No. 19-296

In the Supreme Court of the United States

DAMIEN GUEDES; SHANE RODEN; FIREARMS POLICY FOUNDATION, a non-profit organization; MADISON SOCIETY FOUNDATION, INC., a non-profit organization; FLORIDA CARRY, INC., a non-profit organization; DAVID CODREA; SCOTT HEUMAN; and OWEN MONROE,
Petitioners,

v.

BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES; WILLIAM P. BARR, in his official capacity as Attorney General of the United States; REGINA LOMBARDO, in her official capacity as Acting Deputy Director; and the UNITED STATES OF AMERICA,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Is judicial deference to the executive branch's reinterpretations of laws with both civil and criminal application consistent with the separation of powers and judicial review?

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INTEREST OF *AMICUS CURIAE*[1]

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, and issues the annual *Cato Supreme Court Review*.

Cato addresses an issue of vital importance to limited government and 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 novel reinterpretations of statutes establishing new crimes. The implications of this case extend far beyond bump stocks to the very structure of our constitutional government.

SUMMARY OF ARGUMENT

In response to a tragic mass killing in Las Vegas, President Trump announced that his administration would unilaterally ban "bump-stock" devices—a type

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[1] Rule 37 statement: All parties were timely notified and consented to the filing of this brief. No part of this brief was authored by any party's counsel, and no person or entity other than *amicus* funded its preparation or submission.

of firearm accessory reportedly used by the Las Vegas killer. Expressly declining to pursue a legislative solution—even though the political will was likely strong enough—the president directed his administration to redefine bump-stock devices as automatic weapons by reinterpreting the phrases "single function of the trigger" and "automatically," as used in the National Firearms Act of 1934 (NFA) and Gun Control Act of 1968 (GCA). In turn, the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) broke from decades of precedent and discovered a new power to prohibit this common firearm accessory. This expansion of regulatory authority, motivated by political expediency, is arbitrary and capricious. This change is not limited to a ban on bump stocks. ATF has asserted the plenary authority to prohibit new classes of weapons that long-extant federal law did not address. This approach broadly expands the executive branch's power to rewrite generally applicable criminal laws and threatens to stifle new developments in firearm technology.

It's also an unconstitutional exercise of the legislative power by the executive branch, unilaterally changing a statute passed by Congress to criminalize previously lawful conduct. Instead of fulfilling their constitutional duty to check constitutional violations like this one, the lower courts worsened the problem by applying *Chevron* deference, which requires courts to subjugate to the executive branch their own judicial duty to say what the law is.

REASONS FOR GRANTING THE WRIT

I. APPLYING *CHEVRON* DEFERENCE TO THE ATF'S POLITICALLY MOTIVATED INTERPRETIVE REVERSAL SHORT-CIRCUITS THE LEGISLATIVE PROCESS AND VIOLATES THE SEPARATION OF POWERS

Without this Court's intervention, American citizens will be charged, tried, and punished for a crime created extraconstitutionally. The crime for which they will lose liberty, property, or both is entirely a creature of the executive branch. Instead of being drafted in the halls of Congress and reviewed in a courthouse, the ATF's bump-stock rule was crafted, interpreted, and enforced from an executive office building. This violates the most basic constitutional principles by combining powers in one branch and denying defendants their due process right to an impartial and *judicial* resolution of their cases. "[W]hen the separation of powers is at stake, [the Court doesn't] just throw up [its] hands," because "[t]o leave this aspect of the constitutional structure alone undefended would serve only to accelerate the flight of power from the legislative to the executive branch, turning the latter into a vortex of authority that was constitutionally reserved for the people's representatives in order to protect their liberties." *Gundy v. United States*, 139 S. Ct. 2116, 2142 (2019) (Gorsuch, J., dissenting).

A. The ATF's Interpretive Reversal Is Not Based on Statutory Ambiguity, but on Political Expediency

The NFA and the GCA include the same definition of machinegun: "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). Between 2008 and 2016, the Bush and Obama administrations determined in a series of classifications that "bump-stock type devices were not machine guns." 82 Fed. Reg. 66514, 66514–18 (2018). In 2018, the current administration reversed course. An executive action determined that the prior classifications "do[] not reflect the best interpretation of the term 'machinegun' under the GCA and NFA." 83 Fed. Reg. 13442, 13443 (2018). Indeed, the rulemaking attacks the previous classifications for not "includ[ing] extensive legal analysis relating to the definition of 'machinegun.'" *Id*.

What prompted this reversal? The proposed rulemaking reveals that the impetus for this change was not an organic review of agency policy. Instead, the change was triggered by public outrage following the tragic October 2017 mass killing in Las Vegas. The shooter reportedly used a bump-stock-type device:

> Following the mass shooting in Las Vegas on October 1, 2017, ATF has received correspondence from members of the United States Senate and the United States House of Representatives, as well as nongovernmental organizations, requesting that ATF examine its past

> classifications and determine whether bump-stock-type devices currently on the market constitute machineguns under the statutory definition. *In response*, on December 26, 2017, as an initial step in the process of promulgating a federal regulation interpreting the definition of "machinegun" with respect to bump-stock-type devices, ATF published an Advance Notice of Proposed Rulemaking (ANPRM) in the Federal Register.

Id. at 13446.

The ATF admits that rulemaking was commenced "in response" to political pressure. The proposed rule recounts the president's role in this reversal:

> On February 20, 2018, President Trump issued a memorandum to Attorney General Sessions concerning "bump fire" stocks and similar devices. The memorandum noted that the Department of Justice had already started the process of promulgating a Federal regulation interpreting the definition of "machinegun" under Federal law to clarify whether certain bump stock type devices should be illegal. The President then directed the Department of Justice, working within established legal protocols, to dedicate all available resources to complete the review of the comments received in response to the ANPRM, and, as expeditiously as possible, to propose for notice and comment a rule banning all devices that turn legal weapons into machineguns.

Id. (cleaned up). Publication of this NPRM is the next step in the process of promulgating such a rule.

That process, however, was a *fait accompli*. On February 28, 2018, the president hosted a meeting with members of Congress to discuss school and community safety. Senator John Cornyn, the majority whip, suggested that Congress could pass legislation "on a bipartisan basis" to deal with "the bump stock issue." 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/2M6Mjvz. President Trump interjected that there was no need for legislation because he would deal with bump stocks through executive action:

> And I'm going to write that out. Because we can do that with an executive order. I'm going to write the bump stock; essentially, write it out. So you won't have to worry about bump stock. Shortly, that will be gone. We can focus on other things. Frankly, I don't even know if it would be good in this bill. It's nicer to have a separate piece of paper where it's gone. And we'll have that done pretty quickly. They're working on it right now, the lawyers.

Id. Later during the meeting, Rep. Steve Scalise, the House majority whip, proposed other gun-control measures that Congress could vote on. Again, the president reiterated that there was no need to legislate on bump stocks, because his administration would prohibit the devices through executive action:

> And don't worry about bump stock, we're getting rid of it, where it'll be out. I mean, you don't have to complicate the bill by adding another two paragraphs. We're getting rid of it. I'll do that myself because I'm able to. Fortunately, we're able to do that without going through Congress.

Id.

The president left little doubt how his administration would "clarify" the NFA and GCA. Yet, according to press accounts, there was internal dissent about whether the executive branch had the statutory authority to prohibit bump stocks. "[P]rivate and public comments from Justice Department officials following the October shooting suggest there is little appetite within the agency to regulate bump stocks, regardless of pressure from the Trump administration." Ali Watkins, *Despite Internal Review, Justice Department Officials Say Congress Needs to Act on Bump Stocks*, N.Y. Times, Dec. 21, 2017, https://nyti.ms/2EFFpy9. DOJ officials reportedly told Senate Judiciary Committee staff that the government "would not be able to take [bump stocks] off shelves without new legislation from Congress." *Id*. Likewise, the ATF director told police chiefs that his agency "did not currently have the regulatory power to control sales of bump stocks." *Id.*

While the department stated that "no final determination had been made," President Trump boasted that the "legal papers" to prohibit bump stocks were almost completed. Indeed, moments before the rulemaking was announced, President Trump tweeted:

"Obama Administration legalized bump stocks. BAD IDEA. As I promised, today the Department of Justice will issue the rule banning BUMP STOCKS with a mandated comment period. We will BAN all devices that turn legal weapons into illegal machine guns." Donald Trump (@realDonaldTrump), Twitter (Mar. 23, 2018, 1:50 PM), https://bit.ly/2DPV1cY. "The reversal was the culmination of weeks of political posturing from Mr. Trump, whose public demands have repeatedly short-circuited his administration's regulatory process and, at times, contradicted his own Justice Department." Ali Watkins, *Pressured by Trump, A.T.F. Revisits Bump Stock Rules*, N.Y. Times, Mar. 13, 2018, https://nyti.ms/2tczdWI.

B. *Chevron* Deference Raises Separation of Powers and Political Accountability Concerns, Particularly in Allowing the Executive to Unilaterally Criminalize Behavior

1. Deferring to agency interpretations like the ATF's redefinition of "machinegun" short-circuits the legislative process and lessens political accountability. Banning bump stocks was hardly out of congressional reach. Even now, "codifying the bump-stock ban through legislation would eliminate challenges to the rulemaking process," like the one here. Sarah Herman Peck, *Does ATF's Bump-Stock Ban Comport with the APA?*, Congressional Research Service, May 8, 2019, https://fas.org/sgp/crs/misc/LSB10296.pdf. Instead, as discussed above, the executive branch pushed the ban through for political expediency. The president even

discouraged Congress from taking up the issue, despite the political will to do so. While the president's approach may have been quicker and required fewer compromises going through the proper channels of bicameralism and presentment, there are good reasons to be wary of this method of policymaking.

Allowing the executive branch to reinterpret existing statutes in ways that directly contradict past legal interpretation to achieve new policy goals leads to bad law and bad politics. The executive branch is designed to execute existing laws, not write new ones. Its powers are limited, to some extent at least, by the language of the statutes that it is interpreting and enforcing. When an existing statute is stretched to accomplish a policy objective it wasn't meant to address, it leads to bad law. What was appropriate for one situation may not be appropriate for another, even if they appear similar at first glance. Nuance matters.

At the same time, when the executive takes over legislation (and the judiciary allows it), it can lead to bad politics by disincentivizing Congress from acting. Government actions are rarely if ever universally loved. There will always be some level of political opposition. As politicians, members of Congress need to ensure that they please their constituents while aggravating few. Executive branch policy-making gives members of Congress an out by "solving" the policy problem without political accountability for members.

One role of the judiciary is to limit the extent to which Congress can pass the buck by policing the constitutional lines between the other branches. What

happens when the courts don't step in? Over time, the members of Congress grow more dependent on the executive to do their job for them and less willing to deal with national issues. This is a problem, because Congress is, by design, the body best able to consider national issues. Representation from across the country introduces a diversity of viewpoints, interests, and perspectives. That diversity of views and the bicameral nature of Congress help create bills that reflect both the will of the people and the nuances of the issue.

Congress is also far more accountable to the people than is the executive branch. The president and vice president are elected, to be sure, but in a more attenuated way than members of Congress. Nevertheless, most lawmaking happens in the myriad executive agencies, performed by thousands of unelected bureaucrats. Given the number of rules, policies, and legal interpretations executive agencies take behind the scenes, holding a president responsible for every decision his administration makes is impractical. Members of Congress, by contrast, are elected by smaller constituencies that can hold them accountable for their speeches, bills, and votes on a variety of topics.

Getting a bill through Congress is difficult. In fact, "the framers went to great lengths to make lawmaking difficult" in order to protect liberty and "promote deliberation." *Gundy*, 139 S. Ct. at 2134 (Gorsuch, J., dissenting). The lawmaking process was "also designed to promote fair notice and the rule of law, ensuring the people would be subject to a relatively stable and pre-

dictable set of rules." *Id.* The number of elected officials and governmental bodies required to pass a new statute ensure that the process can't be undone on a whim. By contrast, legislating by the executive branch can be, and frequently is, undone when the next administration comes into power. This leads to a great deal of instability and legal uncertainty, as the rules can change every four years.

The bump-stock ban is an excellent example. A previously legal device become illegal without any new bill being passed into law. "The ATF's interpretation of 'machinegun' gives anything but fair warning—instead, it does a *volte-face* of its almost eleven years' treatment of a non-mechanical bump stock as not constituting a 'machinegun.'" *Guedes v. BATFE*, 920 F.3d 1, 41 (D.C. Cir. 2019) (Henderson, J., concurring in part and dissenting in part). And, as discussed *infra*, the instability of the status of bump stocks threatens more than this one device. Companies will be less likely to innovate and create new devices and consumers will be less likely to buy them if ownership could become criminal at the whims of the executive. "[I]f laws could be simply declared by a single person, they would not be few in number, the product of widespread social consensus, likely to protect minority interests, or apt to provide stability and fair notice." *Gundy*, 139 S. Ct at 2135 (Gorsuch, J., dissenting). Instead, they would create an unsteady legal environment and an unconstitutional arrangement of government power.

2. Several members of this Court have recently expressed concern over the separation-of-powers issues

raised by both the executive branch's exercising delegated legislative authority, *id.* at 2130–31 (Alito, J., concurring in judgment) and 2131–48 (Gorsuch, J., dissenting), and the judicial branch's deferring to the executive branch's legal interpretations, *Kisor v. Wilkie*, 139 S. Ct. 2400, 2425–48 (2019) (Gorsuch, J., concurring in judgment) and 2448–49 (Kavanaugh, J., concurring in judgment). Both these separation-of-powers issues are intertwined in this case.

The first issue occurs when the executive branch reinterprets a statute to criminalize behavior that wasn't within the statute's reach at the time of enactment. In so doing, the executive branch exercises the federal legislative powers that properly belong exclusively to Congress. This is particularly concerning when the clear goal of the reinterpretation is to enact the administration's policy preferences rather than to honestly and fairly interpret the legal meaning of the statute. The second separation-of-powers issue is enabled by the first and occurs when the judiciary defers to that agency reinterpretation. This deference cedes a portion of judicial power to the executive branch and prevents the judiciary from fulfilling its "duty . . . to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177, 1 Cranch 137 (1803). Combined, these two issues lead to a single branch of government exercising all three powers—legislative, judicial, and executive.

"The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many . . . may justly be pronounced the very

definition of tyranny." The Federalist No. 47 (Madison). Separation of powers was a core concern of the Framers, who had "seen that the tendency of republican governments is, to an aggrandizement of the legislative, at the expense of the other departments," through their experience with the British parliament. The Federalist No. 49 (Madison). Having experienced the consequences of a single branch of government exercising all three powers, among the Framers it was

> agreed on all sides, that the powers properly belonging to one of the departments, ought not to be directly and completely administered by either of the other departments. It is equally evident, that neither of them ought to possess, directly or indirectly, an overruling influence over the others in the administration of their respective powers.

The Federalist No. 48 (Madison).

Madison recognized that there is a lack of separation of powers not only when one branch *directly* exercises "an overruling influence" over another branch but also when it does so *indirectly*. What would an indirect "overruling influence" look like? In a word, *Chevron*. *Chevron* deference does not involve the executive branch directly ordering the courts to follow its legal interpretation—here, the executive explicitly asked the court *not* to apply *Chevron* deference. Instead, the executive's usurpation of the judicial power comes about indirectly, through the judicial branch's self-imposed deference to the executive's decisions. Whether direct or indirect, however, a rule that grants

the executive branch the "overruling influence" over the judiciary of the sort that *Chevron* requires "sounds all the alarms that the founders left for us." *Gundy*, 139 S. Ct. at 2144 (Gorsuch, J., dissenting).

Chief Justice Marshall famously wrote that "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury*, 5 U.S. at 177. Less frequently quoted is the next sentence: "Those who apply the rule to particular cases, must of necessity expound and interpret that rule." *Id.* Expound and interpret, not defer. *Chevron* deference, especially for laws that carry criminal penalties, is plainly inconsistent with the duties of the judiciary under the Constitution. A doctrine that requires the courts to subjugate their own legal and constitutional determinations of the meaning and limits of executive power is incompatible with the principle of judicial review. It would make little sense for the Constitution to give the judiciary the duty to determine the constitutional limitations of the other branches while also permitting the judiciary to fulfill that duty through deference to the other branch in question.

It is certainly more efficient to have a single branch of government write, interpret, and enforce the laws, particularly when that branch is not subject to legislative debate and compromise. But our Constitution was hardly drafted to maximize government efficiency. "Some occasionally complain about Article I's detailed and arduous processes for new legislation, but to the framers these were bulwarks of liberty." *Gundy*, 139 S. Ct. at 2134 (Gorsuch, J., dissenting).

The Framers designed the Constitution to prevent problems precisely like the one in this case from arising. Here, instead of legislating policy through bicameralism and presentment, the bump-stock ban was enacted by little more than executive edict. Instead of subjecting that edict to rigorous judicial review, the court deferred to the executive and allowed its determination of the law to supersede the court's own.

Thankfully, as a judicially created doctrine, *Chevron* deference and its harms are easily remediable by this Court. Doing away with *Chevron* deference—for criminal penalties at minimum—would open the Court to critically examining executive action to ensure that it remains within constitutional bounds. Enforcing the separation of powers would not "dictate any conclusion about the proper size and scope of government," but would simply require that, whatever their scope, the powers of government are exercised by the appropriate branches. *Id.* at 2145 (Gorsuch, J., dissenting). *Chevron* allows the executive to "say what the law is" in place of the judiciary, most disturbingly in instances where new crimes are created out of thin air. By deferring to the executive, courts fail to fulfil "their duty to interpret the law and declare invalid agency actions inconsistent with those interpretations in the cases and controversies that come before them. A duty expressly assigned to them by the APA and one often likely compelled by the Constitution itself. That's a problem for the judiciary." *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1153 (10th Cir. 2016) (Gorsuch, J., concurring). It's a problem for the country too.

3. Deference to executive branch interpretations of the law is troubling no matter the context. This case is even more concerning, however, because the executive interpretation in question criminalizes previously legal conduct. If courts defer to ATF's criminalization of bump-stock ownership, then the executive branch will have created an entirely new crime that it will then enforce *without* judicial review to determine if the rule creating the crime in question is even lawful. This is concerning for several reasons. First, as petitioners discuss, it violates the rule of lenity, which generally requires courts to construe criminal laws narrowly, absent specific congressional direction otherwise. *Chevron* instead gives the executive branch incentive to adopt the broadest possible definitions, with the assurance that they will later receive deference.

Second, the concerns discussed above regarding accountability and nuance in lawmaking are worsened when the law imposes criminal penalties. Stretching any law to cover conduct not previously contemplated causes problems, but stretching a law with criminal penalties makes lawful conduct criminal without any congressional involvement. Creating criminal law through executive fiat erodes the legitimacy of the justice system and give rise to due process violations each time people are fined or imprisoned for crimes their elected representatives had no say in creating. A statute's poor fit to unforeseen circumstances leads to errors and unintended consequences.

Third, and most seriously, separation-of-powers principles are most vital when the power exerted could

deny a citizen his liberty or property. The Court "has expressly instructed [lower courts] *not* to apply *Chevron* deference when an agency seeks to interpret a criminal statute," because "seemingly . . . doing so would violate the Constitution by forcing the judiciary to abdicate the job of saying what the law is and preventing courts from exercising independent judgment in the interpretation of statutes." *Gutierrez-Brizuela*, 834 F.3d at 1156 (Gorsuch, J., concurring) (citing *Abramski v. United States*, 134 S. Ct. 2259, 2274 (2014)). As Judge Sutton has noted:

> Since the founding, it has been the job of Article III courts, not Article II executive-branch agencies, to have the final say over what criminal laws mean. I would . . . reject the idea that Congress can end-run this principle by giving a criminal statute a civil application.

Esquivel-Quintana v. Lynch, 810 F.3d 1019, 1032 (6th Cir. 2016) (Sutton, J., concurring in part and dissenting in part). Chevron is generally problematic, but particularly so with regard to criminal statutes.

II. THE RULEMAKING EXPANDS ATF'S AUTHORITY AND THREATENS TO BRING AN UNKNOWABLE NUMBER OF FIREARMS WITHIN THE NFA'S PURVIEW

The proposed rule would not only ban bump stocks. ATF's expanded definition of "automatically" places an unknowable amount of firearm owners in criminal peril. For example, crank-operated Gatling guns have never been considered "machineguns" under the NFA.

See Rev. Rul. 55-528, 1955-2 C.B. 482. Gatling guns fire when the operator rotates a crank, which cocks and releases a series of strikers, firing successive rounds of ammunition. The crank mechanism of a Gatling guns requires far less "manual input" than does a bump stock. Accordingly, under the proposed rulemaking, Americans with Gatling guns face a credible threat of prosecution.

Moreover, ATF has previously distinguished manually operated guns from electrically operated versions. An M-134 "minigun" for example, is considered a machinegun. ATF Rul. 2004-5. Functionally, it resembles a Gatling gun, except the role of the crank is performed by an electric motor, which is activated by a switch. This type of weapon differs from a Gatling gun in one way: it fires continuously by pressing an electric switch rather than manually turning a crank. For decades, a machinegun was understood to fire continuously without additional manual input. The ATF's expansive interpretation obliterates this distinction. *Cf. id*. (ATF's previous explanation that the Gatling gun "is not a 'machinegun' as that term is defined . . . because it is not a weapon that fires automatically").

There are many novel semi-automatic firing mechanisms that exist, including solenoid-actuated mechanical triggers and electric-fired primers. *See*, *e.g.*, Miles, Bullpup 2016: Vadum Electronic eBP-22 Bullpup, TheFirearmBlog, Sept. 28, 2016 https://bit.ly/2IAieb1; Chris Dumm, *Electric Cartridge Primers: Gone But Not Lamented*, The Truth About

Guns, Dec. 19, 2013 https://bit.ly/2NLkhbb. Indeed, innovation abounds, and new mechanisms will likely come to market in the future. These new approaches can improve the accuracy of a firearm, provide access to the disabled, and even make guns safer. ATF should not be allowed to arbitrarily re-interpret a statute targeting machineguns to lock firearm technology in time and put innovators in peril of being locked in prison.

Congress may in future decide to update existing statutes to cover innovations in firearms technology. In so doing, it can take testimony and weigh the pros and cons of expanding the ban on certain firing mechanisms. That's Congress's job, not the president's.

CONCLUSION

The Court should grant certiorari.

Respectfully submitted,

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