No. 19-1298

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

GUN OWNERS OF AMERICA, INC., *et al.*,
Plaintiffs-Appellants,

v.

MERRICK B. GARLAND, *et al.*,
Defendants-Appellees.

**On Appeal from the U.S. District Court
for the Western District of Michigan**

AMICUS CURIAE BRIEF OF W. CLARK APOSHIAN, MICHAEL CARGILL, THE NEW CIVIL LIBERTIES ALLIANCE, AND CATO INSTITUTE IN SUPPORT OF APPELLANTS AND REVERSAL

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RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Fed.R.App.P. 26.1, the undersigned counsel states that *amici curiae* New Civil Liberties Alliance (NCLA) and Cato Institute are non-profit corporations operating under § 501(c)(3) of the Internal Revenue Code. Neither NCLA nor Cato has any parent corporations, and no publicly-held company has a 10% or greater ownership interest.

/s/ Richard A. Samp
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INTRODUCTION AND INTERESTS OF *AMICUS CURIAE*

The *amici curiae* filing this brief are: (1) two individuals who legally purchased non-mechanical bump stocks but were later required by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) to surrender their bump stocks to the federal government; and (2) two nonpartisan, nonprofit organizations whose goals include the protection of civil liberties.[1] The interests of the four *amici* are set out in more detail in an addendum to this brief.

The district court upheld ATF's 2018 determination that non-mechanical bump stocks are properly classified as machine guns, ruling that ATF's construction of 26 U.S.C. § 5845(b) is entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). As Appellant Gun Owners of America, Inc. explained in its opening brief, the Supreme Court's recent decision in *HollyFrontier Cheyenne Refining LLP v. Renewable Fuels Ass'n*, 141 S. Ct. 2172, 2180 (2021), conclusively demonstrates that *Chevron* is inapplicable when, as here, the federal government has affirmatively declined to invoke *Chevron*.

Amici write separately to focus on an independent reason why *Chevron* is inapplicable: the government's interpretations of criminal statutes are not entitled to

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[1] *Amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties have consented to the filing of the brief.

deference. When construed without placing a thumb on the scale in favor of either party, § 5845(b) does not include non-mechanical bump stocks within the definition of machine guns.

SUMMARY OF ARGUMENT

The decision below, by deferring to the government's interpretation of a statute with significant criminal applications, is inconsistent with rights traditionally afforded to 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) (statement of Gorsuch, J., respecting denial of certiorari). Whatever one's views of *Chevron* deference in the civil context, it has no proper place in the criminal law. *United States v. Apel*, 571 U.S. 359, 369 (2014).

Importantly, the district court never suggested that ATF's construction is the best reading of § 5845(b); it merely concluded that the ATF's construction was

reasonable. To date, eight federal appellate judges have rendered an opinion as to the best, *Chevron*-free reading of § 5845(b), and *all eight* concluded that non-mechanical bump stocks are *not* "machineguns" as defined by that statute. Indeed, that was ATF's consistent position until 2018. *Amici* concur with that consensus; a semi-automatic rifle equipped with a non-mechanical bump stock is not a weapon which "shoots, is designed to shoot, or can readily be restored to shoot, automatically more than one shot ... by a single function of the trigger." 26 U.S.C. § 5845(b).

ARGUMENT

I. *CHEVRON* DEFERENCE IS INAPPLICABLE WHEN COURTS ARE CONSTRUING STATUTES WITH CRIMINAL-LAW APPLICATIONS

Under the *Chevron* doctrine, courts are directed to defer to an Executive Branch agency's reasonable, formal interpretation of an ambiguous federal statute, if Congress has delegated to the agency authority to administer the statute. *Chevron*, 467 U.S. at 842-43. "*Chevron* is rooted in a background presumption of congressional intent: namely, that Congress, when it left ambiguity in a statute administered by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows." *City of Arlington v. FCC*, 569 U.S. 290, 296 (2013). A principal justification for the *Chevron* doctrine is 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. *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 651-52 (1990); *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001).

Whatever the merits of that rationale in the civil context,[2] it is unpersuasive in the criminal-law realm. Administrative agencies lack any specialized expertise relevant to determining what conduct should be subject to criminal sanction. As the panel stated, "Criminal statutes reflect the value-laden, moral judgments of the community as evidenced by their elected representatives' policy decisions," Op. at 18 (citing *Gregg v. Georgia*, 428 U.S. 153, 175 (1976)), not technical knowledge.[3] Administrative agencies are no more expert than courts in discerning what moral values are reflected in a criminal statute. And the Supreme Court does not apply *Chevron* deference when, as with criminal statutes, the challenged agency interpretation does not involve the agency's expertise. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2417 (2019) (to warrant deference, "the agency's interpretation must in some way implicate its substantive expertise").

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[2] For a persuasive critique of applying *Chevron* deference in *any* context, *see* Philip Hamburger, *Chevron Bias*, 84 Geo. Wash. L. Rev. 1187 (2016).

[3] In her dissent from the panel decision, Judge White asserted that "[t]he dispute here is highly technical." Op. at 51. That assertion is incorrect. The parties are in complete agreement over how non-mechanical bump stocks operate. They disagree only about the proper construction of a federal criminal statute and which branch of government has primary responsibility for undertaking that construction.

In two recent decisions, the Supreme Court has stated categorically that courts should not defer to agency interpretations of criminal statutes. *Apel*, 571 U.S. at 369 ("we have never held that the Government's reading of a criminal statute is entitled to any deference"); *Abramski v. United States*, 573 U.S. 169, 191 (2014) (stating that "criminal laws are for courts, not for the Government to construe"). Efforts by Judge White (in her panel dissent) to distinguish those cases are unavailing, and her arguments for applying *Chevron* deference in the criminal context are unpersuasive.

A. There Is No Reason to Presume that Congress Has Delegated Lawmaking Authority to a Federal Enforcement Agency When It Adopts a Criminal Statute

The *Chevron* doctrine is in some tension with Chief Justice Marshall's famous edict that it "emphatically" is the constitutional "duty" of federal judges "to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1804). In theory, judges do not shirk their constitutional duty when they defer to a non-judicial entity's interpretation of a federal statute, because they are adhering to an *implied* provision of the statute: a provision delegating lawmaking authority to the agency charged with administering the statute. But, as explained above, there is no reason to conclude that Congress intends to include similar implied provisions in criminal statutes; and in the absence of such a provision, *Marbury* prohibits judges from deferring to an agency's construction of a statute if they conclude that an alternative construction is superior.

Applying the *Chevron* framework to statutes with criminal applications is fundamentally unfair to criminal defendants. The executive branch is, by definition, a party in every criminal case. Thus, when courts defer to executive-branch construction of an ambiguous criminal statute, 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). There is no reason to presume that Congress intended that individuals should be subjected to trials, with their liberty at stake, where the prosecutor is, in effect, also permitted to serve as the judge.

Judge White points to *United States v. O'Hagan*, 521 U.S. 642 (1997), as a case that applied deference to a Securities and Exchange Commission regulation that carried criminal penalties. Op. 43-44. But she fails to point out a crucial distinction: *O'Hagan* is not an instance in which the Court invoked *Chevron* as a basis for *presuming* that Congress intended to delegate binding rulemaking authority to the SEC. Instead, the statute at issue, Section 14(e) of the Exchange Act, 15 U.S.C. § 78n(e), *expressly* delegates authority to SEC to adopt regulations to "define ... such acts and practices as are fraudulent, deceptive, or manipulative." As *O'Hagan* recognized, Section 14(e) "delegates definitional and prophylactic rulemaking authority to the [SEC]," and "Congress has authorized the Commission, in § 14(e), to prescribe legislative rules." 521 U.S. at 667, 673.

The Court has authorized Congress to transfer to the executive branch responsibility for defining crimes on several other occasions. *See, e.g., United States v. Grimaud*, 220 U.S. 506 (1911); *Touby v. United States*, 500 U.S. 160 (1991). But in those two cases, as in *O'Hagan*, the delegation was explicit; the Court has never *presumed* congressional delegation of authority to create new crimes. *See, e.g., Grimaud*, 220 U.S. at 519 (Congress must speak "distinctly" if it wishes to delegate authority to define criminal conduct). This clear-statement rule protects individual liberty and at the same time reinforces separation-of-powers principles embedded in the Constitution.

B. *Chevron* Deference Is Inapplicable to a Statute with Both Civil and Criminal Applications—Particularly Where, as Here, the Statute's Applications Are Predominantly Criminal

Apel and *Abramski* foreclose any argument that *Chevron* deference applies to criminal statutes. The statute at issue here, 26 U.S.C. § 5845(b), has both civil and criminal applications, but that fact does not alter the rules governing statutory construction. A statute's meaning does not change depending on whether it is being applied civilly or criminally; rather, courts assign a single meaning to a statute, and that meaning applies regardless of whether courts are addressing it in a civil or criminal law context. *Clark v. Martinez,* 543 U.S. 371, 380 (2005). Applying *Chevron* deference to ATF's construction of § 5845(b), even when the statute is being applied civilly, is thus precluded by the Supreme Court's directive that "criminal laws are for courts, not for the Government, to construe." *Abramski*, 573 U.S. at 191.

Judge White sought to distinguish *Apel* and *Abramski*, noting that neither case involved challenges to "legislative regulations issued through notice-and-comment rulemaking—*i.e.*, regulations that trigger *Chevron*'s deferential framework." Op. at 46. But Judge White made no effort to explain *Apel*'s and *Abramski*'s unequivocal language.[4] The panel majority, after quoting *Apel*'s statement that "we have never held that the Government's reading of a criminal statute is entitled to any deference," cogently observed, "'Never' and 'any' are absolutes, and the Court did not draw any distinctions, add any qualifiers, or identify any exceptions." Op. at 10. And Justice Kagan's unequivocal statement that ATF's interpretations of a statute are "not relevant" because "criminal laws are for courts, not for the Government, to construe," *Abramski*, 573 U.S. at 191, does not contemplate any exception for ATF interpretations promulgated through formal rulemaking.

Application of *Chevron* deference would be particularly inappropriate here because the statutory scheme at issue is overwhelmingly criminal in nature. As Tenth Circuit Judge Eid has explained, federal statutes governing machine guns have only a tiny number of civil applications:

> [T]he definition of "machinegun" ... has an enormous criminal impact. By contrast, the civil scope of the statutory regime is quite limited. ... Only

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[4] Moreover, her interpretation of *Apel* and *Abramski* renders those decisions essentially meaningless, given that *Chevron* deference is rarely ever appropriate *outside* the context of formal Government rules/regulations.

> "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). The Court need not decide whether an agency's legislative rule might in some situations merit *Chevron* deference if the potential applications of the statute being construed are overwhelmingly civil in nature. It is enough to decide that Courts must not defer to agency interpretations of statutes, such as § 5845(b), whose applications are overwhelmingly criminal.

C. The Rule of Lenity Takes Precedence over *Chevron* Deference

The rule of lenity is a centuries-old canon of statutory construction holding that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Skilling v. United States*, 561 U.S. 358, 410 (2010). The district court concluded that § 5845(b)'s definition of "machinegun" was ambiguous, yet it never considered the impact of the rule of lenity on the proper construction of that criminal statute. The failure to consider that impact was legal error and played a role in the district court's erroneous conclusion that Appellants did not demonstrate a likelihood of success on the merits.

Even assuming that *Chevron* applies here, Step 1 of the *Chevron* framework entails "applying the ordinary tools of statutory construction" in an effort to determine the one, best statutory construction. *City of Arlington*, 569 U.S. at 296. Given its lengthy pedigree,

the rule of lenity fits comfortably within *Chevron*'s definition of an "ordinary too[l] of statutory construction." *City of Arlington* thus dictates that the rule of lenity should be taken into account during *Chevron* Step 1—and may well obviate any occasion to defer to an agency interpretation of the criminal statute. The decision below, by eliminating any role for the rule of lenity, directly conflicts with that prescribed analytical method.

The Supreme Court has explained that "[a]pplication of the rule of lenity ensures that criminal statutes will provide fair warning concerning conduct rendered illegal and strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability." *Yates v. United States*, 574 U.S. 528, 548 (2015). If, as the district court suggests, § 5845(b) is ambiguous, then authorizing ATF to determine that the statute criminalizes possession of bump stocks risks permitting the executive branch to usurp Congress's role in defining criminality. And in every case in which *Chevron* matters (*i.e.*, cases in which a reviewing court concludes that Congress did *not* intend the construction adopted by a federal agency), that is exactly what happens—in clear conflict with one of the purposes served by the rule of lenity.

More importantly, contrary to Judge White's claim, the ATF rule does *not* provide "fair warning" of the line that may not be crossed. As Justice Gorsuch stated, with reference to ATF's constantly shifting constructions of § 5845(b):

> How, in all this, can ordinary citizens be expected to keep up—required not only to conform their conduct to the fairest reading of the law they might expect from a neutral judge, but forced to guess whether the statute

> will be declared ambiguous; to guess again whether the agency's initial interpretation of the law will be declared "reasonable"; and to guess *again* whether a later and opposing agency interpretation will *also* be held "reasonable"?

Guedes v. ATF, 140 S. Ct. 789, 790 (statement of Gorsuch, J., respecting denial of certiorari) (emphasis in original).

II. SECTION 5845(b) DOES NOT INCLUDE NON-MECHANICAL BUMP STOCKS WITHIN THE DEFINITION OF MACHINE GUNS

Because ATF's construction of § 5845(b) is not entitled to *Chevron* deference, the Court's sole task is to determine whether, based on the best interpretation of the statute, non-mechanical bump stocks are properly classified as "machineguns." The correct answer 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 which "shoots, is designed to shoot, or can readily be restored to shoot, automatically more than one shot ... by a single function of the trigger." 26 U.S.C. § 5845(b).

One strong indication that the ATF's current construction is incorrect is that it has been rejected by *all eight* appellate judges who have construed § 5845(b) without applying *Chevron* deference. *See* Op. at 29-35 (Batchelder, J., joined by Murphy, J.); *Guedes v. ATF*, 920 F.3d 1, 46-48 (D.C. Cir. 2019) (Henderson, J., dissenting); *Aposhian*, 989 F.3d at 891-96 (Tymkovich, C.J., joined by Hartz, Holmes, Eid, and Carson, JJ., dissenting from decision to vacate *en banc* order).

Amici urge the Court to construe § 5845(b) as a whole, rather than construing in isolation the statute's individual words and phrases (such as "automatically"). When § 5845(b) is construed as a whole, *amici* submit that the statute's inapplicability to semi-automatic rifles equipped with non-mechanical bump stocks is clear. 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 permit 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 the rifle cannot plausibly be described as firing "automatically."

Judge White disagrees, asserting that "[t]he term 'automatically' does not require that there be *no* human involvement to give rise to 'more than one shot.'" Op. at 58 (quoting *Guedes v. ATF*, 920 F.3d at 30). But that assertion improperly separates the word "automatically" from "single function of the trigger." When that word and phrase are considered in conjunction, the answer to Judge White's question is clear: the human involvement necessary to produce multiple shots must be limited to a "single function of the trigger" in order for a weapon to qualify as one that fires "automatically." Because semi-automatic rifles equipped with bump stocks will not

fire more than once without human involvement that goes beyond a human's "single function of the trigger," they are not machine guns.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I am an attorney for *amici curiae* W. Clark Aposhian, *et al.* Pursuant to Fed.R.App.P. 32(a)(7)(C), I hereby certify that the foregoing brief of *amici* is in 14-point, proportionately spaced Garamond type. According to the word processing system used to prepare this brief (WordPerfect X8), the word count of the brief is 3,007, not including the Rule 26.1 disclosure statement, table of contents, table of authorities, signature block, certificate of service, and this certificate of compliance. The brief complies with the page limit imposed by the Court because it is 12 ½ pages long, one-half the length permitted for Appellants' brief.

/s/ Richard A. Samp
Richard A. Samp

August 2, 2021

Addendum

The interests of the four *amici curiae* are as follows:

(1) W. Clark Aposhian is a resident of Utah. He is law-abiding, and no disqualifications prevent him from owning firearms. The Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) in 2010 approved for sale Slide Fire bump stocks after determining that they were not “machineguns” within the meaning of 26 U.S.C. Section 5845(b). Subsequently, Mr. Aposhian legally purchased a Slide Fire bump stock, for use in recreational shooting and target practice. ATF later reversed its position and held that bump stocks are, indeed, “machineguns,” and required private citizens to destroy their bump stocks or surrender them to ATF by March 26, 2019. Aposhian surrendered his bump stock under protest and filed a federal-court challenge to ATF’s new regulation. The U.S. Court of Appeals for the Tenth Circuit affirmed denial of his motion for a preliminary injunction against ATF’s new regulation. *Aposhian v. Barr*, 958 F.3d 1151 (10th Cir. 2019), reh. granted, 973 F.3d 1151 (10th Cir. 2019), grant of rehearing vacated, 989 F.3d 890 (10th Cir. 2021). Mr. Aposhian is filing a petition for Supreme Court review on August 2, 2021.

(2) Michael Cargill is a resident of Texas. He is law abiding, and no disqualifications prevent him from owning firearms. In 2018, Cargill legally purchased two Slide Fire bump stocks. ATF later issued a final regulation that determined that bump stocks are “machineguns,” and required private citizens to

destroy their bump stocks or surrender them to ATF by March 26, 2019. Indeed, ATF's regulation stated that bump stocks have always been "machineguns," meaning that Cargill violated the criminal law by possessing bump stocks. On March 25, 2019, Cargill surrendered his two bump stocks to ATF under protest and later filed a federal-court challenge to ATF's new regulation. The district court dismissed his claims. Cargill's appeal from that decision to the Fifth Circuit has been fully briefed and awaits oral argument. *Cargill v. Garland*, 5th Cir. No. 20-51016.

(3) The New Civil Liberties Alliance (NCLA) is a nonprofit, non-partisan civil-rights organization devoted to defending constitutional freedoms from violations by the administrative state. The "civil liberties" of the organization's name includes 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.

(4) The Cato Institute 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.

CERTIFICATE OF SERVICE

I hereby certify that on this 2d day of August, 2021, I electronically filed the brief of *amici curiae* W. Clark Aposhian, *et al.*, with the Clerk of the Court for the U.S. Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/CF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Richard A. Samp
Richard A. Samp