No. 21-1215

IN THE
Supreme Court of the United States

GUN OWNERS OF AMERICA, INC.; GUN OWNERS FOUNDATION; VIRGINIA CITIZENS DEFENSE LEAGUE; MATT WATKINS; TIM HARMSEN; and RACHEL MALONE,
Petitioners,
v.

MERRICK B. GARLAND, in his official capacity as Attorney General of the United States; U.S. DEPARTMENT OF JUSTICE; BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES; and MARVIN G. RICHARDSON, in his official capacity as 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 Sixth Circuit

BRIEF *AMICUS CURIAE* OF THE NEW CIVIL LIBERTIES ALLIANCE IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether the definition of "machinegun" found in 26 U.S.C. § 5845(b) is clear and unambiguous, and whether bump stocks meet that definition.

2. Whether the Bureau of Alcohol, Tobacco, Firearms and Explosive's interpretation of a criminal statute is entitled to deference under the framework set out in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), thereby displacing the rule of lenity.

3. Whether courts should give deference to an agency's interpretation of a federal statute when the government expressly waives *Chevron*.

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INTERESTS OF *AMICUS CURIAE*

The New Civil Liberties Alliance (NCLA) is a non-partisan, nonprofit civil-rights organization devoted to defending constitutional freedoms from violations by the administrative state.[1] The "civil liberties" of the organization's name include rights at least as old as the U.S. Constitution itself, such as jury trial, due process of law, the right to be tried in front of an impartial and independent judge, and the right to live under laws made by the nation's elected lawmakers through constitutionally prescribed channels. Yet these self-same rights are also very contemporary—and in dire need of renewed vindication—precisely because Congress, administrative agencies, and even sometimes the courts have neglected them for so long.

NCLA aims to defend civil liberties—primarily by asserting constitutional constraints on the administrative state. Although Americans still enjoy the shell of their Republic, there has developed within it a very different sort of government—a type, in fact, that the Constitution was designed to prevent. This unconstitutional administrative state within the Constitution's United States is the focus of NCLA's concern.

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[1] Pursuant to Supreme Court Rule 37.6, NCLA states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than NCLA and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. More than ten days before filing this brief, NCLA notified counsel for the parties of its intent to file. All parties have consented to the filing.

NCLA represents plaintiffs in two separate legal proceedings that challenge the ATF statutory interpretation at issue here. *See Aposhian v. Barr*, 958 F.3d 969 (10th Cir. 2020), *cert. petition filed*, No. 21-159 (Aug. 2, 2021); *Cargill v. Garland*, 20 F.4th 1004 (5th Cir. 2021), *petition for rehearing en banc filed* (5th Cir., Jan. 28, 2022).

NCLA is particularly disturbed by the decision of the lower courts in this case to defer to ATF's interpretation of 26 U.S.C. § 5845(b), a statute that almost always arises in a criminal-law context. Such deference is unwarranted whenever either: (1) courts are interpreting a criminal statute; or (2) the federal government disclaims the applicability of deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Both of those circumstances apply here. If 26 U.S.C. § 5845(b) is construed without placing a thumb on ATF's side of the scale, the statutory language supports Petitioners' construction.

STATEMENT OF THE CASE

Petitioners are challenging a 2018 ATF regulation that construes the meaning of "machinegun," as used in federal criminal statutes. The statutory definition, unchanged since 1986, 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). Also included within the definition is "any part designed and intended solely and exclusively ... for use in converting a weapon into

a machinegun." *Ibid.* At issue is whether a non-mechanical bump stock, a device that can be attached to a semi-automatic weapon to assist with rapid firing, meets that statutory definition.

Between 2008 and 2017, ATF took the position that a non-mechanical bump stock is *not* a "machinegun." ATF reversed course in December 2018, concluding via formal regulation (the "Final Rule") that non-mechanical bump stocks should be reclassified as machineguns. Petitioners challenged the Final Rule in district court, alleging (among other things) that ATF's expanded definition of "machinegun" is inconsistent with § 5845(b).

The district court denied Petitioners' motion for a preliminary injunction in March 2019. App.173a-193a. While noting that ATF "concede[d] that [Petitioners] will suffer irreparable harm without an injunction," the court concluded that Petitioners "ha[d] not demonstrated a likelihood of success on the merits" of their challenge to the Final Rule. App.192a.

The court held, "Congress has not directly addressed the precise question at issue. Congress has not indicated whether bump stocks are included in the statutory definition of machine gun." App.186. It said that "[w]hen applied to bump stocks," the definition is "ambiguous with respect to the word 'automatically,'" App.186a, and "with respect to the phrase 'single function of the trigger.'" App.188a.

The court concluded that it should "follow the *Chevron* framework" because "Congress has delegated authority to administer and enforce" § 5845(b),

"including the authority to prescribe necessary rules and regulations," to the Attorney General and his designee, ATF. App.184a. The court held that ATF's construction of § 5845(b) "is a permissible interpretation." App.187a, 189a. It further held that ATF's permissible interpretation is entitled to *Chevron* deference, App.189a—notwithstanding that ATF "explicitly" told the court that it did not "contend that this Court should apply *Chevron* deference to the final rule." App.183a. The decision did not discuss § 5845(b)'s criminal-law applications or whether the *Chevron* framework should apply to criminal statutes.

A three-judge Sixth Circuit panel reversed. App.76a-173a. It concluded that ATF's interpretation of § 5845(b) was not entitled to *Chevron* deference because "the definition of machine gun in § 5845(b) applies to a machine-gun ban carrying criminal culpability and penalties" and "*Chevron* deference categorically does not apply to the judicial interpretation of statutes that criminalize conduct." App.88a. Construing the statute using ordinary tools of statutory construction, the panel held that a bump stock does not fall within the statutory definition of a "machinegun" because "a bump stock does not cause a firearm to fire more than one shot by a single function of the trigger." App.129a.

The Sixth Circuit later agreed to rehear the case en banc and vacated the panel decision. But the appeals court ultimately split 8-8 and was unable to issue a majority opinion. The result was affirmance of the district court's judgment by an equally divided vote. App.4a.

Eight of the 16 judges joined an opinion by Judge Murphy, concluding that: (1) *Chevron* deference is inapplicable because the statutes contain no "clear indication" that Congress transferred authority to construe a criminal law from the courts to the Attorney General, App.64a; and (2) the statutory "machinegun" definition "unambiguously excludes bump stocks." App.70a.

Judge White, writing for herself and four other judges in support of affirmance, disagreed on both points. App.4a-33a. She argued that *Chevron* applies because: (1) Congress "implicitly" delegated rulemaking authority to the Attorney General and ATF, App.11a; (2) "*Chevron* does not fall away simply because a challenged legislative rule has some criminal applications," App.12a-13a; and (3) ATF's disclaimer of a right to *Chevron* deference is irrelevant because "whether to apply *Chevron* is a question for the courts to decide, not an agency's lawyer." App.10a n.6. She would have afforded *Chevron* deference to ATF's interpretation because "§ 5845(b) is ambiguous and ATF's interpretation of it is permissible and reasonable." App.29a. Judge White acknowledged that there is an "implied tension between" this Court's precedents on the application of *Chevron* to statutes with criminal law applications, but she argued this tension was for "the Supreme Court to resolve, not [the Sixth Circuit]." App.13a n.7. Alternatively, she would have held that "ignoring all deference, ATF's interpretation is the best one." App.31a.

Judge Gibbons also wrote an opinion in support of affirmance. She would have held that "*Chevron* application is unnecessary here" because, "using

ordinary tools of statutory interpretation," ATF's interpretation "is unambiguously the best interpretation" of § 5845(b). App.33a. Judges Griffin and Donald voted to affirm, but neither judge authored or joined a signed opinion. Judge Readler was recused.

SUMMARY OF ARGUMENT

NCLA fully agrees with Petitioners that the *Chevron*-related issues decided by courts upholding the Final Rule here and in other cases are exceptionally important. NCLA writes separately to highlight the widespread disagreement among the lower courts over those issues and the confusion engendered by this Court's often conflicting pronouncements on *Chevron* deference. The inability of the court below to issue *any* opinion as to the meaning of § 5845(b) has added considerably to that confusion. This Court's intervention is necessary to eliminate that confusion.

The district court, whose judgment was affirmed by an equally divided Sixth Circuit, held that ATF's construction of § 5845(b) was entitled to *Chevron* deference without pausing to consider that virtually all of the statute's applications are criminal in nature. That holding directly conflicts with decisions from the Second and Ninth Circuits, which have held that federal agencies' interpretations of criminal statutes are *not* entitled to deference from the courts. *United States v. Balde*, 943 F.3d 73, 83 (2d Cir. 2019); *United States v. Kuzma*, 967 F.3d 959, 971 (9th Cir. 2020).

The district court deferred to ATF's construction of § 5845(b) despite ATF's repeated insistence that it was not invoking *Chevron* deference and that, indeed,

its construction was not entitled to deference. App.183a. That holding is inconsistent with this Court's case law and directly conflicts with a decision from a federal appeals court, the U.S. Navy-Marine Corps Court of Criminal Appeals. That court held that "the Government may waive reliance on *Chevron*"—and then applied ordinary rules of statutory construction to conclude that a non-mechanical bump stock is not a "machinegun" within the meaning of § 5845(b). *United States v. Alkazahg*, 81 M.J. 764, 778, 784 (U.S. Navy-Marine Corps Ct. Crim. App. 2021).

Review is also warranted because of the Final Rule's significant negative impact on hundreds of thousands of law-abiding citizens. ATF estimates that Americans purchased 520,000 bump stocks during the decades when ATF said they were legal. The Final Rule required owners to either surrender or destroy their devices, under threat of criminal prosecution if they did not do so. Review is warranted to determine whether Congress really intended that owners who relied on ATF assurances should incur substantial losses. And without review by this Court, residents of the four States within the Sixth Circuit are left without *any* guidance regarding whether they could face lengthy prison sentences if they do not abide by ATF's latest interpretation of § 5845(b).

Moreover, there is reason to doubt the accuracy of that interpretation: a significant majority of the appeals court judges who have construed § 5845(b) without placing a *Chevron* thumb on the scale have concluded that the statute does *not* include bump stocks within the definition of "machineguns." Indeed, NCLA submits that the statute's language makes clear

§ 5845(b)'s inapplicability to semi-automatic rifles equipped with non-mechanical bump stocks. It is uncontested that if the shooter of such a weapon pulls the trigger once and does nothing more, it will fire only one bullet. Something more than a "single function of the trigger" is required to effectuate repeat firing—and that "something more" is a shooter using his non-trigger hand to apply constant forward pressure on the rifle. And if the initiation of a "single function of the trigger" is insufficient *by itself* to cause repeat firing, then that single function cannot plausibly be described as causing the weapon to fire "automatically." Review is warranted to correct the lower court's error regarding a statute whose meaning continues to be litigated frequently.

REASONS FOR GRANTING THE PETITION

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

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

Although § 5845(b)'s definition of "machinegun" can apply in several contexts, the statutory scheme is overwhelmingly criminal in nature. As Tenth Circuit Judge Eid has explained:

> [T]he definition of "machinegun" ... has an enormous criminal impact. By contrast, the civil scope of the statutory regime is quite limited. ... Only "machineguns" that fall within [two] narrow exceptions are subject to civil consequences, and even then, the civil consequences are limited—the chief consequence is a registration requirement. 26 U.S.C. §§ 5841, 5845(a), (b).

Aposhian v. Wilkinson, 989 F.3d 890, 905 (10th Cir. 2021) (Eid, J., dissenting from decision to vacate *en banc* order).

Petitioners argued in both the district court and the Sixth Circuit that *Chevron* deference has no role to play in construing § 5845(b) because it is a criminal statute. The district court nonetheless applied *Chevron* deference to ATF's construction of the statute, stating categorically that a federal agency's construction of a federal statute is entitled to deference from the courts provided only that Congress has delegated rulemaking authority to the agency and the agency promulgates its interpretation by means of formal rulemaking. App. 184a. The court did not discuss § 5845(b)'s status as a criminal statute.

That holding is in accord with decisions from the Tenth and D.C. Circuits but conflicts with decisions from the Second and Ninth Circuits. Review is warranted to resolve the conflict.

In *Guedes v. ATF*, 920 F.3d 1 (D.C. Cir. 2019), a divided D.C. Circuit panel rejected a challenge to the

Final Rule, holding that ATF's construction of § 5845(b) was "permissible" under the *Chevron* framework. 920 F.3d at 24-29, 32. In so doing, the court found "no general rule against applying *Chevron* to agency interpretations of statutes that have criminal-law applications." *Id.* at 24. In *Aposhian v. Barr*, 958 F.3d 969 (10th Cir. 2020), a divided Tenth Circuit followed the D.C. Circuit's reasoning and its own circuit precedent in deferring to ATF's construction of § 5845(b). 958 F.3d at 984 (noting that "this court has repeatedly given agency interpretations with criminal law implications deference").[2]

In contrast, the Second and Ninth Circuits have categorically rejected claims that they should defer to federal agency interpretations of criminal statutes. 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 articulated three alternative bases for its holding that deference was unwarranted, including that "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 stated unequivocally, "Whether the Government interprets a criminal statute too broadly (as it sometimes does) or too narrowly ..., a court has an

[2] NCLA's client, W. Clark Aposhian, has filed a petition seeking this Court's review of the Tenth Circuit decision. *Aposhian v. Garland*, No. 21-159 (filed Aug. 4, 2021).

obligation to correct the error." *Ibid.* (quoting *Abramski v. United States*, 573 U.S. 169, 191 (2014)).

Similarly, 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. *United States v. Kuzma*, 967 F.3d 959 (9th Cir. 2020). Although the ATF interpretation at issue was an informal guidance, not a formal regulation, the Ninth Circuit's unequivocal language indicates that its ruling would have been the same even if ATF had construed the statute through a formal regulation. *Ibid.* Indeed, the court stated that ATF lacked authority to issue formal regulations interpreting § 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."

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

The appeals courts are thus in deep conflict regarding *Chevron*'s applicability to the interpretation of criminal statutes. The Court should resolve this crucial and abiding conflict. Both this Petition and No. 21-159 are appropriate vehicles for addressing the issue. In this case, the district court's opinion did not directly address the issue, and the Sixth Circuit was unable to issue a controlling opinion because it was equally divided. But the issue was considered at length in the lower courts; it was fully briefed by all parties at both the district court and the Sixth Circuit; and 14 of the 16 *en banc* judges either authored or joined opinions expressing views on the issue (with eight judges opining that *Chevron* has no role to play in construing criminal statutes and six judges expressing the opposite position).

B. The Circuit Split Is a Direct Result of this Court's Mixed Signals on *Chevron* Deference

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 and several judges on the Sixth Circuit (*see* App. 12a-15a (White, J., writing in support of affirming the district court judgment))) rely on a footnote in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S.

687 (1995). 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, the Court more recently has held categorically that "criminal laws are for courts, not for the Government to construe." *Abramski*, 573 U.S. at 191; *see United States v. Apel*, 571 U.S. 359, 369 (2014) ("we have never held that the Government's reading of a criminal statute is entitled to any deference"). 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; *Aposhian*, 958 F.3d at 984. 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 constructions of a criminal statute have "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 clarified that law enforcement agency interpretations of criminal statutes are not entitled to deference"); App.59a (Murphy, J., dissenting) (quoting *Abramski*'s assertion, 573 U.S. at 191, that "criminal laws are for the courts, not for the Government, to construe").

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). Even the Sixth Circuit judges who voted to affirm the district court judgment implicitly acknowledged the need for guidance from this Court. Judge White's opinion on behalf of herself and four other judges recognized the "implied tension" between *Babbitt* and *Abramski*/*Apel*. App.13a n.7. Rather than seeking a means of resolving that tension, she passed the buck to this Court. *Ibid*. (stating that "this [tension] is for the Supreme Court to resolve, not us"). The Court should accept that invitation.

C. The Decision Below 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 v. ATF*, 140 S. Ct. 789, 790 (2020) ("*Guedes II*") (Gorsuch, J., statement regarding 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.

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," App.103a (citing *Gregg v. Georgia*, 428 U.S. 153, 175 (1976)), not technical knowledge.

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 trials, with their liberty at stake, where the prosecutor, in effect, also serves as the judge.

II. GRANTING *CHEVRON* DEFERENCE DESPITE ATF'S WAIVER CONFLICTS WITH DECISIONS OF THIS COURT AND IS INCONSISTENT WITH *CHEVRON*'S RATIONALE

ATF has told each of the five federal appeals courts that has reviewed an APA challenge to the Final Rule that its construction of § 5845(b) is *not* entitled to *Chevron* deference. The district court below acknowledged that "Defendants have explicitly stated that they do not contend that this Court should apply *Chevron* deference to the Final Rule." App.183a.[3] In the district court and the Sixth Circuit, ATF defended its construction of § 5845(b) solely on the ground that it represents the best reading of the statute.

The district court nonetheless rejected ATF's attempted waiver, applied *Chevron* deference, and upheld ATF's construction of § 5845(b) on that basis—concluding that the Final Rule is "a permissible interpretation of the statute." App.184a, 186a, 188a.[4] The court's application of *Chevron* deference despite ATF's waiver of any claim to deference directly conflicts with at least one other federal appeals court

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[3] In its defense of the Final Rule in the D.C. Circuit, ATF 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 II*, 140 S. Ct. at 789 (Gorsuch, J., statement regarding denial of certiorari).

[4] The D.C. and Tenth Circuits adopted substantially similar approaches—they rejected ATF's attempt to waive *Chevron* and upheld the Final Rule under the *Chevron* framework. *Guedes*, 920 F.3d at 17-23; *Aposhian*, 958 F.3d at 979-82.

decision as well as multiple decisions of this Court. Review is warranted to resolve that conflict.

In *Alkazahg,* the U.S. Navy-Marine Corps Court of Criminal Appeals overturned a criminal conviction (of a Marine who possessed a bump stock) for unlawful possession of a machinegun, after determining that the best reading of §5845(b) is that bump stocks are not "machineguns." 81 M.J. at 784. In the course of its opinion, the appeals court considered whether it should apply the *Chevron* framework despite the federal government's disclaimer of *Chevron* deference. Relying on this Court's decision in *HollyFrontier Cheyenne Refining LLP v. Renewable Fuels Ass'n*, 141 S. Ct. 2172, 2180 (2021), the court ruled that it should abide by that disclaimer:

> Following the *HollyFrontier* Court, and the Government's disclaimer of *Chevron* deference in this case, in both its written pleading and at oral argument before us, we hold that the Government may waive reliance on *Chevron*. And despite *HollyFrontier* not being a criminal case, we further find that the Government's waiver of *Chevron* is not affected by whether the waiver comes in a criminal or civil case.

Alkazahg, 81 M.J. at 778. *Alkazahg* is now final within the military justice system; the federal government chose not to seek further appeal.[5]

The decision below is also inconsistent with multiple decisions of this Court. *HollyFrontier* explicitly recognized that a court appropriately declines to apply the *Chevron* framework to an agency's statutory construction when the agency does not request deference, stating that because EPA in the Supreme Court did not seek *Chevron* deference for its interpretation of a disputed statute (as it had done in the appeals court), the Court "therefore decline[s] to consider whether any deference might be due." 141 S. Ct. at 2180. *See also County of Maui v. Hawaii*

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[5] The federal government has suggested elsewhere that *Alkazahg* should not be taken into account when determining whether Supreme Court review is warranted based on the existence of conflicting decisions from appeals courts. That suggestion finds no support in the Court's rules, which indicate that one factor the Court considers in determining whether to grant a certiorari petition is whether "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." Rule 10(a). The U.S. Navy-Marine Corps Court of Criminal Appeals is indisputably "a United States court of appeals," albeit one with a specialized jurisdiction. And the confusion created by the conflict (regarding *Chevron* waiver) between that court and the D.C. and Tenth Circuits (as well as the court below) is at least as great as that created by a conflict between the decisions of two Article III circuit courts. For example, unless this Court steps in, whether a member of the armed forces can be convicted of a felony for possessing a bump stock will depend entirely on whether that individual is charged in a military court or in a federal district court in one of the circuits that has upheld the Final Rule.

Wildlife Fund, 140 S. Ct. 1462, 1474 (2020) (declining to apply *Chevron* deference after noting that "[n]either the Solicitor General nor any party has asked us to give ... *Chevron* deference to EPA's interpretation of the statute"); *Estate of Coward v. Nicklos Drilling Co.*, 505 U.S. 469, 477 (1992) (stating that the Court "need not resolve the difficult issues regarding deference" because the agency requested no deference). The court below refused to accept ATF's waiver of *Chevron* deference; but if, as the Court has repeatedly held, an administering agency can *forfeit* its claim to *Chevron* deference by declining to assert it, then surely the agency can *waive Chevron* by affirmatively disavowing it.

An agency's waiver of *Chevron* deference should be binding on a court reviewing the agency's statutory interpretation. As Justice Gorsuch recently stated: "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 II,* 140 S. Ct. at 790. This is especially true when the agency's decision not to make policy choices is based (as here) on its determination that Congress did not delegate any choices for it to make.

Quite apart from their consideration of the Final Rule, the courts of appeals are in disarray on the question whether *Chevron* deference can be waived by the federal government. *See, e.g.,* James Durling & E. Garrett West, *May* Chevron *Be Waived?*, 71 STAN. L. REV. ONLINE 183, 183 (2019). The waiver issue is

squarely raised both by the Petition and by the petition in No. 21-159. Both are appropriate vehicles for addressing the issue.

III. THE DECISION BELOW MISCONSTRUES THE MACHINEGUN STATUTE AND HAS A SIGNIFICANT NEGATIVE IMPACT ON HUNDREDS OF THOUSANDS OF LAW-ABIDING CITIZENS

Review is also warranted because the Final Rule has a significant negative impact on hundreds of thousands of law-abiding citizens. ATF estimates that Americans purchased 520,000 bump stocks during the decades when ATF said they were legal. The Rule required owners to surrender or destroy their devices; they will recover nothing if the Final Rule stands. ATF admits that the loss of property will exceed $100 million. Final Rule, 83 Fed. Reg. 66,514, 66,515 (Dec. 26, 2018).

Moreover, the Final Rule has branded as criminals everyone who purchased bump stocks based on ATF's assurances. According to ATF's latest decree, federal law has unambiguously prohibited possession of bump stocks since 1986—notwithstanding that until December 2018, ATF was telling Americans that possession of bump stocks was perfectly legal. ATF announced that owners would not be prosecuted if they destroyed or surrendered their bump stocks by March 26, 2019. *Id.* at 66,546. But by announcing that its Final Rule was simply a belated recognition of the proper scope of the machinegun statute, ATF effectively ruled that nonprosecution of pre-2019 bump stock owners is solely a matter of prosecutorial discretion.

Before hundreds of thousands of otherwise law-abiding citizens are permanently branded as criminals, review is warranted to determine which of ATF's conflicting interpretations of § 5845(b)—its current interpretation or its pre-2019 interpretation, under which the definition of "machineguns" did not encompass non-mechanical bump stocks—is correct.

For the reasons explained above, ATF's construction of § 5845(b) is not entitled to *Chevron* deference. But even if the statute were analyzed under the *Chevron* framework, ATF should still lose at *Chevron* Step One: non-mechanical bump stocks unambiguously are *not* "machineguns" within the meaning of § 5845(b). The Court should grant review to correct ATF's erroneous statutory interpretation, one that is adversely affecting so many Americans.

A gun qualifies as a "semi-automatic" weapon (and is not classified as a "machinegun" by ATF) if it will fire only once when the shooter pulls and holds down the trigger; a semi-automatic will fire more than once only if the shooter releases and reengages the trigger between shots. 83 Fed. Reg. at 66,516. But experts can "bump fire" semi-automatic rifles at rates approaching those of automatic weapons. Bump firing is a "technique that any shooter can perform with training or with everyday items such as a rubber band or belt loop." *Id.* at 66,532.[6]

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[6] In the court below, Judge Murphy explained bump firing as follows:

> A shooter who bump fires relies on the recoil energy from the rifle's discharge to push the gun

Long before 2018, manufacturers began selling bump stocks, devices that can be attached to a semi-automatic rifle to assist with bump firing. A bump stock replaces a semi-automatic rifle's standard stock with one that allows the rifle to slide back and forth within the stock. *Id.* at 66,516, 66,518. The bump stock channels the recoil energy from the rifle's discharge in "constrained linear rearward and forward paths." *Id.* at 66,532. "Yet a shooter still must use the non-trigger hand to put forward pressure on the fore-end so that the rifle and trigger move forward after the recoil." App.38a-39a (Murphy, J., dissenting) (citing 83 Fed. Reg. at 66,518).

A semi-automatic rifle operates in precisely the same manner when a bump stock is attached as it does without a bump stock. ATF concedes that one who "bump fires" a semi-automatic rifle not equipped with a bump stock, even if using a belt loop, is not using a

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> slightly backward from the trigger finger, which remains stationary. The rifle's trigger resets as it separates from the trigger finger. The shooter then uses the non-trigger hand placed on the rifle's fore-end to push the gun (and thus the trigger) slightly forward. The trigger "bumps" into the still-stationary trigger finger, discharging a second shot. The recoil energy from each additional shot combined with the shooter's forward pressure with the non-trigger hand allows the rifle's backward-forward cycle to repeat itself rapidly. A shooter may also use a belt loop to bump fire by sticking the trigger finger inside the loop and shooting from the waist level to keep the rifle more stable.

App.38a (Murphy, J., dissenting).

"machinegun." ATF cannot explain why "bump firing" with bump-stock assistance should be treated differently.

The "best reading" of the statute is the one that ATF provided between 2006 and 2018: a non-mechanical bump stock is *not* a "machinegun" because a semi-automatic rifle equipped with a non-mechanical bump stock is not a weapon that "shoots, is designed to shoot, or can readily be restored to shoot, automatically more than one shot ... by a single function of the trigger." It is uncontested that if the shooter of a bump stock-equipped weapon pulls the trigger once and does nothing more, it will fire only one bullet. Something more than a "single function of the trigger" is thus required to effectuate repeat firing—and that "something more" is a shooter using his non-trigger hand to apply constant forward pressure on the rifle. And if the initiation of a "single function of the trigger" is insufficient *by itself* to cause repeat firing, then that single function cannot plausibly be described as causing the weapon to fire "automatically."

One strong indication that the lower court's construction is incorrect is its rejection by a significant majority of federal appellate judges outside the Sixth Circuit who have considered it. Three Fifth Circuit judges concluded that ATF has adopted the best reading of § 5845(b). *Cargill v. Garland*, 20 F.4th 1004 (5th Cir. 2021). Four appeals court judges (two D.C. Circuit panelists in *Guedes* and two Tenth Circuit panelists in *Aposhian*) concluded that § 5845(b) is ambiguous with respect to bump stocks and applied the *Chevron* framework to defer to ATF's interpretation. But *nine* appeals court judges (three

judges on the U.S. Navy-Marine Corps Court of Criminal Appeals who decided *Alkazahg*, the five Tenth Circuit dissenters in *Aposhian*,[7] and Judge Henderson dissenting from *Guedes*) have concluded that bump stocks are unambiguously *not* "machineguns."

CONCLUSION

The Court should grant the Petition.

Respectfully submitted,

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[7] *See Aposhian v. Wilkinson*, 989 F.3d at 890 (Tymkovich, C.J., dissenting).