No. 22-976

IN THE

Supreme Court of the United States

MERRICK B. GARLAND, ATTORNEY GENERAL, ET AL.,

Petitioners,

v.

MICHAEL CARGILL,

Respondent.

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

BRIEF OF THE FIREARMS REGULATORY ACCOUNTABILITY COALITION AND PALMETTO STATE ARMORY, LLC AS *AMICI CURIAE* SUPPORTING RESPONDENT

STEPHEN J. OBERMEIER
Counsel of Record
JEREMY J. BROGGI
MICHAEL D. FAUCETTE
BOYD GARRIOTT
WILEY REIN LLP
2050 M Street NW
Washington, DC 20036
(202) 719-7000
SObermeier@wiley.law

Counsel for Amici Curiae

TABLE OF CONTENTS

Page

Introduction 1

Interest Of *Amici Curiae* 2

Summary Of Argument 3

Argument 6

I. Ambiguity In Criminal Statutes Favors Citizens, Not The Government. 6

A. Under the Separation of Powers, Only Congress May Make An Act A Crime. 6

B. The Rule of Lenity Prevents the Executive from Defining New Crimes Through Rulemaking. 8

C. Deference Doctrines Do Not Apply When The Government Interprets Criminal Statutes. 11

II. The Bump Stock Rule Misinterprets The NFA And GCA. 12

Conclusion 18

TABLE OF AUTHORITIES

Cases **Page(s)**

Abramski v. United States,
573 U.S. 169 (2014) 1, 4, 7, 12

Bittner v. United States,
598 U.S. 85 (2023) 15, 16

Carter v. Welles-Bowen Realty, Inc.,
736 F.3d 722 (6th Cir. 2013) 10

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.,
467 U.S. 837 (1984) 11

Crandon v. United States,
494 U.S. 152 (1990) 10, 11

Gonzales v. Oregon,
546 U.S. 243 (2006) 12

Guedes v. ATF,
140 S. Ct. 789 (2020) 3, 5, 15

Guedes v. ATF,
920 F.3d 1 (D.C. Cir. 2019) 7

Gun Owners of America, Inc. v. Garland,
19 F.4th 890 (6th Cir. 2021) 7

Hardin v. ATF,
65 F.4th 895 (6th Cir. 2023) 4, 15, 16

Leocal v. Ashcroft,
543 U.S. 1 (2004) 4, 9, 10

Marbury v. Madison,
1 Cranch 137 (1803) 7

Rust v. Sullivan,
500 U.S. 173 (1991) 16

Smiley v. Citibank (S. Dakota), N.A.,
517 U.S. 735 (1996) 15

United States v. Apel,
571 U.S. 359 (2014) 4, 11

United States v. Bass,
404 U.S. 336 (1971) 3, 4, 7, 8, 10, 13

United States v. Davis,
139 S. Ct. 2319 (2019) 3, 6, 7

United States v. George,
228 U.S. 14 (1913) 7

United States v. Granderson,
511 U.S. 39 (1994) 4, 8, 13

United States v. Nixon,
418 U.S. 683 (1974) 7

United States v. Santos,
553 U.S. 507 (2008) 15

United States v. Thompson/Center Arms Co.,
504 U.S. 505 (1992) 1, 4, 8, 9, 10, 12, 16, 17

United States v. Wiltberger,
5 Wheat. 76 (1820) 8

Wooden v. United States,
595 U.S. 360 (2022) 8

Statutes

18 U.S.C. § 921 3

18 U.S.C. § 924 11

26 U.S.C. § 5845 ..... 3, 9, 13

Legislative Materials

Automatic Gun-fire Prevention Act, S.
1916, 115th Cong. (2017) 16

Automatic Gunfire Prevention Act, H.R.
3947, 115th Cong. (2017) 5, 16

Administrative Materials

Bump-Stock-Type Devices, 83 Fed. Reg.
66,514 (2018) 3, 16

INTRODUCTION[1]

In this case, the Government defends a rule purporting to reinterpret the federal prohibition on machineguns to cover bump stocks. And although it for the first time criminalizes conduct the Government has long called legal, the Government contends that it is free to switch interpretations so long as the change is "reasonably explained." Pet. Br. 42–43.

That is not this Court's approach to criminal law. When the Court interprets the National Firearms Act ("NFA") and the Gun Control Act ("GCA"), it applies the "rule of lenity" to resolve "ambiguity" against the Government. *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 517–18 (1992) (plurality); *accord id.* at 519 (Scalia, J., concurring). And the Court does not defer to the contrary view of the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") because the "Government's reading of a criminal statute is [not] entitled to any deference." *Abramski v. United States*, 573 U.S. 169, 191 (2014) (citation omitted).

Accordingly, the Government is mistaken to defend the bump stock rule as if it were acting within an area of policymaking discretion. If the application of the federal firearms statutes to bump stocks is ambiguous, then the result is not freedom for the Government to criminalize, but rather lenity for those whose conduct the Government would criminalize. The en banc Fifth Circuit recognized this when it denied

---

[1] No party's counsel authored this brief in whole or in part, and no person or entity other than *amici* or their counsel made a monetary contribution to fund the brief's preparation or submission.

Chevron deference and applied lenity to invalidate the regulation at issue here. This Court should affirm.

INTEREST OF *AMICI CURIAE*

The **Firearms Regulatory Accountability Coalition, Inc.** ("FRAC") is a non-profit association working to improve business conditions for the firearms industry by ensuring the industry receives fair and consistent treatment from firearms regulatory agencies. FRAC is the premiere national trade association representing U.S. firearms manufacturers, retailers, importers, and innovators on regulatory and legislative issues impacting the industry in the United States. **Palmetto State Armory, LLC** is one of the largest firearms manufacturers in the United States. It designs and sells products regulated by the NFA and GCA.

Neither Palmetto State Armory, FRAC, nor FRAC's members make or sell bump stocks or firearms equipped with bump stocks. However, they are opposed to firearms regulatory agencies altering their interpretations of criminal statutes through regulatory actions that outlaw conduct the agencies have long recognized as legal.

Such actions threaten to turn millions of law-abiding Americans into felons overnight, as this case illustrates. And they unnecessarily disrupt the settled expectations of responsible industry players. The Constitution establishes that only Congress can make an act a crime. Palmetto State Armory, FRAC, and FRAC's members thus oppose efforts by ATF and other regulatory agencies to define new crimes through regulatory fiat.

SUMMARY OF ARGUMENT

This case requires the Court to evaluate ATF's interpretation of a criminal statute. Federal law defines a "machinegun" as a weapon that shoots more than one shot "automatically" by "a single function of the trigger." 26 U.S.C. § 5845(b); 18 U.S.C. § 921(a)(24). The question in this case is whether the statutory definition includes bump stocks—devices that allow a shooter to pull the trigger more rapidly, but without altering the internal functioning or cycling of a gun.

That question is colored by ATF's reversal. "The agency used to tell everyone that bump stocks don't qualify as 'machineguns.'" *Guedes v. ATF*, 140 S. Ct. 789, 790 (2020) (statement of Gorsuch, J.). Now its rule says the opposite: "bump-stock-type devices satisfy the statutory definition of 'machinegun.'" Bump-Stock-Type Devices, 83 Fed. Reg. 66,514, 66,533 (2018). Thus, as the Fifth Circuit correctly recognized, ATF's new "interpretive position" is "inconsistent with its prior position." Pet. App. 39a. That inconsistency, together with the statutory text and ATF's claimed authority to change interpretations, suggests a "grievous ambiguity." Pet. App. 42a.

The separation of powers confirms that lenity—not deference—applies when a criminal statute is ambiguous. The Constitution establishes that "[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 32, 34 (1812)). Accordingly, Congress must speak "plainly and unmistakably" before courts will find that it has criminalized conduct. *United States v. Bass*, 404 U.S. 336, 348

(1971) (citations and quotations omitted). If there is any doubt about Congress's language, lenity resolves the ambiguity in favor of the citizen.

In the context of a rulemaking like this one, lenity means ATF's regulation cannot be upheld unless "the Government's position is unambiguously correct." *United States v. Granderson*, 511 U.S. 39, 54 (1994). As a statute with both criminal and noncriminal applications, the NFA must be interpreted consistently in both settings. *See Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004). Thus, this Court has held it "proper" when interpreting the NFA "in a civil setting" "to apply the rule of lenity and resolve the ambiguity in [the citizen]'s favor," *Thompson*, 504 U.S. at 517–18 (plurality); *see also id.* at 519 (Scalia, Thomas, JJ., concurring).

For the same reasons, the Government is not entitled to any deference when interpreting the NFA and GCA. The NFA is a criminal statute, and the Court has "never held that the Government's reading of a criminal statute is entitled to any deference." *United States v. Apel*, 571 U.S. 359, 369 (2014). The GCA is also a criminal statute, so this Court has held that ATF's construction of it carries no weight. *Abramski*, 573 U.S. at 191.

Applied to bump stocks, the definition of "machinegun" is at least sufficiently ambiguous to trigger the rule of lenity. First, the definition is susceptible to at least "two readings." *Bass*, 404 U.S. at 347. The reasonableness of both positions is demonstrated by the statutory text and the "diametrically opposed" interpretations adopted by dozens of appellate judges in 22 opinions issued across the country. *See Hardin v.*

ATF, 65 F.4th 895, 898 (6th Cir. 2023) (collecting cases).

Second, the Government used to hold the same position as Cargill. It thus found Cargill's reading of "machinegun" viable when it adopted that same interpretation "[f]or years" prior to the Rule. *See Guedes*, 140 S. Ct. at 789 (statement of Gorsuch, J.). Even now, the Government refuses to say that the statute is "unambiguous," only that its current reading is "best." Pet. Br. 8, 11, 12. The Government also claims authority to "change its mind," Pet. Br. 43, implying that it believes itself to be acting within a zone of ambiguity.

Third, Congress too read the NFA to not unambiguously cover bump stocks, as evidenced by its repeated attempts to enact legislation to that effect. *See, e.g.*, Automatic Gunfire Prevention Act, H.R. 3947, 115th Cong. (2017). Taken together, it is at least grievously ambiguous whether the term "machinegun" includes bump stocks. Thus, the rule of lenity requires this Court to construe the statute in Cargill's favor.

The Court should affirm the Fifth Circuit.

ARGUMENT

I. AMBIGUITY IN CRIMINAL STATUTES FAVORS CITIZENS, NOT THE GOVERNMENT.

A. Under the Separation of Powers, Only Congress May Make An Act A Crime.

In the controlling opinion below, twelve judges held that the rule of lenity requires invalidation of ATF's bump stock regulation. *See* Pet. App. 2a n.*, 4a. By contrast, the three dissenting judges believed the statute "ambiguous" but would have upheld ATF's construction as "best." Pet. App. 63a, 88a–89a, 89a n.10. As these conflicting decisions make clear, a key question in resolving this case is whether an ambiguity in a criminal statute should be construed to favor the citizen or the Government.

The separation of powers resolves that question in favor of the citizen. The Framers believed the "separate and distinct exercise of the different powers of government" is "essential to the preservation of liberty." The Federalist No. 51, at 321 (James Madison or Alexander Hamilton) (Clinton Rossiter ed., 1961). They warned that the "accumulation of all powers, legislative, executive, and judiciary, in the same hands" is "the very definition of tyranny." The Federalist No. 47, at 301 (James Madison).

Thus, our constitutional system delineates specific roles for each branch of the federal government. "Only the people's elected representatives in the legislature are authorized to 'make an act a crime.'" *Da-*

vis, 139 S. Ct. at 2325 (quoting *United States v. Hudson*, 7 Cranch 32, 34 (1812)). The executive, for its part, may "decide whether to prosecute a case," *United States v. Nixon*, 418 U.S. 683, 693 (1974) (citing Confiscation Cases, 74 U.S. 454 (1868)), but cannot create administrative crimes, *United States v. George*, 228 U.S. 14, 22 (1913). Finally, when the executive prosecutes a case under a law enacted by Congress, the judiciary must "say what the law is," *Marbury v. Madison*, 1 Cranch 137, 177 (1803), including by holding the executive to account when "the Government interprets a criminal statute too broadly," *Abramski*, 573 U.S. at 191.

Because the Framers reserved the criminal lawmaking function to Congress—not the judiciary or the executive—it must speak "plainly and unmistakably" where it wishes to attach criminal liability to an activity. *Bass*, 404 U.S. at 348 (citations and quotations omitted); *see also Davis*, 139 S. Ct. at 2325. This "clear-statement rule" "reinforces" the "fundamental separation-of-powers principle" that "[t]he Constitution allows only Congress to create crimes." *Gun Owners of Am., Inc. v. Garland*, 19 F.4th 890, 917–18 (6th Cir. 2021) ("*Gun Owners II*") (Murphy, J., dissenting); *Guedes v. ATF*, 920 F.3d 1, 41–42 (D.C. Cir. 2019) (Henderson, J., concurring in part and dissenting in part). It also "embodies 'the instinctive distastes against men languishing in prison unless the lawmaker has clearly said they should.'" *Bass*, 404 U.S. at 348.

The principle that Congress must speak clearly to make an act a crime forecloses resolution of ambiguity through deference to an agency. As Chief Justice

Marshall explained long ago, "probability is not a guide which a court, in construing a penal statute, can safely take." *United States v. Wiltberger*, 5 Wheat. 76, 105 (1820). An ambiguous statute is not a clear statute, so it necessarily fails the clear-statement rule required by the separation of powers. *See Bass*, 404 U.S. at 348 ("where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant."). Thus, lenity, not deference, applies in such cases.

B. The Rule of Lenity Prevents the Executive from Defining New Crimes Through Rulemaking.

The "'rule of lenity' is a new name for an old idea—the notion that 'penal laws should be construed strictly.'" *Wooden v. United States*, 595 U.S. 360, 388 (2022) (Gorsuch, J., concurring) (quoting *The Adventure*, 1 F.Cas. 202, 204 (No. 93) (CC Va. 1812) (Marshall, C. J.)). Under lenity, the Court will "resolve [statutory] ambiguity in [a defendant]'s favor" unless "the Government's position is unambiguously correct." *United States v. Granderson*, 511 U.S. 39, 54 (1994) (citing *United States v. Bass*, 404 U.S. 336, 347–49 (1971)). As explained, lenity safeguards the "principle that the power of punishment is vested in the legislative" branch. *Wiltberger*, 5 Wheat. at 95 (Marshall, C.J.). And though it arose in the context of criminal prosecutions, it has equal force in administrative rulemakings.

First, lenity applies where, as here, a statute carrying criminal penalties is construed in a civil setting. This Court's decision in *United States v. Thompson/Center Arms Co.*, 504 U.S. 505 (1992), makes that clear. There, as here, the Court was called to review

ATF's interpretation of an NFA definition "in a civil setting." *Thompson*, 504 U.S. at 517. The question was whether a gun manufacturer "makes" an NFA short-barreled rifle when it sells "a pistol together with a kit containing a shoulder stock and a 21-inch barrel, permitting the pistol's conversion into an unregulated long-barreled rifle, or, if the pistol's barrel is left on the gun, a short-barreled rifle that is regulated." *Id.* at 507. The plurality found the term "make," 26 U.S.C. § 5845(i), ambiguous because of the dual-use nature of the parts kit. *Thompson*, 504 U.S. at 512–18. Given the ambiguity presented by the kit's additional "useful purpose" that would not incur criminal liability, the plurality held that the parts had "not been 'made' into a short-barreled rifle for purposes of the NFA." *Id.* at 518. Justices Scalia and Thomas concurred and found ambiguity elsewhere: "whether the making of a regulated firearm includes the manufacture, without assembly, of component parts." *Id.* at 519. Because this question was "sufficiently ambiguous to trigger the rule of lenity," the concurring opinion agreed "that the kit is not covered." *Ibid.*

In *Leocal v. Ashcroft*, 543 U.S. 1 (2004), a unanimous Court cited *Thompson* as authority that it must apply lenity when interpreting criminal statutes in a civil setting. There, the Court considered whether a conviction for driving under the influence of alcohol was a "crime of violence" under the Comprehensive Crime Control Act. *Id.* at 6–7. Although the interpretive issue arose "in the deportation context," the Court recognized that it "must interpret the statute consistently, whether [it] encounter its application in a criminal or noncriminal context." *Id.* at 11 n.8 (citing

Thompson, 504 U.S. at 517–18). Thus, the Court explained, if the statute was ambiguous, it "would be constrained to interpret any ambiguity in [the challenger]'s favor" under "the rule of lenity." *Ibid.*

In addition to maintaining consistency, lenity respects the roles of the coordinate branches. In a criminal prosecution, lenity restrains the judicial and executive branches alike—that is, the rule prevents courts and prosecutors from reading statutes broadly to capture activity they believe Congress ought to have proscribed. *See Bass*, 404 U.S. at 348 ("legislatures and not courts should define criminal activity"); *Crandon v. United States*, 494 U.S. 152, 178 (1990) (Scalia, J., concurring) ("the Justice Department . . . knows . . . an erroneously broad view will be corrected by the courts when prosecutions are brought"). Because the basis for that restraint is Congress's authority to make the criminal law, there is no reason it should be different when the executive interprets that law through rulemaking.

To hold otherwise would be to privilege the executive interpretation over judicial interpretation—applying lenity to judicial construction but not executive construction of a statute. But "[r]ules of interpretation bind all interpreters, administrative agencies included." *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 731 (6th Cir. 2013) (Sutton, J., concurring). "That means an agency, no less than a court, must interpret a doubtful criminal statute in favor of the defendant." *Ibid.* Thus, just as lenity protects Congress's prerogative in a criminal prosecution, so too in administrative rulemakings.

Both considerations are at work here. This case, just like *Thompson* and *Leocal*, calls for the interpretation of a criminal statute in a civil context—if ATF's rule is upheld, then anyone possessing a bump stock faces up to 10 years imprisonment. *See* 18 U.S.C. § 924(a)(2). And just as the rule of lenity would constrain a court's interpretation in a criminal prosecution, so too it must constrain an identical interpretation advanced in an administrative rulemaking. Thus, if the statute is ambiguous, then lenity requires construing the statute in Cargill's favor.

C. Deference Doctrines Do Not Apply When The Government Interprets Criminal Statutes.

This Court has long held that in certain contexts federal administrative agencies may be entitled to judicial deference for statutory interpretations. The most deferential form of review takes its name from *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). But even if *Chevron* remains good law,[2] this Court owes no deference to ATF's interpretation of the NFA and GCA.

First, this Court has "never held that the Government's reading of a criminal statute is entitled to any deference." *Apel*, 571 U.S. at 369; *see also Crandon v. United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring) ("we have never thought that the interpretation of those charged with prosecuting criminal statutes is entitled to deference."). The Government's

---

[2] *But see Loper Bright Enterprises v. Raimondo*, No. 22-451; *Relentless, Inc. v. Department of Commerce*, No. 22-1219.

decision "whether to prosecute" a case "does not entitle [it] to *Chevron* deference." *Gonzales v. Oregon*, 546 U.S. 243, 264 (2006). As the Solicitor General conceded less than two weeks ago, "the Department of Justice does not get deference in the criminal context." Transcript of Oral Argument at 105:8–12, *Relentless, Inc. v. Department of Commerce*, No. 22-1219 (Jan. 17, 2024).

Second, this Court has applied this general no-deference rule to the federal firearms statutes at issue here. In *Thompson*, as explained above, the Court rejected ATF's construction of the NFA and applied lenity. 504 U.S. at 517–18.

Similarly, in *Abramski v. United States*, 573 U.S. 169 (2014), the Court rejected ATF's interpretation of the GCA. There, the Court explained that ATF's interpretive position was "not relevant at all" because "criminal laws are for courts, not for the Government to construe." *Id.* at 191. Recognizing its "obligation to correct [ATF's interpretive] error," the Court deployed the normal tools of statutory construction to determine the intent of "Congress—the entity whose voice *does* matter[.]" *Ibid.* (emphasis in original). Thus, whatever the life expectancy of *Chevron*, it has no role to play here.

II. THE BUMP STOCK RULE MISINTERPRETS THE NFA AND GCA.

In this case, the Government contends it is free to reverse its longstanding interpretation of "machinegun." But it does not contest that if the statute is genuinely ambiguous, the Government receives no deference and lenity applies. *See* Pet. Br. 44–45. For

three reasons, the NFA definition of "machinegun" is at least ambiguous as applied to bump stocks and thus requires application of the rule of lenity.

First, the text is susceptible to at least "two readings of what Congress has made a crime." *Bass*, 404 U.S. at 347; *see also Granderson*, 511 U.S. at 41 (applying lenity where text was "susceptible" to multiple "interpretations").

To begin, the phrase "automatically" in 26 U.S.C. § 5845(b) is susceptible to different interpretations. Indeed, the Government admits that whether a gun functions automatically "depends on the *degree* of human input that it requires." Pet. Br. 35 (emphasis added). Under this fuzzy degree-based reading, the Government concedes that "ordinary semiautomatic rifles" afford *some* automation because their recoil allows for "bump fire." Pet. Br. 37. But it says a bump stock affords "more" automation by helping the user better control that recoil. *Ibid*; *but see* Pet. App. 150a (explaining that "recoil-harness fire method employed by bump stock devices" requires "practice" and does "not come all that naturally"). So where is the line? The Government does not provide one. It simply says that bump stocks lie closer on the spectrum to traditional automatic guns than traditional semi-automatic guns. Pet. Br. 37. Cargill says the opposite. Resp. Br. 40–41. The correct answer is less satisfying but ultimately dispositive under lenity: automation is "a question of degree that the statute's text does not definitively answer" for bump stocks. Pet. App. 60a.

"Single function of the trigger" is also susceptible to more than one reading. As Judge Ho explained below, the phrase is grammatically ambiguous because

"trigger" could be the subject or the object of the statute: "A 'single function of the trigger' could mean that the trigger acts once—or that the shooter acts once on the trigger." Pet. App. 56a. Cargill contends that the trigger is the subject—pointing to the fact that the subject of the sentence is the "machinegun" and not the shooter. Resp Br. 28–30; *see* Pet. App. 23a. The Government contends that the trigger is the object—pointing to other portions of the sentence that refer to the "shooter's interaction with the weapon." Pet. Br. 26. The plausibility of each interpretation shows that the traditional tools of construction are "inconclusive." Pet. App. 54a.

The Government's attempt to resolve these textual ambiguities through purpose further demonstrates the problem. According to ATF, the Court must accept its interpretation of both phrases to avoid "evasion of the law" because Congress wanted to ban guns with a high rate of fire. Pet. Br. 38–42. But of course, Congress did not ban all guns with a high rate of fire.[3] It banned guns that fire "automatically" with a "single function of the trigger." One cannot "evade" the reach of those definitions until their meaning is discerned. By putting the cart (evasion) before the horse (meaning), ATF's argument assumes the conclusion: the definition of machinegun must include bump stocks to avoid evasion of the ban on machineguns. Worse still, this theory would require courts to construe ambiguities to *maximize* the reach of criminal statutes to further their purported "regulatory objectives." Pet. Br. 41. "That position turns the rule of

[3] And indeed, skilled shooters can fire standard semi-automatic rifles nearly as fast as machineguns. Pet. App. 105a–06a.

lenity upside down." *United States v. Santos*, 553 U.S. 507, 519 (2008) (plurality). The Government may not resolve ambiguity through the invocation of a "presumptive intent to facilitate [NFA] prosecutions." *Ibid.*

At bottom, reasonable minds could disagree on who has the better reading of both "automatically" and "single function of the trigger." And indeed, they have. With more than 20 lower-court opinions spanning "350 pages" of analysis, dozens of "reasonable jurists" have produced "myriad and conflicting judicial opinions" to reach "diametrically opposed conclusions as to whether the definition of a machinegun includes a bump stock." *Hardin*, 65 F.4th at 898. Given these "viab[le]" "competing interpretations," *ibid.*, it "would be difficult indeed to contend that the [statute] is unambiguous with regard to the point at issue here." *Smiley v. Citibank (S. Dakota), N.A.*, 517 U.S. 735, 739 (1996).

Second, ATF's own actions confirm that the statute is ambiguous. "For years," ATF told "everyone that bump stocks don't qualify as 'machineguns.'" *Guedes*, 140 S. Ct. at 790 (statement of Gorsuch, J.). "Now it says the opposite" even though the "law hasn't changed." *Ibid.* According to the Government its decade of prior "inconsistent" interpretations is irrelevant because its interpretations lack "the force and effect of law." Pet. Br. 43. But the "point is not that the administrative guidance is controlling." *Bittner v. United States*, 598 U.S. 85, 97 n.5 (2023) (plurality). "It is simply that, when the government (or any litigant) speaks out of both sides of its mouth, no one should be surprised if its latest utterance isn't the

most convincing one." *Ibid.* "ATF's own flip-flop in its position" confirms the "viability of" Cargill's "competing interpretation[]" because the agency read the statute the same way for a decade. *Hardin*, 65 F.4th at 898.

The Government also confirms ambiguity in its discussion of the statute. The preamble to the bump stock rule nowhere contends that the statute is unambiguous. Instead, it calls ATF's reading the "best" interpretation and a "reasonable construction." 83 Fed. Reg. at 66,521, 66,527. It also expressly invokes *Chevron* and candidly admits that "automatically" and "single function of the trigger" may be "ambiguous." *Id.* at 66,527. The Government's brief also refuses to say that ATF's reading represents the unambiguous meaning of the statute, again claiming only the "best" interpretation. Pet. Br. 8, 11, 12. Even more telling, the brief claims ATF "may change its mind," Pet. Br. 43, citing a line of cases that allow agencies to change interpretations where "the plain language and legislative history *are ambiguous*." *Rust v. Sullivan*, 500 U.S. 173, 187 (1991) (emphasis added). Thus, neither ATF nor its counsel are willing to argue that the statute is unambiguous and instead strongly suggest "we are left with an ambiguous statute." *Thompson*, 504 U.S. at 517.

Third, Congress agrees that the statute does not clearly cover bump stocks. Before ATF promulgated its rule, elected representatives introduced bills in both Chambers to specifically ban bump stocks, notwithstanding the current statutory prohibition on machineguns. *See, e.g.*, Automatic Gunfire Prevention Act, H.R. 3947, 115th Cong. (2017); Automatic Gun-

fire Prevention Act, S. 1916, 115th Cong. (2017). Senator Diane Feinstein, the sponsor of one such bill, claimed that ATF's then-proposed rule was "an about face" that rested on a "dubious analysis." Pet. App. 13a. She stressed that "legislation is the only way to ban bump stocks." *Ibid.* That legislators of a coequal branch found the NFA did not unambiguously ban bump stocks further confirms the statute is ambiguous.

Against this evidence, ATF has stunningly little to say about lenity. In the final pages of its brief, the agency claims that the statute does not contain a "grievous ambiguity." Pet. Br. 44. But just because the Government says it does not make it so. Cargill's interpretation has been endorsed by scores of jurists, by legislators, and, prior to the rule, by ATF itself. As the en banc Fifth Circuit correctly concluded, the statute's uncertainty clears even the "stringent 'grievously ambiguous' condition," assuming it applies. App. 42a; *but see generally* FAMM Amicus Br. (explaining that standard is "reasonable doubt" not "grievous ambiguity"). This Court explained in *Thompson*—a case the Government does not even cite—the proper course under such circumstances: "apply the rule of lenity and resolve the ambiguity in [the challenger]'s favor." *Thompson*, 504 U.S. at 518. Its conclusory assertion notwithstanding, ATF marshals no rejoinder to the only controlling holding of the Fifth Circuit.

* * *

ATF's rules interpreting federal firearms statutes are valid only if they correctly articulate the unambiguous meaning of the statutes. Because the bump stock rule does not, lenity requires that it be set aside.

CONCLUSION

This Court should affirm.

Respectfully submitted.

STEPHEN J. OBERMEIER
Counsel of Record
JEREMY J. BROGGI
MICHAEL D. FAUCETTE
BOYD GARRIOTT
WILEY REIN LLP
2050 M Street NW
Washington, DC 20036
(202) 719-7000
SObermeier@wiley.law

Counsel for Amici Curiae

January 29, 2024