United States Court of Appeals

for the

Fifth Circuit

Case No. 20-51016

MICHAEL CARGILL,

Plaintiff-Appellant,

v.

MERRICK GARLAND, U.S. Attorney General; UNITED STATES DEPARTMENT OF JUSTICE; STEVEN DETTELBACH, in his official capacity as Director of the Bureau of Alcohol, Tobacco, Firearms, and Explosives; BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
CASE NO. 1:19-CV-349, HON. DAVID A. EZRA, U.S. DISTRICT JUDGE

EN BANC BRIEF OF *AMICI CURIAE* FIREARMS REGULATORY ACCOUNTABILITY COALITION, INC., NST GLOBAL, LLC (D/B/A SB TACTICAL) AND B&T USA, LLC IN SUPPORT OF PLAINTIFF-APPELLANT IN SUPPORT OF REVERSAL

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CERTIFICATE OF INTERESTED PERSONS

Cargill v. Garland, No. 20-51016

The undersigned counsel of record certifies that, in addition to the persons and entities listed in Plaintiff-Appellant's Certificate of Interested Persons, the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal:

Amicus Curiae Firearms Regulatory Accountability Coalition, Inc. ("FRAC"). FRAC is a non-stock, non-profit corporation. FRAC has no parent corporation. No publicly held company has any ownership interest in FRAC.

Amicus Curiae NST Global, LLC (d/b/a SB Tactical) ("SB Tactical"). SB Tactical has no parent corporation. No publicly held company has any ownership interest in SB Tactical.

Amicus Curiae B&T USA, LLC ("B&T USA"). B&T USA has no parent corporation. No publicly held company has any ownership interest in B&T USA.

Counsel for *amici curiae*, Stephen J. Obermeier, Jeremy J. Broggi, Michael D. Faucette, and Boyd Garriott.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Rules

Legislation

Other Authorities

INTERESTS OF *AMICI CURIAE*[1]

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 serves as 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.

NST Global, LLC (d/b/a SB Tactical) ("SB Tactical") developed the original Pistol Stabilizing Brace® to promote shooting inclusion for service-disabled military veterans. Today, stabilizing braces pioneered by SB Tactical are used by millions of Americans to help them fire guns safely. SB Tactical is a member of FRAC.

B&T USA, LLC ("B&T USA") is a designer and manufacturer of the industry's most advanced suppressors and has become a world leader in complete, state-of-the-art tactical weapon systems. B&T USA's products are used by civilians,

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), counsel for *amici curiae* state that no party's counsel authored this brief in whole or in part, and that no person other than *amici curiae*, their members, or their counsel contributed money that was intended to fund preparing or submitting this brief. All parties have consented to the filing of this brief. *See* Fed. R. App. P. 29(a)(2).

law enforcement, and military customers across the world. B&T USA is also a member of FRAC.

No member of FRAC manufactures bump stocks. However, FRAC, SB Tactical, and B&T USA are opposed to firearms regulatory agencies altering their interpretations of criminal statutes through regulatory actions in a manner that effectively outlaws conduct the agencies have long recognized as legal.

This case is a perfect example. For years, the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") "t[old] everyone that bump stocks don't qualify as 'machineguns.'" *Guedes v. ATF*, 140 S. Ct. 789, 790 (2020) (statement of Gorsuch, J.). Then, in 2018, ATF "changed its mind" and, without further congressional action, issued a new rule which declared, for the first time, that "owning a bump stock is forbidden by a longstanding federal statute that outlaws the 'possession [of] a machinegun.'" *Id.* at 789 (quoting 26 U.S.C. § 5685(b), 18 U.S.C. § 924(a)(2)). Worse, ATF relied on reasoning entirely divorced from the statutory text to make this determination.

This unlawful regulatory action transformed more than half a million law-abiding American citizens into presumptive felons overnight. And ATF now demands that these citizens surrender their bump stocks—lawfully obtained property that, in the aggregate, represents over $100 million in purchase value—or face potential criminal liability, including prison time. This is precisely the type of

regulatory behavior that, in our constitutional system, must be rigorously reviewed by the independent judiciary to ensure that only Congress, not the Executive, has "ma[d]e an act a crime." *United States v. Davis*, 139 S. Ct. 2319, 2325 (2019) (citation omitted).

The panel below abdicated that responsibility. Concluding that the National Firearms Act ("NFA") and the Gun Control Act ("GCA") were "ambiguous" but not "grievous[ly]" so, *Cargill v. Garland*, 20 F.4th 1004, 1013 (5th Cir. 2021) (citation omitted), it upheld ATF's regulation as "the best interpretation of the statute," *id.* at 1014. That decision allowed ATF to usurp Congress's role. And it effectively set aside both the well-established rule that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity," *Yates v. United States*, 574 U.S. 528, 547–48 (2015), and the requirement that ATF identify a "clear congressional authorization" for its "assertion[] of extravagant statutory power," *W. Virginia v. Env't Prot. Agency*, 142 S. Ct. 2587, 2609 (2022) (citations and quotations omitted).

The panel's error—which effectively delegates to ATF enormous legislative authority to deem actions criminal through regulatory fiat—cannot be allowed to stand. Bump stocks are not the only devices ATF regulates. Indeed, ATF has a well-established history of wrongly declaring legal products illegal. *See, e.g.*, *Tripoli Rocketry Ass'n v. ATF*, 437 F.3d 75 (D.C. Cir. 2006) (holding ATF's classification of ammonium perchlorate composite propellant as an "explosive"

arbitrary and capricious); *Innovator Enters., Inc. v. Jones*, 28 F. Supp. 3d 14 (D.D.C. 2014) (holding ATF's classification of a stabilizer brake as a "firearm silencer" arbitrary and capricious). Even now, ATF is in the process of switching positions on pistol stabilizing braces—orthotic devices that help shooters fire handguns safely. Although ATF has told everyone for more than a decade that stabilizing braces are legal, it recently noticed a rule that would effectively outlaw these devices in their most popular applications by wrongly declaring them short-barreled rifles. *See Factoring Criteria for Firearms with Attached "Stabilizing Braces,"* 86 Fed. Reg. 30,826 (June 10, 2021); Comments of SB Tactical and FRAC (Sept. 8, 2021), https://downloads.regulations.gov/ATF-2021-0002-207706/attachment_1.pdf.

The independent and neutral judiciary owes no deference to ATF's interpretations of criminal statutes. The full Fifth Circuit should make clear that executive interpretations of criminal statutes will be reviewed rigorously as our constitutional system requires.

SUMMARY OF THE ARGUMENT

Because "[o]nly the people's elected representatives in the legislature are authorized to make an act a crime," *Davis*, 139 S. Ct. at 2325 (citations and quotations omitted), the Supreme Court requires Congress to speak "plainly and unmistakably" where it wishes to attach criminal liability to an activity. *United States v. Bass*, 404 U.S. 336, 348 (1971) (citations and quotations omitted).

Agencies may not, by regulation, define new crimes in the absence of a clear statement by Congress. *See United States v. Eaton*, 144 U.S. 677, 688 (1892) ("It would be a very dangerous principle to hold that [violating a regulation] . . . become[s] a criminal offense[.]"). ATF's generic grants of rulemaking authority do not come close to such a clear statement.

Consistent with these separation of powers principles, the Supreme Court has held that ATF is not entitled to *Chevron* deference where—as here—it interprets statutes carrying criminal penalties. In *Abramski v. United States*, the Supreme Court afforded ATF no deference for its interpretation of the GCA because "criminal laws are for courts, not for the Government, to construe." 573 U.S. 169, 191 (2014). In *United States v. Thompson/Center Arms Co.*, the Court found that an ambiguous provision of the NFA had to be resolved by the rule of lenity, despite the agency's request for deference. 504 U.S. 505, 517–18 & n.9 (1992) (plurality); *id.* at 519 (Scalia, J., concurring). For these reasons, the panel was wrong to affirm ATF's interpretation of statutes the panel found ambiguous. The Supreme Court "ha[s] 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).

ATF's assertion of authority also requires a clear statement of congressional authorization under the major questions doctrine. Under that doctrine, courts "greet assertions of extravagant statutory power . . . with skepticism." *W. Virginia*, 142 S.

Ct. at 2609 (citations and quotations omitted). Here, ATF claims authority to retroactively declare as felons 520,000 law-abiding citizens and ordain the surrender or destruction of their property—even though Congress declined to enact similar legislation. This unprecedented exercise of authority—wherein ATF has purported to "discover in a long-extant statute an unheralded power" to address an issue that "has been the subject of an earnest and profound debate across the country"—requires clear legislative authorization. *Id.* at 2610, 2614 (cleaned up). That authorization is lacking here.

Finally, this Court should reject the panel's conclusion that the Bump Stock Rule is "the best interpretation of the statute[.]" *Cargill v. Garland*, 20 F.4th 1004, 1009 n. 4 (5th Cir. 2021) (citation omitted). More than a dozen circuit judges have—consistent with the plain text of the statute—rejected that conclusion. *See, e.g.*, *Aposhian v. Wilkinson*, 989 F.3d 890, 901 (10th Cir. 2021) (*Aposhian II*) (Tymkovich, C.J., dissenting, joined by Hartz, J., Holmes, J. Eid, J., and Carson, J.). And even judges that have affirmed ATF's interpretation have not all claimed that the agency's interpretation was "best," only that it was entitled to deference. At the very least, the staunch disagreement by these judges establishes "ambiguity concerning the ambit of [a] criminal statute[]," which "should be resolved in favor of lenity." *Skilling v. United States*, 561 U.S. 358, 410 (2010) (citation omitted); *accord Thompson/Ctr. Arms*, 504 U.S. at 517–19 & n.9.

ARGUMENT

I. ATF Is Not Entitled To *Chevron* Deference When It Interprets The Scope Of A Statute With Criminal Application.

Under Supreme Court precedent, judges sometimes defer to agency interpretations of ambiguous statutes. The strongest form of deference takes its name from *Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Under the separation of powers, as well as Supreme Court precedent, *Chevron* deference cannot be applied to agency interpretations of statutes with criminal application.

A. The Separation Of Powers Allows Only Congress To Criminalize Conduct.

The Drafters of the Constitution concluded that 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.'" *Davis*, 139 S. Ct. at 2325 (quoting *United States v. Hudson*, 7 Cranch 32, 34 (1812)). Once the legislature has proscribed an

act, the executive has "exclusive authority and absolute discretion to decide whether to prosecute a case." *United States v. Nixon*, 418 U.S. 683, 693 (1974) (citing *Confiscation Cases*, 74 U.S. 454 (1868)). And 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).

Recognizing that "the constitutional structure of our Government" "protects individual liberty," *Bond v. United States*, 564 U.S. 211, 223 (2011), the Supreme Court has long required a "distinct[]" statutory authorization from the legislature before finding a delegation to the executive to define the contours of a crime. *See Eaton*, 144 U.S. at 688 ("It would be a very dangerous principle to hold that [violating a regulation] . . . become[s] a criminal offense[.]"). More recently, the Court has made clear that Congress 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). This "clear-statement rule" serves to "reinforce[]" 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).

Congress has not clearly authorized ATF to define a "machinegun." Although ATF may prescribe "rules and regulations" to implement the GCA and NFA, 18 U.S.C. § 926(a), 26 U.S.C. § 7805(a), these general grants of rulemaking authority cannot provide the "clear legislative basis" agencies "must have" to define criminal acts, *United States v. George*, 228 U.S. 14, 22 (1913); *accord Gun Owners II*, 19 F.4th at 917–18 (Murphy, J.); *Guedes*, 920 F.3d at 42 (Henderson, J.) ("The Congress has made no such clear statement; instead the ATF relies solely on its general rulemaking power and statutory ambiguity."). Thus, ATF was not authorized to classify bump stocks as prohibited "machineguns."

B. The Supreme Court Has Held That ATF Is Not Entitled To Deference When Interpreting The GCA And NFA.

Consistent with longstanding separation of powers principles, the Supreme Court has squarely held that ATF is not entitled to deference when construing statutes carrying criminal penalties. In *Abramski v. United States*, the Supreme Court found ATF's interpretation of the GCA "not relevant at all" because "criminal laws are for courts, not for the Government, to construe." 573 U.S. at 189–91. 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[.]" *Id.* (emphasis in original).

Likewise, in *United States v. Thompson/Center Arms Co.*, the Supreme Court applied "the ordinary rules of statutory construction" to interpret the NFA and was "left with an ambiguous statute." 504 U.S. at 517 (plurality). To resolve this ambiguity, the Government "urged [the Court] to defer to an agency interpretation contained in two longstanding Revenue Rulings[.]" *Id.* at 518 n.9. But the Court declined. A majority of the Justices held that the possibility of "criminal sanction[s]"—despite the "civil setting" of the challenge—required the Court "to apply the rule of lenity and resolve the ambiguity in [the private party]'s favor." *Id.* at 517–18 (plurality); *see also id.* at 519 (Scalia, J., concurring) ("I agree with the plurality that the application of the [NFA] . . . is sufficiently ambiguous to trigger the rule of lenity[.]").

This precedent squarely controls this case. At issue here is the statutory definition of "machinegun" in the GCA and NFA. *See* 26 U.S.C. § 5845(b); 18 U.S.C. § 921(a)(24). ATF has put forward its interpretation of that term in its Bump Stock Rule. *See Bump-Stock-Type Devices*, 83 Fed. Reg. 66,514 (Dec. 26, 2018). The Supreme Court has explained exactly how much weight to give ATF's interpretation: None. *Abramski*, 573 U.S. at 191. The Supreme Court has also dictated the interpretive tool to deploy if a provision of the NFA or GCA is ambiguous: Lenity. *Thompson/Ctr. Arms*, 504 U.S. at 517–19. These holdings plainly foreclose *Chevron* deference.

Some judges have sought to distinguish this precedent, arguing that the Supreme Court's teaching in these cases applies only "outside the context of an agency speaking with the force of law"—a situation where, under *United States v. Mead Corp.*, 533 U.S. 218 (2001), the agency's interpretation would not be "*Chevron*-eligible[.]" (citations and quotations omitted). *Guedes*, 920 F.3d at 25. But *Abramski* and *Thompson/Ctr. Arms* did not purport to rely on that distinction. And the suggestion makes no sense. If the Supreme Court had been relying on *Mead*, there would have been no reason for it to discuss the criminal penalties in those cases. Rather than invent a new rationale for its holdings, the better approach is to "take the Supreme Court at its word," *In re Pilgrim's Pride Corp.*, 690 F.3d 650, 665 (5th Cir. 2012), that "criminal laws are for courts, not for the Government, to construe." *Abramski*, 573 U.S. at 191.

Other judges have rejected the Supreme Court's clear teaching based upon a footnote in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995). There, the Supreme Court concluded that lenity did not apply to the Government's interpretation of the Endangered Species Act even though some violations of that statute carried criminal penalties. 515 U.S. 687, 704 & n.18 (1995). Although some judges have read *Babbitt* as establishing a general rule that "where a regulation is at issue, *and* the agency (here, ATF) has both civil and criminal enforcement authority, . . . *Chevron*, not the rule of lenity, should apply," *Aposhian*

v. Barr, 958 F.3d 969, 982–83 (10th Cir. 2020) ("*Aposhian I*"); *see Guedes*, 920 F.3d at 24; *Gun Owners II*, 19 F.4th at 901–02, the decision cannot bear that weight.

The Supreme Court itself appears to consider *Babbitt* an anomaly. In *United States v. Apel*, the Supreme Court declared that it "ha[s] ***never held*** that the Government's reading of a criminal statute is entitled to any deference." 571 U.S. at 369 (emphasis added). And Justices Scalia and Thomas explained why. Addressing *Babbitt*'s footnote, they explained that *Babbitt* is not binding authority because it "deferred, with scarcely any explanation" and because its result "contradict[ed] the many cases before and since holding that, if a law has both criminal and civil applications, the rule of lenity governs its interpretation in both settings." *Whitman v. United States*, 574 U.S. 1003 (2014) (Scalia, J., joined by Thomas, J., respecting the denial of cert.) (collecting cases).

Babbitt's "drive-by ruling, in short, deserves little weight." *Id.* This Court should not "overlook[]" that the "shortcomings associated with" *Babbitt* "became so apparent that [the Supreme] Court long ago abandoned" it. *See Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2427 (2022) (citations and quotations omitted); *accord Esquivel-Quintana v. Lynch*, 810 F.3d 1019, 1030–31 (6th Cir. 2016) (Sutton, J., concurring in part and dissenting in part) ("Whatever this footnote and its inscrutable reference to facial challenges meant then, cases since *Babbitt* have

not followed the reading the court finds itself constrained to follow."); *Aposhian II*, 989 F.3d at 901 (Tymkovich, C.J.).[2]

Other judges have looked past *Babbitt* and justified deference to ATF based upon *United States v. O'Hagan*, 521 U.S. 642 (1997), arguing that, there, the Supreme Court deferred to the SEC's interpretation of a statute with criminal penalties. *See Gun Owners II*, 19 F.4th at 900 (White, J., opinion in support of affirming the district court judgment); *Guedes* 920 F.3d at 24. But—unlike *Abramski*, *Apel*, and *Thompson/Ctr. Arms—O'Hagan* did not discuss whether *Chevron* deference was appropriate in the context of a statute with criminal penalties. *See O'Hagan*, 521 U.S. at 673. It simply applied it. *Id.* This Court typically does not afford precedential value to cases for issues they do not address. *See Abraugh v. Altimus*, 26 F.4th 298, 305 (5th Cir. 2022) ("precedent that does not discuss standing or jurisdiction cannot be invoked as a precedent on standing or jurisdiction."). And if the question of deference to interpretations of criminal statutes turned on silent implications, there is good reason to think that the

[2] To be sure, this Court will "not lightly assume that a prior decision has been overruled sub silentio merely because its reasoning and result appear inconsistent with later cases." *Cochran v. SEC*, 20 F.4th 194, 206 n.11 (5th Cir. 2021). But accepting that *Babbitt* categorically authorized *Chevron* deference for agency interpretations of criminal statutes with civil applications would itself "(silently) overrule[] an entire line of cases[.]" *Esquivel-Quintana*, 810 F.3d at 1030 (Sutton, J.).

Supreme Court has *not* presumed such deference. Indeed, the Supreme Court's numerous decisions "interpret[ing] the Armed Career Criminal Act" would have been "wasted effort" if the Attorney General's general rulemaking authority gave him "the power to issue a binding regulation listing every offense that qualifies as a 'violent felony[.]'" *Gun Owners II*, 19 F.4th at 923 (Murphy, J.) ("I doubt any judge would take these claims seriously.").[3]

At bottom, these judges have tried to justify deference to the Government's reading of a criminal statute in the face of binding and express contrary authority. At the end of the day, the Supreme Court "ha[s] ***never*** held that the Government's reading of a criminal statute is entitled to any deference." *Apel*, 571 U.S. at 369 (emphasis added); *accord Guedes*, 140 S. Ct. at 790 (statement of Gorsuch, J.) ("[W]hatever else one thinks about *Chevron*, it has no role to play when liberty is at stake.").

II. The Major Questions Doctrine Requires Congress To Clearly Confer Authority For The Executive To Define The Scope Of Criminal Statutes.

Another plain statement rule precludes affording ATF deference. The major questions doctrine instructs courts to "greet assertions of extravagant statutory power

[3] Even if *O'Hagan* or *Babbitt* had precedential value, they are distinguishable because they were interpreting an explicit—not an implicit—grant of interpretive authority. *See, e.g.*, *Guedes*, 920 F.3d at 42 n.11 (Henderson, J.); *Gun Owners II*, 19 F.4th at 917–19 (Murphy, J.); *accord supra* section I.A.

. . . with skepticism." *W. Virginia*, 142 S. Ct. at 2609 (citations and quotations omitted). In such cases, the agency "must point to clear congressional authorization for the power it claims." *Id.* (citations and quotations omitted). The doctrine stems from "separation of powers principles and a practical understanding of legislative intent[.]" *Id.*

ATF's interpretation of the GCA and NFA declaring bump stocks illegal plainly is designed to resolve a major question. Under the rule, half a million Americans will be declared to have already committed felonies and not imprisoned solely because of ATF's discretionary choice to not prosecute them. *See* Appellees' Br. at 37 & 39. Although these newly-minted criminals relied in good faith on ATF's decade-old plain-text interpretation of these statutes, ATF now asserts broad authority to pull the rug out from under these Americans and attach criminal consequences to longstanding law-abiding activity unless they "destroy the devices or abandon them at an ATF office." *Bump-Stock-Type Devices*, 83 Fed. Reg. at 66,514. "The idea that Congress gave [ATF] such broad and unusual authority through an implicit delegation in the [NFA] is not sustainable." *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006).

Consider first the assertion's implications for "separation of powers principles[.]" *W. Virginia*, 142 S. Ct. at 2609. Those principles counsel that "[o]nly the people's elected representatives in the legislature are authorized to make an act

a crime." *Davis*, 139 S. Ct. at 2325; *accord supra* section I.A. But ATF's vast declaration of criminality would eviscerate this principle by defining a new crime from whole cloth by "discover[ing] in a long-extant statute an unheralded power." *W. Virginia*, 142 S. Ct. at 2610 (citations and quotations omitted). Thus, "[w]ere [this Court] to recognize the authority claimed by [ATF] in the [Bump Stock] Rule, [it] would deal a severe blow to the Constitution's separation of powers." *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 327 (2014).[4]

Consider next the "practical understanding of legislative intent." *W. Virginia*, 142 S. Ct. at 2609. Congress tried and failed to take the precise action ATF took with the Bump Stock Rule. *See, e.g.*, Automatic Gunfire Prevention Act, H.R. 3947, 115th Cong. (2017) (did not progress beyond committee); Automatic Gunfire Prevention Act, S. 1916, 115th Cong. (2017) (same). This Court "cannot ignore that the regulatory writ [ATF] newly uncovered conveniently enabled it to enact a program that, long after the dangers posed by [bump stocks] had become well known, Congress considered and rejected multiple times." *W. Virginia*, 142 S. Ct. at 2614 (citations and quotations omitted). Indeed, "[t]he importance of the issue,

[4] Indeed, the major questions doctrine compliments the judiciary's plain statement requirement for criminal delegations—both of which are grounded in separation-of-powers concerns. *See Guedes*, 920 F.3d at 41–42 (Henderson, J.) ("I would treat an ambiguous criminal statute to be of 'vast economic and political significance' and apply *Chevron* only if the Congress expressly delegates its lawmaking responsibility.").

along with the fact that the same basic scheme [ATF] adopted has been the subject of an earnest and profound debate across the country, makes the oblique form of the claimed delegation all the more suspect." *Id.* (cleaned up) (citing *Gonzales*, 546 U.S. at 267–68).

Under these circumstances, "the Government must—under the major questions doctrine—point to clear congressional authorization" to adopt the Bump Stock Rule. *Id.* (citations and quotations omitted). It cannot. As noted above, ATF's only possible sources of express authority are the generic authority to make "necessary" and "needful" regulations for "enforc[ing]" and "carry[ing] out" the NFA and the GCA. 18 U.S.C. § 926(a), 26 U.S.C. § 7805(a). "Such a vague statutory grant is not close to the sort of clear authorization required by [the Supreme Court's] precedents." *W. Virginia*, 142 S. Ct. at 2614.

III. ATF's Bump Stock Rule Cannot Stand Without *Chevron* Deference.

The panel did not determine whether ATF was entitled to *Chevron* deference. *See Cargill v. Garland*, 20 F.4th 1004, 1009 n.4 (5th Cir. 2021) (citation omitted). Instead, the panel assumed that the statute was "ambiguous" and that "bump stocks are machineguns under the *best* interpretation of the statute[.]" *Id.* (cleaned up) (emphasis added). Although that allowed the panel to purport to avoid the *Chevron* question, the panel's conclusion has been roundly rejected outside of this Circuit.

Indeed, the overwhelming majority of appellate judges to consider the Bump Stock Rule have rejected the view that ATF's interpretation is the best one. *See* Appellant's Supp. Br. at 24–25. Twenty-one appellate judges have either rejected ATF's interpretation outright (seventeen) or upheld ATF's interpretation only under the deferential *Chevron* standard (four). *Id.* By contrast, only six judges have found that ATF's interpretation was best. *Id.* at 24.

This Court also need not merely count judges. Appellants persuasively explain why semiautomatic rifles equipped with bump stocks are not machineguns. *See id.* at 17–33. The statutory definition of machinegun includes only weapons that "shoot, automatically more than one shot, without manual reloading, by a single function of the trigger." 26 U.S.C. § 5845(b). But a "semiautomatic rifle, equipped with a bump stock, does not fire multiple shots by a single function of the trigger." *Aposhian II*, 989 F.3d at 895 (Tymkovich, C.J.). Every shot requires an additional function of the trigger. *Id.* To be sure, bump stocks allow the user to activate the trigger faster. But Congress did not choose to define machineguns by their rate of fire but by how many shots are fired by a single trigger function. The "best" reading of the statute is thus that semiautomatic rifles equipped with bump stocks are ***not*** machineguns.

But ultimately, this Court need not quarrel with who is right or which interpretation is best because—at the very least—the existence of such entrenched

disagreement over the interpretation of a complicated statute establishes "ambiguity concerning the ambit of [a] criminal statute[]" that "should be resolved in favor of lenity." *Skilling*, 561 U.S. at 410 (citation omitted); *accord Thompson/Ctr. Arms*, 504 U.S. at 517–19 & n.9. The panel's conclusion that the statute was ambiguous enough to avoid the interpretation advanced by seventeen appellate judges—but not ambiguous enough to trigger lenity—simply cuts the doctrine too thin. The rule of lenity plainly requires that this Court hold that half a million Americans did not become felons overnight.

CONCLUSION

For all these reasons, this Court should reverse the judgment of the district court.

Respectfully submitted,

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Dated August 1, 2022

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CERTIFICATE OF SERVICE

I certify that on August 1, 2022, I caused the foregoing to be served upon all counsel of record via the Clerk of Court's CM/ECF notification system.

/s/ *Stephen J. Obermeier*
Stephen J. Obermeier

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,349 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). *See* Fed. R. App. P. 29(a)(4)(G), (a)(5).

This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Windows, version 10 in Times New Roman font 14-point type face.

Dated: August 1, 2022

/s/ *Stephen J. Obermeier*
Stephen J. Obermeier