No. 21-159

In the Supreme Court of the United States

W. CLARK APOSHIAN, *Petitioner*

v.

MERRICK B. GARLAND, ATTORNEY GENERAL, ET AL.

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

BRIEF OF DAMIEN GUEDES, SHANE RODEN, FIREARMS POLICY FOUNDATION, MADISON SOCIETY FOUNDATION, INC., AND FLORIDA CARRY, INC. AS *AMICI CURIAE* SUPPORTING PETITIONER

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QUESTIONS PRESENTED

1. Whether courts should defer under *Chevron* to an agency interpretation of federal law when the federal government affirmatively disavows *Chevron* deference.

2. Whether the *Chevron* framework applies to statutes with criminal-law applications.

3. Whether, if a court determines that a statute with criminal-law applications is ambiguous, the rule of lenity requires the court to construe the statute in favor of the criminal defendant, notwithstanding a contrary federal agency construction.

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INTERESTS OF *AMICI*[1]

Amici are the plaintiffs/appellants in *Guedes* v. *ATF*, No. 21-5045 (D.C. Cir.), currently on appeal in the D.C. Circuit from a grant of summary judgment upholding the Final Rule concerning bump stocks also at issue in this case. They are interested in this case both due to their own pending appeal, their previous interlocutory petition to the Supreme Court from the denial of a preliminary injunction when the Final Rule was just taking effect, and based on the additional broader constitutional and firearms-related interests of the institutional *amici* plaintiffs/appellants. Those institutional *amici* and their interests are as follows:

Firearms Policy Foundation (FPF) is a non-profit organization dedicated to preserving the rights and liberties protected by the Constitution. FPF focuses on research, education, and legal efforts to inform the public about the importance of constitutional rights—why they were enshrined in the Constitution and their continuing significance. FPF is determined to ensure that the freedoms guaranteed by the Constitution are secured for future generations.

The Madison Society Foundation, Inc. is a not-for-profit 501(c)(3) corporation based in California. It seeks to promote and preserve the Constitution of the

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[1] All parties have consented to the filing of this brief and were notified of its filing ten days before it was due. No counsel for a party authored it in whole or in part, nor did any person or entity, other than *Amici* and their counsel, make a monetary contribution to fund its preparation or submission. *Amici* are not publicly traded and have no parent corporations. No publicly traded corporation owns 10% or more of *Amici*.

United States, in particular the right to keep and bear arms. MSF provides the public and its members with education and training on this important right. MSF contends that this right includes the right of a law-abiding citizen to purchase firearms in all states and territories, subject to federal law.

Florida Carry, Inc. is a Florida nonprofit, non-partisan, grassroots organization dedicated to advancing the fundamental civil right of all Floridians to keep and bear arms for self-defense as guaranteed by the Second Amendment to the United States Constitution and the Constitution of Florida's Declaration of Rights.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Amici fully agree with Petitioners that the *Chevron*-related issues decided by courts upholding the Final Rule here and in other cases are exceptionally important and worthy of this Court's review. Pet. at 3. They write separately to highlight some additional authority relevant to these issues and how these and related questions are currently being addressed in their case and in other courts, at various preliminary or final stages of review.

The first such case is *Amici*'s own in the D.C. Circuit. The *Guedes* plaintiffs' earlier appeal from the denial of a preliminary injunction was the first to be decided by the Courts of Appeals and led to an opinion & dissent much relied upon by subsequent courts. *Guedes* v. *ATF*, 920 F.3d 1 (D.C. Cir. 2019). The panel there held (1) that *Chevron* deference could not be waived, *id.* at 23; (2) that *Chevron* applied despite the

statute's criminal implications, *id.* at 25–26; (3) that *Chevron* should be applied before the rule of lenity, *id.* at 27-28; and (4) that the Final Rule was an acceptable interpretation of an ambiguous statutory definition of "machinegun," *id.* at 29. Due to the urgency of the situation—the pending effective date of enforcement of the revised interpretation and only a limited stay to seek relief from this Court—*Amici* sought an emergency stay, which was denied, and then filed a petition for a writ of certiorari. Appl. for Stay, *Guedes* v. *ATF* (No. 18A1019); Pet. for Cert., *Guedes* v. *ATF* (No. 19-296). This Court denied the petition on March 2, 2020, with a statement from Justice Gorsuch largely agreeing with petitioners on the merits, but expressing his reluctance to address the issues in an "interlocutory petition" seeking review of a "preliminary ruling." *Guedes* v. *ATF*, 140 S. Ct. 789, 791 (2020) (statement of Gorsuch, J.).

Following remand and an adverse summary judgment ruling in the district court, the *Guedes* case is again before the D.C. Circuit, now on full merits review and briefing is already underway. *Guedes* v. *ATF*, No. 21-5045 (D.C. Cir.). Appellants filed their opening brief two days before filing this brief and have raised a variety of issues and additional authority not considered in the D.C. Circuit's previous, *sua sponte*, reliance on *Chevron*. See generally Br. for Appellants, *Guedes* v. *ATF*, No. 21-5045 (D.C. Cir.). If the D.C. Circuit affirms, they will again seek this Court's review.

Other cases addressing the issue are also working their way through the appellate courts. One such case, *Cargill* v. *Garland*, No. 20-51016 (5th Cir.), is

pending in the Fifth Circuit. There, following a bench trial, the district court held that:

- the Final Rule was issued "pursuant to valid delegated authority" and was therefore not "ultra vires," *Cargill* v. *Barr*, 502 F. Supp. 3d 1163, 1187 (W.D. Tex. 2020); and
- the Final Rule reflected the best interpretation of "machinegun" when it included bump stock devices, *id.* at 1190-1195.

Having decided that ATF had reached the best interpretation anyway, the court declined to answer whether *Chevron* could be waived. *Id.* at 1189. It did, however, conclude that *Chevron* deference would be inappropriate because the Final Rule carried the possibility of criminal sanctions. *Id.* at 1190. The *Chevron*-related questions here are now before the Fifth Circuit.

In yet another case involving an interlocutory appeal following the denial of a preliminary injunction, a panel of the Sixth Circuit decided several of the Questions Presented here *against* ATF. The panel declined to defer to the Final Rule because "no deference is owed to an agency's interpretation of a criminal statute." *Gun Owners of Am., Inc.* v. *Garland*, 992 F.3d 446, 460 (6th Cir. 2021). And because it held that *Chevron* did not apply anyway, it declined to "consider or decide the issue of" whether *Chevron* can be waived. *Id.* at 454 n.3. On its own review of the statute, the panel held that "a bump stock cannot be classified as a machine gun under" 26 U.S.C. § 5845(b). *Id.* at 471. The full circuit then granted rehearing *en banc* and vacated the panel's opinion.

Gun Owners of Am., Inc. v. *Garland*, 2 F.4th 576 (6th Cir. 2021). Supplemental briefs from the parties and numerous *amici* in that case were sought and received, and additional authority from this Court was presented for the Sixth Circuit's *en banc* consideration.

As demonstrated by their own efforts to secure this Court's review in a preliminary posture, *Amici* believe that the issues are important, the decisions upholding the Final Rule erroneous, and that they can be addressed when reviewing a preliminary appeal in appropriate circumstances. *Amici* thus support the petition and support reversal of the decision below. But even if this Court remains reluctant to decide such issues in a preliminary posture and on a preliminary record, the issues remain important and should be resolved by this Court following a final decision and appeal in one of the several cases in the pipeline.

ARGUMENT

The issues in this and the various related cases working their way through different stages of litigation and appeal are certainly important and certainly worthy of this Court's attention, whether here or after appeal from a full and final disposition on the merits. Each of the issues, and related questions reflected in other cases, have been wrongly decided by a variety of courts, particularly when considered in light of recent intervening decisions from this Court.

I. Courts Should Not Invoke *Chevron* Deference Over the Government's Objection or Waiver.

Petitioners are correct that *Chevron* deference should not be invoked *sua sponte* by a court where the government has waived or affirmatively eschewed such deference. Pet. 18-19. Indeed, this Court's recent decision in *HollyFrontier Cheyenne Ref., LLC* v. *Renewable Fuels Ass'n*, rejecting any consideration of *Chevron* deference where the government abandoned its claim to deference despite previously having raised it, should largely answer the first Question Presented. 141 S. Ct. 2172, 2180 (2021) (While the government had "asked the court of appeals to defer to its understanding under *Chevron* * * * the government does not * * * repeat that ask here. * * * We therefore decline to consider whether any deference might be due its regulation."); *see also id*. at 2184 (Barrett, J., dissenting) (similarly rejecting the notion that "HollyFrontier wins because its reading is *possible*" and instead seeking to "assess[] the best reading of the phrase" for themselves) (emphasis original).

In this case where the government has *never* made a claim to *Chevron* deference for what it views as an interpretive rule, and affirmatively denies having or exercising delegated legislative discretion regarding the definition of a "machinegun," the result should be all the more obvious. And if that most recent decision is not enough, this Court's decision emphasizing the importance of the party-presentation principle strongly confirms that courts should not *sua sponte* inject issues or defenses into a case that a party's own counsel has declined or even affirmatively refused to endorse. See *United States* v. *Sineneng-Smith*. 140

S. Ct. 1575, 1579 (2020) ("But as a general rule, our system 'is designed around the premise that [parties represented by competent counsel] know what is best for them, and are responsible for advancing the facts and argument entitling them to relief.'") (citation omitted; alteration in original); *id*. at 1578 ("[T]he appeals panel departed so drastically from the principle of party presentation as to constitute an abuse of discretion.").

Arguments based on and citing both of those recent cases are currently before the D.C. Circuit in the *Guedes* merits appeal and—as to *HollyFrontier*—before the *en banc* Sixth Circuit in the *Gun Owners of America* appeal from the denial of a preliminary injunction. While *Gun Owners of America*, like this case, is also an interlocutory appeal from the denial of a preliminary injunction, both the briefing in that case and in the *Guedes* merits appeal have the benefit of, and cite to, this Court's recent decisions. Because such cases were not available to or considered by the Tenth Circuit panel here,[2] they support, at a minimum, a GVR or summary reversal, and would certainly support reversal on plenary review.[3]

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[2] Petitioners raised the party-representation point from *Sineneng-Smith* in their petition for *en banc* rehearing. But because the order granting *en banc* review was vacated, the 10th Circuit never considered it. *HollyFrontier* was decided after the panel decision was reinstated.

[3] Similar issues are currently being raised in *Cargill* v. *Garland*, No. 20-51016, the Fifth Circuit appeal from a bench trial upholding the Final Rule. Though the district court there agreed with the government's reading without applying *Chevron*, it is the rare outlier to deny that the government's view, at best, relies on an ambiguity rather than a correct reading of the law.

In addition to such recent cases impacting the waiver issue, briefing in the *Guedes* appeal also addresses the closely related question concerning the government's denial of having had, or failure to have recognized during the rulemaking, the discretion courts would later impute to it. Thus, if the government waives *Chevron* because it *believes* it has no discretion regarding criminal laws or that its authorizing statute does not confer such discretion, it does not matter whether a court later claims that it had discretion that must be given unwaivable deference. The failure to recognize or exercise discretion, as reflected in the government's repeated denial that it had any such discretion subject to *Chevron* deference, is itself a reason for rejecting he Final Rule. *DHS* v. *Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1911 (2020) (rejecting repeal of DACA because Acting Secretary of DHS "did not appear to appreciate the full scope of her discretion"). That interrelated issue has been briefed in the *Guedes* merits appeal and further demonstrates why waiver is not merely possible but, where affirmatively invoked by the government, might drive invalidation of a rule for abuse of discretion in any event.

The first Question Presented, therefore, is both important and wrongly decided below. Whether this Court addresses it through a GVR, summarily, or through plenary review here or elsewhere, it ultimately should be resolved by this Court.

The *Chevron*-related issues, though, are very much in play in the merits appeal and the Fifth Circuit would have the benefit of this Court's decisions in *HollyFrontier* and *Sineneng-Smith* should it reach the *Chevron* waiver issue, as seems likely.

II. *Chevron* Deference Does Not Apply to Statutes with Criminal Applications, and the Rule of Lenity Takes Priority Over and Applies Before *Chevron* Deference.

Petitioners are also correct that *Chevron* should not apply to statutes with criminal applications and that, even if it does, the rule of lenity should resolve any ambiguity before *Chevron* does. These questions too are being briefed before and considered by the Fifth, Sixth (*en banc*), and D.C. Circuits.

This Court has long rejected attempts to apply deference to criminal statutes. *United States* v. *Apel*, 571 U.S. 359, 369 (2014) ("[W]e have never held that the Government's reading of a criminal statute is entitled to any deference."); *Abramski* v. *United States*, 573 U.S. 169, 191 (2014) (ATF's interpretation of a Gun Control Act prohibition is "not relevant at all"; "criminal laws are for courts, not for the Government, to construe.").

But even if deference were appropriate in criminal cases, *Chevron* step one requires courts to first determine if the statute is actually ambiguous. See *City of Arlington* v. *FCC*, 569 U.S. 290, 296 (2013); *Gundy* v. *United States*, 139 S. Ct. 2116, 2123 (2019) (plurality opinion) ("Only after a court has determined a challenged statute's meaning can it decide whether the law sufficiently guides executive discretion to accord with Article I."). As the Court explained with respect to *Auer* deference, "the possibility of deference can arise only if a 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, as "a rule of

statutory construction whose purpose is to help give authoritative meaning to statutory language," *United States* v. *Thompson/Ctr. Arms Co.*, 504 U.S. 505, 518 n.10 (1992), is one such tool that should apply from the start—and certainly before *Chevron*.

The Tenth Circuit thus answered the second and third Questions Presented wrong when it held that *Chevron* deference both applies to the Final Rule notwithstanding its criminal applications and that—when faced with both an agency interpretation and the rule of lenity—*Chevron* comes first. App. 21a-23a. Any confusion on the latter question has been squarely resolved by *Gundy* and *Kisor*. But even if there were any remaining doubts, the rule of lenity's relationship to the separation of powers and to principles of non-delegation should tip the scales in lenity's favor. See *Whitman* v. *United States*, 135 S. Ct. 352, 353 (2014) (Scalia, J, joined by Thomas, J., statement respecting denial of certiorari) ("[E]qually important, [the rule of lenity] vindicates the principle that only the *legislature* may define crimes and fix punishments. Congress cannot, through ambiguity, effectively leave that function to the courts—much less to the administrative bureaucracy.") (emphasis in original).

In the current *Guedes* appeal, the interrelationship between the underlying principles and rationales of the rule of lenity and *Chevron* deference has been briefed and the *Guedes* appellants have argued that if *Chevron* is thought to trump lenity then such an application of the doctrine would violate the the Constitution on separation of powers and anti-delegation grounds. Br. for Appellants at 44-58,

Guedes v. *ATF*, No. 21-5045 (D.C. Cir.). Should the D.C. Circuit continue to apply *Chevron* to a statute with criminal applications, the as-applied constitutional challenge thus will be squarely presented in any further proceedings *en banc* or before this Court.

Because lower courts, including the D.C. Circuit in the first *Guedes* appeal, have repeatedly erred by applying *Chevron* first, this Court's guidance is needed to correct them. Here again, questions about the proper intersection of lenity and *Chevron*, or of *Chevron* and statutes with criminal implications, are currently pending in the circuits. Each circuit could benefit from this Court's review as they resolve the issues raised by the petition in their own respective cases.

CONCLUSION

The petition should be granted, and the Court should decide the important questions it presents. But if the Court continues to be reluctant to take up the matter from a preliminary ruling, there are other cases on appeal from later stages of litigation that also raise these and closely related issues. Whether now or in one of those cases, this Court's attention is desperately needed to resolve those questions.

Respectfully submitted,

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