No. 21-159

# In the Supreme Court of the United States

W. CLARK APOSHIAN,
*Petitioner*,
v.

MERRICK GARLAND, Attorney General of the United States; U.S. DEPARTMENT OF JUSTICE; BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES; and MARVIN RICHARDSON, Acting Director, Bureau of Alcohol, Tobacco, Firearms, and Explosives,
*Respondents.*

**On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Tenth Circuit**

## REPLY BRIEF FOR PETITIONER


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## ARGUMENT

Throughout the history of this case, from ATF's promulgation of the bump-stock regulation as a final rule in 2018 through the government's defense of the rule in the court of appeals (and three other circuits), the government has argued that the rule simply gives effect to the best reading of the unambiguous statutory language and that the agency, therefore, neither wants nor is entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). So too here. The government emphasizes in its opposition to the Petition that "neither Petitioner nor the government accepts the premise that the final rule was an exercise of delegated authority to resolve a statutory ambiguity." BIO 15.

*Chevron* is thus an orphan in this case, rejected by both sides as inapplicable. The panel majority below, however, applied *Chevron* anyway, deferring to what it deemed ATF's reasonable interpretation of the ambiguous statutory terms "automatically" and "single function of the trigger." App.25a–33a.

Despite agreeing that the panel majority erroneously applied *Chevron*, the government nonetheless urges the Court to deny the Petition and permit that decision to stand based on two principal arguments. First, the government argues that the threshold *Chevron* questions presented here—whether *Chevron* deference can be waived by an agency and whether it applies at all to statutes carrying criminal penalties—are "academic" because "the district court correctly held [that] ATF's interpretation reflects the

best understanding of the statutory language." BIO 14–15. In other words, the government invites the Court to look past the *Chevron* hurdles that the panel majority had to clear to avoid interpreting the statute *de novo*, and to consider instead the merits of ATF's statutory construction, where the government, on its telling, wins anyway.

But the government acknowledges that the panel majority's decision upholding the rules turned on *Chevron*, BIO 11–12, 20, and Petitioner seeks review of *that* decision, not the holding of the district court. And notably the government fails to mention that *all eight* of the federal appeals court judges who have addressed the rule under *de novo* review have rejected the government's "best understanding" argument. Thus, the government's argument for its ultimate success on the merits—without the benefit of *Chevron* deference—is dubious at best, finding *zero* support in the courts of appeals.

Second, the government argues that the circuits are not divided on the issues raised by the Questions Presented. BIO 24–25, 26. But the government's assertion does not survive even the slightest scrutiny. And after the filing of this Petition, yet another appellate court, the U.S. Navy-Marine Corps Court of Criminal Appeals, issued a decision (which was not appealed) that directly conflicts with the decision below. *United States v. Alkazahg*, No. 202000087, 2021 WL 4058360 (N.-M. Ct. Crim. App., Sept. 7, 2021).

The government has articulated no plausible grounds for delaying the Court's consideration of the exceptionally important questions at issue here.

## I. THE COURT SHOULD REVIEW WHETHER *CHEVRON* DEFERENCE CAN BE WAIVED

The government opposes this Court's review of whether an agency can waive *Chevron* because, even without *Chevron* deference, the district court held that ATF's interpretation of 26 U.S.C. § 5845(b) reflects the best understanding of the statutory language. But Petitioner seeks review of the panel majority's decision, and it never ruled on the "best understanding" of the statute.

In any event, the district court's decision in this case is an extreme outlier. Five Tenth Circuit judges interpreted *de novo* the statutory provisions at issue in this case, without giving the government the benefit of *Chevron*'s decisive thumb on the scale. All five concluded that ATF's rule is *ultra vires*. App.79a–90a. And in the other cases in which the ATF's bump–stock rule has been challenged, three circuit judges have considered the meaning of the statute *de novo*, and all three concluded that the rule is *ultra vires*. *See Guedes v. Bureau of Alcohol, Tobacco, Firearms and Explosives*, 920 F.3d 1, 46–48 (D.C. Cir. 2019) (Henderson, J., dissenting); *Gun Owners of Am., Inc. v. Garland*, 992 F.3d 446, 469–73 (6th Cir. 2021) (Batchelder, J., joined by Murphy, J.), *reh'g en banc granted, opinion vacated*, 2 F.4th 576 (6th Cir. 2021).[1]

[1] Likewise, the panel of the Navy-Marine Corps Court of Criminal Appeals in *United States v. Alkazahg*, No. 202000087, 2021 WL 4058360 (Sept. 7, 2021), unanimously concluded that the relevant terms of the definition of "machinegun" are "best read" not to encompass bump stocks, *id* at *12. The time for the Judge

On the other side of the scorecard, the panel majority below and every other circuit judge who has voted to uphold the bump-stock rule has rejected the government's plea to interpret the statute *de novo* and has crammed *Chevron* deference down the government's unwilling throat. Indeed, the D.C. Circuit even applied *Chevron* deference over the government's protest that it would rather lose the case than win under *Chevron*. *See Guedes*, 920 F.3d at 21 (Henderson, J., dissenting).[2] This record in the circuit courts hardly inspires confidence in the merits of the government's statutory interpretation.

Nor is there any merit in the government's complaint that "petitioner has failed to explain why the government's litigation choices would altogether disable a reviewing court from making its own independent judgment about how best to apply this Court's *Chevron* precedents." BIO 25. First, surely the burden should be on the government to explain why its "litigation choices" are somehow special and should be treated differently from any other litigant's express waiver. Second, the government's disavowal of *Chevron* was not just a "litigation choice": in promulgating the bump-stock rule, ATF made clear that it believes the relevant statutory terms are not ambiguous and that

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Advocate General to seek review of this decision has expired.

[2] The government claims "several district courts have upheld the rule as the best interpretation of the statute," BIO 23, but it cites only two such decisions—the district court's decision below and the decision in *Cargill v. Barr*, 502 F. Supp. 3d 1163, 1190, 1194 (W.D.Tex. 2020), appeal pending No. 20-51016 (5th Cir.). We, too, have been able to find only two such decisions.

its interpretation "accords with the plain meaning of those terms" and represents the "best interpretation of the statute." 83 Fed. Reg. at 66,527, 66,518. The government's litigation choice to disavow *Chevron* was thus made by the client agency, for if the final rule, as the government admits, was not "an exercise of delegated authority to resolve a statutory ambiguity," BIO 15, then *Chevron* is by definition inapplicable. *See United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001). And *that* is why, as we *did explain* in the Petition,

> an agency's waiver of *Chevron* deference should be binding on a court reviewing the agency's statutory interpretation. As Justice Gorsuch recently put it: "If the justification for *Chevron* is that policy choices should be left to executive branch officials directly accountable to the people, … then courts must equally respect the Executive's decision not to make policy choices in the interpretation of Congress's handiwork." *Guedes*, 140 S. Ct. at 790. This is especially true when the agency's decision not to make policy choices is based on its determination that Congress did not delegate any choices for it to make.

Pet. 17–18.

The short of it is this: The assumption underlying *Chevron* is that Congress delegates authority to resolve statutory ambiguity *to the administering agency*. So, a court can no more insist

that an agency has exercised delegated interpretive authority that the agency determines it lacks than a court can draft and impose an agency regulation that the agency determines it lacks authority to promulgate.

Finally, the government's strained attempt to prove that the circuits are not in disarray on the issue of agency waiver of *Chevron* deference cannot survive even a casual survey of this terrain in the lower courts. BIO 24–25. In this case, the Tenth Circuit held that the Government's disavowal of *Chevron* deference means that the court is not *required* to apply *Chevron* but was *permitted* to do so. App. 16a. To the Tenth Circuit, then, *Chevron* is a discretionary interpretative tool that a court may use to uphold a favored regulation even if the agency itself disavows the doctrine. The D.C. Circuit, noting that *Chevron* "is an awkward conceptual fit for the doctrines of forfeiture and waiver," has held that *Chevron* cannot be waived "if the underlying agency action manifests its engagement in the kind of interpretive exercise to which review under *Chevron* generally applies." *Guedes*, 920 F.3d at 23. And both the D.C. Circuit and the Tenth Circuit are divided internally on the question of *Chevron* waiver. *See* Pet. 19–20. The Sixth Circuit has concluded that the Government may waive *Chevron*, just as any other litigant may waive any other argument. *See CFTC v. Erskine*, 512 F.3d 309 (6th Cir. 2008) (citing *Help Alert W. Kentucky, Inc. v. Tennessee Valley Auth.*, 191 F.3d 452, *3 (6th Cir. 1999) (table) (finding that *plaintiffs* forfeited *Chevron* argument)); *see also Gun Owners of Am.*, 992 F.3d at

454 n.3 (recognizing "circuit split").[3] The Fourth Circuit views *Chevron* as a nonwaivable standard of review. *Sierra Club v. United States Dep't of the Interior*, 899 F.3d 260, 286 (4th Cir. 2018). And the Fourth Circuit has identified the disarray in the circuits, finding itself in the "minority" on the issue, one that "[c]ourts and scholars continue to grapple with." *Amaya v. Rosen*, 986 F.3d 424, 430 n.4 (4th Cir. 2021). The Eleventh Circuit has similarly recognized the division in approaches. *Martin v. Soc. Sec. Admin., Comm'r*, 903 F.3d 1154, 1161 nn. 48–49 (11th Cir. 2018).

The lower courts are riven on the question whether an agency can waive *Chevron* deference. This Court should grant review now to clear up this confusion and prevent it from spreading further.

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[3] The Government attempts to place *CFTC v. Erskine* outside the lower court confusion on the issue of *Chevron* waiver. It is true that the Sixth Circuit found that the agency failed to meet the minimum requirements for *Chevron* deference under *Mead*. *See* BIO 25. But that was one of three independent reasons for declining *Chevron* deference, the "[f]irst" being that CFTC "waived any reliance on *Chevron* deference by failing to raise it to the district court." *Id.* at 314. The Eighth Circuit's decision in *Sierra Club v. E.P.A.*, 252 F.3d 943 (8th Cir. 2001), is also relevant in articulating that circuit's apparent view on the situations (or rather lack thereof) in which an agency can waive *Chevron*. Even when the agency failed to consider "in its final rule" that the statute was "ambiguous," the court found no waiver of *Chevron*. *Id*. at 947 n.8.

## II. LOWER FEDERAL COURTS NEED GUIDANCE REGARDING *CHEVRON*'S APPLICABILITY TO CRIMINAL STATUTES

The government further asserts that review is unwarranted on the second and third Questions Presented because of a supposed lack of conflict in the lower courts. That erroneous assertion overlooks conflicting decisions from the Second and Ninth Circuits.

The Ninth Circuit decision, *United States v. Kuzma*, 967 F.3d 959 (9th Cir. 2020), involved an ATF interpretation of the very same criminal statute at issue here, 26 U.S.C. § 5845(b). The court stated that ATF interpretations of the statute were not entitled to deference because "criminal laws are for the courts, not for the Government, to construe." 867 U.S. at 971 (quoting *Abramski v. United States*, 573 U.S. 169, 191 (2014). Similarly, the Second Circuit rejected a claim that it should defer to an ATF regulation that sought to clarify when an alien should be deemed "in the United States" for purposes of a criminal immigration statute, relying on *Abramski* for the proposition that "law enforcement agency interpretations of criminal statutes are not entitled to deference." *United States v. Balde*, 943 F.3d 73, 83 (2d Cir. 2019).

The government contends that the Sixth Circuit's decision in *Gun Owners of America* does not suffice to create a circuit conflict, noting that the Sixth Circuit later agreed to rehear that case *en banc* (and held oral argument in October). BIO 22. But the government fails to note the Sixth Circuit panel's observation that:

> [T]here is *already a split* among the Circuits on the meaning of [*United States v. Apel*, 571 U.S. 359 (2014)] and *Abramski* and whether the *Supreme* Court now requires courts *not* to give any deference to agency interpretations of criminal statutes. With this decision we are joining one side of a circuit split, not creating a new one.

992 F.3d. at 460 (emphasis added).

The division in the lower courts became even more pronounced following the recent decision in *Alkazahg*, in which the Navy-Marine Corps Court of Criminal Appeals declined to apply *Chevron* deference, concluded bump stocks do not come within the statutory definition of "machinegun," and, in the alternative, "would apply the rule of lenity" to overturn a Marine's conviction for possession of a "machinegun." *Alkazahg*, 2021 WL 4058360 at *16.

Nor does the government address Petitioner's demonstration (pp. 26-28) that conflicting signals from this Court have created lower-court confusion regarding *Chevron*'s application to criminal statutes. *See* Pet. 26–28. The government discounts the relevance of the Court's *Abramski* and *Apel* decisions to *Chevron* deference issues, stating that "*Abramski* and *Apel* did not involve agency regulations with any claim to *Chevron* deference." BIO 27. But those two decisions use sweeping language that cannot be dismissed as inapplicable to formal regulations interpreting federal statutes. *See Abramski*, 573 U.S.

at 181 ("[C]riminal laws are for courts, not the government, to construe."); *Apel*, 571 U.S. at 369 ("[W]e have never held that the Government's reading of a criminal statute is entitled to any deference.").

The Court previously granted review in a case implicating these issues in *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562 (2017), something the government unpersuasively seeks to deny. BIO 27. In that case, the petitioner expressly argued that "[w]hen construing a statute that imposes criminal liability, the rule of lenity requires courts to interpret ambiguity in favor of defendants. Federal agencies, in other words, have no license to resolve ambiguities in 'criminal laws.'" Cert. Pet., *Esquivel-Quintana v. Lynch*, No. 16-54 (U.S., July 11, 2016) at 30 (quoting *Abramski*, 573 U.S. at 191).[4] Thus, whether this Court's footnote in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 704 n.18 (1995), controls was worthy of certiorari before, and it remains so now. Pet. 28.

Finally, as the seven *amicus* briefs filed in support of the Petition all reinforce, the panel majority's decision that *Chevron* trumps the rule of lenity is inconsistent with this Court's teaching that "the possibility of deference can arise" only if a statute or regulation is "genuinely ambiguous … even after a court has resorted to all the standard tools of interpretation." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2414 (2019). The rule of lenity is one such tool, *United States*

[4] The Court ultimately decided not "to resolve whether the rule of lenity or *Chevron* takes priority." 137 S. Ct. at 1572.

*v. Thompson/Ctr. Arms Co.*, 504 U.S. 505, 518 n.10 (1992), one that should certainly apply before *Chevron*. *See* Amicus Brief of Damien Guedes at 10.

## III. THE PETITION IS WELL-SUITED TO ADDRESS ISSUES OF EXCEPTIONAL IMPORTANCE

The government does not contest that the lower federal courts must grapple with these threshold *Chevron* issues in cases across the full spectrum of administrative law. And the stakes of whether to apply *Chevron* to the rule at issue here are particularly high. As the *amicus* brief for West Virginia and 19 other States explains, tens of thousands of Americans purchased bump stocks and used them lawfully during the two decades that ATF said they were not "machineguns." Amicus Brief of West Virginia, *et al.*, at 3. Yet the rule purports to extinguish their property and liberty interests, retroactively declaring them criminals. *Id.* Few federal agency actions could have graver implications than the criminalization of previously lawful conduct.

Further, these exceptionally important issues are cleanly presented for this Court's review. The legality of the rule turns exclusively on the interpretation of statutory and regulatory text—there are no disputed facts raised by this Petition. The Court has previously granted review in cases in a similar interlocutory posture, *see, e.g., Nat'l Inst. of Family &*

*Life Advocates v. Becerra*, 138 S. Ct. 2361, 2370 (2018), and it should do so here.[5]

The panel majority's alternative holding that Petitioner failed to establish irreparable harm is not an impediment to granting review. That decision, App.34a, has no merit. Petitioner was under no obligation to provide irreparable-harm evidence because the government *stipulated* that Petitioner satisfied the irreparable harm requirement. App.64a. The government's concession satisfies a showing of irreparable harm. *See Gun Owners of Am.*, 992 F.3d at 473. And the government cannot argue in this Court that Petitioner failed to satisfy that requirement when it was the government's stipulation that induced Petitioner not to proffer evidence that the government now contends is lacking. See App.55a-57a (Carson, J., dissenting).

The government also asserts that Petitioner waived claims that he suffered irreparable loss of unique property by failing to raise that claim on appeal. BIO 30 (citing App.36). Not so. Petitioner's opening brief below explicitly explained that:

> Here, the "parties do not dispute that Mr. Aposhian will experience irreparable harm if the injunction is denied." Without an injunction, Mr. *Aposhian had to*

[5] Petitioner notes that any petition for writ of certiorari arising from the Sixth Circuit *Gun Owners* case would come to the court in a similar procedural posture—that case's *en banc* proceedings likewise concern an appeal from the denial of a preliminary injunction.

> *surrender his lawfully acquired bump stock* … Mr. Aposhian therefore faces further irreparable constitutional injury warranting an injunction.

*Aposhian v. Barr*, Tenth Cir. No. 19-4036, Appellant's Brief-in-Chief at 48–49 (June 12, 2019) (cleaned up) (emphasis added).

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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