No. 19-296

IN THE

Supreme Court of the United States

DAMIEN GUEDES, ET AL.,
Petitioners,

v.

BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, ET AL.,
Respondents.

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

BRIEF OF *AMICUS CURIAE* FIREARMS POLICY COALITION IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*[1]

Firearms Policy Coalition, Inc. ("FPC") is a nonprofit membership organization that defends constitutional rights and promotes individual liberty. FPC seeks to protect the Constitution and the freedom it secures. To that end, FPC engages in direct and grassroots advocacy, research, legal efforts, outreach, publications, and educational programs. FPC has a significant interest in how this Court interprets administrative law, the separation of powers, and the rule of lenity, because each issue affects the rights FPC defends.

FPC participated in all phases of the subject regulatory process, including the Advance Notice of Proposed Rulemaking phase (submitting a comment in opposition, available at http://bit.ly/fpc-anprm-comment) and the Notice of Proposed Rulemaking phase (commissioning significant specialized research and filing a comment in opposition with 35 exhibits, including a video of a bump-stock device in use, available at http://bit.ly/fpc-npr-comment).

SUMMARY OF ARGUMENT

James Madison declared that "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny." THE FEDERALIST NO. 47. The Father of the Constitution assured the people that the Constitution he was advocating for would not tolerate

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[1] All parties received timely notice and consented to the filing of this brief. No counsel for any party authored the brief in whole or in part. Only *amicus* funded its preparation and submission.

such tyranny. If any threat of it existed, "no further arguments would be necessary to inspire a universal reprobation of the system." *Id.*

Yet, the decision below expressly permitted the executive branch to create and interpret the same law it is charged with the "administration and enforcement" of—a criminal law, no less.

As the court below acknowledged, the ATF's Rule did not merely interpret Congress's law. Rather, "[t]he Rule unequivocally bespeaks an effort by the Bureau to adjust the legal rights and obligations of bump-stock owners." *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 920 F.3d 1, 18 (D.C. Cir. 2019). Indeed, "[t]he Rule makes clear throughout that possession of bump-stock devices will become unlawful only as of the Rule's effective date, not before." *Id.* To make lawful activity unlawful is to create law.

What is more, this accumulation of power was allowed due to the statute's supposed ambiguity. But there was no ambiguity. While the court found the statutory definition of "machinegun" unclear as applied to bump stocks, the ATF endeavored to ban the devices through a rulemaking manifestly inconsistent with not only the text of the law, but the very function of the equipment the ATF is tasked with expertise of. This case therefore presents an ideal vehicle to reexamine the extent of the judicial and legislative authority that administrative agencies might properly hold.

ARGUMENT

I. The statutory definition of "machinegun" is unambiguous.

In applying *Chevron* deference to the Bump-Stock Rule, the court below first asked "whether the agency-administered statute is ambiguous on the 'precise question at issue.'" *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 920 F.3d 1, 28 (D.C. Cir. 2019) (quoting *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984)). The precise question at issue was whether "the statutory definition of 'machinegun' is ambiguous" as applied to bump stocks. *Id.* at 29. The court continued, "if we find ambiguity, we proceed to the second step and ask whether the agency has provided a 'permissible construction' of the statute." *Id.* at 28 (quoting *Chevron*, 467 U.S. at 842). But "[i]f the statute's meaning is unambiguous, then we need go no further." *Id.* at 28. The court should have gone no further. Bump stocks fall clearly outside the statutory definition of "machinegun."

A. The function of a bump stock is unlike any true "machinegun."

Federal law defines "machinegun" as "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). The ATF's new interpretation, however, dramatically expands this definition. *See* Bump-Stock-Type Devices, 83 Fed. Reg. 66,514 (Dec. 26, 2018) ("Bump-Stock Rule"). In fact, the matter before the Court is technical as much as it

is textual: The ATF's new conception of a "machinegun" is not only textually distinct from the wording of the law, but it is wholly divorced from the way actual machineguns function.

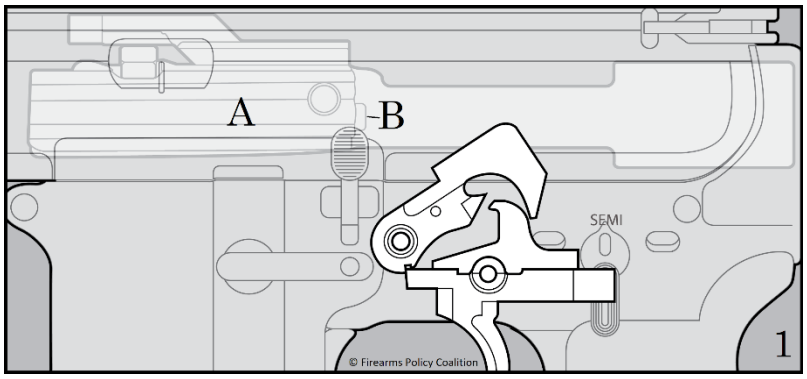
The core of the dispute here is the operative term "automatically," which the ATF defines as "the result of a self-acting or self-regulating mechanism that allows the firing of multiple rounds." 83 Fed. Reg. 66,554. The ATF's tortuous interpretation of its own selected language to include bump stocks—especially against the backdrop of the "self-regulating" mechanisms found in actual machineguns—seems intended to disguise a "legislative" rulemaking as "interpretive."

The ATF is testing the limits of administrative deference. Its interpretive reversal is so plainly beyond the scope of the law, and so manifestly contrafactual with respect to the field the government is charged as expert in, the case presents an ideal vehicle to revisit any one of the host of deferential doctrines the government relies on to support its legislative exercise.

B. "A self-acting or self-regulating mechanism" relates to "automatic," not "semi-automatic," firearms.

The ATF is correct that some devices in existence can convert a semi-automatic firearm into a machinegun. But it errs in equating a "bump stock"—the functional equivalent of a broken or loose-fitting stock—with the self-regulatory mechanisms found in machineguns.

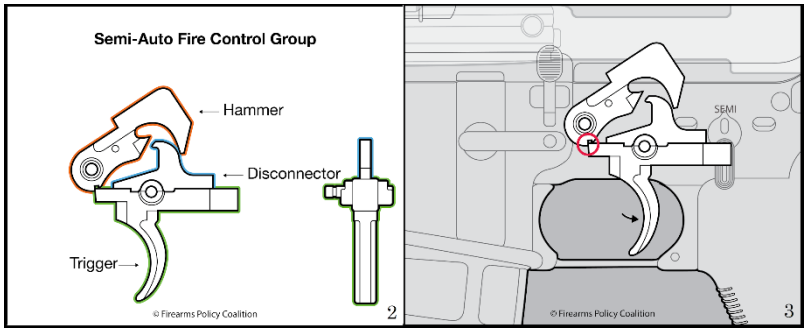
Understanding what goes into a machinegun's operation requires a grasp on firearm functionality in general. For simplicity, the following diagrams represent the Armalite pattern firearm. With very few exceptions, all modern firearms employ similar components that serve the same means.



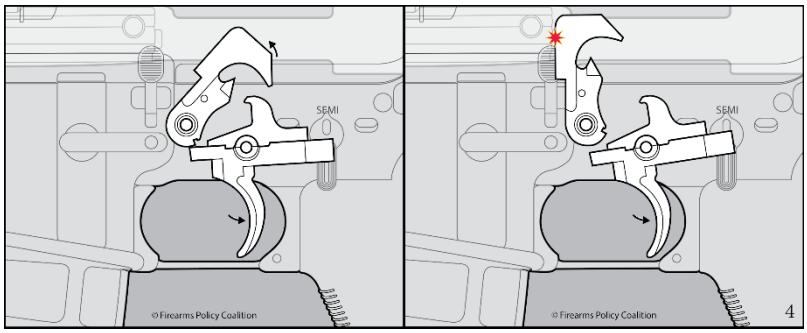
At the core of a self-loading firearm is the bolt. Image 1(A). The bolt ensures that an ammunition shell stays firmly in place so that sufficient energy pushes the bullet down the barrel, rather than simply pushing the bolt rearward. In a single-shot or manually repeating firearm, the bolt stays firmly locked in place during firing, whereas a self-loading firearm uses some of the energy from the fired round to cause the bolt to reciprocate.

Inside the bolt is the firing pin. Image 1(B). The firing pin, which comes to a point towards its breech end (towards the face of the bolt), is what strikes the primer, causing the propellant inside an ammunition casing to combust and fire the weapon. Firing pins are generally either free-floating or spring-loaded towards the rear, so that the pin will not strike an ammunition

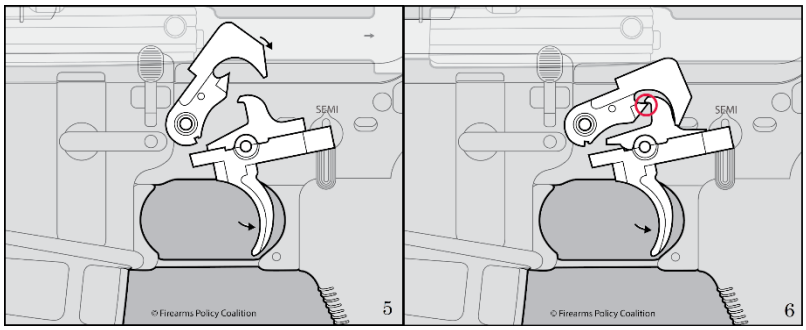
primer with sufficient force to discharge the weapon independent of operator input.



The trigger mechanism of a semi-automatic firearm consists of a trigger, hammer, and disconnector. Image 2. The hammer is spring-loaded, storing energy as it is moved rearward into the "cocked" position. The trigger keeps the hammer in the "cocked" position by way of its "sear," a geometric plane locking the two pieces together. Image 3.



When the trigger is actuated, the trigger sear slides out of the way of the hammer, allowing the hammer to swing, ultimately striking the firing pin. Image 4.

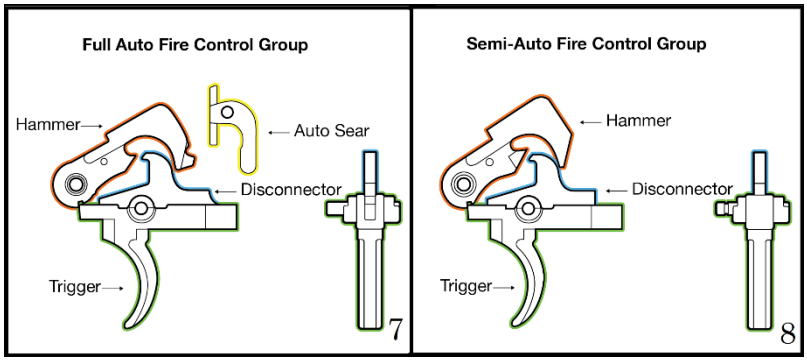


There is a complication here. In a self-loading firearm, the bolt re-cocks the hammer. Image 5. By the time the bolt reciprocates, the operator will likely still have the trigger depressed. This is where the "disconnector" comes into play. When the trigger is actuated, the disconnector moves into its active state. When the weapon fires, the bolt travels rearward, pushing the hammer to the rear. The "disconnector" captures the hammer near its rearmost position. Image 6. Then, as the operator releases the trigger, the hammer slips off the disconnector and onto the primary sear, where it is ready to fire again.

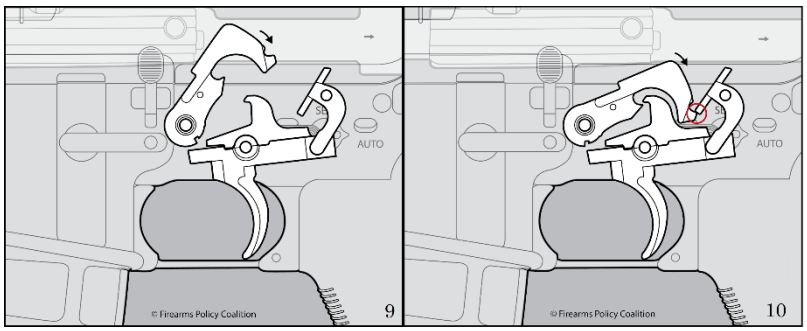
Were it not for the disconnector, upon firing, the bolt would push the hammer rearward, but as the bolt returned forward under spring pressure, the hammer would "follow" the bolt as it returns to battery, failing to re-cock the hammer or to strike the firing pin with sufficient force to discharge a subsequent round. Absent extraordinary circumstances, this would create a need to manually re-cock the hammer. This is why a typical self-loading firearm doesn't become a "machinegun" absent a disconnector.

A weapon failing to fire a subsequent shot because the hammer was not re-cocked is known as a "hammer follow" situation. This can happen in a typical semi-

automatic firearm when the trigger is released and depressed again before the bolt travels all the way forward. It can happen as an ordinary result of rapid semi-automatic firing, be it from tapping the trigger too fast, a non-traditional firing grip, "bump firing," or otherwise.

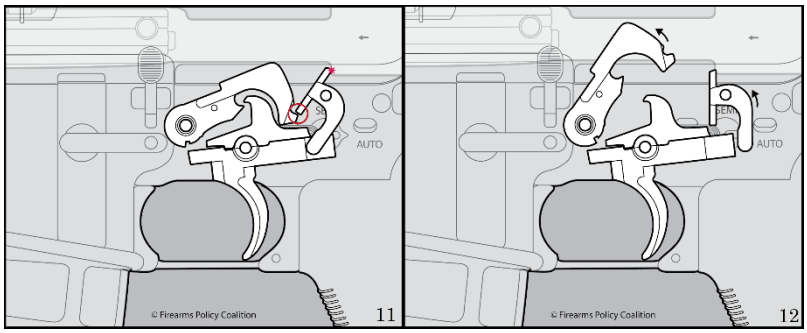


For a true machinegun, the "hammer follow" problem is one of precise timing. If the hammer is released too early, the hammer will follow the bolt and the firearm will not fire, needing to be manually re-cocked. Too late, and the bolt will lose forward travel before tripping the mechanism. This issue of timing is handled in machineguns by an "auto sear." Image 7.



When a machinegun is set to fully automatic mode, the semi-auto disconnector is disengaged and the "auto sear" engaged. Image 9. The "auto sear" is precisely designed and regulated to hold the hammer in the

"cocked" position (Image 10) until the firearm's bolt has returned all the way forward to battery (Image 11), releasing the hammer, and discharging the weapon again (Image 12). With an auto sear mechanism, as long as the trigger is depressed, the weapon will fire continuously at a fairly consistent rate.



Thus, a machinegun equipped with an automatic fire mechanism contains a "self-acting or self-regulating mechanism," which upon simply keeping the trigger depressed, without any further input, will "self-actuate" and "regulate" itself to fire successive rounds without "hammer follow." Machineguns, and the other automatic firing devices that fall within the statute's wording, are incomparable to bump stocks in their function.

C. A bump stock has no "self-acting or self-regulating mechanism."

Bump stocks have more in common with a broken stock than a machinegun firing mechanism. As the petitioners and other *amici* have explained, "bump firing" is accomplished basically by bouncing the trigger finger against a firearm's trigger. Recoil energy exists independent of bump-stock devices, and a bump stock is not necessary in order to bump fire.

Nonetheless, the ATF contends that a rifle with a bump stock fires "automatically" "because it fires 'as the result of a self-acting or self-regulating mechanism.'" 83 Fed. Reg. 66,519.

Unlike a machinegun, bump stocks take a significant amount of skill and very intentional movements to fire quickly. Also unlike a machinegun, there is no "self-acting" of "self-regulating" quality to a bump stock. Where a machinegun fires at a somewhat fixed cadence, bump firing is completely dependent on the speed at which the operator presses the firearm back against the trigger finger. Because bump-stock-equipped firearms use standard semi-automatic fire control groups as described, any successive firing requires the removal and reapplication of the finger to the firing mechanism.

The ATF contends that placing a finger on the stock's "shelf" and holding it there is "functioning" the trigger, despite the fact that subsequent trigger activations are accomplished with the input of the other hand. This is far from a "single function," as rightly noted by Judge Henderson below. *Guedes*, 920 F.3d at 44 (Henderson, J., concurring in part and dissenting in part) (noting that "single function" does not mean a single function "and then some") (emphasis omitted). It may be happening fast, in the case of a skilled bump-stock user, but the user must still relax enough to allow recoil to shift the rifle back, and then press it forward until it bumps the trigger finger. Unlike a machinegun, this is in no way "self-acting," but rather the result of continued distinct operator inputs.

The ATF elides the fact that bump firing can be accomplished without a bump stock by vaguely alluding to the linear movement of a firearm in a bump stock. It states "[when other methods] are used for bump firing, no device is present to capture and direct the recoil energy; rather, the shooter must do so [and] control the distance that the firearm recoils and the movement along the plane on which the firearm recoils." 83 Fed. Reg. 13,443. What the ATF omits, however, is the fact that recoil is, by nature, linear. Recoil energy occurs directly opposite the expelled projectile. The forward pressure applied when bump firing is no different with or without a bump stock. Recoil's linear impulse drives the weapon rearward, not the stock. The only remaining distinction the ATF makes is that, without a bump stock, the operator must "control" other planes of movement while firing. But this control of various planes of movement with a firearm is observable even without the context of bump fire: it is a phenomenon colloquially referred to as "aiming."

As for "self-regulating," a bump stock does no such thing. Where a machinegun is calibrated and regulated to fire at a certain rate, the rate of fire when bump firing is generally sinusoidal, as it depends heavily on operator input. *Compare Operator's Manual for Rifle, 5.56 mm, M16A2, W/E (1005-01-128-9936)*, HEADQUARTERS, DEPARTMENT OF THE ARMY, page 3 (May 1, 1994) (noting the cyclic rate of fire of the M4A1 as approximately 800 rounds per minute) *with* KRGV, *Gun Expert Demonstrates Difference Between Bump-Stock Semi-Auto, Full Automatic Weapons*, YOUTUBE at 1:50 (Oct. 3, 2017),

https://youtu.be/Dd9y8hHMUag (exhibiting sporadic, inconsistent rate upon bump firing).

Further, unlike a machinegun, nothing about a bump stock prevents "hammer follow," which is in fact a common malfunction when bump firing.

No matter how bump firing is conceptualized, a bump stock is manifestly *not* a "part or device that allows a gunman to pull the trigger once and thereby discharge the firearm repeatedly." *Akins v. United States*, 312 F. App'x 197, 201 (11th Cir. 2009) (per curiam).

D. The ATF conflates bump stocks with devices containing "self-acting or self-regulating mechanisms."

In a related case, the ATF likened bump stocks to other devices. Specifically, the ATF mentioned the "Akins Accelerator," the "LV-15 Trigger Reset Device," the "AutoGlove," and motor-operated triggers. Br. for Appellees at 25–27, *Aposhian v. Barr*, No. 19-4036 (10th Cir. Aug. 26, 2019).

The "Akins Accelerator" was a spring-loaded sliding stock, designed and calibrated for a specific firearm. When the operator pulled the trigger on an Akins device, recoil energy would drive the weapon rearward, pushing the trigger out of contact with the operator's hand, allowing the trigger to re-set. The spring would then decompress, driving the firearm forward and back into contact with the stationary trigger finger. Unlike a bump stock, the only user input needed to keep an Akins device firing was keeping the trigger finger stationary. While a bump stock is in no way "self-regulating," an Akins device

contained a spring whose strength and rate was calibrated specifically to drive the weapon to fire at a particular rate, and avoid "hammer follow." *See* "Method and apparatus for accelerating the cyclic firing rate of a semi-automatic firearm," U.S. Patent No. 6,101,918 (filed May 5, 1998).

The "LV-15 Trigger Reset Device" was an electronically controlled solenoid that would rapidly reset the trigger on an otherwise semi-automatic firearm when the operator put pressure on the trigger. The LV-15 employed onboard electronics to pulse the trigger at regular intervals, allowing the operator to simply hold the trigger—as one would with a machinegun—and fire continuously. 83 Fed. Reg. 66,518 n.4. Unlike the electro-mechanical LV-15, bump stocks are simply plastic stocks, but a bit wobbly. *See* "Slide stock for firearm with contoured finger rest," U.S. Patent No. US8607687B2 (filed May 4, 2012).

The "AutoGlove" was a glove with a battery, motor, and mechanical piston affixed to the index finger. *See* Redacted Letter from Michael R. Curtis, Chief of the Firearms Industry Services Branch, ATF, to Autoglove USA, Inc. (Sep. 11, 2017), https://bit.ly/2oi6b8D. When the operator pressed a button, the AutoGlove would repeatedly fire the weapon the operator was holding. The AutoGlove thus needed only a single function to repeatedly fire a weapon, and had its function regulated by onboard electrics and its motor. *Id*. Bump stocks, by comparison, are sloppy buttstocks.

The ATF has alluded to a host of other motor-operated triggers. Br. for Appellees 24–29, *Aposhian v. Barr*, No. 19-4036 (10th Cir. Aug. 26, 2019).

Effectively, these are motors upon whose spinning output shaft had one or more protruding "lobes." The motor would be put ahead of the trigger, and upon the press of a button, would spin its shaft, thereby actuating the trigger one or more times per rotation. Of note here is that, if one replaces the electric motor with a manual crank, the government does not consider it a machinegun—manual crank-operated guns have never been considered machineguns. *See* Rev. Rul. 55-528, 1955-2 C.B. 482 (distinguishing crank-operated gatling guns from the motor-driven General Electric M134A "minigun"). Crank guns, like bump stocks, require substantial, continuous input from the operator. Unlike electric motors, which operate at a controlled speed upon the operation of a switch, bump stocks are solid plastic.

Given that the "self-acting or self-regulating" language the ATF selected to justify its ban does not describe bump-stock devices, the ATF's arguments to the contrary are disingenuous. This interpretation is at best aggressively extratextual, and at worse a thinly veiled attempt to test and push the outer boundaries of executive authority.

II. If ambiguity exists, the court below should have applied the rule of lenity to preserve constitutional safeguards.

Even if ambiguity exists in the statute, the court below should have "invoke[d] the rule that 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.'" *Yates v. United States*, 135 S. Ct. 1074, 1088 (2015) (quoting *Cleveland v. United States*, 531 U.S. 12, 25 (2000)). Under the rule of lenity, "when choice has to be made between two

readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *United States v. Universal C. I. T. Credit Corp.*, 344 U.S. 218, 221–22 (1952).

As Chief Justice Marshall noted, the rule of lenity antedates the Constitution, and has roots in the genesis of America's legal traditions:

> The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment.

United States v. Wiltberger, 18 U.S. 76, 95 (1820). *See also* Antonin Scalia & Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 343 (2012) (the rule of lenity "reflect[s] the spirit of the common law").

William Blackstone, "whose works, we have said, 'constituted the preeminent authority on English law for the founding generation,'" *District of Columbia v. Heller*, 554 U.S. 570, 593–94 (2008) (quoting *Alden v. Maine,* 527 U.S. 706, 715 (1999)), agreed that "[p]enal statutes must be construed strictly." 1 William Blackstone, COMMENTARIES 88 (4th ed. 1770). "Where the statute acts upon the offender, and inflicts a penalty, as the pillory or a fine, it is then to be taken strictly." *Id.*

John Locke believed that "[f]reedom of men under government is, to have a standing rule to live by . . . made by the legislative power erected in it . . . and not to be subject to the inconstant, uncertain, unknown, arbitrary will of another man." John Locke, SECOND TREATISE OF CIVIL GOVERNMENT § 22, p. 13 (J. Gough ed. 1947). Yet it is difficult to conjure more precise language than "inconstant, uncertain, unknown, arbitrary" to explain that while the ATF now defines bump stocks as machineguns, "[i]n ten letter rulings between 2008 and 2017 . . . ATF ultimately concluded that these devices did not qualify as machineguns." 83 Fed. Reg. 66,517. Indeed, "[w]ords which are vague and fluid may be as much of a trap for the innocent as the ancient laws of Caligula." *United States v. Cardiff*, 344 U.S. 174, 176 (1952) (citation omitted).

The court below acknowledged that "the rule of lenity generally applies to the interpretation of the National Firearms Act and the Gun Control Act." *Guedes*, 920 F.3d at 27. But it declined to apply the rule here, because "in circumstances in which *both Chevron* and the rule of lenity are applicable, the Supreme Court has never indicated that the rule of lenity applies first." *Id.* at 27 (emphasis in original). This "Goldilocks" approach constrains the important and ancient rule of lenity to a miniscule class of situations in the ever-expansive federal criminal law. It would mean the criminal counterpart to *contra proferentem* exists only in the absence of an executive agency, or when the law is "just right": vague, but not *Chevron* vague.

To the contrary, this Court has recently made clear that *Chevron* deference is altogether inapplicable to an

interpretation of a criminal statute. *See United States v. Apel*, 571 U.S. 359, 369 (2014) ("we have never held that the Government's reading of a criminal statute is entitled to any deference."); *Abramski v. United States*, 573 U.S. 169, 191 (2014) ("The critical point is that criminal laws are for courts, not for the Government, to construe. We think ATF's old position no more relevant than its current one—which is to say, not relevant at all.") (quotation omitted).

Nevertheless, assuming *arguendo* that this Court's precedents are unclear, the underlying principles of fairness necessitating the rule of lenity for centuries are no less important. Thus, the rule should apply regardless.

The rule of lenity "is founded on two policies that have long been part of our tradition." *United States v. Bass*, 404 U.S. 336, 348 (1971). "[A] fair warning . . . of what the law intends to do if a certain line is passed" and assurance that "legislatures . . . define criminal activity." *Id.* "This policy embodies 'the instinctive distastes against men languishing in prison unless the lawmaker has clearly said they should.'" *Id.* (quoting H. Friendly, BENCHMARKS 209 (1967)).

The right to fair notice and the requirement that legislatures define criminal laws are fundamental. They cannot waiver depending on what branch of government is opining on the law—the law applies all the same, so constitutional protections must as well. "Very early Chief Justice Marshall told us, 'Where the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived.' Particularly is this so when we construe statutes defining conduct which entail stigma and penalties

and prison." *Universal C. I. T. Credit Corp.*, 344 U.S. at 221 (quoting *United States v. Fisher*, 6 U.S. 358, 386 (1805)).

In fact, some state courts statutorily forbidden to apply the rule of lenity have disregarded such laws. *See State v. Ovind*, 186 Ariz. 475 (Ct. App. 1996); *Harrott v. Cty. of Kings*, 25 Cal. 4th 1138 (2001); *State v. Dansereau*, 157 N.H. 596 (2008). These courts likely recognized the constitutional protections that the rule affords, and that its proscription would be invalid. *See* Scalia & Garner, READING LAW, at 245 (suggesting that a prohibition on the rule of lenity's application might violate Due Process).

To replace the rule of lenity—which secures several constitutional safeguards—with *Chevron* deference—which is known for violating constitutional safeguards—frustrates the framework the founders established to ensure that Americans would remain a free people.

III. Applying *Chevron* deference in criminal matters violates the separation of powers.

James Madison declared that "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, selfappointed, or elective, may justly be pronounced the very definition of tyranny." THE FEDERALIST NO. 47. Madison, advocating for the ratification of the Constitution, was responding to an objection that the Constitution violated "the political maxim, that the legislative, executive, and judiciary departments ought to be separate and distinct"—an "essential precaution in favor of liberty." *Id.* Madison,

acknowledging that "the preservation of liberty requires that the three great departments of power should be separate and distinct," was confident "that it will be made apparent to every one, that the charge cannot be supported." *Id.* "Were the federal Constitution . . . really chargeable with the accumulation of power, or with a mixture of powers, having a dangerous tendency to such an accumulation, no further arguments would be necessary to inspire a universal reprobation of the system." *Id.*

Madison was echoing Blackstone, who had stated that "[i]n all tyrannical governments the supreme magistracy, or the right both of *making* and of *enforcing* the laws, is vested in one and the same man, or one and the same body of men; and wherever these two powers are united together, there can be no public liberty." 1 Blackstone, COMMENTARIES at 146. Blackstone "thought a delegation of lawmaking power to be "disgraceful." *Dep't of Transp. v. Ass'n of Am. Railroads*, 135 S. Ct. 1225, 1244 (2015) (Thomas, J., concurring in the judgment) (quoting 4 Blackstone, COMMENTARIES at 424).

The Constitution was ratified with the understanding and expectation that these powers were separate and distinct. Thomas Jefferson wrote to Madison in 1797, explaining that "[The] principle [of the Constitution] is that of a separation of Legislative, Executive and Judiciary functions except in cases specified. If this principle be not expressed in direct terms, it is clearly the spirit of the Constitution. . . ." Letter from Thomas Jefferson to James Madison, *in* 9 THE WRITINGS OF THOMAS JEFFERSON 368 (Andrew A. Lipscomb & Albert Ellery Bergh, eds., 1905). *See also*

Letter from Thomas Jefferson to George Hay (May 20, 1807), *in* 10 THE WORKS OF THOMAS JEFFERSON 404 (Paul Leicester Ford ed., 1905) ("The leading principle of our Constitution is the independence of the Legislature, executive and judiciary of each other").

Jefferson and Madison—and the rest of the founders—would have been puzzled by the decision below, which upheld the executive branch's exercise of "all powers, legislative, executive, and judiciary," in direct contradiction to the "spirit of the Constitution."

A. Executive Powers.

Congress instructed that the "administration and enforcement" of the National Firearms Act "shall be performed by or under the supervision of the Attorney General." 26 U.S.C. § 7801(a)(2)(A). With this, the Attorney General gained the authority to "prescribe all needful rules and regulations for the enforcement" of the Act. 26 U.S.C. § 7805. Congress then granted the Attorney General the authority to "prescribe only such rules and regulations as are necessary to carry out the provisions" of the Gun Control Act of 1968. 18 U.S.C. § 926(a). The Attorney General in turn delegated to the ATF the duties to "[i]nvestigate, administer, and enforce the laws related to" the National Firearms Act and Gun Control Act. 28 C.F.R. § 0.130(a).

The court below justified the ATF's use of executive authority to effectively create legislation by explaining that this Court "held that, in the criminal context, as in all contexts, the separation of powers 'does not prevent Congress from seeking assistance * * * from its coordinate Branches' so long as Congress 'lays down by legislative act an intelligible principle to which the

person or body authorized to act is directed to conform.'" *Guedes*, 920 F.3d at 26 (quoting *Touby v. United States*, 500 U.S. 160, 165 (1991)). "And no party suggests that such an intelligible principle is lacking in this case." *Id.*

Congress did indeed "lay[] down by legislative act an intelligible principle to which the [ATF] is directed to conform." But the ATF far exceeded that directive. Specifically, the ATF was directed to "carry out," "[i]nvestigate," "administer," and "enforce" the law. These duties are consistent with the executive power to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. But they cannot reasonably be read to allow for the creation of laws—which, as explained next, is among the ways the ATF used its power.

B. Legislative Powers.

As the court below acknowledged, the ATF's Rule did not merely administer or enforce Congress's law; it created new criminal law.

"The Rule unequivocally bespeaks an effort by the Bureau to adjust the legal rights and obligations of bump-stock owners—i.e., to act with the force of law." *Guedes*, 920 F.3d at 18. "The Rule makes clear throughout that possession of bump-stock devices will become unlawful only as of the Rule's effective date, not before." *Id.* Specifically, the Rule states that bump stocks "will be prohibited when this rule becomes effective." 83 Fed. Reg. 66,514. The change in law is reflected by the Rule's assurance that "[a]nyone currently in possession of a bump-stock-type device is not acting unlawfully unless they fail to relinquish or

destroy their device after the effective date of this regulation." *Id.* at 66,523. Most explicitly, the Rule acknowledges that it "criminalize[s] only future conduct, not past possession." *Id.* at 66,525.

To make lawful activity unlawful is to create law. As Judge Henderson noted, the ATF exceeded its authority:

> The statutory definition of "machinegun" does not include a firearm that shoots more than one round "automatically" by a single pull of the trigger **AND THEN SOME** (that is, by "constant forward pressure with the non-trigger hand"). Bump-Stock-Type Devices, 83 Fed. Reg. at 66,532. By including more action than a single trigger pull, the Rule invalidly expands section 5845(b), as the ATF itself recognized in the rulemaking.

Guedes, 920 F.3d at 44 (Henderson, J., concurring in part and dissenting in part) (emphasis in original).

The Constitution provides that "All legislative Powers . . . granted" to the federal government "shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." U.S. Const. art. I, § 1. "Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States." U.S. Const. art. I, § 7, cl. 2. "This text permits no delegation of those powers." *Whitman v. Am. Trucking Associations*, 531 U.S. 457, 472 (2001).

Thus, "the Court has derived the nondelegation doctrine: that Congress may not constitutionally delegate its legislative power to another branch of Government." *Touby*, 500 U.S. at 165. "For example, Congress improperly 'delegates' legislative power when it authorizes an entity other than itself to make a determination that requires an exercise of legislative power." *Dep't of Transp.*, 135 S. Ct. at 1241 (Thomas, J., concurring in the judgment). "The nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of Government." *Touby*, 500 U.S. at 165 (quoting *Mistretta v. United States,* 488 U.S. 361, 371 (1989)).

The Constitution carefully establishes a system, and safeguards it, to ensure that legislation requires the approval of both houses of Congress, as well as the president—thus requiring today the consideration of 536 elected representatives directly accountable to their constituents. *See Dep't of Transp.*, 135 S. Ct. at 1237 (Alito, J., concurring) ("The principle that Congress cannot delegate away its vested powers exists to protect liberty. Our Constitution, by careful design, prescribes a process for making law, and within that process there are many accountability checkpoints. It would dash the whole scheme if Congress could give its power away to an entity that is not constrained by those checkpoints.") (citation omitted). By contrast, here, the ATF effectively created its own legislation, entirely independent of the legislative branch, and unaccountable to the People or any other branch of government. This cannot stand, for "[l]iberty requires accountability." *Id.* at 1234 (Alito, J., concurring).

C. Judiciary Powers.

Rufus King emphasized the importance for judges to "expound the law as it should come before them, free from the bias of having participated in its formation." 6 PROCEEDINGS OF SIXTH NATIONAL CONFERENCE 291 (1917). Madison's Journal of the Constitutional Convention represents the Founders' view:

> MR. STRONG thought, with MR. GERRY, that the power of making, ought to be kept distinct from that of expounding, the laws. No maxim was better established. The Judges in exercising the function of expositors might be influenced by the part they had taken in passing the laws.

JOURNAL OF THE CONSTITUTIONAL CONVENTION, KEPT BY JAMES MADISON 400 (E.H. Scott, ed. 1893). Hence the independent judiciary established in the Constitution.

Here, however, the executive branch has been free to expound its own Rule, despite having participated in its formation *and* its "responsibility for administering and enforcing" it. 83 Fed. Reg. 66,515.

What is more, the court below deferred to the ATF's interpretation of the law even though the government's counsel asked it not to apply *Chevron*. And, in accordance with *Chevron*, the court was willing to "accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation." *Guedes*, 920 F.3d at 32 (quoting *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005)).

In sum, the ATF "criminalize[d] . . . future conduct," *Guedes*, 920 F.3d at 18; 83 Fed. Reg. 66,525, is responsible for "enforcing" the prohibition on that conduct, *Guedes*, 920 F.3d at 19; 83 Fed. Reg. 66,515, and is permitted to interpret its own enforcement of that prohibition—"even if the agency's reading differs from . . . the best statutory interpretation." *Guedes*, 920 F.3d at 32 (quoting *Brand X*, 545 U.S. at 980).

This accumulation of powers in a single, unaccountable bureau is precisely what the founders endeavored to avoid. "An elective despotism was not the government we fought for; but one in which the powers of government should be so divided and balanced among the several bodies of magistracy as that no one could transcend their legal limits without being effectually checked and restrained by the others." THE FEDERALIST NO. 84.

Jefferson warned that "[t]o take a single step beyond the boundaries" established in the Constitution "is to take possession of a boundless field of power." THE WRITINGS OF THOMAS JEFFERSON: 1788-1792, at 285 (Paul Leicester Ford, ed. 1895). The ATF ventured well beyond those boundaries here, and if these transgressions are tolerated, the lasting implications will affect far more than mere bump-stocks.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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