No. 21-159

IN THE
Supreme Court of the United States

W. CLARK APOSHIAN,
Petitioner,
v.
MERRICK GARLAND, et al.,
Respondents.

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

BRIEF FOR THE NATIONAL RIFLE ASSOCIATION OF AMERICA, INC. AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The National Rifle Association of America, Inc. ("NRA") is America's oldest civil-rights organization and is widely recognized as America's foremost defender of Second Amendment rights. It was founded in 1871, by Union generals who, based on their experiences in the Civil War, sought to promote firearms marksmanship and expertise amongst the citizenry. Today, the NRA has approximately five million members, and its programs reach millions more. The NRA is America's leading provider of firearms marksmanship and safety training for both civilians and law enforcement.

The NRA has a significant interest in this case. Many NRA members possessed or wish to possess bump stocks, and their freedom to do so is hindered by the Bureau of Alcohol, Tobacco, Firearms and Explosives' ("ATF") rule reclassifying bump stocks as machine guns. Bump-Stock-Type Devices, 83 Fed. Reg. 66,514 (Dec. 26, 2018). Indeed, representatives for the NRA testified before Congress in 1934, when it was debating how to define "machinegun." *Id.* at 66,518. And the NRA has been arguing that the rule of lenity should apply to statutes that impose criminal liability instead of *Chevron* deference, the question presented

[1] In accordance with this Court's Rule 37.6, counsel for amicus curiae certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than amicus curiae or its counsel has made a monetary contribution for the preparation or submission of this brief. All parties received timely notice of this amicus brief and have consented to its filing.

to the Court, for over 30 years. *See, e.g.*, *Nat'l. Rifle Ass'n v. Brady*, 914 F.2d 475, 479 n.3 (4th Cir. 1990).

STATEMENT OF THE CASE

Since passing the National Firearms Act in 1934, Congress has consistently defined "machineguns"[2] by their ability to fire multiple rounds "by a single function of the trigger." Pub. L. No. 73–474, 48 Stat. 1236; 26 U.S.C. § 5845(b). Bump stocks replace standard, stationary stocks (the portion of a rifle that rests against the shooter's shoulder). This in turn allows "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." 83 Fed. Reg. at 66,516. The harnessed recoil causes the trigger to bump and reset against the shooter's finger. Bump stocks were not classified as machine guns because—unlike machine guns—the trigger on bump-stock-equipped items must be pulled, released, and reset after every round is discharged. *See, e.g.*, 83 Fed. Reg. at 66,517.

Then, on October 1, 2017, a shooter senselessly attacked a crowd of concertgoers in Las Vegas with a bump-stock equipped rifle. 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 (Feb. 20, 2018). ATF then promulgated the Bump-Stock-

[2] NRA uses the modern spelling of machine gun throughout this brief except while quoting the statute.

Type Devices Rule, 83 Fed. Reg. 66,514 ("Final Rule"), which now classifies bump stocks as machine guns.

The Final Rule prompted several challenges and several divided opinions. In particular, the lower courts have struggled to determine whether *Chevron* deference applies to agency interpretations of criminal statutes. A divided panel of the D.C. Circuit held that *Chevron* applied and upheld the Final Rule. *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 920 F.3d 1 (D.C. Cir. 2019), *cert. denied*, 140 S. Ct. 789 (2020). A divided panel of the Sixth Circuit held that *Chevron* did not apply and that bump stocks were not machine guns. *Gun Owners of Am., Inc. v. Garland*, 992 F.3d 446, 450 (6th Cir. 2021), *reh'g en banc granted, opinion vacated*, 2 F.4th 576 (6th Cir. 2021). And in this case, a divided panel of the Tenth Circuit held that *Chevron* applied and upheld the Final Rule. *Aposhian v. Barr*, 958 F.3d 969 (10th Cir. 2020) ("*Aposhian Panel*") (Pet. App. 1a). The Tenth Circuit then granted en banc review and asked the parties for supplemental briefing on *Chevron's* proper application in the case. *Aposhian v. Barr*, 973 F.3d 1151 (10th Cir. 2020) (Pet. App. 74a). But the deeply divided court subsequently withdrew its order granting en banc review and reinstated the panel's opinion. *Aposhian v. Wilkinson*, 989 F.3d 890 (10th Cir. 2021) ("*Aposhian En Banc*") (Pet. App. 78a). This petition followed.[3]

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[3] The ATF has repeatedly asserted that it was not invoking *Chevron* throughout all of these cases, but the D.C. and Tenth Circuits applied *Chevron* nevertheless. The NRA agrees with the Petitioners that an agency must invoke *Chevron* for it to be considered. *HollyFrontier Cheyenne Refining, LLC v. Renewable Fuels Assn.*, 141 S. Ct. 2172, 2180 (2021). The NRA does not re-

It is difficult to pose a more important question of federal law than whether an agency interpretation of a criminal statute is due *Chevron*, or any other type of, deference. The fact that the lower courts are divided and are granting en banc review with regularity verifies the question's importance. And there is no better time to answer that question than now. The Court has the benefit of several lower court opinions to guide it. And federal agencies would benefit greatly from having an answer to this question sooner rather than later. The Court should grant the petition and give the lower courts, the federal agencies, and the people a clear answer.

SUMMARY OF THE ARGUMENT

The Final Rule is arbitrary and capricious. Congress defined "machinegun" clearly, and bump stocks clearly do not fit that definition. Even if there is ambiguity in the statute, it is inappropriate to apply *Chevron* deference because this is a criminal statute. This Court has also applied the traditional canons of construction, including the rule of lenity, before deferring to the agency's preferred interpretation under *Chevron*. The rule of lenity would resolve all ambiguity in the statute, leaving no gaps for ATF to fill. This Court also does not defer to agency interpretations on important questions that Congress is likely to have answered itself. Imposing criminal liability comes with certain stigmas and a loss of liberty. Those moral

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peat those arguments here. Instead, the NRA focuses on the impropriety of applying *Chevron* to criminal statutes.

judgments are the types of important questions that Congress must answer itself.

Moreover, the purposes behind the rule of lenity are furthered when applied in this case, while *Chevron* deference is misplaced. The rule of lenity provides notice to the people, limits arbitrary prosecutions, and preserves the separation of powers. *Chevron*, however, promotes arbitrary prosecutions and muddles the separation of powers.

ARGUMENT

ATF got it wrong in the Final Rule. Bump stocks are not machine guns. In defining machine gun, Congress focused solely on the trigger's mechanics, not the process by which the shooter pulls the trigger. 26 U.S.C. § 5845(b). The statutory benchmark is clear, and ATF missed the mark.

ATF's error cannot be salvaged by deferring to its expertise under *Chevron*. *Chevron* provides a two-step framework for reviewing an agency's interpretation of a statute. First, courts review the statutory text, using the traditional canons of statutory construction if necessary, to determine if Congress has spoken on the issue. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842, 843 n.9 (1984). If Congress's intentions are clear, that is the end of the matter. *Id.* at 842–43. But if, and only if, the statute is "silent or ambiguous with respect to the specific issue," courts then proceed to step two to determine if the agency's interpretation of the statute is reasonable. *Id.* at 843.

Here, not only is the statute clear, but it also defines criminal conduct. 18 U.S.C. §§ 921(a)(23), 922(o). "[C]riminal laws are for courts, not for the Govern-

ment, to construe"; ATF's position is "not relevant at all." *Abramski v. United States*, 573 U.S. 169, 191 (2014) (citation omitted); *Gonzales v. Oregon*, 546 U.S. 243, 264 (2006) ("Just as he must evaluate compliance with federal law in deciding about registration, the Attorney General must as surely evaluate compliance with federal law in deciding whether to prosecute; but this does not entitle him to *Chevron* deference.") (citing *Crandon v. United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring)). *Abramski's* edict is "clear, unequivocal, and absolute." *Gun Owners of Am., Inc.*, 992 F.3d at 455. That should be the end of the matter. But even if it were appropriate to set that precedent aside, it is inappropriate to defer to ATF's interpretation of "machinegun" because (1) the statute is clear, (2) the rule of lenity necessarily resolves any ambiguities in favor of criminal defendants, and (3) *Chevron's* purposes are misplaced in the criminal arena.

I. CONGRESS DEFINED MACHINE GUNS BY THE TRIGGER'S MECHANICS, NOT THE HUMAN PROCESS.

Although not as important as the other issues raised in the petition, the Court must first determine whether a bump stock is a machine gun under the plain meaning of the statute. It is not.

"When the words of a statute are unambiguous, then … 'judicial inquiry is complete.'" *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 254 (1992) (citations omitted). Congress specifically defined "machinegun" as "any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automat-

ically more than one shot, without manual reloading, *by a single function of the trigger*." 26 U.S.C. § 5845(b) (emphasis added); 18 U.S.C. § 921(a)(23). Congress's clear definition is objectively based on the trigger's mechanics, nothing else. The term "automatically" is clear as well: automatic fire must also occur by "a single function of the trigger." *Id.*; *Staples v. United States*, 511 U.S. 600, 602 n.1 (1994); *Aposhian En Banc*, 989 F.3d at 895 (Tymkovich, J. dissenting) (Pet. App. 89a) ("'[A]utomatically' is not so ambiguous as to imply Congress intended ATF to engage in gap-filling."). That clarity is further reinforced by Congress's distinct definition of "semiautomatic rifle," which "requires a separate pull of the trigger to fire each cartridge." 18 U.S.C. § 921(a)(28). Indeed, this Court had no trouble distinguishing the terms in *Staples*: an automatic firearm will "continue to fire until the trigger is released," while a semiautomatic "fires only one shot with each pull of the trigger." 511 U.S. 602 n.1. There is no doubt about what these terms mean.

Unburdened by any ambiguity in 2006, ATF had no problem concluding that "the drafters equated 'single function of the trigger' with 'single pull of the trigger.'" 83 Fed. Reg. at 66,517 (citing ATF Ruling 2006-2, at 2). ATF then concluded that bump stocks do not meet the statute's objective criteria for "machineguns" no less than ten times between 2008 to 2017. *Id.* at 66,517. There was no ambiguity in the statute then. There is none now.

But in the Final Rule, ATF moved the goalposts and reversed its consistent interpretation of machine gun. ATF now declares bump stocks to be machine guns by claiming bump stocks "produce[] more than

one shot … after a single pull of the trigger, so long as the trigger finger remains stationary on the device's ledge." *Id.* at 66,519. There is an insurmountable problem with ATF's statement: by ATF's own admission—in the same paragraph—"the trigger resets" after each round is discharged. *Id.* "Shooters use bump-stock-type devices *with semiautomatic* firearms to accelerate the firearms' cyclic firing rate to *mimic automatic fire*." *Id.* at 66,516 (emphasis added). Mimicking automatic fire does not constitute automatic fire under the statute. *Aposhian En Banc*, 989 F.3d at 895 (Tymkovich, J. dissenting) (Pet. App. 89a) ("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.").

This bears repeating: the trigger on a bump stock "must be released, reset, and pulled again," by the shooter's finger, every time an additional round is discharged. *Gun Owners of Am.*, 992 F.3d at 471; *Aposhian Panel*, 958 F.3d at 993, 995 (Carson, J., dissenting) (Pet. App. 42a, 46a) ("The rifle cannot fire a second round until both the trigger and hammer reset."). The Government conceded this point during the en banc oral argument below. *Aposhian En Banc*, 989 F.3d at 896 (Tymkovich, J. dissenting) (Pet. App. 90a); *see also Fowler v. State of R.I.*, 345 U.S. 67, 69 (1953) (A broad factual concession can be "fatal" to a party's case.). This means that bump-stock equipped firearms remain semiautomatic. *Staples*, 511 U.S. 602 n.1.

"A bump stock may change *how* the pull of the trigger is accomplished" but does not change the fact that the firearm "shoots only one shot for each pull of the trigger." *Gun Owners of Am.*, 992 F.3d at 471 (citing *Guedes*, 920 F.3d at 48 (Henderson, J., concurring

in part and dissenting in part) (emphasis in original); *Aposhian Panel*, 958 F.3d at 993, 996 (Carson, J., dissenting) (Pet. App. 48a) ("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.") (emphasis in original). Had Congress chosen to define machine guns by the particular motion of the shooter's trigger finger or the rate of fire, then those factors would be relevant. *See Staples*, 511 U.S. at 604 ("'[T]he definition of the elements of a criminal offense is entrusted to the legislature, particularly in the cases of federal crimes, which are solely creatures of statute.'") (citation omitted). But Congress clearly and unequivocally did not. *Aposhian En Banc*, 989 F.3d at 895 (Tymkovich, J. dissenting) (Pet. App. 88a). ATF did not define machine gun by the "shooter's finger or a volitional action" either. *Guedes*, 920 F.3d at 43 (Henderson, J., concurring in part and dissenting in part). ATF nevertheless looked to those factors to determine that bump stocks are machine guns. *See, e.g.*, 83 Fed. Reg. at 66,519. By doing so, ATF went off target, and the Final Rule is arbitrary and capricious. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).[4]

[4] ATFs responses to public comments received further illustrate the Final Rule's arbitrariness. For example, a firearm with a binary trigger will discharge one round when the trigger is pulled and a second round when the trigger is released. But ATF concluded "[e]ven if this release results in a second shot being fired, it is as the result of a separate function of the trigger." 83 Fed. Reg. at 66,534. But according to ATF—in the same paragraph—a bump stock that requires the trigger to be pulled, released, and reset before each round is discharged is done by a single "function" of the trigger and is a machine gun. *Id.*

II. THE RULE OF LENITY RESOLVES ANY AMBIGUITY IN LIEU OF *CHEVRON* DEFERENCE

If there is any ambiguity in § 5845(b), the bigger and more important question for the Court would be how to resolve it: in favor of a criminal defendant under the rule of lenity, *United States v. Santos*, 553 U.S. 507, 514 (2008), or deferring to the government's reasonable interpretation under *Chevron*, 467 U.S. at 843. The Court cannot apply both. As Chief Justice Roberts recently explained, these two doctrines cannot "coexist" because "[t]hey each point in the opposite direction based on the same predicate." Transcript of Oral Argument at 12, *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562 (2017) (No. 16-54).[5] Fortunately, *Chevron's* structure and this Court's precedent lead to one conclusion: the rule of lenity applies.

1. If *Chevron* applies at all, then, at a minimum, the Court must apply the traditional tools of statutory construction at step one. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1630 (2018) (citing *Chevron* 467 U.S. at 843 n.9). This includes the rule of lenity, which is as traditional as it gets. *See, e.g., United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820) (describing the rule of lenity as an "ancient maxim"). And once the rule of lenity is applied, all ambiguity gets resolved, and "'*Chevron* leaves the stage.'" *Epic Sys. Corp.*, 138 S. Ct. at 1630 (quoting *Natl. Lab. Rel. Bd.*

[5] The *Esquivel-Quintana* Court did not "resolve whether the rule of lenity or *Chevron*" applies because it held that the statute "unambiguously forecloses the [government's] interpretation." 137 S. Ct. at 1572.

v. Alt. Ent., Inc., 858 F.3d 393, 417 (6th Cir. 2017) (Opinion of Sutton, J.)).

This Court has constantly applied the rule of lenity in lieu of deferring to an agency's preferred interpretation of a statute, both before and after *Chevron*. *Negusie v. Holder*, 555 U.S. 511, 518 (2009) ("[T]he rule of lenity … may be persuasive in determining whether a particular agency interpretation is reasonable."); *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 985 (2005); *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004) ("Although here we deal with § 16 in the deportation context, § 16 is a criminal statute…. Because we must interpret the statute consistently, … the rule of lenity applies."); *United States v. Thompson/Ctr. Arms Co.*, 504 U.S. 505, 517–18 (1992) (plurality) (applying the rule of lenity in a civil case to determine that a device had "not been 'made' into a short-barreled rifle" under the National Firearms Act); *McNally v. United States*, 483 U.S. 350, 360 (1987) (declining to "construe the [mail fraud] statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards"); *Fed. Commc'ns Comm'n v. Am. Broad. Co.,* 347 U.S. 284, 296 (1954) (rejecting the FCC's preferred interpretation of the law because it would apply in criminal cases and "do violence to the well-established principle that penal statutes are to be construed strictly"). There is no reason to disregard that long line of consistent precedent here.

Applying the rule of lenity is also on par with how the Court applies other substantive canons of construction in lieu of *Chevron*. The Court applied the federalism canon to resolve ambiguity in the term

"chemical weapon" under the International Convention on Chemical Weapons and held that the term did not encompass a wife's attempt to injure her husband's lover with commonly used chemicals. *Bond v. United States*, 572 U.S. 844, 859–60 (2014); *see also Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 172–73 (2001) (applying the federalism canon and rejecting the agency's position that ponds formed in abandoned sand and gravel pits were "waters of the United States" under the Clean Water Act). This Court has also used the constitutional avoidance canon to reject an agency interpretation of the Voting Rights Act that "compel[ed] race-based districting." *Miller v. Johnson*, 515 U.S. 900, 923 (1995); *see also Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 574–75 (1988). In *I.N.S. v. St. Cyr*, the Court rejected the Board of Immigration Appeals' preferred interpretation of the Illegal Immigration Reform and Immigrant Responsibility Act because it would have violated the presumption against retroactive application. 533 U.S. 289, 320 n.45 (2001) (abrogated by statute). And more recently, the Court rejected the National Labor Relations Board's preferred interpretation of the National Labor Relations Act because it would have nullified the Federal Arbitration Act and violated the "canon against reading conflicts into statutes." *Epic Sys. Corp.*, 138 S. Ct. at 1630. Applying the rule of lenity here is entirely consistent with these precedents, too.

If there was any remaining doubt about *Chevron's* application to criminal laws, the "major question" doctrine resolves it. Courts do not defer to agencies on important political and economic questions because

Congress is likely to have answered those questions itself. *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–60 (2000). As this Court explained, "[i]t is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion—and even more unlikely that it would achieve that through such a subtle device." *MCI Telecommunications Corp. v. Am. Tel. & Tel. Co.,* 512 U.S. 218, 231 (1994). Likewise, because criminal statutes "entail stigma and penalties and prison," this Court requires Congress to use "language that is clear and definite." *United States v. Universal C. I. T. Credit Corp.,* 344 U.S. 218, 221–22 (1952). The Court therefore rejects the "harsher" reading of the statute because it does "not derive criminal outlawry from some ambiguous implication." *Id.* at 222. Moreover, the *Brown & Williamson Tobacco Corp.* Court found that the country's long and unique political history with tobacco made it "highly unlikely" that Congress would have ambiguously granted the FDA authority to regulate cigarettes through a strained reading of the word "safety." 529 U.S. at 159–60. The country also has a long and unique political history with firearms, which—unlike cigarettes—are safeguarded by an enumerated, fundamental constitutional right. It is just as, if not more, unlikely that Congress would have subtly granted ATF the authority to regulate any firearm under a strained and shifting reading of a statutorily defined term.

Chevron's structure and the weight of the Court's precedent lead to one conclusion: courts do not defer to agency interpretations of criminal statutes.

2. It is true that in *Babbitt v. Sweet Home Chapter of Communities for a Great Ore.,* the Court said 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." 515 U.S. 687, 704 n.18 (1995). But *Babbitt* contradicts all of the above-mentioned cases (and *Abramski*), many of which were subsequently decided. *Babbitt* has also been criticized by members of the Court, which further limits its persuasiveness. *Whitman v. United States*, 574 U.S. 1003, 135 S. Ct. 352, 353–54 (2014) (mem.) (Statement of Scalia, J.,); *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 140 S. Ct. 789, 790 (2020) (Statement of Gorsuch, J.,) ("*Chevron* … has no role to play when liberty is at stake.").

But there is another material distinction between *Babbitt* and this case. The statutory scheme at issue in *Babbitt*, the Endangered Species Act ("ESA") 16 U.S.C. §§ 1531-44, is primarily regulatory. Its purpose is to conserve species to the point where they no longer need the ESA's protections. *Id*. §§ 1531(b), 1532(3). Indeed, the ESA is codified under Title 16, the subject of which is Conservation. And while imposing misdemeanor criminal liabilities for unlawfully taking, possessing, importing, exporting, or selling an *endangered species* is one tool for conserving species under the ESA, *id*. §§ 1538(a), 1540(b),[6] the other non-

[6] These prohibitions only apply to species that are listed as "endangered" under the ESA. For "threatened" species, Congress authorized the Secretary to issue regulations that "he deems necessary and advisable" for the conservation of the species. *Id*. § 1533(d). The ESA imposes the same misdemeanor penalties for

criminal regulatory tools paint a far broader picture. Moreover, the ESA's prohibited criminal acts are not absolute. The statute gives the Secretaries of Interior and Commerce discretionary authority to permit an otherwise unlawful act, including taking a species, if certain conditions, including "for scientific purposes," are met. *Id.* § 1539(a). There are also economic hardship exceptions and subsistence exceptions for Alaskan natives. *Id.* §§ 1539(b), (e).

More importantly, the majority of the provisions in the ESA do not restrict the general public at all. The ESA directs the Secretaries of Interior and Commerce to determine if a species is "endangered" or "threatened" by consulting the best available scientific and commercial data and to list the species accordingly. *Id.* §§ 1533(a)-(c). The ESA requires those Secretaries to develop "recovery plans" for each listed species and present the plans to Congress. *Id.* § 1533(f). The ESA directs those Secretaries to develop conservation programs with the Secretary of Agriculture, including purchasing lands to carry out the conservation efforts. *Id.* § 1534(a). The ESA mandates that those Secretaries cooperate with states when conserving species, which includes entering into joint wildlife management agreements with and allocating funds to the state wildlife-management agencies. *Id.* § 1535. The ESA requires other federal agencies to consult with the Secretaries to "insure" that their actions do not "jeopardize the continued existence of" any listed species. *Id.* § 1536(a)(2). The ESA allows the Secretaries to lend conservation assistance to foreign

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violating any of those regulations. *Id.* §§ 1538(a)(1)(G), 1540(b)(1).

nations, which includes acquiring lands and waters in those nations. *Id.* § 1537(a). And finally, the ESA is the statute through which Congress executed the Convention on International Trade in Endangered Species of Wild Fauna and Flora. *Id.* § 1537a. There is no doubt that the ESA is overwhelmingly regulatory in nature with a focus on science-based wildlife conservation, which is where *Chevron* is most appropriately applied. *See, e.g.*, *Baltimore Gas and Elec. Co. v. Nat. Resources Def. Council, Inc.*, 462 U.S. 87, 103 (1983) (Courts are to be "most deferential" when agencies are operating in their "area of special expertise, at the frontiers of science.") (citing *Indus. Union Dep't v. Am. Petroleum Inst.*, 448 U.S. 607, 656 (1980) (plurality opinion)).

In contrast, 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), is primarily criminal in nature. It is codified under Title 18 of the United States Code, which regulates Crimes and Criminal Procedure. This Court has repeatedly noted that "Congress's principal purpose in enacting the statute [was] to *curb crime* by keeping firearms out of the hands of those not legally entitled to possess them." *Abramski*, 573 U.S. at 181 (quoting *Huddleston v. United States*, 415 U.S. 814, 824 (1974) (emphasis added) (internal quotation marks omitted)). There are only two circumstances under which a machine gun may be lawfully possessed: if the machine gun is possessed under the authority of a government agency or if it was possessed before May 19, 1986, when the statute took effect. 18 U.S.C. § 922(o)(2). Thus, unlike the ESA, which authorizes certain exemptions for its prohibited criminal

acts, 16 U.S.C. § 1539, "'private ownership of machine guns' is 'effectively banned' by the GCA." *Aposhian En Banc*, 989 F.3d at 895 (Tymkovich, J. dissenting) (Pet. App. 108a) (quoting *Guedes*, 920 F.3d at 36 (Henderson, J., concurring in part and dissenting in part). Moreover, unlawful possession of a machine gun is "a felony punishable by up to *ten years of imprisonment*." *Id.* (citing 18 U.S.C. § 924(a)(2)) (emphasis in original). Unlike the ESA, the GCA's criminal consequences are "enormous" when compared to the "limited" scope of its civil regulatory regime for pre-1986 machine guns. *Id.*; *see also, e.g.*, 26 U.S.C. § 5811(a) (imposing a $200 transfer tax on machine guns); *id.* § 5821(a) (imposing a $200 tax on manufacturing machine guns). And because the GCA is overwhelmingly criminal, ATF's position is "not relevant at all." *Abramski*, 573 U.S. at 191.

III. THE POLICIES BEHIND THE RULE OF LENITY ARE FURTHERED WHEN APPLIED HERE WHILE THE POLICIES BEHIND *CHEVRON* ARE DUBIOUS.

This Court has also looked to the purposes behind the rule of lenity to determine if it supplants the government's preferred interpretation of a statute. *See, e.g.*, *United States v. Kozminski*, 487 U.S. 931, 952 (1988). Those purposes are "to promote fair notice to those subject to the criminal laws, to minimize the risk of selective or arbitrary enforcement, and to maintain the proper balance between Congress, prosecutors, and courts." *Id.* Each of these purposes is further served by applying the rule of lenity here.

1. The first purpose behind the rule of lenity is to "ensure[] that criminal statutes will provide fair warning concerning conduct rendered illegal." *Liparota v. United States*, 471 U.S. 419, 427 (1985). Although this is "required," it has been referred to as a "fiction" because it is unlikely that a criminal will consult the United States Code before acting. *United States v. R.L.C.*, 503 U.S. 291, 309 (1992) (Scalia, J., concurring) (citation omitted). But that "necessary fiction descends to needless farce when the public is charged even with knowledge of Committee Reports" and other legislative history. *Id.* If it were possible to descend any lower, assuming that the public consults the Federal Register or the Code of Federal Regulations before acting does just that.

2. The second purpose behind the rule of lenity is to prevent "arbitrary or discriminatory prosecution and conviction." *Kozminski*, 487 U.S. at 949. Arbitrary enforcement is the inherent result of "delegat[ing] to prosecutors and juries the inherently legislative task of determining what type of coercive activities are so morally reprehensible that they should be punished as crimes." *Id.* Again, ATF determined that bump stocks were not machine guns no fewer than ten times between 2008 to 2017. 83 Fed. Reg. at 66,517. Now ATF has reversed itself.[7] And there is nothing stopping ATF from reversing itself again if it so chooses. No agency should have that power. That is why "criminal laws are for courts, not for the Government, to construe." *Abramski*, 573 U.S. at 191.

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[7] Even if ATF was due any deference here, that deference gets reduced "'considerably'" because ATF flipped its position. *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993) (quoting *I.N.S. v. Cardoza–Fonseca,* 480 U.S. 421, 446, n.30 (1987).

3. Lastly, applying the rule of lenity preserves the separation of powers. *Chevron* is founded on the premise that Congress delegates authority to the executive branch through ambiguities or gaps in statutes. *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001). But the power to create crimes lies exclusively with Congress. *Liparota*, 471 U.S. at 424 (quoting *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 33 (1812); *see also id.* at 427 ("'[C]riminal punishment usually represents the moral condemnation of the community,'" which the legislature is best equipped to do.) (citation omitted). As Chief Justice Marshall rightly wrote almost two centuries ago, Congress cannot "delegate … powers which are strictly and exclusively legislative," *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42–43 (1825), and Congress definitely cannot do this "casually" through an ambiguous grant of authority, *Solid Waste Agency of N. Cook Cty.*, 531 U.S. at 172–73.[8]

This Court has twice struck "delegation[s] of a power to make federal crimes of acts that never had been such before." *Fahey v. Mallonee*, 332 U.S. 245, 249 (1947) (citing *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935) and *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935)). The Final Rule is

[8] There is also a political-accountability problem with applying *Chevron* in this case. Because Congress delegates its legislative authority to the executive branch through ambiguities or gaps, "'the executive branch should have to take ownership of [its] policy choices so that the voters know whom to blame (and to credit')" for those choices. *Epic Sys. Corp.*, 138 S. Ct. at 1630 (citation omitted). But ATF has not invoked *Chevron* in any of the challenges to the Final Rule. Granting ATF *Chevron* deference therefore gives ATF the benefits of the doctrine without any accountability.

no different: "If allowing the President to draft a 'cod[e] of fair competition' for slaughterhouses was 'delegation running riot,' then it's hard to see how giving the nation's chief prosecutor the power to write a criminal code rife with his own policy choices might be permissible." *Gundy v. United States*, 139 S. Ct. 2116, 2144 (2019) (Gorsuch, J., dissenting) (quoting *Schechter Poultry*, 295 U.S. at 552–553 (Cardozo, J., concurring)). The justifications for preserving the separation of powers are at their pinnacle in the criminal arena. The rule of lenity furthers these justifications. *Chevron* does not.

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Because the competing doctrines of lenity and *Chevron* cannot coexist in this case, the Court should resolve the disaccord amongst the lower courts by applying the rule of lenity, which furthers the legitimate policy interests, and forego *Chevron* deference.

CONCLUSION

For the foregoing reasons, petition for writ of certiorari should be granted.

Respectfully submitted,

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