CASE NO. 20-51016

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MICHAEL CARGILL,
Plaintiff -Appellant,

v.

MERRICK GARLAND, U.S. ATTORNEY GENERAL; UNITED STATES DEPARTMENT OF JUSTICE; REGINA LOMBARDO, IN HER OFFICIAL CAPACITY AS ACTING DIRECTOR OF THE BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES; BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES
Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of Texas, No. 19-349
(Hon. David A. Ezra)

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT ON REHEARING *EN BANC*

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July 29, 2022

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

The Cato Institute is a nonprofit entity operating under § 501(c)(3) of the Internal Revenue Code. *Amicus* is not a subsidiary or affiliate of any publicly owned corporation and does not issue shares of stock. No publicly held corporation has a direct financial interest in the outcome of this litigation due to *amicus*'s participation.

RULE 29 DISCLOSURE STATEMENT

No counsel for either party authored this brief in whole or in part. No person or entity other than *amicus* made a monetary contribution to its preparation or submission.

MOTION FOR LEAVE TO PARTICIPATE AS *AMICUS*

Pursuant to this Court's discretion, the Cato Institute respectfully moves for leave to file an *amicus* brief supporting plaintiff-appellant, Michael Cargill, to assist the Court in its consideration of plaintiff-appellant's claims. All parties were provided with notice of *amicus*'s intent to file as required under Rule 29(2). All parties consented to this filing.

INTEREST OF *AMICUS CURIAE*

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies helps restore the principles of constitutional government that

are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and produces the annual *Cato Supreme Court Review*.

This case concerns *amicus* because it involves an issue of vital importance to individual liberty: the separation of powers. Courts should not defer to the executive branch's reinterpretations of statutes establishing crimes. That is especially true where, as here, the government disclaims any right to deference.

ISSUES TO BE ADDRESSED BY *AMICUS*

1. *Amicus* will focus on why the government's disclaiming of its potential right to *Chevron* deference should be treated as a waiver by this Court.
2. *Amicus* will discuss how the reasons undergirding the party-presentation rule apply to the *Chevron* doctrine just as much as they do to most other legal questions. When *Chevron* applies is rarely clear, and this case is no exception. Elaboration on this reality will assist the Court in determining whether *Chevron* deference is appropriate.
3. *Amicus* will discuss how the government's waiver of *Chevron* deference, along with additional facts, indicates that the agency did not make an actual policy choice based on expertise. This will help the Court determine whether it makes sense to apply *Chevron* deference when the government does not request it.

CONCLUSION

For the reasons stated above, the Cato Institute respectfully requests that the

Court grant this motion to participate as *amicus* in the above-captioned case.

Respectfully submitted,

DATED: July 29, 2022

/s/ Trevor Burrus

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CERTIFICATE OF COMPLIANCE

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2. This motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface, Times New Roman, 14-point font.

/s/ *Trevor Burrus*
July 29, 2022

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court, who will enter it into the CM/ECF system, which will send a notification of such filing to the appropriate counsel.

/s/ *Trevor Burrus*
July 29, 2022

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July 29, 2022

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Case No. 20-51016

Michael Cargill v. Merrick Garland, et al.

The undersigned counsel of record certifies that the following listed persons and entities as described in Local Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Person or Entity	Connection to Case
Trevor Burrus	Counsel to *amicus*
Gregory Mill	Counsel to *amicus*
Cato Institute	*Amicus curiae*

Amicus Cato Institute is a Kansas nonprofit corporation that has no parent companies, subsidiaries, or affiliates, and does not issue shares to the public.

/s/ Trevor Burrus

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INTEREST OF AMICUS CURIAE[1]

Cato was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, issues the annual *Cato Supreme Court Review*, and files *amicus* briefs with the courts.

This case is important to Cato because it involves an issue of vital importance to individual liberty: the separation of powers. The executive branch can no more use the administrative process to accomplish legislative goals that Congress declined to enact than the courts can defer to the executive branch's reinterpretations of statutes establishing new crimes. The implications of this case extend far beyond bump stocks to the very structure of our constitutional government.

[1] Fed. R. App. P. 29 Statement: No counsel for either party authored this brief in any part. No person or entity other than *amicus* made a monetary contribution to its preparation or submission. All parties have consented to the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

For years, Congress, the executive branch, and the people shared a common understanding: "single function of the trigger" and "automatically"—as those terms are used in the National Firearms Act of 1934 (NFA) and Gun Control Act of 1968 (GCA) in the definition of "machinegun"[2]—unambiguously did not include devices like "bump stocks." In response to a tragic mass killing in Las Vegas,[3] however, President Donald Trump announced that his administration would change course. Expressly declining to pursue a legislative solution,[4] he directed his administration to redefine bump-stock devices—a type of firearm accessory thought to have been used by the Las Vegas killer—as automatic weapons.[5] In turn, the U.S. Justice Department—through the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF)— broke from years of precedent and discovered a new power to prohibit that widely held type of firearm accessory. That power does not exist, and this Court should not defer to the government's conclusions.

Amicus believes that the statutory definition of "machinegun" does not give the Justice Department power to prohibit bump-stock devices. But if this Court believes

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[2] 26 U.S.C. § 5845(b).
[3] Bump-Stock-Type Devices, 83 Fed. Reg. 66, 516 (Dec. 26, 2018).
[4] Remarks by President Trump, Vice President Pence, and Bipartisan Members of Congress in Meeting on School and Community Safety (Feb. 28, 2018), https://bit.ly/3cJ5s9n.
[5] 83 Fed. Reg. 66, 516–17 (Dec. 26, 2018).

that the statute is ambiguous, it should still not afford the Justice Department any deference under *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984). The government has waived any right to it.

The reasons undergirding the party-presentation rule apply to the *Chevron* doctrine just as much as they do to most other legal questions. As then-Judge Antonin Scalia once wrote, "[t]he premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them." *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983). This Court should not abandon its general practice now.

Moreover, the Justice Department's rejection of a potential right to *Chevron* deference demonstrates that an essential premise of the doctrine—namely, that an agency made a policy choice based on expertise—may be missing. When a congressional delegation involves agency expertise, then *Chevron* deference might be appropriate because it signals that Congress intended for the agency to assume interpretive primacy. When, however, a court is comparatively expert on the statutory question, then it is the judge's duty to find the best meaning of the statute. Here, the Justice Department's consistent waiver of *Chevron*, the circumstances under which the Bump-Stock Rule was promulgated, the nature of the interpretative issue, and the government's purported basis for the new rule, all indicate that the

Justice Department did not make a policy choice based on expertise that courts do not possess.

In cases like this at least, courts should "afford the parties before [them] an independent judicial interpretation of the law." *Burlington Northern Santa Fe Ry. Co. v. Loos*, 139 S. Ct. 893, 908–09 (2019) (Gorsuch, J., dissenting).

ARGUMENT

The U.S. Supreme Court has suggested that the government can waive[6] the right to *Chevron* deference. *Holly Frontier Cheyenne Ref., LLC v. Renewable Fuels Ass'n*, 141 S. Ct. 2172, 2180 (2021) (stating that, because the government was no longer "invoking *Chevron*," the Court would "decline to consider whether any deference might be due its regulation"); *see also Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 140 S. Ct. 789, 790 (2020) (statement of Gorsuch, J., respecting denial of certiorari) (noting how the Supreme Court "has often declined to apply *Chevron* deference when the government fails to invoke it"). And, at least among courts that have expressly considered the issue, the dominant view among

[6] While the terms "waive" and "forfeit" are formally distinguishable, for purposes of this case, *amicus* believes that the terms are interchangeable and uses the terms more generically. *See Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 894 n.2 (1991) (Scalia, J., concurring in part and concurring in the judgment).

the Federal Courts of Appeals seems to be that parties may waive or concede to the applicability of *Chevron* deference.[7]

[7] In most circuit courts that have addressed the issue, the rule seems to be that parties can waive the right to contest or invoke *Chevron*. *Am. Auto. Mfrs. Ass'n v. Comm'r, Mass. Dep't of Envtl. Prot.*, 31 F.3d 18, 25–26 (1st Cir. 1994); *New York v. U.S. Dep't of Justice*, 951 F.3d 84, 101, 101 n.17 (2d Cir. 2020); *Kikalos v. Comm'r*, 190 F.3d 791, 796 (7th Cir. 1999); *Humane Soc'y of the U.S. v. Locke*, 626 F.3d 1040, 1054 n.8 (9th Cir. 2010); *E. Bay Sanctuary Covenant v. Garland*, 994 F.3d 962, 976 (9th Cir. 2021) (suggesting—arguably in *dicta*—that the court doesn't need to apply *Chevron* when the government doesn't address it); *Hydro Res., Inc. v. EPA*, 608 F.3d 1131, 1146 (10th Cir. 2010) (en banc); *Dutcher v. Matheson*, 840 F.3d 1183, 1203 & n.12 (10th Cir. 2016); *Hays Med. Ctr. v. Azar*, 956 F.3d 1247, 1264 n.18 (10th Cir. 2020); *but see Aposhian v. Barr*, 958 F.3d 969, 981 (10th Cir. 2020), *vacated*, 973 F.3d 1151 (10th Cir. 2020) (en banc), *reinstated*, 989 F.3d 890 (10th Cir. 2021) (en banc) (suggesting that any party mentioning *Chevron* allows the court the *option* to consider whether *Chevron* applies).

In two circuit courts, while they have discussed the issue, the rule is unclear. *Martin v. Soc. Sec. Admin.*, 903 F.3d 1154, 1160–62 (11th Cir. 2018) (expressly avoiding answering whether *Chevron* may be waived); *Commodity Futures Trading Comm'n v. Erskine*, 512 F.3d 309, 314 (6th Cir. 2008) (concluding that the government can waive *Chevron*); *but see Gun Owners of Am. v. Barr*, 19 F.4th 890 (6th Cir. 2021) (en banc) (affirming, by means of an evenly divided *en banc* court, the district court's decision, which had concluded that *Chevron* was not waivable).

The D.C. Circuit has produced a series of back-and-forth decisions that are, at best, difficult to reconcile. The result seems to be that a party challenging an agency's interpretation of a statute can easily forfeit an objection to *Chevron* deference. *Lubow v. U.S. Dep't of State*, 783 F.3d 877, 884 (D.C. Cir. 2015). And while it is possible for an agency to waive deferential review under *Chevron*, *Neustar, Inc. v. FCC*, 857 F.3d 886, 893–94 (D.C. Cir. 2017), it does so only if the agency fails to invoke *Chevron* in its briefing *and* "'review of the relevant agency orders shows no invocation of *Chevron* deference[.]'" *SoundExchange, Inc. v. Copyright Royalty Bd.*, 904 F.3d 41, 54–55 (D.C. Cir. 2018); *see also Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 920 F.3d 1, 21–23 (D.C. Cir. 2019) (concluding that an agency neither forfeits nor waives its right to *Chevron "*unless the underlying agency action fails to 'manifests its engagement in the kind of interpretive exercise to which review under Chevron generally applies'"); *but see*

This Court should likewise not apply *Chevron* deference when the government, as it does here, disclaims any right to it. First, the justifications for the party presentation rule apply to *Chevron* deference. And second, the government's consistent repudiation of its potential right to *Chevron* is evidence that the agency did not make a real policy choice.

I. THE RATIONALE FOR THE PARTY PRESENTATION RULE APPLIES TO *CHEVRON* DEFERENCE

A litigant may ordinarily waive a right or privilege of "any sort." *United States v. Olano*, 507 U.S. 725, 731 (1993) (internal quotation marks omitted). This general rule "is not a mere technicality and is essential to the orderly administration of justice." *Freytag*, 501 U.S. at 894–95 (Scalia, J., concurring in part and concurring in the judgment) (internal quotation marks omitted). It "is designed around the premise that parties represented by competent counsel know what is best for them, and are responsible for advancing the facts and argument entitling them to relief." *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020) (cleaned up). Courts, by contrast, "depend 'on the adversarial process to test the issues for [their]

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*Global Tel*Link v. FCC*, 866 F.3d 397, 407–08 (D.C. Cir. 2017) (holding that because "the agency *no longer* seeks deference for the [relevant] parts of the *Order*," "it would make no sense for [the] court to determine whether the disputed agency positions advanced in the *Order* warrant *Chevron* deference") (emphasis added).

Out of the circuit courts to have expressly discussed the issue so far, only two simply do not allow parties to waive *Chevron*. *Singh v. Attorney General of the U.S.*, 12 F.4th 262, 271 n.8 (3d Cir. 2021); *Sierra Club v. U.S. Dep't of Interior*, 899 F.3d 260, 268 (4th Cir. 2018); *Amaya v. Rosen*, 986 F.3d 424, 430 (4th Cir. 2021).

decision[.]'" *Aposhian*, 989 F.3d at 897 (Tymkovich, J., dissenting) (quoting *Hydro Res., Inc.*, 608 F.3d at 1146 n.10).

As Chief Judge Tymkovich of the Tenth Circuit persuasively laid out, "Courts and parties undoubtedly benefit from this type of adversarial presentation of *Chevron*." *Id.* Even when *Chevron* deference seems applicable, the Supreme Court generally does not apply it. William N. Eskridge Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 Geo. L.J. 1083, 1124–25 (2008). As a result, *Chevron*'s applicability "is often contested and unclear." *Aposhian*, 989 F.3d at 897 (Tymkovich, J., dissenting). This, in turn, has spawned literature on *Chevron* that "is vast and defies summary or cataloging." Lawrence B. Solum, *Disaggregating* Chevron, 82 Ohio St. L.J. 249, 251 (2021).

A mere sampling of *Chevron*'s complexities reveals why the uncertainty is unsurprising. *See Aposhian*, 989 F.3d at 897–98 (Tymkovich, J., dissenting). The familiar questions of whether a statute is ambiguous and whether an agency's choice is reasonable present enough difficulties themselves. *See Chevron*, 467 U.S. at 842–44. Just as an example, it is unclear the extent to which substantive canons affect whether a statute is ambiguous. *See id.* at 843 (explaining that courts must "employ traditional tools of statutory interpretation" in determining whether "Congress had an intention on the precise question at issue"); *see e.g.*, *King v. Burwell*, 576 U.S.

473, 485–86 (2015) (refusing to apply *Chevron* because the issue was "of deep economic and political significance [and] central to [the] statutory scheme"); *see also* Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315, 330–32 (2000) (noting multiple "nondelegation canons" that might "trump *Chevron* itself"). But the two-step canonical formulation is only the beginning: Courts must also consider whether additional "terms of the congressional delegation" indicate that "Congress meant to delegate authority" carrying "the force of law" and whether an agency promulgated a rule "in the exercise of that authority." *United States v. Mead Corp.*, 533 U.S. 218, 227–29 (2001). Answering that may require examining "'the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time[.]'" *Texas v. United States*, 809 F.3d 134, 178 n.160, 185–86 (5th Cir. 2015) (quoting *Barnhart v. Walton*, 535 U.S. 212, 221 (2002)).

This case illustrates the need for the adversarial process with *Chevron*. Whether and to what extent *Chevron* applies in criminal cases and how the rule of lenity interacts with the doctrine is hotly contested. *See e.g.*, *Cargill v. Barr*, 502 F. Supp. 3d 1163 (W.D. Tex. 2020) (arguing that *Chevron* does not apply in criminal cases); *Guedes*, 140 S. Ct. at 790 (statement of Gorsuch, J., respecting denial of certiorari) (same); *Aposhian*, 958 F.3d at 998–99 (Carson, J. dissenting) (same); *Gun Owners*

of Am., 19 F.4th at 916–18 (Murphy, J., dissenting) (same); *but see Aposhian*, 958 F.3d at 982–84 (holding that *Chevron* applies in criminal cases); *Gun Owners of Am.*, 19 F.4th at 901–94 (White, J., concurring) (same).

The bottom line is simple: This Court should not apply *Chevron* without the benefit of full adversarial process articulating the arguments on both sides.

II. THE GOVERNMENT'S DISCLAIMING OF *CHEVRON* DEFERENCE HERE INDICATES THAT THE AGENCY DID NOT MAKE A POLICY CHOICE

The *Chevron* doctrine is judicially created authority for an agency. *See Chevron*, 467 U.S. at 844; *see also* Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2150 (2016) ("In many ways, *Chevron* is nothing more than a judicially orchestrated shift of power from Congress to the Executive Branch."). The doctrine presumes, in a "kind of legal fiction," that when a set of observations are present, Congress has *implicitly* delegated to an agency the ability to make a range of policy choices. Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 369–70 (1986); *City of Arlington v. FCC*, 569 U.S. 290, 296 (2013). This concept is largely justified based on considerations of agency expertise. *Chevron*, 467 U.S. at 865 (grounding deference in the understanding that "judges are not experts in the field" of environmental regulation).

Because *Chevron* is a multifaceted judicially created presumption, courts should not apply the doctrine if any of these "essential premises are missing." *Aposhian*,

989 F.3d at 905–06 (Eid, J., dissenting); *see also Breyer*, *supra*, at 370 (noting that courts look "to practical features of the particular circumstance to decide whether [the presumption of delegation] 'makes sense'"). When an agency lacks superior expertise relative to a court, courts should not apply *Chevron*. *See Barnhart*, 535 U.S. at 221 (listing "the related expertise of the Agency" as a factor for courts to consider). And when an agency "believes that interpretation is compelled by Congress" and fails to make a policy choice based on superior expertise, courts should not apply *Chevron*. *Peter Pan Bus Lines, Inc. v. Fed. Motor Carrier Safety Admin.*, 471 F.3d 1350, 1354 (D. C. Cir. 2006); *see also Gila River Indian Cmty. v. United States*, 729 F.3d 1139, 1149 (9th Cir. 2013); *Am. Fed'n of Gov't Emps., Local 1592 v. Fed. Lab. Rel. Auth.*, 836 F.3d 1291, 1295 (10th Cir. 2016).

The government rejecting its potential right to *Chevron* deference during litigation is evidence that the agency did not make real "policy choices in the interpretation of Congress's handiwork." *See Guedes*, 140 S. Ct. at 790 (statement of Gorsuch, J., respecting denial of certiorari). From the beginning of promulgating the Bump-Stock Rule, the ATF has insisted that the rule "accord[s] with the plain meaning" of the statute and is "the best interpretation of 'machinegun' under the NFA and GCA." 83 Fed. Reg. 66, 514, 527 (Dec. 26, 2018). The ATF only referenced *Chevron* as a backup argument. *See id.* at 527 (saying "*even if* [the statutory language is] ambiguous, this rule rests on a reasonable construction of [it]")

(emphasis added). And here, the government has described *Chevron* as "irrelevant" and exclusively relies on why "the Final Rule adopts the *proper* interpretation of 'machinegun' by including bump stock devices." Br. of Appellees at 18, *Cargill v. Garland*, 20 F.4th 1004 (5th Cir. 2021) (emphasis added) (internal quotation marks omitted). The executive branch's consistent reliance on the "plain meaning" of the statute indicates that it simply does not believe that it actually "promulgated the Final Rule pursuant to *Chevron*." *See Aposhian*, 989 F.3d at 897–98 (Tymkovich, J., dissenting). To the extent that ATF used *Chevron* as a backup justification, this Court should be wary of the government speaking "from both sides of its mouth." *Cf. Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1630 (2018) (rejecting *Chevron* deference to an agency in part because the Court "received competing briefs" from the government).

The government correctly doubts its right to *Chevron* deference. There is no indication that the agency has superior expertise to that of courts in interpreting "automatically" and "single function of the trigger" in the statutory definition of "machinegun" under the National Firearms Act.

First, the actual delegee of lawmaker authority—the attorney general—has no particular expertise on these issues. At the end of the day, the attorney general—not the Bureau of Alcohol, Tobacco, Firearms and Explosives—is responsible for regulations and enforcement under the National Firearms Act and Gun Control Act.

See 26 U.S.C. § 7801(a)(2)(A). Yes, the Justice Department has delegated this responsibility to the ATF, but the ATF remains "subject to the direction of the Attorney General and the Deputy Attorney General." *See* 28 C.F.R § 0.130(a)(1)–(2). The attorney general still calls the shots.

Recognizing who is in charge is critical. It means that courts granting *Chevron* deference are ultimately deferring to the attorney general. But "the Attorney General has no particular expertise in defining a term under federal law[.]" *Yong Wong Park v. Att'y Gen.*, 472 F.3d 66, 71 (3d Cir. 2006).

Second, the Executive Branch's asserted basis for creating the new Bump-Stock Rule involves interpretative issues that "fall more naturally into a judge's bailiwick." *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2417 (2019). To be sure, sometimes agency expertise is easy to spot because the agency must rely on scientific or economic factors. *See e.g.*, 42 U.S.C. § 7411 (delegating to the Environmental Protection Agency a duty to promulgate emissions standards for new stationary sources of criteria pollutants). Even "more prosaic-seeming questions"— like "the TSA assessing the security risks of pâté or a disabilities office weighing the costs and benefits of an accommodation"—might "commonly implicate policy expertise[.]" *Kisor*, 139 S. Ct. at 2417.

But, in this case, the attorney general relies on nothing to which an agency might have expertise above and beyond that of courts. Instead of employing or even citing technical know-how, the attorney general justified the Bump-Stock Rule based on an *ad hoc* "extensive legal analysis." 83 Fed. Reg. 66, 514, 516, 521, 528, 530–31 (Dec. 26, 2018). As a practical matter, this is no different than the analysis that informs every brief submitted by the Justice Department, to which courts obviously do not confer *Chevron* deference. Indeed, if "legal analysis" is the operative criterion for determining who should interpret phrases like "machineguns," then this Court is the more expert institution.

Sure, agencies might acquire what scholars call "legislative expertise," or insight into legislative history and congressional intent through years of enforcing a statute. *See* Kent Barnett, *Improving Agencies' Preemption Expertise with* Chevmore *Codification*, 83 Fordham L. Rev. 587, 591–92 (2014). But nothing of that sort coincided with the development of the Bump-Stock Rule.

The new Bump-Stock Rule reflected an abrupt change in what had been the government's consistent and long-held construction of the statute. In ten rulings from 2008 to 2017, the ATF interpreted the phrase "machineguns" to exclude devices like those at issue in this case. 83 Fed. Reg. 66, 514, 517–18 (Dec. 26, 2018) (describing the letter rulings). In 2018, however, the agency reversed course and outlawed these devices. According to the Justice Department, the problem with its

previous ten rulings was that they "did not include extensive legal analysis of the statutory terms." *Id.* In effect, the government claims that its prior steady interpretation was wrong because the agency had never studied the law it was enforcing. Far from demonstrating expertise, the administrative record raises questions about the agency's proficiency.

Chevron deference is thus inappropriate. The government's waiver of *Chevron* and the surrounding circumstances demonstrate that the government did not make a policy choice based on developed expertise. Nor could it. This Court is the better institution to interpret the NFA's definition of "machinegun" and should "say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

CONCLUSION

Ultimately, this Court may or may not agree with the Justice Department that its interpretation is the best reading of "machineguns." *Amicus* suggests it's not. But the final decision must come from the judiciary; deference has no role to play.

Respectfully submitted,

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DATED: July 29, 2022

CERTIFICATE OF COMPLIANCE

3. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and Fed. R. App. P. 32(a)(7)(B) because it contains 3,526 words, excluding the parts exempted by Fed. R. App. P. 32(f).

4. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface in Times New Roman, 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court, who will enter it into the CM/ECF system, which will send a notification of such filing to the appropriate counsel.

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