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

SUPPLEMENTAL BRIEF FOR PETITIONER

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SUPPLEMENTAL BRIEF FOR PETITIONER

Pursuant to Supreme Court Rule 15.8, Petitioner submits this Supplemental Brief in support of his pending Petition for Writ of Certiorari.

After the parties completed briefing on the Petition, the U.S. Court of Appeals for the Sixth Circuit, sitting en banc, issued its judgment in *Gun Owners of America, Inc. v. Garland,* No. 19-1298, 2021 WL 5755300 (6th Cir. Dec. 3, 2021). As detailed in the Petition, *Gun Owners of America* involves similar questions regarding the bump-stock rule and the applicability of deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

The en banc Sixth Circuit "divided evenly." *Gun Owners of Am.*, 2021 WL 5755330 at *1. Eight judges would have preliminarily enjoined the rule and eight judges would have denied that injunction. As a consequence, the district court's decision to deny a preliminary injunction was upheld with no controlling appellate opinion.

Judge Murphy, writing for the eight judges who would have enjoined the rule, explained "why bump stocks are not 'machineguns' " as a matter of ordinary statutory interpretation, and "why [courts] cannot fall back on '*Chevron* deference' to save the ATF's rule." *Id.* at *11 (Murphy, J., dissenting). In particular, Judge Murphy persuasively explained why it was " 'preposterous' 'to say that when criminal statutes are ambiguous, the Department of Justice is permitted to construe them as it sees fit[.]' " *Id.* at *20 (quoting Cass

R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 210 (2006). Deference to statutes with criminal law applications would "undercut our separation of powers" turning the Attorney General into both prosecutor and judge. *Id.* at *21. And, allowing *Chevron* to displace the rule of lenity—a rule "perhaps not much less old than construction itself"—"would turn the normal construction of criminal statutes upside-down." *Id.* at *20–21 (quoting *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820); *Crandon v. United States*, 494 U.S. 152, 178 (1990) (Scalia, J., concurring in the judgment)).

Judge White, writing for five judges in support of affirmance, argued that *Chevron* deference should apply, notwithstanding the government's waiver or the criminal law applications. *Id.* at *2 n.5, *3–6, (White, J., writing in support of affirming the district court judgment). In doing so, Judge White acknowledged that there is an "implied tension between" this Court's precedents on the application of *Chevron* to statutes with criminal law applications, but Judge White argued this tension was for "the Supreme Court to resolve, not [the Sixth Circuit]." *Id.* at *3 n.6.[1] Judge White would also have upheld the rule under either

[1] Just last week on November 30, 2021, the Fourth Circuit also recognized the "thoughtful and ongoing debate about whether *Chevron* can apply to interpretations of criminal law, which implicates serious questions about expertise, delegation, flexibility, notice, due process, separation of powers, and more." *Pugin v. Garland*, No. 20-1363, 2021 WL 5576042, at *3 & n.3 (4th Cir. Nov. 30, 2021) (collecting cases). The Fourth Circuit ultimately decided that it "need not resolve that question" in the immigration case at issue in *Pugin*. *Id.*

Skidmore deference or as the "best" interpretation of the statute. *Id.* at *9–10. In a separate opinion, Judge Gibbons agreed with affirmance. *Id.* at *11 (Gibbons, J., writing in support of affirming the district court judgment).[2]

The fractured Sixth Circuit decision underscores the confusion in the lower courts and the need for this Court's review. The Sixth Circuit joined the Tenth Circuit in going en banc to review the threshold *Chevron* issues and the legality of the rule. Both circuits were unable to issue a controlling en banc opinion. Both deeply divided on the scope of this Court's precedents. Both offer little certainty to future litigants.

Thirty courts of appeals judges and three appellate military judges have now reviewed the rule. Yet this percolation of the *Chevron* issues has not led to resolution. Because the rule "implicates administrative-law questions with significance for many statutes," *Gun Owners of Am.*, 2021 WL 5755330 at *12 (Murphy, J., dissenting), the lack of clear answers from the lower courts in these cases is a detriment to both individual citizens and agencies alike for future cases.

This Court's review is urgently needed.

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[2] The published order and opinions indicate that Judge Griffin and Judge Donald voted to affirm the district court, but neither judge appears to have authored or joined a signed opinion. Judge Readler was recused.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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