than 20 double-spaced pages in a 13- or 14-point font. Sixteen paper copies of Appellant's supplemental brief must be received in the Clerk's Office within 5 business days of the brief's electronic filing.

Within 30 days of service of Appellant's supplemental brief, Appellees shall file a supplemental memorandum response brief subject to the same length and font limitations. Sixteen paper copies of Appellees' supplemental brief must be received in the Clerk's Office within 5 business days of the brief's electronic filing.

Within 14 days of service of Appellees' supplemental brief, Appellant may file a reply. The reply shall be limited to 10 double-spaced pages in length. Like the primary supplemental briefs, 16 paper copies of the reply must be received in the Clerk's

Office within 5 business days of the brief's electronic filing.

Upon completion of supplemental briefing, this matter will be set for oral argument before the en banc court. The parties will be advised of the date and time for the en banc argument via separate order.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT
No. 19-4036

W. CLARK APOSHIAN,
Plaintiff - Appellant,

v.

Robert M. WILKINSON, Acting Attorney General of the United States; UNITED STATES DEPARTMENT OF JUSTICE; REGINA LOMBARDO, Acting Director Bureau of Alcohol Tobacco Firearms and Explosives; BUREAU OF ALCOHOL TOBACCO FIREARMS AND EXPLOSIVES,
Defendants - Appellees.*

CATO INSTITUTE and FIREARMS POLICY COALITION; DUE PROCESS INSTITUTE,
Amicus Curiae.

(D.C. No. 2:19-CV-00037-JNP-BCW)
(D. Utah)

FILED March 5, 2021

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* Pursuant to Fed. R. App. P 43(c)(2), William Barr is replaced by Robert M. Wilkinson as Acting United States Attorney General, and Thomas E. Brandon is replaced by Regina Lombardo as Acting Director of the Bureau of Alcohol Tobacco Firearms and Explosives.

ORDER

Before **TYMKOVICH**, Chief Judge, **BRISCOE**, **LUCERO**[**], **HARTZ**, **HOLMES**, **MATHESON**, **BACHARACH**, **PHILLIPS**, **MORITZ**, **EID**, and **CARSON**, Circuit Judges.[***]

On September 4, 2020, this court entered an order granting Appellant's *Petition for Rehearing En Banc*. Having now considered the parties' supplemental briefs and heard oral argument in this matter, a majority of the en banc panel has voted to vacate the September 4, 2020 order as improvidently granted. As a result, the court's September 4, 2020 order granting en banc rehearing is VACATED, the court's May 7, 2020 opinion is REINSTATED, and the Clerk shall reissue this court's judgment as of the date of this order.

Chief Judge Tymkovich, as well as Judges Hartz, Holmes, Eid and Carson would proceed with en banc rehearing. Chief Judge Tymkovich, Judge Hartz, Judge Eid, and Judge Carson have written separate

[**] The Honorable Carlos F. Lucero participated in the en banc court's consideration of this matter while still in active status. He took senior status effective February 1, 2021, but has participated fully in this order.

[***] The Honorable Carolyn B. McHugh is recused in this matter

dissents from this order, and each has joined in the others' dissents. Judge Holmes has also joined all dissents.

All pending motions for leave to file amicus briefs on rehearing are DENIED.

Entered for the Court,

CHRISTOPHER M. WOLPERT, Clerk

TYMKOVICH, Chief Judge, joined by **HARTZ**, **HOLMES**, **EID**, and **CARSON**, Circuit Judges, dissenting.

I dissent from the majority's decision to vacate the en banc order as improvidently granted. The issues that initially led this court to grant en banc rehearing remain unresolved and it is important that they be addressed to give guidance to future panels and litigants. I write separately to identify why the panel majority wrongly decided the case in the first place and why its opinion will have deleterious effects going forward.

W. Clark Aposhian brought a pre-enforcement challenge to a rule promulgated by the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) that classifies bump stocks as machine guns[1] under the National Firearms Act (NFA), 26 U.S.C. §§ 5801–5872. The Final Rule was promulgated to clarify the definition of "machinegun" found in 26 U.S.C.

[1] I use the two-word spelling of machine gun except when quoting sources.

§ 5845(b). *See* 27 C.F.R. § 479.11. The Final Rule required owners of bump stocks to destroy them or abandon them to the ATF by March 26, 2019. *See* Bump-Stock-Type Devices, 83 Fed. Reg. 66,514, 66,514 (Dec. 26, 2018) (Final Rule).

Mr. Aposhian sought a preliminary injunction from the district court to prevent ATF from enforcing the Final Rule. The district court denied the motion for a preliminary injunction, concluding Mr. Aposhian had not shown a likelihood of success on the merits of his challenge. Mr. Aposhian then filed an interlocutory appeal with this court.

The panel majority who considered the interlocutory appeal affirmed the district court. *See Aposhian v. Barr*, 958 F.3d 969 (10th Cir. 2020). The panel agreed with the district court that Mr. Aposhian had not demonstrated a likelihood of succeeding on the merits of his claim.[2] But it departed from the district court's reasoning. While the district court had concluded the best reading of "machinegun" in § 5845(b) included bump stocks, the panel majority found the statute ambiguous. *Id.* at 985–88. Having identified an "ambiguity," the panel applied *Chevron* deference to the ATF's interpretation of § 5845(b). *Id.* at 988. Given this deference, Mr. Aposhian had no realistic path to success. The panel found ATF's

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[2] To prevail on a motion for a preliminary injunction, the movant must show "(1) a substantial likelihood of success on the merits; (2) irreparable harm to the movant if the injunction is denied; (3) the threatened injury outweighs the harms that the preliminary injunction may cause the opposing party; and (4) the injunction, if issued, will not adversely affect the public interest." *Gen. Motors Corp. v. Urban Gorilla, LLC*, 500 F.3d 1222, 1226 (10th Cir. 2007).

application of § 5845(b) to bump stocks to be a permissible reading of the statute and denied Mr. Aposhian's request for a preliminary injunction.

I believe the panel majority went looking for ambiguity where there was none. Then, having found ambiguity, it unnecessarily placed a thumb on the scale for the government by invoking *Chevron* deference. The panel majority did this even though ATF maintained the statute was unambiguous and did not claim its interpretation was entitled to any special deference. The panel also applied *Chevron* even though ATF's Final Rule has criminal, as well as civil, consequences. In doing so, the panel majority further confused this court's law about whether *Chevron* can be waived and whether the rule of lenity can ever be used to resolve ambiguities when *Chevron* might also apply to statutes with criminal penalties. Now, by vacating the en banc order as improvidently granted, the court deprives us of the chance for much-needed clarity on these issues.

I. Likelihood of Success on the Merits

As an initial matter, Mr. Aposhian has shown a likelihood of success on the merits. Section 5845(b) unambiguously excludes bump stocks from its ambit. And even if the statute is ambiguous, *Chevron* deference is inapplicable here for several reasons. First, the government consistently refused to invoke *Chevron* deference for its interpretation. That is a decision we should respect. And second, because the Final Rule interprets a statute with criminal consequences, we must resolve ambiguity through the rule of lenity before ever reaching for *Chevron*. The manner in which the panel majority addressed these

issues is not only wrong, it creates an unfortunate amount of uncertainty for future litigants.

A. Standard of Review

The standard for reviewing a district court's denial of a preliminary injunction is abuse of discretion. *Fish v. Kobach*, 840 F.3d 710, 723 (2016). The district court abuses its discretion when its decision is premised "on an erroneous conclusion of law or where there is no rational basis in the evidence for the ruling." *Id.* (internal quotation marks omitted). We evaluate the district court's legal determinations de novo. *Id.*

B. Statutory Framework

I am not the first to spill ink over this issue, so I will keep my description of the statutory regime brief. *See Aposhian*, 958 F.3d 969; *see also Guedes v. Bureau of Alcohol, Tobacco, Firearms and Explosives*, 920 F.3d 1 (D.C. Cir. 2019), *cert. denied*, 140 S. Ct. 789 (2020). The NFA, originally passed in 1934, "imposes strict registration requirements on statutorily defined 'firearms.' " *Staples v. United States*, 511 U.S. 600, 602 (1994). Machine guns are among those firearms subject to regulation and registration under the NFA. *See* 26 U.S.C. § 5845(a). Under § 5845(b), a "machinegun" is "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 statutory definition also includes "any part designed and intended ... for use in converting a weapon into a machinegun." *Id.*

The Gun Control Act of 1968 (GCA), as amended by the Firearm Owners' Protection Act of 1986, Pub. L. No. 99-308, 100 Stat. 449, incorporated the NFA's

definition of machine gun. 18 U.S.C. § 921(a)(23). These acts went beyond mere regulation, criminalizing almost all possession of machine guns. *See id.* at § 922(o)(1).

No such blanket prohibition exists for possession of semiautomatic rifles, which require separate pulls of the trigger for each bullet fired. As a result, firearm manufacturers have created accessories that allow a semiautomatic rifle to increase the speed with which it can fire a single round. A bump stock is one such accessory. It is intended to replace the rifle's standard stock, the part of the rifle that usually rests against the shooter's shoulder. This frees "the weapon to slide back and forth rapidly, harnessing the energy from the firearm's recoil either through a mechanism like an internal spring or in conjunction with the shooter's maintenance of pressure." Bump-Stock-Type Devices, 83 Fed. Reg. at 66,516. For a non-mechanical bump stock—one without an internal spring—to work as intended, the shooter must maintain backward pressure with his trigger finger and forward pressure on the rifle's barrel with his non-trigger hand. The channeled recoil from the bump stock then causes the trigger to reset and bump repeatedly against the shooter's stationary trigger finger, resulting in a rate of fire comparable to a machine gun.

ATF classified a bump stock device as a "machinegun" for the first time in 2006. Specifically, "ATF concluded that a device attached to a semiautomatic firearm that uses an internal spring to harness the force of a firearm's recoil so that the firearm shoots more than one shot with a single pull of the trigger is a machinegun." *Id.* at 66,514. But over the next decade, ATF issued classification decisions in

which it repeatedly assured bump stock owners that non-mechanical bump stocks were not machine guns as understood in § 5845(b). *Id.*

In 2017, a shooter used a non-mechanical bump stock to attack a large crowd attending an outdoor concert in Las Vegas. Scores died and hundreds were injured during this senseless act of violence. Following this tragic incident, members of Congress and the President asked ATF to examine these past classifications. *Id.* at 66,516. ATF reviewed its definition and then went through the formal notice-and-comment process to update its understanding of what qualifies as a machine gun. *Id.* at 66,517. The Final Rule clarified the definition of "machinegun" in § 5845(b), stating

> [f]or purposes of this definition, the term "automatically" as it modifies "shoots, 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 or 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 round with a single pull of the trigger by harnessing the recoil energy of the semiautomatic firearm to which it is affixed so that the trigger resets and continues firing without additional manipulation of the trigger by the shooter.

27 C.F.R. § 479.11.

The Final Rule was set to take effect on March 26, 2019, at which point everyone who possessed a bump stock was supposed to destroy it or turn it over to ATF. Bump-Stock-Type Devices, 83 Fed. Reg. at 66,514.

C. The Statute Is Unambiguous

Mr. Aposhian argued before the district court and the panel that ATF exceeded its authority by including bump stocks within the definition of "machinegun" in its Final Rule. Under the Administrative Procedure Act (APA), courts must "hold unlawful and set aside agency action, findings, and conclusions found to be ... in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(C).

When evaluating an agency's interpretation of a statute, we often afford its interpretation *Chevron* deference. *Chevron* requires courts to defer to an agency's interpretation of a statute "even if the agency's reading differs from what the court believes is the best statutory interpretation." *Nat. Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005). But such deference is not automatically warranted whenever an agency issues a statement regarding its understanding of a statute. Courts apply *Chevron* deference only "[i]f a statute is ambiguous, and if the implementing agency's construction is reasonable." *Id.* Here, § 5845(b) contains no ambiguity so "*Chevron* leaves the stage." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1630 (2018).

As a reminder, § 5845(b) defines a "machinegun" 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 question before the panel was whether this definition includes nonmechanical bump stocks. The panel majority regarded two parts of the statutory definition as sufficiently ambiguous for *Chevron* deference to apply: "single function of the trigger" and "automatically."

Chevron deference "is not due unless a court, employing traditional tools of statutory construction, is left with an unresolved ambiguity." *Epic Sys. Corp.*, 138 S. Ct. at 1630. Among other tools, this includes "examination of the statute's text, structure, purpose, history, and relationship to other statutes" with an emphasis on a word or phrase's "plain meaning." *Harbert v. Healthcare Servs. Grp., Inc.*, 391 F.3d 1140, 1147, 1149 (10th Cir. 2004). The fact that self-interested litigants disagree as to the meaning of a statute does not render it ambiguous. *See In re Woolsey*, 696 F.3d 1266, 1273 (10th Cir. 2012) (explaining that this is "an ailment surely afflicting most every statutory interpretation question in our adversarial legal system").

The panel majority, however, evaded these rules of interpretation. Rather than attempt to *resolve* ambiguity, the panel majority performed interpretive gymnastics to *create* ambiguity. In truth, neither of the parties really dispute the *meaning* of any words or phrases in the statutory definition of "machinegun." They dispute only whether the meaning encompasses bump stocks. And the answer to that question is apparent on the face of the statute.

A "single function of the trigger" is not ambiguous. At the time the NFA was passed, a "function" meant the "action" of the trigger. Webster's New International Dictionary 1019 (2d ed. 1934). The

use of the word "function" continues to capture the different ways that triggers can work. As the government explained in the Final Rule, triggers can initiate fire "by voice command, electronic switch, swipe on a touchscreen or pad, or any conceivable number of interfaces." Bump-Stock-Devices, 83 Fed. Reg. at 66,534. Whether a trigger is pushed, pulled, switched, or swiped, each involves a "single function."

The panel majority insists this language is ambiguous because "a single function of the trigger" can be interpreted to refer to the trigger or the shooter. *See Aposhian*, 958 F.3d at 986 (arguing the statutory language "begs the question of whether 'function' requires our focus upon the movement of the trigger, or the movement of the trigger finger"). But the panel majority finds ambiguity where there is none. The statute's plain language makes clear the "function" must be "*of the trigger*." 26 U.S.C. § 5845(b) (emphasis added). The statute speaks only to how the trigger acts, making no mention of the shooter.[3]

The statute's plain meaning unambiguously excludes bump stocks. A semiautomatic rifle, equipped with a bump stock, does not fire multiple shots by a single function of the trigger. "The trigger on that type of rifle must necessarily 'pull' backwards and release the rifle's hammer ... every time that the rifle discharges .... The rifle cannot fire a second round until

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[3] And the same is true of ATF's definition. *See Guedes*, 920 F.3d at 43 (Henderson, J., dissenting) ("The Rule's definition describes the 'motion' of the trigger, not of the trigger finger .... Indeed, nothing in the Rule's definition refers to a shooter's finger or a volitional action."). To consider the shooter or the trigger-finger in the statute or ATF's definition is to read in language that simply is not there.

both the trigger and hammer reset." *Aposhian*, 958 F.3d at 995 (Carson, J., dissenting). Every shot requires the trigger to go through this full process again. The fact that a bump stock accelerates this process does not change the underlying fact that it requires multiple functions of the trigger to mimic a machine gun.

Likewise, "automatically" is not so ambiguous as to imply Congress intended ATF to engage in gap-filling. In fact, ATF disclaims any gap-filling in the Final Rule. *See* Bump-Stock-Type Devices, 83 Fed. Reg. at 66,519. Far from indicating any statutory ambiguity, ATF's proposed definition in the Final Rule "accords with the everyday understanding of the word 'automatic[ally].'" *Guedes*, 920 F.3d at 31. It defines "automatically" as "having a self-acting or self-regulating mechanism that performs a required act at a predetermined point in the operation." Bump-Stock-Type Devices, 83 Fed. Reg. at 66,519 (quoting Webster's New International Dictionary 187 (2d ed. 1934)). Mr. Aposhian does not contest this definition. Rather, he contests its application to bump stocks.

The panel majority unnecessarily abstracts "automatically" from the rest of the statutory language to render the word ambiguous. The statute says a machine gun is designed to shoot "automatically more than one shot, without manual reloading, *by a single function of the trigger*." 26 U.S.C. § 5845(b) (emphasis added). "Section 5845(b)'s awkward syntax does not equal ambiguity." *Guedes*, 920 F.3d at 183 (Henderson, J., dissenting). The statute is unambiguous about what makes the firearm shoot automatically: the function of the trigger. To track with the dictionary definition, the statute itself identifies the "predetermined point in the

operation" at which the "self-regulating mechanism performs the required act." If a single function of the trigger *and then some other input* is required to make the firearm shoot automatically, we are not talking about a "machinegun" as defined in § 5845(b).

The government conceded during the en banc oral argument that if a shooter pulls the trigger of a semiautomatic rifle equipped with a non-mechanical bump stock without doing anything else, the rifle will fire just one shot. Oral Arg. at 1:01:40, *Aposhian v. Rosen* (2021) (19-4036). That's why the statute is unambiguous. To make the firearm "shoot automatically more than one shot", the shooter must also be pulling forward on the barrel of the gun. Because a bump stock requires this extra physical input, it does not fall within the statutory requirement that the weapon shoot "automatically ... by a single function of the trigger." 26 U.S.C. § 5845(b).

D. Chevron *Does Not Apply Here*

1. The Government Waived *Chevron*

Throughout litigation, the government has maintained that the Final Rule represents the best reading of § 5845(b). It has consistently refused to invoke *Chevron* deference. The panel majority paid no heed to this steadfast refusal. Instead, the panel majority scoured the briefs to justify bringing an uninvited guest to the statutory interpretation party.

According to the majority, all the court needs is an "invitation" to apply *Chevron* deference. *Aposhian*, 958 F.3d at 981–82. And that invitation can be brought by either party—it need not be brought by the government, whom *Chevron* benefits. In fact, even a brief argument in a footnote *opposing* the application

of *Chevron* deference constitutes such an invitation. *Id.* (citing *TransAm Trucking, Inc. v. Admin. Review Bd.*, 833 F.3d 1206, 1212 n.4 (10th Cir. 2016)).

This theory of waiver is untenable. Under the panel majority's theory, a party that challenges an agency's interpretation of a rule is forced to dance around *Chevron*, even where the government has not invoked it. *Chevron* becomes the Lord Voldemort of administrative law, "the-case-which-must-not-be-named." And litigants bold enough to expressly oppose *Chevron* in their briefing will be left guessing whether their reference to the case was fleeting or perfunctory enough to avoid making an invitation. All the while, courts are given a troubling amount of freedom when deciding whether to use *Chevron*—discretion that will dictate the outcome in many cases.

Even the panel majority acknowledged it was unsure whether its invitation theory is correct. *See id.* at 982 n.6. And yet the en banc majority is perfectly content to leave this confusion in place. This failure to clarify our rule about whether *Chevron* can be waived has real implications for litigants and courts in our circuit. Plaintiffs challenging an agency's interpretation of a statute are left guessing how to approach a given case. Should they argue vigorously against *Chevron* in their briefing? Should they go to lengths to avoid mentioning *Chevron* and its progeny at all? Or are all such litigation decisions futile because a court can sua sponte apply *Chevron* whenever it pleases? The majority's decision to vacate the en banc order leaves us all without a clear answer.

For my part, I believe we must abide by the government's decision to forgo *Chevron* deference. I come to this conclusion for two reasons.

First, the normal rules that govern party presentation and waiver should apply to *Chevron*. "[W]hen a party chooses not to pursue a legal theory potentially available to it, we generally take the view that it is 'inappropriate' to pursue that theory in our opinions." *Hydro Res., Inc. v. EPA*, 608 F.3d 1131, 1146 n.10 (10th Cir. 2010) (en banc). We refuse to consider arguments a party fails to make because we depend "on the adversarial process to test the issues for our decision" and are concerned "for the affected parties to whom we traditionally extend notice and an opportunity to be heard on issues that affect them." *Id.*[4]

Courts and parties undoubtedly benefit from this type of adversarial presentation of *Chevron*. *Chevron*'s applicability in a given case is seldom

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[4] To be sure, courts treat some issues as non-waivable. For instance, parties typically cannot waive the proper standard of review. *See, e.g.*, *United States v. Fonseca*, 744 F.3d 675, 682 (10th Cir. 2014) ("[T]he court, not the parties, must determine the standard of review, and therefore, it cannot be waived.") (internal quotation marks omitted). Likewise, we are not bound by a party's failure to make an argument regarding statutory interpretation. *See Kamen v. Kemper Financial Servs., Inc.*, 500 U.S. 90, 99 (1991) ("When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law.").

But Chevron is neither a standard of review nor a canon of construction. The APA describes the appropriate standards of review for reviewing agency actions. *See* 5 U.S.C. § 706. *Chevron* is not among them. And unlike the traditional tools of statutory interpretation, *Chevron* is not concerned with ascertaining the fixed meaning of a statute. Once a statute is deemed ambiguous, a statute interpreted pursuant to Chevron can be understood in any number of ways that could change as the political winds blow.

straightforward. See *Gonzales v. Oregon*, 546 U.S. 243, 258 (2006) ("*Chevron* deference, however, is not accorded merely because the statute is ambiguous and an administrative official is involved."). Rather, whether *Chevron* applies is often contested and unclear. Among the issues courts must consider is whether the agency acted with the requisite formality, *see United States v. Mead Corp.*, 533 U.S. 218, 229–31 (2001), whether the statute deals with a major question Congress would not have intended to delegate, *see King v. Burwell*, 576 U.S. 473, 485–86 (2015), and whether the agency has adopted a specific and consistent position, *see Epic Sys. Corp.*, 138 S. Ct. at 1630. All this to say: it is often not apparent at first blush whether *Chevron* should apply.

In practice, courts have applied the party-presentation rule to *Chevron*. The Supreme Court has deemed *Chevron* to be waived when inadequately invoked. *See, e.g.*, *Est. of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 477 (1992) (concluding that when an agency does not ask for special deference to its interpretation "we need not resolve the difficult issues regarding deference which would be lurking in other circumstances"). We have followed the Court's lead in our own practice. *Hydro Res.*, 608 F.3d at 1146 ("[W]e need not decide whether EPA's interpretation of the statute is entitled to deference because, throughout the proceedings before the panel and now the en banc court, EPA itself hasn't claimed any entitlement to deference."); *see also Hays Med. Ctr. v. Azar*, 956 F.3d 1247, 1264 n.18 (10th Cir. 2020) (same).

Second, when the government does not invoke *Chevron* as part of its litigation strategy, the

preconditions for *Chevron* are not present. For *Chevron* to apply, two conditions must be met: (1) Congress must delegate authority to the agency to make rules carrying the force of law and (2) the agency's ensuing interpretation must be "promulgated in the exercise of that authority." *Mead*, 533 U.S. at 226–27. The agency's litigation position is no less an exercise of that authority than the agency's interpretation. *See Guedes v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 140 S. Ct. 789, 790 (Gorsuch, J., statement regarding denial of certiorari) ("If the justification for *Chevron* is that policy choices should be left to the 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.") (internal quotation marks omitted) (emphasis in original).

Here, in promulgating the Final Rule, ATF insisted its definitions represented "the best interpretation" and accorded "with the plain meaning" of the statute.[5] Bump-Stock-Type Devices, 83 Fed. Reg. at 66,521, 66,527. And during litigation, the government repeatedly disavowed *Chevron* deference. Aple. Br. at 16 ("[P]laintiff's discussion of *Chevron* deference has no bearing on the disposition of this suit."); *id.* at 36 ("[N]othing in the Rule suggest that its legality depends on the application of *Chevron* deference, or that the agency believed *Chevron* deference was required to uphold the rule."). ATF does not believe it promulgated the Final Rule pursuant to

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[5] In the Final Rule, ATF invokes *Chevron* as a last resort, arguing "even if those terms are ambiguous, this rule rests on a reasonable construction of them." *Id.* at 66,527.

Chevron. If the agency disavows any reliance on *Chevron*, who are we to second-guess it?

Whether we view the issue as one of waiver or of *Chevron*'s applicability, the result is the same. We cannot sua sponte raise *Chevron* deference. In this case, that means we must do what courts have done for centuries and interpret the statute the old-fashioned way: de novo. As indicated above, doing so leads to a clear result: bump stocks are not machine guns.

2. The Rule of Lenity Resolves Any Ambiguity

Even if *Chevron* cannot be waived and is applicable here, it cannot and should not jump the line when courts interpret an ambiguous statute. As a reminder, *Chevron* only kicks in once the traditional tools of interpretation have been exhausted. See *Epic Sys. Corp.*, 138 S. Ct. at 1630. But the panel majority did not exhaust all the traditional tools. We still have one left in our toolbox: the rule of lenity. And it "is more than up to the job of solving today's interpretive puzzle." *Id.*

The rule of lenity is a substantive canon of construction applied in statutory interpretation cases involving criminal laws. The rule dictates that "when there are two rational readings of a criminal statute, one harsher than the other, we are 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 also United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 222 (1952) ("We should not derive criminal outlawry from some ambiguous implication."). "To invoke the rule, we must conclude that there is a grievous ambiguity or uncertainty in the statute." *Muscarello v. United*

States, 524 U.S. 125, 138 (1998). And the panel majority was correct in identifying it as a "rule of last resort." *Aposhian*, 958 F.3d at 978 n.4.

But it is not clear to me that the level of ambiguity required to invoke the rule of lenity is any different from that necessary to invoke *Chevron*. And I am admittedly lost as to why *Chevron* gets to cut in front of the rule of lenity in the statutory interpretation line. *Chevron* is of recent provenance. It is a rule of interpretive convenience, rooted in notions of agency expertise and political accountability. *See Chevron, U.S.A., Inc. v. Nat. Res. Defense Council, Inc.*, 467 U.S. 837, 865 (1984). The rule of lenity, by contrast, "provides a time-honored interpretive guideline." *Liparota v. United States*, 471 U.S. 419, 427 (1985). It addresses core constitutional concerns: fair notice and the separation of powers. *United States v. Kozminski*, 487 U.S. 931, 952 (1988); *see also United States v. Wiltberger,* 5 Wheat. 76, 95 (1820) (Marshall, C.J.) ("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 the judicial department. It is the legislature ... which is to define a crime, and ordain its punishment."). Applying *Chevron* deference to an agency's interpretation of a statute does not address either of those concerns.

Take the present case as an example. The definition of "machinegun" in § 5845(b) has both civil and criminal consequences. *See* 18 U.S.C. 922(o)(1) (making it unlawful to possess a machine gun). The rule of lenity applies to such statutes. See *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004) ("Because we must interpret the statute consistently, whether we

encounter its application in a criminal or noncriminal context, the rule of lenity applies."); *see also United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 517–18 (1992) (Breyer, J., plurality) ("The key to resolving the ambiguity lies in recognizing that although it is a tax statute we now construe in a civil setting, the NFA has criminal consequences .... It is proper, therefore, to apply the rule of lenity and resolve the ambiguity in Thompson/Center's favor.").

Section 5845(b) as re-interpreted by ATF does not provide citizens with fair notice of what conduct is criminalized. When an agency can define criminal conduct, there is a genuine concern that "if [they] are free to ignore the rule of lenity, the state could make an act a crime in a remote statement issued by an administrative agency." *See Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 732 (6th Cir. 2013) (Sutton, J., concurring). The government insists fair notice concerns are not implicated here because the Final Rule is not tucked away in obscurity. Rather, the Final Rule went through notice and comment and is published in the Federal Register.

But this is cold comfort to a citizen tasked with conforming their conduct to the law. The government expects an uncommon level of acuity from average citizens to know that they must conform their conduct not to the statutory language, but to the interpretive gap-filling of an agency which may or may not be upheld by a court. Justice Gorsuch recently expressed this same concern regarding a case with nearly identical facts:

> How, in all this, can ordinary citizens be expected to keep up—required not only to conform their conduct to the fairest reading of the law they might expect

> from a neutral judge, but forced to guess whether the statute will be declared ambiguous; to guess again whether the agency's initial interpretation of the law will be declared "reasonable"; and to guess again whether a later and opposing agency interpretation will also be held "reasonable"?

Guedes, 140 S. Ct. at 790 (statement regarding denial of certiorari). When an agency plays pinball with a statute's interpretation, as the ATF has here, fair notice cannot be said to exist.

Furthermore, the Final Rule violates the separation of powers. It is not by sheer happenstance or convenience that Congress writes the criminal laws. Rather, "because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity." *United States v. Bass*, 404 U.S. 336, 348 (1971). ATF has no authority to substitute its moral judgment concerning what conduct is worthy of punishment for that of Congress.

And we should feel deep discomfort at allowing an agency to define the very criminal rules it will enforce by implicit delegation. Such a delegation "turn[s] the normal construction of criminal statutes upside down, replacing the doctrine of lenity with a doctrine of severity." *Carter*, 736 F.3d at 730 (Sutton, J., concurring)."[6] The delegation raises serious

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[6] Citing *Touby v. United States*, 500 U.S. 160 (1991), the government argues that it is well within Congress's power to give agencies the power to define crimes. But if Congress wants to give the executive branch discretion to define criminal conduct, it must

constitutional concerns by making ATF the expositor, executor, *and* interpreter of criminal laws.

Applying the rule of lenity to § 5845(b) would alleviate these concerns. The rule of lenity instructs us, when confronted with two possible understandings of a statute, to adopt the narrower construction. With the rule aiding our interpretation, § 5845(b) clearly answers the issue at hand: bump stocks do not fall within the definition of machine gun.

Still, the panel majority says the rule of lenity does not apply here.

In doing so, the panel majority fails to explain why the rule of lenity should receive such a disfavored status among the rules of construction. We have regularly applied similar substantive canons of construction before reaching *Chevron*. For instance, constitutional avoidance is a canon of construction that resolves statutory ambiguities to avoid potential constitutional issues. And like the rule of lenity, "the canon of constitutional avoidance comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction." *Hernandez-Carrera v. Carlson*, 547 F.3d 1237, 1245 (10th Cir. 2008). And yet we have said "[i]t is well established that the canon of constitutional avoidance does constrain an agency's discretion to interpret statutory ambiguities, even when *Chevron* deference would otherwise be due." *Id.*

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speak "distinctly." *United States v. Grimaud*, 220 U.S. 506, 519 (1911). *Touby* involved such an express delegation of interpretive authority to the attorney general. Here, we are far removed from the statute at issue in *Touby*. We are having to infer from *ambiguity*, not an express delegation, that Congress implicitly authorized ATF to define criminal conduct.

at 1249. We have done the same with other canons of construction. *See, e.g.*, *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1462 (10th Cir. 1997) (applying the canon of construction favoring Native Americans rather than *Chevron*). Why should we favor some substantive canons over *Chevron* but not the longstanding rule of lenity?

Faced with these conundrums, the panel majority looks to a footnote in a Supreme Court opinion to serve as the lodestar for its reasoning. *See Babbitt v. Sweet Home Chapter of Cmtys. for a Greater Ore.*, 515 U.S. 687, 704 n.18 (1995). In *Babbitt*, the Court was confronted with an agency's interpretation of a statute that had both civil and criminal consequences. The majority applied *Chevron* rather than the rule of lenity. In making this prioritization, Justice Stevens wrote: "We have never suggested that the rule of lenity should provide the standard for reviewing facial challenges to administrative regulations whenever the governing statute authorizes criminal enforcement." *Id.* And he went on to say "[e]ven if there exist regulations whose interpretations of statutory criminal penalties provide such inadequate notice of potential liability as to offend the rule of lenity, the 'harm' regulation, which has existed for two decades and gives fair warning of its consequences, cannot be one of them." *Id.* The majority takes this footnote and turns it into a categorical rule: "where a regulation is at issue, and the agency (here, ATF) has both civil and criminal enforcement authority, *Babbitt* suggests that *Chevron*, not the rule of lenity, should apply." *Aposhian*, 958 F.3d at 983.

The panel majority reads the *Babbitt* footnote for more than it is worth. *Babbitt* does not prevent us

from applying the rule of lenity here for several reasons. First, Justice Steven's abbreviated reasoning did not create any binding rule about the relationship between lenity and *Chevron* in all circumstances. The footnote is composed of four sentences of reasoning. And it addresses only one of the concerns underlying the rule of lenity—fair notice—but not the other—the separation of powers. "[O]ne would have expected the Court to say more before allowing agencies to trump a doctrine Chief Justice Marshall described as 'perhaps not much less old than construction itself.' " *Carter*, 736 F.3d at 735 (Sutton, J., concurring) (quoting *Wiltberger*, 5 Wheat. at 95).

The post-*Babbitt* cases further punctuate the limits of the footnote. Several years after *Babbitt*, the Court declined to weigh in on the interaction between *Chevron* deference and the rule of lenity. *See Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 n.8 (2001). And the Court's most recent decisions have also indicated the government's interpretation of criminal laws should not receive deference. *See, e.g.*, *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) ("[C]riminal laws are for courts, not for the Government, to construe."). The panel majority acknowledges these statements by the Court, but insists *Chevron* deference was not in play in either *Apel* or *Abramski*. But the panel majority gives no reason, other than *Babbitt*'s allegedly categorical footnote, as to why we should treat any differently a case in which *Chevron* would otherwise be applicable.

Even if some binding rule about the rule of lenity and *Chevron* exists in *Babbitt*, that rule would not apply here. The regulation at issue in *Babbitt* had been on the books for twenty years. So, any concerns about fair warning were significantly diminished. The same cannot be said about ATF's Final Rule. For over a decade, ATF consistently reassured the owners of bump stocks that their property did not fall within the definition of "machinegun." Then, in just over a year, it performed an about-face on its own interpretation. The regulation at issue here does not fall within *Babbitt*'s purview.

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For all these reasons, Mr. Aposhian has demonstrated that his claim is likely to succeed.

II. Irreparable Harm

Having already determined that Mr. Aposhian was not likely to succeed on the merits of his claim, the panel majority proceeded to the other prongs of the preliminary injunction test. But in doing so, it created further confusion.

In its briefing before the district court, the government conceded the second prong of the preliminary injunction test. The government "acknowledge[d] that the irreparable harm prong of the preliminary injunction test is met here." Aplt. App. 106. And the district court recognized and accepted this concession: "The parties do not dispute that Mr. Aposhian will experience irreparable harm if the injunction is denied." *Id.* at 131.

Yet, on appeal, the government argued it was not bound by this concession and the panel majority agreed. Untethered from what happened below, the panel majority concluded Mr. Aposhian had not shown

irreparable harm—yet another reason to deny his request for a preliminary injunction. The panel cited *Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 356 F.3d 1256 (10th Cir. 2004), to support its conclusion that a "stipulation without more is insufficient to support an irreparable harm finding." *Aposhian*, 958 F.3d at 990 (quoting *Dominion*, 356 F.3d at 1266).

I am not convinced. *Dominion* dealt explicitly with a *pre-litigation* contractual stipulation, not a formal concession by a party opposing a preliminary injunction. District courts are entirely capable of managing a preliminary injunction. And when a district court recognizes a formal concession by a party which relieves the other party of its burden, we as the appellate court are bound by that concession. *See Christian Legal Soc'y Chapter of the Univ. Of Cal., Hastings Coll. of L. v. Martinez*, 561 U.S. 661, 677, (2010) (explaining that "factual stipulations are formal concessions ... that have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact .... [A] judicial admission is conclusive in the case.") (internal quotation marks omitted).

It was improper for the panel majority to ignore the government's concession regarding irreparable harm. And it puts parties seeking preliminary injunctions in a bind. Can they no longer rely on an opposing party's concessions regarding any of the preliminary injunction prongs? After receiving a concession, can the opposing party simply sandbag the movant on appeal, demanding proof of a previously conceded prong? Indeed, the government can and does stipulate that all of the prongs of a preliminary injunction have been met when it consents to the entry of such an order. And this lack of clarity places the

district court in an impossible dilemma in the rush of injunctive litigation to decide what they can and cannot rely on in the parties' presentation of the case.

As with the *Chevron* issues discussed above, the en banc majority's decision to vacate the en banc order places litigants in an untenable position until we offer further clarity.

III. Conclusion

Anyone who has seen a semiautomatic rifle equipped with a bump stock understands it increases the rate of lethal fire. But Congress did not define "machinegun" based upon the speed at which a firearm shoots or the firearm's potential for mass carnage. Section 5845(b) defined "machinegun" based on its mechanical operation. The language of that statute and that statute alone is what we must apply.

The en banc majority has done the circuit no favors today. By dismissing the en banc order, the majority perpetuates confusion on difficult issues in the circuit. We are left not knowing whether the government can waive *Chevron*, whether the rule of lenity can ever trump *Chevron*, and whether formal concessions concerning a preliminary injunction factor before the district court is binding. For the sake of courts and future litigants who must wade through the panel majority's reasoning, I can only hope we receive clarity on these issues sooner rather than later.

For the foregoing reasons, I dissent from the majority's decision to vacate the en banc order.

HARTZ, Circuit Judge, joined by **TYMKOVICH**, Chief Judge, and **HOLMES**, **EID**, and **CARSON**, Circuit Judges, dissenting.

I am disappointed that the majority of the en banc court has voted not to consider this matter. There are a variety of important issues raised in the appeal. The one of most interest to me is whether the doctrine of *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), is at all in play.

The question here is whether a particular type of bump stock is a "machinegun" as defined by 26 U.S.C. § 5845(b). This is a matter of statutory interpretation, inherently a responsibility of the courts. As Chief Justice Marshall said more than two centuries ago, "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). Perhaps that sentence has been quoted so much that it seems trite, but it is an essential starting point for the analysis in this appeal.

I say "starting point" because there are qualifications to the general rule. Any qualification, however, must be soundly grounded in a compelling rationale. One qualification has been recognized in *Chevron* and the multitude of cases expounding on it. Those cases inform us, instruct us, that in proper circumstances courts must defer to a government agency's interpretation of ambiguous statutory language. I question whether such circumstances are present here.

At the end of 2018 the federal Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) promulgated a Final Rule interpreting the statutory definition of "machinegun" to include bump stocks that the ATF had previously declared not to be machine guns. The panel majority in this case held that it should defer to the definition in the Final Rule under the *Chevron*

doctrine. Its opinion carefully, and intelligently, analyzed the Rule and its history and concluded that it was a legislative rule compelling deference, rather than an interpretive rule entitled to no deference.

That opinion's analysis, however, strikes me as formalistic. It does not explain *why* this court should shirk its fundamental duty "to say what the law is." As I understand the *Chevron* line of cases, deference to an agency's interpretation of an ambiguous statute can be justified on either of two grounds. First, the statutory ambiguity may signal congressional intent to delegate policymaking authority to an agency within the bounds of the statutory language, and courts should defer to that policy choice. Second, the complexity or technical difficulty of the subject matter may suggest the wisdom of deferring to the experience and expertise of the agency in construing the statute. If, however, the agency's interpretation of the statute is based neither on a policy judgment nor the application of agency expertise, deference cannot be justified. In particular, if the agency has done nothing more than conduct an analysis typical of that performed by the judiciary, there is no reason to defer. To be sure, agency lawyers may well have legal minds superior to those of any member of the court construing the statute, but that does not excuse disobedience to Article III's requirements for one to be empowered to exercise the functions of a federal judge. *We* must be the ones to perform those tasks, although always grateful for assistance from the bar.

The Final Rule is solely the product of the ATF's performing a judge-like interpretation of the statutory language. The agency disclaimed any policy-making component to its analysis. Nor has it suggested that its departure from its prior publicly expressed views on

the legality of bump stocks was based on any new expert knowledge or experience. *Chevron* deference is improper.

EID, Circuit Judge, joined by **TYMKOVICH**, Chief Judge, and **HARTZ**, **HOLMES**, and **CARSON**, Circuit Judges, dissenting.

Chevron has no place in this case. At least four reasons support this conclusion. First, the statutory language is not ambiguous. *Ante,* at 9–12 (Tymkovich, C.J., dissenting); *post*, at 1–2 (Carson, J., dissenting). Second, even if the language were ambiguous, the agency offers up no particular expertise or policy insight to help resolve the ambiguity. *Ante,* at 1–3 (Hartz, J., dissenting). Third, any argument for deference is waived because the agency disavows reliance on *Chevron* altogether. *Ante*, at 12–17 (Tymkovich, C.J., dissenting); *post*, at 1–3 (Carson, J., dissenting). Finally, the criminal penalties at issue in this proceeding counsel against *Chevron*'s application. *Ante*, at 898–902 (Tymkovich, C.J., dissenting). I join my dissenting colleagues, and write briefly to elaborate on this latter point.

The panel majority rests the propriety of its application of *Chevron* in this context on footnote 18 of *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995). *Aposhian* v. *Barr*, 958 F.3d 969, 982–83 (10th Cir. 2020). In the footnote, the Supreme Court states that it has "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*, 515 U.S. at 704 n.18.

The panel majority interprets this footnote as a directive from the Court to apply *Chevron* in any case that involves both civil and criminal penalties. *Aposhian*, 958 F.3d at 983. But the footnote is not a mandate. Simply because the footnote may *allow* application of *Chevron* when criminal penalties are involved does not mean that it *commands* deference be applied. *Cf. ante*, at 901 (Tymkovich, C.J., dissenting) (suggesting that the footnote does not create a categorical rule that *Chevron* trumps the rule of lenity). Here, the fact that the statutory regime before us is predominantly criminal in nature counsels against applying *Chevron*.

The Gun Control Act of 1968 ("GCA"), 18 U.S.C. § 921 *et seq.,* as amended by the Firearm Owners' Protection Act, Pub. L. No. 99-308, 100 Stat. 449 (1986), imposes a broad prohibition against owning a "machinegun," making it "unlawful for any person to transfer or possess a machinegun." 18 U.S.C. § 922(o)(1); *see Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 920 F.3d 1, 36 (D.C. Cir. 2019) (Henderson, J., concurring in part and dissenting in part) (explaining that "private ownership of machine guns" is "effectively banned" by the GCA). And to enforce this prohibition, the GCA renders such unlawful possession a felony punishable by up to *ten years of imprisonment*. 18 U.S.C. § 924(a)(2). Thus, the definition of "machinegun"—which the GCA incorporates by reference from the National Firearms Act ("NFA"), 26 U.S.C. §§ 5801–5872, *see* 18 U.S.C. § 921(a)(23) (incorporating the NFA's definition into the GCA)—has an enormous criminal impact. By contrast, the civil scope of the statutory regime is quite limited. The GCA's prohibition on "machineguns" is

subject to only two extremely limited exceptions, for "machineguns" (1) "transfer[red] to or by, or possess[ed] by or under the authority of" the federal or a state government, *id.* § 922(o)(2)(A), or (2) lawfully possessed before the prohibition went into effect, *id.* § 922(o)(2)(B). Only "machineguns" that fall within these narrow exceptions are subject to civil consequences, and even then, the civil consequences are limited—the chief consequence is a registration requirement. *See* 26 U.S.C. §§ 5841, 5845(a), (b). Given the breadth of the criminal prohibition and the limited nature of the exceptions giving rise to civil ramifications, I conclude that the statutory regime is predominately criminal.

Because this case involves a predominately criminal proceeding, I would hold that the agency's interpretation of "machinegun" does not qualify for *Chevron* deference. Criminal laws do not fall within the specialized expertise of any agency. True, the executive branch enforces the federal criminal laws and prosecutes federal criminal cases. But the Supreme Court has "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). Moreover, deferring to an agency's interpretation of a criminal statute would run headlong into the constitutional concerns of fair notice and separation of powers. *Ante,* at 19–22 (Tymkovich, C.J., dissenting) (discussing concerns as related to the rule of lenity). Indeed, the Court has made clear that "criminal laws are for courts, not for the Government, to construe." *Abramski v. United States*, 573 U.S. 169, 191 (2014). The panel majority recognizes the Court's statements but points out that they were made outside of a "*Chevron*-eligible interpretation." *Aposhian*, 958

F.3d at 984 (internal quotation mark omitted) (quoting *Guedes*, 920 F.3d at 25). That fact, however, does not mean the principles can be disregarded.

Chevron does not apply inexorably. It is a presumption about congressional intent, grounded in considerations such as agency expertise and the preference for leaving policy choices to Executive Branch officials who are politically accountable. *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984). When these essential premises are missing or there is otherwise reason to doubt that Congress intended to delegate authority to an agency, *Chevron* does not apply. *See Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1629–30 (2018). *See generally United States v. Mead Corp.*, 533 U.S. 218 (2001). Here, there is ample reason to doubt that Congress would have intended that deference be paid given the substantial criminal consequences at stake. Because the statutory regime at issue regulates primarily through a criminal prohibition with only limited civil ramifications, *Chevron* deference is misplaced. Accordingly, I respectfully dissent.

CARSON, Circuit Judge, joined by **TYMKOVICH**, Chief Judge, and **HARTZ**, **HOLMES**, and **EID**, Circuit Judges, dissenting from the denial of rehearing en banc.

I join the well-reasoned dissents authored by Chief Judge Tymkovich, Judge Hartz and Judge Eid. I write separately to emphasize a few points from my dissent to the panel opinion.

I.

The National Firearms Act ("NFA") is not ambiguous. It has been on the books for nearly ninety years and its definition of a "machinegun" has proven workable. Indeed, until the Executive developed an unfavorable opinion of nonmechanical bumpstocks, the federal government blessed the devices as complying with the NFA on many occasions. A legal device can be used to perpetrate horrific acts, but that does not make it illegal and does not render the statutory definition allowing its possession ambiguous. The NFA makes illegal the ownership of "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." 26 U.S.C. § 5845(b). The NFA speaks in terms of how a firearm functions, not its capability of firing rapidly or causing harm. As I explain more fully in my dissent to the panel opinion, a semiautomatic weapon equipped with a nonmechanical bumpstock requires the trigger to function each time it fires. And it does not keep firing "automatically" when the operator presses the trigger. So under the clear statutory language, a firearm equipped with a nonmechanical bumpstock is definitionally not a prohibited machinegun. The panel majority, in my opinion, clearly erred by determining the NFA's definition of "machinegun" is ambiguous.

II.

I also question the Court's decision to vacate the en banc order when the parties' thorough briefing identified an apparent intracircuit conflict about whether the application of Chevron deference must be requested by the government in the first instance. That concerns me, especially given that both the Supreme

Court and our Circuit have "often declined to apply Chevron deference when the government fails to invoke it" or otherwise rely on it. Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 140 S. Ct. 789, 790, (2020) (statement of Gorsuch, J., respecting denial of certiorari). See also, e.g., Hays Med. Ctr. v. Azar, 956 F.3d 1247, 1264 n.18 (10th Cir. 2020); Hydro Res., Inc. v. EPA, 608 F.3d 1131, 1146 (10th Cir. 2010). Indeed, as early as 2010, we put the burden of asking for Chevron deference on the government. Id.

But here the panel opinion ignores Hydro Resources and instead relies on our later decision in TransAm Trucking, Inc. v. U.S. Dep't of Lab. Admin. Rev. Bd., 833 F.3d 1206, 1212 n.4 (10th Cir. 2016), where we relied on Chevron with no government request that we do so. The panel's reliance on TransAm violates the venerable circuit rule that when faced with an intracircuit conflict, we should follow the earlier, settled precedent and not the later decided case. United States v. Melendez-Garcia, 28 F.3d 1046, 1054 (10th Cir. 1994). And if the court wishes to jettison the older line of cases in favor of more recent authority, that action requires invoking the machinery of the en banc court. Cf. United States v. Taylor, 828 F.2d 630, 633 (10th Cir. 1987) (obtaining en banc review for rejecting the first published decision in favor of subsequent contrary authority).

The majority's application of Chevron with no government request that it do so is even more alarming in the context of this case. Here, the government *expressly disavowed* any reliance on

Chevron and, in fact, asked the panel *not to apply it*.[1] "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." Guedes, 140 S. Ct. at 790 (statement of Gorsuch, J., respecting denial of certiorari) (quoting Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1630 (2018)). Here, by turning a blind eye to the government's request and applying Chevron anyway, the majority—unfairly in my opinion—sealed Mr. Aposhian's fate by tipping the scales in favor of the government.

III.

As a final point, I wish to emphasize that the panel majority (perhaps inadvertently) has increased the burden on district courts in the preliminary injunction context. Our preliminary injunction jurisprudence required Mr. Aposhian to demonstrate four things to the district court—one of which was that he would suffer irreparable harm if the injunction did not issue. As is common in litigation, the government conceded that if a preliminary injunction did not issue, Mr. Aposhian would suffer irreparable harm. He, therefore, presented no evidence on that issue and the district court denied the request for preliminary injunction based on another ground.

Despite the clarity with which the government conceded the irreparable harm element and Mr.

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[1] The district court noted that the government "defendants went out of their way to avoid citing Chevron and its progeny and repeatedly stressed that they neither request nor believe their interpretations are entitled to any measure of deference."

Aposhian's reasonable reliance on that concession, the panel majority concluded that he failed to meet his burden, in part, because he did not show irreparable harm. I view the panel majority's conclusion as contrary to our caselaw, unfair, and as impeding judicial economy. Here's why.

Trial courts are busy places and their judges are tasked with making decisions and moving cases in a swift and efficient manner. To assist the administration of their busy dockets, judges encourage parties to focus on the areas in dispute. The parties in turn do things like stipulate to facts or concede certain elements of a claim. We, as an appellate court, encourage these practices and routinely hold parties to the stipulations and concessions they make in federal district courts. See, e.g., Johnson v. Spencer, 950 F.3d 680, 708 (10th Cir. 2020) (concluding that defendants who had relied on claim preclusion as a defense met their burden of proof on two of the three requisite elements because the opposing party "concede[d] ... the second and third elements"); United States v. Sinks, 473 F.3d 1315, 1321 (10th Cir. 2007) (observing that the government can concede elements of the plain error standard of review, which a criminal defendant has the burden of proof to establish). We have even held, in the preliminary injunction context, that the parties can stipulate to the entry of a preliminary injunction—which necessarily means they concede that the applicant can prove all the elements required to receive the injunction.[2]

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[2] And this invites the question—if you can concede all the elements required for injunctive relief, why can't you concede just one? Obviously—you can.

As this shows, the panel's decision conflicts with our caselaw which allows the district court to accept as proven an element to which the opposing party stipulates. The panel's decision impedes judicial economy because going forward, parties will now have to spend time and resources proving elements about which there is no dispute. And it is unfair because the panel departed from common practice and our established caselaw with no notice to Mr. Aposhian.

APPENDIX E

Regulatory Provisions

1. 27 C.F.R. § 447.11 provides:

Meaning of terms.
When used in this part and in forms prescribed under this part, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof, terms shall have the meanings ascribed in this section. Words in the plural form shall include the singular, and vice versa, and words imparting the masculine gender shall include the feminine. The terms "includes" and "including" do not exclude other things not enumerated which are in the same general class or are otherwise within the scope thereof.

* * * *

Machinegun. A "machinegun", "machine pistol", "submachinegun", or "automatic rifle" is a firearm 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. 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 "machinegun" 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.

2. 27 U.S.C. § 478.11 provides:

Meaning of terms.
When used in this part and in forms prescribed under this part, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof, terms shall have the meanings ascribed in this section. Words in the plural form shall include the singular, and vice versa, and words importing the masculine gender shall include the feminine. The terms "includes" and "including" do not exclude other things not enumerated which are in the same general class or are otherwise within the scope thereof.

* * * * *

Machine gun. 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 machine gun, and any combination of parts from which a machine gun can be assembled if such parts are in the possession or under the control of a person. 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.

3. 27 C.F.R. § 479.11 provides:

Meaning of terms.
When used in this part and in forms prescribed under this part, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof, terms shall have the meanings ascribed in this section. Words in the plural form shall include the singular, and vice versa, and words importing the masculine gender shall include the feminine. The terms "includes" and "including" do not exclude other things

not enumerated which are in the same general class or are otherwise within the scope thereof.

* * * * *

Machine gun. 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 machine gun, and any combination of parts from which a machine gun can be assembled if such parts are in the possession or under the control of a person. 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.