No. 21-1215

In the
# Supreme Court of the United States

GUN OWNERS OF AMERICA, INC., ET AL.,
*Petitioners*,
v.

MERRICK GARLAND, ATTORNEY GENERAL , ET AL.,
*Respondents.*

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

## BRIEF OF *AMICI CURIAE* DAVID CODREA, SCOTT HEUMAN AND OWEN MONROE IN SUPPORT OF PETITIONERS

ALAN ALEXANDER BECK
2692 Harcourt Drive
San Diego, CA 92123
(619) 905-9105
Alan.Alexander.Beck@gmail.com

STEPHEN D. STAMBOULIEH
*Counsel of Record*
STAMBOULIEH LAW, PLLC
P.O. Box 428
Olive Branch, MS 38654
(601) 852-3440
Stephen@sdslaw.us

*Counsel for Amici Curiae*

April 6, 2022

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

## CORPORATE DISCLOSURE STATEMENT

The amici curiae are not corporations and thus they have no parent corporations, and do not issue stock.

## TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT . . . . . . i

TABLE OF CONTENTS . . . . . . . . . . . . . . . . . . . . . . ii

TABLE OF AUTHORITIES. . . . . . . . . . . . . . . . . . . iii

INTERESTS OF THE AMICI CURIAE . . . . . . . . . . . 1

INTRODUCTION AND BACKGROUND . . . . . . . . . 1

SUMMARY OF THE ARGUMENT. . . . . . . . . . . . . . 4

ARGUMENT . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 5

A. The Rule of Lenity Applies Instead of *Chevron* Deference. . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 5

B. Bumpstocks are not Machineguns . . . . . . . . . . . 10

CONCLUSION. . . . . . . . . . . . . . . . . . . . . . . . . . . . . 15

## TABLE OF AUTHORITIES

### CASES

*Abramski v. United States*,
573 U.S. 169 (2014) . . . . . . . . . . . . . . . . . . . . . . . 6, 7

*Calder v. Bull*,
3 U.S. (3 Dan.) 386, 390 (1798) . . . . . . . . . . . . . 10

*Cargill v. Garland*,
No. 20-51016, 2021 U.S. App. LEXIS 36905
(5th Cir. Dec. 14, 2021) . . . . . . . . . . . . . . . . . . 5, 12

*Carter v. Welles-Bowen Realty, Inc.*,
736 F.3d 722 (6th Cir. 2013) . . . . . . . . . . . . . . . 7, 8

*Chevron v. Nat. Res. Def. Council*,
467 U.S. 837 (1984) . . . . . . . . . . . . . . . . . . . *passim*

*Dig. Realty Trust, Inc. v. Somers*,
138 S. Ct. 767 (2018) . . . . . . . . . . . . . . . . . . . . . . . 7

*Freedom Ordnance Mfg, Inc., v. Brandon*,
No. 16-234, 2018 WL 7142127
(S.D. Indiana 2018) . . . . . . . . . . . . . . . . . . . . . . . 11

*Grayned v. City of Rockford*,
408 U.S. 104 (1972) . . . . . . . . . . . . . . . . . . . . . . . . 9

*Guedes v. BATFE*,
356 F. Supp. 3d 109 (D.D.C. 2019) . . . . . . 2, 13, 14

*Guedes v. BATFE*,
440 U.S. App. D.C. 141, 920 F.3d 1,
762 F. App'x 7 (2019) . . . . . . . . . . . . . . . . . . . 2, 14

*Guedes v. BATFE*,
140 S. Ct. 789 (2020). . . . . . . . . . . . . . . . . . . . . . . . 2

*Guedes v. BATFE*,
No. 18-cv-2988 (DLF), 2021 U.S. Dist. LEXIS 30926 (D.D.C. Feb. 19, 2021) . . . . . . . . . . . . . . . . 3

*Gun Owners of Am., Inc. v. Garland*,
992 F.3d 446 (6th Cir. 2021). . . . . . . . . . . . . . . 5, 14

*Gun Owners of Am., Inc. v. Garland*,
No. 19-1298, 2021 U.S. App. LEXIS 19006 (6th Cir. June 25, 2021) . . . . . . . . . . . . . . . . . . . . 5

*Gun Owners of Am., Inc. v. Garland*,
No. 19-1298, 2021 U.S. App. LEXIS 35812 (6th Cir. Dec. 3, 2021). . . . . . . . . . . . . . . . . . 5, 8, 14

*HollyFrontier Cheyenne Ref., LLC v. Renewable Fuels Ass'n*, 141 S. Ct. 2172 (2021) . . . . . . . . . . . 7

*Johnson v. United States*,
135 S. Ct. 2551 (2015). . . . . . . . . . . . . . . . . . 13, 14

*Lamie v. United States Trustee*,
540 U.S. 526, 124 S. Ct. 1023, 157 L. Ed. 2d 1024 (2004). . . . . . . . . . . . . . . . . . . . 6

*Marbury v. Madison*,
5 U.S. (1 Cranch) 137 (1803) . . . . . . . . . . . . . . . . 5

*McDonnell v. United States*,
136 S. Ct. 2355 (2016). . . . . . . . . . . . . . . . . . . . . 10

*Niz-Chavez v. Garland*,
141 S. Ct. 1474 (2021). . . . . . . . . . . . . . . . . . . . . . 6

*Sessions v. Dimaya*,
138 S. Ct. 1204 (2018). . . . . . . . . . . . . . . . 9, 13, 14

*United States v. Apel*,
571 U.S. 359 (2014). . . . . . . . . . . . . . . . . . . . . . . . 6

*Wisconsin Central Ltd. v. United States*,
585 U.S. ___, 138 S. Ct. 2067,
201 L. Ed. 2d 490 (2018). . . . . . . . . . . . . . . 6, 8, 15

**STATUTES**

18 U.S.C. § 922(o). . . . . . . . . . . . . . . . . . . . . . . . . 4, 9

28 U.S.C. § 1295(a)(2) . . . . . . . . . . . . . . . . . . . . . . . 3

**REGULATIONS**

27 CFR § 478.11 . . . . . . . . . . . . . . . . . . . . . . . . . . . 11

83 Fed. Reg. 13442 (Notice of Proposed
Rulemaking) . . . . . . . . . . . . . . . . . . . . . . . . . . . 10

83 Fed. Reg. 66514 (Dec. 26, 2018) . . . . . . . . 9, 11, 12

**OTHER AUTHORITIES**

George Orwell, 1984. . . . . . . . . . . . . . . . . . . . . . . . . 11

## INTERESTS OF THE AMICI CURIAE

David Codrea, Scott Heuman and Owen Monroe lawfully owned bumpstocks.[1] They relied on the Bureau of Alcohol, Tobacco, Firearms and Explosives' ("ATF") repeated express approval of so-called bumpstock-type devices. Despite the ten-plus years of approval, the ATF reimagined and redefined terms in an unambiguous criminal statute to outlaw bumpstocks under penalty of prison, fines, and loss of Second Amendment rights.

As such, they have an interest in the outcome of this case because a positive ruling in the instant matter will assist them in their efforts to have their lawful property returned to them in the future and will help guide other courts in reaching the correct conclusion which is that bumpstocks are not machineguns.

## INTRODUCTION AND BACKGROUND

Mr. Codrea, Mr. Heuman and Mr. Monroe filed their complaint in the District of Columbia district court against the ATF and the then-acting Attorney General. *See David Codrea, et al., v. Bureau of Alcohol, Tobacco, Firearms and Explosives, et al.*, Civ. No. 1:18-cv-3086 (DLF). On January 18, 2019, the Codrea plaintiffs moved for a preliminary injunction. *Amici*'s case was related, but not consolidated, with *Guedes v.*

---

[1] No counsel for any party authored this brief in whole or in part, nor did any counsel or party make any monetary contribution intended to fund the preparation or submission of this brief. All parties' counsel of record received timely notice of the intended filing of this brief and all consented to its filing.

*BATFE*, Civ. No. 1:18-cv-02988 (DLF). Inexplicably, the district court applied deference found in *Chevron v. Nat. Res. Def. Council*, 467 U.S. 837, (1984), despite the government wholly failing to even mention *Chevron* in its briefing.[2] *Guedes v. BATFE*, 356 F. Supp. 3d 109 (D.D.C. 2019).

The *Codrea* plaintiffs appealed the denial of the preliminary injunction to the Court of Appeals for the District of Columbia, and the *Guedes* plaintiffs appealed as well. The Circuit Court then consolidated the appeals and granted the parties' request for expedited treatment. After an expedited hearing, the Circuit Court affirmed the district court, and applied *Chevron* deference as well. *Guedes v. BATFE*, 440 U.S. App. D.C. 141 (2019).

This Court denied the parties' petition for writ of certiorari, but Justice Gorsuch wrote separately cautioning that, "[c]ontrary to the court of appeals's decision in this case, [*Chevron*] has nothing to say about the proper interpretation of the law before us. " *Guedes v. BATFE*, 140 S. Ct. 789, 789 (2020) (Gorsuch, J., Statement of Justice Gorsuch).

Back in the district court, the *Codrea* plaintiffs and government defendants cross-moved for summary judgment. The government took the position that there was no ambiguity in the statute (Docket No. 42, p. 18), and therefore, no need to apply *Chevron*. But the district court applied *Chevron* deference again because the D.C. Circuit Court blessed its application. *See*

---

[2] *See* Government's Opposition, 1:18-cv-03086 (DLF) Docket No. 16.

*Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, No. 18-cv-2988 (DLF), 2021 U.S. Dist. LEXIS 30926, at *11-12 (D.D.C. Feb. 19, 2021) (D.C. Circuit addressed *Chevron* "in *Guedes II*, which held that the application of *Chevron* deference in this case was proper"). Applying *Chevron*, the court found "automatically" and "single function of the trigger" ambiguous, and the government's interpretation "reasonable." *Id*. at *15-16. Notably, neither the district court nor the circuit court held that the government had the "best reading" of the statute at issue.

*Guedes* was appealed to the D.C. Circuit Court (*see Damien Guedes, et al v. ATF, et al*; 21-5045) and *Codrea,* because it contained a Takings Clause claim, was appealed to the Federal Circuit (*see David Codrea, et al., v. Merrick B. Garland, et al*.; 21-1707) because the Federal Circuit has exclusive appellate jurisdiction over Little Tucker Act claims under 28 U.S.C. § 1295(a)(2). Both are currently pending before the aforementioned circuit courts with *Guedes* having already been argued on March 8, 2022 and *Codrea* stayed pending the grant or denial of certiorari in this matter and *W. Clark Aposhian, Petitioner v. Merrick B. Garland, Attorney General, et al.* (21-159).

*Amici* request that this Court grant certiorari in this case as there is no need to allow further percolation in the Courts of Appeals and because the Sixth Circuit was hopelessly deadlocked. Such a grant would stop the waste of party and judicial resources and would have this Court announce a bright line rule on the application of *Chevron* to a criminal statute.

## SUMMARY OF THE ARGUMENT

18 U.S.C. § 922(o) is undeniably a criminal statute, with real criminal penalties associated with its enforcement, and thus, deference granted to an agency under *Chevron v. Nat. Res. Def. Council*, 467 U.S. 837, (1984) is improper. Instead, the rule of lenity should apply. But taking away the application of *Chevron* that the D.C. and Tenth Circuit, foisted upon the parties, neither found that the agency has the best reading of the statute. The Sixth Circuit, before vacating its opinion and going en banc, found that *Chevron* did not apply and ruled in favor of those plaintiffs, but then hopelessly deadlocked en banc, affirming the lower court. But then the Fifth Circuit weighed in and said yes, the ATF has the best reading and didn't apply *Chevron*.

In any event, the Circuits are confused about what rule of law to apply to determine whether the Final Rule stands. It seems clear that bumpstocks are not machineguns, despite the agency trying to define them as such, because the National Firearms Act specifically defines what a machinegun is, and a bumpstock doesn't qualify. Because the Circuits do not know how to deal with this Rule and have said both that the government has the best reading of the statute, and that the government receives *Chevron* deference for an obviously criminal statute, this Court should grant the petition for certiorari and clarify this law for the lower courts.

## ARGUMENT

### A. The Rule of Lenity Applies Instead of *Chevron* Deference

These bumpstock cases have taken a bizarre turn. These cases present what should be a straightforward analysis by each of the courts, exercising its Article III power (and duty) "to say what the law is" (*Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)) and decide if the government's rule is the best reading of the statute. Instead, the circuit courts (except for the panel in the Sixth Circuit Court of Appeals in *Gun Owners of Am., Inc. v. Garland*, 992 F.3d 446 (6th Cir. 2021) and a panel in the Fifth Circuit, *Cargill v. Garland*, No. 20-51016, 2021 U.S. App. LEXIS 36905 (5th Cir. Dec. 14, 2021)) have applied *Chevron* deference, allowing the *government* to "say what the law is", and have essentially abdicated their Article III duty. The Sixth Circuit came to the rescue and correctly freed the parties from the albatross that neither wanted hanging around their necks, analyzed the Final Rule, and found that the government did not have the best reading. Unfortunately, the Sixth Circuit then granted the government's petition for rehearing en banc, vacated the panel's opinion (*Gun Owners of Am., Inc. v. Garland*, No. 19-1298, 2021 U.S. App. LEXIS 19006 (6th Cir. June 25, 2021)) and then hopelessly deadlocked as to what to do next (*Gun Owners of Am., Inc. v. Garland*, No. 19-1298, 2021 U.S. App. LEXIS 35812 (6th Cir. Dec. 3, 2021) which, as a result, affirmed the decision of the district court upholding the rule.

As this Court recently stated, in resolving "a dispute over a statute's meaning, this Court normally seeks to afford the law's terms their ordinary meaning at the time Congress adopted them. *See*, e.g., *Wisconsin Central Ltd. v. United States*, 585 U.S. ___, ___, 138 S. Ct. 2067, 201 L. Ed. 2d 490, 495 (2018). The people who come before us are entitled, as well, to have independent judges exhaust 'all the textual and structural clues' bearing on that meaning. *Id*., at ___, 138 S. Ct. 2067, 201 L. Ed. 2d 490, 499. When exhausting those clues enables us to resolve the interpretive question put to us, our 'sole function' is to apply the law as we find it, *Lamie v. United States Trustee*, 540 U.S. 526, 534, 124 S. Ct. 1023, 157 L. Ed. 2d 1024 (2004) (internal quotation marks omitted), not defer to some conflicting reading the government might advance." *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1480 (2021). And yet, the courts are ignoring the plain meaning of the statute at issue and applying *Chevron* despite neither party wanting it and the government explicitly stating it does not apply, and deferring to a "conflicting reading the government" advanced. This should not be allowed to stand.

The definition of a machinegun is a matter of criminal law. This Court has made clear, "[t]he critical point is that criminal laws are for courts, not for the Government, to construe." *Abramski v. United States*, 573 U.S. 169, 191 (2014). *See also United States v. Apel*, 571 U.S. 359, 571 U.S. 359, 369 (2014) ('[W]e have never held that the Government's reading of a criminal statute is entitled to any deference'). Under this principle, the "ATF's old position no more relevant than its current one — which is to say, not relevant at

all." *Abramski*, 573 U.S. at 191. In 2018, this Court held "[t]he statute's unambiguous ... definition, in short, precludes the [agency] from more expansively interpreting that term." *Dig. Realty Trust, Inc. v. Somers*, 138 S. Ct. 767, 782 (2018) (emphasis added). To put it bluntly, *Chevron* is thus utterly irrelevant to this case.

This position is supported by this Court's recent decision in *HollyFrontier Cheyenne Ref., LLC v. Renewable Fuels Ass'n*, 141 S. Ct. 2172 (2021). That case dealt with smaller fuel refiners' eligibility for hardship extensions under the federal renewable fuels program. The EPA granted such an exemption and some program participants objected. In that case, the federal government did not ask for such deference and, rightfully so, *Chevron* was not considered: "the government is not invoking *Chevron*. … We therefore decline to consider whether any deference might be due its regulation." *HollyFrontier Cheyenne Ref., LLC v. Renewable Fuels Ass'n*, 141 S. Ct. 2172 (2021).

In Judge Sutton's well-reasoned concurrence in *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 730-31 (6th Cir. 2013), discussing the differing applications of lenity and *Chevron*, he stated:

> the rule of lenity forbids deference to the executive branch's interpretation of a crime-creating law. If an ordinary criminal law contains an uncertainty, every court would agree that it must resolve the uncertainty in the defendant's favor. No judge would think of deferring to the Department of Justice. Allowing prosecutors to fill gaps in criminal laws would

> "turn the normal construction of criminal statutes upside down, replacing the doctrine of lenity with a doctrine of severity."

And this is precisely the situation the government created with the Final Rule. The government created a new crime out of thin air regarding what is now considered a machinegun, despite telling everyone for over a decade that a bumpstock was in fact not a machinegun.[3] "The rule of lenity carries into effect the principle that only the legislature, the most democratic and accountable branch of government, should decide what conduct triggers these consequences." *Id.* at 731 (Sutton, J., concurring). This is supported by the holding in *Wis. Cent., Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018) that "Congress alone has the institutional competence, democratic legitimacy, and (most importantly) constitutional authority to revise statutes in light of new social problems and preferences."

---

[3] Circuit Judge Murphy, dissenting about why the Final Rule is not sustainable, astutely summarized the problem with what the federal government is doing: "Despite the introduction of multiple bills, Congress opted not to pass such legislation. And while the burdensome legislative process may seem 'unworkable' in today's polarized age, it is a core component of our separation of powers designed to protect the liberty of all Americans—not just bump-stock owners. [] **Whether one favors or disfavors a policy banning bump stocks, we should all be concerned with the way in which the federal government has enacted that policy into law**." *Gun Owners of Am., Inc. v. Garland*, No. 19-1298, 2021 U.S. App. LEXIS 35812, at *35 (6th Cir. Dec. 3, 2021) (Murphy, J., dissenting) (citation omitted and emphasis added).

And we know that the Final Rule was a crime-creating statute because prior to the Final Rule, bumpstocks were not machineguns, and thus legal. But after the Final Rule went into effect, hundreds of thousands of law-abiding owners were required to destroy or surrender them or become instant criminals.

As the ATF stated, "[t]he rule clarifies the regulatory definition of 'machinegun' to include bump-stock-type devices, and, therefore, subjects them to the restrictions imposed by the NFA and GCA." 83 Fed. Reg. at 66520. Under ATF's reasoning, any bumpstock made after 1986 has *always* been a machinegun and thus has *always* been banned. The retroactive reach of the rule to illegalize the very same devices made and sold during the 2008 to 2017 time period pursuant to the ATF's "ten letter rulings" is undeniable. In response, the ATF dodges the question from retroactivity to one of enforcement discretion.

A violation of 18 U.S.C. § 922(o) is not dependent on an agency promise to withhold *enforcement* until a date certain in the future. Congress, not the agency, establishes the bounds of criminal law and Congress has not made these devices illegal, prospectively or otherwise. As this Court recently explained, the void-for-vagueness doctrine "is a corollary of the separation of powers—requiring that Congress, rather than the executive or judicial branch, define what conduct is sanctionable and what is not." *Dimaya*, 138 S. Ct. at 1212. This doctrine ensures that the legislature, not prosecutors or courts, determine the scope of the criminal law. *See Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972).

Here, in applying its rule retroactively to existing devices that it indisputably previously allowed, the ATF "makes an action, done before the passing of the law, and which was innocent when done, criminal." *Calder v. Bull*, 3 U.S. (3 Dan.) 386, 390 (1798). It is now construing the statute to include conduct that it had previously viewed as innocent. By any measure, applying the statute in this way is retroactive and thus unauthorized by the enabling statutory authority that governs ATF rulemaking. The retroactive reach of the rule cannot be avoided by an agency promise to forego *enforcement* in the exercise of prosecutorial discretion. While a prosecutor has undeniable discretion, that discretion cannot be used to change the meaning of criminal law. *See McDonnell v. United States*, 136 S. Ct. 2355, 2373–74 (2016).

### B. Bumpstocks are not Machineguns

A mere four days before the Notice of Proposed Rulemaking[4] ("NPRM") was issued, the ATF was involved in litigating a bumpstock-type case in the Southern District of Indiana in July 2017. In *Freedom Ordnance Mfg., Inc. v. Thomas E. Brandon, Director of the Bureau of Alcohol, Tobacco, Firearms and Explosives*, Civil Action No. 3:16-cv-243-RLY-MPB, the ATF argued that bump stocks (of the type at issue here) were not machineguns because bump firing:

> requires the shooter to manually pull and push the firearm in order for it to continue firing. Generally, the shooter must use both hands –

---

[4] 83 Fed. Reg. 13442 (Notice of Proposed Rulemaking)

> one to push forward and the other to pull rearward – to fire in rapid succession. While the shooter receives an assist from the natural recoil of the weapon to accelerate subsequent discharge, the rapid fire sequence in bump firing is contingent on shooter input in pushing the weapon forward, rather than mechanical input, and is thus not an automatic function of the weapon.

That argument was sustained. *See* ATF motion for summary judgment, Dkt. entry 28 at page 22, *filed in Freedom Ordnance Mfg, Inc., v. Brandon*, No. 16-234 2018 WL 7142127 (S.D. Indiana 2018).

However, this plain understanding of how a bump stock type device works and why it is not a machinegun evaporated after the Las Vegas incident and the ATF was instructed to find a way to ban the devices.[5] On December 26, 2018, the government published the Final Rule banning bump stocks as machineguns in the Federal Register. *See* 83 Fed. Reg. 66514 (Dec. 26, 2018). Under the ATF's new revised rule, 27 CFR § 478.11, it stated the term "machine gun" includes a bump-stock-type device. But, if this new rule is so clear, why must the agency include the sentence that the rule specifically applies to bumpstocks? It is because even

---

[5] The government's position is reminiscent of George Orwell's classic novel 1984. Basically, the government announces to the court what it is to believe and then demands the court march in lock-step along with it - "In the end the Party would announce that two and two made five, and you would have to believe it. It was inevitable that they should make that claim sooner or later: the logic of their position demanded it." George Orwell, 1984.

under the Final Rule, bumpstocks still do not fit the definition and are not machineguns and in fact, can only be classified as machineguns because the ATF put this one sentence in the Rule. It is the equivalent of allowing an agency to declare a Honda Accord to be a Lamborghini simply because it passed a rule declaring it as such. Or maybe it would declare that the Accord, with an internal combustion engine, is actually an electric vehicle because it contains a battery.

In the Final Rule, the government took the position that the terms "automatically" and "single function of the trigger" are not ambiguous. In the Final Rule, the government stated that "even if those terms are ambiguous, this rule rests on a reasonable construction of them." *See* 83 FR 66527. This is a concession that the government does not believe and does not consider the terms ambiguous, and in fact, it has taken this position in litigation. But, unable to square the new definitions with the plain text of an almost century-old statute, in order to uphold the Final Rule, all circuit courts, except for the now-vacated Sixth Circuit panel and an outlier Fifth Circuit decision[6], were forced to find that the term "automatically" and the phrase "single function of the trigger" were ambiguous.

---

[6] The Fifth Circuit's decision came out a mere 11 days after the Sixth Circuit's deadlock. What appears to be an attempt to insulate its ruling from a troublesome *Chevron* analysis (and this Court's cases holding that *Chevron* has no application to criminal statutes), the Fifth Circuit held that the "Bump Stock Rule's interpretation of the NFA's definition of 'machinegun' is the best interpretation of the statute." *Cargill v. Garland*, No. 20-51016, 2021 U.S. App. LEXIS 36905, at *21 (5th Cir. Dec. 14, 2021).

Indeed, if the terms are ambiguous, then that ambiguity opens these provisions to serious attack for vagueness under the Due Process Clause of the Fifth Amendment. *See Sessions v. Dimaya*, 138 S. Ct. 1204, 1212 (2018) ("'the prohibition of vagueness in criminal statutes…is 'essential' of due process, required by both 'ordinary notions of fair play and the settled rules of law.'") quoting *Johnson v. United States*, 135 S. Ct. 2551, 2557 (2015). This is, no doubt, the reason that the government has never claimed that the provisions are ambiguous.

In *Codrea*, first, the district court analyzed whether "as the plaintiffs argue, 'single function of the trigger' means a mechanical act of the trigger, or whether, as ATF argued in the rule, a 'single function of the trigger' means a single pull of the trigger from the perspective of the shooter." *Guedes v. BATFE*, 356 F. Supp. 3d 109, 130 (D.D.C. 2019). Because the district court adopted the government's version, the statute has now been completely rewritten to focus on the trigger's function "from the perspective of the shooter." This new perspective upends what Congress intended in 1934 when it drafted the NFA and defined machinegun from the perspective of the firearm itself. We know this because the statute itself declares a "single function of the trigger", *not* a "single function of the trigger and the intent of the person manipulating the trigger while also applying forward pressure on the handguard."[7]

[7] Circuit Judge Henderson, of the D.C. Circuit Court of Appeals, explains this additional operation as something more than what the statute requires: "But that added physical pressure is inconsistent with the statutory definition of a 'machinegun,' which

Then, the district court found that ATF "acted reasonably in defining the phrase 'single function of the trigger' to mean a 'single pull of the trigger and analogous motions." *Id.* at 131. But "analogous motions" is not in the statutory language which focuses on "automatic" fire from "single function of the trigger." In fact, the ATF made the statute ambiguous <u>now</u> by including "analogous motions" in its new definition which is itself not further defined and instead left to the reader's (and a future ATF's) imagination. It is unnecessary surplusage which arguably makes the statute unconstitutionally vague under *Dimaya* and *Johnson*. The Sixth Circuit panel opinion correctly determined that the language is focused on the trigger of the firearm and not the shooter. *See Gun Owners of Am., Inc. v. Garland*, 992 F.3d 446, 471 (6th Cir. 2021) reh'g en banc granted, panel vacated, s*uperseded by Gun Owners of Am., Inc. v. Garland*, 2021 U.S. App. LEXIS 35812 (6th Cir.) (6th Cir. Mich., Dec. 3, 2021) ("Indeed, the entire definition focuses exclusively on the firearm's design and capability. At no point does the definition mention the shooter or the shooter's actions").

The best interpretation of the statute as to why a bumpstock is not a machinegun, as consistently held by the government for over ten years, is what it refered to in the classification letters: "The stock has no

---

fires multiple rounds with a self-acting mechanism effected through a single pull of the trigger simpliciter. In short, the statute uses 'pull' and the Rule—invalidly—uses 'pull *plus*.'" *Guedes v. BATFE*, 440 U.S. App. D.C. 141, 186, 920 F.3d 1, 46, 762 F. App'x 7, 9 (2019) (Henderson, J., dissenting in part).

automatically functioning mechanical parts or springs and performs no automatic mechanical functions when installed. In order to use the installed device, the shooter must apply constant forward pressure with the non-shooting hands and constant rearward pressure with the shooting hand…" This is a far cry from their current 180-degree conclusion that yes, in fact a bumpstock allows a shooter to automatically fire a weapon because everything the agency said years ago is now wrong in light of the new political pressure the agency faced.

## CONCLUSION

The government has no authority to rewrite a criminal statute to fit its current agenda. Despite the ATF's attempt to the contrary, "Congress alone has the institutional competence, democratic legitimacy, and (most importantly) constitutional authority to revise statutes in light of new social problems and preferences. Until it exercises that power, the people may rely on the original meaning of the written law." *Wis. Cent., Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018). While individuals may or may not like bump stocks, that "new social problem [or] preference[]" is properly left to Congress to declare such and not an unelected agency which has stated over and over in the past that is has no authority to regulate bump stocks.

This Court should grant Petitioners' writ of certiorari.

Respectfully submitted,

ALAN ALEXANDER BECK
2692 Harcourt Drive
San Diego, CA 92123
(619) 905-9105
Alan.Alexander.Beck@gmail.com

STEPHEN D. STAMBOULIEH
*Counsel of Record*
STAMBOULIEH LAW, PLLC
P.O. Box 428
Olive Branch, MS 38654
(601) 852-3440
Stephen@sdslaw.us

*Counsel for Amici Curiae*

April 6, 2022